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5 December 2018

By email & by post

Mr Kenneth Fok
Director of Practitioners Affairs
The Law Society of Hong Kong
3/F Wing On House
71 Des Voeux Road Central
Hong Kong

Dear Mr Fok,

Evidence (Amendment) Bill 2018

Thank you for your letter dated 9 November 2018 to the Solicitor General. The Law Society's submission dated 18 July 2017 ("Submission") in response to the consultation of the Evidence (Amendment) Bill 2017 ("2017 Bill") did receive careful attention.

Each and every suggestion in the Submission has been considered in detail as was the case for comments and suggestions received from other respondents in the course of the public consultation. All such comments and suggestions and our responses and proposed refinements for incorporation in the 2017 Bill have been summarised in tabulated form. The relevant table was submitted together with our paper to the Legislative Council's Panel on Administration of Justice and Legal Services for discussion in their meeting on 26 February 2018:

https://www.legco.gov.hk/yr17- 18/english/panels/ajls/papers/ajls20180226cb4-619-5-e.pdf.

In order to address the Law Society's particular concern expressed in your letter, we have attempted to summarise the issues raised in the Submission and our corresponding updated responses and related refinements made to the Evidence (Amendment) Bill 2018 ("2018 Bill") in another table, a copy of which is attached to this letter (at Annex A) for your easy reference. The four suggestions set out in pages 1 and 2 of your letter have already been responded to in Annex A. In this connection, please refer to paragraphs 5, 2, 3 (sub-paragraph 6) and 5 (sub-paragraph 2) respectively of Annex A.

Paragraph 1 of Annex A has also responded to the first preliminary observation at page 2 of your letter relating to the practical difficulty for timely plea of "guilty". Regarding the second preliminary observation relating to the drafting of section 55Q, please note that provisions in section 55Q are to be read together and should not be read in isolation. When section 55Q(2) is read with section 55Q(1)[1], it is clear that the court must direct the acquittal of the accused in relation to the relevant offence in the scenario set out in section 55Q(1). Adopting the approach the Government has can also avoid the use of sandwich clause, which is usually considered as difficult to read.

As requested, we have prepared a copy of the 2017 Bill marked with the amendments made for the 2018 Bill for your reference. A copy of the marked-up 2017 Bill is attached to this letter (at Annex B) for your reference please. Apart from stylistic and editorial amendments, you would also see that we have made the following improvements:

(1) Deletion of section 55G to avoid duplication and enhance conciseness.

(2) Revision of the wording for section 55P(2) so that the factors to be considered by the court in deciding whether the condition of threshold reliability are meant to be exhaustive.

(3) Amendment to section 55Q(5)(e) to include the inability to cross-examine the declarant as one of the factors in considering whether it would be unsafe to convict the accused.

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[1] Section 55Q(1) provides:

"(1) This section applies in relation to proceedings if-

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

(b) the court considers that it would be unsafe to convict the accused of the offence."

The reasons why certain matters or suggested amendments that the Law Society has raised in the Submission have not been adopted in the 2018 Bill will, we trust, have been apparent from a reading of Annex A.

We hope this will have addressed all your enquiries and look forward to the continued support from the Law Society in favour of the reform exercise.

Yours sincerely,

Dlam

(Ms Diana Lam)
Assistant Solicitor General (Policy Affairs) (Ag)
Legal Policy Division

Enc.

cc : (1) The Honourable Mr Cheung Kwok-kwan
Chairman of the Bills Committee of the Legislative Council on Evidence (Amendment) Bill 2018

(2) The Honourable Mr Dennis Kwok

#477981v5

Summary of The Law Society of Hong Kong's Comments and Suggestions on the Evidence (Amendment) Bill 2017 on 18 July 2017 and Department of Justice (DoJ)'s Responses

Issues	Comments/Suggestions	DoJ's Responses
Sections 55I – 55K[1]		
1 Admission of hearsay evidence not opposed	1. The questions of admissibility should be determined well prior to trial to allow proper advice on plea. The one-third discount in sentence should not be deducted due to delay in plea by hearsay evidence. The 28 days' of notice of hearsay will be given after the plea is taken. The Law Society queried whether the matter would be dealt with by a sentencing judge so that he/she could make a fair discount of sentence. (p.18, para 60)[2]	1. As stated by Silke VP in *R v Kwok Chi Kwan* [1990] 1 HKLR 293 and adopted in para 65 of *HKSAR v Ngo Van Nam*, CACC 418/2014, the rationale for allowing discounts from otherwise appropriate sentences to defendants who plead guilty is to give allowance for the remorse indicated by such a course; to assist in the saving of time; and to avoid the necessity for the bringing of witnesses to Court. It is confirmed in para 133 of *Ngo Van Nam* that one of the main purposes of the court giving this one-third discount to a defendant who pleads guilty is to encourage a guilty person to own up to the crimes he committed, so as to conserve the resources of the community and to ensure that justice can be administered more efficiently and matters can be concluded in the most expeditious manner. "The main features of the public interest", relevant to the discount for a plea of guilty, are "purely utilitarian" (para 171, *Ngo Van Nam*) and the Court of Appeal is satisfied that a discount of 20% from that taken for the starting

[1] Section number of the Evidence (Amendment) Bill 2018.
[2] In this Annex, the page numbers and paragraph numbers are referring to those in The Law Society of Hong Kong's submission dated 18 July 2017.

