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**Panel on Administration of Justice and Legal Services**  
**Meeting on 26 February 2018**

**Background brief on implementation of the**  
**Law Reform Commission of Hong Kong Report on Hearsay in**  
**Criminal Proceedings — Evidence (Amendment) Bill 2018**

**Purpose**

This paper provides background information on implementation of the Law Reform Commission of Hong Kong ("LRC") Report on Hearsay in Criminal Proceedings ("the Report") and the working draft of the Evidence (Amendment) Bill ("the Draft Bill") proposed by the Department of Justice ("DoJ") to implement the Report. It also summarizes the major views and concerns of members on this subject.

**Background**

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' 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. LRC released a consultation paper on Hearsay in Criminal Proceedings in 2005. Having considered the responses received, LRC published the Report in November 2009,<sup>1</sup> recommending that the existing

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<sup>1</sup> Hyperlink of the Report:  
<http://www.hkreform.gov.hk/en/publications/rcrimhearsay.htm> [Accessed February 2018].

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. A Core Scheme (**Appendix I**) is recommended to be adopted as a whole as the major vehicle for reforming the law of hearsay in criminal proceedings.

4. The Administration consulted the Panel on Administration of Justice and Legal Services ("the Panel") on the Report on 23 April 2012. During the meeting, the Administration indicated that it was supportive of most of the recommendations and proposals in the Report and a team had been set up within DoJ to consider implementation of the Report. A small-scale forum was organized in May 2012 for the purposes of consulting representatives of the Hong Kong Bar Association ("the Bar Association"), the Law Society of Hong Kong ("the Law Society") and the Judiciary on the way forward.

5. At the Panel meeting on 27 March 2017, the Administration briefed members on the measures adopted by the prosecution for protecting mentally incapacitated persons ("MIPs") in criminal proceedings and, among others, the plan of DoJ to implement the recommendations as set out in the Report. Taking into account the views and recommendations of LRC, the Administration proposed to implement LRC's recommendations in full (with appropriate modifications) except for some of the special topics examined in Chapter 10 of the Report. It was considered that those topics required further study and should not be implemented at that moment.

6. At that meeting, the Administration also briefed members on the key features of the Draft Bill which sought to implement the recommendations of the Report. According to the Administration, the Draft Bill did 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 Draft Bill or when the relevant parties agree to the admission of hearsay evidence, admission of such evidence would be based on a statutory discretionary power to admit hearsay evidence when it was both necessary and reliable. The key features of the Draft Bill are attached in the **Appendix II**.

7. In the second quarter of 2017, the Administration launched a consultation exercise on the Draft Bill to seek the views of the legal professional bodies, the Judiciary and other interested parties on the Draft

Bill. The consultation exercise ended on 31 July 2017 and DoJ received comments from nine government agencies and outside bodies on the Draft Bill. DoJ would refine the Draft Bill taking into account the comments received. The aim is to introduce the Bill in the 2017-2018 legislative session.

## **Major views and concerns**

### Report on Hearsay in Criminal Proceedings

#### *Standard of proof and safeguards*

8. When discussing the Report at the Panel meeting on 23 April 2012, some members enquired about the situation where the prosecution's case against the defendant was wholly based on hearsay evidence or otherwise the facts of the case could not be established. In response, the Administration advised that hearsay evidence could be of critical importance in considering whether there was sufficient evidence to institute the criminal proceeding. This was also the case for confession statement of the accused which might be the main evidence for prosecution albeit its admissibility would be decided by the court.

9. Some members also considered that the proposed discretionary power vested in the court to admit hearsay in prescribed circumstances might lead to more prosecutions and create uncertainties for the accused. The Administration ought to take a cautious approach in its decision to implement any changes to the existing system and the proposals should require more thorough consideration by the Administration in the light of the concerns of members and the legal profession.

