



THE
LAW SOCIETY
 OF HONG KONG
 香港律師會

3/F WING ON HOUSE · 71 DES VOEUX ROAD
 CENTRAL · HONG KONG DX-009100 Central 1
 香港中環德輔道中71號
 永安集團大廈3字樓

TELEPHONE (電話) : (852) 2846 0500
 FACSIMILE (傳真) : (852) 2845 0387
 E-MAIL (電子郵件) : sg@hklawsoc.org.hk
 WEBSITE (網頁) : www.hklawsoc.org.hk

Our Ref : CLP/20/ 5536343
 Your Ref :
 Direct Line : LP 5019/16C

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8 January 2021

Mr Vernon LOH
 Legal Policy Division
 Department of Justice
 5th Floor, East Wing, Justice Place
 18 Lower Albert Road, Central

By Email and By Post

Dear Mr LOH,

Evidence (Amendment) Bill 2018

Thank you for your letter of 3 December 2020 on the captioned, which has been passed to the Criminal Law and Procedure Committee of the Law Society (the "Committee") for consideration.

Before replying to you on your further proposed committee stage amendments ("CSAs") to the Evidence (Amendment) Bill 2018 (the "Bill"), the Committee seeks the following clarifications and elaboration from you on those key features you have identified in the above letter.

A. Section 55M - Timing on the determination of the admissibility of hearsay evidence

You propose to refine section 55M of the Bill by making it clear that the Court has a discretion to make a determination on the shortening or extension of the notice period to adduce hearsay evidence (under section 55L), at any time as it considers appropriate in the interest of justice.

The Committee has no objection to the above principle.

The Committee however notices that your latest proposed amendment (below) seemingly goes beyond the above principle (your amendments appear as underlined; italics supplied by the Committee).



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

- (1) Hearsay evidence may be admitted in proceedings with the permission of the court.
- ...
- (3) The court may determine whether to grant the permission at any time as the court considers appropriate in the interest of justice, having regard particular to the possibility of an application under section 55Q.

The Committee does not understand the reasons why the wordings in italics in the above are required. Furthermore, the Court will under the proposal be asked to consider “particularly” the *possibility* of a section 55Q application. As a preliminary observation, the Committee considers it to be extremely unusual and rare, in applications of this nature, that the Court is asked to consider the possibility of something happening.

In a summary, the Committee could accept the proposed amendments up to the words “... *interest of justice.*” and that those words in italics be removed in their entirety.

If the above is not acceptable to you, please explain what you have in mind by including in the further proposed CSAs those wordings in italics and also the circumstances you are envisaging.

B. Section 55Q - the scope of application

You propose to amend section 55Q(1) of the Bill to make clear that an accused can only make an application under the section 55Q, if the accused has previously opposed the admission of the hearsay evidence under section 55M. Section 55Q relates to the safeguards to an accused if it is unsafe to convict.

The proposed amendments are excerpted in the following (only those amendments under discussion are underlined).

55Q. Safeguard if it is unsafe to convict

- (1) This section applies in relation to proceedings if-

- (a) the case against an accused for an offence is based wholly or partly on hearsay evidence admitted with the court's permission granted under section 55M; and
- (b) the permission was granted on the application of a party other than the accused and, before the hearsay evidence was admitted, the accused has opposed its admission.

The preliminary responses of the Committee to the above are that

- (1) there is no convincing reason why the discretion of the Judge to consider a section 55Q application should be limited by this CSA;
- (2) unforeseen circumstances could arise and that the accused who does not originally intend to object the hearsay evidence could now have to seek to oppose the admission of the evidence;
- (3) there could be additional or late disclosure of evidence by the Prosecution, the sum total of which could make it necessary for the accused to oppose the hearsay evidence produced at an early stage.

The Committee also considers that, if the above CSA is to be introduced, then in each and every case, the accused would almost *as a matter of routine* object to the admission of any and all hearsay evidence at the start of the proceedings, in order to preserve the rights for his or her subsequent section 55Q applications. Would that be helpful to case management?

C. Section 55Q - the Court's powers

Still on section 55Q, you propose to amend the Bill to the effect that, for those cases which are based on hearsay evidence admitted under section 55M and the Court considers that it would be unsafe to convict the accused, instead of a direct acquittal (as originally proposed), the Court would have a wide range of powers, e.g. asking to consider hearsay evidence, a retrial etc.

