LC: Speech by Secretary for Justice on resumption of Second Reading debate on the Apology Bill (English only)
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Following is the speech by the Secretary for Justice, Mr Rimsky Yuen, SC, on the resumption of the Second Reading debate on the Apology Bill in the Legislative Council meeting today (July 13):

President,

First of all, I would like to express our gratitude to the Hon Holden Chow, the chairman of the Bills Committee of the Apology Bill, and all the members of the Bills Committee for their contribution in respect of the scrutiny of the Bill. In this regard, I would also like to thank the staff of the Legislative Council who provided unfailing support to the Bills Committee for working within a tight timetable, and thus made it possible to resume the Second Reading of the Bill within this legislative session. Needless to say, I am also grateful to the deputations and individuals for the constructive views they put forward in relation to the Bill.

As I pointed out when I introduced the Bill into this Council in February this year, the objective of the Bill is to facilitate the resolution of disputes by promoting and encouraging the making of apologies by parties in disputes when they want to do so by stating the legal consequences of making an apology. Such disputes include disputes arising from medical negligence and health care cases mentioned by a member at yesterday's debate. The Bill was formulated on the basis of the recommendations made by the Steering Committee on Mediation after two rounds of public consultation held in 2015 and 2016. We also provided briefings to the Panel on Administration of Justice and Legal Services in 2015 and 2016.

Committee Stage Amendments

I shall move two Committee Stage Amendments (CSAs) at a later stage. The CSAs, which have all been endorsed by the Bills Committee, can be outlined as follows:

CSA to Clause 8(2)

Clause 4 of the Bill defines an apology as an expression of a person's regret, sympathy or benevolence. If part of that expression is an admission of the person's fault or liability, or a statement of fact, the admission or statement is also included in the meaning of apology. Under clause 8(1) of the Bill, evidence of an apology, including an accompanying statement of fact, made by a person in connection with a matter is not admissible in applicable proceedings as evidence for determining fault, liability or any other issue in connection with the matter to the prejudice of the person.

Nevertheless, under the original proposed clause 8(2) of the Bill, the decision maker of the relevant applicable proceedings may exercise a discretion to admit a statement of fact contained in an apology as evidence in the relevant proceedings if there is an exceptional case and the decision maker is satisfied that it is just and equitable to do so, having regard to all the relevant circumstances. An example of such an exceptional case is given in Clause 8(2) which is where there is no other evidence available for determining an issue.

Some members considered that the discretion of the decision maker and in particular the words "all the relevant circumstances" in clause 8(2) would give rise to uncertainties. Some members took the view that this might deter people from disclosing statements of fact when making apologies.

We understand those views expressed by members. As a matter of fact, the issues involved were studied in depth

by the Department of Justice and discussed thoroughly by the Bills Committee. Having carefully considered the views expressed by the members of the Bills Committee, and without unduly restricting the discretion of the decision maker (as defined in the Bill), we decided to propose a CSA to clause 8(2). The effect of the CSA is that if there is an exceptional case in the relevant particular proceedings, the decision maker has to give regard to the public interest or the interests of the administration of justice in deciding whether it is just and equitable to exercise the discretion.

We share the views of some members of the Bills Committee that a decision maker would necessarily take into account and consider all relevant circumstances in deciding whether it is just and equitable to exercise the discretion having regard to the public interest and the interests of the administration of justice. The CSA in question is also in response to the views of some members on the need for clearer guidelines for the exercise of the discretion.

We take the view that the above proposal would strike an appropriate balance between achieving the policy objective of the Bill on the one hand and safeguarding the interests of the potential claimants on the other. While the objective of the Bill is to encourage the making of sincere and meaningful apologies that include statements of fact, this should not be achieved at the expense of the parties' fundamental rights to a fair hearing and to secure a just resolution of disputes in accordance with their substantive rights. If we were to remove the discretion altogether, there is a real risk that the provision might become unconstitutional and might in turn give rise to all sort of uncertainties.

In the course of yesterday's debate, I note that Dr the Hon Yiu Chung-yim suggested that there is an inconsistency between the English version and the Chinese version of

clause 8(2) regarding the use of the expression "just and equitable". We have looked at the position and do not think that there is any inconsistency. The Chinese expression "公正及公平", which can be found in the Chinese version of the Bill, has been used as the Chinese equivalent of "just and equitable" in many of the local legislations.

I also note that the Hon Claudia Mo expressed concern about the position of the "decision maker". As defined in clause 8(4) of the Bill, the expression "decision maker" is defined to mean the person (whether a court, a tribunal, an arbitrator or any other body or individual) having the authority to hear, receive and examine evidence in the proceedings. Accordingly, the expression "decision maker" does not mean just any person. Instead, "decision maker" is the person who has the conduct of the "applicable proceedings" (as defined in clause 6 of the Bill) and who has the jurisdiction to decide on the question of evidence.

CSA to the Schedule

Clause 6(1) sets out the proceedings to which the Bill is applicable. Clause 6(2) provides that applicable proceedings do not include criminal proceedings or proceedings specified in the Schedule to the Bill.

When the Bill was being considered, a question was raised as to whether the Bill would apply to the proceedings of the Legislative Council. Having regard to the constitutional role and functions of the Legislative Council, we do not intend to apply the Bill to the proceedings of the Legislative Council. To avoid any unnecessary doubt, we decided to propose a CSA to expressly disapply the Apology Bill to proceedings of the Legislative Council, including proceedings of its committees, panels or subcommittees.

Conclusion

The Bill is the latest initiative for implementing the Government's policy to encourage the wider use of mediation in resolving disputes. Experiences and studies in other jurisdictions demonstrate that apology legislation would facilitate settlement of disputes and would thereby reduce hostile litigation. If and when enacted, the Hong Kong SAR will be the first jurisdiction in Asia to have apology legislation and the first jurisdiction amongst the 56 common law jurisdictions that we have studied to protect statements of fact in an apology legislation. This, we believe, will help further enhance the Hong Kong SAR's position as a centre for international legal and dispute resolution services in the Asia-Pacific region, and hopefully will also bring about a change in the dispute resolution culture.

With these remarks, I urge Members to support the passage of the Second Reading of the Bill and the amendments that I will move at the subsequent Committee Stage.

Thank you, President.

Ends/Thursday, July 13, 2017