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Report of the Bills Committee on Evidence (Amendment) Bill 2018

Purpose

This paper reports on the deliberations of the Bills Committee on Evidence (Amendment) Bill 2018 ("the Bills Committee").

Background

2. The common law rule against hearsay renders hearsay evidence generally inadmissible in criminal proceedings unless that evidence falls within one of the common law or statutory exceptions to the rule ("hearsay rule"). The hearsay rule seeks to ensure that the witness's credibility and accuracy can be tested in cross-examination. Despite this rationale, the hearsay rule has been the subject of widespread criticism over the years from academics, practitioners and the bench.

3. 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 inadmissibility of hearsay evidence that is otherwise cogent and relevant to the determination of the guilt or innocence of an accused sometimes results in the exclusion of evidence which by standards of ordinary life would be regarded as accurate and reliable. This can result in absurdity and also injustice.

4. The complexity of the rule and the lack of clarity of its exceptions have also been criticised. In the light of these criticisms, proposals for reform have been put forward in every common law jurisdiction where the subject has been studied for the purpose of reform. In each instance where a review has been carried out, there has been recognition of the need for change.

5. 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 its report in November 2009 recommending a reform of the hearsay rule in criminal proceedings ("the LRC Report"). The proposed model of reform was made up of a Core Scheme and a series of proposals on special topics. According to paragraph 5 of the Legislative Council ("LegCo") Brief, after careful consideration of the views and recommendations of LRC, the Administration proposed to introduce the Bill so as to implement LRC's recommendations in full with certain modifications, with the aim of reforming the hearsay rule in criminal proceedings and aligning it with the developments in other major common law jurisdictions.

The Bill

6. The Evidence (Amendment) Bill 2018 ("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.

7. The main provisions of the Bill are summarized below.

8. Clause 5 of the Bill adds a new Part IVA to the Evidence Ordinance (Cap. 8) containing 7 Divisions (sections 55C – 55V).

Division 1 - General

9. Sections 55C and 55D are the interpretation provisions. Section 55E(1) provides that the newly added Part IVA applies to evidence adduced or to be adduced in criminal proceedings started on or after the commencement date of Part IVA and in relation to which the strict rules of evidence apply. For the purpose of section 55E(1), section 55E(2) provides that criminal proceedings also include proceedings for, or in relation to, surrender of a person to a place outside Hong Kong under the Fugitive Offenders Ordinance (Cap. 503); proceedings arising therefrom; as well as proceedings in respect of sentencing.

10. Section 55F provides that hearsay evidence is admissible 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 section 55R; or (c) any other enactment. Section 55G provides that the new Part IVA does not affect the Court’s power to exclude evidence on other grounds.

Division 2 – Admission of hearsay evidence by agreement of parties

11. Section 55H provides that hearsay evidence is admissible by agreement of the relevant parties and may be adduced only in respect of an accused who has so agreed.

Division 3 – Admission of hearsay evidence not opposed by other parties

12. Section 55I introduces a mechanism whereby a party who proposes to adduce hearsay evidence may give a hearsay evidence notice to each other party to the proceedings and the responsible court officer within the prescribed time limit. In general, the hearsay evidence is admissible if no party gives an opposition notice within the prescribed time limit. Section 55J prescribes the details of a hearsay evidence notice. Section 55K prescribes the filing requirement of an opposition notice. Section 55L empowers the court to vary the time limit for giving such notices.

Division 4 – Admission of hearsay evidence with permission of court

13. This Division sets out the procedures whereby a party who has given a hearsay evidence notice and has been given an opposition notice may apply for permission of the court to admit the hearsay evidence. Further, a party who has not given a hearsay evidence notice may still apply to the court for permission to admit the hearsay evidence on specified grounds.

14. Section 55M(2) provides that the court may grant permission only if the prescribed conditions are satisfied, namely : (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.

15. According to section 55O(1), the condition of necessity is satisfied only if the declarant : (a) is dead; (b) 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) is outside Hong Kong and it is not reasonably practicable to secure the declarant’s attendance at

the proceedings or to make the declarant available for examination and cross-examination in another competent manner in the proceedings; (d) cannot be found although all reasonable steps have been taken to find the declarant; or (e) refuses to give the evidence in the proceedings in circumstances where the declarant would be entitled to refuse on the ground of self-incrimination.