55Q. Safeguard if it is unsafe to convict

- (1) ...
- (2) The court may, on application by the accused, consider whether it would be unsafe to convict the accused of the offence.
...
- (6) If the court considers it unsafe to convict the accused of the offence, the court must exclude the hearsay evidence.
- (7) If in proceedings before a jury the court excludes hearsay evidence on an application under subsection (2), the court must —
 - (a) if the prosecution indicates that it does not intend to continue with the prosecution of the offence—direct the acquittal of the accused of the offence;
 - (b) if the prosecution does not so indicate and —
 - (i) the court considers it appropriate to continue the proceedings — continue the proceedings, and give direction as may be appropriate for the jury to ignore the hearsay evidence; or
 - (ii) the court considers it not appropriate to continue the proceedings — discharge the jury and order a retrial.
- (8) If in proceedings not before a jury the court excludes hearsay evidence on an application under subsection (2), the court must —
 - (a) if the court considers it appropriate to continue the proceedings — continue the proceedings;
 - (b) if the court considers it not appropriate to continue the proceedings — order a retrial;
 - (c) if the application is made after the court rules that there was a prima facie case against the accused for the offence and there is no longer such prima facie case after the

hearsay evidence is excluded — acquit the accused of the offence.

(Only the proposed amendments under discussion are underlined in the above).

The above proposal is prima facie objectionable on at least the following grounds.

- (1) Among other things, under the proposed CSA, it is open to the Court to still ask the jury to consider the weight of the hearsay evidence (for jury trials) or itself to consider such weight (for non-jury trials), after it has excluded the hearsay evidence in a section 55Q application. The Committee considers that, once excluded, the hearsay evidence should not carry any weight for determination.

By way of an analogy, when it comes to expert evidence, when the Court determines that the expert evidence is not admissible, then those evidence would no longer be available for the jury or the Court. Why is there a difference in the treatment of hearsay evidence (expert evidence is also a kind of hearsay evidence)?

Additionally, there is no policy discussion as to why, under the above proposal, the treatment of hearsay evidence could be different from confession statements.

- (2) One of the other powers of the Court under the proposal is to order a retrial of the matter. The Committee requires an elaboration on the scenario under which the Prosecution would apply to the Court for retrial, when the hearsay evidence is excluded by the Court. In the opinion of the Committee, in a trial when the hearsay evidence is excluded, the Prosecution should decide whether to proceed with the trial. It is not clear as to why in that case a retrial is needed.
- (3) On the other hand, the proposal also states that after exclusion of the hearsay evidence, the Court could, among others, direct the jury to ignore the hearsay evidence. In the experience of the Committee, the above never happens and would not happen, as any argument on admissibility of evidence would not take place in front of the jury.

- (4) Lastly, as a matter of logic and principle, if the hearsay evidence is the *only* evidence against an accused, and if that evidence is excluded, there should be no other evidence against the accused. In these circumstances, why the accused should not be acquitted? What other evidence the accused has to face?

D. Section 55Q - the factors for determining whether it would be unsafe to convict

You pointed out that inability to cross-examine should go to the weight of the hearsay, not admissibility, and that the inability to cross-examine a declarant will necessarily arise in every case where the court grants permission to admit hearsay evidence. You therefore propose the following amendments to section 55Q(5)(e) (only the amendments under deliberations are highlighted).

55Q. Safeguard if it is unsafe to convict

...

- (5) In considering whether it would be unsafe to convict the accused of the offence, the court may have regard only 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) having regard to the totality of the other evidence, the prejudicial effect on the accused that may be caused by the admission of the hearsay evidence, including the effect arising from the inability to cross-examine the declarant.

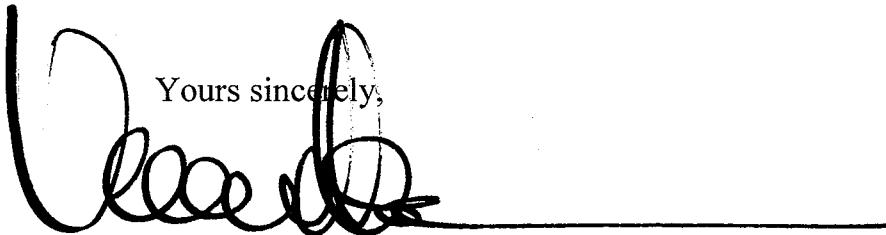
The Committee disagrees with your assertion and your reasoning. Members wish to point out that, unlike civil hearsay whose admissibility is a matter of

weight, criminal hearsay is a matter of admissibility. It is always a danger to admit evidence when the evidence has not been tested.

The Committee shall await your elaboration and clarification on the above before they are to comment further on your proposed CSAs.

Thank you for your attention.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Kenneth Fok', is written over a horizontal line. The signature is stylized and cursive.

Kenneth Fok
Director of Practitioners Affairs
The Law Society of Hong Kong

c.c. The Bills Committee on Evidence (Amendment) Bill 2018, LegCo