Issues	Comments/Suggestions	DoJ's Responses
		point for sentence being the appropriate discount to be afforded to a defendant who pleads guilty only on the first day of trial reflects the reduced utilitarian value of the plea of guilty, in comparison to a plea of guilty intimated at an early stage (para 199, *Ngo Van Nam*). Para 215 of *Ngo Van Nam* confirms the discount to be afforded to a defendant who pleads guilty after arraignment but during the trial itself would usually be less than the 20% afforded to the defendant who pleads guilty on the first day of trial and will reflect the circumstances in which the plea was tendered. It includes the guilty plea following the holding of a voir dire and where the defence has sought to test some other aspect of the prosecution case. It is clearly stated that a discount for guilty plea is to give allowance for the remorse and the willingness to facilitate the course of justice. The purpose is purely utilitarian. The utilitarian value of a guilty plea at an early stage is higher than a guilty plea at a later stage. The admission of hearsay evidence is of no difference to the admission of other disputed evidence, e.g. a confession. A guilty plea after the hearsay evidence being tried and admitted does not reflect any remorse from the defendant or any acceptance to own up to the crimes he committed. Time will be spent by courts and witnesses will be brought before the courts to rule on the admissibility of the hearsay evidence. It is of a lower utilitarian value than that of a guilty plea before the evidence being

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

Issues	Comments/Suggestions	DoJ's Responses
		guilt and (ii) the opportunity for his lawyers to assess the strength of the case against him and to advise him on it … There may be other cases in which a defendant cannot reasonably be expected to make any admission until he and his advisers have seen at least **some** of the evidence. Such cases aside, however, whilst it is perfectly proper for a defendant to require advice from his lawyers on the strength of the evidence (just as he is perfectly entitled to insist on putting the Crown to proof at trial), he does not require it in order to know whether he is guilty or not; he requires it in order to assess the prospects of conviction or acquittal, which is different." (emphasis added) This view is also consistent with the practice as described by the Court of Appeal in para 231 that "a defendant is afforded not only the opportunity to be informed of the charge and, by provision of the Brief Facts, made aware of the prosecution case in summary but also has the opportunity to seek legal advice before being called upon to tender a plea to the charge." Viewed against the above distinction, the proposition that a defendant should be first given notice of the prosecution's intention to adduce hearsay evidence against him before he can obtain proper advice on his plea falls within the second category identified by Hughes LJ, which is irrelevant to the court's consideration of the timeliness of a guilty plea. In the normal course of events, by the time a defendant is reasonably expected to

Issues	Comments/Suggestions	DoJ's Responses
		tender his plea, the prosecution would have already served on him/her the charge sheet / summons, Summary of Facts / Brief Facts, and documentary evidence (such as cautioned statements and photographs) and statements of witnesses which the prosecution intends to call, and any unused materials requested by the defence. Furthermore, to comply with the prosecution's proactive and continuing duty of disclosure, if the prosecution has already decided at that stage to adduce and rely on hearsay evidence against the defendant, the prosecution is also required to serve such hearsay evidence on the defence, despite not being required to give the notice of hearsay at that stage[3]. The defendant would already have sufficient materials and "at least some of the evidence" (the phrase in *Caley* above) to know the prosecution's case against him for the purpose of knowing "whether he is guilty or not", and if need be, with appropriate advice. To insist upon being also given the notice of hearsay before a plea is tendered would be to require the prosecution to inform the defendant the *precise way* in which it will prove its case against him/her, which only goes to "the prospects of conviction or acquittal", being a different matter.
	2. The 14 days allowed for giving an	2. Hearsay as well as other evidence in the prosecution bundle may

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

Issues	Comments/Suggestions	DoJ's Responses
	opposition notice is not enough for investigation, be provided with and going through the unused materials in the bundle. (p.18, para 61)	require investigation. There is no reason why hearsay evidence should necessarily be treated differently because of the 14 days limit. In any event, the court has power to extend a time limit for giving a hearsay notice or opposition notice under section 55L.
Section 55O		
2 Condition of necessity	1. The Law Reform Commission of Hong Kong (the LRC) is clear that unwillingness on the part of a declarant to attend to testify does not equate to "unavailability". The notion of genuine unavailability (not mere unwillingness) should be more explicitly set out in section 55O(1)(c). (pp.5 – 6, paras 18 – 19)	1. Section 55O(1)(c) has defined when a declarant outside Hong Kong can satisfy the condition of necessity.[4]
	2. Without setting out explicitly the notion of "unavailability", section	2. The condition of necessity under section 55O(1)(c) does not depend on the intention of the declarant. The criterion is whether

