

Evidence (Amendment) Bill 2018

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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 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 this Part.

3. 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)

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

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 any matter communicated.

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.

55E. Application

- (1) This Part applies to evidence adduced or to be adduced in criminal proceedings—
 - (a) started on or after the commencement date of this Part; and
 - (b) in relation to which the strict rules of evidence apply.
- (2) For the purposes of subsection (1)—
 - (a) 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 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 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).

55F. When is hearsay evidence admissible

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

- (a) Division 2, 3, 4 or 6;
- (b) a common law rule preserved by section 55R; or
- (c) any other enactment.

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

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

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 respect of whom the evidence is to be adduced—
 - (a) make an oral agreement before the court for the admission of the evidence in the proceedings; 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.
- (2) For subsection (1), the accused concerned may only make the oral agreement or written agreement in person or by the person's counsel or solicitor.
- (3) For subsection (1)(b), the written agreement must purport to be signed by—
 - (a) if the accused concerned is an individual—the individual;

- (b) if the accused concerned is a body corporate—a director, manager, company secretary or other similar officer of the body corporate; or
 - (c) the counsel or solicitor of the accused concerned.
- (4) Hearsay evidence admitted because of an accused's agreement may be adduced only in respect of the 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 the matter (including an appeal); and
 - (b) may, with the permission of the court, be withdrawn for the purpose of—
 - (i) the proceedings for which it was made or produced; or
 - (ii) any subsequent criminal proceedings 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) a party who intends to adduce the evidence in the proceedings has given a hearsay evidence notice stating the party's intention to adduce the evidence to—

- (i) each other party to the proceedings; and
- (ii) the responsible court officer;
- (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
- (c) no party gives an opposition notice under section 55K.

55J. Further provision on hearsay evidence notice

A hearsay evidence notice given by a party for the purposes of section 55I 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;
- (c) if the evidence is in the form of a written statement—be accompanied by a copy of the document in which the statement is contained;
- (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 of why, if an application were made under section 55N, the court concerned should grant permission for the evidence to be admitted;
 - (ii) the facts on which the party would rely to support the application;

- (iii) an explanation 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 in respect of any hearsay evidence may oppose the admission of the evidence by giving an opposition notice.
- (2) An opposition notice must—
 - (a) be given to—
 - (i) each other party to the proceedings concerned; and
 - (ii) the responsible court officer; and
 - (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, contained in the hearsay evidence notice under section 55J(e)(ii) are disputed by the party; and
 - (c) 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 or opposition notice under section 55K.
- (2) An application for the extension of a time limit may be made before or after the time limit has expired.
- (3) If a party applies for the extension after the time limit has expired, the application—
 - (a) must be made when giving the notice in respect of which the extension is applied for; and
 - (b) must state the reason why the application is not made earlier.

**Division 4—Admission of Hearsay Evidence with
Permission of Court**

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

- (1) Hearsay evidence may be admitted in proceedings with the permission of the court.
- (2) The court may grant the permission only if—
 - (a) an application for 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 would be admissible as evidence of the fact that the hearsay evidence is intended to prove;

- (d) the condition of necessity is satisfied under section 55O in respect of the evidence;
- (e) the condition of threshold reliability is satisfied under section 55P in respect of the evidence; 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 permission to admit hearsay evidence

- (1) Subject to subsection (2), an application for permission to have hearsay evidence admitted under section 55M may only be made by a party to the proceedings who has—
 - (a) given a hearsay evidence notice under section 55I in respect of the evidence; and
 - (b) 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 may make an application for permission to have hearsay evidence admitted under section 55M only if—
 - (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 to give the notice;
 - (ii) giving the notice was not reasonably practicable in the circumstances; or

- (iii) the interests of justice require it; or
 - (b) the proceedings are proceedings in respect of sentencing.
- (3) If making the application is allowed under subsection (2)(a), the court may—
 - (a) in the proceedings in which the evidence is adduced, draw inferences from the applicant's failure 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)(b)—
 - (a) the court must have regard to the actual costs incurred by each other party as a result 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 another competent manner, in the proceedings because of the declarant's age or physical or mental condition;
 - (c) 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;
 - (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 permission under section 55N (*applicant*) may not rely on 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 a subject 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—
 - (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) 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.
- (2) The court must direct the acquittal of the accused in relation to the offence.
- (3) The court may give the direction at or after the conclusion of the case for the prosecution.
- (4) The court may give the direction even if there is a prima facie case against the accused for the offence.
- (5) In considering whether it would be unsafe to convict the accused of the offence, the court must 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—Common Law Rules Relating to Hearsay Evidence

