Bills Committee on Evidence (Amendment) Bill 2018

The Administration's Responses to the list of follow-up actions arising from the discussion at the meeting on 13 November 2018

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

(a) Provide a consolidated response to the deputations' views and suggestions on the Bill;

Protection for vulnerable witnesses

1. Regarding Mr Ip Chun Yuen's concern of protection for vulnerable witnesses, section 55O(1)(b) specifically provides that the condition of necessity is satisfied in respect of any hearsay evidence in criminal proceedings if the declarant is unfit to be a witness, either in person or in another competent manner, in the proceedings because of the declarant's age or physical or mental condition. Hearsay evidence of a declarant being a vulnerable witness who falls within section 55O(1)(b) may, subject to satisfaction of other conditions stipulated in section 55M(2), be admitted in criminal proceedings.

Concern over technology advancement

2. In response to the concern over technology advancement, please note that evidence in the form of electronic communications does not necessarily engage the hearsay rule[1]. The Bill is drafted in a technologically neutral way. Admissibility of hearsay evidence in whatever form (including evidence arising from electronic communications) is to be determined in accordance with the new provisions under the Bill. In any case, electronic communications which fulfils the conditions set out by section 22A (read together with section 22B) of the Evidence Ordinance (Cap. 8) may also be adduced as hearsay evidence because by virtue of the new section 55F(c) in the Bill, hearsay evidence is admissible in criminal proceedings if it is admissible under any other enactment.

[1] For example, see *HKSAR v Lau Shing Chung Simon* (2015) 18 HKCFAR 50 where the smartphone text messages in question were not relied upon as evidence of the truth of any facts stated in them, but were relied upon to show that the statements therein were made and their effect on the defendant's state of mind.

The United Kingdom Police and Criminal Evidence Act 1984

3. In response to Mr Alan Hoo, SC's suggestion of deferring the Bill's commencement date until the passing of comprehensive legislation similar to the Police and Criminal Evidence Act 1984 ("PACE") in England and Wales, the Government's position is this.

4. The Law Reform Commission of Hong Kong (the "LRC") published its Report on Arrest [2] in August 1992. Among the various recommendations in the Report on Arrest, the one which particularly concerns Mr Hoo, SC is that which goes for the adoption of section 78 of PACE. Section 78 of PACE provides :

> "(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
>
> (2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence."

5. Section 78 of PACE empowers the court to exercise discretion to exclude evidence (including hearsay evidence) if "the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it". Once evidence has been admitted, section 78 of PACE no longer operates. The Bill, on the contrary, also provides safeguards to the right to fair trial of the accused even after the hearsay evidence is admitted in criminal proceedings. For example, under section 55Q in the Bill, if the case against the accused for an offence is based wholly or partly on hearsay evidence admitted with the permission of the court and the court considers that it would be unsafe to convict the accused of the offence, the court must direct acquittal of the accused.

6 It is also true that section 82(3) of PACE provides :

[2] https://www.legco.gov.hk/yr03-04/english/panels/se/papers/se0706cb2-2980-3e.pdf

> "Nothing in this Part of this Act shall prejudice any power of a court to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion."

7. Insofar as hearsay evidence is concerned, any common law residual discretion of the court as may have been expressly codified under section 82(3) of PACE to exclude otherwise admissible evidence by reason that the prejudicial effect of such evidence outweighs its probative value will be more than sufficiently covered by the new section 55M(2)(f) in the Bill. Under that provision, the court may grant permission to admit hearsay evidence (even after satisfaction of the "necessity" and "threshold reliability" tests) if and only if the probative value of the evidence is **greater than** any prejudicial effect it may have on any party to the proceedings. In other words, under the proposed scheme of admission of hearsay evidence with permission of the court in Hong Kong, the accused will not in this regard be in a position worse off than that of an accused in England and Wales where PACE is implemented.

