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Ms Rachel Dai, (By email : rktdai@legco.gov.hk)
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Dear Ms Dai,

Evidence (Amendment) Bill 2018

Thank you for your letter dated 21 September 2018. Our reply to your observations on the legal and drafting aspects of the captioned Bill listed in the schedule to your letter is set out in the schedule to this letter.

Yours sincerely,

(Ms Diana Lam)
Assistant Solicitor General (Policy Affairs) (Acting)

Enc.

#471956

Schedule

Response to Part I : Legal Issues

Clause 5 – proposed section 55E(1)

1. The purpose of referring to "criminal proceedings in relation to which the strict rules of evidence apply" is to make sure that Part IVA of the Bill applies only to those parts or categories of criminal proceedings in which the common law exclusionary rule applied previously. It is not practicable to set out what such parts or categories of criminal proceedings are in an exhaustive manner. Common examples of criminal proceedings in relation to which the strict rules of evidence apply are trial proceedings, *voir dire* proceedings and committal proceedings. The present drafting approach is based on section 134(1) of the English Criminal Justice Act 2003. (See paragraph 9.14 of the Report on Hearsay in Criminal Proceedings published by the Law Reform Commission of Hong Kong ("the Report").)

Clause 5 – proposed section 55E(3)(a)

2. The terms "a complaint made" and "an information laid" in the proposed section 55E(3)(a) refer to a complaint made and an information laid before a magistrate as provided in the Magistrates Ordinance (Cap. 227). The prosecution of the offence of serious vilification under section 47 of the Disability Discrimination Ordinance (Cap. 487), like other criminal offences, are to be instituted in the aforesaid manner and is therefore covered by section 55E(3)(a) of the Bill.

Clause 5 – proposed section 55H(4)

3. Where there is more than one accused in the proceedings, the provision allows hearsay evidence to be admitted by an agreement made between the prosecution and only one or some of the accused (but not necessarily all of them) in the same proceedings. In such

circumstances, the prosecutor and the accused in respect of whom the evidence is to be adduced may make an oral agreement before the court or jointly produce to the court a written agreement made by them setting out the evidence to be admitted in accordance with the provisions in the proposed section 55H(1). A similar practice already exists in relation to section 65C of the Criminal Procedure Ordinance (Cap. 221) ("CPO"), which allows facts to be admitted by the prosecution and only one or some of the accused (again, not necessarily all of them) in the same proceedings. It is not uncommon to find, in criminal proceedings, situations where certain pieces of evidence can only be used against one or some of the accused but not other co-accused even in relation to the same charge (e.g. the incriminating parts of the confession of an accused). Judges in jury trials are experienced enough to direct the jury in such circumstances, such as that the jury must consider the case against and for each of the accused separately and that the evidence concerning each accused is different and therefore their verdicts need not be the same. (See Specimen Directions in Jury Trials (September 2013), page 3.1.)

Clause 5 – proposed section 55H(5)

4. When presented with such an application, the court will consider all the relevant factors including the reasons given by the party/parties in deciding whether to grant the permission to withdraw an agreement for the admission of hearsay evidence. One example is where an initially unavailable witness has now re-appeared and is available to testify in person in court, and the court may then give permission to withdraw the hearsay evidence. Under the proposed section 55H(5), an application to withdraw an agreement can be made by either party unilaterally. Reference can be made to section 65C(4) of the CPO, under which an admission of facts may also, with the leave of the court, be withdrawn in the proceedings for which it is made or any subsequent criminal proceedings.

Clause 5 – proposed section 55N(2)

5. Examples of circumstances in which giving a hearsay evidence

notice is not reasonably practicable include (a) that a witness suddenly died in the middle of the trial; and (b) the hearsay evidence only emerges in the course of the trial under circumstances which are not reasonably foreseeable to the applicant.

Clause 5 – proposed section 55N(4)

6. Reference can be made to section 121(14) of the Copyright Ordinance (Cap. 528), which also empowers the court to award costs exceeding the limit of costs, if any, which that court may award. A particular instance where the amount of costs that a court may award is otherwise limited but for the proposed section 55N(4)(b) can be found in section 20(2)(b) of the Magistrates Ordinance. The section provides that where a hearing is adjourned on the application of the complainant or informant, and the magistrate is satisfied that the application is occasioned by some default, neglect or omission on the part of the complainant, informant or his counsel, as the case may be, the magistrate may order that the complainant or informant shall pay costs to the defendant such costs, not exceeding $5,000, as the magistrate may think fit.

Clause 5 – proposed section 55O(1)

7. The words "another competent manner in the proceedings" in the proposed section 55O(1)(b) and (1)(c)(ii) 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 giving evidence by live television link and video recording under sections 79B and 79C respectively of the CPO, taking evidence from witnesses outside Hong Kong by live television link under Part IIIB of the CPO, 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) ("EO").