[4] The Law Society asked the notion of "genuine unavailability" and not mere unwillingness to testify be more explicitly set out under the conditions of necessity (s.55O). The LRC was very much alive to the above distinction, and has come up with proposal 8 of the Core Scheme, which is adopted wholesale in s.55O. Those conditions may thus reasonably be regarded as the LRC's view of what amounts to genuine unavailability. In para 17, the Law Society referred to the expression "truly insurmountable difficulties" used by the Scottish Law Commission. Nevertheless, when this concept was reduced into statute, i.e. s.259(2) of the Criminal Procedure (Scotland) Act 1995 (quoted in para 5.87 of the Report), the conditions provided are essentially the same as those under our s.55O, except that one of the conditions under the Scottish law was not adopted by the LRC, i.e. (e) where the statement-maker is called as a witness and either refuses to swear or, having been sworn, refuses to give evidence. The reason we think is plainly to address the concern that hearsay evidence should not be admitted simply because of the unwillingness on the part of a declarant to attend to testify orally.

Issues	Comments/Suggestions	DoJ's Responses
	55O(1)(c) or (1)(d) could arise when a declarant hides himself. (He is unwilling, not unable, to give evidence.) (p.6, para 20)	or not it is reasonably practicable to secure the declarant's attendance or to make the declarant available for examination and cross-examination in a competent manner. If the declarant is deliberately hiding himself in circumstances which have implication on his truthfulness, this may be a factor to be taken into account by the court pursuant to section 55P(2)(c) in determining whether condition of threshold reliability is satisfied.
	3. Section 55O(1)(c) "*reasonably practicable*" does not accommodate the fact that people with ordinary means would not be in any easy position to secure overseas declarants/witnesses. (p.6, para 21)	3. English case law suggests that the expense and inconvenience of securing a witness's attendance is a relevant consideration of "reasonably practicable". In any event, this problem is not unique to hearsay overseas witnesses but may occur to every overseas witness. It, however, does not deprive defendant of a fair trial since he can obtain costs from the prosecution if he is found not guilty afterwards. In *R v Gyima* [2007] EWCA Crim 429, at para 24, applying the pre-2003 case of *R v Castillo* [1996] 1 Cr App R 438, the English Court of Appeal held that "reasonably practicable" in section 116(2)(c) of the Criminal Justice Act 2003 requires the consideration of (i) the importance of the evidence that the witness can give and the prejudice to the other party if the witness does not attend, and (ii) the <u>expense and inconvenience</u> of securing the witness's attendance. We also note that the defence only needs to prove on the balance of probabilities that the condition of necessity

Issues	Comments/Suggestions	DoJ's Responses
		is satisfied: section 55O(4)(b).
Section 55P		
3 Condition of threshold reliability	1. In section 55P(1) of the Bill, the threshold in Recommendation 26 of the Report is more reassuring in tone by the positioning of the word "*only*" before the word "*satisfied*". (p.7, para 23)	1. It is not considered that there would be any practical difference.
	2. The use of "*including*" in section 55P(2) is unclear. It may include absence of cross-examination as a factor (i.e. non-exhaustive) where DoJ's intention seems otherwise. DoJ should use "*meaning*" instead. (p.13, para 41)	2. DoJ has revised the wording of section 55P(2) as appropriate. The factors in the subsection are meant to be exhaustive.
	3. To address the deprivation of cross-examination (p.9 – 13, paras 28, 30, 34, 37, 38, 40), it is to be added the words "*the absence of cross-examination of the declarant at trial*" or other alternatives in section 55P(2). (p.15, paras 45-48)	3. The Report discussed thoroughly whether or not "the absence of cross-examination of the declarant at trial" should be included as a factor in assessing "threshold reliability". The majority of the sub-committee decided against the inclusion. The sub-committee noted that none of the legislative schemes for reform of the law of hearsay in other jurisdictions included a provision that the inability to cross-examine the declarant was a factor bearing on the

Issues	Comments/Suggestions	DoJ's Responses
		admissibility of the hearsay statement. (See para 9.61-9.63 of the Report.) DoJ therefore considers it not appropriate to depart from the sub-committee's view.[5]
	4. Relative importance of hearsay evidence stated in para 9.96 of the Report is not reflected in the Bill: "*The greater the importance of the hearsay evidence, the greater may be the need for the accused to have the opportunity*	4. It is reflected in section 55Q(5)(d): "*importance of the hearsay evidence*" when the court considers whether or not to direct the acquittal of the accused.

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

Issues	Comments/Suggestions	DoJ's Responses
	to challenge that evidence by cross-examination". (p.14, para 42)	
	5. The logic underlying section 55P(2)(e) is circular "…*whether the statement is supported by other admissible evidence*" but no revision recommended. (p.13, para 40)	5. The absence or presence of supporting evidence may have a bearing on "threshold reliability". The English authorities strongly indicate that the presence or absence of supporting evidence is a highly relevant factor in assessing the reliability of hearsay evidence. The facts in *Riat* [2013] 1 Cr App R 2 illustrate the point.
	6. The strength of the threshold reliability test provided in para 9.55 of the Report was stronger than prima facie: "…*merely because on its face it appeared reliable was considered not enough*." (p.7, paras 24 – 26) It is suggested to add a section 55P(3) to provide a stronger test.	6. "Threshold reliability" already signifies a stronger test than prima facie and when combined with the various indicia in section 55P(2) as to its meaning, it can provide sufficient safeguard against too loose an approach to admissibility. Reference can be made to para 9.56 of the Report which states, with reference to the formulation now adopted in s.55P(1) of the Bill, that "The sub-committee considered the word 'assurance' to be particularly apt because it implied a reasonably high threshold which was appropriate for such a criterion."
Section 55Q		
4 Right to cross-examination	1. Absence of cross-examination mean there is "insufficient assurance" of reliability. (p. 10, para 31) The LRC	The Government has amended s 55Q(5)(e) to include the inability to cross-examine the declarant as one of the factors in considering whether it would be unsafe to convict the accused. For background,

