中華人民共和國香港特別行政區
Hong Kong Special Administrative Region of the People's Republic of China

立法會秘書處 法律事務部
LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

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By Fax (3918 4525)

20 March 2017

Mr William LIU
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Dear Mr LIU,

Apology Bill

Thank you for your letter dated 8 March 2017. We should be grateful for your further clarification of the following issues:

Clauses 4(3) and 8(2)

(a) Clause 4(3) distinguishes between an express or implied admission of fault or liability, and a statement of fact. You have indicated that they are different concepts and do not overlap. You have also mentioned during one of our previous telephone conversations that there is a difference between *implying* fault and *inferring* fault. Would you please provide an example to illustrate the difference between an implied admission of fault on the one hand, and a statement of "pure facts" from which fault can be inferred on the other?

(b) How would a decision maker exercising his discretion under clause 8(2) deal with a statement included in an apology which, on its face, merely describes how the relevant incident occurred (including what the apology maker did and did not do) without *expressly* admitting any fault, but from which an admission of fault could reasonably be *implied* or *inferred* by reading between the lines?

(c) In view of:

(i) some Members' concerns that the proposed retention of a discretion under clause 8(2) for a decision maker to admit statements of fact contained in an apology as evidence in exceptional cases (which are open-ended) would create a significant amount of uncertainty as to whether such statements would be protected by the Bill, thus discouraging the inclusion of facts in making an apology; and

(ii) your concerns that a blanket exclusion of such statements of fact without exception and without giving the decision maker any discretion to disapply the exclusionary rule or mitigate its effect in appropriate circumstances may unduly affect a claimant's right to a fair hearing contrary to Article 10 of the Hong Kong Bill of Rights and Article 39 of the Basic Law ("BL") and, as such, may be struck down by the court (see paragraphs 25 and 26 of LC Paper No. CB(4)669/16-17(03)),

please consider whether the definition of "apology" under clause 4(3) must include statements of fact, given that at present no other jurisdiction expressly protects statements of fact in an apology.[1]

Clause 5

(d) In relation to applicable proceedings which take place within Hong Kong, is the Bill intended to apply to an apology made outside Hong Kong? If so, is it necessary for the Bill (e.g. clause 5(1)) to provide expressly that it applies to an apology made by a person "whether within or outside HKSAR"? In this regard, you may wish to refer to the decision by the Ontario Superior Court of Justice in *Coles v. Takata Corporation*, Perell J., 2016 ONSC 4885 (CanLII).

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[1] It is noted that "admission of fault" and "statement of fact" originally included in the proposed definition of apology under the *Apologies (Scotland) Bill* have both been omitted from the final definition under section 3 of the *Apologies (Scotland) Act 2016* as enacted.

(e) If a letter of apology is disclosed in disciplinary or regulatory proceedings pursuant to a summons issued by, for example, an appeal tribunal under section 37(1)(b)(iii) of the Property Management Services Ordinance (Cap. 626), would such disclosure constitute the filing or submission of an apology in applicable proceedings within the meaning of clause 5(2)(a)?

Clause 6

(f) You have confirmed that the Bill is not intended to apply to the proceedings of the Legislative Council ("LegCo"). However, it seems unclear whether the following proceedings would constitute "disciplinary proceedings" within the meaning of clause 6(1)(a):

(i) proceedings under BL79(6) or (7) for relieving a Member of his duties by reason of a criminal conviction and imprisonment for one month or more, or for censuring a Member for misbehaviour or breach of oath; or

(ii) proceedings relating to the Committee of Members' Interests or the Investigation Committee under Rule 73, 73A or 85 of the Rules of Procedure of LegCo.

Nor is it entirely clear whether:

(iii) proceedings where LegCo or its committee exercises any powers under section 9 of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) to summon witnesses etc. would constitute "other proceedings conducted under an enactment" for the purposes of clause 6(1)(b); or

(iv) the handling of complaints by LegCo Members pursuant to BL73(8) would constitute "applicable proceedings" under clause 6(1)(a) and/or (b).

For the avoidance of doubt, is it necessary for the Schedule to exclude proceedings of LegCo or any of its committees, panels or subcommittees, and the handling of complaints by Members of LegCo, from the definition of "applicable proceedings"?

Clause 10

(g) Clause 10(3) provides that clause 10 would apply "despite anything to the contrary in any rule of law or agreement". Is clause 10 intended to apply to a contract of insurance or indemnity which provides for Hong Kong arbitration but chooses a foreign law (e.g. English or Californian law) as its governing law? Would your answer be different if the parties deliberately chose a foreign law in order to evade the operation of the Bill? In that regard, please refer to section 7(2) of the Unconscionable Contracts Ordinance (Cap. 458) under which Cap. 458 has effect notwithstanding any contract term which purports to apply the law of a jurisdiction other than Hong Kong if (i) the term appears to the court or arbitrator to have been imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of Cap. 458, and/or (ii) one of the parties dealt as consumer and was habitually resident in Hong Kong, and the essential steps necessary for making the contract were taken in Hong Kong by him or on his behalf.

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

Yours sincerely,

Bonny Loo

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