For discussion on
26 February 2018

Legislative Council Panel on
Administration of Justice and Legal Services

Implementation of the Law Reform Commission of Hong Kong Report on Hearsay in Criminal Proceedings – Evidence (Amendment) Bill 2018

INTRODUCTION

Members were briefed on the Government's proposals to implement the recommendations of the Report on Hearsay in Criminal Proceedings ("the Report") published by the Law Reform Commission of Hong Kong ("the LRC") in November 2009 and the planned consultation exercise at the Panel meeting held on 27 March 2017. This paper seeks to update Members on the outcome of the consultation exercise conducted from 21 April to 31 July 2017 and the proposed way forward.

BACKGROUND

2. The common law rule against hearsay renders hearsay evidence generally inadmissible in criminal proceedings unless that evidence falls within one of the common law or statutory exceptions to the rule ("the hearsay rule"). The rule seeks to ensure that the witness's credibility and accuracy can be tested in cross-examination. Despite this rationale, the hearsay rule has been the subject of widespread criticism over the years from academics, practitioners and the bench.

3. One of the main criticisms against the hearsay rule is that the rule is strict and inflexible, and excludes hearsay evidence even if it is cogent and reliable. The inadmissibility of hearsay evidence that is otherwise cogent and relevant to the determination of the guilt or innocence of an accused sometimes results in the exclusion of evidence which by standards of ordinary life would be regarded as accurate and reliable. This can result in absurdity and also in injustice.

4. The complexity of the rule and the lack of clarity of its exceptions have also been criticised. In the light of these criticisms, proposals for reform have been put forward in every common law jurisdiction where the subject has been studied for the purpose of reform. The law of hearsay is a topic which

many other jurisdictions have recognised as being in need of attention. In each instance where a review has been carried out, there has been recognition of the need for change. In line with such international development, the LRC has proposed reform to the hearsay rule as detailed in the Report.

CONSULTATION EXERCISE

5. On the basis of the Report, we issued a consultation paper at **Annex I** ("the Consultation Paper") with a consultation draft of the Evidence (Amendment) Bill[1] ("the Consultation Bill") attached (see Annex C of the Consultation Paper). The Consultation Bill seeks to implement the recommendations of the LRC in full (with appropriate modifications) except for some of the special topics examined in Chapter 10 of the Report.[2] It is considered that those topics require further study and should not be implemented at the present stage. Following the recommendations of the LRC, the Consultation Bill does not seek to abolish the common law exclusionary rule against hearsay evidence, but to provide for a comprehensive and principled approach to admissibility of hearsay by way of specifying when hearsay would be admissible. Save for the statutory exceptions and common law rule exceptions preserved by the Consultation Bill or when the relevant parties agree to the admission of hearsay evidence, the court has a discretionary power to admit hearsay evidence if the conditions of (a) necessity and (b) threshold reliability are satisfied ("the Core Scheme"). Under the Core Scheme, the probative value of the hearsay evidence must always be greater than any prejudicial effect it may have on any party to the proceedings before it can be admitted. As a built-in safeguard to protect the integrity of the proceedings, the court is further required under the Core Scheme to direct a verdict of acquittal of the accused where it considers that it would be unsafe to convict.

6. During the consultation exercise, we specifically sought the views from various stakeholders including the Judiciary, legal professional bodies, relevant government bureaux and departments, law schools and other interested parties as set out at **Annex II**. We received 11 submissions. Respondents in general supported the proposals. In particular, detailed comments and suggestions on various aspects of the Consultation Bill were provided by the Hong Kong Bar Association and The Law Society of Hong Kong. Having carefully considered all the comments and suggestions received, we set out in the table at **Annex III** a summary of those comments and suggestions of the Respondents and our responses and proposed refinements for incorporation in the Bill under preparation ("the Bill")**.**

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[1] The draft Evidence (Amendment) Bill at Annex C to Annex I is the consultation draft published in the consultation and is subject to further revision. The draft is therefore for reference only.

[2] Such special topics include banking, business and computer records.

SUMMARY OF LEGISLATIVE PROPOSALS

Necessity condition

7. More specifically, the necessity condition under the Core Scheme would only be satisfied where the declarant is genuinely unable to provide testimony of the hearsay evidence and not merely unwilling to do so. In this regard, the Bill will provide that the necessity condition is satisfied only if the declarant: (a) is dead; (b) is unfit to be a witness because of the declarant's age or physical or mental condition; (c) is outside Hong Kong and it is not reasonably practicable to – (i) secure the declarant's attendance; and (ii) make the declarant available for examination and cross-examination in other competent manner; (d) cannot be found although all reasonable steps have been taken to find the declarant; or (e) refuses to give evidence on ground of self-incrimination.

8. The Bill will further provide that the party applying to admit hearsay evidence has the burden of proving the necessity condition according to the required standard of proof, which will be beyond reasonable doubt if the applicant is the prosecution and on the balance of probabilities if the applicant is the defence.

Condition of threshold reliability

9. The condition of threshold reliability under the Core Scheme will only be satisfied where the circumstances provide a reasonable assurance that the hearsay evidence is reliable. The Bill will provide that in assessing the condition, the court must have regard to — (a) the nature and content of the hearsay evidence; (b) the circumstances in which the hearsay was made; (c) the truthfulness of the declarant; (d) the accuracy of the observations of the declarant; and (e) the presence of other admissible supporting evidence.

Safeguards

10. In addition to the conditions of necessity and threshold reliability, other safeguards will be put in place in the Core Scheme to prevent miscarriages of justice and unsafe convictions and also to strike a fair balance between the fair trial right of the accused and other legitimate interests. These include, as highlighted above, requiring the court to be satisfied that the probative value of the hearsay evidence is greater than any prejudicial effect it may have on any party to the proceedings. As a built-in safeguard to protect the integrity of the proceedings, the Bill will further require the court, at or after the conclusion of

the prosecution's case, to direct a verdict of acquittal of the accused against whom the hearsay evidence has been admitted under the discretionary power where the court considers that it would be unsafe to convict the accused. In considering whether it would be unsafe to convict the accused, the court must take into account the following factors – (a) the nature of the proceedings; (b) the nature of the hearsay evidence; (c) the probative value of the hearsay evidence; (d) the importance of the hearsay evidence to the case against the accused; and (e) any prejudice to the accused which may be caused by the admission of the hearsay evidence, including the inability to cross-examine the declarant.

WAY FORWARD

11. In the light of the above and comments that Members may have, the Government will finalise the Bill with a view to introducing it into the Legislative Council within the current legislative session.

Department of Justice
February 2018

Annex I

Consultation Paper on
Evidence (Amendment) Bill 2017

Introduction

The Department of Justice ("DoJ") would like to invite comments on the proposed **Evidence (Amendment) Bill 2017** ("the proposed Bill") which seeks to implement the recommendations of the Law Reform Commission of Hong Kong ("LRC") in the report of "Hearsay in Criminal Proceedings" ("Report") and makes related legislative amendments.

2. The rule against hearsay in criminal proceedings renders hearsay evidence generally inadmissible in criminal proceedings unless that evidence falls within one of the common law or statutory exceptions to the rule. The rule seeks to ensure that the witness's credibility and accuracy can be tested in cross-examination. Despite this rationale, the rule has been the subject of widespread criticism over the years from academics, practitioners and the bench.

Background

3. In May 2001, the then Chief Justice and Secretary for Justice directed the LRC:

> "To review the law in Hong Kong governing hearsay evidence in criminal proceedings, and to consider and

make such recommendations for reforms as may be necessary."

4. A sub-committee ("LRC sub-committee") was appointed to study the subject. In November 2005, the LRC published the consultation paper on "Hearsay in Criminal Proceedings" examining the current law in Hong Kong on hearsay evidence in criminal proceedings and setting out various proposals for reform of the law ("LRC consultation paper"). The LRC consultation paper was circulated to interested parties for comments. In November 2009 the LRC published the Report recommending that the reform should be achieved by a detailed legislative scheme.

Objectives

5. After careful consideration of the views and recommendations of the LRC, the DoJ has prepared the proposed Bill with the aims of implementing the recommendations of the LRC and making related legislative amendments.

6. Following the recommendations of the LRC, the proposed Bill does not seek to abolish the common law exclusionary rule against hearsay evidence, but to provide for a comprehensible and principled approach to admissibility of hearsay by way of specifying when hearsay would be admissible. To this end, the proposed Bill preserves certain common law exceptions. It also extends and clarifies the scope under which hearsay evidence can be admitted in criminal proceedings in specific circumstances. Under the proposed Bill, hearsay evidence would be admissible:

(a) if the relevant parties agree ;

(b) if the court is satisfied that it is "necessary" to admit the hearsay evidence and that the evidence is "reliable";

(c) if it falls within one of several common law exceptions to be preserved; or

(d) if it falls within a statutory exception.

7. The admission of hearsay will be "necessary" only in certain specified circumstances, such as where, in very general terms, the declarant is dead, unfit to be a witness, outside Hong Kong, cannot be found, or refuses to testify on the ground of self-incrimination.

8. In determining whether the evidence is "reliable" for the purposes of admission, the court must have regard to all circumstances relevant to the apparent reliability of the statement, including the nature and content of the statement, the circumstances in which it was made, any circumstances that relate to the truthfulness and the accuracy of the observation of the declarant, and whether the statement is supported by other admissible evidence. The evidence will not be admitted unless its probative value is greater than any prejudicial effect it may have on any party to the proceedings.

9. DoJ now wishes to seek the views of the Judiciary, legal professional bodies, law enforcement agencies and other interested parties on the proposed Bill.

LRC's recommendations

10. The Report acknowledges that a clear case for reform of the hearsay has been made out. It points out that any reform must incorporate effective safeguards, as unrestricted relaxation of the hearsay rule may run counter to the interests of the accused persons, community and justice as a whole. It is the Report's conclusion that while irrelevant and unreliable hearsay evidence should be excluded, relevant and reliable hearsay evidence should be admissible. The proposed reform aims at providing a comprehensible and principled approach to admissibility, with the goal of admission of relevant and reliable evidence where need exists for such evidence.

11. Although views varied as to the extent and degree of reform required, the majority of those who had responded to the LRC consultation paper agreed that there was a need for reform of the hearsay rule in criminal proceedings in Hong Kong. Accordingly, the Report recommends that the existing law of hearsay in criminal proceedings be reformed comprehensively and coherently according to a principled, logical and consistent system of rules and principles.

12. A summary of the detailed recommendations of the LRC is set out at Annex A (Recommendations). In particular, Recommendation 10 proposes a Core Scheme, as set out at Annex B, that envisages the admission of hearsay in **only** one of four ways: an existing statutory exception (proposal 4); a preserved common law exception (proposal 5); consent of the parties concerned (proposal 6); or the general discretionary power to admit hearsay (proposal 7).

