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Ms Sophie LAU
Clerk to Bills Committee
Legislative Council
Legislative Council Complex
1 Legislative Council Road
Hong Kong

13 May 2020

BY EMAIL & BY POST

Dear Ms LAU,

Bills Committee on Evidence (Amendment) Bill 2018
Follow-up Actions arising from the Meeting on 25 January 2019

I refer to the fifth meeting of the Bills Committee held on 25 January 2019, where the Government was requested to take certain follow up actions. I now enclose the Government's responses in the Chinese and English languages to the list of follow-up actions arising from the discussion at the meeting on 25 January 2019 together with the annexes for the Bills Committee's consideration please.

2. I also enclose a copy of this department's response to The Law Society of Hong Kong's Submissions on the Evidence (Amendment) Bill 2018 of May 2020 for the Bills Committee's information.

Yours sincerely,

(Vernon LOH)
Assistant Solicitor General (Policy Affairs) (Ag)

Encls

cc : Mr Kenneth FOK
Director of Practitioners Affairs
The Law Society of Hong Kong

#507172 –v3

Bills Committee on Evidence (Amendment) Bill 2018
The Government's Responses to the list of follow-up actions arising from the discussion at the meeting on 25 January 2019

The Government provides the following responses to the follow-up actions arising from the discussion at the captioned meeting :

(a) <u>Consult the Hong Kong Bar Association and The Law Society of Hong Kong (if not already done) regarding the Government's proposed amendments to section 55O(1)(e) in clause 5 of the Bill, which will limit the scope of application of that provision to the defence only and report on the responses of the two professional bodies to members for reference</u>

On 24 January 2019, the Department of Justice wrote to both the Hong Kong Bar Association and The Law Society of Hong Kong (the "Law Society") to consult them regarding the Government's proposed amendments to section 55O(1)(e) in clause 5 of the Bill. The Hong Kong Bar Association informed the Department of Justice on 7 March 2019 that their Bar Council had considered the proposed amendments, and agreed with the Government's view on them. A copy of the Hong Kong Bar Association's letter dated 7 March 2019 is at **Annex A**.

The Law Society replied to the Department of Justice on 26 March 2019, a copy of which is at **Annex B**. The Law Society's comments on the Government's Committee Stage Amendments are at Appendix 2 of those submissions. On the basis that section 55O(1)(e) is applicable only to the defence, the Law Society agreed to the amendments. To the extent that the Law Society's reply also referred to their previous submission dated 18 July 2017 on the consultation draft of the Evidence (Amendment) Bill, the relevant points are already dealt with separately in "The Department of Justice (DoJ)'s Response to The Law Society of Hong Kong's Submissions on the Evidence (Amendment) Bill 2018" of May 2020 and supplied to the Law Society by way of a letter from the Department of Justice

dated 13 May 2020.

(b) <u>Give an elaboration as to under what circumstances would the new Part IVA in clause 5 of the Bill be useful in proceedings for, or in relation to, the surrender of a person to a place outside Hong Kong under the Fugitive Offenders Ordinance (Cap. 503); and identify the possible impact it may have on agreements for the surrender of fugitive offenders between the Hong Kong Special Administrative Region and other places</u>

Surrendering of fugitive offenders proceedings under the Fugitive Offenders Ordinance, Cap. 503 ("FOO") are generally held to determine if there is prima facie evidence for or restrictions on the surrender of persons to other jurisdictions to stand trials or serve sentences in respect of offences committed in those jurisdictions. Admissibility of evidence in surrender proceedings under Part 2 of the FOO, is governed by section 23 of FOO.

Pursuant to section 23 of the FOO, any document which is duly authenticated is admissible in evidence in proceedings held under the FOO. In accordance with the said provision, surrender proceedings are conducted primarily on the basis of documentary evidence taken overseas that is duly authenticated by the requesting jurisdiction by the signature of an officer and the official or public seal of the competent authority of that jurisdiction. Evidence relevant to the proof of the commission of an offence is usually in the form of statements of witnesses under oath or solemn declarations made overseas and duly authenticated by the requesting jurisdiction. Insofar as local evidence (such as evidence of the arrest of a fugitive in Hong Kong pursuant to the surrender request in question) is concerned, the new Part IVA in clause 5 of the Bill will be useful in the surrender proceedings by rendering admissible hearsay evidence where Divisions 2, 3, 4 or 6 applies.

Hong Kong's agreements for the surrender of fugitive offenders invariably contain a provision on authenticity of documents provided by the requesting jurisdiction in support of a surrender request. The

provision is the same as, or consistent with, the requirements of section 23 of FOO. The operation of section 23 of FOO is not affected by the new Part IVA in clause 5 of the Bill as section 55F(c) in clause 5 provides that hearsay evidence is admissible if it is admissible under any other enactment. Hence, the agreements will continue to operate according to their terms.

(c) **Confirm whether and, if so, how the proposed relaxation of the rule against hearsay by way of the Bill is expected to change the existing practice of obtaining evidence from witnesses in another jurisdiction by way of letter of request**

Insofar as obtaining hearsay evidence from witnesses in another jurisdiction is concerned, section 55O(1)(c) in clause 5 of the Bill provides that for the purposes of section 55M(2)(d), the condition of necessity is satisfied in respect of any hearsay evidence in proceedings if the declarant is outside Hong Kong and securing the declarant's attendance at the proceedings or making the declarant available for examination and cross-examination in another competent manner in the proceedings is not reasonably practicable. Section 55O(1) is aimed at implementing proposal 8 of the Core Scheme and recommendation 25 of the Report on Hearsay in Criminal Proceedings published by the Law Reform Commission of Hong Kong ("Hearsay Report"). As paragraph 9.47 of the Hearsay Report states, the declarant's presence outside of Hong Kong will not be enough in itself to satisfy the necessity condition in section 55O(1)(c). It will also be necessary to show that it was not reasonably practicable to secure his attendance at the proceedings, or to make him available for examination and cross-examination in another competent manner in the proceedings.

The words "another competent manner in the proceedings" are intended to be references to the existing laws which allow the giving of evidence in a manner other than by a witness physically present and testifying in court. Examples of "competent manner" include taking evidence from witnesses outside Hong Kong by live television link under Part IIIB of the Criminal Procedure Ordinance (Cap. 221) and obtaining evidence in other jurisdictions for use in criminal

proceedings in Hong Kong pursuant to letters of request under Part VIIIA of the Evidence Ordinance (Cap. 8).

In practice, this will mean that the party relying on section 55O(1)(c) will need to exercise reasonable diligence in either arranging the declarant's return to Hong Kong or for the giving of his testimony by other means, such as by way of letter of request. Therefore, the existing practice of obtaining evidence from witnesses in another jurisdiction by way of letter of request for use in criminal proceedings in Hong Kong will continue unless it is not reasonably practicable to make use of it as a means to obtain evidence from witnesses in another jurisdiction.

Department of Justice
May 2020

Encl

#482150 – v8

《2018 年證據(修訂)條例草案》委員會

政府因應 2019 年 1 月 25 日的會議
而須採取的跟進行動一覽表的回應

政府就題述會議提出的跟進行動回應如下：

(a) 就政府當局對條例草案第 5 條中第 550(1)(e)條提出的修訂，諮詢香港大律師公會及香港律師會(如有關諮詢尚未進行的話)，有關修訂旨在規限該條文只適用於辯方；並匯報該兩個專業團體的回應，供委員參考；

2019 年 1 月 24 日，律政司就政府對《條例草案》第 5 條中第 550(1)(e)條提出的擬議修正案以書面諮詢香港大律師公會和香港律師會("律師會")。香港大律師公會在 2019 年 3 月 7 日通知律政司，其下的執行委員會在研究擬議修正案後，同意政府在這方面的看法。香港大律師公會 2019 年 3 月 7 日來信的複本見附件 A。

律師會在 2019 年 3 月 26 日回覆律政司，複本見附件 B。律師會對政府的委員會審議階段修正案的意見載於該意見書的附錄 2。在第 550(1)(e)條只適用於辯方的基礎下，律師會同意有關修正案。至於律師會的回覆中亦提及他們之前在 2017 年 7 月 18 日就證據（修訂）條例諮詢草案的意見，政府已就有關論點分別在 2020 年 5 月"律政司就香港律師會對《2018 年證據（修訂）條例草案》意見的回應"中作出回應並以律政司 2020 年 5 月 13 日的信件提供給律師會。

(b) 闡釋條例草案第 5 條新增的第 IVA 部，會在哪些情況下，對根據《逃犯條例》(第 503 章)將某人移交到香港以外地方的法律程序或與此相關的法律程序產生效用；並指出這對香港特別行政區與其他地方簽訂的移交逃犯協定可能造成的影響

根據《逃犯條例》(第 503 章)進行的移交逃犯法律程序通常是為了裁定把某人移交其他司法管轄區就其在該地干犯的罪行受審或服刑是否有表面證據或是否受到限制。在根據

《逃犯條例》第 2 部提起的移交逃犯法律程序中，證據是否可獲接納受該條例第 23 條規管。

依據《逃犯條例》第 23 條，已妥為認證的任何文件均可在根據該條例提起的法律程序中獲接納為證據。按照上述條文，移交逃犯法律程序的進行主要依據在海外錄取並由提出要求的司法管轄區的官員簽署及當地主管當局蓋上官方或正式印鑑或公印妥為認證的文件證據。與證明犯罪有關的證據通常是證人在海外以宣誓或鄭重聲明的形式作出並經提出要求的司法管轄區妥為認證的供詞。就本地證據(例如依據相關移交要求在香港逮捕逃犯的證據)而言，《條例草案》第 5 條新增的第 IVA 部在第 2、3、4 或 6 分部適用的情況下使傳聞證據成為可獲接納，因而會對移交逃犯程序有用。

