

## Hong Kong Bar Association

### Comments on the proposed Evidence (Amendment) Bill 2026 (the “2026 Bill”)

#### General Comments

1. The 2026 Bill proposes the enactment of a new Part IVA to the Evidence Ordinance (Cap. 8) (the “**proposed Part IVA**”).
2. While substantial reforms had been made to hearsay in civil proceedings as early as in 1999, hearsay in Hong Kong criminal proceedings has seen little reform. As outlined in Chapter 5 of the 2005 Consultation Paper on hearsay in criminal proceedings<sup>1</sup>, Hong Kong is one of the last common law jurisdictions to initiate any substantial change to the criminal hearsay rule.
3. Under the current common law approach to hearsay exceptions, the rules are criticized for being narrowly and strictly defined and leaving no room for the judge to admit hearsay on the basis of discretion<sup>2</sup>. There is a dire need for

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<sup>1</sup> The Law Reform Commission of Hong Kong’s Hearsay in Criminal Proceedings Sub-Committee, Consultation Paper: Hearsay in Criminal Proceedings (Hong Kong: Law Reform Commission of Hong Kong, 2005) (the “**2005 Consultation Paper**”).

<sup>2</sup> See page 150 of Young, Simon N. M., Concerning the Common Saying [Law Depends on the Evidence] and the Reform of Criminal Hearsay and Recent Complaint in Hong Kong. LAW LECTURES FOR PRACTITIONERS 2006, M. Cheng, J. Jen and J. Young, eds., Hong Kong: Hong Kong Law Journal Ltd, pp. 149-173, 2006, Available at SSRN: <https://ssrn.com/abstract=957202>.

modernization of the hearsay rules and it is for the legislature to embed these clarifications in the new amendment.

4. As an overview of the 2026 Bill, the proposed Part IVA provisions:
  - (1) Maintains the exclusionary rule against hearsay, but “hearsay” is redefined in **Section 55D** of the proposed Part IVA to include a statement 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.
  - (2) Abolishes common law exceptions except for the eight exceptions preserved under **Section 55G** and **55T**<sup>3</sup> of the proposed Part IVA, by reference to the proposed inclusion of Schedule 2 that lists out the preserved exceptions of:- Confessions (Rule 1), Joint Enterprise or Conspiracy (Rule 2), Expert Opinion (Rule 3), Public Information (Rule 4), Reputation as to Character (Rule 5), Reputation or Family Tradition (Rule 6), Res Gestae (Rule 7) and Admissions by Agents etc (Rule 8).
  - (3) Introduces a core scheme for the admission of hearsay either by agreement of the party (Division 2), or upon notice (whether unopposed or opposed) and with court’s permission (Division 3). Five conditions

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<sup>3</sup> Section 55T(1) of the proposed Part IVA refers to and preserves 8 common law exceptions to rule against hearsay, as listed out in Schedule 2 of the 2026 Bill.

must also be satisfied for the court to grant permission pursuant to **Section 55P(2)** of the proposed Part IVA.

5. The proposed amendment aims to remedy for the shortcomings of the current common law framework. However, these proposed changes must also be scrutinized with utmost regards to the underlying rationale of the hearsay rule.
6. In the recent Court of Final Appeal decision in *HKSAR v Li Cheung Choi* (李長再) [2025] HKCFA 1, the Court considered the appropriateness in introducing new hearsay exceptions in a case dealing with whether an accused charged with murder could admit his out-of-court statements made to a medical practitioner, regarding his background and state of mind at the time of the offence, before a jury.
7. After a comprehensive review of the Court of Appeal's Proposed New Approach<sup>4</sup>, the Court of Final Appeal rejected this approach holding *inter alia* that creation of new hearsay exceptions is a matter for the legislature<sup>5</sup>, and the Court reiterated that the proposed new approach ought to pay due regard to the rationale for the hearsay rule set out in *R v Blastland* [1986] 1 A.C. 41 where Lord Bridge held at page 54 that:-

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<sup>4</sup> See definition set out at §26 of *Li Cheung Choi*.

<sup>5</sup> See §34 of *Li Cheung Choi*.

