CONSULTATION PAPER ON THE EVIDENCE (AMENDMENT) BILL 2026

LAW SOCIETY SUBMISSIONS

1. The Law Society provides this submission in response to the Consultation Paper on the *Evidence (Amendment) Bill 2026* ("Consultation Paper") issued by the Department of Justice ("DOJ") on 11 December 2025.

2. Unless otherwise defined, the same abbreviations and definitions appearing in the Consultation Paper are used in this submission.

GENERAL OBSERVATIONS

3. In November 2009, the Law Reform Commission of Hong Kong ("LRC") published the report on "Hearsay in Criminal Proceedings", proposing that the existing rule prohibiting the admission of hearsay evidence in criminal proceedings be reformed and that the Court be given a discretion to admit hearsay evidence where it is satisfied that the admission of that evidence is "necessary" and the evidence "reliable".

4. To implement the proposals set out in the LRC report, the Government introduced the *Evidence (Amendment) Bill 2018* ("2018 Bill") into the Legislative Council ("LegCo") in July 2018. The Law Society provided a submission in July 2017[1] in response to the DOJ's last consultation exercise on the legislative proposal, another submission in March 2019[2] when the 2018 Bill was under the scrutiny of the Bills Committee, and our views on the DOJ's response to our 2019 submission which were set out in our letter dated 2 July 2020. The 2018 Bill eventually lapsed at the end of the term of office of the sixth-term LegCo in October 2021 due to insufficient time to complete the relevant legislative processes.

[1] The Law Society's Submission on Consultation on Evidence (Amendment) Bill 2017 dated 18 July 2017 is available on the Law Society's website at here.

[2] The Law Society's Submission on Evidence (Amendment) Bill 2018 dated 26 March 2019 is available at on the Law Society's website at here.

5. We understand that the DOJ had conducted a comprehensive review of the 2018 Bill and took into account the comments received through various channels in the past years (including those offered in our submissions in 2017 and 2019 and other written correspondence) in preparing the *Evidence (Amendment) Bill 2026* ("2026 Bill"). As we review the Consultation Paper and the working draft of the 2026 Bill, we would like to reiterate the following general comments:

   (i). The Law Society agrees that the law on hearsay evidence in criminal trials should be reformed to clarify uncertainties and improve criminal justice.

   (ii). Having said so, any changes to the current regime should be cautious and should not emasculate or prejudice the rights of the accused. It is ***fundamentally important*** to put in place the necessary checks and balance for the protection of the constitutional rights of the accused in criminal trials.

6. Our comments and concerns on the 2026 Bill are set out in the ensuing paragraphs.

SPECIFIC COMMENTS

Hearsay evidence admissible by agreement – section 55I

7. Section 55I provides that hearsay evidence is admissible by agreement of the relevant parties. We are concerned about the steps that the Prosecution would take if it makes an agreement with the accused who is a Litigant in Person ("LIP") and how the LIP's right would be safeguarded in such scenario.

8. Article 11(2) of the Hong Kong Bill of Rights provides that "in the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality—
…

   (e) 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."

   We should be grateful for the DOJ's clarification on the abovementioned scenario and advice on its education to the general public regarding the new hearsay rules.

Hearsay evidence admissible on unopposed hearsay evidence notice – section 55J

9. Section 55J stipulates that hearsay evidence is admissible if the notice is unopposed. The Law Society is concerned that this provision would be unfair to LIPs.

Requirements for hearsay evidence notice – section 55L

Question of admissibility be determined before trial to allow proper advice on plea

10. As mentioned in our 2019 submission, the Defence should know in full the admissibility of hearsay evidence before tendering the pleas. The DOJ had previously argued that—

- "to insist upon being also given the notice of hearsay before a plea is tendered would be to require the prosecution to inform the defendant the precise way in which it will prove its case against him/her";

- "[the] admission of hearsay evidence is of no difference to the admission of other disputed evidence, e.g. a confession."[3]

11. It would only be fair for the Defence to know in advance the Prosecution's case before the accused is to enter his plea. This is particularly important, as the Prosecution might not have made full and frank disclosure to the Defence and/or that the discovery was not made in good time.