香港的移交逃犯協定都有條文規定提出要求的司法管轄區須提供經認證的文件以支持移交要求。有關條文與《逃犯條例》第 23 條的規定相同或相符。《逃犯條例》第 23 條的實施不受《條例草案》第 5 條新增的第 IVA 部影響，因為《條例草案》第 5 條下第 55F(c)條訂明，傳聞證據如根據任何其他成文法則可予接納，即可獲接納。因此，有關協定會繼續按其條款實施。

(c) 確認擬藉條例草案放寬豁除傳聞證據的規則一事預期會否改變現時以請求書的方式向另一司法管轄區的證人取證的做法，如會，改變的方式為何。

關於向在另一司法管轄區的證人取得傳聞證據，《條例草案》第 5 條中第 550(1)(c)條訂明，為施行第 55M(2)(d)條，在法律程序中的傳聞證據在以下情況符合必要性條件：若陳述者不在香港，而確使陳述者出席有關法律程序，或致使陳述者能夠在有關法律程序中以另一合乎規定的方式接受訊問及盤問，並非合理地切實可行。第 550(1) 條旨在落實香港法律改革委員會發表的《刑事法律程序中的傳聞證據報告書》(《傳聞證據報告書》)內的核心方案提議 8 和建議 25。正如《傳聞證據報告書》第 9.47 段所述，陳述者

不在香港並不足以符合第 550(1)(c)條的必要性條件，有關一方亦須證明確使陳述者出席有關法律程序，或致使陳述者能夠在有關法律程序中以另一合乎規定的方式接受訊問及盤問，均並非合理地切實可行。

"在有關法律程序中，以另一合乎規定的方式"的字眼旨在提述准許證人以親身出庭作供以外的方式提供證據的現行法律。"合乎規定的方式" 的例子包括根據《刑事訴訟程序條例》(第 221 章)第 IIIB 部，藉電視直播聯繫錄取在香港以外的證人的證據；以及依據《證據條例》(第 8 章)第 VIIIA 部的請求書在其他司法管轄區內取得證據供在香港的刑事法律程序中使用。

實際上，這表示倚據第 550(1)(c)條的一方，須為安排陳述者返回香港或以其他方式(例如請求書)作供而作出合理努力。因此，除非以請求書的方式向另一司法管轄區的證人取證並非合理地切實可行，否則現時以此方式向另一司法管轄區的證人取證以供在香港的刑事法律程序中使用的做法，將會繼續維持。

律政司
2020 年 5 月

#482507v7

Annex A

HONG KONG BAR ASSOCIATION

Secretariat: LG2 Floor, High Court, 38 Queensway, Hong Kong
DX-180053 Queensway 1 E-mail: info@hkba.org Website: www.hkba.org
Telephone: 2869 0210 Fax: 2869 0189

7 March 2019

Mr. Wesley Wong, S.C.
Office of the Solicitor-General
Department of Justice
5/F Main Wing, Justice Place
18 Lower Albert Road
Central, Hong Kong

BY POST &
BY FAX (3918 4019)

Dear Wesley

Re: Evidence (Amendment) Bill 2018

I refer to your letter dated 24 January 2019 concerning certain Committee Stage Amendments the Administration proposes to make in respect of the captioned Bill. I am glad to inform you that the Bar Council has considered the proposed amendments, and agrees with the Administration's views on them.

Thank you for your kind attention.

Philip Dykes, SC
Chairman

c.c. Mr. Edwin Choy, SC,
Chairman of Committee on Criminal Law & Procedure
Hong Kong Bar Association

PD/EC/ct

Annex B

THE LAW SOCIETY OF HONG KONG
香 港 律 師 會

Practitioners Affairs

3/F WING ON HOUSE · 71 DES VOEUX ROAD
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Our Ref : CLP/19/ 4484470
Your Ref : LP 5019/16C
Direct Line :

26 March 2019

Office of the Solicitor-General
Department of Justice
Legal Policy Division
5/F Main Wing, Justice Place
18 Lower Albert Road
Central, Hong Kong

BY FAX (3918 4019)
& BY POST

Received on 28.3.2019

To: Roland Ma, SGC
c.c. ASG/P Date 8/4/2019
DSG/P Sgd 4/4/2019

Attn: Mr. Wesley Wong, SC

Dear Wesley,

Evidence (Amendment) Bill 2018

In response to the Evidence (Amendment) Bill 2018, the Law Society offers its submission thereon.

Please find enclosed a copy of the above submission.

Thank you for your attention.

Yours sincerely,

Kenneth Fok
Director of Practitioners Affairs
The Law Society of Hong Kong

Encl.

c.c. The Honourable Mr. Cheung Kwok-Kwan
Chairman of the Bills Committee of the Legislative Council on
Evidence (Amendment) Bill 2018

THE LAW SOCIETY OF HONG KONG 香港律師會

EVIDENCE (AMENDMENT) BILL 2018

SUBMISSIONS

1. Before the Evidence (Amendment) Bill 2018 (the "2018 Bill") was gazetted in June 2018, the Law Society has on 18 July 2017 prepared and sent to the Department of Justice ("DOJ") a comprehensive submission on the DOJ's proposed reform on criminal hearsay evidence (the "Submission"). Our Submission made at that time was by reference to the predecessor to the 2018 Bill, viz. the Evidence (Amendment) Bill 2017 ("2017 Bill").

Submission to the 2017 Bill

2. In our above Submission, we have raised a number of concerns on the safeguards that need to be put into the legislation, as a matter of fairness to the accused. One of the main concerns we have raised was the deprivation of the rights of cross-examination and the potential risks arising therefrom upon admission of such hearsay evidence. We have in the Submission proposed a set of amendments to the 2017 Bill.

3. A copy of our Submission dated 18 July 2017 is on ***Appendix 1***.

4. The DOJ by its letter of 5 December 2018[1] responded to our Submission. Broadly speaking, the DOJ did not agree to most of our comments.

5. We wish to point out the following.

---

[1] See LegCo Paper LC Paper No. CB(4)310/18-19(01)

Question of admissibility be determined before trial to allow proper advice on plea

6. We maintain our views that the Defence should know in full the admissibility of hearsay evidence before tendering the pleas. In this regard, we do not agree to the DOJ's arguments that

   (i) *"to insist upon being also given the notice of hearsay before a plea is tendered would be to require the prosecution to inform the defendant the precise way in which it will prove its case against him/her."*[2] ;

   (ii) *"[the] admission of hearsay evidence is of no difference to the admission of other disputed evidence, e.g. a confession."*[3]

7. To the contrary it is only fair for the Defence to know in advance the case of the Prosecution before the accused is to enter his or her plea. This is particularly important, given that the Prosecution might not have made full and frank disclosure to the Defence and/or that the discovery was not made in good time.

One-Third Discount on Sentence

8. Uncertainty on admissibility of hearsay evidence adds layers of concerns to the Defence in particular when it is to consider sentencing discount that is available only for an early plea of guilty. This is the case even though discovery (if any) has been made by the Prosecution on the hearsay evidence in question. The concern is not illusory. Consider this example: an overseas witness has given a statement unfavourable to the Defence. Even if the Defence has been made aware of the statement (by inclusion of that statement into the bundle of unused materials or otherwise), the Defence could not know whether the evidence would be accepted by the Court. The accused would have tremendous difficulty to tender his or her plea. Yet, the one-third discount on sentence would not be available if he chooses to wait and see. The accused would be caught into a dilemma and given the above pressure, he would be very much tempted to plead guilty, in the hope of securing the sentencing discount.

[2] See DOJ's response on Annex A to the DOJ's letter of 5 December 2018, page 5 of the table.
[3] See DOJ's response on Annex A to the DOJ's letter of 5 December 2018, page 2 of the table.

9. The proposed hearsay evidence regime in the circumstances would be turned into an inducement trap for guilty pleas. This cannot be correct.

10. For all intent and purpose, usually the one-third discount is not based on remorse. The purpose is utilitarian.

11. In any event, we query whether there could be any *genuine* disadvantages or shortcomings caused to the Prosecution or to the Court, if the one-third discount is reserved until the question of admissibility of the evidence be determined. In any event, the 14 days period of filing an opposition notice (section 55K(2), 2018 Bill) would put huge pressure upon the Defence. The situation is not fair.

Condition of necessity: non-availability

12. One of the conditions of necessity to be satisfied before a piece of hearsay evidence could be admitted under section 55M(2) is section 55O(1)(c)), *i.e that the declarant is outside Hong Kong and neither of the following is reasonably practicable:*

    (i) securing the declarant's attendance at the proceedings;

    (ii) making the declarant available for examination and cross-examination in another competent manner in the proceedings.

13. On this, the DOJ's explained that [4] *"[the] condition of necessity under section 55O(1)(c) does not depend on the intention of the declarant. The criterion is whether or not it is reasonably practicable to secure the declarant's attendance or to make the declarant available for examination and cross-examination in a competent manner. If the declarant is deliberately hiding himself in circumstances which have implication on his truthfulness, this may be a factor to be taken into account by the court pursuant to section 55P(2)(c) in determining whether condition of threshold reliability is satisfied".*

14. We take note but do not agree to the above. We maintain the view that the intent of a declarant *not* to give evidence should be taken into consideration, as in the case of a declarant intentionally hiding himself. In point of fact, we further say that unwillingness to give evidence should itself already be the bar to the admissibility of the evidence itself. We invite the DOJ to

[4] See DOJ's response on Annex A to the DOJ's letter of 5 December 2018, page 8 of the table

revisit our Submission in 2017 which we have suggested to embrace the notion of "*genuine non-availability of the declarant*"[5].

15. We also add that Section 55P(2), as currently drafted, is not sufficiently comprehensive. By reference to threshold reliability and our Submission in 2017, we suggest an amendment to section 55P (and also section 55O) to the effect that, unless otherwise stated, the standard of proof remains as that beyond reasonable doubt. This echoes the concerns on the inherent danger of admitting hearsay evidence.