*“The rationale of excluding it as inadmissible, rooted as it is in the system of trial by jury, is a recognition of the great difficulty, even more acute for a juror than for a trained judicial mind, of assessing what, if any, weight can properly be given to a statement by a person whom the jury have not seen or heard and which has not been subject to any test of reliability by cross-examination.”<sup>6</sup>*

8. Confrontation and the opportunity to cross-examination is central to the common law adversarial system of trial<sup>7</sup>, and as set out by the Privy Council in *Teper v The Queen* [1952] A.C. 480 at 486:

*“[t]he rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost”*

9. In Hong Kong, the considerations highlighted by overseas authorities finds their constitutional root in Articles 10 and 11 of Part II of the Hong Kong Bill of Rights Ordinance (Cap. 383) for right to fair and public hearing and the rights of persons to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

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<sup>6</sup> Cited at §4 of *Li Cheung Choi*.

<sup>7</sup> See *Lee v The Queen* (1998) 72 ALJR 1484 at §32.

10. Therefore, as rightly and repeatedly reiterated in the Consultation Paper on Evidence (Amendment) Bill 2026 (the “**2026 Consultation Paper**”)<sup>8</sup> and in the preceding consultation papers on the same subject matter, there must be safeguards to any major reform of the hearsay rule to reaffirm the abovesaid rationale for having the hearsay rule.
11. Whilst it is entirely agreeable for the 2026 Bill to inaugurate a much-needed discretionary power in the law of criminal hearsay, the drafting of the Bill could be improved. As observed, that on some issues, the legislative amendments are not sufficiently clear and could create difficulties in the understanding of this law. There are also proposed provisions where certain inclusions could lead to problematic enforcement issues.
12. Ultimately, all reforms must strive to produce evidentiary rules that are clear, simple, accessible and easily understood<sup>9</sup>.
13. Comments on each Division, general or section-specific, are listed in the ensuing paragraphs.

### **Division 1 – Preliminary**

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<sup>8</sup> See §20 of the 2026 Consultation Paper.

<sup>9</sup> See page 37 of the 2005 Consultation Paper.

14. It is trite that a piece of legislation needs to be clear, unambiguous and certain, particularly when that legislation aims to criminalize certain conducts and behaviors. If the law is not clear, it would fail to serve or protect the public, if at all.
15. Division 1 of the 2026 Bill sets out the interpretative provisions for the proposed Part IVA.
16. **Section 55E** of the 2026 Bill provides for the scope of application. Section 55E(1) draws a distinction between the application of the newly added Part IVA to (a) “evidence” in criminal proceedings other than sentencing proceedings or surrender proceedings and (b) “specified evidence” in criminal proceedings in respect of sentencing. References and definition to “specified evidence” is set out under Section 55E(3), as evidence that (a) is adduced or to be adduced by the prosecution to prove an aggravating factor; and (b) is not information furnished under section 27<sup>10</sup> of the Organized and Serious Crimes Ordinance (Cap. 455), or under an order of the Court.
17. However, Section 55E(2)(b) sets out that:-

*“(2) Despite subsection (1), this Part does not apply to evidence adduced or to be adduced in:-*

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<sup>10</sup> Provides for sentencing in respect of specified offences.

- (a) *proceedings commenced before the commencement date of this Part; or*
- (b) *proceedings that relate to a case concerning national security (within the meaning of section 3(2) of the Safeguarding National Security Ordinance (6 of 2024)).*" (emphasis added).

18. Adopting the meaning of "evidence" as set out under Section 55E(1), Section 55E(2)(b) would seem to only apply to *"evidence adduced or to be adduced in criminal proceedings (other than proceedings in respect of sentencing)"*<sup>11</sup> (emphasis added).

19. The rationale of Section 55E(2)(b) as set out by the Department of Justice (the "**Department**") in the Consultation Paper on Evidence (Amendment) Bill 2026 (the "**2026 Consultation Paper**")<sup>12</sup> is that this section is to ensure effective implementation of the NSL<sup>13</sup> in conjunction with the relevant local laws, and specifically, to remedy for potential disinformation campaigns and manipulation of evidentiary sources which NS proceedings are susceptible to:-

*"20. NS proceedings are vulnerable to disinformation campaigns and the manipulation of evidentiary sources. It is not reasonably practicable for the HKSAR to establish*

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<sup>11</sup> As worded in Section 55E(1)(a) of the proposed Part IVA.

<sup>12</sup> See §20 of the 2026 Consultation Paper.

<sup>13</sup> See definition set out at §19 of the 2026 Consultation Paper.

