

立法會 *Legislative Council*

LegCo Paper No. CB(2)984/98-99

Report of the Bills Committee on Evidence (Amendment) Bill 1998

Purpose

This paper reports on the deliberations of the Bills Committee on the Evidence (Amendment) Bill 1998.

Background

2. Evidence is described as being hearsay where a witness proposes to testify to a particular fact on the basis of what he has been told by another, whether that communication was made to him directly or indirectly. Historically, the common law treated hearsay evidence with suspicion. A rule was developed whereby hearsay evidence was excluded subject to a number of exceptions. The common law rule and its exceptions were replaced in England and Wales by the Civil Evidence Act 1968, which considerably relaxed the strict rule of exclusion. This Act was adopted in Hong Kong in 1969 as Part IV of the Evidence Ordinance (Cap. 8). The categories of hearsay statement described in Part IV are admissible only if certain procedural requirements specified in the Rules of the High Court are complied with. Criticism of the complexity of the rules and procedures in England led to the enactment of the Civil Evidence Act 1995, which abolished the exclusionary rules against hearsay and introduced a new system allowing the admission of hearsay evidence in civil proceedings.

3. In August 1992, the Hong Kong Law Reform Commission (LRC) published a Consultation Paper. The paper, which was circulated to interested parties for comments, examined the current law in Hong Kong on hearsay evidence in civil proceedings. The recommendations of the LRC are contained in the Report on Hearsay Rule in Civil Proceedings (Topic 3) published in July 1996.

The Bill

4. The Bill seeks to give effect to the recommendations of the LRC that the rule against hearsay evidence in civil proceedings be abolished and a new system allowing the admission of hearsay evidence in civil proceedings be introduced.

The Bills Committee

5. At the House Committee meeting held on 17 July 1998, members agreed to form a Bills Committee to study the Bill. The Bills Committee first met on 24 July 1998 and Hon Margaret NG was elected Chairman of the Bills Committee. The membership list of the Bills Committee is attached at Appendix I.

6. The Bills Committee held four meetings with the Administration. It also met with representatives of the Hong Kong Bar Association, the Faculty of Law of the University of Hong Kong and the School of Law of the City University of Hong Kong.

Deliberations of the Bills Committee

7. The main deliberations of the Bills Committee are set out in paragraphs 8 - 30 below.

Views of the Bills Committee

8. From the outset, the Bills Committee has noted that the Bill follows closely the recommendations of the LRC and that the practitioners are in support of the objective of the Bill. The main thrust of the Bill is to abolish the rule against hearsay and substitute it with a system allowing general admissibility of hearsay evidence. It will be up to the Court to assess the weight to be attached to the evidence. Having regard to the views of the practitioners, the Bills Committee has mainly focused its discussion on the following two issues.

Notice of intention to adduce hearsay evidence

9. Under the existing Rules of the High Court, a party wishing to adduce a hearsay statement must serve a notice on all other parties of his intention to do so. This notice must be served not later than 21 days before application is made to set down for trial. If the statement is non-documentary hearsay, the party who proposes to adduce it must give particulars of the maker and the substance of the statement. The opposing party must serve a counter-notice within 21 days after the service of the hearsay notice if he requires the maker of the hearsay statement to attend court.

10. The LRC recommended that the present hearsay notice and counter-notice requirements be abolished and no special provision should be made for the giving of notice of intention to adduce hearsay evidence. The issue as to whether such a notice

should be given should be left to informal arrangement between the parties.

11. The Hong Kong Bar Association is of the view that while elaborate provisions should not be made for the giving of notice of intention to adduce hearsay evidence, a provision requiring all parties to file a list of the documentary hearsay evidence they intend to adduce, say, within 21 days after the case has been set down for trial should be included in the Rules of the High Court. While the Law Society is content with the Bill, it is not convinced that the issue of notice should be determined on an informal basis.

12. While representatives of the Faculty of Law of the University of Hong Kong and the School of Law of the City University of Hong Kong are in support of the proposal to abolish the hearsay rule in civil proceedings, the latter is of the view that in order to minimise the potential abuse of "trial by ambush", it is desirable for an effective formal notice procedure to be adopted whereby solicitors or counsel had a statutory duty to give advance notice and to disclose the nature of any hearsay evidence to be adduced, whilst reserving to the parties the option of waiving the notice requirement. Such categorisation process should be done at as early a stage of the litigation as possible in order to assist the court and to allow the litigants to make an early assessment of the full strength of their case, and hence to achieve saving of time and costs.

13. The Bills Committee generally agrees that a party to litigation intending to adduce hearsay evidence should give advance notice to the other party.

