

立法會
Legislative Council

LC Paper No. LS81/17-18

**Paper for the House Committee Meeting
on 6 July 2018**

**Legal Service Division Report on
Evidence (Amendment) Bill 2018**

I. SUMMARY

- 1. The Bill**

The Bill seeks to amend the Evidence Ordinance (Cap. 8) to implement the recommendations in the report of the Law Reform Commission of Hong Kong on "Hearsay in Criminal Proceedings" published in November 2009 ("LRC Report") to provide for the admissibility of hearsay evidence in criminal proceedings; and to provide for related matters.
- 2. Public Consultation**

In April 2017, a consultation paper together with a working draft of the Bill was sent by the Administration, for consultation, to various stakeholders including the Judiciary, legal professional bodies, relevant government bureaux and departments, law schools and other interested parties. Respondents in general supported the legislative proposals. According to the Administration, some of the comments and drafting suggestions made by the Hong Kong Bar Association and The Law Society of Hong Kong on the working draft of the Bill have been adopted in the Bill after consideration by the Administration.
- 3. Consultation with LegCo Panel**

The Clerk to the Panel on Administration of Justice and Legal Services has advised that the Panel was briefed on the Administration's proposal to implement the recommendations in the LRC Report and the outcome of the consultation exercise conducted by the Administration on the legislative proposals at its meetings on 27 March 2017 and 26 February 2018 respectively. Members of the Panel generally supported the legislative proposals.
- 4. Conclusion**

The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. Since the Bill seeks to reform the law on the admissibility of hearsay evidence in criminal proceedings in Hong Kong, Members may wish to form a Bills Committee to study the Bill in detail.

II. REPORT

The date of First Reading of the Bill is 4 July 2018. Members may refer to the Legislative Council ("LegCo") Brief (File Ref.: LP 5019/16C) issued by the Department of Justice on 20 June 2018 for further details.

Object of the Bill

2. The Bill seeks to amend the Evidence Ordinance (Cap. 8) to provide for the admissibility of hearsay evidence in criminal proceedings; and to provide for related matters.

Background

3. The Bill was based on the recommendations in the report of the Law Reform Commission of Hong Kong on "Hearsay in Criminal Proceedings" published in November 2009 ("LRC Report") to introduce a legislative scheme for the admissibility of hearsay evidence in criminal proceedings.

4. Hearsay is a statement made otherwise than by a person while giving oral evidence in legal proceedings which is tendered as evidence of the matters stated. Under the common law rule against hearsay, hearsay evidence is generally inadmissible in criminal proceedings unless it falls within one of the common law or statutory exceptions ("the hearsay rule"). The basis for excluding hearsay evidence is the assumption that indirect evidence might be untrustworthy and unreliable, particularly insofar as it is not subject to cross-examination.

5. According to paragraphs 2 to 4 of the LegCo Brief, the hearsay rule has been the subject of widespread criticism over the years from academics, practitioners and judges. One of the main criticisms against the hearsay rule is that the rule is strict and inflexible, and excludes hearsay evidence even if it is cogent and reliable. The complexity of the rule and the lack of clarity of its exceptions have also been criticized.

6. In 2005, the Law Reform Commission of Hong Kong ("LRC") published a consultation paper on Hearsay in Criminal Proceedings examining the current law in Hong Kong on hearsay evidence in criminal proceedings and setting out various proposals for reform of the law. Having considered the responses received, LRC published the LRC Report in November 2009 recommending a reform of the hearsay rule in criminal proceedings. The proposed model of reform was made up of a Core Scheme and a series of proposals on special topics. Taking into account LRC's views and recommendations, the Administration has proposed to introduce the Bill to implement LRC's recommendations in full (with

certain modifications) except for some of the special topics examined in Chapter 10 of the LRC Report which would require further study (e.g. the topic of the requirements for admissibility and the formalities or procedures for adducing documentary and digital evidence). According to paragraph 5 of the LegCo Brief, the Bill would reform the hearsay rule in criminal proceedings and align it with the developments in other major common law jurisdictions.

Key provisions of the Bill

7. Currently, Part IV of Cap. 8 provides for the admissibility of hearsay evidence in civil proceedings. The Bill proposes to add a new Part IVA to Cap. 8 to provide for the rules and principles for admissibility of hearsay evidence in criminal proceedings. The new Part IVA consists of seven Divisions. The key provisions are summarized below.