Issues	Comments/Suggestions	DoJ's Responses
	quoted and approved a New Zealand decision that the court must make assessment of likely impact of cross-examination. Such a test was not foreseen as a difficulty by New Zealand Court. (p. 10, para 31) The Hong Kong Court of Final Appeal in *HKSAR v Lau Shing Chung Simon* [2015] HKCU 291 also underscores the importance of cross-examination in the consideration of the matter. (p. 10, para 33) 2. The rationale of the absence of cross-examination set out in para 9.61 of the Report that the matter goes to weight rather than admissibility is not convincing. (p. 10, para 34) This argument ignores the rationale of the necessity and reliability safeguards, which are before considering the weight. (p.12, para 37) 3. The concern listed out in para 9.62 of the Report that inconsistencies might	please also see footnote 6.

Issues	Comments/Suggestions	DoJ's Responses
	arise if cross-examination is listed as a factor for court to consider is not convincing as well. (p.11, para 38) Contrary to para 9.62, central argument should be reliability, and not inconsistencies of decision which this argument is premised. (p.12, para 38)	
	4. The Core Scheme allows supporting evidence to be considered as part of the reliability test for the hearsay. Contrarily, material 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. (p.16, para 49)	The safeguards provided under the Core Scheme should be viewed holistically. Admission of evidence for the purposes of challenging a declarant's credibility is provided under section 55T.
5 Court must direct acquittal	1. Although general wording may not assist, general guidance of that nature does appear in the English legislation. Hence, section 55Q(1) of the Bill should contain a very clear warning of	1. When a conviction would be unsafe or unsatisfactory is well established under case law, it would not be necessary to further remind the court on the danger of miscarriage of justice. What the Law Society referred to in para 13 of its submissions as "general wording", namely discretion to exclude "in the interests of justice",

Issues	Comments/Suggestions	DoJ's Responses
	the danger of admitting hearsay evidence. (p.4, paras 12 – 13)	citing para 5.32 of the Report, is taken from the old UK legislation, i.e. section 23 of the Criminal Justice Act 1988. However, under section 125 of the Criminal Justice Act 2003, the power of the court to stop a case is now couched in terms of whether the conviction would be "unsafe", without reference to "in the interest of justice". The Hong Kong Bar Association does not have any problem with using the notion of "unsafe".
	2. To address the deprivation of cross-examination, the absence of cross examination should be spelled out as one of the factors for the court to consider to direct acquittal as a counterbalancing factor. (pp.9 – 17, paras 27 – 55)	2. DoJ has revised the wording of the provision to this effect. [This is consistent with the sub-committee's view at para 9.96 of the Report: "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. But since cross-examination is impossible, the question becomes how adequately is this absent opportunity to test the evidence catered for in the assurances of reliability or in the overall probative value of the hearsay evidence. Thus, in a jury trial, where the hearsay evidence plays a significant role in the prosecution's case, there would seem to be a good basis for exercising the [power to direct acquittal] if either the threshold reliability or the hearsay statement is low or its probative value is only minimally more than its prejudicial effect."]

Issues	Comments/Suggestions	DoJ's Responses
	3. The reliability threshold should be reconsidered to direct an acquittal by adding it as para (f) to section 55Q(5). (p.4, para 14)	3. Section 55Q(5)(a) – (c) and (e) have already included the element of threshold reliability. In any event, section 55P concerns admissibility while section 55Q concerns directions to acquit, which include some of the considerations for assessing the weight of the evidence.

Department of Justice
December 2018

#478968v2

Evidence (Amendment) Bill ~~2017~~2018

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Clause Page

Hearsay Evidence

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Consequential Amendment

Clause Page

A BILL

To

Amend the Evidence Ordinance to provide for the admissibility of hearsay evidence in criminal proceedings; and to provide for related matters.

Enacted by the Legislative Council.

Part 1

Preliminary

1. Short title and commencement

(1) This Ordinance may be cited as the Evidence (Amendment) Ordinance ~~2017~~2018.

(2) This Ordinance comes into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.

Part 2

Amendments to Evidence Ordinance

2. Evidence Ordinance amended

The Evidence Ordinance (Cap. 8) is amended as set out in ~~sections~~ this Part.

3 ~~and~~ . Section 25 amended (Government Chemist's certificates)

Section 25(1)—

Repeal

"the Schedule"

Substitute

"Schedule 1".