*unerring protection or mechanisms to eliminate the risk of manufactured hearsay, particularly statements purporting to originate from sources outside the HKSAR. The proposed amendments, if applied to NS proceedings, may open the door for the introduction of unverified, malicious, or sensitive information into the public record, even if such material or information is eventually ruled inadmissible or given no weight. The mere introduction of such material or information in NS proceedings poses irreparable risks of undermining national security through the dissemination of disinformation.”.*

20. Based on the above, it would appear that the Department intends to exclude all stages of proceedings of cases concerning national security from the application of Part IVA. If that is the case, it would be clearer if Section 55E(2)(b) be amended so that it reads that:-

*“(2) Despite subsection (1), this Part does not apply to evidence or specified evidence adduced or to be adduced in:-*

- (a) proceedings commenced before the commencement date of this Part; or*
- (b) proceedings that relate to a case concerning national security (within the meaning of section 3(2) of the Safeguarding National Security Ordinance (6 of 2024)).” (emphasis added)*

21. Insofar as “specified evidence” is concerned, the current proposed definition is
- “(a) is adduced or to be adduced by the prosecution to prove an aggravating factor; and*
- (b) is not information furnished under section 27 of the Organized and Serious Crimes Ordinance (Cap. 455), or under an order of the court.” (See Section 55E(1)(b) read*

in conjunction with Section 55E(3)). It is noted that it does not include “specified evidence” adduced or to be adduced by the defence to prove a mitigating factor. Since as soon as Part IVA is implemented, the only way to adduce hearsay evidence is by way of Part IVA, the Department is respectfully requested to clarify whether Part IVA applies to defence evidence intended to prove a mitigating factor. If yes, this should be clearly spelt out in the definition of “specified evidence”. If not, please explain the rationale behind it and how the Department proposes the defence to adduce such evidence so that the Bar can deliberate on it.

## **Division 2 – Admission of Hearsay Evidence by Agreement**

22. **Section 55I** sets out one of the ways of admitting hearsay evidence, by agreement between the prosecution and the accused (or the relevant individuals on the accused’s behalf). Specifically, Section 55I(1) sets out two methods of admitting hearsay evidence in proceedings, if the prosecution and the accused for or against whom the hearsay evidence is to be adduced by the parties’ (a) **oral agreement** before the court or, (b) **written agreement** jointly made and produced to the court. Pursuant to Sections 55I(5) and (6), such oral agreement is to be taken as an agreement in subsequent appeal in respect of the matter and does not include a retrial or further trial of the matter, and such agreement provided for under Section 55I(1) may only be withdrawn with the permission of the court.

23. It is noted that in the Consultation Paper on Evidence (Amendment) Bill 2026 (the “**2026 Consultation Paper**”), it is stated that “*the mechanism in section 55I is comparable to that of section 65C of the Criminal Procedure Ordinance (Cap. 221). While section 65C(3) provides that an admission under that section shall be treated as an admission for the purpose of any subsequent criminal proceedings relating to the same matter (including any appeal or retrial), section 551(6) of the proposed Bill expressly provides that the agreement does not bind the parties in a retrial or further trial. DOJ considers that to bind parties in a retrial or further trial to an agreement made*”.
24. Even for the purpose of admissions made pursuant to Section 65C of the CPO, which is said to be “comparable” to the present provision in the 2026 Consultation Paper, the statutory language of Section 65C does not provide for such admission to be made only by oral agreement between the prosecutor and the defendant. If the admissions are agreed prior to the hearing, they must be put into writing. For an admission made during a trial, although strictly speaking such can be made orally, it is also customary for such admissions to be reduced into writing<sup>14</sup>. An “Admitted Facts” agreed between parties pursuant to section 65C should be signed either by the party himself or his legal representative, in the case of a corporation, by a director or authorize manager, secretary or clerk.

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<sup>14</sup> See Archbold Hong Kong 2025 at §§10-8 and 15-154.