Deprivation of Cross-examination

16. We note section 55Q(5)(e) of the 2018 Bill now includes a reference to the lack of cross-examination:

> *"In considering whether it would be unsafe to convict the accused of the offence, the court must have regard to—*
>
> ...
>
> *(e) any prejudice to the accused which may be caused by the admission of the hearsay evidence, including the inability to cross-examine the declarant.*

17. We note that the DOJ has not taken on board our suggestion to refer to the circumstances in section 55P [6].

18. We ask to amend the above to state "*including, but not limited to, the inability to cross-examine the declarant.*"

Committee Stage Amendments

19. As for the various Committee Stage Amendments[7] now moved by the DOJ, our comments are on ***Appendix 2***.

Conclusion

20. In the case of *HKSAR v Lau Shing Chung Simon* FACC 6/2014, the Court of Final Appeal explained the rationale for the rule against hearsay:

[5] See para 15 – 21 of the LSHK submission of 18 July 2017
[6] See para 34-35 of the LSHK submission of 18 July 2017
[7] See https://www.legco.gov.hk/yr17-18/english/bc/bc105/papers/bc10520190125cb4-428-1-e.pdf

"28. … The rationale [against the admission of hearsay] is a concern for the probative value of out-of-court statements. Sometimes the circumstances in which an out-of-court declaration is made are deemed to confer sufficient inherent reliability as to render the declaration admissible to prove the truth of what is declared and it is upon that reasoning that the common law and statutory exceptions are based. In other circumstances, however, *the probative value of evidence of a fact in issue is said to be materially undermined where it cannot be tested by cross-examination and it is the inability to cross-examine the declarant to test the accuracy of his out-of-court statement that lies at the heart of the general rule.*

29. The reason for the rule was stated by Lord Normand in *Teper v R* [[1952] 2 TLR 162]:

'It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination and the light, which his demeanour would throw on his testimony, is lost.'"

[Emphasis supplied]

21. The above serves as a relevant reminder of the core issue that should carefully be considered in the legislative exercise.

The Law Society of Hong Kong
26 March 2019

APPENDIX 1

THE LAW SOCIETY OF HONG KONG 香港律師會

CONSULTATION ON EVIDENCE (AMENDMENT) BILL 2017

SUBMISSIONS

EXECUTIVE SUMMARY

a. The Law Society agrees that the law on hearsay evidence in criminal trials should be reviewed, with the aim of clarifying uncertainties and improving criminal justice. The review is welcomed and is timely.

b. However, it is *fundamentally* important that in the course of the above review, necessary checks and balance should be put in place for protection of the constitutional rights of the accused in criminal trials.

c. The Law Society has serious reservations as to whether safeguards for the above protection, as set out and explained in the Consultation Paper and the Consultation Report published by the Law Reform Commission of Hong Kong respectively in 2005 and 2009, have been transposed to the Evidence (Amendment) Bill 2017. Absent these safeguards, there is a potential for abuse.

d. We ask that those safeguards be put back into the amendment bill. Significantly, the right to cross-examine a witness (or the deprivation of such right) should be one of the factors the Court needs to take into account, whilst it is to consider admissibility of hearsay evidence.

e. We also ask that the latest criminal practice on sentencing (set out in the Court of Appeal decision of *HKSAR v Ngo Van Nam* CACC 418/2014), and case management of criminal trials (in Practice Direction 9.3), be taken into consideration in this review.

GENERAL OBSERVATIONS

1. The Law Society has reviewed the consultation paper from the Department of Justice ("DoJ") on the Evidence (Amendment) Bill 2017, released in April 2017 (the "Consultation Paper").

2. The Consultation Paper follows a 2005 consultation paper ("2005 Paper")[1] and a 2009 consultation report ("2009 Report")[2] both by the Law Reform Commission of Hong Kong ("LRC"). We have on the earlier occasions made submissions to the 2005 Paper and 2009 Report.

3. The concerns we have underscored in our above submissions are still valid. We reiterate any changes to the regime on hearsay evidence should be cautious, and that the legislative amendments now sought should not emasculate or prejudice the rights of the accused.

4. In this response, we shall focus our comments on the single question as to whether the draft legislation has matched the stated intention of the proposals made in and the safeguards set out in the 2005 Paper and/or the 2009 Report. We will propose amendments to some provisions in Division 4 of the amendment bill (summarized in Appendix 2). Towards the end of this submission, we will provide comments on the draft legislation, in the context of the latest criminal practice.

5. Our concerns are **bold-printed** in the following paragraphs. References to the 2005 Paper and the 2009 Report, where relevant, are set out in order to assist reading.

QUESTION: DOES THE DRAFT LEGISLATION MEET THE STATED INTENTION OF THE LRC?

6. The 2005 Paper and the 2009 Report are unambiguous on the prejudicial effect of hearsay evidence. It sets out the greatest injustice of the hearsay rule – it could potentially deny defendants justice (e.g. para 4.20 of the 2009

[1] http://www.hkreform.gov.hk/en/docs/crimhearsaye.pdf
[2] http://www.hkreform.gov.hk/en/docs/rcrimhearsay_e.pdf

Report). Examples of injustice to defendants appear at e.g. para 4.17 and the examples at para 4.29 of the 2009 Report.

7. Notably, it is suggested that the hearsay rule could be a denial of a right to a fair trial under the Basic Law (see para 4.24 of the 2009 Report).

8. Notwithstanding the red flags raised in the 2009 Report, the draft legislation as it is now proposed does not fulfill the reassuring nature of the views expressed by the LRC in the 2009 Report. For one thing, the LRC was unequivocally clear that mechanisms should be in place to guard against admission of evidence, the reliability of which cannot be tested

9. Does the reliability threshold, as now appearing in the draft legislation, adequately ensure that reliability will be established (particularly after the removal from the threshold consideration on the reliability of the absence of cross examination)? **We have grave doubts. We ask that, among other things, the necessary threshold by reference to the right to cross-examine a witness be included in the legislation.**

Direction to acquit

10. It is acknowledged in the 2009 Report that hearsay should not progress to the extent that a defendant can be convicted primarily on hearsay evidence alone. A "paper trial" is not acceptable (see para 9.66 of the 2009 Report).

11. A sanction is now provided in the draft legislation - section 55Q states that:

> **55Q. Court must direct acquittal if it is unsafe to convict**
> (1) If—
> (a) the case against an accused is based wholly or partly on hearsay evidence admitted with the leave of the court granted under section 55M; and
> (b) the court considers that it would be unsafe to convict the accused,
>
> the court must direct the acquittal of the accused.

12. The above direction to acquit is welcome in principle, but we ask that the legislation should contain a very clear warning of the danger of admitting evidence, where the preponderance or a very significant element of evidence is hearsay. In this regard, **we suggest the following, as underlined, be added at the beginning of section 55Q(1)(b)**: "bearing in mind the dangers of miscarriage of justice by substantial reliance on hearsay evidence, the court considers that it would be unsafe to convict the accused ..."

13. The LRC believed "general wording" may not assist (see para 9.72 of the 2009 Report). However, general guidance of that nature does appear, helpfully, in the UK legislation (see para 5.32 of the 2009 Report – discretion to exclude "in the interests of justice", para 43 below and section 77 of the Evidence Ordinance).

14. A further suggestion is **to add to 55Q(4), a new subsection (f) on the Condition of threshold reliability:**

> **55Q. Court must direct acquittal if it is unsafe to convict**
>
> ...
>
> (4) In considering whether it would be unsafe to convict the accused, the court must take into account—
>
> (a) the nature of the proceedings, including whether the proceedings are before a jury or not;
> (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 which may be caused; and
> (f) the circumstances considered in section 55P.

Genuine Unavailability

15. We have considered the notion of "*genuine unavailability*" under the "*Conditions of Necessity*" (section 55O(1)(a) – (e)).

16. Section 55O as currently drafted provides the following.

> **55O. Condition of necessity**
>
> (1) For the purposes of section 55M(2)(d) [i.e. court granting leave to admit hearsay evidence], the condition of necessity is satisfied in respect of any hearsay evidence only if—
>
> (a) the declarant is dead;
>
> (b) the declarant is unfit to be a witness, either in person or in any other competent manner, in the proceedings concerned because of the age or physical or mental condition of the declarant;
>
> (c) the declarant is outside Hong Kong, and—
>
> (i) it is not reasonably practicable to secure the declarant's attendance at the proceedings; and
>
> (ii) it is not reasonably practicable for the party concerned to make the declarant available for examination and cross-examination in any other competent manner in the proceedings;
>
> (d) the declarant cannot be found although all reasonable steps have been taken to find the declarant; or
>
> (e) the declarant refuses to give the evidence in the proceedings in circumstances where the declarant would be entitled to refuse on the ground of self-incrimination.

17. The 2009 Report stated that the necessity criteria would not be satisfied unless a declarant is genuinely unable and not merely unwilling to provide testimony (see para 7.8 and Recommendation 25 of the 2005 Paper, para 7.9 and Recommendation 25 of the 2009 Report). Furthermore, the condition of necessity "should not turn on the whim or discretion of the declarant" (see proposals 7(c), 9, & 10 at paras 9.35-9.37 of the 2005 Paper, and para 9.46 of the 2009 Report). Compare the above to the position in Scotland - the above concept is expressed as "truly insurmountable difficulties" (see pp 75-76 of the 2009 Report).

18. The LRC is clear that unwillingness on the part of a declarant to attend to testify does *not* equate to "unavailability" (see para 7.8 of the 2005 Paper and para 7.9 of the 2009 Report).

19. Unfortunately, the above has not been rendered entirely apparent in the draft legislation. **We ask that this notion of genuine unavailability (and not**

mere unwillingness) be more explicitly set out in the legislation (see p 81 of the 2005 Paper and p 87 of the 2009 Report), e.g. by amending 55O(1) "(c) the declarant is outside Hong Kong, genuinely unable to attend, and ...".