4. Section 26 amended (certificates as to photographic process)

~~3~~Section 26(1)—

Repeal

"the Schedule"

Substitute

"Schedule 1".

5. Part IVA added

After Part IV—

Add

"Part IVA

Hearsay Evidence in Criminal Proceedings

Division 1—General

55C. Interpretation

~~(1)~~ In this Part—

declarant (~~———~~陳述者), in relation to any statement adduced or to be adduced as hearsay evidence in criminal proceedings, means the person who made the statement;

hearsay (傳聞)—see section 55D;

responsible court officer (~~———~~負責法庭人員) means—

(a) in relation to proceedings in the High Court~~,~~ ~~—~~ the Registrar of the High Court;

(b) in relation to proceedings in the District Court~~,~~ ~~—~~ the Registrar of the District Court; or

(c) in relation to proceedings before a magistrate~~,~~ ~~—~~ the first clerk of the magistracy;

statement (~~———~~陳述) means any representation of fact or opinion however made, including a written or non-written communication, or a non-verbal communication in the form of conduct, that is intended to be an assertion of ~~the~~any matter communicated.

~~(2)~~ **55D. Meaning of *hearsay***

For the purposes of this Part—

(a) a statement adduced or to be adduced as evidence in criminal proceedings is hearsay if—

(i) it was made otherwise than by a person while giving oral evidence in the proceedings; and

(ii) it is adduced or to be adduced to prove the truth of its content;

(b) a reference to hearsay includes hearsay of whatever degree; and

(c) a reference to hearsay evidence is to be construed accordingly.

~~55D~~55E. Application

(1) This Part applies to evidence adduced or to be adduced in criminal proceedings—

~~(a~~ (a) started on or after the commencement date of this Part; and

(b) in relation to which the strict rules of evidence apply~~; and~~

~~(b) instituted on or after the commencement date of this Part~~.

(2) For the purposes of subsection (1)—

(a) ~~the following proceedings are regarded as~~ criminal proceedings include—

(i) proceedings for, or in relation to, the surrender of a person to a place outside Hong Kong under the Fugitive Offenders Ordinance (Cap. 503);

(ii) proceedings arising from the proceedings mentioned in subparagraph (i); and

(iii) proceedings in respect of sentencing; and

(b) evidence adduced or to be adduced in proceedings in respect of sentencing in relation to which the

strict rules of evidence do not apply is also regarded as evidence adduced or to be adduced in criminal proceedings in relation to which the strict rules of evidence apply if—

(i) it is adduced or to be adduced by the prosecution to prove an aggravating factor; and

(ii) it is not information furnished to the court under section 27 of the Organized and Serious Crimes Ordinance (Cap. 455), or under an order of the court.

(3) For the purposes of subsection (1), criminal proceedings are regarded as having been ~~instituted~~started if—

(a) a complaint has been made, or an information has been laid;

(b) an indictment has been preferred under section 24A(1)(b) of the Criminal Procedure Ordinance (Cap. 221);

(c) for proceedings instituted in respect of contempt of court—the person concerned ~~is~~has been committed by the court; or

(d) for proceedings mentioned in subsection (2)(a)(i) or (ii)—a warrant for the arrest of the person concerned has been issued by a magistrate under section 7 of the Fugitive Offenders Ordinance (Cap. 503).

~~55E.~~ 55F. When is hearsay evidence admissible

Hearsay evidence is admissible in proceedings only if it is admissible under—

(a) Division 2, 3, 4 or ~~4~~6;

(b) a common law rule preserved by ~~Division 5;~~section 55R; or

(c) ~~Division 6; or~~

~~(d)~~ any other enactment.~~.~~

55G. ~~55F.~~ Court's power to exclude evidence not affected

This Part does not affect any ~~powers~~power of the court to exclude evidence on grounds other than that it is hearsay.

~~55G. This Part not to affect admissibility of evidence under other law~~

~~This Part does not affect the admissibility of evidence admissible apart from this Part.~~

Division 2—Admission of Hearsay Evidence by Agreement of Parties

55H. Hearsay evidence is admissible if parties agree

(1) Hearsay evidence is admissible in proceedings if the prosecutor and the accused in ~~relation to~~respect of whom the evidence is to be adduced ~~(*parties*)~~

(a) make an oral agreement before the court for the admission of the evidence in the proceedings ~~concerned~~; or

(b) jointly produce to the court a written agreement made (whether before or during the proceedings) by the parties stating the parties' agreement for the admission of the evidence in the proceedings ~~concerned~~.

(2) ~~The~~ For subsection (1), the accused concerned may only make the oral agreement ~~by themselves~~ or ~~by~~

~~their~~written agreement in person or by the person's counsel or solicitor ~~on their behalf~~.

(3) ~~A~~ For subsection (1)(b), the written agreement ~~made by the accused~~ must purport to be signed by—

(a) if the accused concerned is an individual—the ~~accused; or~~individual;

(b) if the accused concerned is a body corporate—a director, manager, ~~the~~ company secretary or ~~some~~ other similar officer of the body corporate~~.~~; or

(c) the counsel or solicitor of the accused concerned.