8. In the light of the above, on the basis that the Bill, which now seeks to implement the 2009 LRC Report on Hearsay in Criminal Proceedings ("Hearsay Report"), has in fact provided better safeguard to the right to fair trial of the accused relating to the exclusion of unfair evidence (including hearsay evidence) compared with the safeguard the LRC back in 1992 intended in its earlier Report on Arrest to provide by its then recommendation to adopt section 78 of PACE, the Administration takes the view that the Bill should be implemented as soon as possible and it is not necessary to defer commencement of the Bill until the passing of legislation in Hong Kong similar to PACE.

<u>Progress on implementation of the LRC's Report on Arrest</u>

9. For Members' general information, in July 2004, the Security Bureau issued a Panel paper to outline the progress of implementation of the recommendations put forward by the Inter-departmental Working Group (the "WG") on the LRC's Report on Arrest ("2004 Panel Paper").

10. It was stated in the 2004 Panel Paper, among others, that of the 61 recommendations put forward by the LRC, the WG accepted 30 in full, 21 in principle but with suitable adaptations taking into

account existing law enforcement practice and local situation, and rejected 10 because they were considered unnecessary, impracticable and/or would unjustifiably weaken the existing law enforcement capability. The Government also stated in the 2004 Panel Paper that it would continue to take appropriate steps to implement the recommendations put forward by the WG in a phased manner and, in the process, would take into account developments since the WG's report, e.g. changes to PACE. Details of the implementation of the Report on Arrest then were set out in the table at the Annex of the 2004 Panel Paper.

11. More recently, in the Legislative Council meeting held on 1 November 2017, the Hon Mr Kenneth Leung asked the Government for information about the latest position of the implementation of each of the recommendations accepted in full or in principle by the WG, as well as the relevant work plan for the coming three years; in respect of each of the recommendations rejected by the WG, of the reasons for rejection given by the authorities at that time, and whether the authorities had assessed afresh its feasibility in the past three years; if so, of the assessment outcome. The Secretary for Security replied as follows -

> "The Arrest Report published by the LRC in 1992 put forward 61 recommendations on the powers of stop, search, arrest and detention of law enforcement agencies and other matters related to the exercise of such powers. In 1993, the Government set up an inter-departmental working group to study the recommendations. The views of the working group were deliberated in the public consultation in 1996 and discussed at the Legislative Council Panel on Security meeting in February 1998. The HKSAR Government also provided information on the follow-up actions on the various recommendations for the meeting of the Legislative Council Panel on Security in July 2004.
>
> Among the 61 recommendations put up by LRC, 51 were accepted or accepted in principle, and the majority of them had been suitably implemented with regards to the existing law enforcement practice and local situation. These include, for example, the appointment of 'Custody Officers' and 'Review Officers' by law enforcement agencies to ensure those in detention are treated properly, stating in layman's term the reasons for the stop and search to the persons affected by law enforcement agencies, the expanded use of

video-interviewing with suspects, disclosure of statistics and information in relation to stop, search and road block checks, as well as ensuring that the person arrested should be informed that he is under arrest and of the ground for the arrest, etc. Regarding the recommendations to be followed up, since the relevant reasons and grounds were put up many years ago, we need to review and consider their way forward taking into consideration the changes of situation since then and local law enforcement experience."

12. As regards the remaining 10 recommendations, including the adoption of PACE on issuing code of practice to facilitate the exercise of powers by police officers, as well as the recommendation of giving persons not charged or not convicted the rights to witness the destruction of their fingerprints and samples, etc., the WG has rejected them as they were considered unnecessary, impracticable and/or would unjustifiably weaken the law enforcement capability. The question and answer can be found at pages 1050 – 1053 of the Legislative Council's Official Record of Proceedings[3].