Scope of application of new Part IVA of Cap. 8

8. New section 55D seeks to provide for the statutory meaning of hearsay in criminal proceedings. New section 55E(1) proposes that the new Part IVA would apply to evidence adduced or to be adduced in criminal proceedings (including proceedings for the surrender of a person to a place outside Hong Kong under the Fugitive Offenders Ordinance (Cap. 503) and proceedings in respect of sentencing) started on or after the commencement date of the new Part IVA.

Criteria for admission of hearsay evidence in criminal proceedings

9. Under new section 55F, hearsay evidence would be admissible in criminal proceedings only if it is admissible under (a) Division 2, 3, 4 or 6 of new Part IVA; (b) a common law rule preserved by new section 55R; or (c) any other enactment. New section 55G proposes that new Part IVA would not affect any power of the court to exclude evidence on grounds other than it is hearsay.

Admission of hearsay evidence by agreement of parties (Division 2)

10. Division 2 (new section 55H) proposes that hearsay evidence would be admissible in proceedings if the prosecutor and the accused in respect of whom the evidence is to be adduced make an agreement for the admission of the evidence.

Admission of hearsay evidence not opposed by other parties (Division 3)

11. Division 3 (new sections 55I to 55L) seeks to introduce a mechanism by which a party who intends to adduce hearsay evidence in the proceedings may give a hearsay evidence notice to each other party to the proceedings and the

responsible court officer within the prescribed time limit, and a party who has received the notice may oppose the admission of the evidence by giving an opposition notice. The hearsay evidence would be admissible in the proceedings if no party gives an opposition notice within the prescribed time limit.

Admission of hearsay evidence with permission of court (Division 4)

12. Under Division 4 (new sections 55M to 55Q), hearsay evidence may be admitted in proceedings with the permission of the court. New section 55M(2) seeks to provide for the circumstances under which the court may grant the permission. These circumstances include the condition of necessity (as proposed in new section 55O) and the condition of threshold reliability (as proposed in new section 55P) being satisfied. Further, new section 55Q proposes that if the court considers that it would be unsafe to convict the accused based on the admitted hearsay evidence, the court must direct the acquittal of the accused.

Preservation of common law rules relating to hearsay evidence (Division 5)

13. New section 55R proposes the preservation of the common law rules relating to exceptions to the rule against hearsay as set out in new Schedule 2.¹ The effect is that hearsay evidence may continue to be admitted under those preserved rules, and the common law rules relating to exceptions to the rule against hearsay not preserved in new Schedule 2 would be abolished upon the commencement of the Bill after it is enacted as an Ordinance.

Admission of certain hearsay evidence and related evidence (Division 6)

14. New section 55T in Division 6 proposes that if hearsay evidence is admitted under new Division 2, 3 or 4, or under a common law rule preserved by new section 55R, any evidence for proving the credibility of the declarant of the hearsay evidence would be admissible, and any evidence for showing that the declarant contradicted himself or herself would also be admissible. New section 55U(1) seeks to provide for the circumstances under which a previous statement made by a witness would be admissible for proving the truth of its content.

Other provisions

15. Other provisions of the Bill seeks to provide for related matters and consequential amendments.

¹ The common law rules that would be preserved in Schedule 2 relate to the admissibility of the following evidence: (a) admission, confession and statement against self-interest or mixed statement made by an accused; (b) statement made by a party 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.

Commencement

16. The Bill, if passed, would come into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.

Public Consultation

17. According to paragraph 26 the LegCo Brief, in April 2017, a consultation paper together with a working draft of the Bill was sent by the Administration, for consultation, to various stakeholders including the Judiciary, legal professional bodies, relevant government bureaux and departments, law schools and other interested parties. The Administration received 11 submissions. Respondents in general supported the legislative proposals. According to the Administration, some of the comments and drafting suggestions made by the Hong Kong Bar Association and The Law Society of Hong Kong on the working draft of the Bill have been adopted in the Bill after consideration by the Administration.

Consultation with LegCo Panel

18. As advised by the Clerk to the Panel on Administration of Justice and Legal Services, the Panel was briefed on the Administration's proposal to implement the recommendations in the LRC Report and the outcome of the consultation exercise conducted by the Administration on the legislative proposals at its meetings on 27 March 2017 and 26 February 2018 respectively. While members of the Panel generally supported the legislative proposals and welcomed the Administration's plan to introduce the relevant Bill within the 2017-2018 session, some members raised questions and concerns regarding the details of the implementation of LRC's recommendations.

Conclusion

19. The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. Since the Bill seeks to reform the law on the admissibility of hearsay evidence in criminal proceedings in Hong Kong, Members may wish to form a Bills Committee to study the Bill in detail.

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