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9 November 2018

BY EMAIL AND BY POST

Mr. Wesley Wong, SC, JP
Solicitor General
Department of Justice
5/F Main Wing
Justice Place
18 Lower Albert Road
Central, Hong Kong

Dear

Evidence (Amendment) Bill 2018

We refer to the Evidence (Amendment) Bill 2018 (the "2018 Bill").

When in April 2017 your Department released the 2018 Bill's predecessor (viz. the Evidence (Amendment) Bill 2017 ("2017 Bill")) for consultation, we have provided a comprehensive submission in response. In that submission (dated 18 July 2017), we have set out in detail our suggestions to improve the 2017 Bill and the reasons for the suggestions in some detail.

These suggestions included (by way of illustration) the following,

- (1) the need for a suitably worded warning for admitting evidence where the preponderance or a very significant element of evidence is hearsay (see para 12 of our submission);
- (2) the logic of referring to genuine non-availability, not the mere unwillingness of a witness to give evidence (para 19, *ibid*);
- (3) the Law Reform Commission ("LRC")'s own comments on the threshold of reliability not being reflected in the draft i.e. the threshold should be stronger than a *prima facie* case (para 25, *ibid*); and

- (4) the vital importance of considering the fundamental right to cross-examination, in deciding on admissibility of hearsay evidence (and no less than four suggestions were made in our submission, para 44 – 47, *ibid*).

The above are not exhaustive and we invite your attention to our submission (enclosed).

We have carried out a comparison of the 2017 Bill with the 2018 Bill. We may wish to provide further comment after clarification by you. In the meantime our preliminary observations are that,

- (1) the 2018 Bill, as it is, continues to pose practical difficulties for criminal practitioners when they are for instance, to advise lay clients on entering a plea. Practitioners would not know the admissibility of any hearsay evidence, until those conditions of necessity (Section 55O), threshold reliability (Section 55P), and relative probative value (Section 55M(f)), have been determined as provided for in section 55M of the 2018 Bill. A Defendant's credit for potentially entering into timely plea of 'guilty' should not be prejudiced because one needs to await the result of such determination in order to be properly advised on the matter;
- (2) when compared to the 2017 Bill, some sections in the 2018 Bill appear to be less clear and may even be open to mis-reading. An example is section 55Q(2) in the 2018 Bill, which reads:

“(2) The court must direct the acquittal of the accused in relation to the offence.”

The above does not seem to make sense when read in isolation. The corresponding draft in the 2017 Bill (section 55 Q(1)) (which carries with it the two conditions for acquittal) appears to us to be the preferred approach:

“(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.”

- (3) apart from some minor stylistic or editorial amendments, the 2018 Bill appears to be substantially the same as the 2017 Bill. Those important issues which we have referred you to, including those matters succinctly

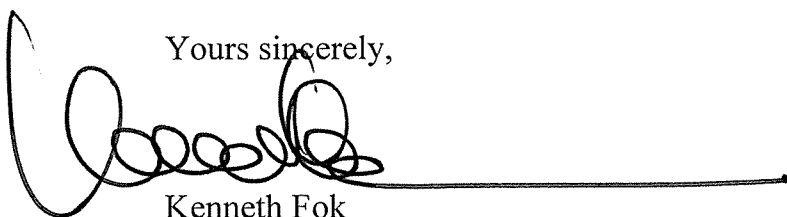
canvassed in the previous LRC reports, have not been adopted. There is no reason proffered to explain why.

In this regard, could you please set out in detail,

- (a) what substantive amendments have been made to the 2017 Bill (preferably by way of a marked-up draft);**
- (b) the reason(s) why each of those amendments have been made; and**
- (c) the reason(s) why none of those matters or suggested amendments which we have drawn your attention to in our submission of 18 July 2017 have not been adopted in the 2018 Bill.**

We look forward to hearing from you.

Yours sincerely,

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke at the end.

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

Encl.

cc (with enclosure)

- 1. the Bills Committee of the LegCo on Evidence (Amendment) Bill 2018
- 2. the Hon Dennis Kwok



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/crimhearsave.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).

“All of the circumstances” – only the factors listed or others?

41. There is an oddity in section 55P(2) (supra). It says that the phrase “the Court should have regard to all circumstances ... including” 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 in 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 2017⁴ 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>

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/Plea⁵ 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.

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 reliability 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].