16. Section 55O(3) provides that the burden of proving that the condition of necessity is satisfied is on the applicant, and according to section 55O(4) the standard of proof required is beyond reasonable doubt if the applicant is the prosecution, and on the balance of probabilities if the applicant is the accused.

17. Section 55P(1) provides that 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. In deciding whether the condition of threshold reliability is satisfied, according to section 55P(2), 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.

18. As a built-in safeguard, section 55Q provides that the court must direct the acquittal of the accused if: (i) the case against an accused is based wholly or partly on hearsay evidence admitted with the permission of the court granted under section 55M; and (ii) the court considers that it would be unsafe to convict the accused. In considering whether it would be unsafe to convict the accused, 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

19. The common law rules set out in the new Schedule 2 are preserved and hence hearsay evidence may continue to be admitted under those rules. Common law rules relating to hearsay evidence not preserved in Schedule 2 will in effect be abolished after the passage of the Bill. Further, the common law rule that excludes implied assertions is abrogated.

Division 6 - Admissibility of certain hearsay evidence and related evidence

20. Where in any proceedings hearsay evidence is admitted under Divisions 2 to 4, or under a preserved common law rule, evidence for proving the credibility of the declarant of the hearsay evidence, as well as evidence tending to prove that the declarant made a statement that is inconsistent with the hearsay evidence for the purpose of showing that the declarant has contradicted himself or herself, is also admissible.

21. A previous statement made by a witness in criminal proceedings is admissible for proving the truth of its content if it fulfils the statutory requirements.

Division 7 – Supplementary Provision

22. According to section 55V, multiple hearsay is admissible only if each level of hearsay itself is admissible in evidence in the proceedings under the new Part IVA.

Repeal of Section 79 of the Evidence Ordinance

23. It is also proposed to repeal section 79 of the Evidence Ordinance, which provides for admissibility of any medical notes or reports by any Government medical officer which purport to relate to the deceased in any prosecution for murder or manslaughter. These notes or reports may be admissible under section 22 of the Evidence Ordinance or section 65B of the Criminal Procedure Ordinance (Cap. 221).

The Bills Committee

24. At the House Committee meeting on 6 July 2018, members agreed to form a Bills Committee to study the Bill. The membership list of the Bills Committee is in **Appendix I**.

25. Under the chairmanship of Hon CHEUNG Kwok-kwan, the Bills Committee held five meetings to deliberate on the details of the Bill with the Administration, at one of which the Bills Committee received views from three deputations. A list of the deputations which have given views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

26. Members generally support the Bill which seeks to implement LRC's recommendations to reform the law on the admissibility of hearsay evidence in criminal proceedings in Hong Kong. The Bills Committee has examined: (i) issues surrounding the relaxation of the rule against hearsay evidence, (ii) conditions under which hearsay evidence will be admissible in criminal proceedings, i.e. the condition of necessity and the condition of threshold reliability, and (iii) the impact of the amendments to the Evidence Ordinance on agreements for the surrender of fugitive offenders as well as that on the existing practice of obtaining evidence from witnesses in another jurisdiction by way of letter of request. The major deliberations of the Bills Committee are set out in the ensuing paragraphs.

Issues surrounding the relaxation of the rule against hearsay evidence

Protection for vulnerable witnesses

27. Noting the withdrawal of prosecution against the accused in a sexual offence case which occurred at a residential care home for persons with disabilities, Dr Fernando CHEUNG and some deputations attending the Bills Committee meeting on 13 November 2018 consider that the Bill, if passed, would provide better protection for mentally incapacitated persons and vulnerable witnesses in criminal proceedings. Referring to a deputation's concern of protection for vulnerable witnesses, the Administration has highlighted that section 55O(1)(b) specifically provides that the condition of necessity is satisfied in respect of any hearsay evidence in criminal proceedings if 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. Hearsay evidence of a declarant being a vulnerable witness who falls within section 55O(1)(b) may, subject to satisfaction of other conditions stipulated in section 55M(2), be admitted in criminal proceedings.

28. However, some members express their concern that the proposed relaxation of the rule against hearsay in criminal proceedings may lead to the conviction of more people; or lead to strengthening of the hand of prosecutors. Mr Holden CHOW and Mr James TO are concerned that the admission of hearsay evidence would result in more prosecutions and it would become easier to convict a person under the proposed reform. The Administration explains that the purpose of the Bill is to ensure that evidence which ought to be considered by the court is admissible, and notes that the hearsay evidence could be incriminating or exonerating as the case

might be.