Reference to case law in common law jurisdictions other than New Zealand

13. Some Members queried why the Administration has made reference to English case law even when the Bill is based on the New Zealand Law Commission model. Members may wish to note that references were made by the LRC Sub-committee on Hearsay in Criminal Proceedings (when considering the proposed model of reform) and the Administration (when drafting the Bill) to not just to the New Zealand Law Commission model but also to similar provisions of the relevant statutory schemes in other jurisdictions such as England and Wales and Scotland. Hence, the jurisprudence developed under the English and Scottish legal systems is also closely relevant.

[3] https://www.legco.gov.hk/yr17-18/english/counmtg/hansard/cm20171101-translate-e.pdf#nameddest=orq

(b) <u>In respect of the condition of necessity under new section 55O, provide examples or case law to illustrate the situations in which new sections 55O(1)(c) and 55O(1)(e) apply and address a member's concern about the admission of hearsay evidence without cross-examination of the declarant in those situations;</u>

14. Section 55O(1) is aimed at implementing proposal 8 of the Core Scheme and recommendation 25 of the 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, or to make him available for examination and cross-examination in another competent manner. In practice, this will mean that the party relying on this condition 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.

15. The proposed amendment does not conflict and will not replace the existing mechanisms of obtaining evidence from outside jurisdiction. The court will consider whether the condition of necessity is satisfied only if making the declarant available for examination and cross-examination in another competent manner is not reasonably practicable.

16. Section 55O(1)(c) was drafted with reference to section 116(2)(c) of the United Kingdom Criminal Justice Act 2003 ("the Act") which states that "that the relevant person is outside the United Kingdom and it is not reasonably practicable to secure his attendance". In comparison, section 55O(1)(c) is a more detailed provision as it expressly stipulates in the condition that neither (i) securing the declarant's attendance nor (ii) making the declarant available for examination and cross-examination in another competent manner is reasonably practicable. Nevertheless, as the case authorities show, in practice, the English courts would nevertheless consider whether it is reasonably practicable to make the declarant available to give evidence in another competent manner such as by video link.

17. The English Court of Appeal's judgment of *R v Juskelis* [2016] EWCA Crim 1817[4] illustrates a situation in which the new provision can apply. The appellant of that case appealed against his conviction

[4] http://www.bailii.org/ew/cases/EWCA/Crim/2016/1817.html

of "inflicting grievous bodily harm". The prosecution case was that he attacked his cell mate when he was remanded in custody for a driving offence. The complainant was deported to Lithuania before trial. The officer in the case tried to contact the complainant by all the information he had but was still unable to locate him.

18. The prosecution applied to adduce the complainant's witness statement under section 116(2)(c) and/or (d)[5] of the Act. The trial judge allowed the application. The Court of Appeal held that although the officer in the case had done what he thought was his best, more could have been done by him. There was a failure of communication between the prison service, the Home Office, the police and the prosecution. The complainant's movements should have been monitored and enquiries should have been made of the Lithuanian consulate or some other such source to seek to ascertain the whereabouts of the complainant. Further, Lithuania being a member of the European Union it can be assumed that had the complainant been located arrangements could have been made, if need be by video link, for him to give evidence orally at trial.

19. The Court of Appeal held that the prosecution had not shown that the requirements of section 116(2)(c) had been met. The court therefore allowed the appeal.

20. In *R v Edward Gyima, Francis Adjei* [2007] EWCA Crim 429, the appellants were convicted of assault occasioning actual bodily harm and theft. The 17-year-old victim was attacked by a group of five boys in the street. The attack was witnessed by the victim's 14-year-old cousin ("K"), who lived in the United States but came to the United Kingdom on holiday at the time of the incident. A video interview was conducted with K, who then returned to the United States. Due to K's age, K's mother would be required to accompany K to return to the United Kingdom for the trial and to act as his appropriate adult. K's mother initially agreed to do so. However, K's parents soon became uncooperative and did not answer telephone calls made by the police on a daily basis. The English Court of Appeal found it was clear that K's parents would not co-operate with the prosecution which, since K lived in the United States, presented a very considerable difficulty in communications with him and his mother and the ability of the police to persuade them to co-operate with any arrangement for giving evidence by video link or for him to come to the United Kingdom. In the circumstances, the English

[5] Section 116(2)(d) of the Act corresponds to the proposed section 55O(1)(d) in the Bill.