(4) Hearsay evidence admitted because of ~~a party's~~an accused's agreement may ~~only~~ be adduced only in respect of the ~~party~~accused.

(5) An agreement made before the court or produced to the court for the purpose of proceedings relating to a matter—

(a) must be treated as an agreement for the purpose of any subsequent criminal proceedings relating to ~~that~~the matter (including an appeal~~).~~); and

~~(6) An agreement made before the court or produced to the court~~ (b) may, with the ~~leave~~permission of the court, be withdrawn for the purpose of—

(~~a) in~~ i) the proceedings for ~~the purpose of~~ which it ~~is~~was made or produced; or ~~produced; or~~

(~~b) in~~ ii) any subsequent criminal proceedings ~~relating to the same matter.~~mentioned in paragraph (a).

Division 3—Admission of Hearsay Evidence not Opposed by Other Parties

55I. Hearsay evidence is admissible if other parties do not oppose

Hearsay evidence is admissible in proceedings if—

(a) ~~the~~a 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 to—

(i) ~~to~~ each other party to the proceedings; and

(ii) ~~to~~ the responsible court officer; ~~and~~

~~(iii)~~ (b) the notice is given within 28 days after the day on which the date for the hearing in which the evidence is intended to be adduced is fixed, or within the time limit as shortened or extended under section 55L; and

(~~b~~c) 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).~~.

55J. Further provision on hearsay evidence notice

A hearsay evidence notice given by a party for the purposes of section 55I~~(a)~~ in respect of any hearsay evidence must—

(a) state the name of the declarant;

(b) if the evidence is in the form of an oral statement—state the content of the statement;

(~~b~~c) if the evidence is ~~not~~ in the form of ~~an oral~~a written statement—be accompanied by a copy of the document in which the statement is contained;

~~(c) state the name of the declarant; and~~

~~(d~~ (d) if the evidence is not in the form of an oral statement or written statement—contain a description of the evidence; and

(e) contain all of the following—

(i) an explanation ~~on~~of why ~~the evidence would be admissible under Division 4 should~~ , if an application ~~for leave be~~were made under section 55N, the court concerned should grant permission for the evidence to be admitted;

(ii) the facts on which the party ~~relies~~would rely to support the application;

(iii) an explanation ~~on~~of how the party will prove those facts if another party disputes them.

55K. Opposition notice

(1) A party who has received a hearsay evidence notice given under section 55I~~(a)~~ in respect of any hearsay evidence may oppose the admission of the evidence by giving an opposition notice.

(2) An opposition notice must ~~be given~~ —

(a) be given to ~~—~~

(i) each other party to the proceedings~~;~~ concerned; and

(~~b) to~~ ii) the responsible court officer; and

(~~c~~) b) be given within 14 days after the day on which the hearsay evidence notice is given, or within the time limit as shortened or extended under section 55L.

(3) The opposition notice must state—

(a) why, if an application were made under section 55N, the court concerned should not grant permission for the evidence to be admitted;

(b) which facts, if any, ~~facts set out~~contained in the hearsay evidence notice under section 55J(~~d~~e)(ii) are disputed by the party; and

~~(b) why the evidence is not admissible under Division 4 as explained in the hearsay evidence notice; and~~

(c) ~~if~~ any~~,~~ other objection to the admission of the evidence.

55L. Court's power to vary requirement

(1) The court may, on the application of a party, shorten or extend a time limit for giving a hearsay evidence notice under section 55I~~(a)~~ or opposition notice under section 55K.

(2) An application for the extension of a time limit may be made before or after the ~~expiry of the~~ time limit has expired.

(3) ~~An application~~If a party applies for the extension ~~of a~~after the time limit ~~made after the expiry of~~has expired, the ~~time limit~~application—

(a) must be made when giving the notice ~~for~~ in respect of which the extension is applied for; and

(b) must state the reason ~~for not making~~why the application ~~at an~~is not made earlier ~~time~~.

Division 4—Admission of Hearsay Evidence with ~~Leave~~Permission of Court

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

(1) Hearsay evidence may be admitted in proceedings with the ~~leave~~permission of the court.

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

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

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

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

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

(e) the condition of threshold reliability is satisfied under section 55P 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~~permission to admit hearsay evidence

(1) Subject to subsection (2), an application for ~~the purposes of~~permission to have hearsay evidence admitted under section 55M may only be made by a party to the proceedings ~~concerned~~ who has—

(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~~permission to have hearsay evidence admitted under section 55M only if—

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

~~(b~~ (a) 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 applicant's 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~~.~~ it; or

(b) the proceedings are proceedings in respect of sentencing.

(3) If making the application is allowed ~~to be made~~ under subsection (2)(~~b~~a), 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~~in which the evidence is adduced, draw inferences from the applicant's

failure ~~of the applicant~~ to give the hearsay evidence notice~~.~~; and

(b) without limiting the power of the court to otherwise award costs and irrespective of the outcome of the proceedings, award costs against the applicant.