#### *Views of the Hong Kong Bar Association*

10. During the deliberations on the Report, the Bar Association stated its view that as defence counsel, their duty was to cross-examine witnesses to ensure a fair trial for the accused. The following concerns of members of the Bar Association were raised:

- (a) unavailability of a hearsay declarant for cross-examination of witnesses, which was the right of the other party to the proceedings to challenge the accuracy of evidence;

- (b) admission of hearsay evidence might complicate and create uncertainties for the criminal proceedings and thereby put the unprepared defendants at a disadvantaged position and would undermine the defence counsel's ability to defend the case;
- (c) the proposed discretionary power vested in the court to admit hearsay in prescribed circumstances in meeting the necessity and threshold reliability criteria might run the risk of producing inconsistent results;
- (d) the condition of necessity was considered beneficial to the prosecution in particular where a witness in favour of the prosecution could not be located, which would easily satisfy the condition as specified in item (d) of proposal 8 of the Core Scheme; and
- (e) adequate safeguards should be put in place to ensure the rights of the public who were charged with criminal offences, including different standards of proof should be imposed on parties to establish the right in producing hearsay evidence, since it was the nature of criminal proceedings that the burdens and standards of proof of different parties were fundamentally asymmetrical.

#### Working draft of the proposed Evidence (Amendment) Bill

##### *Main considerations*

11. At the Panel meeting on 27 March 2017, some members enquired about the main considerations for the current proposed reform on the law on hearsay evidence in criminal proceedings. In response, the Administration said that in proposing the current reform, it would have to ensure that the proposal would be consistent with the principle of open justice which could effectively safeguard the rights of a complainant/witness while at the same time would not affect the fundamental right of a defendant to a fair trial. Moreover, the proposal should be able to pass the tests of rationality and proportionality, especially when it would be subject to challenge under the Basic Law. Furthermore, relevant law and judgments in other jurisdictions, especially the recent judgments delivered by the European Courts of Human Rights in this regime, also served as important reference.

### *Necessity conditions*

12. Noting that the Draft Bill would set out the necessity conditions to be satisfied in order for the hearsay evidence to be ruled admissible by the court, some members asked about the rationale for proposing refusal by the declarant to give evidence on ground of self-incrimination as one of the necessity conditions. The Administration explained that the above proposed necessity condition aimed at giving due protection of human rights. The standard of proof required to prove the satisfaction of the necessity conditions was high. In considering the proposal in this regard, a balance had to be struck between different interests, including the protection of a defendant's right to be presumed innocence until being proven guilty and his/her right to a fair hearing, protection for a witness from being compelled to incriminate oneself and/or exposing oneself to criminal prosecution by giving evidence in the court and the interest of open justice.

### *Views of the legal professional bodies*

13. During the discussions on the Draft Bill, the Bar Association and the Law Society expressed support for the direction of the proposed reform in relation to hearsay evidence in criminal proceedings. The Bar Association noted that under the Draft Bill, it was proposed that the threshold reliability condition was only satisfied where the circumstances provided a reasonable assurance that the hearsay evidence was reliable. In this regard, the Bar Association expressed that it would need further clarification on the wordings to be adopted in the provision of the Draft Bill.

### *Implementation progress*

14. When discussing the measures adopted by the prosecution for protecting MIPs in criminal proceedings and the key features of the Draft Bill as set out in paragraph 5 above, some members expressed serious concern over the withdrawal of prosecution against the defendant in a sexual offence case occurred at a residential care home for persons with disabilities. Hence, they urged the Administration to implement the relevant legislative proposal as soon as practicable.

15. The Administration replied that as the two legal professional bodies had agreed on the direction of the reform, it was optimistic about the implementation of the core recommendations in relation to the reform on the law on hearsay evidence in criminal proceedings. With a view to

resolving all the outstanding issues and expediting the implementation of the legislative amendments, the Administration hoped that all relevant stakeholders could work together on the necessary revisions and refinements on the Draft Bill.

### **Recent developments**

16. The Administration will brief members at the Panel meeting to be held on 26 February 2018 on the result of its consultation exercise on the Draft Bill as mentioned in paragraph 7 above, and the proposed way forward.

