

# **Evidence (Amendment) Bill 2017**

## **Comments of the Hong Kong Bar Association**

### **Introduction**

1. The Evidence (Amendment) Bill 2017 is an attempt to put in legislative form some of the proposals of the Law Reform Commission. We will not recite the history of the proposals to abolish or reduce the impact of some aspects of the law of hearsay in criminal proceedings. It is both long and not terribly enlightening. What we would say is that the Bar has consistently maintained its support in principle for the proposals, which emerged from the Law Reform Commission.
2. The Bar's concern has always been focused on ensuring that such changes that are appropriate in the law relating to hearsay in criminal proceedings be accompanied by practical, realistic and readily understood safeguards. These safeguards should ensure that some of the most basic guarantees of the Basic Law are observed not just in form but in substance as well. While the Bar's position does not change it is right to say that this draft of the Evidence (Amendment) Bill 2017 does not, in some respects, meet the Bar's principal concerns.
3. We must comment on the perception of the Bar's position. For a long time, a mythology has existed in certain quarters (including, sadly, the judiciary) that the Bar has been implacably opposed to reasonable reform in this area. This view is still prevalent. The point which is important is that when the Bar does respond it must be very careful to do so in clear, positive and strident terms. Any

lesser response will not only run the risk of perpetuating the negative mythology. That will do the Bar a grave disservice.

4. The Bill provides a number of routes by which hearsay evidence may be admitted in criminal proceedings. These are:
  - a. Admission of hearsay evidence by the agreement of parties;
  - b. Admission of hearsay evidence which is not opposed by other parties;
  - c. Admission of hearsay evidence with the leave of the court;
  - d. The provision of common law rules relating to hearsay evidence; and
  - e. The reception in evidence of certain forms of hearsay.

#### **Division 1: various preliminary matters**

5. Division 1 of the Bill provides, for the most part, common sense definitions. We are not totally convinced that the definition of hearsay given in this Division is satisfactory. It is probably saved by the definition of "statement". We have a technical issue with the proposed section 553D(3)(a) – we suggest that this provision referred to a complaint having been made or information laid before a court. There may also be an argument for the court to be a "court exercising criminal jurisdiction in Hong Kong".
6. Further, we think that the problem that sections 55E and 55G intend to address are perfectly acceptable in terms of policy. However, it is our view that section 55E and 55G are clumsily worded. In particular, the declaration in section 55E that hearsay can only be admitted if it is admissible under (d) "any other enactment." It is our view that this does not sit well with section 55G, which declares that this legislation does not affect the admissibility that would otherwise be admissible (if not for this part). That is relevant because vast quantities of what would be

otherwise inadmissible hearsay evidence are admissible under sections 20-22 of the Evidence Ordinance. We are unsure of what section 55G is meant to achieve.

**Division 2: reception of hearsay by agreement**

7. Division 2 of the Bill provides a means by which hearsay evidence may be received by a court by agreement of the parties. There are problems with the aspect of a corporation "party" agreeing to hearsay. We recommend that consideration be given to bolstering section 55H(3)(b) to require the court to be satisfied that the director, manager company Secretary or some other similar officer of the body corporate has the both the power and authority to bind the corporation. The reason for this concern is that there have been a number of cases over the years where within a company there is not perfect unity and there are various aspects of bastardry, skullduggery, dirty dealing and betrayal. In other words, one faction in a body corporate may be perfectly happy to agree to the admission of certain hearsay and another faction may be implacably opposed.
  
8. In many respects, this Division has a very strong relationship to section 65C of the Criminal Procedure Ordinance, Cap 221. The principal difference is that once something is agreed under section 65C it is not only binding on the parties, it is to be treated as true. This does not appear to be intended under section 55H, but it is certainly desirable. There is certainly nothing in section 55H that declares how such evidence is to be considered once the court receives it. Additionally, there is a widely held view (not necessarily adopted by the Bar) that hearsay may not be received under section 65C and thus be made binding under that section. On the premise of this widely held view, there may be an argument for making plain that hearsay evidence by agreement could be treated under section 65C.

### **Division 3: reception of hearsay after notice not opposed**

9. The provisions of Division 3 reflect a means of getting hearsay evidence, which would be admissible under Division 4. There are parallels (which are largely unrecognised or ignored) in relation to getting statements before a court under section 65B of the Criminal Procedure Ordinance. Section 65B provides that under certain conditions witness statements can be put before a court. Notice must have been given by a party (either the prosecution or accused) and such a statement is admissible if there is no response to the notice within a prescribed time. This is broadly the scheme proposed in Division 3. However, the proposals in Division 3 are substantially more complex.
  