20. Conditions (1)(c) (or Condition (1)(d)) in Section 55O could arise when a declarant hides himself, (as in the case where a witness has decided to hide in China). He is unwilling, not unable, to give evidence. The applicant cannot find him, but could not show he was "unable" to attend the trial.

21. Additionally, section 55O(1)(c) embraces the condition "*reasonably practicable*". The wording does not accommodate the fact that many defendants would be unable to afford the costs of the exercise of taking evidence overseas. **People with ordinary means, legally-aided or not, would not be in any easy position to secure overseas declarants/witnesses.**

Threshold Reliability

22. We turn our attention to the provision on threshold reliability, which is provided for under section 55P.

55P. Condition of threshold reliability

(1) For the purposes of section 55M(2)(e) [i.e. court granting leave to admit hearsay evidence], the condition of threshold reliability is satisfied in respect of any hearsay evidence only if the circumstances relating to the evidence provide a reasonable assurance that the evidence is reliable.

(2) In deciding whether the condition of threshold reliability is satisfied in respect of any hearsay evidence, the court must have regard to all the circumstances relevant to the apparent reliability of the evidence, including—

(a) the nature and content of the statement adduced as the evidence;
(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.

We ask the question: has the high threshold reliability in the 2005 Paper and the 2009 Report been conveyed into the draft legislation under the above-quoted section?

23. We compare the above draft with the 2009 report. The views as set out in Recommendation 26 of the 2005 Paper and 2009 Report are more reassuring in tone – the threshold reliability "condition should "only be satisfied where ...". In the legislation (55P(1), *supra*), the emphasis has been shifted and been weakened because the word "only" in the draft legislation now appears later in the sentence. We ask that the word "only" be placed as the LRC had it at p138 i.e. 55P(1) *"the condition of threshold reliability is only satisfied in respect of any hearsay evidence, if ....."*.

24. Reassurance was offered of the "strength" of the "threshold reliability" test. It is to be "stronger than prima facie". See (with emphasis supplied)

> 9.55 ... "threshold reliability" signified a stronger test and when combined with statutory indicia as to its meaning, it would be likely to provide a better safeguard against too loose an approach to admissibility. In other words, to admit evidence merely because on its face it appeared reliable was considered not enough.

(para 9.55 of the 2009 Report; see also para 9.44 of the 2005 Paper)

This reference to and a reminder of this high threshold reliability are absent from the draft legislation. If there is no guidance in the legislation on the "strength" of the "threshold reliability" test for the trial judges, we are concerned that trial judges may approach "reliability" merely on the basis of a prima facie test, and not as a threshold.

25. **We suggest to add a new section 55P(3)**

> "(3) 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."

26. A better alternative could be to **apply 55O(4) to section 55P**.

55O. Condition of necessity

...

(4) The standard of proof required to prove that the condition of necessity is satisfied is—

(a) if the applicant is the prosecution—beyond reasonable doubt; or

(b) if the applicant is the accused—on the balance of probabilities.

In other words, the same standard of proof should apply to the assurance of reliability (beyond reasonable doubt standard for the prosecution, balance of probability standard for defence).

In this regard see para 8.17 and Recommendation 5 of the 2009 Report, "...there are good reasons to require a higher standard of proof when it is the prosecution which intends to use the new proposal for admitting hearsay evidence".

Deprivation of Cross-examination

27. Section 55P, which has been quoted in the above discussion on threshold reliability, is recapped in the following:

55P. Condition of threshold reliability

(1) For the purposes of section 55M(2)(e), the condition of threshold reliability is satisfied in respect of any hearsay evidence only if the circumstances relating to the evidence provide a reasonable assurance that the evidence is reliable.

(2) In deciding whether the condition of threshold reliability is satisfied in respect of any hearsay evidence, the court must have regard to all the circumstances relevant to the apparent reliability of the evidence, including—

(a) the nature and content of the statement adduced as the evidence;

(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.

28. Previously, the LRC proposed that the matters which the Court would have regard to in the threshold of reliability, included the "absence of the cross-examination of the declarant" (see proposal 12(f) at p 110 and para 12.32 of the 2005 Paper:

> 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;
> (e) whether the statement is supported by other admissible evidence; and
> (f) the absence of cross-examination of the declarant at trial.

We note " ... there was a general feeling that it would be more appropriate to make reference to the absence of cross examination a mandatory factor to consider in assessing the threshold reliability ..." (see para 9.50 of the 2005 Paper). This however has not been included in the draft legislation, having been dropped in the 2009 Report (see Recommendations 26 and 27). **The absence of this important factor in the draft legislation causes concerns.**

29. We have revisited the relevant consideration for the Proposal 12(f) in the 2005 Paper –that the Court should take into account the absence of cross examination of the declarant (at paras 9.50-9.51 of the 2005 Paper). Reasons why the reminder to the Judge is very important was set out at para 9.51 of the same paper.

30. It is the opinion of the LRC that "cross examination is a factor that a Court would necessarily consider when the threshold of reliability is assessed. And, "hearsay is inherently less reliable ... in the absence of cross examination" (see para 9.51 of the 2005 Paper). Note particularly – "The last factor in proposal 12 [in the 2005 Paper] reminds the Judge that in some circumstance cross examination of the hearsay statement will be of great importance in testing the statement". **We consider that there should be such a reminder.**

31. By itself, the absence of cross examination may mean there is "insufficient assurance" of reliability. The LRC quotes and approves a New Zealand decision that the Court "must" make an assessment of likely impact of cross examination. The Court must ask itself whether, in the particular case, cross examination of the maker of the statement might make a real difference (see para 9.51 of the 2005 Paper).

That quote disappeared in the 2009 Report which then removes all of the above very persuasive (and in our views correct) statements. Such a "test" is obviously not foreseen as a difficulty by the New Zealand Court.

32. Further, when we revisit para 11.30 of the 2005 Paper, we note the paragraph makes it plain that the absence of cross examination is a core factor which can be taken into account as inhibiting "reliability". That is unarguable. For example in Scotland's LRC Report it was described as "The principal disadvantage of hearsay..." (see para 5.85 of the 2009 Report).

33. The following excerpts of a Court of Final Appeal judgment in *HKSAR v Lau Shing Chung Simon* [2015] HKCU 291 singularly underscores the importance of cross-examination in the consideration of the matter (with emphasis supplied).

> "[28] The reach of the rule [against hearsay testimony] may more readily be understood if the rationale for it were better appreciated. The rationale is a concern for the probative value of out-of-court statements. Sometimes the circumstances in which an out-of-court declaration is made are deemed to confer sufficient inherent reliability as to render the declaration admissible to prove the truth of what is declared and it is upon that reasoning that the common law and statutory exceptions are based. In other circumstances, however, the probative value of evidence of a fact in issue is said to be materially undermined where it cannot not tested by cross-examination and it is the inability to cross-examine the declarant to test the accuracy of his out-of-court statement that lies at the heart of the general rule."

34. The rationale of why cross-examination is now said to be not needed is set out at para 9.61 et seq of the 2009 Report. This is not persuasive. It is also an extraordinary change of position from the 2005 Paper (see para 9.63). We surmise that this is because the factor is not listed in some other jurisdictions.

However it is pertinent to bear in mind the New Zealand view cited above and notably, our model is based on the New Zealand model. The principle justifications are that for 55P, the proposal in 12(f) in the 2005 Paper was not sui generis with 12(a) – (e) therein; that it may become too big a factor in Judge's minds and lead to excessive exclusion; that the other tests and particularly the power under 55Q to dismiss are sufficient balance.

35. With all due respect, the reasons offered in the above are thin. It is indeed paradoxical to suggest its removal, when "it is the opinion of the [LRC] sub-committee that the absence of cross-examination is a factor that a court would necessarily consider when the threshold reliability of a hearsay statement is assessed...The last factor in proposal 12 reminds the judge that in some circumstances cross-examination of the hearsay statement will be of great importance in testing the statement...Although not expressly stated in proposal 12(f), [LRC sub-committee was] satisfied that it is implicit in the present formulation that the court must consider whether the absence of cross-examination was likely to make a difference in the particular case." (para 9.51, 2005 paper)

36. We notice the following paragraphs of the 2009 Report:

> 9.61 After lengthy deliberation, and notwithstanding the contrary view of the Bar Association, the majority of the sub-committee agreed to delete from the list of factors put forward in its consultation paper "the absence of cross-examination of the declarant at trial." The Bar Association was of the view that:
>
> > "a far greater stress needs to be placed on the ability of an accused person to cross-examine. It is a constitutional right and a critical incident of the right to a fair trial. Accordingly, it should not be relegated to a mere factor to be considered along with everything else."
>
> In contrast, a number of those who responded to the consultation paper argued that the absence of cross-examination is a matter which is relevant to the weight to be given to the evidence, rather than its admissibility. In Mr Justice Lunn's view, if the purpose of proposal 12 was to establish threshold reliability admissibility only, then proposal 12(f)

(the absence of cross-examination) did "not sit well with (a)-(d), which are matters directly so relevant." The absence of cross-examination, he went on, "seems to me ... a matter relevant to the weight to be given to the evidence but not to its admissibility."

37. There is an answer to the Judge Lunn's above view (i.e. it goes to weight, not reliability and it should be shifted to the "later" stage). The threshold reliability and necessity tests are, and were always said to be intended to be, a combined package for hearsay admissibility. The argument that it goes to weight, not admissibility, ignores the rationale of the necessity and reliability safeguards, the purpose of which is to transcend this conventional weight issue, in a new "safeguard" of a layered scheme for admissibility. The factors bearing on reliability (and necessity and other requirements) are assessed before admission of the evidence. If it is admitted after reliability test (including all relevant factors, of which cross examination is a most potent issue) then weight is considered at a later stage.

