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8 March 2017

By Post & By E-mail

Mr Bonny LOO
Assistant Legal Adviser
Legal Service Division
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Mr LOO,

Re: Apology Bill

We refer to your letter dated 6 February 2017 and enclose herewith our reply to the questions relating to the Apology Bill that you had set out in your letter

Please let us know if you have further queries or comments.

Yours sincerely,

(William LIU)
Senior Government Counsel

Encl.

c.c.

(1) Legal Adviser, Legal Service Division, Legislative Council Secretariat (By Post)
(2) Senior Assistant Legal Adviser 2, Legal Service Division, Legislative Council Secretariat (By Post)
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(*#1490275*)

Administration's reply to the questions of the Assistant Legal Adviser in the letter dated 6 February 2017

No.	Questions of the Assistant Legal Adviser	Administration's Reply
(a)	Please provide further examples to illustrate what would constitute "an expression of the person's regret, sympathy or benevolence".	A wide definition of "apology" is provided so as to achieve the objective of the Bill which is to promote and encourage the making of apologies with a view to preventing the escalation of disputes and facilitating their amicable resolution. Therefore "an expression of the person's regret, sympathy or benevolence" covers a wide range of expressions, allowing sufficient flexibility to the person in deciding on a suitable expression. They may range from a simple gesture of good will (such as sending a card expressing sympathy or flowers) to a formal letter of apology. Having said that, it should be noted that the question of whether a particular expression would constitute an apology for the purposes of the Bill is a fact-sensitive one, and the answer depends on the relevant circumstances of each case, including the context in which the expression is made.
(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)?	As noted above, the question of whether a particular expression would constitute an apology for the purposes of the Bill is fact-sensitive. Accordingly, whether "an undertaking to look at the circumstances giving rise to [the matter] with a view to preventing a recurrence" and an "offer or promise to pay medical, hospital or similar expenses occasioned by [the matter]" would constitute an expression of the person's regret, sympathy or benevolence would depend on the circumstances under which the expression is given. *Prima facie*, such an undertaking, offer or promise is capable of amounting to an expression of regret, sympathy or benevolence, but it all depends on the context in

		which the undertaking, offer or promise is made.
(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).	Yes, the word "written" is intended (and should be wide enough) to cover an apology made by way of an electronic record 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").	Clause 4(5) is included with a view to assisting readers to understand the meaning of ***apology*** as used in the Bill in conjunction with the application provision at clause 5.
(e)(i)	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)?	It depends on the application of the relevant rules of discovery (e.g. the test of relevance under Order 24 of the Rules of the High Court (Cap. 4 sub. leg. A)) (if applicable), or such other rules of discovery as may be applicable in the procedures of the relevant proceedings. Take civil action in the High Court as an example, if the document is discoverable under those rules, then A has a duty to disclose it in the list of documents. He may need to produce it to the other party upon request, unless he has good grounds not to do so under the law of discovery. However, a discoverable document does not necessarily mean that it is admissible at trial. Under the Bill, A can resist the admission of the apology as evidence against himself although it has been disclosed to the other side at the discovery stage.
(e)(ii)	(ii) If so, would the disclosure or production of such document in	No. In the discovery or similar procedure, a document is

	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?	disclosed and produced only to the other party but not filed to the Court or tribunal. Normally the lists of documents of the parties need not be filed (see: §9 of Practice Direction 24.1).
(e)(iii)	(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?	Under clause 7, an apology must not be taken into account in determining fault, liability or any other issue to the prejudice of the apology maker in applicable proceedings. But there may be circumstances where a party chooses to make an apology in court documents, such as pleadings and witness statements, or other similar written submissions, or in testimonies or oral submissions given at the hearing in particular proceedings, intending the apology to be taken into account in the proceedings. Clause 5(2)(a) and (b) disapplies the Bill to such an apology made in those circumstances so that it may be taken into account in the proceedings if the apology maker so intends. This is consistent with the policy objective of facilitating amicable resolution of disputes. Clause 5(2)(c) deals with evidence of apologies made outside the proceedings, for example, an apology made shortly after the relevant incident takes place. Evidence of such an apology is generally inadmissible in applicable proceedings by virtue of clause 8. But there may also be circumstances in which the apology maker agrees or seeks to its admission as evidence. The purpose of clause 5(2)(c) is to exclude such an apology from the application of the Bill if the apology maker so decides or intends. As explained above, a document disclosed or produced to the other party for discovery purposes in applicable proceedings (see clause