13. The LRC recommends that the Core Scheme be adopted as the main vehicle for reforming the law of hearsay in criminal proceedings in Hong Kong. The passages in bold italics in Annex B are words or phrases that were the subject of particular discussion by the LRC sub-committee and which it intended to be adopted in the legislation to be proposed. Recommendations 11 to 32 stem from the Core Scheme.

Overview of the Proposed Bill

14. A working draft of the proposed Bill is attached at Annex C which may be subject to further revisions or refinements in the light of the comments to be received. The main provisions of the proposed Bill are outlined below with reference to the Recommendations.

15. Clause 3 of the proposed Bill adds a new Part IVA to the Evidence Ordinance (Cap 8) containing sections 55C – 55W.

Division 1 - General

16. Section 55C is the interpretation provision of the proposed Bill. For instance, the term "statement" is defined in section 55C(1) to mean any representation of fact or opinion however made, including a written or non-written communication, non-verbal communication in the form of conduct that is intended to be an assertion of the matter communicated. A video-recorded interview of a complainant would therefore be a statement that may be admitted under the new Part IVA. (See Recommendation 12)

17. Section 55D(1) provides that the newly added Part IVA applies

to evidence adduced or to be adduced in criminal proceedings in relation to which the strict rules of evidence apply. The term "criminal proceedings" has been used throughout the Evidence Ordinance. It is intended that the same meaning shall apply to the new Part IVA, subject to appropriate modifications as outlined in paragraph 18 and 19 below.

18. Section 55D(2)(a) makes it clear that the following proceedings are regarded as criminal proceedings for the purposes of section 55D(1)—

(i) proceedings for or in relation to the surrender of a person to a place outside Hong Kong under the Fugitive Offenders Ordinance (Cap. 503);

(ii) proceedings arising from the proceedings mentioned in subparagraph (i); and

(iii) proceedings in respect of sentencing.

19. Section 55D(2)(b) makes it clear that evidence adduced or to be adduced in proceedings in respect of sentencing is regarded as evidence adduced or to be adduced in criminal proceedings to which the strict rules of evidence apply[1] for the purposes of section 55D(1) if—

[1] See *R v Newton* (1983) 77 Cr App R 13 in which the English Court of Appeal considered the procedure to be followed where conflicting versions of the facts of the offence are put forward in sentencing proceedings. This procedure is adopted by the courts in Hong Kong in various cases eg *HKSAR v Chong Chee-Meng*, CACC 315/2007 and *HKSAR v Chan Wan Cheung and Another* [2007] 4 HKLRD 606.

(i) it is adduced or to be adduced by the prosecution to prove an aggravating factor; and

(ii) it is not information furnished to the court under section 27 of the Organized and Serious Crimes Ordinance (Cap. 455), or under an order of the court.[2] (See Recommendations 15 – 17 and 42)

20. Section 55E sets out the only circumstances under which hearsay evidence is admissible in criminal proceedings, i.e. under—

(a) Division 2, 3, 4 or 6 of the new Part IVA; (See Recommendations 11 and 18)

(b) a common law rule preserved by Division 5; (See Recommendations 19) or

(c) any other enactment. (See Recommendation 20)

Division 2 – Admission by agreement

21. Section 55H provides that hearsay evidence is admissible by agreement of the relevant parties. (See Recommendation 21)

22. The mechanism in section 55H is comparable to that of section

[2] They seek to address the concerns (a) that requiring the prosecution to prove an aggravating factor in accordance with the proposed reform may unduly prolong sentencing proceedings and make such proceedings more complicated; and (b) that the proposed reform may affect statistical data furnished pursuant to section 27 of the Organized and Serious Crimes Ordinance (Cap 455). (See para. 9.17 of the Report.)

65C of the Criminal Procedure Ordinance (Cap 221). While section 65C(3) provides that an admission under that section shall be treated as an admission for the purpose of any subsequent criminal proceedings relating to that matter (including any appeal or retrial), the term "or retrial" is omitted in the corresponding section 55H(5) of the proposed Bill. DoJ considers that to bind parties in a retrial to an agreement made in the original trial to admit the hearsay evidence may in some cases put the parties in the subsequent retrial in a difficult and awkward position, where for instance, there has been a change of the defence case or change of counsel or that new evidence has since surfaced in the interim.

Division 3 – Admission not opposed

23. Section 55I in Division 3 introduces a mechanism whereby a party who proposes to adduce hearsay evidence in the proceedings may give a hearsay evidence notice to each other party to the proceedings and the responsible court officer. In general, the hearsay evidence is admissible if no party gives an opposition notice within 14 days after the day on which the hearsay evidence notice is given. (See Recommendation 29)

24. Section 55K provides that a party who has received a hearsay evidence notice given under section 55I(a) in respect of any hearsay evidence may oppose the admission of the evidence by giving an opposition notice.

Division 4 – Admission sanctioned by court

25. Section 55N(1) in Division 4 provides that a party who has

given a hearsay evidence notice under section 55I(a) and has been given an opposition notice under section 55K may apply for leave of the court under section 55M to admit the hearsay evidence. (See Recommendation 22) A party who has given no hearsay evidence notice may still make the application if one or more of the conditions set out at section 55N(2) are satisfied, though costs may be awarded against him, and that inferences may be drawn from the failure of that party to give the notice.

26. Section 55M(2) provides that the court may grant leave for the admission of hearsay evidence only if:

(a) an application for leave is made under section 55N;

(b) the declarant is identified to the court's satisfaction; (See Recommendation 23)

(c) oral evidence given in the proceedings by the declarant would be admissible as evidence of the fact which the hearsay evidence is intended to prove; (See Recommendation 24)

(d) the condition of necessity is satisfied in respect of the evidence under section 55O;

(e) the condition of threshold reliability is satisfied in respect of the evidence under section 55P; and

(f) the court is satisfied that the probative value of the evidence is greater than any prejudicial effect it may have on any party to the proceedings. (See Recommendation 28)

27. For the purposes of section 55M(2)(d), section 55O(1) provides that the condition of necessity is satisfied in respect of any hearsay evidence only if—

(a) the declarant is dead;

(b) the declarant is unfit to be a witness, either in person or in any other competent manner, in the proceedings concerned because of the age or physical or mental condition of the declarant;

(c) the declarant is outside Hong Kong, and—

(i) it is not reasonably practicable to secure the declarant's attendance at the proceedings; and

(ii) it is not reasonably practicable to make the declarant available for examination and cross-examination in any other competent manner in the proceedings;

(d) the declarant cannot be found although all reasonable steps have been taken to find the declarant; or

(e) the declarant refuses to give the evidence in the proceedings in circumstances where the declarant would be entitled to refuse on the ground of self-incrimination. (See Recommendation 25)

28. Section 55O(4) further provides that the standard of proof required to prove that the condition of necessity is satisfied is beyond

reasonable doubt if the applicant is the prosecution, and on the balance of probabilities if the applicant is the accused. (See Recommendation 30)

29. For the purposes of section 55M(2)(e), section 55P(1) provides that the condition of threshold reliability is satisfied in respect of any hearsay evidence only if the circumstances relating to the evidence provide a reasonable assurance that the evidence is reliable. (See Recommendation 26)

30. In deciding whether the condition of threshold reliability is satisfied in respect of any hearsay evidence, section 55P(2) provides that the court must have regard to all circumstances relevant to the apparent reliability of the evidence, including—

(a) the nature and content of the statement adduced as the evidence;

(b) the circumstances in which the statement was made;

(c) any circumstances that relate to the truthfulness of the declarant;

(d) any circumstances that relate to the accuracy of the observation of the declarant; and

(e) whether the statement is supported by other admissible evidence. (See Recommendations 9D and 27)

31. As a built-in safeguard, section 55Q provides that the court

must direct the acquittal of the accused if—

(a) the case against an accused is based wholly or partly on hearsay evidence admitted with the leave of the court granted under section 55M; and

(b) the court considers that it would be unsafe to convict the accused. (See Recommendations 9C and 32)

Human rights implications

32. The LRC has devoted the entire Chapter 11 of the Report to discuss the human rights implications of the admission of an incriminating hearsay statement at the instance of the prosecution as the accused would not be able to cross-examine and confront the statement maker. Particular reference has been drawn to Article 11(2)(e) of the Hong Kong Bill of Rights (in section 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383)) ("HKBOR"). Article 11(2)(e) provides that:

> "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality-
> …
> (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;…"

33. Article 11(2)(e) of HKBOR incorporates Article 14(3)(e) of the International Covenant on Civil and Political Rights ("ICCPR") into

domestic law. The United Nations Human Rights Committee considers the guarantee as an application of the principle of equality of arms:-

> "Paragraph 3(e) of article 14 guarantees the right of accused persons to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them. As an application of the principle of equality of arms, this guarantee is important for ensuring an effective defence by the accused and their counsel and thus guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution. It does not, however, provide an unlimited right to obtain the attendance of any witness requested by the accused or their counsel, but only a right to have witnesses admitted that are relevant for the defence, and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings. Within these limits, and subject to the limitations on the use of statements, confessions and other evidence obtained in violation of article 7, it is primarily for the domestic legislatures of States parties to determine the admissibility of evidence and how their courts assess it."[3]

34. In assessing whether the proposed Bill is compliant with

[3] United Nations Human Rights Committee, General Comment No.32 (2007) on Article 14 of the ICCPR, para 39.

Article 11(2)(e), a key issue is whether there are sufficient justifications to liberalise the hearsay rule and whether the proposed Bill has incorporated sufficient safeguards to prevent miscarriages of justice and unsafe convictions and strike a proper balance between the fair trial right of the accused and other legitimate interests.

35. The LRC has explained in detail why the existing law should be reformed. It has included substantive and procedural safeguards in the Core Scheme and considered them sufficient to prevent injustice to either the prosecution or the defence. Such safeguards include the conditions of necessity and threshold reliability, and the ultimate discretion of the court to direct an acquittal.[4]

36. The proposed Bill seeks, *inter alia*, to implement the LRC's recommendations by adding section 55M which requires that the conditions of necessity and threshold reliability must be satisfied before hearsay evidence may be admitted. In *Al-Khawaja v The United Kingdom,*[5] the Grand Chamber of the European Court of Human Rights ("ECtHR") held in the context of the English Criminal Justice Act 2003 that convictions based solely or decisively on statements from absent witnesses will not automatically constitute a breach of Article 6(3)(d) of the European Convention on Human Rights[6] – the equivalent of Article 11(2)(e) of the HKBOR.

