

**Summary of The Law Society of Hong Kong’s Comments and Suggestions on
the proposed Evidence (Amendment) Bill 2026¹ and Department of Justice (DoJ)’s Responses**

Issues	Law Society’s Comments/Suggestions	DoJ’s Responses
General		
1 Importance of reform	(1) The Law Society agrees that the law on hearsay evidence in criminal trials should be reformed to clarify uncertainties and improve criminal justice. Any changes to the current regime should be cautious and should not emasculate or prejudice the rights of the accused. It is fundamentally important to put in place the necessary checks and balance for the protection of the constitutional rights of the accused in criminal trials.	The Department welcomes the Law Society’s support to reform the law on hearsay evidence in criminal proceedings and agrees that any reform to the hearsay regime must protect the accused’s right to a fair trial.
Section 55I – Hearsay evidence admissible by agreement		
2 Agreement to admit hearsay evidence	(1) There is concern about the steps the prosecution would take if it makes an agreement with the accused who is a Litigant in Person (“LIP”) and how the LIP’s right would be safeguarded in such scenario.	<p>The Department notes the Law Society’s concern regarding LIP. Robust systemic safeguards are already embedded within the criminal justice system to protect their rights.</p> <p>First, prosecutors are required to assist the court in finding the truth in an impartial manner and are to abide by the Prosecution Code. The Code has laid down clear guidance as to how they should communicate with LIPs. Second, and most importantly, the court retains an overriding duty to ensure that the</p>

¹ References to the “proposed Evidence (Amendment) Bill 2026” and the “proposed Bill” in this Summary refer to the working draft of the proposed Evidence (Amendment) Bill 2026 at Annex C to the Consultation Paper issued by DoJ in December 2025 for the purpose of consultation.

		<p>proceedings are conducted in a fair manner.</p> <p>The Department will consider whether there is room to adopt practical measures at the operational level to assist LIPs in better understanding the new hearsay regime and the implications of their actions.</p>
	<p>(2) There is a query as to whether there is any education to the general public regarding the new hearsay rules</p>	<p>If the proposed Bill is passed, the Secretary for Justice will appoint its commencement date by notice published in the gazette at a later stage. The Department will ensure there is sufficient time for legal practitioners, the judiciary, law enforcement agencies, and the general public to familiarize themselves with the new statutory regime.</p>

Section 55J – Hearsay evidence admissible on unopposed hearsay notice

<p>3 Unopposed admission</p>	<p>(1) There is concern as to whether section 55J would be unfair to LIPs.</p>	<p>The Department notes the concern that LIPs might not fully appreciate the legal consequences of failing to file an opposition notice within the statutory timeframe.</p> <p>The proposed Bill specifically incorporates enhanced procedural flexibilities to prevent any potential injustice. If an LIP informs the court after the deadline that they in fact wish to oppose the admission of the relevant hearsay evidence, the court is equipped with broad discretionary powers under section 55N. Specifically, the court may extend the time limit for giving the opposition notice and may even permit the notice to be given orally, if it is satisfied that doing so is in the interests of justice.</p> <p>Coupled with the court’s overriding duty to ensure fairness in</p>
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		proceedings involving LIPs, these statutory safeguards ensure that the unopposed notice mechanism under section 55J will not operate unfairly.
Sections 55L and 55M – Requirements for hearsay evidence notice and opposition notice		
4 Prosecution hearsay evidence notice	(1) It is only fair for the defence to know in advance the prosecution’s case before the accused is to enter his plea. Therefore, it is submitted that the question of admissibility should be determined before 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.	<p>The Department notes that the Law Society’s submissions on this issue largely reiterate concerns previously raised regarding the Evidence (Amendment) Bill 2018. As comprehensively explained in our previous response on this issue in 2020, the proposition that a defendant should be entitled to wait for a judicial ruling on the admissibility of hearsay evidence before deciding whether to plead guilty, while still retaining the right to a full one-third sentencing discount, is fundamentally incompatible with established legal principles in Hong Kong. We respectfully maintain our position.</p> <p>First, the Law Society’s proposal effectively seeks to allow a defendant to “have it both ways” by enjoying the maximum sentencing discount without giving sufficient regard to the corresponding benefit. As the Court of Appeal unequivocally established in <i>HKSAR v Ngo Van Nam</i> [2016] 5 HKLRD 1, the full one-third discount is a substantial reduction granted primarily for its utilitarian value: it rewards genuine early remorse, saves precious judicial time, and spares the public the expense of contested hearings.² A defendant who chooses to litigate the admissibility of hearsay evidence forces the court and the prosecution to expend the very time and resources the</p>