8. If the cross-examination of the declarant in respect of the same matter before a court or tribunal in another jurisdiction was conducted in the course of different proceedings, i.e. not the criminal

proceedings involving the application for admission of hearsay evidence, it would not be regarded as satisfying "making the declarant available for examination and cross-examination in another competent manner in **the** proceedings". In the case of a declarant outside Hong Kong, if the necessity condition under section 55O(1)(c) is relied upon, the applicant should explain why it is not reasonably practicable to obtain evidence from the declarant by other means such as those under Part IIIB of the CPO and Part VIIIA of the EO.

9. English case law suggests that the expense and inconvenience of securing a witness's attendance is a relevant consideration for the test of "reasonably practicable".

10. The steps which an applicant is expected to take to find the declarant must be reasonable having regard to all relevant circumstances and must be considered on a case-by-case basis.

11. There are similarities in as well as differences between the provisions of the Bill and its overseas counterparts. The cases provided below are for illustrative purpose only and not intended to be taken as an authoritative statement of the legal position in Hong Kong if the Bill is enacted, nor should they preclude Hong Kong courts from developing jurisprudence in this area of law. This disclaimer also applies to the responses to questions 12, 15 and 17 below.

Section 18(1) of the New Zealand Evidence Act 2006 provides, *inter alia*, that—

"A hearsay statement is admissible in any proceeding if—

...

(b) either—

(i) the maker of the statement is unavailable as a witness; or

(ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness."

In *R v Allen Ian Robert Wallis*, HC AK CRI 2007-092-008480, the defence served a notice of hearsay to offer in evidence certain attendance records and questionnaires of complainants of charges relating to sexual offending. The Crown objected to the questionnaires being produced. The High Court of New Zealand did not consider that undue expense or delay would be caused if the complainants were required to be called as witnesses. The judge therefore concluded, at paragraph [23], that the hearsay statements were inadmissible under section 18(1)(b)(ii).

In *Carr and Carr v Ambler Homes Ltd*, HC AK CIV-2009-404-000093, the appellants sought to introduce fresh evidence on appeal to the High Court of New Zealand that recorded a discussion between counsel for the parties during a break of a civil trial before a District Court Judge which showed that counsel for the appellants (then defendants) was concerned about the state of the pleadings and was making enquiries as to whether they would be altered. The High Court considered, at paragraph [23], that there was nothing to suggest that the evidence could be unreliable and it would cause undue expense and delay if it were to require the counsel to give that evidence himself, as that would immediately disqualify him from appearing as counsel for the appellants. The court therefore granted the application to admit the fresh evidence in the form of affidavits of the appellants and allowed the respondent to file any rebuttal evidence.

Clause 5 – proposed section 55P(1)

12. As for the meaning of "reasonable assurance that the evidence is reliable", the Law Reform Commission of Hong Kong ("LRC") has stated in paragraph 8.44 of its Report that the trial judge should have a greater degree of flexibility in drawing upon evidence that can support the threshold reliability criterion. The essence of this criterion is the requirement that the judge be satisfied of reasonable assurances as to the statement's veracity.

In *R v Khelawon* (2006) 215 CCC (3d) 161, cited in paragraph 8.48

of the Report, the Supreme Court of Canada explained that the reliability requirement was met in two different ways—

"*One way is to show that there is no real concern about whether the statement is true or not because of the circumstances in which it came about. Common sense dictates that if we can put sufficient trust in the truth and accuracy of the statement, it should be considered by the fact finder regardless of its hearsay form...*

Another way of fulfilling the reliability requirement is to show that no real concern arises from the fact that the statement is presented in hearsay form because, in the circumstances, its truth and accuracy can nonetheless be sufficiently tested... [C]ommon sense tells us that we should not lose the benefit of the evidence when there are adequate substitutes for testing the evidence." (paragraphs 62-3)

Section 18(1) of the New Zealand Evidence Act 2006 provides, *inter alia*, that—

"A hearsay statement is admissible in any proceeding if—
(a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
(b) either—
(i) the maker of the statement is unavailable as a witness; or ..."

In *Preston v R* [2017] 2 NZLR 358, Mr Preston appealed against his conviction of murder on the ground of, among others, the admissibility of evidence of the victim's statements to third parties. The New Zealand Court of Appeal held that the statements were reliable and admissible under section 18 of the Evidence Act 2006 notwithstanding they were hearsay. The Court of Appeal noted that Mr Preston did not challenge the reliability of the witnesses' evidence recounting the victim's evidence to them but he did challenge the reliability of the victim's statements. There was strong evidence to support the victim's account of a tempestuous relationship and there was no apparent reason for the victim to make up threats or conjure up non-existent fear when speaking to the

police or friends. The Court of Appeal considered that section 18(1)(a) and (1)(b)(i) of the Act were satisfied. At paragraph 41 of the judgment, the Court of Appeal referred to its earlier comments in *TK v R* [2012] NZCA 185 that—

"*The issue of reliability is ultimately a jury matter. A court, when considering admissibility under s 18(1), does not have to assess the reliability of the hearsay statement against the criminal standard of proof. What is instead required is a scrutiny of the circumstances surrounding the statement and an assessment, in that context, that there is a "reasonable assurance" the statement is reliable. If admitted, the function of weighing up the surrounding circumstances of the hearsay evidence and assessing its overall reliability passes to the jury.*"

The proposed section 55P(2) contains a list of factors to be considered in deciding whether the condition of threshold reliability is satisfied. The condition is only concerned with the reliability of the hearsay evidence for the purpose of admissibility. If the hearsay evidence is admitted, the court will then evaluate the strength/weight of the evidence as in the case of other admitted evidence.