10. Division 3 has an immense amount of potential for defendants, which we fear will go largely unrecognised. That is a discussion for another day. What is important is to examine section 55K, which sets out the nature of an opposition notice to the reception in evidence of hearsay. This does require the party filing the opposition notice to reveal the position of that party in relation to the evidence (both in terms of what will be opposed and why, as per section 55K(3)). This is a highly important step not just for the purposes of Division 3 but also for the far more contentious provisions of Division 4.

### **Division 4: reception of hearsay which is opposed**

11. Division 4 is probably the most critical provision of this Bill. As noted in the preceding paragraph, a notice under Division 3 is (mostly) a pre-requisite to a decision to admit hearsay evidence under an application under Division 4. It is not necessary to give a notice under Division 3 if the conditions of section 55N(2) are satisfied. That makes some sense in relation to section 55N(2)(a) – provisions in relation to sentence. However, it does not make perfect sense in

this regard because a plea of guilty may be notified well in advance of the hearing at which the notice is required for.

12. We recommend that section 55N(2)(a) only apply to sentencing proceedings that occur after a conviction after trial for the offence to be sentenced. We fail to see why sentencing provisions in respect of which there has been abundant notice should be treated under section 55N(2)(a). However, in contested proceedings, the non-provision of a notice under Division 3 may be permitted if one of the conditions in section 55N(2)(b) is satisfied. The first two conditions (no prejudice and the lack of reasonable practicability to give the notice) are perfectly fine. The 3rd basis that would permit the court to admit hearsay without a notice under Division 3 is not a prerequisite is if it is "in the interests of justice". There are dangers in the vagueness of the concept but there must always be some form of a "let out" clause that must, of necessity, be vague.
  
13. Our principal concern is that one party or another may hold the application back for tactical reasons. Indeed, that is plainly part of what is behind section 55N(3)(b), which empowers a court to "draw inferences from the failure of the applicant to give the hearsay notice." One hopes that such a provision would be applied in a fair and even-handed way. The other component of section 55N(3) is the power to award costs. We think it would be appropriate to make it plain that the award of costs in this regard is not a matter that is dependent on the outcome of the ultimate trial. Thus, if the prosecution were to hold back an application to adduce hearsay evidence and seek to bring itself within section 55N costs would be awarded regardless of whether the accused was finally convicted or otherwise. Some thought will need to be given for legally aided cases. Further in relation to the issue of costs, we do not understand the meaning of section 55N(4)(b).

14. Section 55M gives a court the discretion to receive hearsay evidence if the conditions in section 55M(2) are satisfied. Broadly, those conditions are perfectly fine as considerations. However, they do not recognise the prejudice to a party (e.g. the prejudice to an accused and at least logically prejudice to the prosecution is also relevant) from the effect of the reception of the proposed hearsay evidence. A possible effect we have in mind is the denial of a party against whom the evidence is tendered to cross-examine.
15. In some cases, the ability to cross-examine is, at most, a matter of utter triviality. Indeed, we suspect, that will be true in many, many cases. However, the consequence of inability to cross-examine can have a critically prejudicial effect on the party. The starting point would have to be that both the Bill of Rights (Article 11) and the International Covenant on Civil and Political Rights (Article 14(3)(e)) provide that cross-examination is one of the minimum rights of an accused person "in full equality". However, cross-examination is not some vague unattainable standard. It has an immensely practical content in the hands of a competent and experienced barrister.
16. For an accused whose ability to investigate or contradict such evidence is often limited for a multitude of reasons (resources, the inability to execute a search warrant to gather information and others) the ability to cross-examine is often the only weapon available.
17. Perhaps the greatest writer on the law of evidence, Wigmore, described cross-examination as 'beyond any doubt the greatest legal engine ever invented for the discovery of truth'. (Wigmore: *Evidence*, Volume 5, section 1367, 1974 Edition) That is no less true today.

18. The Supreme Court of Canada expressed the importance of cross-examination: "Cross-examination may often be futile and sometimes prove fatal, but it remains nonetheless a faithful friend in the pursuit of justice and an indispensable ally in the search for truth. At times, there will be no other way to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed." (*R v Lyttle* [2004] SCC 5)
19. It is certainly true that the discretion in section 55M *might* be informed by the inability of the party against whom the hearsay evidence is to be adduced. However, so important is this right that it ought to be explicitly provided for. It seems that it ought to be a threshold test. It is not as if legislation in Hong Kong has not set this standard on other occasions. An example already appears in the Evidence Ordinance to which these provisions are intended to be an amendment.
20. Section 77F of the Evidence Ordinance, which concerns the admissibility in criminal proceedings of evidence obtained pursuant to a letter of request and explicit provision as to the admissibility of such material, provides the inability to cross-examine as a relevant factor. That is critical for 2 reasons. The first is not only that it can be done as section 77F manifestly demonstrates. However, there is a greater danger. Given that there is an explicit provision to consider cross-examination as a precondition to the reception into evidence of material obtained from outside Hong Kong in section 77F, the absence of such provision in the very same ordinance might carry with it the implication that the inability to cross-examine is not to be considered. This is a major flaw in the Bill.
21. It is necessary to recall that criminal cases may stand or fall on the ability or inability to cross-examine. Perhaps the most recent example of a case being

thrown out on appeal because of a deprivation of the right of an accused person to cross-examine might be seen in *HKSAR v Lau Shing Chung* (2015) 18 HKCFAR 50. The problem has existed for many years and this recent example demonstrates not only how important cross-examination is but that the problem has not gone away.