"Reliability" comes first. The only issue is whether the cross examination point goes to reliability? In 2005 there was no doubt about that at all.

38. We note another "justification" in removing cross-examination (para 9.62 of the 2009 Report). It is suggested (by one academic correspondent) that it may increase the likelihood of inconsistent decisions between Judges. In a scheme where there is a discretion for Judges over the application of many factors, there is already possibilities for inconsistent decisions (see also, for example, the English LRC recognition of it at para 5.53 of the 2009 Report). At any rate, the five remaining factors may be applied differently by Judges. The less guidance on the most significant touchstones, the more this will happen. Even then, however, that argument (i.e. Judges may apply it differently) is not a reason for excluding the consideration of cross examination. Absence of cross examination in some cases will be an indication of unreliability. After all, the central argument should be reliability, and not inconsistencies of decision which this argument is premised.

39. The other suggestion to take away cross-examination as a factor, that Judges may have to "guess" over cross examination, is without regard to the practicality of the situation. There will be situations where lawyers for a defendant will be able to point to material that could be deployed in cross

examination, and its possible effect. That is less "guessing" than is involved in other factors which are retained. Without any disrespect, the above views may be mistaken and should be removed from the consideration of the current review of the hearsay evidence.

40. We notice that the LRC have added factor (e) (now section 55P(2)(e), recapped in the following:

> **55P. Condition of threshold reliability**
>
> ...
>
> (2) In deciding whether the condition of threshold reliability is satisfied in respect of any hearsay evidence, the court must have regard to all the circumstances relevant to the apparent reliability of the evidence, including—
>
> ...
>
> (e) whether the statement is supported by other admissible evidence.

The above does not appear in the New Zealand legislation (see paras 9.57-9.59 of the 2009 Report) (the presence of supporting evidence). The logic underlining the above is circular, with such evidence and hearsay being used to bolster each other. In this context the absence of a cross examination factor may be even more important for balance. The material for cross examination could in some cases directly be set against the "supporting evidence" (and see paragraphs under "Human Rights Implications" below).

<u>"All of the circumstances" – only the factors listed or others?</u>

41. There is an oddity in section 55P(2) (supra). It says that the phrase "the Court should have regard to all circumstances ... <u>including</u>" We note para 9.52 of the 2005 Paper and para 9.64 of the 2009 Report that the word was not intended to add to, or subtract from the enumerated factors.

It is not easy to follow the logic here. If the DoJ intends not to include absence of cross-examination as a factor, should it use the word "meaning", instead of "including"? Note however para 9.42 of the 2005 Paper and para 9.53 of the 2009 Report.

> ... Under proposal 12, the court is provided with further guidance on how to determine this criterion. The court must have "*regard to all circumstances relevant to the statement's apparent reliability*", including five distinct factors that relate to the circumstances surrounding the making of the statement and the presence of any admissible supporting evidence.

(Compare this to, for instance, the Matrimonial Proceedings and Property Ordinance (Cap.192, Law of Hong Kong), where the use of the word "including" directs the Court to consider all relevant matters including, but not limited to, those listed in the section (e.g. a prenuptial agreement) (section 7)).

Should the absence of cross-examination be allowed to be taken into account? We consider the meaning ascribed to "including" now used in section 55P(2) is not clear.

42. We take note that at para 9.79 of the 2005 Paper and para 9.96 of the 2009 Report where the relative importance of hearsay evidence is broached:

> 9.96 ... it is the requirement in proposal 15(b)(iv) that the judge must consider the relative importance of the hearsay evidence to the case against the accused ... The greater the importance of the hearsay evidence, the greater may be the need for the accused to have the opportunity to challenge that evidence by cross-examination.

43. We note with uneasiness that there is no reference in the draft legislation to address the relative importance of hearsay evidence to be admitted or be challenged. **We ask that the deprivation of cross examination should be borne in mind in exercising the power now set out in section 55Q(4),** recapped as follows.

> **55Q. Court must direct acquittal if it is unsafe to convict**
>
> ...
>
> (4) In considering whether it would be unsafe to convict the accused, the court must take into account—
>
> (a) the nature of the proceedings, including whether the proceedings are before a jury or not;
> (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 which may be caused.

44. To remove lingering doubts, **we suggest section 55Q(4)(e) be amended by adding towards the end** "... and inability to cross examine".

45. Additionally, **we ask to put back the previous Proposal 12(f) on threshold reliability condition in the 2005 Paper to become section 55P(2)(f) :** "the absence of cross-examination of the declarant at trial."

46. **Alternatively, we ask to insert at** 55P(2) "having regard to the absence of cross examination and all of the circumstances...".

47. In the further alternative, **we suggest reference be made to the New Zealand legislation,** where the words "the Judge must take into account the right of the defendant to offer an effective defence" (see LRC 2009 at page 73, para 5.81), be included at 55P(2)(f), or at 55Q(4).

48. By way of further reference, the DoJ could have adopted the formulation already in place for depositions in the Evidence Ordinance (Cap 8, Law of Hong Kong) (See Section 77F(1)(c)(ii) "no unfairness is likely to occur in those criminal proceedings consequent upon the deposition and that document being admitted in evidence..." which is coupled with a factor in (d)(ii) – "whether the deponent was cross examined before such Court or tribunal ...".

Human Rights Implications

49. The LRC noted European Court of Human Rights cases at para 9.74 and in Chapter 11, both of the 2009 Report. The LRC considered that although hearsay evidence preventing cross examination could breach guarantees provided by the Bill of Rights (para 11.3 of the 2009 Report and Article 11(2)(e) of the Hong Kong Bill of Rights in particular), that would be cured under the Core Scheme because the Hong Kong Core Scheme allows as part of the reliability test, supporting evidence to be considered (para 9.76 of the 2009 Report). We do not agree. By excluding cross examination from the

draft legislation, it means that materials that would otherwise be available in cross examination, which could damage the reliability of the hearsay, would not be taken into account in the reliability tests. That is not helped by evidence supporting the hearsay; it is a contrary position.

50. It is correct that there is an ultimate power to acquit (para 9.77 of the 2009 Report). However, as noted in the above, the draft legislation (section 55Q) which the DoJ now proposes does not include absence of cross examination as one of factors the Court is to consider to direct acquittal. If it is intended by the DoJ that the Judge's direction to an acquittal is a counterbalancing factor (e.g. para 11.30 of the 2009 Report), then reasons for the exercise of this discretion should specifically include an absence of cross examination and that should be spelled out given its acknowledged importance.

51. At para 11.30 of the 2009 Report, the LRC argued to suggest the validity of the "reliability" test. In our view, that test is not helpful at all if the possible effect of cross examination on the facts of a case in which it is a material factor has not been taken into account before its admission. The DoJ whilst reviewing the regime should take note of that.

52. **We also notice that some principles enunciated in the LRC report have not been addressed or taken on board in the draft legislation.** E.g. at para 11.14 of the 2009 Report, the Chief Justice was noted to say that "A fundamental feature of a fair trial is the right to cross examine a witness". It was also mentioned at para 11.16 of the 2009 Report, a trial must be "fundamentally fair".

53. Yet, at para 11.18 of the 2009 Report, we note that

> " Lord Steyn adopted the following "proportionality test" in *Regina v A (No 2)*:
>
> "In determining whether a limitation is arbitrary or excessive a court should ask itself:
>
> whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'

The critical matter is the third criterion."

Given the fundamental importance of the right to cross examine, we do not consider that a simple reference to it could be out of place. It is a right which is unnecessarily impaired, by not mentioning it, when to do so in the right way is not only unobjectionable, but acknowledged in the 2005 Paper as fundamentally necessary.

54. We note from e.g. para 11.33 of the 2009 Report that the LRC assumed and must rely on the hope that directions will be given concerning the absence of cross examination. But that "wish list" for directions has not been adopted by the DoJ in the draft legislation. There is no assistance in overcoming the Human Rights objections to this law, particularly given the vagaries of ungoverned and unguided directions.

55. In our view the draft legislation as it is leaves the provisions open to challenge. **We suggest that the above could be addressed by among others incorporating references to cross examination in the ways proposed in the above.**

CRIMINAL PRACTICE

56. We note the draft legislation prescribes procedures for admission of hearsay evidence.

> **55I. Hearsay evidence is admissible if other parties do not oppose**
> Hearsay evidence is admissible if —
> (a) the party who intends to adduce the evidence in the proceedings concerned has given a hearsay evidence notice stating the party's intention to adduce the evidence—
> ...
> (iii) within 28 days after the day on which the date for the hearing in which the evidence is intended to be adduced is fixed; and
> (b) no party gives an opposition notice under section 55K within 14 days after the day on which the hearsay evidence notice is given under paragraph (a).

57. The time frame envisaged in the above is stringent, and imposes pressure upon the defence.

58. We have revisited paras 4.7(5) and 4.42-4.44 of the 2009 Report (hearsay admissibility must be resolved before advice on plea can be given) - any questions of admissibility should be determined well prior to trial to allow proper advice on plea.

59. Where hearsay evidence is significant, its admissibility will be relevant to advice on plea. Yet, following Court of Appeal decision of *HKSAR v Ngo Van Nam* CACC 418/2014 (2 September 2016), a defendant would lose his usual 1/3 discount for a guilty plea if his guilty plea is tendered only late in the proceedings. The timing of notices in the draft legislation does not cater for the new practice.

60. The notice of hearsay is to be given within 28 days of fixing date for trial. Plea will have been taken, before the intention to rely on hearsay evidence is notified. Would this be dealt with by a sentencing Judge making fair allowance? (i.e. **the 1/3 would remain available until admissibility is determined in the event of a plea change).**

61. On the other hand, **the proposed legislation apparently does not mesh with the new Practice Direction 9.3.** For example para 5.1.3 of the said Practice Direction – the inclusion of hearsay evidence in a bundle may require investigation, provision of and perusal of unused material relating to the issue etc. So for PD 5.1.3(2) (Appendix 1), 14 days, could in some cases be insufficient.