25. “Oral agreement” is not defined in the current Evidence Ordinance or the proposed provisions in the 2026 Bill, and there is no prescribed formality of how such “oral agreement” is to be constituted.
26. Absence of clear procedure is haphazard, particularly given that Section 55I allows for agreement (oral or written) to be entered into between the prosecution and an accused appearing in person<sup>15</sup>, who understandably, may not appreciate the significance of agreeing for the admission of certain hearsay evidence. Seemingly, all that is required under Section 55I is for the prosecution to obtain some sort of verbal confirmation from the defendant, without offering any procedural safeguard to the accused to review and consider a written document that delineates the exact nature and scope of the admissible hearsay evidence.
27. In an adversarial and accusatorial litigation system, the roles of prosecutors are integral part of the criminal justice process<sup>16</sup>. As Rand J. stated in *Boucher v The Queen* [1955] SCR 16 at 23-24:

*“It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available*

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<sup>15</sup> See Section 55EI(2) of the proposed Part IVA.

<sup>16</sup> See §2.4 of the Prosecution Code.

*legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."*

28. The Prosecution Code sets out at §3.5a that, in litigation, a prosecutor must fairly "*seek to have relevant and credible evidence **placed fully and intelligibly** before the court*". Where the accused is unrepresented, §16 of the Prosecution Code sets out that:-

*"16.1 Care must be exercised by a prosecutor dealing with an unrepresented accused. This may involve striking a balance between inconsistent imperatives. The duty of fairness requires a prosecutor to ensure that the accused is appropriately informed of the prosecution case and the course it will take. The court has an overriding duty to ensure that the proceedings are fairly conducted, and the prosecutor should assist the court to do so by acting and responding appropriately during the course of the proceedings. While a prosecutor is not obliged to provide advice of any sort to an unrepresented accused, it is in the interests of justice to ensure that an unrepresented accused seeks or applies for legal representation or assistance.*

*16.2 In communications with an unrepresented accused a prosecutor should maintain a degree of detachment. Written communication is preferable and communication may be made through the agency of the court. Telephone*

*communications should be avoided by prosecutors and where required should be made by law enforcement officers. Personal contacts should be in the presence of a reliable person who should compile a note in writing of any communications made.*

16.3 *Plea negotiations with an unrepresented accused should not be initiated by the prosecution and should be conducted with care, and where possible, in the presence of a reliable person and appropriately recorded.*" (emphasis added).

29. Without specification of how such "oral agreement" pursuant to Section 55I(1) is to be accurately recorded and documented, parties would need to request for court transcript to ascertain what exactly was agreed, which could prolong the proceedings unnecessarily where disputes arise.
30. Even where admissions are expressly documented in accordance with Section 65C of the CPO, an accused acting in person could still be at risk of not understanding of the nature and scope of the admissions purportedly made. This issue arises in the case of *HKSAR v Ngai Hon Kwong* [2019] HKCFI 1205, where admissions were made by an accused's counsel who representing him at previous trial, which it was only in the pre-trial hearing of the retrial, that when the Court obtained the transcript of the previous trial and went through each of the assertions of fact in the Admitted Facts made in the previous trial to ascertain the position of the accused to those facts, that "[i]t became apparent in

*this process that the accused did not understand the nature and scope of some of the admissions”<sup>17</sup>.*

31. In *R v Lennard* (1973) 57 Cr. App. R. 542, the English Court of Appeal held at page 834A, that:-

*“...Admissions can be made in many ways and it is not for this court to issue a practice direction; but we do say that whenever admissions are made, the manner of doing so should be such that what has been admitted should appear clearly on the shorthand note.”*

32. In England and Wales, there are four headings under which hearsay evidence may be admitted are set out in the Criminal Justice Act 2003 (the “CJA 2003”), section 114 , which are (1) statutory exceptions (including but not limited to, the exceptions provided in the CJA 2003 itself); (2) common-law exceptions (but only as preserved by section 118); (3) agreement of all parties; and (4) cases where it is in the ‘interests of justice’ to admit hearsay.

33. Despite “oral agreement” is not expressly provided for pursuant to section 114(1)(c) of the CJA 2003, the provision allows a hearsay statement to be

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<sup>17</sup> See §15 of the judgment, notwithstanding that the court ultimately dismissed the accused’s application to withdraw admissions for other reasons stated at §§16-19 of the decision.

admitted proving the truth of its contents if all parties to the proceedings agree to it to be admissible.