² The utilitarian foundation of the sentencing discount for a guilty plea was exhaustively analyzed and affirmed by the Court of Appeal in *Ngo Van Nam*, with extensive reference to local and overseas authorities. See, e.g., paragraphs 47-49, 65, 84-86, 133-135, 140-144, 152-153, 158-159, 161, 166-169 of *Ngo Van Nam*.

discount is designed to save. To allow a defendant to test the waters and fail in his attempt to oppose the prosecution hearsay evidence, and *then* claim a full one-third discount for a guilty plea would completely undermine the utilitarian foundation of the discount policy. It would unjustly afford the same mitigation to a defendant who tactically prolongs proceedings as to one who honestly accepts responsibility at the first reasonable opportunity.

Second, the Law Society's suggestion that defence counsel cannot properly advise on a plea without knowing if the prosecution hearsay evidence will be admitted conflates two entirely different concepts: a defendant's knowledge of their own guilt, and a tactical assessment of the likelihood of the prosecution securing a conviction. As firmly established in *Ngo Van Nam* (para. 193), **it is the long-standing practice in Hong Kong not to have regard to the strength of the prosecution's case when determining the discount for a guilty plea.** Citing *R v Caley*³, the Court of Appeal made clear that while a defendant is entitled to put the prosecution to proof and test the strength of the prosecution evidence, they do not require a pre-plea judicial ruling to know whether they actually committed the offence.⁴

Also, there is no lack of transparency that would prejudice the defence. The prosecution's proactive and continuing duty of disclosure ensures that the defence is served with all relevant documentary and witness materials, including the very witness

³ (2013) 2 Cr App R (S) 305

⁴ *Ngo Van Nam*, para. 201

statements implicating the defendant, before a plea is entered. The defence is thus fully aware of the case against the defendant from the outset. A defendant cannot reasonably expect to withhold a plea until they possess absolute certainty about the prosecution's prospect of securing a conviction. For a defendant who is genuinely remorseful, the fundamental question when considering a plea is whether they did in fact commit the crime in question. If a witness statement accurately implicates the defendant, the reality of whether they actually committed the acts alleged remains exactly the same whether the witness testifies in person or whether the witness statement is ultimately admitted as hearsay due to the witness's unavailability. Delaying a guilty plea merely in the hope that the prosecution's case might collapse on a procedural hurdle is a tactical choice. The defendant is perfectly entitled to make this choice and oppose the admissibility of the prosecution hearsay evidence, but the defendant cannot expect to shield themselves from the natural consequence that such a choice, having consumed valuable judicial time and resources, will still be reflected in the maximum sentencing discount if they subsequently plead guilty following an unfavourable court ruling on admissibility.