37. In the recent case of *Horncastle v United Kingdom*,[7] a

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[4] At para 9.103 of the Report.
[5] (2012) 54 EHRR 23
[6] Article 6(3)(d) expressly provides for the right of the accused to examine or have examined witnesses against him.
[7] (2015) 60 EHRR 31

Chamber of the ECtHR noted the views of Lord Phillips of the United Kingdom Supreme Court[8] that the safeguards in the Criminal Justice Act 2003 pertaining to the admission of hearsay evidence meant that there could be no breach of Article 6(3)(d) even if a conviction was based solely or to a decisive extent on the evidence of an absent witness. The Chamber confirmed that the admissibility of evidence was primarily a matter for regulation by national law and the ECtHR's function was to determine whether the proceedings as a whole were fair. Referring to the Grand Chamber's decision in *Al-Khawaja*, the Chamber restated, in the context of the Criminal Justice Act 2003, that the admission of hearsay evidence that was the sole or decisive evidence against an accused person would not breach Article 6 where there was a good reason for the witnesses' non-attendance and there were adequate counterbalancing measures to protect the defendants' right to fair trial.

38. These cases support the LRC's conclusion that the right under Article 11(2)(e) of HKBOR will not be infringed where sufficient safeguards have been incorporated by the law to protect the accused's right to fair trial. Division 4 of the proposed Bill has already adopted the safeguards recommended by the LRC that would protect the rights of the accused and ensure the integrity of the trial process, including the detailed provisions on the conditions of necessity and threshold reliability in sections 55O and 55P, and the requirement that the court must direct the acquittal of the accused in the circumstances specified in section 55Q. These safeguards are more extensive than those contained in the Criminal Justice Act 2003. In particular, hearsay is admissible under the English legislation on the ground of necessity alone without a requirement of

[8] *R v Horncastle* [2009] UKSC 14

threshold reliability. Of equal significance is the requirement to direct acquittal specified in section 55Q. In reaching that decision, one of the factors which the court must take into account is the importance of the hearsay evidence to the case against the accused. In the circumstances, it is considered that the proposed Bill is consistent with Article 11(2)(e) of HKBOR.

Division 5 – Preservation of common law rules

39. Section 55R in Division 5 set out the common law rules that are preserved. Section 55S provides that the words in which a common law rule is described in sections 55R are intended only to identify the rule and are not to be construed as altering the rule in any way. Reading section 55R in light of section 55E, common law exceptions not preserved in the Division will in effect be abolished after the passing of the proposed Bill.[9] (See Recommendation 19)

Division 6 - Admissibility of certain evidence

40. Division 6 contains 3 sections that provide for admissibility of certain evidence. Section 55T provides that if hearsay evidence is admitted under Divisions 2 – 5, certain evidence is admissible for proving the credibility of the declarant of the hearsay evidence. (See Recommendation 31)[10]

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[9] See the term "only if" in the chapeau of section 55E.

[10] When a witness testifies in the usual way, the witness can be cross-examined, and the cross-examiner may ask questions designed to test the witness's credibility. When an absent witness's statement is admitted as hearsay this cannot usually be done. From the point of view of the side against which such evidence is admitted this inability can be a serious disadvantage. So in the hope of making up for this when hearsay evidence is admitted under Divisions 2 – 5, the scope of Recommendation 31 is expanded to give the opposing side the possibility of adducing evidence about matters affecting

41. Section 55U(1) provides for certain circumstances under which a previous statement made by a witness is admissible for proving the truth of its content. (See Recommendation 39)

42. Section 55U(2) presumptively removes the physical record of a statement which has been admitted previously from the jury when they retire to consider their verdict unless the judge considers it appropriate or all parties to the proceedings agree that it should accompany the jury. (See Recommendation 40)

43. Section 55V abrogates the common law rule that excludes implied assertions. In other words, statements containing implied assertions are not excluded as being inadmissible. (See Recommendation 13)

Multiple Hearsay

44. Section 55W provides that multiple hearsay is admissible only if each level of hearsay itself is admissible under the new Part IVA. (See Recommendation 14)

Repeal of Section 79 of the Evidence Ordinance

45. Clause 4 repeals section 79 of the Evidence Ordinance, which provides for admissibility of any medical notes or reports by any Government medical officer which purport to relate to the deceased in any

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credibility which the absent witness could have been asked about in cross-examination if he had testified in court.

prosecution for murder or manslaughter. (See Recommendation 20)

Other Special Topics

46. Chapter 10 of the Report also recommends reforms on other special topics relating to banking, business and computer records. (See Recommendations 33 – 37) It is considered that those topics require further study and should not be implemented at the present stage.

Consultation

47. Before taking the matter forward, DoJ would like to seek the views of the Judiciary, legal professional bodies and other interested parties on the proposed Bill outlined above.

48. Please address your views or comments on the proposed Bill to the following on or before the end of July 2017-

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Annex A

Summary of Recommendations of the LRC

The LRC made the following recommendations:

1. The existing law of hearsay in Hong Kong criminal proceedings be reformed comprehensively and coherently according to a principled, logical and consistent system of rules and principles. (Recommendation 1)

2. Any reform of the existing law of hearsay in Hong Kong criminal proceedings must have built-in safeguards that protect the rights of defendants and ensure the integrity of the trial process. (Recommendation 2)

3. The polar extreme options of no change or free admissibility, or options just short of these extreme positions, be rejected. (Recommendation 3)

4. The "best available evidence option" be rejected, for it is impractical for the parties to comply with, difficult for the court to enforce without becoming inquisitorial, contains insufficient safeguards, and may contribute to inefficient use of court time. (Recommendation 4)

5. Any reforms of the law of hearsay in criminal proceedings should apply in the same manner to both the prosecution and defence, although allowances for differences in the standard of proof are justifiable. (Recommendation 5)

6. The South African model, which admits hearsay on an entirely discretionary basis "in the interests of justice", be rejected because of concerns with the open-endedness of the discretion. (Recommendation 6)

7. The English model be rejected for two main reasons: its categories of automatic admissibility provide insufficient assurances of reliability and the terms of the residual discretion to admit hearsay are too open-ended and vague. (Recommendation 7)

8. The United States model be rejected because full codification of the existing exceptions cannot cater for all justifiable situations. (Recommendation 8)

9. A modified version of the New Zealand Law Commission model be adopted as the proposed model of reform. The LRC accordingly recommended that, save for those statutory provisions and common law rules respectively mentioned in proposals 4 and 5 of the Core Scheme, the admission of hearsay evidence should be based on a single statutory discretionary power to admit hearsay evidence if it is both necessary and reliable. (Recommendation 9A)

10. Only those common law exceptions provided in proposal 5 of the Core Scheme be preserved. (Recommendation 9B)

11. In cases where prosecution hearsay evidence has been admitted, the judge should have the power to direct a verdict of acquittal where upon an overview of the prosecution evidence once adduced, it would be unsafe to convict the accused. (Recommendation 9C)

12. The New Zealand Law Commission model proposes that the judge, in assessing the reliability criterion, only considers "circumstances relating to the statement". The LRC recommended that the ambit of listed factors to be considered under this criterion be widened to include the presence of supporting evidence. (Recommendation 9D)

Proposed model for reform: the Core Scheme

13. The Core Scheme envisages admitting hearsay in only one of four ways: an existing statutory exception (proposal 4); a preserved common law exception (proposal 5); consent of the parties (proposal 6); or the general discretionary power to admit hearsay (proposal 7). The LRC recommended that the Core Scheme, as set out in the Report, be adopted as a whole as the main vehicle for reforming the law of hearsay in Hong Kong criminal proceedings. (Recommendation 10)

14. The definition of hearsay in the Core Scheme should not include prior statements made by a witness who is available to testify in the trial proceedings. (Recommendation 11)

15. The definition of hearsay should include written and non-written, and verbal and non-verbal, communication. (Recommendation 12)

16. The common law rule that excludes implied assertions as hearsay be abrogated. (Recommendation 13)

17. Multiple hearsay be admissible under the Core Scheme only if each level of hearsay itself satisfies the Scheme's tests for admissibility. (Recommendation 14)

18. The Core Scheme applies only to those criminal proceedings that currently apply the common law hearsay rule. (Recommendation 15)

19. The Core Scheme should apply in sentencing proceedings only when the prosecution is relying on hearsay evidence to prove an aggravating factor. (Recommendation 16)

20. The Core Scheme should apply to extradition proceedings. (Recommendation 17)

21. The codification of the exclusionary rule should be the starting point in the Core Scheme. (Recommendation 18)

22. The abrogation of all common law rules governing the admission of "hearsay evidence" in "criminal proceedings", as those are defined in the Core Scheme, with the exception of the rules governing the admissibility of admissions, confessions and statements against interest made by an accused, acts and declarations in furtherance of a joint or common enterprise or conspiracy, expert opinion evidence, evidence in bail proceedings, evidence in sentencing proceedings (except when the prosecution relies on hearsay evidence to prove an aggravating factor), public information, reputation as to character, reputation or family history, *res gestae*, and admissions by agents. (Recommendation 19)

23. With the exception of section 79 of the Evidence Ordinance (Cap 8), which should be repealed, the retention of all existing statutory provisions that enable the admission of hearsay evidence. (Recommendation 20)

24. The admission of hearsay evidence if the party or parties in relation to whom the evidence is to be adduced consent to the admission. (Recommendation 21)

25. At the heart of the Core Scheme is the discretionary power of the court to admit hearsay evidence if five preconditions are met: the declarant has been adequately identified; oral testimony of the evidence would have been admissible; the necessity and threshold reliability criteria have been satisfied; and the probative value of the evidence exceeds its prejudicial effect. The LRC recommended that this discretionary power to admit be the main vehicle by which to admit hearsay evidence in criminal proceedings. (Recommendation 22)

26. The declarant be identified to the court's satisfaction before the discretionary power to admit can be exercised. (Recommendation 23)

27. Hearsay evidence should be otherwise admissible before it can be admitted under the discretionary power. (Recommendation 24)

28. The necessity condition should only be satisfied where the declarant is genuinely unable to provide testimony of the hearsay evidence and not merely unwilling to do so. In particular, the necessity condition will only be satisfied if the declarant:

(a) is dead;

(b) is physically or mentally unfit to be a witness;

(c) is outside Hong Kong and it is not reasonably practicable to secure his attendance;

(d) cannot be found after all reasonable steps have been taken to find him; or

(e) refuses to give evidence on the ground of self-incrimination. (Recommendation 25)

29. The threshold reliability condition should only be satisfied where the circumstances provide a reasonable assurance that the statement is reliable. (Recommendation 26)