Court of Appeal found that the prosecution had proved that they had taken all reasonable steps to secure K's attendance (although the appeal against convictions was allowed on other grounds).

21. Section 55O(1)(e) applies where the declarant would be entitled to refuse to give evidence on the ground of self-incrimination and he refuses to do so. Section 259(2)(d) of the Criminal Procedure (Scotland) Act 1995 is a similar provision.

22. The Scottish Law Commission considered that if a criminal has made a statement disclosing that he had committed a crime, evidence of the statement should not be excluded, if relevant, at a trial in which he claims the privilege against self-incrimination in relation to the subject matter of the statement. If he has already disclosed the information in the statement to someone, it should not be withheld from the court. It should not be acceptable for a criminal to disclose his criminal activity to a person outside the court and then to claim the privilege in order to prevent the disclosure of his crime to a court which requires information relevant to the guilt or innocence of an accused person. The Scottish Law Commission said that they would not go so far as to require the witness to disclose the privileged matter himself, but they saw no objection to the leading of evidence of a statement he had already made about the matter to another person or persons.[6]

23. In *McConnachie v HM Advocate* [2010] ScotHC HCJAC 93[7], the appellant appealed against his conviction of assault and attempted robbery. A ground of the appeal was that fresh information showed that the crime was committed by another person, Mark Campbell. A person known as Paul Murning also told the appellant in prison that Campbell had committed the attempted robbery.

24. Campbell testified at the hearing of the appeal. He was warned that he was not obliged to answer any question which tended to incriminate him. When asked about the incident, he declined to answer the questions put to him. In cross-examination, the prosecution put to him his previous statement in which he had denied any involvement in the attempted robbery. Campbell testified that everything he had said in the statement was true. He also denied having told Murning in prison that he had committed the offence.

---

[6] Scottish Law Commission Report 149: https://www.scotlawcom.gov.uk/files/9412/7989/7413/rep149.pdf at para 5.59 - 5.62.

[7] http://www.bailii.org/scot/cases/ScotHC/2010/2010HCJAC93.html

25. The Scottish Appeal Court held that in those circumstances Murning's account of what Campbell had told him in prison was albeit hearsay, admissible evidence, by virtue of section 259 of the Criminal Procedure (Scotland) Act 1995, of the content of Campbell's statement. Although Campbell admitted that he had given a statement asserting that the denial in it of his involvement in the attempted robbery was true, he insisted on sheltering behind his right not to incriminate himself. The truth of his denial could accordingly not be tested.

26. However, although Murning's evidence of what Campbell told him was admitted, the court found Campbell's testimony to be wholly without credit and conflicting with the testimony of other witnesses accepted by the court. In those circumstances, Campbell's statement to Murning was, in the court's view, incapable of being regarded by a reasonable jury as being credible and reliable as to its contents. The court refused the appeal.

27. The above case illustrates a situation in which the new section 55O(1)(e) can be applied for admitting hearsay evidence without cross-examination of the declarant. It also shows that after admitting the hearsay evidence, the court can still reject the evidence it considers as unreliable and not credible.

28. Unlike the situation in Scotland, hearsay evidence in the Hong Kong context will also need to satisfy the condition of threshold reliability before the court may grant permission to admit it. This additional safeguard, together with other built-in safeguards provided for in the Bill, means that a more stringent regime as a whole will be in place to ensure that, notwithstanding the inability to cross-examine the declarant from whom the admissible hearsay evidence originated, the court will be able to reach a verdict that is safe.