Finally, we must stress that a defendant who chooses to adopt a "wait-and-see" tactical approach regarding the admissibility of prosecution hearsay evidence is not unduly prejudiced. Such a defendant still falls within the court's established sliding scale of sentence discounts. While the full one-third sentencing discount is reserved for those who plead guilty at the earliest reasonable opportunity, a defendant who chooses to contest the

		<p>prosecution's hearsay evidence and then pleads guilty after an unfavourable court ruling on admissibility is not left without any discount. Under the sliding scale established in <i>Ngo Van Nam</i>, a defendant who pleads guilty after trial dates have been fixed, but before the first day of trial, may still be afforded a discount of between 20% and 25%. This relatively modest reduction, a difference of only 8% to 13% compared to the maximum one-third discount (about 33%), ensures that a defendant who chooses to challenge the admissibility of prosecution hearsay evidence can still benefit from a meaningful degree of discount. This proportionate deduction appropriately reflects the diminished utilitarian value of the delayed plea and the corresponding wastage of time and resources expended by the court and the prosecution in the interim.</p>
	<p>(2) The defence would be caught off guard when the prosecution suddenly decided not to call a particular prosecution witness and tender hearsay evidence instead.</p>	<p>Section 55L of the proposed Bill imposes a statutory timeline. It requires the prosecution to give a hearsay evidence notice to the defence and the court within 28 days after the day which the date for the hearing is fixed, unless the court varies the requirement under section 55N. This timeframe ensures that the defence is formally notified well in advance of the prosecution's intent to rely on hearsay. The very purpose of the notice mechanism is to provide early clarity and prevent trial by ambush.</p>
<p>5 Timing for defence hearsay evidence notice</p>	<p>(1) There is concern that requiring the defence to give a hearsay evidence notice to the prosecution within the stipulated time limit would reveal its line of defence,</p>	<p>As explained in paragraph 9.82 of the LRC Report, the notice requirement is an essential procedural safeguard in the Core Scheme, and is a standard proposal appearing in the law reform initiatives of other jurisdictions. Most importantly, the LRC</p>

which the accused is not obliged to until after the end of the prosecution case.

expressly stipulated that **“the notice requirement should be the same for both the prosecution and the defence.”**

We acknowledge that a notice requirement may result in the defence revealing certain aspects of its case at a pre-trial stage. However, requiring the defence to provide advance notice of specific types of evidence, even where doing so inevitably reveals part of its case, is not novel. For example, the existing statutory obligations to serve a notice of alibi and a notice of expert evidence under sections 65D and 65DA of Criminal Procedure Ordinance (Cap. 221) similarly require the defence to disclose certain aspects of its case before trial.

The primary rationale for the notice requirement is to ensure procedural fairness and trial efficiency. It guarantees that all parties have sufficient time to prepare their cases and formulate any grounds of opposition to the admission of the hearsay evidence. This is particularly crucial in trials involving multiple defendants. If advance notice were not required, a co-defendant could be severely prejudiced if another defendant suddenly sought to adduce hearsay evidence detrimental to the co-defendant’s case.

Furthermore, sufficient flexibility is built into the proposed scheme to ensure the notice requirement does not result in injustice. Under section 55N, the court possesses the discretion to extend the time limit for giving hearsay evidence notice.

<p>6 Hearsay notices requirements</p>	<p>(1) It is submitted that the proposed notice requirement would significantly increase the workload of the magistrates which might be disproportionate to the benefits.</p>	<p>As identified in paragraph 9.82 of the LRC Report, the notice requirement is an essential procedural safeguard in the Core Scheme, and is a standard proposal appearing in the law reform initiatives of other jurisdictions. Besides, the proposed Bill aims to reform the hearsay rule and to provide sufficient safeguard in the admission of hearsay evidence. The passing of the proposed Bill will allow the courts to receive more relevant and reliable evidence and thus upholding justice. As such, we do not consider that the increase in workload would be disproportionate to the benefits.</p>
	<p>(2) The proposed requirement adds to the workload of the defence's team, given that the defence is to make a defence bundle at an early stage. This is especially difficult for private clients when the case is listed in the higher courts. Costs management would be of concern.</p>	<p>Under paragraph 2.3.1 of Practice Direction 9.3, the parties (including the defence) are required to actively prepare the case for trial without constant recourse to the court. As such, even without a hearsay notice requirement, the defence would still have to actively prepare the case for trial and hence, we do not see how it would add to the overall workload of the defence team.</p> <p>Regarding costs, so long as the accused decides to rely on hearsay evidence or to oppose the prosecution's use of it, the legal analysis and preparation must be carried out regardless of whether there is a notice requirement. Requiring an advance notice only relates to <i>when</i> the expenditure is incurred, but it does not inherently increase the overall cost of the defence. On the contrary, dealing with hearsay admissibility through a structured pre-trial notice mechanism helps to prevent costly mid-trial adjournments, unexpected delays, and protracted legal arguments during the trial itself, which can also protect private clients from inflated litigation costs and save valuable</p>