30. In assessing the threshold reliability condition, the court must have regard to the nature and content of the statement, the circumstances in which the statement was made, the truthfulness of the declarant, the accuracy of the observations of the declarant and the presence of supporting evidence. (Recommendation 27)

31. The probative value of the hearsay evidence must always be greater than any prejudicial effect it may have on any party before it can be admitted under the discretionary power. (Recommendation 28)

32. Rules of court be made to require the party applying to admit hearsay evidence under the discretionary power to give timely and

sufficient notice to all other parties to the proceedings. (Recommendation 29)

33. The party applying to admit hearsay evidence under the discretionary power has the burden of proving the condition of necessity to the required standard of proof, which will be beyond reasonable doubt if the party applying is the prosecution, and on a balance of probabilities if the party applying is the defence. (Recommendation 30)

34. Where hearsay evidence is admitted under the discretionary power, evidence relevant to the declarant's credibility (including other inconsistent statements), which would have been admissible had the declarant testified as a witness, be admitted. (Recommendation 31)

35. The addition of a new power requiring the trial judge, at the conclusion of the prosecution's case or any time thereafter, to direct a verdict of acquittal of an accused against whom hearsay evidence has been admitted under the discretionary power where the judge considers that, taking account of the factors listed at proposal 15(b) of the Core Scheme, and notwithstanding the fact that there is a prima facie case against the accused, it would be unsafe to convict the accused. The factors listed at proposal 15(b) to which the judge must have regard in deciding whether to exercise this power are the nature of the proceedings, the nature of the hearsay evidence, the probative value of the hearsay evidence, the importance of such evidence to the case against the accused, and any prejudice to an accused resulting from the admission of that hearsay evidence. (Recommendation 32)

Special topics

36. The exception in respect of bankers' records be retained but that its implementation should form part of the general exception in regard to the production of records as appears in Recommendations 34, 35 and 36 below. (Recommendation 33)

37. The exceptions in respect of business records and computer records be retained with the primary aim being simplification of the production of all records, with existing legislation relating to non-computerised records being replaced by a single section that applies to all documents irrespective of their varying nature. (Recommendation 34)

38. Insofar as computerised records are concerned:

(1) separate regimes should apply to data stored or generated in the course of business and that stored or generated for non-business purposes; and

(2) specific consideration should be given to, inter alia, the implications arising from the storage of data outside of Hong Kong (and its retrieval) and the integrity of such data. (Recommendation 35)

39. Records complying with the proposed legislation will be automatically admissible subject to a discretion vested in the court to direct that a document not be admissible if the court is satisfied that the statement's reliability is doubtful. (Recommendation 36)

40. Further study of the topic of documentary and digital evidence as a whole, both as to the requirements for admissibility and the formalities or procedures for adducing such evidence in the trial process. (Recommendation 37)

41. The existing law that makes prior inconsistent statements of witnesses inadmissible for the truth of their content will not be changed. However, this should be reconsidered if and when there is an established general practice by law enforcement agencies of recording witness statements by reliable audio-visual means. (Recommendation 38)

42. In relation to prior consistent statements:

(1) where prior consistent statements are presently admitted under existing common law exceptions (eg prior identification, recent complaint, rebutting recent fabrication), they should also be admitted for their substantive truth; (Recommendation 39A)

(2) prior statements used by witnesses to refresh their memory should not be admitted for their substantive truth; (Recommendation 39B)

(3) the prior identification exception should be extended (in addition to persons) to objects and places generally; (Recommendation 39C) and

(4) the question of whether the recent complaint exception should be extended to all victim offences and to complaints made as soon as could reasonably be expected after the alleged conduct

should be further studied together with the question of abolishing the recent complaint exception and replacing it with a narrower one that admits complaint evidence only for the purpose of narrative, in the sense of describing how the charge came to be laid. (Recommendation 39D)

43. Inclusion of an express provision that makes the physical record of an admitted prior statement presumptively removed from the jury's possession in their deliberations, unless the judge finds that the jury would be substantially assisted by receiving and reviewing the physical record. (Recommendation 40)

44. No specific regime be introduced for appeals against decisions on the admissibility of hearsay evidence. (Recommendation 41)[1]

45. The new legislation should specifically address the issue of the admissibility of hearsay in sentencing in conformity with the general recommendations in the Report for safeguarded change to the existing law. (Recommendation 42A)

46. The new legislation should also specifically state that in all courts, in the sentencing phase, any disputed issue of fact or matter of aggravation must be proved by the prosecution beyond reasonable doubt. (Recommendation 42B)

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[1] See Corrigendum issued by LRC on para 12.44 of the Report.

Annex B

The Core Scheme

1. Hearsay means a statement that:

(a) was made by a person (the declarant) other than a witness;

(b) is offered in evidence at the proceedings to prove the truth of its content; and

(c) is a written, non-written or oral communication which was intended to be an assertion of the matter communicated.

2. Hearsay evidence may not be admitted in criminal proceedings except under the terms of these proposals.

3. Unless otherwise stipulated, all previous common law rules relating to the admission of hearsay evidence (including the rule excluding statements containing implied assertions) are abolished.

4. Nothing contained in these proposals shall affect the continued operation of existing statutory provisions that render hearsay evidence admissible.

5. The common law rules that relate to admissibility of the following evidence are not affected by these proposals:

(a) admissions, confessions, and statements against interest made

by an accused;

(b) acts and declarations made during the course and in furtherance of a joint or common enterprise or conspiracy;

(c) expert opinion evidence;

(d) evidence admissible upon application for bail;

(e) evidence admissible in sentencing proceedings, except when the prosecution is relying on hearsay evidence to prove an aggravating factor;

(f) public information;

(g) reputation as to character;

(h) reputation or family tradition;

(i) *res gestae*; and

(j) admissions by agents.

6. (a) Hearsay evidence shall be admitted ***where each party in relation to whom the evidence is to be adduced agrees to its admission for the purposes of those proceedings***.

(b) An agreement under this proposal may with the leave of the court be withdrawn in the proceedings for the purposes of

which it is made.

7. Hearsay evidence not admitted under proposals 4, 5 or 6 is admissible only where:

(a) ***the declarant is identified to the court's satisfaction***;

(b) oral evidence given in the proceedings by the declarant would be admissible of that matter;

(c) ***the conditions of***

(i) necessity and

(ii) threshold reliability

stipulated in proposals 8 to 12 below are satisfied; and

(d) ***the court is satisfied that the probative value of the evidence is greater than any prejudicial effect it may have on any party to the proceedings***.

8. The condition of necessity will be satisfied only:

(a) where the declarant is dead;

(b) ***where the declarant is unfit to be a witness, either in person or in any other competent manner, at the proceedings because of his age or physical or mental condition***;

(c) where the declarant is outside Hong Kong and it is not reasonably practicable to secure his attendance, or to ***make him available for examination and cross-examination in any other competent manner***;

(d) where the ***declarant cannot be found and it is shown that all reasonable steps have been taken to find him***; or

(e) where the declarant refuses to give evidence in circumstances where the declarant would be entitled to refuse to testify on the ground of self-incrimination.

9. The condition of necessity will not be satisfied ***where the circumstances said to satisfy the condition have been brought about by the act or neglect of the party offering the statement, or someone acting on that party's behalf***.

10. The burden of proving the condition of necessity is on the party applying to admit the hearsay evidence. In the case of the prosecution, the standard of proof is beyond reasonable doubt, and in the case of the defence, the standard is on the balance of probabilities.

11. ***The condition of threshold reliability will be satisfied where the circumstances provide a reasonable assurance that the statement is reliable***.

12. In determining whether the threshold reliability condition has been fulfilled, ***the court shall have regard to all circumstances relevant to***

the statement's apparent reliability, including:

(a) the nature and contents of the statement;

(b) the circumstances in which the statement was made;

(c) any circumstances that relate to the truthfulness of the declarant;

(d) any circumstances that relate to the accuracy of the observation of the declarant; *and*

(e) whether the statement is supported by other admissible evidence.

13. Rules of court are to be made that a party give notice of his intention to adduce hearsay evidence under proposal 7; that evidence is to be treated as admissible if notice has been properly served, and no counter notice has been served; that the failure to give notice means that the evidence will not be admitted save with the court's leave; that where leave is given, the tribunal of fact may draw inferences, if appropriate, from the failure to give notice; and that the failure to give notice may attract costs.

14. Where in any proceedings hearsay evidence is admitted by virtue of these proposals:

(a) any evidence which, if the declarant had given evidence in connection with the subject matter of the statement, would have been admissible as relevant to his credibility as a witness

shall be admissible for that purpose in those proceedings; and

(b) evidence tending to prove that the declarant had made a statement inconsistent with the admitted statement shall be admissible for the purpose of showing that the declarant has contradicted himself.

15. ***(a) At the conclusion of the case for the prosecution, or at any time thereafter, in any proceedings in which hearsay evidence is admitted under proposal 7 of the Core Scheme, the court shall direct the acquittal of an accused against whom such evidence has been admitted under the terms of these proposals where the judge considers that, taking account of the factors listed at proposal 15(b), and notwithstanding the fact that there is a prima facie case against the accused, it would be unsafe to convict the accused.***

(b) In reaching its decision under this proposal, the court shall have regard to:

(i) the nature of the proceedings;

(ii) the nature of the hearsay evidence;

(iii) the probative value of the hearsay evidence;

(iv) the importance of such evidence to the case against the accused; and

(v) ***any prejudice to an accused which may eventuate consequent upon the admission of such evidence.***

#446097-v14

Evidence (Amendment) Bill 2017

Contents

Clause Page

A BILL

To

Amend the Evidence Ordinance to provide for the admissibility of hearsay evidence in criminal proceedings.

Enacted by the Legislative Council.

1. Short title and commencement

(1) This Ordinance may be cited as the Evidence (Amendment) Ordinance 2017.

(2) This Ordinance comes into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.

2. Evidence Ordinance amended

The Evidence Ordinance (Cap. 8) is amended as set out in sections 3 and 4.

3. Part IVA added

After Part IV—

Add

"

Part IVA

Hearsay Evidence in Criminal Proceedings

Division 1—General

55C. Interpretation

(1) In this Part—

declarant ( ), in relation to any statement adduced or to be adduced as hearsay evidence in criminal proceedings, means the person who made the statement;

responsible court officer ( ) means—

(a) in relation to proceedings in the High Court, the Registrar of the High Court;

(b) in relation to proceedings in the District Court, the Registrar of the District Court;

(c) in relation to proceedings before a magistrate, the first clerk of the magistracy;

statement ( ) means any representation of fact or opinion however made, including a written or non-written communication, or non-verbal communication in the form of conduct, that is intended to be an assertion of the matter communicated.