(c) <u>In respect of the recommendations for reforming the hearsay rule in criminal proceedings, provide a comparison between the English model and the New Zealand Law Commission model and the justifications for adopting a modified version of the New Zealand Law Commission model as the proposed model of reform to be adopted in Hong Kong; and</u>

29. The English model was implemented by way of the Criminal Justice Act 2003. The New Zealand Law Commission model was implemented by way of the Evidence Act 2006. Annex A is a comparison presented in tabulated form between the two models. The Law Reform Commission Sub-committee on Hearsay in Criminal Proceedings has, after careful consideration, decided to recommend that the New Zealand model should be adopted subject to three modifications.

30. Under the English model, admission of hearsay evidence is automatic once it is shown that the declarant is unavailable to give evidence, thus giving rise to concern that it would have an over-inclusive effect by allowing in all types of relevant evidence, including unreliable hearsay evidence[8]. The strength of the New Zealand model is its inclusionary discretion based on the principles of necessity and reliability, a logical reflection of principles underlying specific exceptions to the hearsay rule. By introducing flexibility into the law, such discretion has the appropriate level of filtering effect to weed out undesirable hearsay evidence. With its well defined terms and conditions, the New Zealand model provides a sufficient degree of guidance to judges in exercising the discretion.

31. The three modifications to the New Zealand model recommended by the Sub-committee are as follows. First, the Sub-committee considered that preservation of the eight common law exceptions to the hearsay rules by virtue of section 118(1) of the Criminal Justice Act 2003 would provide greater certainty and predictability to practitioners, save court time and avoid an abrupt change in the law. Secondly, as an ultimate safeguard against possible miscarriages of justice, it is necessary to confer on the trial judge a power to direct a verdict of acquittal in certain cases where prosecution hearsay evidence is admitted (which power exists under the English model). Thirdly, extrinsic evidence that corroborates or contradicts the truth of the hearsay statement should be considered by the trial judge in applying the reliability criterion. The Sub-committee therefore

[8] See paras 8.24-8.25 of the Hearsay Report.

proposed to widen the ambit of listed factors to be considered under the threshold reliability test to include the presence of supporting evidence.[9]

[9] See paras 8.35 – 8.49 of the Hearsay Report.

(d) <u>Provide relevant cases in New Zealand jurisdiction demonstrating if there are any difficulties encountered by the local courts in the course of implementing the New Zealand Law Commission model in admitting hearsay evidence, with a view to facilitating members' understanding of the areas requiring particular attention if the modified New Zealand Law Commission model is to be adopted in Hong Kong.</u>

32. We have conducted a research into the New Zealand case law and are unable to find any case law which demonstrates that the New Zealand courts have encountered any difficulties in implementing the New Zealand Law Commission model. Nonetheless, for Members' information, we set out the following cases decided by the New Zealand courts to illustrate how the courts have rigorously applied the statutory criteria in determining the admission or otherwise of hearsay evidence. These cases did not show any difficulties encountered by the court and that there is no evidence to suggest that the New Zealand regime has been frequently abused. In the circumstance, Members have good reasons to be confident that the Hong Kong courts will also be able to apply the statutory criteria under the Bill rigorously and will properly dismiss any unmeritorious or abusive applications.

32. In *R v Gwaze* [2010] NZSC 52[10], the accused was acquitted of sexual violation and murder. An important issue at trial was the cause of death of the child victim, who was HIV positive. The defence case was that the prosecution had not excluded natural causes for the death as a result of the victim's HIV status. At trial, the judge admitted as hearsay evidence comments by a medical expert that HIV children with symptoms similar to those exhibited by the victim might deteriorate suddenly and die.[11]

34. On appeal by the prosecution, the New Zealand Supreme Court held that it was wrong in law to admit the evidence. The expert's comments should have been excluded, inter alia, under section 8 of the Evidence Act 2006 as their probative value was outweighed by the risk of unfair prejudice and under sections 17 and 18 as inadmissible hearsay.

---

[10] http://www.courtsofnz.govt.nz/cases/the-queen-v-george-evans-gwaze-1/@@images/fileDecision?r=808.193986717

[11] In Hong Kong, rules relating to the admissibility of expert opinion are governed by common law as preserved under s.55R and Schedule 2 in the Bill.