One-Third Discount on Sentence

12. As mentioned in our 2019 submission, uncertainty on admissibility of hearsay evidence adds layers of concerns to the Defence in particular when it is to consider sentencing discount that is available only for an early plea of guilty. Even though discovery (if any) has been made by the Prosecution on the hearsay evidence in question, the Defence could not know whether the evidence would be accepted by the Court, and therefore the accused would have tremendous difficulty to tender his plea. Yet, the one-third discount on sentence would not be available if he chooses to wait and see. The accused would be caught in a serious dilemma.

13. The Law Society also repeats our query at paragraph 11 of our submission in 2019, on whether there could be any genuine disadvantages or shortcomings caused to the Prosecution or the Court, if the one-third discount is reserved until the question of admissibility of the evidence be determined.

[3] See paragraph 6 of the Law Society's Submission on Evidence (Amendment) Bill 2018 dated 26 March 2019

Giving of hearsay evidence notice and opposing notice

14. Section 55L requires that the notice of adducing hearsay evidence must be given within 28 days after the day on which the date for the hearing in which the hearsay evidence is intended to be adduced is fixed.

15. While it is noted that similar mechanism is adopted in other jurisdictions (e.g. New Zealand), it may create problems in relation to the Defence's preparation of the case. Although the Defence would be provided with the full set of the Prosecution bundle and list of witnesses for determining whether the accused would plead guilty or not, if the Prosecution does not inform the Defence beforehand that there would be hearsay evidence, both sides are in fact operating on different sets of rules. When the Defence looks at the Prosecution bundle, it would assume that the witnesses would come to the Court to testify and prepare the cross-examination of a particular Prosecution witness on that basis. If the Prosecution suddenly decided not to call that particular Prosecution witness and tender hearsay evidence instead, the Defence would be caught off guard in such scenario. Furthermore, the Defence's act of giving such notices and providing its bundle to the Prosecution at that early stage would be tantamount to revealing its line of defence, which the accused is not obligated to until after the end of the Prosecution case.

16. The Law Society asks that the proposed legislation should be fair play for both the Prosecution and the Defence. We maintain that the legal proceedings for the consideration of the admission of the hearsay evidence notice and the opposition notice should be conducted not as a substantive part of the trial but decided in a standalone hearing (like an interlocutory proceeding or voir dire for jury trials), *before* a trial date is fixed. The potential cost impact on the Defence for such a proceeding, including that for the replacement of evidence from a key Prosecution witness with hearsay evidence deemed admissible by the Court, cannot be ignored.

17. If the matter is listed in the Magistrates' Court when the date fixed for hearing is only a few months away, the proposed requirement would significantly increase the workload of the magistrates which might be disproportionate to the benefits.

18. The proposed requirement also adds to the workload of the Defence's team, given that the Defence is to make a defence bundle at an early stage. This is especially difficult for private clients when the case is listed in the higher courts. Costs management would be of concern. This also applies to legally aided defendants, who would face the question of whether there would be adjustment to the legal aid fees when the matter has to be picked up twice.

19. LIPs may find it difficult to handle the complicated procedures set out under the proposed mechanism.

20. Section 55L(1)(b) states that for the purposes of sections 55J(1)(a) and 55K(1)(a), a hearsay evidence notice to be given by a party to any proceedings who intends to adduce any hearsay evidence in the proceedings must state, ***if known***, the name of the declarant of the statement to be adduced as the hearsay evidence. (emphasis added). We should be grateful for the DOJ's clarification on the rationale of inserting the wording "if known", which may be unfair and prejudicial to the Defence.

Requirements for opposition notice – section 55M

21. As mentioned in our 2019 submission, the 14-day period of filing an opposition notice, stipulated under section 55M(2)(b) of the 2026 Bill, would put huge pressure upon the Defence. We ask that the DOJ should ensure fair play for both the Prosecution and the Defence in this regard.

Court's power to vary requirement of sections 55L and 55M – section 55N

22. Regarding section 55N(1)-(2) on the Court's power to shorten or extend the time limit for giving the hearsay evidence notice or the opposition notice, our view is that the opposing party should still have the right to oppose, and this implied meaning should be set out clearly in writing. We also question under what circumstances the time limit could be shortened for giving the notice(s).