PROPOSED AMENDMENTS

62. We summarize our above proposed amendments to some provision sin Division 4 of the amendment bill on Appendix 2.

CONCLUSION

63. We are aware of the case of Bridge of Rehabilitation Company (康橋之家)[3] which gave rise to the discussion at the Panel of Administration of Justice and Legal Service on 27 March 2017[4] on, inter alia, a review of the hearsay regime. The cases involved mentally-challenged witnesses who, for reason of their mental faculty, are unfit and/or incompetent to give evidence.

64. We do not comment on particular case(s). However, as a matter of principle, although we welcome necessary legislative amendments to help clarify and improve evidential and procedural rules in criminal trials, we ask that the requisite legal analysis of this complicated matter should not in any event be displaced by sentiments arising in criminal cases such as the above-quoted. Under no circumstances should the rights of the defence, entrenched both constitutionally and as a matter of necessary procedures, be prejudiced by hurrying reforms in hearsay.

65. We conclude by citing the following excerpts of the Court of Final Appeal judgment in *Oei Hengky Wiryo v HKSAR* [2007] HKCU 245

> [36] ... [the hearsay rule] is a fundamental common law rule, one of whose objects is to ensure that only reliable evidence, tested by cross-examination, is put before the tribunal of fact..."

THE LAW SOCIETY OF HONG KONG

18 JULY 2017

[3] According to a news report the DoJ was condemned by concern groups for dropping charges against a former superintendent of a home for the mentally disabled, for allegedly sexually assaulting a woman under his care, because the woman was declared unfit to testify (SCMP 17 October 2016)

[4] See LegCo Paper No. CB(4)718/16-17(08) at http://www.legco.gov.hk/yr16-17/english/panels/ajls/papers/ajls20170327cb4-718-8-e.pdf

APPENDIX 1

EXTRACT FROM PRACTICE DIRECTION 9.3

Part 5 – Procedure for the Fixture List

5.1 Listing and Preparation before the Case Management Hearing

5.1.1 Once committal is ordered, the parties should start actively preparing the case so as to assist the court in giving appropriate case management directions and procedural timetable at the Case Management Hearing.

5.1.2 Without prejudice to §5.1.1 above, the prosecution should ensure that all matters which may affect the conduct of the case are attended to without delay.

5.1.3 Likewise, the legal representative of the defendant should take instructions from the defendant once committal is ordered and in any event must do so within 14 days after the service of the Paginated Committal Bundle. More specifically, instructions should be taken from the defendant about his plea :

(1) If he is going to change his plea to a guilty plea, the defendant's legal representative should forthwith take the steps as set out in §§3.2.1 and 3.2.2. Upon receiving the Request for a Plea and Sentence Hearing, the court will fix a Plea and Sentence Hearing.

(2) If he maintains his not guilty plea, the defendant's legal representative should forthwith notify the court, and in any event not later than 14 days after the service of the Paginated Committal Bundle, by way of a letter copied to the prosecution, to confirm that the case is required to be listed for trial.

5.1.4 Within 21 days after receiving the defence's request for listing, the Criminal Listing Judge will list the case for trial with trial dates

given and will assign the case to a Judge ("the Trial Judge"). Written notification of such will be sent to the prosecution and the defence.

5.1.5 For those defendants who are acting in person :

(1) they are similarly required to notify the court, by filing the Request for Listing/Plea[5] with a copy sent to the Department of Justice, within 14 days after the service of the Paginated Committal Bundle, as to whether there is any change to their not guilty pleas entered at the committal stage;[6]

(2) if the request is not received by the court or where the defendant confirms that he is maintaining his not guilty plea, a mention hearing will be arranged for the purpose of listing the case; and

(3) if the defendant confirms that he is going to plead guilty, a Plea and Sentence Hearing will be arranged.

[5] Appendix B in the Practice Direction.
[6] The Request for Listing/Plea is to be given to the defendant by the Committal Clerk of Eastern Magistrates' Court on the day of the committal.

APPENDIX 2

PROPOSED AMENDMENTS

Division 4—Admission of Hearsay Evidence with Leave of Court

55M. Hearsay evidence may be admitted with leave of court

(1) Hearsay evidence may be admitted with the leave of the court.

(2) The court may grant leave for the admission of hearsay evidence only if—

(a) an application for leave is made under section 55N;

(b) the declarant is identified to the court's satisfaction;

(c) oral evidence given in the proceedings concerned by the declarant would be admissible as evidence of the fact which the hearsay evidence is intended to prove;

(d) the condition of necessity is satisfied in respect of the evidence under section 55O;

(e) the condition of threshold reliability is satisfied in respect of the evidence under section 55P; and

(f) 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.

55N. Application for leave to admit hearsay evidence

(1) Subject to subsection (2), an application for the purposes of section 55M may only be made by a party to the proceedings concerned who—

(a) has given a hearsay evidence notice under section 55I(a) in respect of the hearsay evidence concerned; and

(b) has been given an opposition notice under section 55K in respect of the evidence.

(2) A party who has not given a hearsay evidence notice under section 55I(a) in respect of the hearsay evidence concerned may make an application for the purposes of section 55M only if—

(a) the proceedings concerned are proceedings in respect of sentencing; or

(b) the court allows the application to be made on the ground that—

(i) having regard to the nature and content of the evidence, no party is substantially prejudiced by the failure of the party to give the notice;

(ii) giving the notice was not reasonably practicable in the circumstances; or

(iii) the interests of justice so require.

(3) If the application is allowed to be made under subsection (2)(b), the court may—

(a) without limiting the powers of the court to award costs, award costs against the applicant; and

(b) in the proceedings where the evidence is adduced, draw inferences from the failure of the applicant to give the hearsay evidence notice.

(4) In awarding costs under subsection (3)(a)—

(a) the court must have regard to the actual costs incurred by each other party as a result of the failure of the applicant to give the hearsay evidence notice; and

(b) the court may award costs exceeding the limit of costs which it may award.

55O. Condition of necessity

(1) For the purposes of section 55M(2)(d), the condition of necessity is satisfied in respect of any hearsay evidence only if—

(a) the declarant is dead;

(b) the declarant is unfit to be a witness, either in person or in any other competent manner, in the proceedings concerned because of the age or physical or mental condition of the declarant;

(c) the declarant is outside Hong Kong, genuinely unable to attend, and—

(i) it is not reasonably practicable to secure the declarant's attendance at the proceedings; and

(ii) it is not reasonably practicable for the party concerned to make the declarant available for examination and cross- examination in any other competent manner in the proceedings;

(d) the declarant cannot be found although all reasonable steps have been taken to find the declarant; or

(e) the declarant refuses to give the evidence in the proceedings in circumstances where the declarant would be entitled to refuse on the ground of self-incrimination.

(2) Despite subsection (1), the party applying for leave under section 55N (***applicant***) must not rely on a paragraph of that subsection to prove that the condition of necessity is satisfied if—

(a) the circumstances mentioned in that paragraph were brought about by the act or neglect of—

(i) the applicant; or

(ii) a person acting on the applicant's behalf; and

(b) the purpose of bringing about the circumstances was to prevent the declarant from giving oral evidence in the proceedings (whether at all or in connection with the subject matters of the evidence).

(3) The burden of proving that the condition of necessity is satisfied is on the applicant.

(4) The standard of proof required to prove that the condition of necessity is satisfied is—

(a) if the applicant is the prosecution—beyond reasonable doubt; or

(b) if the applicant is the accused—on the balance of probabilities.

55P. Condition of threshold reliability

(1) For the purposes of section 55M(2)(e), the condition of threshold reliability is only satisfied in respect of any hearsay evidence ~~only~~ if the circumstances relating to the evidence provide a reasonable assurance that the evidence is reliable.

(2) In deciding whether the condition of threshold reliability is satisfied in respect of any hearsay evidence, the court must have regard to the absence of cross examination and *[as an alternative amendment to (2)(f) below]* all the circumstances relevant to the apparent reliability of the evidence, including—

(a) the nature and content of the statement adduced as the evidence;

(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; and

(f) the absence of cross-examination of the declarant at trial.

[Note: please also see New Zealand legislation, where the words "the Judge must take into account the right of the defendant to offer an effective defence" are deployed].

(3) The standard of proof required to prove that the threshold reliablity is satisfied is—

(a) if the applicant is the prosecution—beyond reasonable doubt; or

(b) if the applicant is the accused—on the balance of probabilities.

OR

(3) 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.

55Q. Court must direct acquittal if it is unsafe to convict

(1) If—

(a) the case against an accused is based wholly or partly on hearsay evidence admitted with the leave of the court granted under section 55M; and

(b) bearing in mind the dangers of miscarriage of justice by substantial reliance on hearsay evidence, the court considers that it would be unsafe to convict the accused,

the court must direct the acquittal of the accused.

(2) The court may give the direction at or after the conclusion of the case for the prosecution.

(3) The court may give the direction even if there is a prima facie case against the accused.

(4) In considering whether it would be unsafe to convict the accused, the court must take into account—

(a) the nature of the proceedings, including whether the proceedings are before a jury or not;

(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 which may be caused by the admission of the hearsay evidence and the inability to cross examine; and

(f) the circumstances considered in sections 55P.

[Note: please also see New Zealand legislation, where the words "the Judge must take into account the right of the defendant to offer an effective defence" are deployed].