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

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

(b) the court may award costs exceeding the limit of costs which it may otherwise 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 in proceedings only if—

(a) the declarant is dead;

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

(c) the declarant is outside Hong Kong~~,~~ and~~—~~

~~(i) it~~ neither of the following is ~~not~~ reasonably practicable ~~to secure~~ —

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

(ii) ~~it is not reasonably practicable to make~~making the declarant available for examination and cross-examination in ~~any~~

~~other~~another 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~~permission under section 55N (***applicant***) ~~must~~may not rely on ~~a~~ paragraph (a), (b), (c), (d) or (e) 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~~a subject ~~matters~~matter 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 satisfied in respect of any hearsay evidence in proceedings 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 in proceedings, 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.

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

~~(1) If~~

(1) This section applies in relation to proceedings if—

(a) the case against an accused for an offence is based wholly or partly on hearsay evidence admitted with

the ~~leave~~permission of the court granted under section 55M; and

(b) the court considers that it would be unsafe to convict the accused~~,~~ of the offence.

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

(~~2~~3) The court may give the direction at or after the conclusion of the case for the prosecution.

(~~3~~4) The court may give the direction even if there is a prima facie case against the accused for the offence.

(~~4~~5) In considering whether it would be unsafe to convict the accused of the offence, the court must ~~take into account~~have regard to—

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

(b) the nature of the hearsay evidence;

(c) the probative value of the hearsay evidence;

(d) the importance of the hearsay evidence to the case against the accused; and

(e) any prejudice to the accused which may be caused by the admission of the hearsay evidence, including the inability to cross-examine the declarant.

Division 5—~~Preservation of~~ Common Law Rules Relating to Hearsay Evidence

55R. ~~Common~~Certain common law rules relating to exceptions to rule against hearsay preserved

(1) The common law rules set out ~~below~~in Schedule 2 are preserved.

(2) The words describing a common law rule mentioned in Schedule 2 are intended only to identify the rule and are not to be construed as altering the rule in any way.

55S. Evidence not to be excluded on ground of implied assertion

Any evidence that, if this section had not been enacted, would have been excluded under any common law rule on the ground that it contains an implied assertion, is not to be excluded on that ground.

Division 6—Admissibility of Certain Hearsay Evidence and Related Evidence

55T. Admissibility of evidence for proving credibility

(1) This section applies if hearsay evidence is admitted in proceedings under Division 2, 3 or 4, or under a common law rule preserved by section 55R.

(2) Any evidence that, if the declarant had given evidence in connection with the subject matter of the hearsay evidence, would have been admissible in the proceedings as relevant to the declarant's credibility as a witness, is admissible.

(3) Also, any evidence tending to prove that the declarant made a statement that is inconsistent with the hearsay evidence is admissible in the proceedings for showing that the declarant contradicted himself or herself.

55U. Previous statements of witnesses

(1) A previous statement made by a person giving evidence in proceedings is admissible in evidence in the proceedings for proving the truth of its content if—

(a) any of the following conditions is satisfied—

(i) the purpose of adducing the statement is to rebut a suggestion that the person's evidence has been recently fabricated;

(ii) the purpose of adducing the statement is to prove the person's prior identification of a person, object or place;

(iii) the statement is admissible in evidence in the proceedings under any common law rule relating to evidence of recent complaint; and

(b) while giving evidence, the person indicates that, to the best of the person's belief—

(i) the statement was made by the person; and

(ii) the statement states the truth.

(2) If, on a trial before a judge and jury, a previous statement made by a person giving evidence is admitted in evidence under this section and the statement or copy of it is produced as an exhibit, the exhibit must not accompany the jury when they retire to consider the verdict unless—

(a) all parties to the proceedings agree that it should accompany the jury; or

(b) the court considers it appropriate.

Division 7—Supplementary Provision

55V. Additional requirement for admission of multiple hearsay

A statement that is hearsay is not admissible in evidence in proceedings to prove that an earlier statement that is hearsay was made unless both statements are admissible in evidence in the proceedings under this Part.".

6. Section 79 repealed (admissibility of certain medical notes and reports)

Section 79—

Repeal the section.

7. Schedule renumbered (forms)

The Schedule—

Renumber the Schedule as Schedule 1.

8. Schedule 2 added

After Schedule 1—

Add

"Schedule 2

[s. 55R]

Common Law Rules Relating to Exceptions to Rule against Hearsay Preserved

Rule 1

Confessions, etc.

Any rule of law under which in criminal proceedings an admission, a confession, a statement against self-interest or a mixed statement made by an accused is admissible in evidence.

Rule 2

Joint ~~enterprise~~Enterprise or Conspiracy

Any rule of law under which in criminal proceedings a statement made by a party ~~during the course or~~ in furtherance of a joint enterprise or conspiracy is admissible in evidence against another party to the enterprise or conspiracy for proving the truth of its content.

Rule 3

Expert ~~opinion~~Opinion

Any rule of law under which in criminal proceedings ~~where~~ the opinion of a person ~~is~~ called as a witness~~, the opinion of the person~~ on ~~any relevant matter~~an issue in the proceedings on which the person is qualified to give expert evidence is admissible in evidence.