(2) For the purposes of this Part—

(a) a statement adduced or to be adduced as evidence in criminal proceedings is hearsay if—

(i) it was made otherwise than by a person while giving oral evidence in the proceedings; and

(ii) it is adduced or to be adduced to prove the truth of its content;

(b) a reference to hearsay includes hearsay of whatever degree; and

(c) a reference to hearsay evidence is to be construed accordingly.

55D. Application

(1) This Part applies to evidence adduced or to be adduced in criminal proceedings—

(a) in relation to which the strict rules of evidence apply; and

(b) instituted on or after the commencement date of this Part.

(2) For the purposes of subsection (1)—

(a) the following proceedings are regarded as criminal proceedings—

(i) proceedings for or in relation to the surrender of a person to a place outside Hong Kong under the Fugitive Offenders Ordinance (Cap. 503);

(ii) proceedings arising from the proceedings mentioned in subparagraph (i); and

(iii) proceedings in respect of sentencing; and

(b) evidence adduced or to be adduced in proceedings in respect of sentencing in relation to which the strict rules of evidence do not apply is also regarded as evidence adduced or to be adduced in criminal proceedings to which the strict rules of evidence apply if—

(i) it is adduced or to be adduced by the prosecution to prove an aggravating factor; and

(ii) it is not information furnished to the court under section 27 of the Organized and Serious Crimes Ordinance (Cap. 455), or under an order of the court.

(3) For the purposes of subsection (1), criminal proceedings are regarded as having been instituted if—

(a) a complaint has been made, or an information has been laid;

(b) an indictment has been preferred under section 24A(1)(b) of the Criminal Procedure Ordinance (Cap. 221);

(c) for proceedings instituted in respect of contempt of court—the person concerned is committed by the court; or

(d) for proceedings mentioned in subsection (2)(a)(i) or (ii)—a warrant for the arrest of the person concerned has been issued by a magistrate under section 7 of Fugitive Offenders Ordinance (Cap. 503).

55E. When is hearsay evidence admissible

Hearsay evidence is admissible only if it is admissible under—

(a) Division 2, 3 or 4;

(b) a common law rule preserved by Division 5;

(c) Division 6; or

(d) any other enactment.

55F. Court's power to exclude evidence not affected

This Part does not affect any powers of the court to exclude evidence on grounds other than that it is hearsay.

55G. This Part not to affect admissibility of evidence under other law

This Part does not affect the admissibility of evidence admissible apart from this Part.

Division 2—Admission of Hearsay Evidence by Agreement of Parties

55H. Hearsay evidence is admissible if parties agree

(1) Hearsay evidence is admissible if the prosecutor and the accused in relation to whom the evidence is to be adduced (***parties***)—

(a) make an oral agreement before the court for the admission of the evidence in the proceedings concerned; or

(b) jointly produce to the court a written agreement made (whether before or during the proceedings) by the parties stating the parties' agreement for the admission of the evidence in the proceedings concerned.

(2) The accused may only make the agreement by themselves or by their counsel or solicitor on their behalf.

(3) A written agreement made by the accused must be signed by—

(a) if the accused is an individual—the accused; or

(b) if the accused is a body corporate—a director, manager, the company secretary or some other similar officer of the body corporate.

(4) Hearsay evidence admitted because of a party's agreement may only be adduced in respect of the party.

(5) An agreement made before the court or produced to the court for the purpose of proceedings relating to a matter must be treated as an agreement for the purpose of any subsequent criminal proceedings relating to that matter (including an appeal).

(6) An agreement made before the court or produced to the court may, with the leave of the court, be withdrawn—

(a) in the proceedings for the purpose of which it is made or produced; or

(b) in any subsequent criminal proceedings relating to the same matter.

Division 3—Admission of Hearsay Evidence not Opposed by Other Parties

55I. Hearsay evidence is admissible if other parties do not oppose

Hearsay evidence is admissible if—

(a) the party who intends to adduce the evidence in the proceedings concerned has given a hearsay evidence notice stating the party's intention to adduce the evidence—

(i) to each other party to the proceedings;

(ii) to the responsible court officer; and

(iii) within 28 days after the day on which the date for the hearing in which the evidence is intended to be adduced is fixed; and

(b) no party gives an opposition notice under section 55K within 14 days after the day on which the hearsay evidence notice is given under paragraph (a).

55J. Further provision on hearsay evidence notice

A hearsay evidence notice given by a party for the purposes of section 55I(a) in respect of any hearsay evidence must—

(a) if the evidence is in the form of an oral statement—state the content of the statement;

(b) if the evidence is not in the form of an oral statement—be accompanied by a copy of the document in which the statement is contained;

(c) state the name of the declarant; and

(d) contain all of the following—

(i) an explanation on why the evidence would be admissible under Division 4 should an application for leave be made under section 55N;

(ii) the facts on which the party relies to support the application;

(iii) an explanation on how the party will prove those facts if another party disputes them.

55K. Opposition notice

(1) A party who has received a hearsay evidence notice given under section 55I(a) in respect of any hearsay evidence may oppose the admission of the evidence by giving an opposition notice.

(2) An opposition notice must be given—

(a) to each other party to the proceedings;

(b) to the responsible court officer; and

(c) within 14 days after the day on which the hearsay evidence notice is given.

(3) The opposition notice must state—

(a) which, if any, facts set out in the hearsay evidence notice under section 55J(d)(ii) are disputed by the party;

(b) why the evidence is not admissible under Division 4 as explained in the hearsay evidence notice; and

(c) if any, other objection to the admission of the evidence.

55L. Court's power to vary requirement

(1) The court may, on the application of a party, shorten or extend a time limit for giving a hearsay evidence notice under section 55I(a) or opposition notice under section 55K.

(2) An application for the extension of a time limit may be made before or after the expiry of the time limit.

(3) An application for the extension of a time limit made after the expiry of the time limit—

(a) must be made when giving the notice for which the extension is applied; and

(b) must state the reason for not making the application at an earlier time.

Division 4—Admission of Hearsay Evidence with Leave of Court

55M. Hearsay evidence may be admitted with leave of court

(1) Hearsay evidence may be admitted with the leave of the court.

(2) The court may grant leave for the admission of hearsay evidence only if—

(a) an application for leave is made under section 55N;

(b) the declarant is identified to the court's satisfaction;

(c) oral evidence given in the proceedings concerned by the declarant would be admissible as evidence of the fact which the hearsay evidence is intended to prove;

(d) the condition of necessity is satisfied in respect of the evidence under section 55O;

(e) the condition of threshold reliability is satisfied in respect of the evidence under section 55P; and

(f) the court is satisfied that the probative value of the evidence is greater than any prejudicial effect it may have on any party to the proceedings.

55N. Application for leave to admit hearsay evidence

(1) Subject to subsection (2), an application for the purposes of section 55M may only be made by a party to the proceedings concerned who—

(a) has given a hearsay evidence notice under section 55I(a) in respect of the hearsay evidence concerned; and

(b) has been given an opposition notice under section 55K in respect of the evidence.

(2) A party who has not given a hearsay evidence notice under section 55I(a) in respect of the hearsay evidence concerned may make an application for the purposes of section 55M only if—

(a) the proceedings concerned are proceedings in respect of sentencing; or

(b) the court allows the application to be made on the ground that—

(i) having regard to the nature and content of the evidence, no party is substantially prejudiced by the failure of the party to give the notice;

(ii) giving the notice was not reasonably practicable in the circumstances; or

(iii) the interests of justice so require.

(3) If the application is allowed to be made under subsection (2)(b), the court may—

(a) without limiting the powers of the court to award costs, award costs against the applicant; and

(b) in the proceedings where the evidence is adduced, draw inferences from the failure of the applicant to give the hearsay evidence notice.

(4) In awarding costs under subsection (3)(a)—

(a) the court must have regard to the actual costs incurred by each other party as a result of the failure of the applicant to give the hearsay evidence notice; and

(b) the court may award costs exceeding the limit of costs which it may award.

55O. Condition of necessity

(1) For the purposes of section 55M(2)(d), the condition of necessity is satisfied in respect of any hearsay evidence only if—

(a) the declarant is dead;

(b) the declarant is unfit to be a witness, either in person or in any other competent manner, in the proceedings concerned because of the age or physical or mental condition of the declarant;

(c) the declarant is outside Hong Kong, and—

(i) it is not reasonably practicable to secure the declarant's attendance at the proceedings; and

(ii) it is not reasonably practicable to make the declarant available for examination and cross-examination in any other competent manner in the proceedings;

(d) the declarant cannot be found although all reasonable steps have been taken to find the declarant; or

(e) the declarant refuses to give the evidence in the proceedings in circumstances where the declarant would be entitled to refuse on the ground of self-incrimination.

(2) Despite subsection (1), the party applying for leave under section 55N (***applicant***) must not rely on a paragraph of that subsection to prove that the condition of necessity is satisfied if—

(a) the circumstances mentioned in that paragraph were brought about by the act or neglect of—

(i) the applicant; or

(ii) a person acting on the applicant's behalf; and

(b) the purpose of bringing about the circumstances was to prevent the declarant from giving oral evidence in the proceedings (whether at all or in connection with the subject matters of the evidence).

(3) The burden of proving that the condition of necessity is satisfied is on the applicant.

(4) The standard of proof required to prove that the condition of necessity is satisfied is—

(a) if the applicant is the prosecution—beyond reasonable doubt; or

(b) if the applicant is the accused—on the balance of probabilities.

55P. Condition of threshold reliability

(1) For the purposes of section 55M(2)(e), the condition of threshold reliability is satisfied in respect of any hearsay evidence only if the circumstances relating to the evidence provide a reasonable assurance that the evidence is reliable.

(2) In deciding whether the condition of threshold reliability is satisfied in respect of any hearsay evidence, the court must have regard to all the circumstances relevant to the apparent reliability of the evidence, including—

(a) the nature and content of the statement adduced as the evidence;

(b) the circumstances in which the statement was made;

(c) any circumstances that relate to the truthfulness of the declarant;

(d) any circumstances that relate to the accuracy of the observation of the declarant; and

(e) whether the statement is supported by other admissible evidence.

55Q. Court must direct acquittal if it is unsafe to convict

(1) If—

(a) the case against an accused is based wholly or partly on hearsay evidence admitted with the leave of the court granted under section 55M; and

(b) the court considers that it would be unsafe to convict the accused,

the court must direct the acquittal of the accused.

(2) The court may give the direction at or after the conclusion of the case for the prosecution.

(3) The court may give the direction even if there is a prima facie case against the accused.