		<p>judicial time and resources.</p> <p>Finally, the existing mechanism governing costs in criminal proceedings remains unaffected. A defendant who is ultimately acquitted may apply for costs against the prosecution.</p>
	<p>(3) LIPs may find it difficult to handle the complicated procedures set out under the proposed mechanism.</p>	<p>The Department will consider whether there is room to adopt practical measures at the operational level to assist LIPs in better understanding the new hearsay regime and the implications of their actions.</p>
	<p>(4) Rationale for inserting the wording “if known” at section 55L(1)(b), which may be unfair and prejudicial to the defence.</p>	<p>There may be genuine factual scenarios where the exact name of a declarant is untraceable or unknown, yet their statement is highly probative, reliable, and necessary. The phrase “if known” must be read alongside the strict admissibility requirement in section 55P(2)(a), which mandates that the declarant is “sufficiently identified.” A person can be sufficiently identified by their role, position, or physical description without their formal name being known. Also, if the lack of a name causes undue prejudice or undermines the threshold reliability, the court will refuse permission to admit the hearsay evidence under section 55P(2)(e) or 55R.</p>
<p>7 Opposition Notice</p>	<p>(1) It would put huge pressure upon the defence to file an opposition notice within 14 days. The Department should ensure fair play for both the prosecution and the defence in this regard.</p>	<p>Evaluating and investigating evidence, whether direct or hearsay, is an inherent part of standard trial preparation once the case materials are served. The 14-day period for the opposition notice is primarily intended to identify areas of dispute early to facilitate efficient case management. In any event, the court has power to extend a time limit for giving a hearsay evidence notice or opposition notice under section</p>

		<p>55N.</p> <p>Both the prosecution and the defence have to adhere to the same notice requirement. Hence, there is fair play for both the prosecution and the defence.</p>
Section 55N – Court’s power to vary requirement of sections 55L and 55M		
8 Right to oppose	(1) The opposing party should still have the right to oppose, and this implied meaning should be set out clearly in writing.	The court has an overriding duty to ensure the proceedings are conducted in a fair manner and retains the power to manage its cases. The court will invite submissions from the other parties on whether it should exercise its power under this section, if it sees fit. As such, we consider that it is not necessary to state the same expressly in the provision.
9 Time limits	(1) Under what circumstance the time limit could be shortened for giving the notice(s).	<p>The provision of power to the court to shorten or extend a time limit for giving a hearsay evidence notice or opposition notice is to provide the necessary flexibility to cater for different scenarios.</p> <p>In normal circumstances, parties to the proceedings should comply with the requirements under sections 55L and 55M. However, there may be exceptional circumstance which warrants a timely determination. For example, an unrepresented accused may inadvertently attempt to adduce a piece of hearsay evidence during a jury trial. Given that the trial is already underway before a jury, it is in the interests of justice to determine the admissibility of such evidence promptly. In such scenarios, the court may exercise its discretion to shorten the requisite notice period.</p>

