

LETTERHEAD OF Hong Kong Bar Association

Your Ref:LP/5019/5

15th May, 1998

Ms. Daphne Siu,
Government Counsel,
Department of Justice,
Legal Policy Division,
4/F High Block,
Queensway Government Offices,
66 Queensway,
Hong Kong.

Dear Ms. Siu,

Re: Evidence (Amendment) Bill 1998
- Reform of Hearsay Rule in Civil Proceedings

I refer to your letter dated 20th April, 1998 addressed to the Chairman. I enclose a letter dated 12th May, 1998 from Mr. Mohan Bharwaney, who was asked by the Bar Council to consider the draft bill with other members of the Bar setting out their comments on the 5th draft. Their comments are adopted by the Bar Council.

In addition, the Bar Council has noted that clause 7 of the draft bill, which deals with transitional arrangements, provides that the amendments do not apply to pending proceedings which have been brought before the commencement of the amendment legislation. The Bar Council is of the view that as the amendments are procedural in nature, they should enure for the general benefit of litigants and apply to pending as well as future proceedings in accordance with the general principle governing retrospectivity of procedural legislation.

Yours sincerely,

Susan Kwan
Hon. Secretary

Encl.

香港大律師公會

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Please Address All Correspondence to the Bar Secretariat

Letterhead of MOHAN BHARWANEY

12 May 1998

Ms. Audrey Eu S.C.
Chairman
Hong Kong Bar Association
LG 2, High Court
38 Queensway
Hong Kong

Dear Audrey,

Re: Evidence (Amendment) Bill 1998
Reform of Hearsay Rule in Civil Proceedings (5th Draft)

I refer to the Memo from Ms. Amy Lee dated 20th April 1998 enclosing the fifth draft of the Evidence (Amendment) Bill 1998 and a copy of a letter from Ms. Daphne Siu of the Legal Policy Division of the Department of Justice for our consideration. Mr. K.Y. Thong, Mr. M.C. Chiu and Mr. Victor Gidwani and I have reviewed the fifth draft of the bill and the said letter and we report as follows:-

1. Proposed New Section 46

We have noted the inclusion of a separate definition for "court" with which we agree.

2. Proposed New Section 48

We recommend that the exact wording of the equivalent Section 3 of the UK Civil Evidence Act, 1995 be adopted so that the opening words of the new Section should read as follows: -

"Rules of Court may provide that where a party to civil proceedings adduces hearsay evidence of a statement made by a person and does not call that person as a witness -

a) any other party.....

3. Omission of notice provisions in the proposed amendment and the amendment to the Rules of the High Court.

For the reasons set out at page 3 of our previous letter to your predecessor dated 18th September 1996 (copy enclosed herewith) we are in agreement that elaborate provisions should not be made for the giving of notice of intention to adduce hearsay evidence. However, we reiterate our recommendation that the Rules of the High Court should be amended with the inclusion of a provision for all parties to file a list of the documentary hearsay evidence they intend to adduce at trial, say, within 21 days after the case has been set out for trial. This provision can be inserted into Order 25 as an automatic direction applying to all actions. Failure to do so should not prevent any party from relying on hearsay evidence but can have cost implications if the other party is prejudiced and requires an adjournment (which ought to be rare since the hearsay document would probably have been previously disclosed). In our view, this minimum requirement is better than leaving the matter to the informal arrangement of parties in dispute with each other or leaving it to judicial case management which may vary from case to case and for different types of action.

4. Proposed New Section 49

We had recommended previously that this provision be amended to include a specific reference to the evidence attacking the credibility of the maker of the hearsay statement which is made admissible by the new proposed Section 50(2). However, the omission to follow our recommendation does not cause any serious concern as it must be obvious to the court that any successful attack on the credit of the maker must affect the weight of his hearsay statement relied upon in the proceedings.

5. Proposed New Section 52

We are pleased to note that Section 7 of the U.K. Civil Evidence Act 1995 has been adopted almost in its entirety, thereby preserving certain common law exceptions to the hearsay rule. However, we fail to understand why the reference to "family tradition" has not been retained in the proposed new Section 52(3)(b)(ii). Evidence of family tradition may be of great assistance to the Court in "identifying any person".

6. Proposed New Section 55

There is a typographical error in the reference to the U.K. legislation. The correct reference should be to Section 9 and not to Section 7.

7. Proposed New Section 55A

We agree with the deletion of the proposed new Section 55A(2) and (3) which appeared in the third draft of this proposed bill. The deletion of these subsections is consistent with the view taken that strict rules of evidence do not apply in arbitration proceedings (see paras. 5.86 and 5.87 of the Hong Kong Law Reform Commission's Report on the Hearsay Rule in Civil Proceedings). Accordingly, there is no need to extend any rules of court made under the proposed legislation to arbitration proceedings.

8. Proposed New Section 55B

This is the last provision that we wish to comment on.

Firstly, we disagree with the language adopted. The English equivalent in Section 14(1) of the Civil Evidence Act 1995 is not elegantly drafted. However, the proposed Section 55B(1) may cause confusion and should be redrafted.

Secondly, and more importantly, we reiterate our concern that there should be an express residual discretion to exclude hearsay evidence.

It has been suggested that it is unnecessary to create an express residual discretion to exclude hearsay evidence since the Court already has the inherent power to exclude evidence which is irrelevant, superfluous or prejudicial. Of course, we accept that the Court has power to exclude irrelevant material. However, the Courts have often disclaimed any general discretion in civil cases to exclude evidence except for similar fact evidence (see Phipson on Evidence, 14th Edition at paras. 28-21 to 28-23 and Cross & Tapper Evidence, 8th Edition at pp. 215 to 218). Indeed, it was held in Savings and Investment Bank Ltd v Gasco Investments (Netherlands) BV (2) [1998] CH 422 that hearsay evidence could not

be excluded at the Court's discretion in civil contempt proceedings although it may be accorded little weight. We therefore reiterate our concern that there should be an express residual discretion to exclude hearsay evidence which is prejudicial and which should be incorporated into the proposed new legislation.

In any event, we propose a new Section 55B(1) as follows:

"Nothing in this Part affects the right of the Court to exclude evidence on grounds other than that it is hearsay and the right of the Court to exclude hearsay evidence admissible under this Part, whether the evidence falls to be excluded under the court's discretion to exclude evidence which is irrelevant, or in pursuance of any enactment or rule of law for failure to comply with rules of court or an order of the court or otherwise, is hereby preserved."

Yours faithfully

MOHAN BHARWANEY