(4) In considering whether it would be unsafe to convict the accused, the court must take into account—

(a) the nature of the proceedings, including whether the proceedings are before a jury or not;

(b) the nature of the hearsay evidence;

(c) the probative value of the hearsay evidence;

(d) the importance of the hearsay evidence to the case against the accused; and

(e) any prejudice to the accused which may be caused by the admission of the hearsay evidence.

Division 5—Preservation of Common Law Rules Relating to Hearsay Evidence

55R. Common law rules preserved

The common law rules set out below are preserved.

Rule 1

Confessions, etc.

Any rule of law under which in criminal proceedings an admission, a confession, a statement against self-interest or a mixed statement made by an accused is admissible in evidence.

Rule 2

Joint enterprise

Any rule of law under which in criminal proceedings a statement made by a party during the course or in furtherance of a joint enterprise or conspiracy is admissible in evidence against another party to the enterprise or conspiracy for proving the truth of its content.

Rule 3

Expert opinion

Any rule of law under which in criminal proceedings where a person is called as a witness, the opinion of the person on any relevant matter on which the person is qualified to give expert evidence is admissible in evidence.

Rule 4

Public information

Any rule of law under which in criminal proceedings—

(a) a published work dealing with a matter of a public nature (for example, history, a scientific work, a dictionary and a map) is admissible as evidence of facts of a public nature stated in the work;

(b) a public document (for example, a public register and a return made under public authority with

respect to a matter of public interest) is admissible as evidence of facts stated in the document;

(c) a record (for example, the record of a court, treaty, Government grant, pardon and commission) is admissible as evidence of facts stated in the record; or

(d) evidence relating to a person's age or date or place of birth may be given by a person without personal knowledge of the matter.

Rule 5

Reputation as to character

Any rule of law under which in criminal proceedings evidence of a person's reputation is admissible for proving the person's good or bad character.

Rule 6

Reputation or family tradition

Any rule of law under which in criminal proceedings evidence of reputation or family tradition is admissible for proving or disproving—

(a) pedigree or the existence of a marriage;

(b) the existence of any public or general right; or

(c) the identity of any person or thing.

Rule 7

Res gestae

Any rule of law under which in criminal proceedings a statement is admissible in evidence for proving the truth of its content if—

(a) the statement was made by a person so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded;

(b) the statement accompanied an act which can be properly evaluated as evidence only if considered in conjunction with the statement; or

(c) the statement relates to a physical sensation or a mental state (for example, intention or emotion).

Rule 8

Admissions by agents etc.

Any rule of law under which in criminal proceedings—

(a) an admission made by an agent of an accused is admissible against the accused in evidence for proving the truth of its content; or

(b) a statement made by a person to whom an accused refers another person for information is admissible against the accused in evidence for proving the truth of its content.

55S. Effect of description of common law rules in section 55R

The words in which a common law rule is described in section 55R are intended only to identify the rule and are not to be construed as altering the rule in any way.

Division 6—Admissibility of Certain Hearsay Evidence and Related Evidence

55T. Admissibility of evidence for proving credibility

(1) This section applies if hearsay evidence is admitted under Division 2, 3, 4 or 5.

(2) Any evidence that, had the declarant given evidence in connection with the subject matter of the hearsay evidence, would have been admissible in the proceedings concerned as relevant to the declarant's credibility as a witness is so admissible.

(3) Any evidence tending to prove that the declarant made any other statement that is inconsistent with the hearsay evidence is admissible in the proceedings concerned for showing that the declarant contradicted himself or herself.

55U. Previous statements of witnesses

(1) A previous statement made by a person giving evidence in criminal proceedings is admissible in evidence in those proceedings for proving the truth of its content if—

(a) oral evidence of the matter stated in the statement by the person would be admissible;

(b) any of the following conditions is satisfied—

(i) the purpose of adducing the statement is to rebut a suggestion that the person's evidence has been recently fabricated;

(ii) the purpose of adducing the statement is to prove the person's prior identification of a person, object or place;

(iii) the statement was a recent complaint made by an alleged victim in proceedings instituted in respect of a sexual offence; and

(c) while giving evidence, the person indicates that to the best of the person's belief—

(i) the statement was made by the person; and

(ii) the statement states the truth.

(2) If, on a trial before a judge and jury, a previous statement by a person giving evidence is admitted in evidence under this section and the statement or copy of it is produced as an exhibit, the exhibit must not accompany the jury when they retire to consider the verdict unless—

(a) the court considers it appropriate; or

(b) all parties to the proceedings agree that it should accompany the jury.

(3) In this section—

sexual offence ( ) means—

(a) an offence under Part VI or XII (except sections 118C, 118G, 118J, 118K, 118L, 126, 139, 143, 144, 145, 147, 147A, 147F and 157) of the Crimes Ordinance (Cap. 200);

(b) an offence of aiding, abetting, counselling or procuring the commission of an offence under paragraph (a);

(c) an offence of incitement to commit an offence under paragraph (a);

(d) an offence of attempting to commit an offence under paragraph (a), (b) or (c); or

(e) an offence of conspiracy to commit an offence under paragraph (a), (b) or (c).

55V. Implied assertion

Any evidence that, had this section not been enacted, would have been excluded under any common law rule on the ground that it contains an implied assertion, is not to be excluded on that ground.

Division 7—Supplementary Provisions

55W. Additional requirement for admission of multiple hearsay

A statement that is hearsay is not admissible to prove the fact that an earlier statement that is hearsay was made unless both of them are admissible under this Part.".

4. Section 79 repealed (admissibility of certain medical notes and reports)

Section 79—

Repeal the section.

#466176

Evidence (Amendment) Bill 2017
List of Consultees

Legal Professional Bodies

1. Hong Kong Bar Association*
2. The Law Society of Hong Kong*

Government

3 Judiciary*

4. Security Bureau*
5. Labour and Welfare Bureau*
6. Legal Aid Department*
7. Hong Kong Police Force
8. Independent Commission Against Corruption*
9. Customs and Excise Department*
10. Immigration Department

Law Schools

11. Faculty of Law, The University of Hong Kong
12. Faculty of Law, The Chinese University of Hong Kong
13. School of Law, The City University of Hong Kong*

Other Organisations

14. Duty Lawyer Service*

15. Civil Society Law Reform Committee*

16 Advocacy Institute of Hong Kong

17. Hong Kong Federation of Women Lawyers

18. Hong Kong Young Legal Professionals Association Ltd

19. Hong Kong Human Rights Commission

20. Hong Kong Human Rights Monitor

21. The Hong Kong Society for the Rehabilitation of Offenders

22. Association for the Promotion of Public Justice

23. JUSTICE (Hong Kong Branch)

*: The consultees that have replied to the Consultation Paper.

Annex III

Summary of Comments and Suggestions on the Evidence (Amendment) Bill 2017[1] and Department of Justice (DoJ)'s Responses

Issues	Respondents' Comments/Suggestions	DoJ's Responses
1 Definition of "hearsay".	A respondent was not convinced that the definition of hearsay in section 55C(2)(a) of the Bill is satisfactory, but probably saved by the definition of "statement".	It is unclear why the proposed definition is not considered satisfactory. The two essential elements in the common law meaning of "hearsay"[2] ie (a) the statement was made otherwise than by the person while giving oral evidence in the proceedings and (b) the statement is adduced to prove the truth of its content, are incorporated in section 55C(2)(a)(i) and (ii) of the Bill respectively. The proposed definition of "hearsay" is also in line with the approaches adopted in the English Criminal Justice Act 2003 section 114(1) and section 121(2) and (subject to the paragraph below) the New Zealand Evidence Act 2006 section 4(1). [Note: Unlike the New Zealand approach which excludes out-of-court statements made by a witness from the definition of "hearsay", DoJ considers it more appropriate to modify the definition of "hearsay" in the Report[3] (which recommends the adoption of the New Zealand approach) by including

[1] Reference to the "Evidence (Amendment) Bill 2017" and the "Bill" in this Summary refer to the draft Evidence (Amendment) Bill 2017 at Annex C to the Consultation Paper issued by DoJ in April 2017 for the purpose of consultation.

[2] *HKSAR v Oei Hengky Wiryo* [2007] 10 HKCFAR 98 provided the definition of the hearsay rule: "*a reasonable working definition of the hearsay rule is that an oral or written assertion, express or implied, other than one made by a person in giving oral evidence in court proceedings is inadmissible as evidence of any fact or opinion so asserted.*" (para 35, p.114-115)

[3] The term "Report" means the Report on Hearsay in Criminal Proceedings published by the Law Reform Commission of Hong Kong ("LRC") in November 2009. See para 9.4 and 9.5 of the Report.

Issues	Respondents' Comments/Suggestions	DoJ's Responses
		out-of-court statements made by a witness, ie following the common law definition of "hearsay".]
2 Application	A respondent suggested that section 55D(3)(a) of the Bill should refer to a complaint having been made or information laid "*before a court*". There may also be an argument for the court to be a "*court exercising criminal jurisdiction in Hong Kong*".	Unlike civil proceedings which may be held in a tribunal, it is already implied in the term "criminal proceedings" that the complaint or information is being laid in the magistrates' court.[4]
3 Admissibility of evidence	A respondent considered that sections 55E and 55G are clumsily worded.	DoJ will review sections 55E and 55G with a view to avoiding any duplication and enhancing conciseness.
4 Admission of hearsay evidence by agreement	A respondent made the following comments : 1. Hearsay evidence by agreement could be treated under section 65C of the Criminal Procedure Ordinance (Cap.221). The principal difference is that section 65C admitted facts not only binding on parties but also treated as true whereas it does not	1. If parties agree on the content of the hearsay as facts, they can admit this fact under section 65C of Cap.221 and full weight will be attached to that fact which is conclusive. Section 55H only deals with admissibility, not weight.[5]

[4] See *Archbold Hong Kong 2017*, para 1-198.