22. A precondition to the reception of hearsay evidence following an application under section 55N is that the evidence is necessary. The concept of necessity is dealt with in section the 55O. This appears to deal with the matter in a perfectly reasonable and sensible manner.
23. The other condition for the reception of evidence following an application under section 55N is that the hearsay evidence is reliable. That is dealt with in section 55P. The concept of a "reasonable assurance that the evidence is reliable" seems perfectly fine in relation to applications to adduce hearsay evidence on behalf of the prosecution provided that is clearly understood that this is a requirement for admissibility only and does not affect the standard of proof that the prosecution must attain in order to secure a conviction in any way. However, in relation to an application on behalf of the accused to adduce hearsay evidence under this provision, the notion of a "reasonable assurance that the evidence is reliable" might have the unintended effect imposing a higher standard for the reception of the evidence than it might require either alone or together with other evidence for an acquittal. In that regard, the requirement would be to establish that the evidence is "true or might be true". That is, of course, the classic formulation for defence evidence and is not to be restricted to the evaluation of evidence given by the accused directly. Thus, attention needs to be given to this threshold of admissibility where the applicant for adducing the hearsay evidence is the accused.
24. Section 55Q provides some but not an adequate safeguard for the reception of hearsay evidence at the instance of the prosecution against an accused person.



The safeguard is, in my opinion, perfectly fine as far as it goes. The concept of what is "unsafe" invokes the notion of safety under the English legislation, which would permit the allowing of an appeal. We use the rubric "unsafe and unsatisfactory". However, the way in which the case law has developed in England under the notion of safety has clearly imported circumstances of unsatisfactory-ness. For this reason, provided our courts take inspiration in the interpretation of "unsafe" from the English experience, we are fairly comfortable with the application of that phrase.

25. We have not overlooked that section 55Q(4) provides a list of considerations as to determining whether reception of hearsay would make it unsafe to convict full. In that list is section 55Q(4)(e), which could deal with what we consider the fatal flaw of this provision. The fatal flaw is that when hearsay evidence is received it has the effect of denying the party against whom it is received the ability to cross-examine on that evidence. However, earlier in this note we have expressed that this ought not to be a point restricted to the issue of whether there should be an acquittal under section 55Q. We are strongly of the view that a relevant consideration for such an acquittal is the inability to cross-examine but that this also should not prejudice the requirement for the inability to cross-examine being a relevant factor in relation to the reception into evidence. In other words, it should not necessarily be considered only at the time when a judge considers whether to acquit but rather threshold of admissibility.
26. Finally, as a matter of style, we think it might be appropriate to start using the word "permission" rather than "leave". Other jurisdictions have managed to cope with this outburst of modernity. We fail to see why Hong Kong could not do so as well.

### **Division 5: preservation of common law rules relating to hearsay**

27. It is our view that this division is perfectly fine. We have some minor quibbles with the language that has been employed but, overall, the provisions in this division are appropriate. Ultimately, even if the common law rules thus preserved have not been totally aptly expressed, the whole thing is saved by section 55S.

### **Division 6: Consequential matters**

28. Section 55T appears to us to be perfectly fine and sensible. We are less sure about section 55U. Previous inconsistent statements of a witness are already dealt with under sections 13 and 14 of the Evidence Ordinance. These sections supplement the common law governing previous inconsistent statements. However, the problem is that section 55U speaks of previous statements and does not make the distinction so readily established in the common law. This might be an under intended restriction on the operation of the laws relating to previous inconsistent statements which are an important component of cross-examination. We suspect this is not intended because section 55U might be interpreted as without prejudice to other parts of the law. So far as previous *consistent* statements are concerned, we fail to see what section 55U actually achieves. It may actually have a further unintended consequence in the sense that in relation to both rebutting recent fabrication and the doctrine of recent complaint it elevates such a complaint to an assertion of truth. At the moment, the doctrine of recent complaint is admissible only to prove consistency and is not evidence of the truth of what is asserted. This provision is so utterly unclear as to its intent, purpose or effect that it should not be in this amendment.

**Other matters**

29. We have no quarrel with section 55V. Section 55W addresses a problem, which seems to me to be imaginary.
30. The repeal of section 79, which is an obscure and little-used section of the Evidence Ordinance, is perfectly justified.

Dated this the 18<sup>th</sup> day of August 2017

HONG KONG BAR ASSOCIATION