29. Notwithstanding the Administration's emphasis that any reforms of the law of hearsay in criminal proceedings should apply in the same manner to both the prosecution and defence, Mr Paul TSE raises the concern as to whether the current proposed reform would be more beneficial to the prosecution which may deviate from the long-established common law principle of providing the benefit of the doubt to the accused. Mr TSE has enquired about the need for the current proposed reform to achieve the policy objectives of the Bill.

30. The Administration explains that the Bill does not favour any one side over the other. The main purpose of the Bill is to address the instances where common law rules relating to hearsay evidence are illogical, unclear and contradictory, with a view to refining the present law relating to hearsay evidence in criminal proceedings. The rule against hearsay is a rule of admissibility historically applied by common law courts to all civil and criminal proceedings. The hearsay rule in Hong Kong civil proceedings was abolished in 1999 following recommendations made by LRC. Insofar as the hearsay rule in criminal proceedings is concerned, LRC has clearly stated in its report that the existing law of hearsay in Hong Kong should be reformed as the hearsay rule is strict and inflexible, and exclude hearsay evidence even if it is cogent and reliable. This can result in absurdity and also in injustice.

31. The Administration further explains that it is also important to note that the House of Lords in the United Kingdom in its judgment in *Myers v DPP* [1963] AC 1001 stated that under the common law the court should not create new exceptions to the hearsay rule and such task should be done by the legislature. With reference to the experience of and practices from other common law jurisdictions that have applied the hearsay rule in criminal proceedings, LRC recommended that save for the eight common law rule exceptions now preserved in the new Schedule 2 of the Bill, hearsay evidence may be admissible in criminal proceedings if the conditions of necessity and threshold reliability are satisfied. Taking into account the views from various stakeholders expressed during the consultation exercises, in addition to the conditions of necessity and threshold reliability, a built-in safeguard has been provided for in section 55Q of the Bill to protect the integrity of the proceedings, i.e. the court must direct the acquittal of the accused where the case is based wholly or partly on hearsay evidence admitted with the permission of the court and it considers that it would be unsafe to convict the accused of the offence. Indeed, this safeguard helps to strike a fair balance between the fair trial right of the accused and other legitimate interests. In view of the above, the Administration has proposed the Bill to implement the

recommendations in the LRC Report to provide for the admissibility of hearsay evidence in criminal proceedings.

32. The Administration further stresses that the object of the Bill is not to deprive the right of the accused to a fair trial, but to ensure that the court has the discretionary power to admit cogent and reliable hearsay evidence that is relevant to the determination of the guilt or innocence of an accused, so as to avoid injustice and conviction of the innocent. The Administration explains that it is possible that evidence not currently admissible could with the permission of the court be adduced upon the passage of the Bill, and that is the reason why proper safeguards should be put in place in the Bill to filter out such hearsay evidence which should not be so adduced. In any event, even if a hearsay statement is admitted after the conditions of necessity and threshold reliability as proposed in sections 55O and 55P respectively are satisfied, as an ultimate safeguard against possible miscarriages of justice, the court must direct acquittal of the accused if the court considers that it would be unsafe to convict the accused of the offence under section 55Q of the Bill. The Administration further points out that there are some cases illustrating that hearsay evidence will not only help the prosecution, but also the defence, especially those cases involving witnesses aged under 18 whose oral testimony is not given on oath or affirmation.

Right to cross-examination

33. Some members and a deputation attending the Bills Committee meeting on 13 November 2018 are gravely concerned that the admission of hearsay evidence without cross-examination of the declarant might deprive defendant of a fair trial. The deputation has pointed out that cross-examination is of critical importance in criminal proceedings and is therefore deeply concerned that an accused would be convicted based on only a "paper trial" because of the inability to cross-examine the declarant. The deputation has raised concern about a particular situation where the prosecution's case against the accused is wholly based on hearsay evidence. He suggested that if the case against the accused for an offence is wholly based on hearsay evidence, the accused could not be convicted in the absence of corroborated evidence.

