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來函檔號 YOUR REF :

本函檔號 OUR REF : LS/B/22/17-18

電話 TELEPHONE : 3919 3504

傳真 FACSIMILE : 2877 5029

電郵 E-MAIL : rktdai@legco.gov.hk

By Fax (3918 4799)

21 September 2018

Ms LAM Man-yee, Diana
Assistant Solicitor General (Policy Affairs) (Acting)
Department of Justice
Legal Policy Division
5th Floor, East Wing, Justice Place
18 Lower Albert Road
Central, Hong Kong

Dear Ms LAM,

Re: Evidence (Amendment) Bill 2018

We are scrutinizing the captioned Bill with a view to advising Members.

Please find attached a schedule listing our observations on the legal and drafting aspects of the captioned Bill. We should be grateful if you could let us have your response in both English and Chinese as soon as possible on or before 5 October 2018.

Yours sincerely,

(Rachel DAI)
Assistant Legal Adviser

Encl.

cc. Department of Justice
(Attn: Mr Richard MA, SGC (Fax: 3918 4799),
Miss Selina LAU, SGC, Miss Cindy CHEUK, SGC (Fax: 3918 4613))
Legal Adviser
Senior Assistant Legal Adviser 3
Clerk to the Bills Committee

Schedule

Part I: Legal Issues

Clause 5 – proposed section 55E(1)

1. Under the proposed section 55E(1), Part IVA of the Bill applies to evidence adduced or to be adduced in criminal proceedings started on or after the commencement date of Part IVA and in relation to which the strict rules of evidence apply. Please clarify what "criminal proceedings in relation to which the strict rules of evidence apply" refers to. For the avoidance of doubt, please consider setting out the proceedings to which Part IVA of the Bill intends to apply.

Clause 5 – proposed section 55E(3)(a)

2. Under the proposed section 55E(3)(a), criminal proceedings are regarded as having been started if a complaint has been made, or an information has been laid. It seems that the complaint made and the information laid refer to the complaint made to and the information laid before a magistrate as mentioned in the Magistrates Ordinance (Cap. 227). Please clarify whether the proposed section 55E(3)(a) would also cover other circumstances, for example, proceedings in relation to the offence of serious vilification under the Disability Discrimination Ordinance (Cap. 487).

Clause 5 – proposed section 55H(4)

3. The proposed section 55H(4) provides that hearsay evidence admitted because of an accused's agreement may be adduced only in respect of the accused. Please provide examples to illustrate how this provision operates where there are multiple defendants in the proceedings, and in particular, how the jury would be properly directed in a jury trial.

Clause 5 – proposed section 55H(5)

4. Under the proposed section 55H(5)(b), an agreement made before the court or produced to the court for the purpose of proceedings relating to a matter may, with the permission of the court, be withdrawn. Please clarify what are the factors to be considered by the court in deciding whether to grant the permission and the procedures for making an application, in particular, whether an application for the permission to withdraw an agreement jointly produced by the prosecution and the accused to the court could be made by either party unilaterally.

Clause 5 – proposed section 55N(2)

5. Under the proposed section 55N(2)(a)(ii), a party who has not given a hearsay evidence notice under section 55I may make an application for permission to have hearsay evidence admitted under section 55M only if the court allows the application to be made on the ground that giving the notice was not reasonably practicable in the circumstances. Please give examples to illustrate the circumstances in which giving a hearsay evidence notice was not reasonably practicable.

Clause 5 – proposed section 55N(4)

6. Please clarify the meaning of "the court may award costs exceeding the limit of costs which it may otherwise award" in the proposed section 55N(4)(b). Please give examples to illustrate the circumstances in which the court would exercise the power to make such costs order.