Clause 5 – proposed section 55P(2)

13. The factors set out in section 55P(2)(a) to (e) are meant to be exhaustive.

14. In response to a comment received during the consultation exercise conducted in April to July 2017, the government has revised the proposed section 55P(2) so that the factors set out in the provision are meant to be exhaustive. The revision is in line with Recommendation 27 of the Report when it stated in paragraph 9.64 that the umbrella clause in proposal 12 of the Core Scheme was not intended to add or subtract from the enumerated factors.

15. Section 18(1) of the New Zealand Evidence Act 2006 provides, *inter alia*, that—

"A hearsay statement is admissible in any proceeding if—
(a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and ..."

In *Carr and Carr v Ambler Homes Ltd* (*supra*), the fresh evidence sought to be introduced by the appellants related to the concern of counsel for the appellants (then defendants) about the state of the pleadings and was making enquiries as to whether they would be altered. The High Court of New Zealand stated, at paragraph [23], that there was nothing to suggest that the fresh evidence to that extent in the form of affidavits could be unreliable.

Clause 5 – proposed section 55Q(5)

16. The factors set out in section 55Q(5)(a) to (e) are meant to be exhaustive.

17. In England and Wales, section 125(1) of the Criminal Justice Act 2003 provides, *inter alia*, that—

"If on a defendant's trial before a judge and jury for an offence the court is satisfied at any time after the close of the case for the prosecution that—

(a) the case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceedings, and

(b) the evidence provided by the statement is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe,

the court must...direct the jury to acquit the defendant of the offence..."

In *R v Riat* [2013] 1 Cr. App. R. 2, the Crown successfully applied to adduce hearsay evidence of statements and police interviews of witnesses on the grounds that the witnesses were unavailable to give evidence owing to death, unfitness or fear, or that it was in the interests of justice for the evidence to be admitted pursuant to the

relevant provisions of the Criminal Justice Act 2003. The accused were convicted and they appealed against conviction on the ground that the hearsay evidence should not have been admitted in evidence. The Court of Appeal of England and Wales held, at paragraphs [28] to [29], that the judge was required by section 125 of the Criminal Justice Act 2003 to look to see whether the hearsay evidence is so unconvincing that any conviction would be unsafe. That means looking at its strengths and weaknesses, at the tools available to the jury for testing it, and at its importance to the case as a whole. Counsel and the judge should keep the question under review throughout the trial. The exercise involves an overall appraisal of the case. It may often, therefore, best be dealt with at the end of all the evidence.

It has to be noted that, unlike the proposed section 55P, hearsay evidence does not have to pass a reliability test before it can be admitted under the Criminal Justice Act 2003. As an additional built-in safeguard, the proposed section 55Q(5) further provides an exhaustive list of factors for the court to consider whether it would be unsafe to convict the accused.

Clause 8 – proposed Schedule 2

18. The common law rules relating to evidence admissible upon application for bail; and those relating to evidence admissible in sentencing proceedings (except when the prosecution is relying on hearsay evidence to prove an aggravating factor), respectively mentioned in paragraphs (d) and (e) of Proposal 5 of the Core Scheme proposed in the Report, are not affected by the Bill. The proposed section 55E(1)(b) states that the new Part IVA only applies to evidence adduced or to be adduced in criminal proceedings in relation to which the strict rules of evidence apply, whereas both application for bail and sentencing proceedings in general are not proceedings in relation to which the strict rules of evidence apply.

Response to Part II : Drafting Issues

Clause 5 – proposed section 55C

19. According to 《國語活用辭典》, "宣稱" means "聲稱，公開宣布". As the emphasis of "assertion of any matter communicated" in the definition of ***statement*** is on the declarant's belief that the matter is true (instead of making a declaration or public announcement), the Government considers the present formulation, i.e. "該等傳達旨在表示所傳達的事宜確有其事" appropriately reflects the meaning of the English text.

20. Since "verbal" in the English definition of ***statement*** includes both oral and written communication, the Government considers it more appropriate to adopt "語文", which means "白話和文言、語言和文字" according to《國語活用辭典》.

Clause 5 – proposed section 55H(5)

21. Under section 10B(1) of the Interpretation and General Clauses Ordinance (Cap. 1), the English and Chinese texts of an Ordinance are equally authentic. The bilingual texts of legislation should therefore be considered on their own. The tag definitions "(***原本的法律程序***)" and "(***其後的法律程序***)" are included in the Chinese text of s.55H(5) to facilitate the drafting of the Chinese text and enhance its readability. The English text can attain these objectives without using any tag definition. It is not necessary for the English text to add tag definitions merely to follow the presentation of the Chinese text.