		11(a)) does not constitute a document filed or submitted in the proceedings. Neither does that document automatically constitute a piece of evidence adduced in the proceedings. We consider the provisions of the Bill are sufficiently clear and effective in achieving the policy intent.
(f)(i)	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	As mentioned, there is a difference between discoverability and admissibility. The fact that a document is discoverable does not necessarily mean that it is admissible as evidence at hearing. Clause 11(a) avoids any argument that an apology would not be discoverable because it is rendered irrelevant by virtue of clause 7 of the Bill. The provisions of the Bill work together and should be construed in the context of all relevant facts of each particular case.
(f)(ii)	(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?	Clause 4 defines an apology made by a person to mean "an expression of the person's regret, sympathy or benevolence". The Bill does not require the apology to be published or disclosed in any particular manner. For determining the admissibility of evidence of an apology in any applicable proceedings, the provisions of the Bill should be construed in the context of all relevant facts of the case.
(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	Clause 5(2)(a) refers to a document filed or submitted in applicable proceedings. The type of "document" that can be filed or submitted in the context is governed by the procedural rules followed in the applicable proceedings in question. Clause 11(a) refers to documents subject to discovery. The meaning of "document" in the context is governed by the rules of discovery or

	record (see, for example, section 35A(4) of the Telecommunications Ordinance (Cap. 106)) for the purposes of clauses 5(2)(a) and 11(a)?	other similar procedural rules followed in the applicable proceedings in question. We consider it unnecessary to define "document" in the context of clauses 5(2)(a) and 11(a). We note s.35A(4) of the Telecommunications Ordinance (Cap. 106) contains a specific requirement for a licensee to provide the appropriate system for reading information recorded by electronic or other means, and reducing the information into a written form on paper. The requirement in that section is for serving the specific purposes of that Ordinance and is not relevant in the context of this Bill.
(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 11(a) is included to avoid any argument that an apology would not be discoverable in applicable proceedings because it is rendered irrelevant by virtue of clause 7 of the Bill. Insofar as the investigation power or the information-seeking power of a regulator is concerned, it is different in nature from discovery of documents between parties in civil proceedings, and will not be affected by the Bill.
(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.	The Bill intends to cover, among others, all regulatory proceedings, whether or not they are conducted under an enactment. Therefore we consider the "proceedings by way of non-statutory self-regulation by industry bodies such as the Travel Industry Council" are "applicable proceedings" for the purposes of the Bill.

(j)(i)	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;	See answer to question (k).
(j)(ii)	(ii) proceedings where no such powers are exercised.	See answer to question (k).
(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).	In our review of the apology legislation of over 50 overseas jurisdictions considered by the Steering Committee, we did not note any express provision extending the application of the apology legislation to parliamentary proceedings. Similar to the Commission of Inquiry, Obscene Articles Tribunal and the Coroner's Court, the LegCo would not determine civil liability. After considering the policy objective and the impact that may be caused to the proceedings of LegCo, the Administration takes the view that the Bill does not apply to the proceedings of LegCo. However, if LegCo Members take a different view, the Administration is prepared to consider the views and reasons of LegCo Members.
(l)	Please provide further examples to illustrate what would constitute "an exceptional case" within the meaning of clause 8(2).	As we expect clause 8(2) will rarely be invoked, we do not have further examples to illustrate what would constitute "an exceptional case", but will stress that one possible situation is

		where the apology is the only evidence of fault or liability. Whether there is an exceptional case in particular applicable proceedings depends on the circumstances and the facts involved in the case.
(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?	Yes, "statement of fact" in clauses 4(3)(b) and 8(2) bears the same meaning. Admission of fault or liability is distinguished from a statement of fact. They are different concepts and do not 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:	As explained in the Final Report, the discretion under clause 8(2) is necessary to ensure that a proper balance has been struck between a claimant's right to fair trial and the policy objective of the Bill. Such discretion should be exercised sparingly to ensure the efficacy of the Bill and therefore the words "an exceptional case" are included. How the discretion should be exercised depends on the circumstances of the particular case.
(n)(i)	(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;	In order to determine whether part of an expression of regret, sympathy or benevolence is an admission of fault or liability, or a statement of fact, for the purposes of clauses 4(2) and 8(2), it is necessary to consider the entire expression in its context. While in our preliminary view, a statement by a person that he or she "has been working overnight without rest and may have dozed off at the wheel" appears, on its own, to be a statement of fact rather

		than an express or implied admission of fault, we do not consider it appropriate for the Administration to express a conclusive view based on incomplete information of a hypothetical scenario.
(n)(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");	Again, in order to determine whether part of an expression of regret, sympathy or benevolence is an admission of fault or liability, or a statement of fact, for the purposes of clauses 4(2) and 8(2), it is necessary to consider the entire expression in its context. While in our preliminary view, a statement by a person that he or she "wasn't paying attention" appears, on its own, to be a statement of fact rather than an express or implied admission of fault, we do not consider it appropriate for the Administration to express a conclusive view based on incomplete information of a hypothetical scenario.
(n)(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	Again, in order to determine whether part of an expression of regret, sympathy or benevolence is an admission of fault or liability, or a statement of fact, for the purposes of clauses 4(2) and 8(2), it is necessary to consider the entire expression in its context. While in our preliminary view, the statement that "our registration of the Discharges was through inadvertence" appears, on its own, to be an admission of fault rather than a statement of fact, we do not consider it appropriate for the Administration to express a conclusive view based on incomplete information.
(n)(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	Again, in order to determine whether part of an expression of regret, sympathy or benevolence is an admission of fault or liability, or a statement of fact, for the purposes of clauses 4(2) and 8(2), it is necessary to consider the entire expression in its context.