35. The Supreme Court held that the relevant provision made it clear that the inquiry into the reliability must include not only accuracy of the record of what was said and the veracity of the declarant, but also the nature and contents of the statement, and the circumstances relating to its making.

36. The Supreme Court further held that rules of exclusion provided by the Act did not confer discretion as to the admission of evidence, but prescribe standards that must be observed. Failure to comply with the conditions of admissibility was an error of law that could be corrected on appeal. The error of law in the present case led to a mistrial that occasioned a substantial miscarriage of justice. Such substantial miscarriage of justice arose where an error capable of affecting the verdict was in fact highly material to the verdict. The Supreme Court accordingly directed a new trial on the charges.

37. Later in *R v Yun Qing Liu* [2015] NZHC 732[12], the accused was charged with murder of his girlfriend. The prosecution applied to admit witness statements of the victim's brothers and a friend recording what the victim had told them to prove the accused's motive. The High Court of New Zealand explained that:

> "…in some cases, the subject matter of the evidence expressed in its present objectionable form may well be admissible if a proper evidential foundation for its admission is laid at trial. That exercise is properly left to the discipline of counsel and the supervision of the presiding Judge having regard to the context and nuances of evidence as the trial evolves. It is simply neither practical nor desirable to undertake a line by line analysis of these lengthy statements in an attempt to settle every evidential point, particularly if the objections are capable of being met either by agreement or by the laying of proper foundations."[13]

38. The trial judge said that in considering the factors relating to reliability, it was important to bear in mind the role of the court in determining whether the evidence should be admitted. The purpose of the general exclusionary rule was to balance the prejudice that came from being unable to cross-examine the maker of the statement. The focus was therefore on the reliability of the statements themselves, not on the reliability of the witness who claimed to have

[12] http://www.nzlii.org/nz/cases/NZHC/2015/732.html
[13] *R v Yun Qing Liu* [2015] NZHC 732, at para [43]..

heard them. Similarly, the purpose of the examination was not to remove from the jury the role of weighing competing evidence or determining credibility. Questions of weight remained with the jury.

39. The trial judge referred to the following passage in the Court of Appeal's decision in *TK v R* [2012] NZCA 185 and held that as a result of that distinction, the threshold for admitting evidence was comparatively low:

> "The issue of reliability is ultimately a jury matter. A court, when considering admissibility under s 18(1) [of the Evidence Act 2006], 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."[14]

40. The trial judge ruled that he did not need to accept the statements as evidence merely because it is sure that they were uttered. The Court must still consider whether the statements themselves were reliable and whether they provided useful evidence of the facts which they alleged. After referring to *R v Gwaze*[15], the judge ruled that:

> "…in determining whether to admit hearsay statements, the Court must consider whether they provide useful evidence to support the claims which the statements contain. The Court can consider the likelihood that the maker of the statement knew whether the statement was correct and the likelihood that she was speaking honestly. It can also consider the surrounding circumstances to consider whether the statements have been captured accurately and whether they accurately represent what the statement maker was trying to say. But where objections to admissibility are limited to attacks on the credibility of the hearers of those statements, those objections will not generally affect whether the statements can be admitted under this rule."[16]

---

[14] *R v Yun Qing Liu* [2015] NZHC 732, at para [55].
[15] [2010] NZSC 52 (see para 32 above).
[16] *R v Yun Qing Liu* [2015] NZHC 732, at para [58].

41. The trial judge was satisfied, amongst others, that hearsay evidence was reliable and its probative value outweighed any illegitimate prejudicial value. The trial judge concluded that the hearsay statements could be admitted as evidence at trial.