34. Noting that The Law Society of Hong Kong ("Law Society") has suggested in its earlier submission to the Department of Justice ("DoJ") that "inability to cross-examine" should be included as a factor in assessing admissibility of hearsay evidence, Mr Holden CHOW has enquired about the Administration's stance in this regard.

35. In response, the Administration advises that it has noted both Law

Society and the Hong Kong Bar Association ("Bar Association") have put forward similar suggestions of addressing the deprivation of cross-examination by including "the absence of cross-examination of the declarant at trial" as a factor in assessing "threshold reliability". The Administration takes the view 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. Since it is apparent that there would be no opportunity to cross-examine the declarant at trial, it would be circular to single out "inability to cross-examine" as a factor in assessing admissibility of hearsay evidence. To address the concern of the two legal professional bodies, the inability to cross-examine the declarant has been expressly provided for in section 55Q(5)(e) as one of the factors for the court to consider whether it would be unsafe to convict the accused of an offence. Sufficient built-in safeguards, including section 55Q(5)(e), have been incorporated in the Bill to ensure a fair trial.

Exclusion of unfair evidence (including hearsay evidence)

36. Mr Tommy CHEUNG and a deputation giving views to the Bills Committee point out that in 1992, LRC published its Report on Arrest in which many of the recommendations were modelled on the Police and Criminal Evidence Act 1984 ("PACE") in England and Wales. In its report LRC recommended, among other things, to adopt section 78 of PACE[1] in Hong Kong, such that the court would be empowered to exercise discretion to exclude prosecution evidence if in all circumstances, its admission of the evidence would have such an adverse effect on the fairness of the trial that it should be excluded. Mr CHEUNG and the deputation are deeply concerned that this recommendation was rejected by the Administration, and opine that the current proposed reform to the law of hearsay in criminal proceedings in Hong Kong should be taken forward in tandem with the enactment of legislation similar to PACE. In this regard, the deputation has proposed to defer the Bill's commencement date until the passage of comprehensive legislation in Hong Kong similar to PACE.

37. The Administration explains that section 78 of PACE empowers the court to exercise discretion to exclude evidence (including hearsay

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[1] Section 78 of PACE reads as follows:

(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.

evidence) if "the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it". That means once evidence has been admitted, the court's discretion under the section ends. The Bill goes beyond that and provides safeguards to the right to fair trial of the accused even after the hearsay evidence is admitted in criminal proceedings. For example, under section 55Q in the Bill, if the case against the accused for an offence is based wholly or partly on hearsay evidence admitted with the permission of the court and the court considers that it would be unsafe to convict the accused of the offence, the court must direct acquittal of the accused.

38. The Administration further points out that section 82(3) of PACE provides: "Nothing in this Part of this Act shall prejudice any power of a court to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion." The Administration adds that insofar as hearsay evidence is concerned, any common law residual discretion of the court as may have been expressly codified under section 82(3) of PACE to exclude otherwise admissible evidence by reason that the prejudicial effect of such evidence outweighs its probative value will be more than sufficiently covered by the new section 55M(2)(f) in the Bill. Under that provision, the court may grant permission to admit hearsay evidence (even after satisfaction of the "necessity" and "threshold reliability" tests) if and only if the probative value of the evidence is greater than any prejudicial effect it may have on any party to the proceedings. In other words, under the proposed scheme of admission of hearsay evidence with permission of the court in Hong Kong, the accused will not in this regard be in a position worse off than that of an accused in England and Wales where PACE is implemented.

39. In the light of the above, the Administration takes the view that the Bill has in fact provided better safeguard to the right to fair trial of the accused relating to the exclusion of unfair evidence (including hearsay evidence) compared with the safeguard LRC, back in 1992, intended in its earlier Report on Arrest to provide by its then recommendation to adopt section 78 of PACE. As such, the Bill should be implemented as soon as possible and it is not necessary to defer the commencement of the Bill until the passage of legislation in Hong Kong similar to PACE.

Concern over technology advancement

40. In response to the concern over technology advancement, the Administration advises that the Bill is drafted in a *technologically neutral* way. Admissibility of hearsay evidence in whatever form (including evidence arising from electronic communications) is to be determined in accordance with the new provisions under the Bill. In any case, electronic

communications which fulfils the conditions set out by section 22A (read together with section 22B) of the Evidence Ordinance (Cap. 8) may also be adduced as hearsay evidence because by virtue of the new section 55F(c) in the Bill, hearsay evidence is admissible in criminal proceedings if it is admissible under any other enactment.