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

- (1) The common law rules set out 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 or Conspiracy

Any rule of law under which in criminal proceedings a statement made by a party 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

Any rule of law under which in criminal proceedings the opinion of a person called as a witness on an issue in the

proceedings on which the person is qualified to give expert evidence is admissible in evidence.

Rule 4

Public 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 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 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

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

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

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 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 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.”.
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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”.

Explanatory Memorandum

The purpose of this Bill is to implement the proposals set out in the core scheme of the report of the Law Reform Commission of Hong Kong on hearsay in criminal proceedings published in November 2009.

2. Clause 1 sets out the short title and provides for commencement.
3. Clause 2 introduces the enactment that is amended by the Bill.
4. Clause 5 adds a new Part IVA to the Evidence Ordinance (Cap. 8) (***Ordinance***) that deals with the admissibility of hearsay evidence in criminal proceedings. The new Part IVA is divided into 7 Divisions.
5. Division 1 (sections 55C to 55G) of the new Part IVA provides for general matters. In particular, section 55D provides for the meaning of ***hearsay***. Section 55E provides that the new Part IVA applies only to criminal proceedings (including proceedings under the Fugitive Offenders Ordinance (Cap. 503)) in relation to which the strict rules of evidence apply. Section 55F sets out when hearsay evidence is admissible in proceedings. Under section 55F, hearsay evidence is admissible in proceedings only if it is admissible under—
 - (a) Division 2, 3, 4 or 6 of the new Part IVA;
 - (b) a common law rule preserved by the new section 55R; or
 - (c) any other enactment.

6. Division 2 (section 55H) of the new Part IVA provides that hearsay evidence is admissible in proceedings if both parties to the criminal proceedings concerned make an agreement for its admission.
7. Division 3 (sections 55I to 55L) of the new Part IVA provides that hearsay evidence is admissible in proceedings if a party gives a hearsay evidence notice stating the party's intention to adduce the evidence, and no opposition notice is given by any other party to the proceedings within a time limit.
8. Division 4 (sections 55M to 55Q) of the new Part IVA provides that hearsay evidence is admissible in proceedings with the permission of the court. In particular, it is provided that the permission may be granted only if the condition of necessity (section 55O) and the condition of threshold reliability (section 55P) are satisfied. Section 55Q provides that, if the court considers it unsafe to convict the accused based on hearsay evidence that has been admitted, the court must direct the acquittal of the accused.
9. Division 5 (sections 55R and 55S) of the new Part IVA deals with common law rules relating to hearsay evidence.
10. Section 55R provides that the common law rules set out in the new Schedule 2 added by clause 8 are preserved (hence hearsay evidence may be admitted under those rules). The rules are those relating to the admissibility of the following evidence—
 - (a) admissions, confessions and statements against self-interest made by an accused;
 - (b) acts and declarations made during the course and in furtherance of a joint enterprise or conspiracy;
 - (c) expert opinion;

- (d) public information;
- (e) reputation as to character;
- (f) reputation or family tradition;
- (g) *res gestae*; and
- (h) admissions by agents.

11. Section 55S provides that evidence is not to be excluded on the ground that it contains an implied assertion.
12. Division 6 (sections 55T and 55U) of the new Part IVA deals with certain hearsay evidence and related evidence. Section 55T deals with evidence relating to the credibility of the declarant of a statement admitted as hearsay evidence under Division 2, 3 or 4 of that Part. Section 55U deals with previous statement made by a witness.
13. Division 7 (section 55V) of the new Part IVA provides for the admission of multiple hearsay.
14. Clause 6 repeals section 79 of the Ordinance. That section concerns the admissibility of medical notes and reports by Government medical officers in cases of murder or manslaughter.
15. Clause 10 makes a consequential amendment to the Air Pollution Control (Dust and Grit Emission) Regulations (Cap. 311 sub. leg. B).