### **Relevant papers**

17. A list of relevant papers is in the **Appendix III**.

Council Business Division 4  
Legislative Council Secretariat  
20 February 2018

**The Core Scheme recommended in the Report on Hearsay in  
Criminal Proceedings by the Law Reform Commission of Hong Kong**

**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 reliabilitystipulated 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.

Source: p.19 to p.21 of the Executive Summary of the Report on Hearsay in Criminal Proceedings; [http://www.hkreform.gov.hk/en/docs/rcrimhearsay\\_se.pdf](http://www.hkreform.gov.hk/en/docs/rcrimhearsay_se.pdf) [Accessed February 2018].

### **Key features of the working draft of the proposed Evidence (Amendment) Bill**

#### **Discretionary power to admit hearsay**

The working draft of the proposed Evidence (Amendment) Bill ("the Draft Bill") would add a new Part IVA to the Evidence Ordinance (Cap. 8). At the heart of this new Part IVA is the court's power to admit hearsay evidence if the following conditions are met:

- (a) the declarant is identified to the court's satisfaction;
- (b) oral testimony of the evidence would have been admissible;
- (c) the necessity and threshold reliability conditions have been satisfied; and
- (d) the probative value of the evidence exceeds its prejudicial effect.

#### **Necessity condition**

2. The necessity condition would only be satisfied where the declarant is genuinely unable to provide testimony of the hearsay evidence and not merely unwilling to do so. The Draft Bill provides that the necessity condition is satisfied only if the declarant:

- (a) is dead;
- (b) is physically or mentally unfit to be a witness;
- (c) is outside Hong Kong and —
  - (i) it is not reasonably practicable to secure the declarant's attendance; and
  - (ii) it is not reasonably practicable to make the declarant available for examination and cross-examination in other competent manner;
- (d) cannot be found after all reasonable steps have been taken to find the declarant; or
- (e) refuses to give evidence on ground of self-incrimination.

3. The Draft Bill further provides 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 a balance of probabilities if the applicant is the defence.

### **Threshold reliability condition**

4. Under the Draft Bill, the threshold reliability condition is only satisfied where the circumstances provide a reasonable assurance that the hearsay evidence is reliable. The Draft Bill provides that in assessing the condition, the court must have regard to all relevant circumstances including:

- (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**

5. Under the Draft Bill, 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. As a built-in safeguard to protect the integrity of the proceedings, the Draft Bill further requires 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 assessing 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 resulting from the admission of the hearsay evidence.

## **What is hearsay**

6. Following the recommendation of the Report on Hearsay in Criminal Proceedings, hearsay statement in the Draft Bill is defined to mean any representation of fact or opinion however made, including a written or non-written, verbal or non-verbal communication that is intended to be an assertion of the matter communicated, which is adduced as evidence in criminal proceedings. A prior statement made by a witness who is available to testify in the proceedings, on the other hand, would not be regarded as a hearsay statement.

## **Scope of application**

7. The Draft Bill provides that the new Part IVA would apply to evidence to be adduced in criminal proceedings in relation to which the strict rules of evidence apply. Depending on whether the common law exclusionary rule applies, evidence adduced in criminal proceedings may or may not be subject to the Bill. Thus the new Part IVA would apply to evidence to be adduced in sentencing proceedings in relation to which the strict rules of evidence apply. Following the recommendation of the Report, the new Part IVA would also apply to evidence to be adduced in surrender proceedings where the strict rules of evidence apply.

8. The new Part IVA would not apply to criminal proceedings instituted before the commencement of the Draft Bill when enacted so that existing proceedings would not be affected.