[5] Despite the similarities in terms of the procedural formalities of agreement under section 65C of the Criminal Procedure Ordinance (Cap.221) and section 55H of the Bill, they should best be separated for the following reasons: (i) Conceptually, the "facts" admitted by way of section 65C of Cap.221 must be treated by the tribunal of fact conclusively as such (as indicated by the statutory wording). On the other hand, section 55H of the Bill only seeks to treat hearsay evidence as admissible evidence by parties' agreement. It remains for the tribunal of fact to determine whether the matters asserted in the hearsay evidence are true (i.e. whether they are accepted to be the facts); (ii) In practice, an agreement under section 65C and an agreement under section 55H, even if contained in the same document, would have to be couched in different terms to reflect the above conceptual distinction. However, if such an agreement is indeed couched in different terms, there are bound to be arguments on what exactly has been agreed by parties. As an illustration, in a recent case *香港特別行政區 訴 吳家燕* HCMA 101/2017, in the section 65C admitted facts, the prosecution and the defence purported to agree to the "真實性" and "準確性" of the defendant's responses under caution as recorded in the police notebook and her record of interview, giving rise to the unfortunate controversies of whether the parties purported to agree that the contents of the police notebook and record of interview are true (as the conclusive facts) (see paras 13-22); (iii) In a jury trial, agreeing to the admissibility of hearsay evidence by way of section 65C but not section 55H could even pose a real risk of

Issues	Respondents' Comments/Suggestions	DoJ's Responses
	appear to be so intended under section 55H. 2. It is suggested that section 55H(3)(b) of the Bill should require the court to be satisfied that the director, manager, company secretary or some other similar officer of the body corporate has both the power and authority to bind the corporation since there may be one faction in a body corporate perfectly happy to agree to admit certain hearsay and another faction implacably opposes.	 2. It is not necessary to prove that the relevant officer has the authority to bind the corporation, which is a matter of internal business of the corporation. There is similarly no such requirement of proving authority in the context of section 65C of Cap.221.
5 Admission of hearsay evidence not opposed	Some respondents made the following comments : 1. The proposals are substantially more complex than saying a notice must be given and a statement is admissible if there is no response within certain time. 2. There is an immense amount of potential for defendants, which they fear will go largely unrecognized.	 1. The detailed proposals are considered necessary to protect the integrity of the relevant process. Section 55I of the Bill deals with the timing of a notice. Section 55J deals with the format of such notice. Section 55K deals with the procedures for opposing such notice. Section 55L deals with the court's power on the procedural requirement. 2. If the "potential" means the defence (as well as the prosecution) may overlook this notice requirement and miss the deadline, practically such risk may exist especially in the case of an

confusing the jury with "facts" and "evidence". We foresee that it would be very difficult for the judge to properly direct the jury on the above conceptual distinction if section 65C can somehow be used to produce an agreement contemplated under section 55H.

Issues	Respondents' Comments/Suggestions	DoJ's Responses
		unrepresented accused, but this appears to be a practical concern which can be addressed administratively after the legislative proposal comes into operation. In any event, the court reserves the power to abridge or extend the relevant time-limit under section 55L.
	3. The questions of admissibility should be determined well prior to trial to allow proper advice on plea. The one third discount in sentence should not be deducted due to delay in plea by hearsay evidence. The 28 days of notice of hearsay will be given after the plea taken. The respondent queried whether the matter would be dealt with by a sentencing judge so that he/she could make a fair discount of sentence.	3. As stated by Silke VP in *R v Kwok Chi Kwan* [1990] 1 HKLR 293 and adopted in para 65 of *HKSAR v Ngo Van Nam*, CACC 418/2014, the rationale for allowing discounts from otherwise appropriate sentences to defendants who plead guilty is to give allowance for the remorse indicated by such a course; to assist in the saving of time; and to avoid the necessity for the bringing of witnesses to Court. It is confirmed in para 133 of *Ngo Van Nam* that one of the main purposes of the court giving this one third discount to a defendant who pleads guilty is to encourage a guilty person to own up to the crimes he committed, so as to conserve the resources of the community and to ensure that justice can be administered more efficiently and matters can be concluded in the most expeditious manner. "The main features of the public interest", relevant to the discount for a

Issues	Respondents' Comments/Suggestions	DoJ's Responses
		plea of guilty, are "purely utilitarian" (para 171, *Ngo Van Nam*) and the Court of Appeal is satisfied that a discount of 20% from that taken for the starting point for sentence being the appropriate discount to be afforded to a defendant who pleads guilty only on the first day of trial reflects the reduced utilitarian value of the plea of guilty, in comparison to a plea of guilty intimated at an early stage (para 199, *Ngo Van Nam*). Para 215 of *Ngo Van Nam* confirms the discount to be afforded to a defendant who pleads guilty after arraignment but during the trial itself would usually be less than the 20% afforded to the defendant who pleads guilty on the first day of trial and will reflect the circumstances in which the plea was tendered. It includes the guilty plea following the holding of a voir dire and where the defence has sought to test some other aspect of the prosecution case. It is clearly stated that a discount for guilty plea is to give allowance for the remorse and the willingness to facilitate the course of justice. The purpose is purely utilitarian. The utilitarian value of a guilty plea at an early stage is higher than a guilty plea at a later stage. The admission of hearsay evidence is of no difference to the

Issues	Respondents' Comments/Suggestions	DoJ's Responses
		admission of other disputed evidence, e.g. a confession. A guilty plea after the hearsay evidence being tried and admitted does not reflect any remorse from the defendant or any acceptance to own up to the crimes he committed. Time will be spent by courts and witnesses will be brought before the courts to rule on the admissibility of the hearsay evidence. It is of a lower utilitarian value than that of a guilty plea before the evidence being tried and admitted. For the reasons stated above, it is not considered necessary to have the admissibility of the hearsay evidence determined or the notice given before plea. *Ngo Van Nam* should still apply.
	4. The 14 days allowed for giving an opposition notice is not enough for investigation, be provided with and going through the unused materials in the bundle.	4. Hearsay as well as other evidence in the prosecution bundle requires investigation. There is no reason why hearsay evidence should necessarily be treated differently because of the 14 days limit. In any event, the court has power to extend a time limit for giving a hearsay notice or opposition notice under section 55L.
6 Admission of hearsay evidence	A respondent made the following comments : 1. Section 55M of the Bill should use the word	1. DoJ agrees to replace the word "*leave*" by

Issues	Respondents' Comments/Suggestions	DoJ's Responses
with leave of court	"*permission*" instead of "*leave*".	"*permission*".
	2. The discretion of the court in section 55M might be informed by the absence of an opportunity to cross-examine the hearsay maker.	2. Inability to cross-examine should go to the weight of the hearsay, not admissibility. The very purpose of the Bill is to admit hearsay evidence in certain situations. It would be futile to ask the court to consider that there is no opportunity to cross-examine the hearsay maker in every application in deciding whether the hearsay should be admitted. The various conditions which have to be satisfied before the court would exercise its discretion to admit hearsay evidence all serve as safeguards to ensure that a defendant's right to a fair trial will not be jeopardized by his or her inability to cross-examine the declarant (see paras 9.65-9.80 of the Report).
	3. Inability to cross-examine should be a "threshold test". The provision should follow section 77F of the Evidence Ordinance which makes "whether the deponent was cross-examined before such court or tribunal" a relevant factor for admissibility.	3. Section 77F of the Evidence Ordinance does not only deal with admissibility but also weight of deposition admitted as the deposition would on its production without further proof be admitted as prima facie evidence of any fact stated in the deposition. Section 55M of the Bill, on the other hand, makes no provision for the weight of the hearsay, whether as prima facie evidence or

Issues	Respondents' Comments/Suggestions	DoJ's Responses
		not. Furthermore, "*such court or tribunal*" in section 77F(1)(d)(ii) apparently refers to the "court or tribunal specified in the order and exercising jurisdiction in a place outside Hong Kong" in section 77E(1), and not Hong Kong's court. The context is different. Naturally, if the relevant witness has been cross-examined in the foreign court or tribunal, it provides an additional safeguard for the reliability of admitting the deposition as evidence without subjecting the witness to cross-examination by the defence in the Hong Kong court. Viewed in this light, the reference to "cross-examination" in section 77F is in line with DoJ's response in paragraph 2 above. It is understandably required in the context of letters of request, but considered unnecessary in the present context.
7 Application for leave to admit hearsay evidence	A respondent made the following comments : 1. Section 55N(2)(a) of the Bill, which provides that it is not necessary to give a notice under Division 3 if the proceedings concerned are in respect of sentencing, does not make perfect sense, since a plea of guilty may be notified well in advance of the hearing at which the notice is required for. It is recommended that section 55N(2)(a) should only	1. It is not uncommon for the accused to change their pleas to guilty on the first day of the trial or during the trial. In these circumstances, pleas of guilty will not be notified well in advance of the hearing at which the notice is required for.

Issues	Respondents' Comments/Suggestions	DoJ's Responses
	apply to sentencing proceedings that occur after a conviction after trial for the offence to be sentenced. However, in contested proceedings, the non-provision of a notice under Division 3 may be permitted if one of the conditions in section 55N(2)(b) is satisfied.	
	2. There are dangers in the vagueness of the concept "the interests of justice so require" in section 55N(2)(b)(iii) but there must always be some form of a "let out" clause.	2. As another respondent has suggested, general wordings are used in legislation and it provides the court discretion to cater for unexpected circumstances.
	3. Section 55N(3)(a) of the Bill should make it plain that the award of costs in this regard is not a matter that is dependent on the outcome of the ultimate trial.	3. DoJ would review the wording of section 55N(3)(a) and, if necessary, revise the provision to make it clear that the award of costs in this regard does not depend on the outcome of the trial.
	4. Section 55N(3)(b) of the Bill empowers the court to "draw inferences from the failure of the applicant to give the hearsay notice". One hopes that such a provision would be applied in a fair and even-handed way.	4. The court draws inferences from time to time and shall be competent to do so.
	5. Section 55N(4)(b) of the Bill cannot be understood.	5. Reference can be made to section 121(14) of the Copyright Ordinance (Cap.528). A particular

Issues	Respondents' Comments/Suggestions	DoJ's Responses
		instance where the amount of costs that a court may award is otherwise limited but for section 55N(4)(b) can be found in section 20(2)(b) of the Magistrates Ordinance (Cap.227).[6]
8 Condition of necessity	A respondent made the following comments : 1. LRC is clear that unwillingness on the part of a declarant to attend to testify does not equate to "unavailability". The notion of genuine unavailability (not mere unwillingness) should be more explicitly set out section 55O(1)(c). 2. Without setting out explicitly the notion of "unavailability", Section 55O(1)(c) or (1)(d) could arise when a declarant hides himself. (He is unwilling, not unable, to give evidence.)	1. Section 55O(1)(c) has defined when a declarant outside Hong Kong can satisfy the condition of necessity. 2. The condition of necessity under section 55O(1)(c) does not depend on the intention of the declarant. The criterion is whether or not it is reasonably practicable to secure the declarant's attendance or to make the declarant available for examination and cross-examination in a competent manner. If the declarant is deliberately hiding himself in circumstances which have implication on his truthfulness, this may be a factor to be taken into account by the court pursuant to section 55P(2)(c) in

[6] Section 20(2)(b) of Cap.227 provides that where a hearing is adjourned on the application of the complainant or informant, and the magistrate is satisfied that the application is occasioned by some default, neglect or omission on the part of the complainant, informant or his counsel, as the case may be, the magistrate may order that the complainant or informant shall pay costs to the defendant such costs, not exceeding $5,000, as the magistrate may think fit.