Justification for adopting the proposed model of reform by LRC

41. Members have noted that LRC recommended the New Zealand Law Commission mode as the proposed model of reform. Some members have asked why the Administration has made reference to English case law even when the Bill is based on the New Zealand Law Commission model. Mr Paul TSE has requested the Administration to provide a comparison between the English model and the New Zealand Law Commission model and the justifications for adopting a modified version of the New Zealand Law Commission model as the proposed model of reform to be adopted in Hong Kong.

42. The Administration advises that the English model was implemented by way of the Criminal Justice Act 2003. The New Zealand Law Commission model was implemented by way of the Evidence Act 2006. A comparison presented in tabulated form between the two models is set out in Annex A to LC Paper No. CB(4)253/18-19(02). In gist, admission of hearsay evidence under the English model is automatic once it is shown that the declarant is unavailable to give evidence, thus giving rise to concern that it would have an over-inclusive effect by allowing in all types of relevant evidence, including unreliable hearsay evidence. The strength of the New Zealand model is its inclusionary discretion based on the principles of necessity and reliability, a logical reflection of principles underlying specific exceptions to the hearsay rule. By introducing flexibility into the law, such discretion has the appropriate level of filtering effect to weed out undesirable hearsay evidence. With its well defined terms and conditions, the New Zealand model provides a sufficient degree of guidance to judges in exercising the discretion.

43. At the request of Mr Paul TSE, the Administration has also provided relevant cases in the New Zealand jurisdiction demonstrating if there are any difficulties encountered by the local courts in the course of implementing the New Zealand Law Commission model in admitting hearsay evidence, with a view to facilitating members' understanding of the areas requiring particular attention if the modified New Zealand Law Commission model is to be adopted in Hong Kong. The Administration's reply has been set out in part (d) of LC Paper No. CB(4)253/18-19(02). With reference to the two instances from cases decided by the courts in New Zealand, the Administration advises that those cases demonstrated

that the courts did not encounter any difficulties in the course of implementing the New Zealand Law Commission model. The Administration considers that when the new scheme comes into operation after passage of the Bill, legal practitioners and the courts in Hong Kong would also be able to refer to other cases determined by the courts in New Zealand as well as those from other common law jurisdictions, as appropriate, for considering the admissibility of hearsay evidence under the new scheme.

Common law exceptions to the hearsay rule

44. Members note that the common law rules set out in the new Schedule 2 are preserved and hence hearsay evidence may continue to be admitted under those rules. Common law rules relating to hearsay evidence not preserved in the new Schedule 2 will in effect be abolished after the passage of the proposed Bill. Members further note that the exception to hearsay rules in respect of admissions and confessions of an accused was preserved by Rule 1 under the new Schedule 2.

45. The Administration adds that while the New Zealand Law Commission model does not preserve any of the common law exceptions to the hearsay rule, the current approach of retaining certain common law rules relating to hearsay evidence in the Bill is proposed with reference to the English model which also adopted the option of preserving some common law exceptions. One of the advantages of this option is that it does not preclude Hong Kong courts from developing jurisprudence in this area of law. For the hearsay evidence not falling within any of the eight common law rules preserved in the new Schedule 2, the court would have the discretionary power to admit those hearsay evidence if, among others, the conditions of necessity and threshold reliability under sections 55O and 55P respectively of the Bill are satisfied. After careful consideration of the cases of other common law jurisdictions, LRC recommended that only those common law exceptions now provided for in the new Schedule 2 should be preserved. DoJ agrees with LRC's recommendations and therefore proposes to reform the hearsay rule by way of the Bill to implement the recommendations of LRC.

<u>Conditions under which hearsay evidence will be admissible in criminal proceedings</u>

Sections 55O(1)(b) and 55O(1)(c)(ii)

46. The legal adviser to the Bills Committee ("Legal Adviser") has asked the Administration to clarify the meaning of "another competent manner in the proceedings" in sections 55O(1)(b) and 55O(1)(c)(ii) of the

Bill. The Administration advises that the words "another competent manner in the proceedings" in the above-mentioned sections are intended to be references to the existing laws which allow the giving of evidence in a manner other than by a witness physically present and testifying in court. Examples of "competent manner" include giving evidence by live television link and video recording under sections 79B and 79C respectively of the Criminal Procedure Ordinance (Cap. 221), taking evidence from witnesses outside Hong Kong by live television link under Part IIIB of Cap. 221 and obtaining evidence in other jurisdictions for use in criminal proceedings in Hong Kong pursuant to letters of request under Part VIIIA of the Evidence Ordinance (Cap. 8).

