

For discussion on
27 March 2017

**Legislative Council Panel
on Administration of Justice and Legal Services**

Evidence (Amendment) Bill

Purpose

The Government proposes to introduce legislation to implement the recommendations of the report on “Hearsay in Criminal Proceedings” (“**Report**”) published by the Law Reform Commission of Hong Kong (“**LRC**”) in November 2009 so as to reform the law on hearsay evidence in criminal proceedings by a detailed legislative scheme. This paper briefs Members on the key features of the working draft of the proposed Evidence (Amendment) Bill (“**Consultation Bill**”).¹

Reforming the Rule against Hearsay in Criminal Proceedings

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 hearsay rule has been the subject of widespread criticism over the years from academics, practitioners and the Bench.

3. The LRC recommended that the existing law of hearsay in criminal proceedings be reformed comprehensively and holistically according to a principled, logical and consistent system of rules and principles. After careful consideration of the views and recommendations of the LRC, the Government proposes 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.

4. Following the recommendations of the LRC, the Consultation Bill does not seek to abolish the common law exclusionary rule against

¹ The Department of Justice will soon commence consultation exercise in respect of the Consultation Bill. The Consultation Paper together with the Consultation Bill will then be uploaded to the website of the Department.

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

hearsay evidence, but to provide for a comprehensible 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, admission of such evidence would be based on a statutory discretionary power to admit hearsay evidence when it is both necessary and reliable.

Key Features of the Consultation Bill

Discretionary power to admit hearsay

5. The Consultation 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

6. 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 Consultation 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.

7. The Consultation 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

8. Under the Consultation Bill, the threshold reliability condition is only satisfied where the circumstances provide a reasonable assurance that the hearsay evidence is reliable. The Consultation 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

9. Under the Consultation 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 Consultation 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

10. Following the recommendation of the Report, hearsay statement in the Consultation 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

11. The Consultation 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.

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

Consultation

13. The Government would consult various stakeholders including the Judiciary, legal professional bodies, law enforcement agencies and other interested parties on the Consultation Bill in the upcoming months. The Government will further revise or refine the Consultation Bill in light of the comments received.

Way Forward

14. Subject to Members' views on the legislative proposal, we aim to finalise the Consultation Bill with a view to introducing it into the Legislative Council in early 2018.