<p>10 Oral notices</p>	<p>(1) The Law Society strongly opposes allowing notices to be given orally under section 55N(2)(b), and do not see scenarios warranting such discretion.</p>	<p>We agree that the giving of written notices is the standard and preferred practice. The proposed power of the court to allow notices to be given orally is intended to provide the essential flexibility. Given the inherently dynamic nature of criminal trials, unforeseen evidentiary issues frequently arise, particularly when the accused is an LIP.</p> <p>This flexibility can be valuable for LIPs. We acknowledge Law Society's concern that LIPs may have practical difficulties in navigating the procedural requirements. An LIP may not possess the legal knowledge to draft a formal written notice prior to trial, or they may only realize the need to adduce a specific piece of hearsay evidence midway through the proceedings. In such scenarios, rather than excluding potentially relevant evidence purely on technical grounds, section 55N serves as a practical backup mechanism. It simplifies the process for the LIP by allowing the court to accept an oral notice on the spot.</p> <p>We will further examine whether the drafting language can be refined to make it clear that oral notices should be given before the court.</p>
	<p>(2) The Law Society was not sure whether a LIP could deal with the relevant notices on his own on applications under section 55N(5).</p>	<p>We acknowledge that an LIP may face difficulties in strictly complying with procedural requirements. It is precisely for this reason that adequate flexibility has been built into the framework. By allowing the court to exercise its discretion to accept oral notices, the trial judge is empowered to assist the LIP and ensure that technical defaults do not obstruct the presentation of the LIP's case.</p>

Section 55O – Withdrawal of notices		
11 Withdrawal of notices	(1) It is submitted that the withdrawal of a given notice should not be subject to the court’s permission.	We will further consider the matter.
Section 55P – Court’s permission for admission of hearsay evidence		
12 Determination of admissibility of hearsay evidence	(1) It is submitted that a standalone hearing (like an interlocutory proceeding or voir dire in jury trials) should be conducted before a trial date is fixed to determine the admissibility of the hearsay evidence. The Law Society asked the Department to provide information of past ruling(s) which might not be challenged by judicial review per the Court of Appeal decision in <i>Ngo Van Nam</i> .	<p>We agree that there is merit for the admissibility of hearsay evidence to be determined before the substantive part of the trial, as is the case when the admissibility of a certain piece of evidence is being challenged (e.g. a voir dire) to determine the admissibility of a cautioned statement. However, as to when it is the proper timing for such hearing/determination, it is a matter of case management and we trust that the court will be in the best position to determine the same.</p> <p>The nexus between those “past rulings” per <i>Ngo Van Nam</i> and the operation of the proposed section 55P(2) is not immediately apparent. Hence, we are unable to accede to the request.</p>
13 “Sufficiently identified”	(1) How a declarant could be sufficiently identified if the name of the declarant of the statement to be adduced as the hearsay evidence may not be known?	Please see our response to Issue 6(4) above.
Section 55Q – Condition of necessity		
14 Condition of necessity	(1) The Law Society considers that the principle of upholding the accused’s rights to a fair trial should not be compromised by the principle of promoting judicial	The Department considers that the principles of upholding the right to a fair trial and promoting judicial efficiency are not mutually exclusive, but rather complementary within the proposed statutory scheme.

	<p>efficiency. In this connection, the condition of necessity should not be too wide to impair the accused's right to fair trial. It maintains that the unwillingness to give evidence should itself already be the bar to the admissibility of the evidence itself. The LRC was clear that unwillingness on the part of a declarant to attend to testify does not equate to "unavailability". It is submitted that the notion of genuine unavailability should be explicitly set out in section 55Q.</p>	<p>The Department maintains that the concept of "genuine unavailability" is already firmly embedded within section 55Q. The LRC was acutely aware of the distinction between a declarant being genuinely unable to testify and merely being unwilling to do so. Consequently, the LRC deliberately devised the five specific necessity conditions (Recommendation 25), whose specific requirements and phrasing already act as the practical embodiment of genuine unavailability. Section 55Q adopts Recommendation 25 wholesale.</p> <p>Introducing a separate notion of "genuine unavailability," as the Law Society suggests, would necessitate an unworkable inquiry into the declarant's subjective state of mind. There is an inherent paradox in this proposition. Since the declarant is absent and cannot be brought to court to be cross-examined as to the true intent behind their non-attendance, the court would be left in an evidentiary void. The parties would be practically unable to prove or challenge the subjective reasons for the declarant's absence. Inviting such speculation would undermine the objective certainty of the LRC's carefully calibrated necessity conditions in Recommendation 25.</p>
	<p>(2) The incorporation of the "age" factor would cause confusion and an "unrestricted" extension of the condition of necessity. It is submitted that if the incompetence in giving evidence is because of either tender age or old age, it would have been covered by the factor of</p>	<p>We respectfully decline the Law Society's suggestion to remove "age" from section 55Q(1)(b). The Law Society argues that "age" would be subsumed under "mental condition," but this may not be necessarily legally or factually accurate. The inability of a young child or a frail elderly person to testify may stem from developmental immaturity or general frailty that does not strictly qualify as a "mental condition" or physical</p>

