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22 May 2017

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

By Post & By E-mail

Dear Mr LOO,

Re: Apology Bill

We refer to your letter dated 20 March 2017 and enclose herewith our reply to the further 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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(*#1497804*)

Administration's reply to the questions of the Assistant Legal Adviser in the letter dated 20 March 2017

No.	Questions of the Assistant Legal Adviser	Administration's Reply
(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?	We wish to clarify that the distinction we have been making is between (i) an implied admission of fault by an apology maker and (ii) a finding of fault which may be made by a decision maker based on inference drawn from facts and evidence admitted. Depending on the context and the specific circumstances of the case in question, one possible example of an implied admission of a person's fault or liability is the person's gesture such as bows of apology. It does not contain any factual information. This should be distinguished from finding of fault by drawing inferences based on facts by a decision maker.
(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?	By virtue of clause 8(1) and clause 4(3) which provide that an apology also includes a statement of fact in connection with the matter, a statement of fact contained in an apology in connection with the matter is not admissible as evidence for determining fault or liability. Clause 8(2) provides that if 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. Where a statement of fact has been ruled admissible under clause 8(2), it becomes admissible evidence which a decision maker may take into account together with all other available evidence (if any) in determining whether the apology maker is liable or at fault. In such circumstances

		when the decision maker has admitted a statement of fact as evidence by exercising the discretion provided by clause 8(2), the decision maker may determine liability or fault on the basis of evidence admitted and will not be required to make any ruling as to whether there was admission of fault by the apology maker.
(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]	The option of excluding statements of fact from protection conferred under the Bill received the least support during the public consultation. At the meeting of the Bills Committee on 9 May 2017, no deputation or individual supported such option. We take the view that such option would create even more uncertainty. If statements of fact contained in apologies are not protected, the court or decision-makers in applicable proceedings concerned may be asked to consider and decide from time to time on the extent to which statements of fact form part of the apologies. This may give rise to satellite litigation on how the statements of fact are to be construed in the particular circumstances of the case in question. As this is a fact-sensitive issue, there will be great difficulty in predicting the outcome of a particular case, hence, giving rise to even greater uncertainty. The option of excluding statements of fact may therefore indirectly promote the making of bare apologies without any factual disclosure and this may be counter-productive to the objective of the Bill to prevent the escalation of disputes and facilitating their amicable resolution. The discussions of and justifications for the approach adopted in the Bill are provided in Government's papers in response to issues raised at the meetings on 24 February 2017,

[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.

		15 March 2017 and 9 May 2017.
(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).	Similar to overseas apology legislation, the Bill protects an apology in a triple-barrelled manner: declarative aspect (clause 7(1)(a)), relevance aspect (clause 7(1)(b)) and procedural aspect (clause 8). It is plain from the Bill, as well as supported by *Coles v Takata Corporation*, that clause 8 of the Bill is about the admission of evidence, which is procedural (not substantive) law. The law of the forum governs admissibility of evidence. It follows that clause 8 applies to applicable proceedings conducted in Hong Kong, with the effect that an apology will generally be inadmissible as evidence even if the apology is not made in Hong Kong. In such instances, an apology made outside Hong Kong is still protected by clause 8 of the Bill if the applicable proceedings concerned take place in Hong Kong. It is also not the policy intent to extend the Bill to affect the substantive law of other jurisdictions. Hence the Bill does not provide for extra-territorial effect.
(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)?	The party being summoned to produce such letter of apology would have the right to object to such production based on the apology legislation. If such objection is dismissed, that party would be obliged to produce such letter unless he takes the matter further by appeal or judicial review.
(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	As stated in our earlier reply to your query as to whether the proceedings of LegCo or its committees are capable of falling within the definition of "applicable proceedings" for the purposes

	"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: (i) 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 (ii) 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"?	of the Bill, the Administration takes the view that the Bill does not apply to the proceedings of LegCo. The Administration is prepared to make this view and effect of the Bill clear, by including LegCo proceedings in the Schedule to the Bill. However, if LegCo Members take a different view, the Administration is prepared to consider the views and reasons of LegCo Members. Nevertheless, we offer our views on the queries raised for Members' reference. (i) In relation to the proceedings under BL79(6) or (7), we doubt if they would constitute "disciplinary proceedings" for the purposes of the Bill as the relief of a Member's duties under any of these articles are provided for in the Basic Law which is a constitutional document. (ii) An exercise of the powers under section 9 of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) *per se* does not constitute proceedings for the purposes of the Bill. Section 9 merely confers a power that may be exercised by LegCo or its committees. (iii) We note that under the LegCo Redress System, the Complaint Officer may obtain relevant information from the Government where necessary. If the complaint is justified, Members may (a) ask the Government to take remedial action; and/or (b) refer the issue to the relevant LegCo committee or raise the issue at a LegCo meeting if a change in policy or law is considered necessary. Neither of these would involve any binding determination of fault or liability. In any event, we consider that generally, handling of complaints does not constitute any of the proceedings described in the Bill. (iv) As regards the proceedings relating to Rule 73, 73A and 85, we appreciate that there may be doubts whether they may

		constitute "disciplinary proceedings". To avoid any doubt, we are prepared to propose appropriate Committee Stage amendments to the Bill with the effect to exclude LegCo proceedings from the application of the Bill by including LegCo proceedings in the Schedule to the Bill.
(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.	Clause 10(3) aims to, *inter alia*, avoid the "contracting out" of the Bill. For arbitration, if the parties have chosen Hong Kong as the seat of arbitration, the procedural law governing the conduct of the arbitral proceedings (*lex arbitri*) would be Hong Kong law. Accordingly, the procedural law aspect of the Bill would apply to applicable proceedings conducted in Hong Kong, even though the underlying contract of insurance or indemnity is governed by foreign law. Please also see our answer to question (d) above. If the parties choose a foreign law as the governing law of the insurance contract, the parties have the freedom to do so and should be aware of their rights and obligations under the foreign law. It is only advisable for parties to carefully consider the implications of choosing the foreign law before deciding if and which foreign law is to be chosen. For the time being, the Government does not see the need to provide a clause in the Bill similar to section 7(2) of the Unconscionable Contracts Ordinance (Cap. 458).