Section 55O(1)(d)

47. The Bills Committee notes that under the new section 55O(1)(d), the condition of necessity is satisfied in respect of any hearsay evidence in proceedings if the declarant cannot be found although all reasonable steps have been taken to find the declarant. Mr Holden CHOW has enquired about the examples of "all reasonable steps"; Legal Adviser has also sought clarifications from the Administration on the relevant factors to be considered in determining whether all reasonable steps have been taken for the purpose of the new section 55O(1)(d).

48. The Administration advises that the steps which an applicant is expected to take to find the declarant must be reasonable having regard to all relevant circumstances and must be considered on a case-by-case basis. It is not practicable to set out all relevant factors in an exhaustive manner. The Administration explains that English case law suggests that the expense and inconvenience of securing a witness's attendance is a relevant consideration for the test of "reasonably practicable". The case authorities show that, in practice, the English courts would nevertheless consider whether it is reasonably practicable to make the declarant available to give evidence in another competent manner such as by video link.

Section 55O(1)(c)

49. A deputation has expressed serious concern over the new section 55O(1)(c) which prescribes the circumstances under which a declarant outside Hong Kong can satisfy the condition of necessity. He is worried that the declarant might hide himself if he was unwilling, but not unable, to give evidence, resulting in depriving the accused of a fair trial. Given that the existing mechanism of obtaining evidence from jurisdictions outside Hong Kong has been implemented smoothly over the years, the deputation considers that this new section is unnecessary. Mr Tommy CHEUNG proposes to move an amendment to the Bill to delete section 55O(1)(c) in

clause 5 of the Bill.

50. The Administration in response explains its view that section 55O(1)(c) should be retained due to the following reasons. 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. The party relying on the said section 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. Additionally, the proposed amendment does not conflict with and will not replace the existing mechanism of obtaining evidence from outside jurisdiction. The condition of necessity is satisfied only if making the declarant available for examination and cross-examination in a competent manner is not reasonably practicable.

51. The Administration has stressed that in any event, 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 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.

52. In view of the Administration's explanations, Mr Tommy CHEUNG subsequently decides to withdraw his proposed amendment to section 55O(1)(c).

Section 55O(1)(e)

53. Some members, including Mr Tommy CHEUNG, Dr Fernando CHEUNG and Mr Holden CHOW, have expressed concern about the rationale for proposing refusal by the declarant to give evidence on ground of self-incrimination as one of the necessity conditions. Dr Fernando CHEUNG considers that the factors set out in sections 55O(1)(a) to (d) that the judge must have regard in deciding whether the condition of necessity has been satisfied are reasonable. But he queries whether section 55O(1)(e) would be too loose to invite abuse that might compromise the integrity of the trial process. A deputation has expressed similar concern. Dr CHEUNG asked the Administration to further explain whether the built-in safeguards provided for in the Bill, including sections 55P and 55Q,

would be sufficient to prevent miscarriages of justice.

54. The Administration has responded that in addition to the conditions of necessity and threshold reliability provided for in sections 55O and 55P respectively, other safeguards have been adopted in the Bill to prevent miscarriages of justice and unsafe conviction. These include, as highlighted before, requiring the court to be satisfied that the probative value of the hearsay evidence is greater than any prejudicial effect it may have on any party to the proceedings as proposed in section 55M(2)(f) of the Bill. Further, section 55Q acts as an ultimate safeguard to the Bill by requiring the court, at or after the conclusion of the prosecution's case, to direct a verdict of acquittal of the accused against whom the hearsay evidence has been admitted under the discretionary power where the court considers that it would be unsafe to convict the accused. Hence, the Administration is of the view that a more stringent regime as a whole will be in place to ensure that, notwithstanding the inability to cross-examine the declarant from whom the hearsay evidence originated, the court will be able to reach a verdict that is safe.