Clause 5 – proposed section 55O(1)

7. Please clarify the meaning of "another competent manner in the proceedings (在有關法律程序中，以另一合乎規定的方式)" in the proposed sections 55O(1)(b) and 55O(1)(c)(ii). What does the term "規定" refer to? What manner would be regarded as competent (合乎規定)?
8. Please clarify whether the condition under the proposed section 55O(1)(c)(ii) covers the situation in which it is not reasonably practicable to secure the declarant's attendance at the proceedings in Hong Kong but the declarant has been cross-examined in respect of the same matter before a court or tribunal in another jurisdiction.
9. It is noted that DoJ's response to the comment on the condition of "not reasonably practicable to secure the declarant's attendance at the proceedings in Hong Kong" under the proposed section 55O(1)(c)(i) (i.e. it does not accommodate the fact that people with ordinary means would not be in any easy position to secure overseas declarants/witnesses) is that it does not deprive defendant of a fair trial since the defendant can obtain costs from the prosecution if he is found not guilty afterwards (see paragraph 3 of DoJ's Responses in relation to the issues in relation to condition of necessity). Please clarify.
10. Under the proposed section 55O(1)(d), the condition of necessity is satisfied in respect of any hearsay evidence in proceedings if the declarant cannot be found although all reasonable steps have been taken to find the

declarant. Please clarify what are the relevant factors to be considered in determining whether all reasonable steps have been taken for the purpose of the proposed section 55O(1)(d).

11. Please provide case law in relevant jurisdictions, if any, to illustrate how the provisions similar to those on the condition of necessity under the proposed section 55O operate.

Clause 5 – proposed section 55P(1)

12. Please clarify the meaning of "reasonable assurance that the evidence is reliable" in the proposed section 55P(1). Please provide case law in relevant jurisdictions, if any, to illustrate how "reasonable assurance that the evidence is reliable" has been interpreted. Please consider whether any provisions on the factors to be considered in evaluating the strength of the evidence should be included in the Bill.

Clause 5 – proposed section 55P(2)

13. Please clarify whether the factors set out in paragraphs (a) to (e) of the proposed section 55P(2) are meant to be exhaustive.
14. It is noted that "all the circumstances relevant to the apparent reliability of evidence, including—" which appeared in the proposed section 55P(2) of the working draft of the proposed Evidence (Amendment) Bill 2017 attached at Annex C to the Consultation Paper issued by the DoJ in 2017 has been deleted from the current version of the proposed section 55P(2) of the Bill. Please explain the reason(s) for the deletion and the effect of such deletion.
15. Please provide case law in relevant jurisdictions, if any, to illustrate how the provisions similar to those on the condition of threshold reliability under the proposed section 55P operate.

Clause 5 – proposed section 55Q(5)

16. Please clarify whether the factors set out in paragraphs (a) to (e) of the proposed section 55Q(5) are meant to be exhaustive.
17. Please provide case law in relevant jurisdictions, if any, to illustrate how the provisions similar to those on the court's obligation to direct acquittal under the proposed section 55Q operate.

Clause 8 – proposed Schedule 2

18. Please explain why the common law rules that relate to the admissibility of the two types of evidence mentioned in paragraphs (d) and (e) of Proposal 5 of the Core Scheme proposed by the Law Reform Commission of Hong Kong in the report of the Law Reform Commission of Hong Kong on hearsay in criminal proceedings published in 2009 (i.e. evidence admissible upon application for bail, and evidence admissible in sentencing proceedings, except when the prosecution is relying on hearsay evidence to prove an aggravating factor) are not included in the common law rules preserved that are set out in the proposed Schedule 2 of the Bill.

Part II: Drafting Issues

Clause 5 – proposed section 55C

19. In the interpretation of *statement* under the proposed section 55C, "intended to be an assertion of any matter communicated" is rendered as "旨在表示所傳達的事宜確有其事". Please consider whether "assertion" should be rendered as "宣稱" instead of "表示". Reference can be made to the Chinese rendition of "assertion" in section 90 of the Patents Ordinance (Cap. 514).
20. It is also noted that "a non-verbal communication in the form of conduct" in the interpretation of *statement* under the proposed section 55C is rendered as "並非以語文而以行為所作的傳達". As "語文" normally refers to "language", please consider whether the word "verbal" should be rendered as "文字" or "言詞" rather than "語文".

Clause 5 – proposed section 55H(5)

21. It is noted that in the Chinese rendition of the proposed section 55H(5), "(原本的法律程序)" and "(其後的法律程序)" are used to distinguish "the proceedings relating to a matter for which an agreement for the admission of evidence in the proceedings was made or produced" from "subsequent criminal proceedings relating to the matter". For the sake of clarity and consistency, please consider using "(the original proceedings)" and "(subsequent proceedings)" to distinguish the two proceedings in the English version.