THE LAW SOCIETY OF HONG KONG
香 港 律 師 會

3/F WING ON HOUSE · 71 DES VOEUX ROAD
CENTRAL · HONG KONG DX-009100 Central 1
香港中環德輔道中71號
永安集團大廈3字樓

TELEPHONE（電話）: (852) 2846 0500
FACSIMILE（傳真）: (852) 2845 0387
E-MAIL（電子郵件）: sg@hklawsoc.org.hk
WEBSITE （網頁）: www.hklawsoc.org.hk

Our Ref :
Your Ref : CLP/20/ 5201618
Direct Line : LP 5019/16C

2 July 2020

Mr Vernon LOH
Legal Policy Division
Department of Justice
5th Floor, East Wing, Justice Place
18 Lower Albert Road, Central

By Email: lpd@doj.gov.hk

Dear Mr LOH,

Evidence (Amendment) Bill 2018

Thank you for your letter of 13 May 2020 on the captioned. The Criminal Law and Procedure Committee of the Law Society (the "Committee") wishes to reply to you in the following, and put the following on record.

One-Third Discount on Sentencing

The Committee reiterates (with agreement) that the purpose of 1/3 discount is utilitarian. That *exactly* is the reason why we say that the Defence should be advised of any hearsay evidence before he enters his plea. The case authorities that you have cited do not contradict this utilitarian principle.

We repeat §§ 10 and 11 of our submission of 26 March 2019 (encl).

Condition of necessity: non-availability

As a matter of fairness, a refusal to give evidence itself ought to be a bar to the admissibility of that evidence, or else unsafe evidence given by *any* witnesses could be introduced to the proceedings.

The various issues raised in your letter on the above (§§ 10-12 thereof) are noted but are not agreed. We repeat our observation that the Law Reform Commission of Hong Kong intended that the regime would not be applicable unless in the case of *genuine* non-availability. Please see §14 of our above submission.

Deprivation of Cross-examination

The Committee notes your comments on §14 of your above letter and wishes to reply that the inability to cross-examine could be applicable to the consideration of *both* the reliability *and* the weight of the hearsay evidence in question. We repeat our comments on §18 of our submission.

By way of further observation, we consider that those factors set out in section 55P(2) of the Bill (under which the Court should have regard to when it is to decide on the threshold reliability) need to be more closely reviewed. An example could be section 55P(2)(e) – "*whether the statement is supported by other admissible evidence*" – what would the position be if the statement is contradicted by other admissible evidence? Should those evidence be admissible?

Committee Stage Amendments

We note your comments on the proposed amendments in sections 55P(2) and 55Q(5) to delete "must have regard", and substitute "may have regard only". You state that the above better reflect the policy intent. An elaboration on the "policy intent" as abovementioned is appreciated.

Thank you for your attention.

Yours sincerely,

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

Encl.

c.c. The Bills Committee on Evidence (Amendment) Bill 2018, LegCo
c.c. The House Committee, LegCo

THE LAW SOCIETY OF HONG KONG 香港律師會

EVIDENCE (AMENDMENT) BILL 2018

SUBMISSIONS

1. Before the Evidence (Amendment) Bill 2018 (the "2018 Bill") was gazetted in June 2018, the Law Society has on 18 July 2017 prepared and sent to the Department of Justice ("DOJ") a comprehensive submission on the DOJ's proposed reform on criminal hearsay evidence (the "Submission"). Our Submission made at that time was by reference to the predecessor to the 2018 Bill, viz. the Evidence (Amendment) Bill 2017 ("2017 Bill").

Submission to the 2017 Bill

2. In our above Submission, we have raised a number of concerns on the safeguards that need to be put into the legislation, as a matter of fairness to the accused. One of the main concerns we have raised was the deprivation of the rights of cross-examination and the potential risks arising therefrom upon admission of such hearsay evidence. We have in the Submission proposed a set of amendments to the 2017 Bill.

3. A copy of our Submission dated 18 July 2017 is on *Appendix 1*.

4. The DOJ by its letter of 5 December 2018[1] responded to our Submission. Broadly speaking, the DOJ did not agree to most of our comments.

5. We wish to point out the following.

---

[1] See LegCo Paper LC Paper No. CB(4)310/18-19(01)

Question of admissibility be determined before trial to allow proper advice on plea

6. We maintain our views that the Defence should know in full the admissibility of hearsay evidence before tendering the pleas. In this regard, we do not agree to the DOJ's arguments that

   (i) *"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."*[2] ;

   (ii) *"[the] admission of hearsay evidence is of no difference to the admission of other disputed evidence, e.g. a confession."*[3]

7. To the contrary it is only fair for the Defence to know in advance the case of the Prosecution before the accused is to enter his or her plea. This is particularly important, given that the Prosecution might not have made full and frank disclosure to the Defence and/or that the discovery was not made in good time.

