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21 January 2019

By fax and by email

Ms Sophie LAU,
Clerk to Bills Committee,
Legislative Council,
Legislative Council Complex,
1 Legislative Council Road,
Hong Kong

Dear Ms LAU,

**Bills Committee on Evidence (Amendment) Bill 2018
Proposed amendments to the Bill**

Thank you for your letter dated 4 January 2019 and the draft amendments to the Evidence (Amendment) Bill 2018 to be proposed by Hon Tommy CHEUNG Yu-yan (LC Paper No. CB(4)387/18-19(01)).

As requested, please find the Administration's response as shown in the enclosed English version of the proposed amendments to the Evidence (Amendment) Bill 2018 to be moved by the Secretary for Justice. We shall send to you the Chinese version of the Administration's response as soon as possible.

Yours sincerely,

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

Enc.

#481502

Evidence (Amendment) Bill 2018

Committee Stage

Amendments to be moved by the Secretary for Justice

<u>Clause</u>	<u>Amendment Proposed</u>
5	In the proposed section 55C, Chinese text, in the definition of 陳述 , by deleting “語文” and substituting “語言或文字”. ¹
5	In the proposed section 55E(3)(b), by adding “or” after “221);”. ²
5	By deleting the proposed section 55E(3)(c). ³
5	In the proposed section 55O(1)(e), by adding “where the party applying for permission under section 55N (<i>applicant</i>) is the accused—” before “the declarant refuses”. ⁴
5	In the proposed section 55O(2), by deleting “party applying for permission under section 55N (<i>applicant</i>)” and substituting “applicant”. ⁵
5	In the proposed section 55P(2), by deleting “must have regard” and substituting “may have regard only”. ⁶
5	In the proposed section 55Q(5), by deleting “must have regard” and

¹ Please refer to explanatory note no. 1 below.

² Please refer to explanatory note no. 2 below.

³ Please refer to explanatory note no. 3 below.

⁴ Please refer to explanatory note no. 4 below.

⁵ Please refer to explanatory note no. 5 below.

⁶ Please refer to explanatory note no. 6 below.

substituting “may have regard only”.⁷

⁷ Please refer to explanatory note no. 6 below.

Evidence (Amendment) Bill 2018

Committee Stage

Explanatory notes on the proposed amendments to be moved by the Secretary for Justice

Note no. 1

1. The amendment to the Chinese text of section 55C in Clause 5 of the Bill are proposed to address the Assistant Legal Adviser's comment on the wording in the Evidence (Amendment) Bill 2018 ("Bill") (i.e. "語文") given via paragraph 20 of her letter to the Administration on 21 September 2018.

Note no. 2

2. The amendment to section 55E(3)(b) in Clause 5 of the Bill is a consequential amendment to reflect the deletion of section 55E(3)(c) of the Bill.

Note no. 3

3. The Secretary for Justice will move an amendment to the effect of deleting section 55E(3)(c) in Clause 5 of the Bill. This is a technical amendment which does not affect the scope of application of the new Part IVA. It is the Government's policy intent that the new Part IVA applies to criminal proceedings in relation to which the strict rules of evidence apply and that are started on or after the commencement date of that Part (see section 55E(1)). Criminal proceedings started before the commencement date but are ongoing at the time of the commencement are not intended to be covered by the new regime. Section 55E(3) aids the interpretation of section 55E(1)(a) by specifying the point of time at which certain types of criminal proceedings are regarded as having been started. For

contempt proceedings (see further discussion below), the proposed section 55E(3)(c) seeks to provide that they are regarded as having been started if “the person concerned has been committed by the court”.

4. The Government has reviewed the drafting of section 55E(3)(c). Contempt which is prosecuted on indictment (and this rarely happens in modern times) would already be covered by the proposed section 55E(3)(a) and (b). The only other type of contempt proceedings to which the hearsay exclusionary rule would apply is summary proceedings to deal with criminal contempt in the face of a criminal court. Because of the manner and circumstances in which this type of proceedings arose, there is a dearth of decided cases identifying the precise point of time at which the proceedings should be treated as having started.
5. The Government is therefore of the view that the best way forward is to delete the proposed new section 55E(3)(c) in order not to limit the way in which the courts would be able to develop, in real cases where the point had to be decided, the jurisprudence as to what the point of time at which contempt proceedings should be regarded as having been started. This is after bearing in mind that section 55E(1)(a) and (3) will be relevant only to a limited class of proceedings, namely those which are ongoing at the very time of the commencement of the new Part IVA, and that cases of contempt in the face of court are relatively uncommon (let alone those requiring admission of hearsay evidence).