“mental condition”. Reference is made to section 22 of the Evidence Ordinance, which governs the admission of business records in criminal proceedings. In such section, there is no reference to “age” in such section. Hence, it is suggested that “age” to be removed as one of the standalone factors in considering whether the declarant is unfit to be a witness.

illness. Including “age” ensures the court has the clear and sufficient statutory mandate to cover these vulnerable individuals when they are genuinely unfit to testify.

Further, age itself is merely one of the factors when considering whether the declarant is unfit to be a witness. The determinative factual threshold for necessity is whether the declarant is “unfit to be a witness” as a result of age, physical or mental condition. The core principle of the proposed Bill remains the priority of accepting direct evidence from witnesses who can testify in person and be cross-examined in court. The mere fact that a witness is a child or an elderly person does not automatically trigger provisions exempting him/her from the obligation to appear in court.

Further, section 55Q(1)(b) clearly stipulates that the court must be satisfied that the declarant is unfit to testify in person or “in another competent manner” because of their age, physical or mental condition. Hence, as Cap. 221 has already provided for some special measures to accommodate the needs of vulnerable witnesses (including a child), e.g. arranging them to testify via live television link, the court will certainly consider whether these special measures can assist them in testifying. Only when there is sufficient objective evidence showing that even with all feasible special measures, summoning a child or an elderly person to court would still cause severe psychological trauma, or that they are simply unable to provide testimony in court, they will then meet the threshold of “unfitness”.

Also, the court will not make subjective inferences based solely

		<p>on the apparent condition of the declarant or the applicant’s unilateral claims. The party applying for the admission of hearsay evidence must bear the burden of proof, submitting objective and substantive evidence to the court (such as a certificate from a registered doctor or a professional assessment by a clinical psychologist). More importantly, if the application is made by the prosecution, the standard of proof is “beyond reasonable doubt.”</p>
	<p>(3) The condition of “making the declarant available for examination and cross-examination in another competent manner in the proceedings” is not required under section 22 of the Evidence Ordinance for the admission of documentary records in criminal proceedings as prima facie evidence of any fact. Given the wide coverage of section 55Q(1)(c)(i), it is considered unnecessary for the condition of section 55Q(1)(c)(ii). It is thus proposed to remove the said condition.</p>	<p>As pointed out in paragraph 9.46 of the LRC Report, the necessity criterion is only met if there are good reasons why the declarant’s testimony cannot be made available at the time of trial. As such, the core principle of the proposed mechanism remains the priority of accepting direct evidence from witnesses who testify in person and are cross-examined in court. Hence, the applicant has to exhaust other feasible options to make the declarant available for examination and cross-examination even if he or she is outside Hong Kong, such as by way of letter of request or testifying through a remote medium (see section 6 of the Courts (Remote Hearing) Ordinance (Cap. 654)).</p> <p>Therefore, it is somewhat paradoxical that the Law Society proposes to remove condition (ii). This specific requirement is exactly what gives practical effect to the concept of “genuine unavailability” that the Law Society so vigorously advocates for. Excising condition (ii) would lower the evidentiary threshold for proving this specific necessity condition, allowing hearsay evidence to be admitted even when a declarant could be cross-examined via a remote medium. Hence, we consider it</p>