APPENDIX 2

COMMENTS BY THE LAW SOCIETY ON THE COMMITTEE STAGE AMENDMENTS ("CSA") BY THE DOJ

Committee Stage Amendments proposed by DOJ to clause 5 of the 2018 Bill		Agree?	Views or comments
(1)	In the proposed section 55C, Chinese text, in the definition of 陳述, by deleting "語文" and substituting "語言或文字".	Agreed	
(2)	In the proposed section 55E(3)(b), by adding "or" after "221),".	Agreed	
(3)	By deleting the proposed section 55E(3)(c)	Agreed	
(4)	In the proposed section 55O(1)(e), by adding "*where the party applying for permission under section 55N* ***(applicant)*** *is the accused -* " before "*the declarant refuses*"	Agreed on the basis that the section is applicable only to the Defence	The 2018 Bill currently provides that: **55O. Condition of necessity** (1) For the purposes of section 55M(2)(d) [on court's allowing of hearsay], the condition of necessity is satisfied in respect of any hearsay evidence in proceedings only if … (e) the declarant refuses to give the evidence in the proceedings in circumstances where the declarant would be entitled to refuse on the ground of self-incrimination. Our reading of this CSA is that it would not e.g. allow the accused's confession to a crime be admitted by way of hearsay. Upon this understanding, the CSA is acceptable.
(5)	In the proposed section 55O(2), by deleting "*party applying for permission*	- ditto -	The 2018 Bill currently provides that (with emphasis supplied): **55O. Condition of necessity**

Committee Stage Amendments proposed by DOJ to clause 5 of the 2018 Bill		Agree?	Views or comments
	*under section 55N (**applicant**)"* and substituting *"**applicant**"*.		(2) Despite subsection (1), the party applying for permission under section 55N (***applicant***) may not rely on paragraph (a), (b), (c), (d) or (e) of that subsection to prove that the condition of necessity is satisfied … The CSA is consequential to the amendment in (4) above.
(6)	In the proposed section 55P(2), by deleting *"must have regard"* and substituting *"may have regard only"*.	Not agreed	The 2018 Bill currently provides that: **55P. Condition of threshold reliability** (2) In deciding whether the condition of threshold reliability is satisfied in respect of any hearsay evidence in proceedings, the court must have regard to— (a) the nature and content of the statement adduced as the evidence; (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. • We consider the proposed word "may" (*cf* "must") introduces uncertainty to the matter. As for the proposed use of "only", we repeat our previous Submission in 2018 (Appendix 1 hereto) that underlines the relevance and the importance of a high threshold reliability. That is absent from the current drafting and is prejudicial to the Defence. • We also repeat the suggestion in the Submission in 2018, that a threshold reliability test is a stronger test than prima facie reliability (§ 23, 24). • In addition, lack of cross-examination is absent from the above five factors. By leaving out this vital factor, the 2018 Bill undermines the protection of the accused. • We note but do not agree to the explanation put forward by the DOJ for this CSA – the DOJ asserts that CSA reflects the legislative intent – but whose legislative intent is being reflected? In our views, the draft does not reflect the intent of the LRC working

Committee Stage Amendments proposed by DOJ to clause 5 of the 2018 Bill		Agree?	Views or comments
			party, i.e. the lack of cross examination in the consideration of admission of hearsay • There is no guidance at all to the Court on the high threshold reliability that has been canvassed in the 2005 and 2009 reports. • The present drafting tipped in favour of the Prosecution.
(7)	In the proposed section 55Q(5), by deleting *"must have regard"* and substituting *"may have regard only"*.	Not agreed	The bill currently provides that **55Q. Court must direct acquittal if it is unsafe to convict** (5) In considering whether it would be unsafe to convict the accused of the offence, the court must have regard to— (a) the nature of the proceedings, including whether the proceedings are before a jury or not; (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 which may be caused by the admission of the hearsay evidence, including the inability to cross-examine the declarant. We repeat the reasoning set out in (6) above.

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Mr Kenneth FOK
Director of Practitioners Affairs
The Law Society of Hong Kong
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13 May 2020

BY EMAIL & BY POST

Dear Mr FOK,

Evidence (Amendment) Bill 2018

Thank you for your letter dated 26 March 2019 to the Solicitor General. We appreciate the valuable comments provided by The Law Society on this occasion as well as those it had previously provided during the 2017 consultation of the draft Evidence (Amendment) Bill by way of its written submission of 18 July 2017 ("2017 Submission"). The Bill as introduced in 2018 had already taken on board a number of The Law Society's comments included in the 2017 Submission and our detailed responses thereto and to your letter of 9 November 2018 were set out in our reply by way of letter dated 5 December 2018 and already uploaded in the LegCo's website[1].

2. To the extent that the same points are now further developed and new points made in your letter dated 26 March 2019 on the 2018 Bill, please see the enclosed for our detailed response. We hope this will have addressed all your enquiries and we wish to thank The Law Society again for its continued support in favour of the much needed reform exercise.

Yours sincerely,

(Vernon LOH)
Assistant Solicitor General (Policy Affairs) (Ag)

Encl

cc : The Honourable Mr Cheung Kwok-kwan
Chairman of the Bills Committee of the Legislative Council on the Evidence (Amendment) Bill 2018

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[1] https://www.legco.gov.hk/yr17-18/english/bc/bc105/papers/bc105201812l0cb4-310-1-e.pdf.

THE DEPARTMENT OF JUSTICE (DoJ)'S RESPONSE TO THE LAW SOCIETY OF HONG KONG'S SUBMISSIONS ON THE EVIDENCE (AMENDMENT) BILL 2018

DoJ has on an earlier occasion responded to the Law Society's comments and suggestions on the consultation draft of the Evidence (Amendment) Bill.[1] On 24 January 2019, DoJ wrote to the Law Society to consult them regarding the Administration's proposed amendments to section 55O(1)(e) in clause 5 of the Evidence (Amendment) Bill 2018 (the "Bill"). The Law Society replied to DoJ on 26 March 2019. DoJ now seeks to focus upon the Law Society's latest submissions on the Bill.

<u>One-Third Discount on Sentence</u>

2. The circumstances under which a court would give a full one-third discount on the sentence to an accused who pleads guilty to the charge against him are a matter of the court's discretion. As stated by Silke VP in *R v Kwok Chi Kwan* [1990] 1 HKLR 293 and adopted in para 65 of *HKSAR v Ngo Van Nam*, CACC 418/2014, the rationale for allowing discounts from otherwise appropriate sentences to defendants who plead guilty is to give allowance for the remorse indicated by such a course; to assist in the saving of time; and to avoid the necessity for the bringing of witnesses to Court.

3. It is confirmed in para 133 of *Ngo Van Nam* that one of the main purposes of the court giving this one-third discount to a defendant who pleads guilty is to encourage a guilty person to own up to the crimes he committed, so as to conserve the resources of the community and to ensure that justice can be administered more efficiently and matters can be concluded in the most expeditious manner. "The main features of the public interest", relevant to the discount for a plea of guilty, are "purely utilitarian" (para 171, *Ngo Van Nam*) and the Court of Appeal is satisfied that a discount of 20% from that taken for the starting point for sentence being the appropriate discount to be afforded to a defendant who pleads guilty only on the first day of trial reflects the reduced utilitarian value of the plea of guilty, in comparison to a plea of guilty intimated at an early stage (para 199, *Ngo Van Nam*).

4. Para 215 of *Ngo Van Nam* confirms the discount to be afforded to a defendant who pleads guilty after arraignment but during the trial itself would usually be less than the 20% afforded to the defendant who pleads guilty on the first day of trial and will reflect the circumstances in which the plea was tendered. It includes the guilty plea following the holding of a *voir dire* and where the

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[1] https://www.legco.gov.hk/yr17-18/english/bc/bc105/papers/bc10520181210cb4-310-1-e.pdf

defence has sought to test some other aspect of the prosecution case.

5. It is clearly stated that a discount for guilty plea is to give allowance for the remorse and the willingness to facilitate the course of justice. The purpose is purely utilitarian. The utilitarian value of a guilty plea at an early stage is higher than a guilty plea at a later stage. The admission of hearsay evidence is of no difference to the admission of other disputed evidence, e.g. a confession. A guilty plea after the admission of hearsay evidence being contested and thereafter admitted does not reflect any remorse from the defendant or any acceptance to own up to the crimes he committed. Time will be spent by the court as well as the prosecution and witnesses may have to be brought before the courts before there could be a ruling on the admissibility of the hearsay evidence. Extra costs would also have been incurred if the accused's legal representation is aided by public funds. It is of a lower utilitarian value than that of a guilty plea before the evidence being tried and admitted. In fact, for an accused to assume that no hearsay evidence may normally be relied upon and to wait and see if there may be any tactical advantage to be gained up to the time when the prosecution is able to confirm the position either way will be opportunistic. For the reasons stated above, it is not considered necessary to have the admissibility of the hearsay evidence determined or the notice given before plea. There is therefore no sufficient reason why the application of *Ngo Van Nam* should create injustice.

6. The crux of the Law Society's submissions is that the timing of giving a notice of hearsay by the prosecution poses an obstacle to the defendant's enjoyment of the one-third discount for a timely plea of guilty, because the defendant would not be able to know whether the prosecution will adduce hearsay evidence against him until after his plea and would therefore somehow not be able to obtain proper advice on his plea before he is asked to tender his plea to the court. In para 193 of the judgment of *Ngo Van Nam*, the Court of Appeal described it as a well-established and long-standing practice in Hong Kong of "**not** having regard to the **strength** of the prosecution case in determining the discount to be afforded to a defendant for his plea of guilty", citing para 194 of Hughes LJ (later Lord Hughes)'s judgment in *R v Caley* (2013) 2 Cr App R (S) 305 which gave three cogent reasons in support of this approach. Furthermore, in para 201 (see also para 142), the Court of Appeal opined that there is considerable force in Hughes LJ's observations in *Caley* that a distinction was drawn between:

> "…the first reasonable opportunity for the defendant to indicate his guilt and the opportunity for his lawyers to assess the strength of the case against him and to advise him on it … There may be other cases in which a defendant cannot reasonably be expected to make any

> admission until he and his advisers have seen at least **some** of the evidence … Such cases aside, however, whilst it is perfectly proper for a defendant to require advice from his lawyers on the strength of the evidence (just as he is perfectly entitled to insist on putting the Crown to proof at trial), he does not require it in order to know whether he is guilty or not; he requires it in order to assess the prospects of conviction or acquittal, which is different." (emphasis added)

7. This view is also consistent with the practice as described by the Court of Appeal in para 231 that "a defendant is afforded not only the opportunity to be informed of the charge and, by provision of the Brief Facts, made aware of the prosecution case in summary but also has the opportunity to seek legal advice before being called upon to tender a plea to the charge."