Rule 4

Public ~~information~~Information

Any rule of law under which in criminal proceedings—

(a) a published work dealing with a matter of a public nature (for example, history, a scientific work, a dictionary ~~and~~or a map) is admissible as evidence of facts of a public nature stated in the work;

(b) a public document (for example, a public register and a return made under public authority with respect to a matter of public interest) is admissible as evidence of facts stated in the document;

(c) a record (for example, the record of a court, treaty, Government grant, pardon ~~and~~or commission) is admissible as evidence of facts stated in the record; or

(d) evidence relating to a person's age or date or place of birth may be given by a person without personal knowledge of the matter.

Rule 5

Reputation as to ~~character~~Character

Any rule of law under which in criminal proceedings evidence of a person's reputation is admissible in evidence for proving the person's good or bad character.

Rule 6

Reputation or ~~family tradition~~Family Tradition

Any rule of law under which in criminal proceedings evidence of reputation or family tradition is admissible in evidence for proving or disproving—

(a) pedigree or the existence of a marriage;

(b) the existence of any public or general right; or

(c) the identity of any person or thing.

Rule 7

Res ~~gestae~~Gestae

Any rule of law under which in criminal proceedings a statement is admissible in evidence for proving the truth of its content if—

(a) the statement was made by a person so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded;

(b) the statement accompanied an act ~~which~~that can be properly evaluated as evidence only if considered in conjunction with the statement; or

(c) the statement relates to a physical sensation or a mental state (for example, intention or emotion).

Rule 8

Admissions by ~~agents~~Agents etc.

Any rule of law under which in criminal proceedings—

(a) an admission made by an agent of an accused is admissible against the accused in evidence for proving the truth of its content; or

(b) a statement made by a person to whom an accused refers another person for information is admissible against the accused in evidence for proving the truth of its content.".

~~**55S. Effect of description of common law rules in section 55R**~~

~~The words in which a common law rule is described in section 55R are intended only to identify the rule and are not to be construed as altering the rule in any way.~~

Part 3

Consequential Amendment

9. Air Pollution Control (Dust and Grit Emission) Regulations amended

The Air Pollution Control (Dust and Grit Emission) Regulations (Cap. 311 sub. leg. B) are amended as set out in this Part.

10. Regulation 9 amended (size analysis and viscosity determination of sample)

Regulation 9(a)(ii) and (b)(ii)—

Repeal

"the Schedule"

Substitute

"Schedule 1".

~~Division 6—Admissibility of Certain Hearsay Evidence and Related Evidence~~

~~**55T. Admissibility of evidence for proving credibility**~~

~~(1) This section applies if hearsay evidence is admitted under Division 2, 3, 4 or 5.~~

~~(2) Any evidence that, had the declarant given evidence in connection with the subject matter of the hearsay evidence, would have been admissible in the proceedings concerned as relevant to the declarant's credibility as a witness is so admissible.~~

(3) Any evidence tending to prove that the declarant made any other statement that is inconsistent with the hearsay evidence is admissible in the proceedings concerned for showing that the declarant contradicted himself or herself.

55U. Previous statements of witnesses

(1) A previous statement made by a person giving evidence in criminal proceedings is admissible in evidence in those proceedings for proving the truth of its content if —

(a) oral evidence of the matter stated in the statement by the person would be admissible;

(b) any of the following conditions is satisfied —

(i) the purpose of adducing the statement is to rebut a suggestion that the person's evidence has been recently fabricated;

(ii) the purpose of adducing the statement is to prove the person's prior identification of a person, object or place;

(iii) the statement was a recent complaint made by an alleged victim in proceedings instituted in respect of a sexual offence; and

(c) while giving evidence, the person indicates that to the best of the person's belief —

(i) the statement was made by the person; and

(ii) the statement states the truth.

(2) If, on a trial before a judge and jury, a previous statement by a person giving evidence is admitted in evidence under this section and the statement or copy of it is produced as an exhibit, the exhibit must not

accompany the jury when they retire to consider the verdict unless —

(a) the court considers it appropriate; or

(b) all parties to the proceedings agree that it should accompany the jury.

(3) In this section —

sexual offence ( ) means —

(a) an offence under Part VI or XII (except sections 118C, 118G, 118J, 118K, 118L, 126, 139, 143, 144, 145, 147, 147A, 147F and 157) of the Crimes Ordinance (Cap. 200);

(b) an offence of aiding, abetting, counselling or procuring the commission of an offence under paragraph (a);

(c) an offence of incitement to commit an offence under paragraph (a);

(d) an offence of attempting to commit an offence under paragraph (a), (b) or (c); or

(e) an offence of conspiracy to commit an offence under paragraph (a), (b) or (c).

55V. Implied assertion

Any evidence that, had this section not been enacted, would have been excluded under any common law rule on the ground that it contains an implied assertion, is not to be excluded on that ground.

Division 7 — Supplementary Provisions

55W. Additional requirement for admission of multiple hearsay

A statement that is hearsay is not admissible to prove the fact that an earlier statement that is hearsay was made unless both of them are admissible under this Part.".

4. Section 79 repealed (admissibility of certain medical notes and reports)

Section 79

Repeal the section.