55. The Administration further explains that alongside the Evidence Ordinance (Cap. 8), there are other safeguards incorporated in the legal system to ensure the fairness of trial process, particularly those of the criminal cases. The court requires the prosecution to prove beyond reasonable doubt in criminal proceedings which is consistent with the principle of giving the benefit of the doubt to the accused. In addition, the new sections 55O(3) and (4) of the Bill provide that the party applying to admit hearsay evidence has the burden of proving the necessity condition according to the required standard of proof, which is beyond reasonable doubt if the applicant is the prosecution and on a balance of probabilities if the applicant is the defence. In other words, the prosecution, after the passage of the Bill, will be put to a higher standard of proof (consistent with the usual burden and standard of proof in criminal proceedings) than the defence when attempting to admit hearsay evidence under the new scheme.

56. The Administration has also provided for members' reference the case of *McConnachie v HM Advocate* [2010] ScotHC HCJAC 93 (details are set out from paragraphs 23 to 27 of LC Paper No. CB(4)253/18-19(02)), to illustrate a situation in which section 55O(1)(e) can be applied in favour of admitting hearsay evidence without cross-examination of the declarant. It also shows that after admission of the hearsay evidence, it is open to the court, as the tribunal of fact, to reject it when reaching a verdict if such evidence is considered as unreliable and not credible.

57. The deputation still considers that the provision is not necessary.

In this regard, Mr Tommy CHEUNG has proposed in early January 2019 an amendment to the Bill to the effect that section 55O(1)(e) in clause 5 of the Bill be deleted.

58. Taking Mr Tommy CHEUNG's concern and the views of the deputations and members into account, the Administration has proposed to retain section 55O(1)(e) subject to modification. The Administration explains that 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 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 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[2].

59. When 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 accused was received in evidence by the court.

60. In relation to the second reason, the Administration advises that 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,

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

only the 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.

61. In the light of the above, the Administration considers that 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 Mr Tommy CHEUNG'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 Administration therefore proposes to retain section 55O(1)(e) but to limit the scope of application of this provision to the defence only.

62. Having regard to the Administration's explanations, Mr Tommy CHEUNG has informed the Bills Committee on 22 January 2019 that he decides to withdraw his proposed amendment to section 55O(1)(e).

63. Upon the Bills Committee's request, the Administration has consulted the Bar Association and Law Society on the Administration's proposed amendments to section 55O(1)(e) in clause 5 of the Bill, which will limit the scope of application of that provision to the defence only. The Bar Association informed DoJ that their Bar Council had considered the proposed amendments, and agreed with the Administration's view on them. The Law Society agreed to the amendments on the basis that section 55O(1)(e) is only applicable to the defence. Members may refer to part (a) of the Administration's response to the list of follow-up actions arising from discussion at the meeting on 25 January 2019 [LC Paper No. CB(4)570/19-20(01)] for details.

Section 55P

64. Members noted from the Legislative Council Brief that as proposed in new section 55P, the condition of threshold reliability is satisfied only if there is a reasonable assurance that the evidence is reliable. Members have not raised particular concern on this part.

<u>Impact of the amendments to the Evidence Ordinance on agreements for the surrender of fugitive offenders</u>

65. Mr James TO has expressed concern on the application of the new Part IVA of the Bill as set out in the new sections 55E(1) and (2). Mr TO has queried the reasons for including proceedings for surrender of a person to a place outside Hong Kong under the Fugitive Offenders Ordinance (Cap. 503) as criminal proceedings to which the new Part IVA would apply. In this regard, Mr TO requested the Administration to give an elaboration as to under what circumstances would the new Part IVA be useful in proceedings for, or in relation to, the surrender of a person to a place outside Hong Kong under Cap. 503; and to identify the possible impact it might have on agreements for the surrender of fugitive offenders between the Hong Kong Special Administrative Region and other places.