One-Third Discount on Sentence

8. Uncertainty on admissibility of hearsay evidence adds layers of concerns to the Defence in particular when it is to consider sentencing discount that is available only for an early plea of guilty. This is the case even though discovery (if any) has been made by the Prosecution on the hearsay evidence in question. The concern is not illusory. Consider this example: an overseas witness has given a statement unfavourable to the Defence. Even if the Defence has been made aware of the statement (by inclusion of that statement into the bundle of unused materials or otherwise), the Defence could not know whether the evidence would be accepted by the Court. The accused would have tremendous difficulty to tender his or her plea. Yet, the one-third discount on sentence would not be available if he chooses to wait and see. The accused would be caught into a dilemma and given the above pressure, he would be very much tempted to plead guilty, in the hope of securing the sentencing discount.

---

[2] See DOJ's response on Annex A to the DOJ's letter of 5 December 2018, page 5 of the table.
[3] See DOJ's response on Annex A to the DOJ's letter of 5 December 2018, page 2 of the table.

9. The proposed hearsay evidence regime in the circumstances would be turned into an inducement trap for guilty pleas. This cannot be correct.

10. For all intent and purpose, usually the one-third discount is not based on remorse. The purpose is utilitarian.

11. In any event, we query whether there could be any *genuine* disadvantages or shortcomings caused to the Prosecution or to the Court, if the one-third discount is reserved until the question of admissibility of the evidence be determined. In any event, the 14 days period of filing an opposition notice (section 55K(2), 2018 Bill) would put huge pressure upon the Defence. The situation is not fair.

Condition of necessity: non-availability

12. One of the conditions of necessity to be satisfied before a piece of hearsay evidence could be admitted under section 55M(2) is section 55O(1)(c)), *i.e that the declarant is outside Hong Kong and neither of the following is reasonably practicable:*

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

    (ii) making the declarant available for examination and cross-examination in another competent manner in the proceedings.

13. On this, the DOJ's explained that [4] *"[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 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".*

14. We take note but do not agree to the above. We maintain the view that the intent of a declarant *not* to give evidence should be taken into consideration, as in the case of a declarant intentionally hiding himself. In point of fact, we further say that unwillingness to give evidence should itself already be the bar to the admissibility of the evidence itself. We invite the DOJ to

---

[4] See DOJ's response on Annex A to the DOJ's letter of 5 December 2018, page 8 of the table

revisit our Submission in 2017 which we have suggested to embrace the notion of "*genuine non-availability of the declarant*"[5].

15. We also add that Section 55P(2), as currently drafted, is not sufficiently comprehensive. By reference to threshold reliability and our Submission in 2017, we suggest an amendment to section 55P (and also section 55O) to the effect that, unless otherwise stated, the standard of proof remains as that beyond reasonable doubt. This echoes the concerns on the inherent danger of admitting hearsay evidence.

Deprivation of Cross-examination

16. We note section 55Q(5)(e) of the 2018 Bill now includes a reference to the lack of cross-examination:

> *"In considering whether it would be unsafe to convict the accused of the offence, the court must have regard to—*
>
> ...
>
> *(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.*

17. We note that the DOJ has not taken on board our suggestion to refer to the circumstances in section 55P [6].

18. We ask to amend the above to state "*including, but not limited to, the inability to cross-examine the declarant.*"

Committee Stage Amendments

19. As for the various Committee Stage Amendments[7] now moved by the DOJ, our comments are on ***Appendix 2***.

Conclusion

20. In the case of *HKSAR v Lau Shing Chung Simon* FACC 6/2014, the Court of Final Appeal explained the rationale for the rule against hearsay:

---

[5] See para 15 – 21 of the LSHK submission of 18 July 2017
[6] See para 34-35 of the LSHK submission of 18 July 2017
[7] See https://www.legco.gov.hk/yr17-18/english/bc/bc105/papers/bc10520190125cb4-428-1-e.pdf

"28. ... The rationale [against the admission of hearsay] is a concern for the probative value of out-of-court statements. Sometimes the circumstances in which an out-of-court declaration is made are deemed to confer sufficient inherent reliability as to render the declaration admissible to prove the truth of what is declared and it is upon that reasoning that the common law and statutory exceptions are based. In other circumstances, however, *the probative value of evidence of a fact in issue is said to be materially undermined where it cannot be tested by cross-examination and it is the inability to cross-examine the declarant to test the accuracy of his out-of-court statement that lies at the heart of the general rule.*

29. The reason for the rule was stated by Lord Normand in *Teper v R* [[1952] 2 TLR 162]:

'It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination and the light, which his demeanour would throw on his testimony, is lost.'"

[Emphasis supplied]

21. The above serves as a relevant reminder of the core issue that should carefully be considered in the legislative exercise.

The Law Society of Hong Kong
26 March 2019