8. Viewed against the above distinction, the proposition that a defendant should be first given notice of the prosecution's intention to adduce hearsay evidence against him before he can obtain proper advice on his plea falls within the second category identified by Hughes LJ, which is irrelevant to the court's consideration of the timeliness of a guilty plea. In the normal course of events, by the time a defendant is reasonably expected to tender his plea, the prosecution would have already served on him/her the charge sheet/summons, Summary of Facts/Brief Facts, and documentary evidence (such as cautioned statements and photographs) and statements of witnesses which the prosecution intends to call, and any unused materials requested by the defence. Furthermore, to comply with the prosecution's proactive and continuing duty of disclosure, if the prosecution has already decided at that stage to adduce and rely on hearsay evidence against the defendant, the prosecution is also required to serve such hearsay evidence on the defence, despite not being required to give the notice of hearsay at that stage.[2] The defendant would already have sufficient materials and "at least some of the evidence" (the phrase in *Caley* above) to know the prosecution's case against him for the purpose of knowing "whether he is guilty or not", and if need be, with appropriate advice. To insist upon being also given the notice of hearsay before a plea is tendered would be to require the prosecution to inform the defendant the *precise way* in which it will prove its case against him/her, which only goes to "the prospects of conviction or acquittal", being a different matter.

9. Hearsay as well as other evidence in the prosecution bundle may require investigation. There is no reason why hearsay evidence should

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[2] Logically speaking, that must include cases where the prosecution's case against the defendant is based wholly or substantially on hearsay evidence, because in these situations, the advising counsel (or the relevant law enforcement agency in the absence of legal advice), in deciding to initiate prosecution, must have decided to adduce and rely on hearsay evidence against the defendant.

necessarily be treated differently because of the 14 days limit. In any event, the court has power to extend a time limit for giving a hearsay notice or opposition notice under section 55L in clause 5 of the Bill.

Condition of necessity: non-availability

10. The Law Society asked the notion of "genuine unavailability" and not mere unwillingness to testify be more explicitly set out under the conditions of necessity (s.55O). The Law Reform Commission of Hong Kong (the "LRC") was very much alive to the above distinction, and came up with proposal 8 of the Core Scheme, which is adopted wholesale in s.55O. Those conditions may thus reasonably be regarded as the LRC's view of what amounts to genuine unavailability.

11. In para 17 of its submissions on the consultation draft of the Evidence (Amendment) Bill, the Law Society referred to the expression "truly insurmountable difficulties" used by the Scottish Law Commission. Nevertheless, when this concept was reduced into statute, i.e. s 259(2) of the Criminal Procedure (Scotland) Act 1995 (quoted in para 5.87 of the LRC's Report on Hearsay in Criminal Proceedings (the "Report")), the conditions provided are essentially the same as those under our s.55O, except that one of the conditions under the Scottish law was not adopted by the LRC, i.e. (e) where the statement-maker is called as a witness and either refuses to swear or, having been sworn, refuses to give evidence. The reason is plainly to address the concern that hearsay evidence should not be admitted simply because of the unwillingness on the part of a declarant to attend to testify orally.

12. Regarding the standard of proof, s 55O(4)(a) already provides that if the applicant is the prosecution, the standard required to prove the condition of necessity is beyond reasonable doubt.

13. In respect of the condition of threshold reliability in s 55P, the wording of "reasonable assurance that the evidence is reliable" already signifies a stronger test than *prima facie* and when combined with the various indicia in section 55P(2) as to its meaning, it can provide sufficient safeguard against too loose an approach to admissibility. Reference can be made to para 9.56 of the Report which states, with reference to the formulation now adopted in s.55P(1) of the Bill, that "(t)he sub-committee considered the word 'assurance' to be particularly apt because it implied a reasonably high threshold which was appropriate for such a criterion."

Deprivation of Cross-examination

14. The Report discussed thoroughly whether or not "the absence of cross-examination of the declarant at trial" should be included as a factor in assessing "threshold reliability". The majority of the sub-committee decided against the inclusion. The sub-committee noted that none of the legislative schemes for reform of the law of hearsay in other jurisdictions included a provision that the inability to cross-examine the declarant was a factor bearing on the admissibility of the hearsay statement. (See para 9.61-9.63 of the Report.) DoJ therefore considers it not appropriate to depart from the sub-committee's view.[3]

15. The Government now proposes to amend s 55P(2) by deleting "must have regard" and substituting "may have regard only".

Government's Committee Stage Amendments

16. We thank the Law Society's support to some of the Government's Committee Stage Amendments (the "CSAs"). Regarding the proposed

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[3] Inability to cross-examine should go to the weight of the hearsay, not admissibility. The very purpose of the Bill is to admit hearsay evidence in certain situations. It would be futile to ask the court to consider that there is no opportunity to cross-examine the hearsay maker in every application. The various conditions which have to be satisfied before the court would exercise its discretion to admit hearsay evidence all serve as safeguards to ensure that a defendant's right to a fair trial will not be jeopardised by his or her inability to cross-examine the declarant (see paras 9.65-9.80 of the Report). The New Zealand decision quoted by the LRC is *R v Hamer* [2003] 3 NZLR 757 which was decided prior to the Evidence Act 2006. At that time, the governing law was section 3(1)(a) of the Evidence Amendment Act (No 2) 1980 which provided for the admission of hearsay evidence on the ground of unavailability of witness, without incorporating any safeguards to ensure reliability of the hearsay evidence except providing in section 18 the general discretion to exclude admissible statement if its prejudicial effect would outweigh its probative value or if it was not necessary or expedient in the interests of justice to admit the statement. It is therefore understandable for the New Zealand court in *Hamer* to lay down more detailed guidance on the application of section 18 of the 1980 Act, requiring an assessment of the likely impact if it were possible to cross-examine the maker of the hearsay statement. However, with the introduction of threshold reliability of "reasonable assurance" in the Evidence Act 2006, we do not see any express reference to "cross-examination" in the legislation. Upon a cursory search of the cases decided after the 2006 Act, we do not find any case which has cited the test in *Hamer* either. As explained above, we think the various procedural hurdles which must be passed in order for hearsay evidence to be admitted are safeguards to address any potential danger of admitting unreliable hearsay evidence which is not test by cross-examination. Viewed in this light, it would be circular and would not serve meaningful purpose to single out "inability to cross-examine" as a factor in assessing admissibility of hearsay evidence. *HKSAR v Lau Shing Chung Simon*, FACC 6/2014 is no more than a re-statement of the well-established principles as to what constitutes hearsay and why it is generally inadmissible under common law (subject to exceptions). As stated in para 9.61 of the Report, the majority of the sub-committee agreed to delete from the list of factors put forward in its consultation paper "the absence of cross-examination of the declarant at trial." Mr Justice Lunn apparently agrees that the absence of cross-examination is a matter which is relevant to the weight to be given to the evidence, rather than its admissibility. In his Lordship's view, if the purpose of proposal 12 in the Report was to establish threshold reliability admissibility only, the absence of cross-examination did not sit well with proposal 12(a)-(d), "which were matters directly so relevant". The absence of cross-examination seems to his Lordship a matter relevant to the weight to be given to the evidence but not to its admissibility. The difficulty in asking judges to guess the effect of cross-examination is a valid consideration for not including "absence of cross-examination" as a factor in assessing threshold reliability.

amendments in ss 55P(2) and 55Q(5) to delete "must have regard" and substituting "may have regard only", as explained in Explanatory Note no. 6 of the CSAs, the amendments are proposed to better reflect the policy intent that the factors listed s 55P(2)(a) to (e) and s 55Q(5)(a) to (e) are exhaustive.

17. The proposed amendments to s 55P(2) is to implement Proposal 12 of the Core Scheme in the Report. The LRC noted in paragraph 9.64 of the Report that the umbrella clause in the proposal was not intended to add or subtract from the enumerated factors.

18. The proposed amendments to s 55Q(5) is to implement Proposal 15(b) of the Core Scheme in the Report that in reaching its decision on whether to direct the acquittal of an accused, the court shall have regard to the factors listed in s 55Q(5)(a) to (e).

19. As far as the legislative intent is concerned:

(1) There are strong policy reasons that the factors set out in the proposed new s 55Q(5) should be exhaustive. There must be very cogent reasons for the judge to take the case away from the jury and hence the grounds on which the judge must direct the jury to acquit should be restrictive.

(2) There are also respectable (even if less strong) policy reason to make the factors identified under the proposed new s 55P(2) exhaustive. Those five factors already set out should reasonably have encapsulated those intended by the LRC. The Government has already during the consultative and legislative processes made it clear (including as publicly made known before the Bills Committee) that the lack of cross-examination is not intended to be included for the purpose of section 55P. In the unlikely event that there may be anything else not currently contemplated but discovered after enactment of the Bill, the fairness of the trial process can still be addressed by proper directions to the jury as a question of weight. In determining the issue of admissibility by the judge, the court should not be overburdened with further factors not already generously covered under the five factors as articulated under s 55P(2). In order for the reform to work, a judgement call must now be made and, in this context, the rules on admissibility should be clear and easy to apply even though they should not be at the expense of the fairness of the process. The Government is satisfied, unless the Legislative Council is able to identify anything which is missing and should have been

included, that a proper balance has been struck in making s 55P(2) exhaustive.

Department of Justice
May 2020

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