66. The Administration's explanations are set out in part (b) of LC Paper No. CB(4)570/19-20(01). In gist, the Administration has advised that admissibility of evidence in surrender proceedings under Part 2 of Cap. 503 is governed by section 23 of Cap. 503. Pursuant to section 23 of Cap. 503, any document which is duly authenticated is admissible in evidence in proceedings held under Cap. 503. Surrender proceedings are conducted primarily on the basis of documentary evidence taken overseas that is duly authenticated pursuant to the requirements of section 23. Insofar as local evidence (such as evidence of the arrest of a fugitive in Hong Kong pursuant to the surrender request in question) is concerned, the new Part IVA in clause 5 of the Bill will be useful in the surrender proceedings by rendering admissible hearsay evidence where Divisions 2, 3, 4 or 6 applies. Hong Kong's agreements for the surrender of fugitive offenders invariably contain a provision on authenticity of documents provided by the requesting jurisdiction in support of a surrender request. The provision is the same as, or consistent with, the requirements of section 23 of Cap. 503. The operation of section 23 of Cap. 503 is not affected by the new Part IVA in clause 5 of the Bill as section 55F(c) in clause 5 provides that hearsay evidence is admissible if it is admissible under any other enactment. Hence, the agreements will continue to operate according to their terms.

<u>Impact on the existing practice of obtaining evidence from witnesses in another jurisdiction by way of letter of request</u>

67. In response to Mr James TO's concern on the impact of the proposed relaxation of the rule against hearsay by way of the Bill on the existing practice of obtaining evidence from witnesses in another jurisdiction by way of letter of request, the Administration has advised that the condition of necessity in the new section 55O(1)(c) is satisfied if the declarant is outside Hong Kong and securing the declarant’s attendance at the proceedings or making the declarant available for examination or cross-examination in another competent manner in the proceedings is not

reasonably practicable. Hence, the existing practice of obtaining evidence from witnesses in another jurisdiction by way of letter of request for use in criminal proceedings in Hong Kong will continue unless it is not reasonably practicable to make use of it as a means to obtain evidence from witnesses in another jurisdiction. Details of the Administration's explanations are set out in part (c) of LC Paper No. CB(4)570/19-20(01).

Drafting issue

68. The Legal Adviser notes that "a non-verbal communication in the form of conduct" in the interpretation of *statement* under the new section 55C in clause 5 of the Bill is rendered as "並非以語文而以行為所作的傳達". As "語文" normally refers to "language", Legal Adviser has asked whether the word "verbal" should be rendered as "文字" or "言詞" rather than "語文". In response to the observations given by Legal Adviser, the Administration proposes to amend the Chinese text of section 55C by deleting "語文" and substituting "語言或文字".

Proposed amendments to the Bill

69. The Bills Committee has examined the Administration's proposed amendments to the Bill which is in **Appendix III** and raised no objection thereto. The Bills Committee will not propose any amendments to the Bill.

Resumption of Second Reading debate

70. The Bills Committee has no objection to the resumption of the Second Reading debate on the Bill at the Council meeting on 24 June 2020 or a later date to be confirmed.

Advice sought

71. Members are invited to note the deliberations of the Bills Committee.

Council Business Division 4
Legislative Council Secretariat
4 June 2020

Appendix I

Bills Committee on Evidence (Amendment) Bill 2018

Membership list

Chairman	Hon CHEUNG Kwok-kwan, JP
Members	Hon James TO Kun-sun Hon Tommy CHEUNG Yu-yan, GBS, JP Hon Paul TSE Wai-chun, JP Hon CHAN Chi-chuen Hon Kenneth LEUNG Hon Dennis KWOK Wing-hang Dr Hon Elizabeth QUAT, BBS, JP Dr Hon Junius HO Kwan-yiu, JP Hon Holden CHOW Ho-ding Hon YUNG Hoi-yan (Total : 11 Members)
Clerk	Ms Sophie LAU
Legal adviser	Miss Rachel DAI

Appendix II

Bills Committee on Evidence (Amendment) Bill 2018

List of deputations which have given views to the Bills Committee

1. Society for Community Organization
2. Democratic Alliance For The Betterment And Progress of Hong Kong
3. Liberal Party

Evidence (Amendment) Bill 2018

Committee Stage

Committee Stage

Amendments to be moved by the Secretary for Justice

Clause	Amendment Proposed
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 (***applicant***) is the accused—" before "the declarant refuses".[4]
5	In the proposed section 55O(2), by deleting "party applying for permission under section 55N (***applicant***)" 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 substituting "may have regard only".[7]

[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.
[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 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

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[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.

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 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

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

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 practicable[11] 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 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

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[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.

Cheung Yu-yan's concern and the views expressed at the meeting on 13 November 2018 by deputations and Members of the Bills Committee.