	<p>(4) The wording “reasonably practicable” does not accommodate the fact that many defendants, such as people with ordinary means, legally aided or not, would not be able to afford the costs of the exercise of taking evidence overseas.</p>	<p>appropriate to retain section 55Q(1)(c)(ii).</p> <p>The Law Society’s present concern, that a defendant of ordinary means should not be forced to incur insurmountable expenses to bring an overseas witness to Hong Kong, highlights a flaw in their earlier submission advocating for a “genuine non-availability” test for the necessity condition.</p> <p>If a willing overseas witness is prepared to travel to Hong Kong to testify, provided the defendant covers the full cost of travel and accommodation, such a witness may not be considered “genuinely” unavailable under the rigid test previously proposed by the Law Society. Consequently, the defendant might be forced to either pay the exorbitant travel costs of the overseas declarant or fail to adduce the hearsay statement of the overseas declarant.</p> <p>This practical example aptly demonstrates why an objective “reasonably practicable” test is preferable to mandating “genuine non-availability” under the necessity condition. English case law suggests that the expense and inconvenience of securing a witness’s attendance is a relevant consideration of “reasonably practicable”. In <i>R v Gyima</i> [2007] EWCA Crim 429, at paragraph 24, applying the pre-2003 case of <i>R v Castillo</i> [1996] 1 Cr App R 438, the English Court of Appeal held that “reasonably practicable” in section 116(2)(c) of the Criminal Justice Act 2003 requires the consideration of (i) the importance of the evidence that the witness can give and the prejudice to the other party if the witness does not attend, and (ii) the <u>expense and inconvenience</u> of securing the witness’s</p>
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		<p>attendance. We also note that the defence only needs to prove on the balance of probabilities that the condition of necessity is satisfied: section 55Q(3)(b).</p> <p>In any event, the defendant can obtain costs from the prosecution if he is found not guilty afterwards.</p>
	<p>(5) Section 55Q(1)(e) does not anticipate the difficult situation of the trial of the accomplices together. For example, if this provision is applied in a jointly charged scenario, D1 makes a cautioned statement incriminating himself by saying that he committed the crime on his own alone. Although D1's cautioned statement is ruled inadmissible for being involuntary, D2 may rely on condition (e) to ask for the admission of D1's ruled-out involuntary cautioned statement. D1's interest would be prejudiced in such situation. As such, it is suggested that an accused may only rely on such factor if the declarant does not make any objection to its admission.</p>	<p>We wish to point out that when a party seeking to adduce a piece of hearsay evidence, apart from the condition of necessity, such party has to also satisfy, amongst others, the condition of threshold reliability and show that the probative value of the hearsay evidence outweighs any prejudicial effect it may have on any party to the proceedings. Hence, if D1's cautioned statement has been ruled out as involuntary, we consider that D2 is unlikely to be able to pass the threshold reliability condition as when considering the threshold reliability condition, the court will take into account, amongst others, the nature and content of the statement to be adduced (section 55R(2)(a)) and the circumstances in which the statement was made (section 55R(2)(b)). Also, it is unlikely that the court would now conclude that the probative value of the hearsay statement outweighs its prejudicial impact on D1. In these circumstances, it would be improbable that the court would permit D2 to adduce D1's previously excluded statement under the new hearsay regime.</p>
<p>Section 55R – Condition of threshold reliability</p>		
<p>15 Reasonable assurance</p>	<p>(1) The Law Society considers it suitable to expressly state the standard for “a reasonable assurance that the hearsay</p>	<p>The words “reasonable assurance” already signifies a stronger test than <i>prima facie</i> and when combined with the various indicia in section 55R(2) as to its meaning, it can provide</p>