Source: LC Paper No. CB(4)718/16-17(07)

**Background brief on implementation of the  
Law Reform Commission of Hong Kong Report on Hearsay in  
Criminal Proceedings — Evidence (Amendment) Bill 2018**

**List of relevant papers**

<b>Date of meeting</b>	<b>Meeting</b>	<b>Minutes/Paper</b>	<b>LC Paper No.</b>
23.1.2006	Panel on Administration of Justice and Legal Services	Executive summary of the consultation paper on Hearsay in Criminal Proceedings ("the Consultation Paper")	CB(2)891/05-06(01) <a href="http://www.legco.gov.hk/yr05-06/english/panels/ajls/papers/aj0123cb2-891-1e.pdf">http://www.legco.gov.hk/yr05-06/english/panels/ajls/papers/aj0123cb2-891-1e.pdf</a>
		Press release issued by the Law Reform Commission of Hong Kong ("LRC") on 30 November 2005 concerning the publication of the Consultation Paper	CB(2)891/05-06(02) <a href="http://www.legco.gov.hk/yr05-06/english/panels/ajls/papers/aj0123cb2-891-2e.pdf">http://www.legco.gov.hk/yr05-06/english/panels/ajls/papers/aj0123cb2-891-2e.pdf</a>
		A list of cases provided by the press release issued by the Hearsay in Criminal Proceedings Sub-committee of LRC	CB(2)980/05-06(01) <a href="https://www.legco.gov.hk/yr05-06/english/panels/ajls/papers/aj0123cb2-980-1e-scan.pdf">https://www.legco.gov.hk/yr05-06/english/panels/ajls/papers/aj0123cb2-980-1e-scan.pdf</a>
		Minutes of meeting	CB(2)1491/05-06 <a href="http://www.legco.gov.hk/yr05-06/english/panels/ajls/minutes/aj060123.pdf">http://www.legco.gov.hk/yr05-06/english/panels/ajls/minutes/aj060123.pdf</a>
23.4.2012	Panel on Administration of Justice and Legal Services	Administration's paper on LRC Report on Hearsay in Criminal Proceedings	CB(2)1729/11-12(01) <a href="http://www.legco.gov.hk/yr11-12/english/panels/ajls/papers/aj0423cb2-1729-1e.pdf">http://www.legco.gov.hk/yr11-12/english/panels/ajls/papers/aj0423cb2-1729-1e.pdf</a>
		LRC Report on Hearsay in Criminal Proceedings	<a href="https://www.legco.gov.hk/yr09-10/english/panels/ajls/papers/aj1215-rpt0911-e.pdf">https://www.legco.gov.hk/yr09-10/english/panels/ajls/papers/aj1215-rpt0911-e.pdf</a>

Date of meeting	Meeting	Minutes/Paper	LC Paper No.
		Position paper (issued in May 2006) on the Consultation Paper provided by the Hong Kong Bar Association	CB(2)1842/11-12(01) <a href="https://www.legco.gov.hk/yr11-12/chinese/panels/ajls/papers/aj0423cb2-1842-1-ec.pdf">https://www.legco.gov.hk/yr11-12/chinese/panels/ajls/papers/aj0423cb2-1842-1-ec.pdf</a>
		Minutes of meeting	CB(2)2856/11-12 <a href="http://www.legco.gov.hk/yr11-12/english/panels/ajls/minutes/aj20120423.pdf">http://www.legco.gov.hk/yr11-12/english/panels/ajls/minutes/aj20120423.pdf</a>
27.3.2017	Panel on Administration of Justice and Legal Services	Administration's paper on Evidence (Amendment) Bill	CB(4)718/16-17(07) <a href="https://www.legco.gov.hk/yr16-17/english/panels/ajls/papers/ajls20170327cb4-718-7-e.pdf">https://www.legco.gov.hk/yr16-17/english/panels/ajls/papers/ajls20170327cb4-718-7-e.pdf</a>
		Minutes of meeting	CB(4)1563/16-17 <a href="https://www.legco.gov.hk/yr16-17/english/panels/ajls/minutes/ajls20170327.pdf">https://www.legco.gov.hk/yr16-17/english/panels/ajls/minutes/ajls20170327.pdf</a>