	regretted not telling Rumiana.”.	While in our preliminary view, the statements by Shannon that “she always tells people not to swim behind the dock and has told her father not to go swimming there” and that she did not tell Rumiana appear, on their own, to be statements of fact rather than an express or implied admission of fault, we do not consider it appropriate for the Administration to express a conclusive view based on incomplete information.
	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?	Under clause 8(2), on satisfaction of certain conditions, the decision maker may exercise the discretion to admit a statement of fact contained in an apology as evidence in the particular applicable proceedings in question. Other parts of the apology remain inadmissible as evidence to the prejudice of the apology maker. In practice, whether those other parts should be redacted or excluded through other ways is a matter for the decision maker to direct in conducting the proceedings.
(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)?	In most cases such difficulty would not exist because a statement of fact forming part of an expression of regret would be protected by the Bill. Anyway, we consider that a reasonable decision maker with common sense should be competent enough to segregate pure facts from an expression of regret and admission of fault.
(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	We had considered paragraph 4.16 of the Final Report further when we prepared the Bill. If a party consents to the admission of a statement of fact alone, it can be included as agreed facts under the existing procedures or practice without dispute. If an apology maker consents to the admission of an apology containing

	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))?	a statement of fact, it is covered by clause 5(2)(c), i.e. the Bill does not apply in this scenario, and there is no need for the decision maker to exercise the discretion under clause 8(2). For circumstances such as "whether there exists any other evidence that the claimant has or may obtain", we consider it more effective for clause 8(2) to provide upfront that the discretion is only exercisable in particular applicable proceedings where there is an exceptional case and to give an example (i.e. "where there is no other evidence available for determining an issue") in order to reflect the policy intent that the discretion is expected to be rarely exercised. We are aware of the approach in s.10(2) of the Mediation Ordinance (Cap. 620) but consider that the current clause 8(2) is appropriate and serves the purpose of the Bill.
(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 8(3) is effective in achieving the policy intent that clause 8 should apply to all "applicable proceedings" despite anything to the contrary in any rule of law or other rule concerning procedural matters. In the example given, s.31(1) of the Medical Practitioners (Registration and Disciplinary Procedure) Regulation (Cap. 161 sub. leg. E) is a "rule of law or other rule concerning procedural matters" of the Medical Council, and therefore clause 8 would prevail over that rule according to clause 8(3). This corresponds with the intent that the Bill is to apply to disciplinary proceedings such as the disciplinary proceedings before the Medical Council.
(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	We are aware of the relevant paragraphs of the 2nd paper and the provision in s.70 of the Employment Ordinance (Cap. 57).

	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 10(3) is effective in achieving the policy intent that clause 10 is to override any contrary rule of law or agreement. We do not consider it necessary to elaborate the clause further.
(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?	The factors would include the policy justifications for the proposed amendments and the implications on the objective of the apology law, the stakeholders' feedback, etc. In exercising the proposed power to amend the Schedule, the CE in C would take into account all factors relevant to the particular amendments proposed as in any other legislative amendment exercises. We do not consider it necessary to enumerate these factors in the Bill.
(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.	Yes, it is subject to the negative vetting procedure under s.34 of the Interpretation and General Clauses Ordinance (Cap.1).
(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.	Different Chinese terms may be used as the corresponding expression for the same English term in different Ordinances. The Chinese term "爭端" has also been adopted as the corresponding expression of the English word "dispute" in rule 6(f) of the Companies (Unfair Prejudice Petitions) Proceedings Rules (Cap. 622 sub. leg. L). We need not adhere to a term used in a particular existing Ordinance if we consider it suitable to use another term in the context of a new Bill.
(v)	In clause 4(1), "regret"[1] is proposed to be rendered as "歉意、懊	An English term may bear different meanings. According to the

[1] According to *Shorter Oxford English Dictionary* (Sixth Edition), "regret" means (an expression of) complaint, lament; a feeling of sorrow,

	悔、遺憾".[2] Please explain why three different terms are used to refer to "regret", and the difference (if any) between those terms.	English-Chinese dictionary titled《新英漢詞典》published by the Hong Kong Branch of the Joint Publishing Company, "regret" as a noun can mean (1) 懊悔, 悔恨; (2) 抱歉, 遺憾; and (3) 歉意. We consider it appropriate to use the Chinese terms "歉意、懊悔、遺憾" to express the wide meanings of the English word "regret" intended in the Bill.
(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.	Again, different Chinese terms may be used as the corresponding expression for the same English term in different Ordinances. The Chinese term "爭議事項" has also been adopted as the corresponding expression of the English word "issue" in section 3(7)(a) of the Civil Liability (Contribution) Ordinance (Cap. 377). We need not adhere to a term used in a particular existing Ordinance if we consider it suitable to use another term in the context of a new Bill.

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.