42. The above are just two instances from cases decided by the courts in New Zealand demonstrating that the courts did not encounter any difficulties in the course of implementing the New Zealand Law Commission model. When the new scheme comes into operation after passage of the Bill, legal practitioners and the courts in Hong Kong would also be able to refer to other cases determined by the courts in New Zealand as well as those from other common law jurisdictions, as appropriate, for considering the admissibility of hearsay evidence under the new scheme.

Department of Justice
December 2018

#478023v4

Comparison between the relevant provisions of the United Kingdom Criminal Justice Act 2003 and the New Zealand Evidence Act 2006		
	United Kingdom Criminal Justice Act 2003	**New Zealand Evidence Act 2006**
1. Continued operation of existing statutory provisions that render hearsay evidence admissible	Section 114(1)(a)	Section 17(a)
2. Common law hearsay rules	Section 118 : Preservation of eight common law hearsay rules.	Section 17 : abolition of common law exceptions to the hearsay rule.
3. Agreement to admit hearsay evidence	Section 114(1)(c) : All parties to the proceedings agree to it being admissible.	Section 9(1) : All parties to the proceedings agree to it be admissible in any form or way.
4. Conditions for admitting hearsay evidence.	Section 116(2) : (a) that the relevant person is dead; (b) that the relevant person is unfit to be a witness because of his bodily or mental condition; (c) that the relevant person is outside the United Kingdom and it is not reasonably practicable to secure his attendance;	Section 18(1) : (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 (ii) the Judge considers that undue expense or

	(d) that the relevant person cannot be found although such steps as it is reasonably practicable to take to find him have been taken; (e) that through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence. Section 116(4) : Hearsay evidence may be admitted under section 116(2)(e) only if the court considers that the statement ought to be admitted in the interests of justice. Section 116(5) : These conditions will not be treated as satisfied if they are caused by the party who is seeking to adduce the evidence in support of his case in order to prevent the declarant from testifying in the proceedings. Section 114(1)(d) :	delay would be caused if the maker of the statement were required to be a witness. Section 16(1) : The term **"**circumstances**"**, in relation to a statement by a person who is not a witness, include— (a) the nature of the statement; and (b) the contents of the statement; and (c) the circumstances that relate to the making of the statement; and (d) any circumstances that relate to the veracity of the person; and (e) any circumstances that relate to the accuracy of the observation of the person. Section 16(2) : a person is "unavailable as a witness**"** in a proceeding if the person— (a) is dead; or (b) is outside New Zealand and it is not reasonably practicable for him or her to be a witness; or

	The court may admit hearsay evidence if satisfied that it is "in the interests of justice" for it to be admissible.	(c) is unfit to be a witness because of age or physical or mental condition; or (d) cannot with reasonable diligence be identified or found; or (e) is not compellable to give evidence.
5. Safeguards	Section 126 : The court may refuse to admit a hearsay statement if the case for excluding the statement, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence. Section 125 : In a jury trial, if the court is satisfied after the close of the prosecution case that the case against the accused is based wholly or partly on a hearsay statement and the evidence provided by the statement is so unconvincing that the conviction would be unsafe, the court must either direct the jury to acquit or, if it considers that there ought to be a retrial, discharge the jury.	Section 8 : (1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will— (a) have an unfairly prejudicial effect on the proceeding; or (b) needlessly prolong the proceeding. (2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

6. Serving of notices	Part 34 of the Criminal Procedure Rules 2013 : A party proposing to tender hearsay evidence is required to serve on each party to the proceedings notices and particulars of the evidence.	Section 22 : A party who proposes to offer a hearsay statement in criminal proceedings must give written notice to every other party, stating, inter alia, the name of the maker of the statement, the contents of the hearsay statement (if made orally) or a copy of the statement (if made in writing). If section 18(1)(a) is relied on, the notice must also state the circumstances relating to the statement that provide reasonable assurance of its reliability. The Act allows the judge to dispense with the notice requirements if no party is substantially prejudiced by the failure to give notice, or if compliance with the requirements was not reasonably practicable in the circumstances, or if the interests of justice so require.