14. The Administration has advised members that those responding to the LRC Consultation Paper in 1992 were of the view that the notice requirements were complex and wasteful of resource and time. Parties to proceedings have either adopted an informal approach or omitted to serve hearsay notices altogether. As a result, the first day of the trial is often taken up by application for the court's leave under its residual discretion to admit the hearsay evidence. The LRC was of the view that the requirement for exchange of witness statements and a strict enforcement of the requirement for full discovery by exchange of lists of documents effectively put all parties on notice of any documentary and oral hearsay evidence. The objective of eliminating any element of surprise at the trial as to the substance of the hearsay evidence intended to be adduced can thus be achieved without any formal notice procedure. Besides, where the court is of the opinion that informal notice should have been given but was not, the court has the power to take this into account in considering the exercise of its power with respect to the control of proceedings and costs. The Administration agrees with the LRC that whether notice of intention to adduce hearsay evidence should be served should be left to informal arrangement between the parties.

Residual power of the court to exclude hearsay evidence

15. The LRC considered that hearsay is something that should go to weight and not admissibility. It recommended that subject to safeguards, in civil proceedings whether held with or without a jury, evidence should not be excluded on the ground that it is hearsay and that both first-hand hearsay and multiple hearsay should be admissible. The safeguards include provisions enabling the parties to call for cross-examination of a person whose statement has been tendered as hearsay evidence and statutory guidelines to assist courts in estimating the weight to be attached to hearsay evidence adduced.

16. The Hong Kong Bar Association is of the view that the court should be vested with a residual discretion to exclude hearsay evidence in cases where its admission would be unfair and would cause severe prejudice.

17. Some members opine that given that the Bill allows hearsay of whatever degree to be admissible in civil proceedings, the judge and jury will be faced with the difficult task of estimating the appropriate weight to be given to each and every piece of such hearsay evidence, and owing to the difficulty in verifying the reliability of hearsay statements, this might create unfairness and injustice. The Hong Kong Bar Association's suggestion to provide the court with an express statutory power to refuse admission of hearsay evidence in certain cases would do justice to the parties concerned. A member also points out that the shift of the focus from admissibility to weight might result in a lot more court actions brought on the ground of hearsay evidence as well as lengthened trials as some hearsay evidence might in the end turn out to carry no weight. Consequently, this might lead to a wastage of court's time and increased costs. Other members are concerned that certain hearsay evidence may be of little probative value, but once introduced would seriously prejudice the mind, so that the harm cannot be adequately eradicated simply by awarding it less weight. The danger is especially real with trial by jury. They opine that if the court is given a discretionary power to exclude hearsay evidence for cases tried with a jury, such power should be exercisable at the beginning of the trial and in the absence of the jury; and upon the application of the party opposing the intended use of hearsay.

18. The Administration has explained that the LRC shared the views of the English Law Commission. They took the view that our courts have not experienced any difficulty in dealing with repetitious and superfluous evidence, whether hearsay or not. They did not consider that the risk of the courts being swamped by superfluous evidence would be any greater in relation to hearsay than it is in relation to other types of evidence. They were also of the view that the adduction of evidence of low probative value is futile because such evidence will not be given any significant weight and costs sanction will act as an effective deterrent to the adduction of such evidence. The Administration points out that the Bill contains guidelines which the court should have regard to in estimating the weight to be given to hearsay evidence adduced. Judges are competently trained in sifting evidence and estimating the weight, if any, to be given to hearsay evidence. In the case of a jury trial, the problem of prejudicial or unreliable evidence could be overcome by the judge giving

warning or direction to the jury in determining whether to accept the evidence and the weight to be given to it. The Administration believes that with sufficient safeguards, admission of hearsay of whatever degree would enhance justice because the court would be able to consider all relevant evidence which might otherwise be excluded.

Hearsay in other common law jurisdictions

19. The Bills Committee notes that the LRC, in making its recommendations for reform of law in Hong Kong on hearsay evidence in civil proceedings, had considered in particular the English and Scottish approach, and the observations and recommendations made by the law reform bodies in Northern Ireland, Ireland, New Zealand, Australia, Canada and the United States of America on the hearsay rule. The common law rule against hearsay has been found to be unsatisfactory in many jurisdictions. Reforms on the rule have, as a result, either been introduced or proposed in some of those jurisdictions. Although the rule is still retained in some jurisdictions, numerous exceptions have been developed which rendered the rule confusing and complex.

20. Members have paid particular attention to the Scottish and English models. In Scotland, the Civil Evidence (Scotland) Act 1988 abolished the rule against hearsay and removed any requirement for notification of intention to use hearsay evidence. In England and Wales, the Civil Evidence Act 1995 implemented the recommendations of the English Law Commission by abolishing the exclusionary rule against hearsay in civil proceedings, subject to certain procedural safeguards, such as a duty to give notice of intention to use hearsay evidence where reasonable and practicable to do so.

21. Members note that the Bill seeks to implement all the recommendations of the LRC and is largely modelled on the provisions of the English Civil Evidence Act 1995. However, on hearsay notice, the Bill follows the Scottish approach instead of the English Civil Evidence Act 1995, i.e. whether prior notice is required should be left to be determined by parties informally.