Note no. 4

6. The Government notes the concern expressed in the proposed amendments to the Bill from Hon Tommy Cheung Yu-yan on 4 January 2019 relating to section 55O(1)(e) in Clause 5 of the Bill and that it is proposed to remove section 55O(1)(c). For the reasons stated in paragraphs 7 to 10 below, the Government takes the view that section 55O(1)(e) should be retained subject to modification.
7. Section 55O(1)(e) is modelled on a similar provision in Scotland, namely section 259(2)(d) of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). The underlying rationale was explained by

the Scottish Law Commission as follows: 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 other persons.⁸

8. When the Law Reform Commission of Hong Kong (“the LRC”)’s sub-committee proposed a provision with reference to the Scottish provision, it had this to say: In such a situation, the declarant’s oral testimony is practically impossible to obtain, and there is a legitimate basis (going beyond the mere refusal of the witness to testify) for considering the admissibility of the hearsay statement. Another reason for including this category is that there is a strong likelihood that these declarants are actually third parties who have confessed to the charge being considered by the court. In such a situation, there would be a strong impetus to ensure that the statement exculpating the defendant was received in evidence by the court.⁹
9. In relation to the second reason, it is relevant to note the oft-cited case of *R v Blastland* [1986] AC 41. The appellant of that case was convicted of murdering a young boy. A number of persons were prepared to testify that shortly after the killing, another person “M” had told them a young boy had been murdered. The circumstances were such that M’s knowledge of the killing raised an inference that he had himself committed the murder. The proposed evidence was ruled inadmissible because it was hearsay (at common law, only the

⁸ Scottish Law Commission Report No.149 on Hearsay Evidence in Criminal Proceedings (1995), paragraph 5.61.

⁹ LRC Consultation Paper on Hearsay in Criminal Proceedings (2005), paragraph 9.38.

confession of an accused, but not others, is admissible as an exception to the hearsay rule). This decision and other similar cases were referred to in various jurisdictions as one of the reasons supporting why law reform on hearsay was necessary: namely to avoid injustice and conviction of the innocent.¹⁰

10. In light of the above, section 55O(1)(e) will obviously benefit the defence in relevant situations. As for the prosecution, if a declarant's evidence is considered of sufficient assistance to the prosecution but is self-incriminating, consideration may be given to granting the witness immunity from prosecution so as to enable the declarant to testify in court without incriminating oneself. On balance, having regard to Hon Tommy Cheung Yu-yan's concern and the views expressed at the meeting on 13 November 2018 by deputations and Members of the Bills Committee as well as the prevailing prosecution practice carefully, the Government therefore proposes to retain section 55O(1)(e) but to limit the scope of application of this provision to the defence only.

Note no. 5

11. The amendment to section 55O(2) in Clause 5 of the Bill is consequential to the amendment to section 55O(1)(e) of the Bill.

Note no. 6

12. The amendments are proposed to better reflect the policy intent that the factors listed in section 55P(2)(a) to (e) and section 55Q(5)(a) to (e) in Clause 5 of the Bill are exhaustive.

The Administration's response to the proposed deletion of section 55O(1)(c) by Hon Tommy Cheung Yu-yan

13. The Government notes the concern expressed in the proposed amendments to the Bill from Hon Tommy Cheung Yu-yan on 4 January 2019 relating to section 55O(1)(c) in Clause 5 of the Bill and

¹⁰ The LRC's report on "Hearsay in Criminal Proceedings" ("the Report"), paragraphs 4.20 to 4.29.

that it is proposed to remove section 55O(1)(c). For the reasons stated in paragraphs 14 to 16 below, the Government takes the view that section 55O(1)(c) should be retained.

14. Section 55O(1)(c) prescribes the circumstances under which a declarant outside Hong Kong can satisfy the condition of necessity. The condition of necessity under section 55O(1)(c) does not depend on the intention of the declarant. The criterion is whether or not it is reasonably practicable¹¹ to secure the declarant's attendance or to make the declarant available for examination and cross-examination in a competent manner. Case authorities have shown that a blanket exclusion of hearsay evidence in this category may lead to injustice.¹² That is precisely the reason for introduction of the relevant reform.
15. The party relying on section 55O(1)(c) must first exercise reasonable diligence in either arranging the declarant's return to Hong Kong or for the giving of his evidence by other means. It is not expected that "paper trial" would become a norm.
16. In any event, it must be stressed that even if the condition of necessity is satisfied, that does not lead to the automatic admission of hearsay evidence. The Bill provides for other built-in safeguards which ensure that, notwithstanding the inability to cross-examine admissible hearsay evidence, the court will still reach a verdict that is

¹¹ 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 paragraph 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 expense and inconvenience 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 is satisfied: section 55O(4)(b).

¹² See the case of *R v Edward Gyima, Francis Adjei* [2007] EWCA Crim 429 (referred to in the LC Paper No. CE(4) 253/18-19(02), Administration's Response to the list of follow-up actions arising from the discussion at the meeting on 13 November 2018, paragraph 20), where the overseas child witness, through no fault of his own and the prosecution, was prevented by his parents from testifying in court.

safe and reliable. For instance, if the declarant is deliberately hiding himself in circumstances which have implication upon his truthfulness, this may also be a factor taken into account by the court pursuant to section 55P(2)(c) in determining whether condition of threshold reliability is satisfied.

17. The Government therefore decides that section 55O(1)(c) should be retained after taking into account very carefully Hon Tommy Cheung Yu-yan's concern and the views expressed at the meeting on 13 November 2018 by deputations and Members of the Bills Committee.

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