34. An “agreement” pursuant to section 114(1)(c) can be expressed or implied, and does not require a contract law analysis of offer and acceptance, nor does it require some formal recording of the position by the court, nor does it necessarily require express agreement<sup>18</sup>.
35. In *Williams v Vehicle and Operator Services Agency* [2008] EWHC 849 (Admin) at §14 per Treacy J, it was said that: -

*“14. Those experienced in criminal litigation are familiar with the situation whereby something is done in the course of a hearing by one party without demur from the other side. Judges and justices up and down the country regularly hear evidence admitted without anything formal being said by the parties to the court. The tribunal infers, in the absence of objection or submission, that there is no objection to the admissibility of evidence, and thus that there is agreement to its admissibility. In effect, the agreement is implicit, or capable of being implicit, in the circumstances pertaining before the court, and particularly in circumstances where the appellant has the benefit of legal representation.”*

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<sup>18</sup> See Archbold Criminal Pleading Evidence and Practice 2026 Ed at §11-8.

36. However, lack of engagement in the pre-trial process by, for example, refusing to state issues does not constitute implied consent to the admission of a hearsay statement even if it is uncontroversial, and nor does silence when served by the prosecution with a complex hearsay statement<sup>19</sup>.
37. The complication in finding such “agreement” when the defendant is unrepresented is well-recognised by the English court. As observed by Keene LJ at §19 of *Williams v Vehicle and Operator Services Agency*, he “emphasize[s] that agreement to the admission of hearsay evidence under that particular provision is not to be inferred automatically or in all circumstances from an absence of objection at the time the evidence is given. It depends on all the circumstances. In particular, if a defendant is unrepresented, it would be very difficult indeed for such an inference to be drawn. In most cases it would be impossible. But such an inference may be open to the court where the defendant is legally represented and no objection to admissibility is taken. Even then the court is not obliged to draw such an inference, but it may, in appropriate circumstances, do so. In the present case, I agree that the justices were entitled to draw such an inference, and I too would dismiss this appeal.” (emphasis added).
38. Further, it is also noted that the Criminal Procedure Rules 2025 Part 20 impose a notice requirement that a party intends to adduce hearsay evidence pursuant to ss.114(1)(d), 116, 117(1)(c) and 121. Whether this notice procedure has to be

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<sup>19</sup> See Phipson on Evidence 21st Ed at §30-11.

followed in respect of hearsay evidence whose use is agreed (i.e. pursuant to ss.114(1)(c)) has not been judicially decided<sup>20</sup>.

39. Taking the above into consideration, the 2026 Bill only imposes a notice requirement under Division 3 of the 2026 Bill, which provides that hearsay evidence is admissible in proceedings (a) a party to the proceedings who intends to adduce the hearsay evidence in the proceedings gives a hearsay evidence notice and (b) no opposition notice is given<sup>21</sup>.
40. For the purposes of a notice under Division 3 of the proposed Part IVA, the requirement for a written notice is set out extensively under Section 55L, that delineates *inter alia* the form, content and grounds in support of admitting the hearsay evidence.
41. No such notice is required to be given for any agreement under Division 2, either oral or written. It is unclear why such is the case when “oral agreement” could cause considerably more uncertainties particularly when it is entered into by an unrepresented accused.
42. Therefore, it is imperative for the Department to reconsider whether sufficient safeguard is afforded to an unrepresented accused under the current drafting of the proposed Part IVA, and further, whether clearer guidance is

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<sup>20</sup> See Phipson on Evidence 21st Ed at §30-11.

<sup>21</sup> Section 55J(1) of the proposed Part IVA.

necessary to set out if a notice under Section 55J is still required to document such hearsay evidence that parties purports to admit in accordance with the requirements under Section 55L.

### **Division 3 – Admission of Hearsay Evidence on Unopposed Hearsay Evidence Notice or with Court's Permission**

43. Division 3 of Part IVA of the 2026 Bill deals with the admission of hearsay evidence (a) on unopposed hearsay evidence notice (s 55J) and (b) with the court's permission (ss 55K to 55S). This proposed scheme under the 2026 Bill appears to be essentially similar to those under the 2017 Bill and the 2018 Bill.

44. We shall make general comments on the essence of Division 3, to be followed by specific comments on relevant provisions.

45. Division 3 empowers the court to admit hearsay evidence (S 55D Meaning of Hearsay) in criminal proceedings (S55E Application) namely, statements adduced to prove "*the truth of [their] content,*" by forsaking the party's right to cross-examination. But cross-examination is the very essence of the common law criminal trial. It is apt to quote from previous comments of the Hong Kong Bar Association on the Evidence (Amendment) Bill 2017 (dated 18 August 2017):

"15 ...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.

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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.