22. To facilitate its consideration, the Bills Committee has invited the views of the legal professional bodies in Scotland as well as England and Wales concerning the operation of their systems following the abolition of the hearsay rule in civil proceedings. Members note that Scottish and English legal practitioners are generally supportive of the abolition of the hearsay rule in civil proceedings. However, they have made no specific comments in respect of hearsay notice requirements. Members also reckon that as the English Civil Evidence Act 1995 has only come into force in early 1997, the time is too short for its effect to be fully assessed.

Proposals of the Bills Committee and the Administration's response

23. While the Bills Committee supports in principle the object of the Bill which is to abolish the rule against hearsay, some members are not convinced that the proposed amendments in relation to admission of hearsay evidence are the best approach to deal with the issue. A member points out that some overseas common law jurisdictions adopt somewhat different practices. He queries the propriety of Hong Kong taking the drastic step to remove the rule against hearsay and the procedural notice requirements altogether as proposed in the Bill.

24. To avoid criticism that the hearsay rule is re-introduced by another route, the member has proposed a "half-way house" approach whereby hearsay evidence would be generally admissible in civil proceedings, and the court could exercise an ultimate discretion in exceptional circumstances to exclude hearsay evidence on application of the party opposing to the admission of the evidence. Such discretion should be exercised at the end of a trial except when it is a jury trial in which case the question of admissibility of hearsay might be argued at the beginning of the trial in the absence of the jury. It is for the opposing party to satisfy the court that the case is an exceptional one and that there are sufficient grounds for excluding the hearsay evidence. The Bills Committee supports the proposal.

25. On hearsay notice, the Bills Committee considers that there should be statutory provisions on a simplified notice procedure whereby any party intending to adduce hearsay evidence is required to give advance notice to the other party.

26. After consideration, the Administration has agreed to move Committee Stage amendments (CSAs) to address members' concern on the two issues, subject to the comments of the Judiciary on the proposed CSAs. The Administration has subsequently advised the Bills Committee of the comments made by the Judiciary. In gist, the Judiciary is of the view that one of the main objectives of the LRC in suggesting a change in the law regarding hearsay evidence is to save time and costs which are very often wasted by litigants by filing of hearsay notices and objections. Disputes on these notices and objections (in the form of counter notices) are frequently the subject matter of interlocutory hearings and appeals. The proposals to re-introduce the existing procedure of raising objections and asking the court to adjudicate on them and the procedure of hearsay notices would render the proposals of the LRC nugatory.

27. After considering the Judiciary's comments, the Bills Committee has decided to maintain its position. The Administration has agreed to revert to the Bills Committee on its position after conducting internal consultation.

Conclusion

28. In view of members' concerns with the Bill, the Administration, after re-consideration, has agreed to move CSAs to proposed section 47 of the Bill. It has

also agreed to modify the CSAs to incorporate members' comments. The effect of the CSAs are -

- (a) to provide that hearsay evidence in civil proceedings shall not be excluded unless a party objects to its admission and the court is satisfied that the exclusion of the evidence is not prejudicial to the interests of justice;
- (b) the court may decide whether or not to exclude hearsay evidence in the case of civil proceedings before a jury, at the beginning of the proceedings and in the absence of the jury; and in the case of any other civil proceedings, at the conclusion of the proceedings; and
- (c) it is for the Rules Committee constituted under the High Court Ordinance (Cap. 4) to make rules to specify hearsay evidence in relation to which the notice requirement shall apply.

29. The Administration has clarified that new section 47A(4) is a substantive provision to ensure that admissibility of evidence would not be affected even if there is a failure to comply with the notice requirement or with rules of court under new section 47A(2) and 47A(1)(b) respectively. Members note that the Rules Committee comprises members of the Judiciary, the Department of Justice and the legal profession, and the rules of court are subsidiary legislation which will be subject to the negative vetting procedure of the Legislative Council.

30. In response to the Bills Committee, the Administration will also move an amendment to substitute the word "powers" for "rights" in new section 55B(1).

Committee Stage amendments (CSAs)

31. A full set of the CSAs proposed to be moved by the Administration and agreed to by the Bills Committee is at **Appendix II**.

Consultation with the House Committee

32. The Bills Committee consulted the House Committee on 18 December 1998 and sought the latter's support that the Second Reading debate on the Bill be resumed on 13 January 1999.

Legislative Council Secretariat
5 January 1999

**Bills Committee on
Evidence (Amendment) Bill 1998**

Membership List

Hon Margaret NG (Chairman)

Hon Albert HO Chun-yan

Hon Martin LEE Chu-ming, SC, JP

Hon Eric LI Ka-cheung, JP

Hon Jasper TSANG Yok-sing, JP

Hon Ambrose LAU Hon-chuen, JP

Total : 6 Members

Legislative Council Secretariat

29 July 1998