	<p>evidence is reliable” under section 55R(1). For example, to add a new subsection which state “<i>in deciding whether there is a reasonable assurance of reliability, the threshold reliability test is a stronger test than prima facie reliability and the Court should not admit hearsay evidence merely because on its face it appears reliable.</i>”</p>	<p>sufficient safeguard against too loose an approach to admissibility. Reference can be made to paragraph 9.56 of the LRC Report which states, with reference to the formulation now adopted in section 55R(1) of the proposed 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 criterion.”</p> <p>Furthermore, the phrase “reasonable assurance” was deliberately modeled on section 18(1)(a) of the New Zealand Evidence Act 2006. Hong Kong courts may draw upon New Zealand case law when interpreting and applying the test. In order not to unnecessarily constrain the court in developing its own jurisprudence over time, the Department considers it appropriate not to prescribe further rigid definitions or comparative language in the proposed Bill.</p>
	<p>(2) The same standards of proof as in the necessity condition should also apply: that the prosecution must prove the condition of reliability beyond a reasonable doubt, and balance of probabilities standard for the defence.</p>	<p>The necessity and threshold reliability conditions are qualitatively different. Necessity involves questions of fact requiring appropriate standards of proof. Threshold reliability involves a question of law requiring an evaluative judgment. The concept of differential standards of proof does not apply to threshold reliability because it is not a factual determination but a legal assessment of whether circumstances provide reasonable assurance of reliability.</p> <p>This distinction was recognized by the LRC in its careful consideration of the standards of proof issue. The LRC concluded that while the necessity test “related to facts which required an appropriate standard of proof to be established,” the</p>

		threshold reliability test “required the judge to satisfy himself that the circumstances provided a ‘reasonable assurance’ that the statement was reliable.” This reflects the fundamental difference in nature between the two conditions. Accordingly, while the LRC proposed differential standards of proof for necessity (beyond reasonable doubt for prosecution, and balance of probabilities for defence), no such differential standards were proposed for threshold reliability. ⁵
16 Sections 55R(2) and 55S(6) – may have regard only	(1) The rationale behind why the phrase “must have regard” been replaced with “may have regard only”.	The use of the phrase “may have regard only” is to better reflect the policy intent that the factors listed in sections 55R(2)(a) to (e) and section 55S(6)(a) to (f) are exhaustive. We will consider if the drafting approach can be refined to express this intent more clearly.
17 Section 55R(2)(e)	(1) Whether the hearsay evidence should be admissible if the statement is contradicted by other admissible evidence?	We agree that if a piece of hearsay evidence is contradicted by other admissible evidence, it would have a bearing on the court’s determination on whether the said hearsay evidence is reliable. We will examine whether the drafting language can be improved.
Section 55S – Subsequent exclusion of hearsay evidence admitted with court’s permission		
18 General	(1) The Law Society has noted the departure from the LRC’s recommendation in section 55S and is generally agreeable with the new approach.	We note and thank the Law Society’s support for section 55S.

⁵ Para. 9.85 of the LRC Report

Section 55T – Certain common law rules relating to exceptions to rule against hearsay preserved		
19 Preservation of common law rules	(1) There is no express wording in the section on whether the parties relying on common law rules have to go through the notice mechanism as set out in Division 3.	The statutory notice requirements introduced by the proposed Bill do not apply where a party seeks to adduce hearsay evidence pursuant to a preserved common law exception. In such cases, the admission of the hearsay evidence will continue to be governed by the established procedural practices at common law, if any.
Section 55X – Multiple hearsay		
20 Multiple hearsay	(1) The Law Society has reservations on whether multiple hearsay should be admitted in the first place. It is proposed that section 55X should be removed.	This section implements Recommendation 14 of the LRC Report. Under this section, it requires that all levels of hearsay evidence have to fulfil the requirements as stipulated in the new statutory scheme. Considering that there are sufficient safeguards built in the proposed Bill, we are confident that this section would help enhancing access to justice by allowing the court to receive relevant and reliable hearsay evidence.

Department of Justice
March 2026

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