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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 HKCFAR50. 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."

46. This fundamental right to cross examination is protected by the Basic law and is therefore "constitutional" in nature. Article 87 of the Basic Law provides,

"In criminal or civil proceedings in the Hong Kong Special Administrative Region, the principles previously applied in Hong Kong and the rights previously enjoyed by parties to proceedings shall be maintained."

47. Denying a defendant of the fundamental right to cross examine prosecution witnesses not only denies him of a fair trial, but may also result in actual wrongful conviction:

- (1) Absence of cross-examinations would mean that (a) the "truth quality" of the adduced hearsay evidence cannot be tested by the defendant (and his counsel), and (b) the risk of admitting evidence of *sub-standard truth quality* against the defendant cannot be excluded. This could be fatal to the defendant's right to a fair trial.
- (2) Furthermore, in any case where the prosecution could locate, and adduce hearsay evidence meeting the formal procedural requirements of Division 3, the defendant would face the *real risk of conviction* on such evidence of sub-standard truth quality.

48. These risks are not alleviated by giving the defendant a similar right to adduce hearsay evidence, or by the formal and procedural safeguards set out in the rest of Division 3.
49. The “Consultation Paper on Evidence (Amendment) Bill 2017” reveals that the Law Reform Commission of Hong Kong (“LRC”) has, well over ten years ago, considered models on reforming the hearsay rule from a number of overseas jurisdictions (see Annex A: Summary of Recommendations of the LRC). It may be helpful if the administration reviews the objectives of these overseas models, how these overseas jurisdictions have overcome their constitutional hurdles if any, *and* the impact of their reforms, for further insights in steering the current Bill ahead.
50. Our specific comments on Division 3 provisions, subject to the general comments above, are as follows:
- (1) S.55J appears to be uncontroversial as a matter of principle.
  - (2) Ss.55L to 55Q on matters relating to hearsay evidence notice and opposition notice appear to be uncontroversial.
  - (3) S.55P empowers the court to grant permission if the five conditions set out in S.55P (2) are satisfied. They include the *condition of necessity* and the *condition of threshold reliability*, elaborated by S55Q and S55R respectively.
  - (4) The *condition of necessity* under S.55Q reinforces the intention that there is no chance for the defendant to cross-examine the declarant (the declarant is dead, unfit to be a witness, ...etc.) Given also that there is no burden for any defendant to prove his/her innocence, the standard for proving the condition of necessity under S.55Q (3) should be evidential, rather than on balance of probability.

(5) The *condition of threshold reliability* under S55R requires that the circumstances provide “a reasonable assurance that the hearsay evidence is reliable.” However, any criminal trials, and convictions, should not rest on evidence the reliability of which is only “reasonably assured.” It appears that differential standards should also apply: that the prosecution must prove the condition of reliability beyond a reasonable doubt, and the defendant need only do so on an evidential standard.

(6) These two conditions do not minimize or exclude the real risk on denying fair trial and of wrongful conviction.

(7) S.55S envisages the wrongful admission of hearsay evidence, provides for its subsequent exclusion, and procedural consequences. It is not entirely clear (i) why sub-s (3) (b) is necessary if the trial has been conducted by a professional judge without a jury; and (ii) why, under sub-s (4) (a) where the court rules no case to answer, the court *may* still not direct the acquittal of the accused. Sub-s (6) (e) appears to imply that; a defendant could be convicted on prosecution evidence which is *entirely* hearsay in nature. If so, that would change completely the character of common law criminal trials and is wholly unacceptable.

51. As a final observation, Division 3 may likely divert the resources of both sides towards searching for past hearsay materials – and for evidence for countering the reliability of the hearsay materials adduced by the opposite side. This may likely lengthen criminal trials, and increase their costs.

#### **Division 4 – Common Law Rules relating to Hearsay Evidence**

52. **Section 55T** – we agree with the objective of preserving the generally recognized exceptions to the hearsay rule at common law (which are not yet covered by the

Bill itself). We are also of the view that the wording is clear and accurately reflects the legislative intent.

53. **Section 55U** – we agree with the objective of abolishing the hearsay “implied assertion” rule originating from Kearley which had been heavily criticized. Our only comment is that the section could be simplified as the present wording is slightly convoluted. We suggest the following wording for your consideration: “ The common law rule excluding implied assertions on the ground of hearsay is hereby abolished.”