Issues	Respondents' Comments/Suggestions	DoJ's Responses
		determining whether condition of threshold reliability is satisfied.
	3. Section 55O(1)(c) "*reasonably practicable*" does not accommodate the fact that people with ordinary means would not be in any easy position to secure overseas declarants/witnesses.	3. English case law suggests that the expense and inconvenience of securing a witness's attendance is a relevant consideration of "reasonably practicable". In any event, this problem is not unique to hearsay overseas witnesses but may occur to every overseas witness. It, however, does not deprive defendant of a fair trial since he can obtain costs from the prosecution if he is found not guilty afterwards.
9 Condition of threshold reliability	A respondent considered that: 1. The notion of a "*reasonable assurance that the evidence is reliable*" in section 55P(1) of the Bill might have the unintended effect of imposing a higher standard for the reception of the evidence for Defendant, i.e. it is fine for prosecution but too high for Defendant. The requirement would be to establish that the evidence is "*true or <u>might</u> be true*". A respondent made the following comments :	1. In response to a similar view expressed by the respondent, the LRC Sub-committee ("sub-committee") concluded that a distinction could be drawn between tests for necessity and threshold reliability. While the former related to facts which required an appropriate standard of proof to be established, the latter required the court to satisfy itself that the circumstances provided a reasonable assurance that the statement was reliable (see para 9.85 of the LRC Report).

Issues	Respondents' Comments/Suggestions	DoJ's Responses
	2. In section 55P(1) of the Bill, the threshold in Recommendation 26 of the Report is more reassuring in tone by the positioning of the word "*only*" before the word "*satisfied*".	2. It is not considered that there would be any practical difference.
	3. The use of "*including*" in section 55P(2)(e) is unclear. It includes absence of cross-examination as a factor (i.e. non-exhaustive) where our intention seems otherwise, we should use "*meaning*" instead.	3. DoJ would revise the wording of section 55P(2) as appropriate.
	4. To address the deprivation of cross-examination, it is to be added the words "*the absence of cross-examination of the declarant at trial*" or other alternatives in section 55P(2).	4. The Report discussed thoroughly whether or not "the absence of cross-examination of the declarant at trial" should be included as a factor in assessing "threshold reliability". The majority of the sub-committee decided against the inclusion. The sub-committee noted that none of the legislative schemes for reform of the law of hearsay in other jurisdictions included a provision that the inability to cross-examine the declarant was a factor bearing on the admissibility of the hearsay statement. (See para 9.61-9.63 of the Report.) DoJ therefore considers it not appropriate to depart from the sub-committee's view.

Issues	Respondents' Comments/Suggestions	DoJ's Responses
	5. Relative importance of hearsay evidence stated in para 9.96 of the Report is not reflected in the Bill: "*The greater the importance of the hearsay evidence, the greater may be the need for the accused to have the opportunity to challenge that evidence by cross-examination*".	5. It is reflected in section 55Q(4)(d): "*importance of the hearsay evidence*" when the court considers whether or not to direct the acquittal of the accused.
	6. The logic underlying section 55P(2)(e) is circular "*...whether the statement is supported by other admissible evidence*" but no revision recommended.	6. The absence or presence of supporting evidence may have a bearing on "threshold reliability". The English authorities strongly indicate that the presence or absence of supporting evidence is a highly relevant factor in assessing the reliability of hearsay evidence. The facts in *Riat* [2013] WLR 2592 illustrate the point.
	7. The strength of the threshold reliability test provided in para 9.55 of the Report was stronger than prima facie: "*...merely because on its face it appeared reliable was considered not enough*." It is suggested to add a section 55P(3) to provide a stronger test.	7. "Threshold reliability" already signifies a stronger test than prima facie and when combined with the various indicia in section 55P(2) as to its meaning, it can provide sufficient safeguard against too loose an approach to admissibility. Reference can be made to para 9.56 of the Report which states, with reference to the formulation now adopted in s.55P(1) of the Bill, that "The sub-committee considered the word 'assurance' to be particularly apt because it implied a reasonably high threshold which was appropriate for such a

Issues	Respondents' Comments/Suggestions	DoJ's Responses
		criterion."
10 Right to cross-examination	A respondent made the following comments : 1. Absence of cross-examination mean there is "insufficient assurance" of reliability. LRC quoted and approved a New Zealand decision that the court must make assessment of likely impact of cross-examination. Such a test was not foreseen as a difficulty by New Zealand Court. The Hong Kong Court of Final Appeal in *HKSAR v Lau Shing Chung Simon* [2015] HKCU 291 also underscores the importance of cross-examination in the consideration of the matter.	1. Inability to cross-examine should go to the weight of the hearsay, not admissibility. The very purpose of the Bill is to admit hearsay evidence in certain situations. It would be futile to ask the court to consider that there is no opportunity to cross-examine the hearsay maker in every application. The various conditions which have to be satisfied before the court would exercise its discretion to admit hearsay evidence all serve as safeguards to ensure that a defendant's right to a fair trial will not be jeopardized by his or her inability to cross-examine the declarant (see paras 9.65-9.80 of the Report).
	2. The rationale of the absence of cross-examination set out in para 9.61 of the Report that the matter goes to weight rather than admissibility is not convincing. This argument ignores the rationale of the necessity and reliability safeguards, which are before considering the weight.	2. As stated in para 9.61 of the Report, the majority of the sub-committee agreed to delete from the list of factors put forward in its consultation paper "the absence of cross-examination of the declarant at trial." Mr Justice Lunn apparently agrees that the absence of cross-examination is a matter which is relevant to the weight to be given to the evidence, rather than its

Issues	Respondents' Comments/Suggestions	DoJ's Responses
		admissibility. In the view of Lunn VP, if the purpose of proposal 12 in the Report was to establish threshold reliability admissibility only, the absence of cross-examination did not sit well with proposal 12(a)-(d), "which were matters directly so relevant". The absence of cross-examination seems to his Lordship a matter relevant to the weight to be given to the evidence but not to its admissibility. We also reiterate the preceding response.
	3. The concern listed out in para 9.62 of the Report that inconsistencies might arise if cross-examination is listed as a factor for court to consider is not convincing as well. Contrary to para 9.62, central argument should be reliability, and not inconsistencies of decision which this argument is premised.	3. The difficulty in asking judges to guess the effect of cross-examination is a valid consideration for not including "absence of cross-examination" as a factor in assessing threshold reliability.
	4. The Core Scheme allows supporting evidence to be considered as part of the reliability test for the hearsay. Contrarily, material that would otherwise be available in cross-examination, which could damage the reliability of the hearsay, would not be taken into account in the reliability tests.	4. The safeguards provided under the Core Scheme should be viewed holistically. Admission of evidence for the purposes of challenging a declarant's credibility is provided under section 55T.

Issues	Respondents' Comments/Suggestions	DoJ's Responses
11 Court must direct acquittal	A respondent made the following comments : 1. Although general wording may not assist, general guidance of that nature does appear in the English legislation. Hence, section 55Q(1) of the Bill should contain a very clear warning of the danger of admitting hearsay evidence. 2. To address the deprivation of cross-examination, the absence of cross examination should be spelled out as one of the factors for the court to consider to direct acquittal as a counterbalancing factor. 3. The reliability threshold should be reconsidered to direct an acquittal by adding it as para (f) to section 55Q(4). 4. A relevant consideration for an acquittal under section 55Q(4)(e) of the Bill should be the inability to cross-examine. However, the prejudice of the absence of cross-examination should not only be considered at the time when a judge considers whether to acquit but should also be considered as threshold of admissibility.	1. When a conviction would be unsafe or unsatisfactory is well established under case law, it would not be necessary to further remind the court on the danger of miscarriage of justice. 2. DoJ agrees to revise the wording of the provision to this effect. 3. Section 55Q(4)(a) - (c) and (e) have already included the element of threshold reliability. In any event, section 55P concerns admissibility while section 55Q concerns directions to acquit, which include some of the considerations for assessing the weight of the evidence. 4. DoJ agrees to revise the wording of the provision to the effect that the inability to cross-examine is a relevant consideration for directing acquittal under section 55Q(4), but the inability to cross-examine should not be a factor in assessing "threshold reliability". See para. 9.61-9.63 of the Report discussed in item 4 under the row of

Issues	Respondents' Comments/Suggestions	DoJ's Responses
		"Condition of threshold reliability" above.
12 Previous statements of witnesses	In relation to both rebutting recent fabrication and the doctrine of recent complaint, a respondent considered that section 55U of the Bill may elevate such a complaint to an assertion of truth. This provision is unclear as to its intent, purpose or effect.	The purpose of section 55U(1) is intended to provide that the previous statement is admissible for proving the truth of its content under the prescribed circumstances. This provision implements Recommendation 39A of the Report.
13 Admission of multiple hearsays	A respondent considered that section 55W of the Bill addresses a problem, which seems to be imaginary.	Section 55W intends to deal with the situation of multiple hearsay, which is considered a real possibility.[7]
14 Implied assertion	A group of 3 Juris Doctor students submitted their co-authored article titled "Rethinking the Admissibility of Implied Assertions as Evidence in Hong Kong's Criminal Cases" published in Volume VIII of the Queen Mary Law Journal, University of London for our consideration. The article discussed the concept of "implied assertions", which they defined as a statement that although not intended to assert a fact, appears to rest on an assumption that the maker of the statement believes to be true, and which is subsequently advanced at trial to suggest the existence of that assumption. They	Section 55V of the Bill would abrogate the common law rule that excludes implied assertion.

[7] For example, a defendant had made a verbal confession to a person (W) who gave a witness statement to record the confession (but without the defendant's signature), and who subsequently died before the trial. Multiple hearsay is engaged if the prosecution seeks to adduce W's witness statement to prove that the defendant had made a verbal confession to W. Admission of (i) the verbal confession and (ii) W's witness statement each has to satisfy the requirements under Part IVA of the Bill.

Issues	Respondents' Comments/Suggestions	DoJ's Responses
	proposed that implied assertion should not be blindly denied; their admissibility should be based on the determination of their reliability relying entirely on objective principles.	
15	A respondent expressed general support of the Bill. The respondent takes the view that the proposed Core Scheme is a fair and moderate proposal which relaxes the rigid rules of hearsay with a cautious approach, providing substantive and procedural safeguards to the defendants and in line with the recommendations made by the LRC. The legislative process for the Bill should be implemented immediately.	

Department of Justice
February 2018

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