#### **Division 5 – Admissibility of Certain Hearsay Evidence and Related Evidence**

54. **Section 55V(1)** – we agree with this introductory part subsection.
55. **Section 55V(2)** – we agree with the objective as stated in Recommendation 31 and Footnote 13 that a party should be able to adduce evidence affecting the absent hearsay declarant’s credibility as if he was cross-examined had he given oral evidence. We assume this wording would allow for a wide range of evidence including general evidence of bad character of the absent declarant.
56. We raise two further points here.
57. First, from our reading the wording would also allow for the party seeking to *adduce* the hearsay evidence of the absent witness to be able to adduce evidence in

*support* of his credibility. At present the wording of this subsection appears to allow for both evidence in support of or attacking the absent witness' credibility to be adduced, which would go beyond the objective as stated in Recommendation 31 and Footnote 13.

58. Second, we have a concern as to the present wording which may be read as limiting to a declarant that would have given oral evidence "*in connection with the statement*". We are of the view that these words may cause confusion and are otiose.

59. If the legislative intent is that where hearsay evidence is admitted under the Bill, evidence that relates to that hearsay declarant's "credibility" is admissible. Then such evidence should simply be admissible. We are unsure as to the utility of including the emphasized words: "*if the declarant of the statement adduced as the hearsay evidence had given oral evidence in the proceedings in connection with the statement.*" This may cause confusion as it may be read as "if the declarant had given oral evidence...in connection with the hearsay statement" (which is the statement being adduced under the Bill). Furthermore, the inclusion of those words does not appear to serve any purpose. We therefore suggest removing those words.

60. **Section 55V(3)** – we agree with this provision and its purpose of providing the tribunal with evidence of previous inconsistent statement of the hearsay declarant.

61. **Section 55W** – This provision is in line with the statutory developments of other common law jurisdiction such as the UK. However, we note that this section

does not include the admission of a “previous consistent statement” where that statement had been used in cross-examination and as a memory refreshing tool – which is included in the UK equivalent legislation for admission of hearsay documents under s.120 of the Criminal Justice Act 2003. If the purpose of the section is to allow all previous common law exceptions to the rule against previous consistent statements to be adduced as statutory exception to hearsay, we would recommend adding the relevant parts as worded in the UK Criminal Justice Act 2003.

62. We set out the relevant section 120 of CJA 2003 below for consideration.

*120 Other previous statements of witnesses*

*(1) This section applies where a person (the witness) is called to give evidence in criminal proceedings.*

*(2) If a previous statement by the witness is admitted as evidence to rebut a suggestion that his oral evidence has been fabricated, that statement is admissible as evidence of any matter stated of which oral evidence by the witness would be admissible.*

*(3) A statement made by the witness in a document –*

*(a) which is used by him to refresh his memory while giving evidence,*

*(b) on which he is cross-examined, and*

*(c) which as a consequence is received in evidence in the proceedings,*

*is admissible as evidence of any matter stated of which oral evidence by him would be admissible.*

(4) A previous statement by the witness is admissible as evidence of any matter stated of which oral evidence by him would be admissible, if –

(a) any of the following three conditions is satisfied, and

(b) while giving evidence the witness indicates that to the best of his belief he made the statement, and that to the best of his belief it states the truth.

(5) The first condition is that the statement identifies or describes a person, object or place.

(6) The second condition is that the statement was made by the witness when the matters stated were fresh in his memory but he does not remember them, and cannot reasonably be expected to remember them, well enough to give oral evidence of them in the proceedings.

(7) The third condition is that –

(a) the witness claims to be a person against whom an offence has been committed,

(b) the offence is one to which the proceedings relate,

(c) the statement consists of a complaint made by the witness (whether to a person in authority or not) about conduct which would, if proved, constitute the offence or part of the offence,

(d) .....

(e) the complaint was not made as a result of a threat or a promise, and

(f) before the statement is adduced the witness gives oral evidence in connection with its subject matter.

(8) For the purposes of subsection (7) the fact that the complaint was elicited (for example, by a leading question) is irrelevant unless a threat or a promise was involved.

## **Division 6 – Supplementary Provision**

63. Section 55X – we agree with this provision and its purpose of clarifying the conditions of admitting multiple hearsay.

**Remaining sections**

64. We agree with the removal of section 79 and the wording of Schedule 2.

Hong Kong Bar Association  
20 February 2026