23. The Law Society strongly opposes allowing notices to be given orally under section 55N(2)(b). We do not see any scenarios warranting such discretion.

24. We are not sure whether a LIP could deal with the relevant notices on his own on applications under section 55N(5), and would be grateful for the DOJ's clarification in this regard.

Withdrawal of notices – section 55O

25. The Law Society notes that the new section 55O has been added in the 2026 Bill to allow the Court to permit the withdrawal of a hearsay evidence notice or an opposition notice. Our view is that if a party decides to withdraw the notice, there should not be a need for the Court to grant permission. We should be grateful for the DOJ's clarification on its intention for this proposed mechanism.

Court's permission for admission of hearsay evidence – section 55P

26. While the conditions for the Court to grant permission for the admission of hearsay evidence are set out under section 55P(2), our view is that the matter should be dealt with before the fixing of the trial date. We ask if the DOJ could provide us with information of past ruling(s) which might not be challenged by judicial review per the Court of Appeal decision in *HKSAR v Ngo Van Nam* CACC 418/2014 (2 September 2016).

27. Subsection (2)(a) provides that the Court may grant permission under subsection (1) for the admission of hearsay evidence if it is satisfied that the declarant of the statement to be adduced as the hearsay evidence is "sufficiently identified". Could the DOJ advise how the declarant could be sufficiently identified if the name of the declarant of the statement to be adduced as the hearsay evidence may not be known? We ask the DOJ to review the connection between "sufficiently identified" at section 55P(2)(a) and the wording "if known" at section 55L(1)(b).

Condition of necessity – section 55Q

28. The Consultation Paper has stated that the DOJ was guided by the following principles in preparing the 2026 Bill:

- Upholding the right to a fair trial;
- Safeguarding the public interest in the administration of justice; and
- Promoting judicial efficiency.

29. In our view, the principle of upholding the accused's rights to a fair trial should not be compromised by the principle of promoting judicial efficiency. In this connection, the conditions of necessity should not be too wide to impair the accused's rights to a fair trial.

30. Also, as mentioned in our 2019 submission and our letter of July 2020, the Law Society maintains the view that the intent of a declarant ***not*** to give evidence should be taken into consideration, as in the case of a declarant intentionally hiding himself. We also maintain that the unwillingness to give evidence should itself already be the bar to the admissibility of the evidence itself. The LRC was clear that unwillingness on the part of a defendant to attend to testify does *not* equate to "unavailability"[4]. The Law Society invites the DOJ to revisit our submission in 2017 in which we had suggested to embrace the notion of "*genuine non-availability of the declarant* [5]."

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[4] See para. 7.9 of the LRC Report on Hearsay in Criminal Proceedings

[5] See paras. 15-21 of The Law Society's Submission on Consultation on Evidence (Amendment) Bill 2017 dated 18 July 2017

Section 55Q(1)(b)

31. Section 55Q(1)(b) specifies that the "age" of the declarant is a factor in considering whether the declarant is unfit to be a witness, either in person or in another competent manner. In our view, the incorporation of the "age" factor would cause confusion and an "unrestricted" extension of the condition of necessity. For example, for sexual offence involving tender age victims, it would be extremely difficult for an accused to defend without the opportunity to cross-examine the victims.

32. It is mentioned in para. 5.87 of the Law Reform Commission Consultation Report 2009 that:

> "The Scottish Law Commission proposed that "*hearsay should be admissible only if the difficulties in the way of obtaining a person's evidence are truly insurmountable, and if a number of safeguards against abuse are in place.*
>
> (a) is dead or is, by reason of his bodily or mental condition, unfit or unable to give evidence in any competent manner……"

33. It is sensible for the Scottish Law Commission not to consider the "age" factor. If the incompetence in giving evidence is because of either tender age or old age, it would have been covered by the factor of "mental condition".

34. Moreover, please refer to s.22 of the current Evidence Ordinance which is the principal provision governing the admission of business records in criminal proceedings. S.22(1) deals with the similar situation of the person providing the information that a documentary statement shall be admitted in any criminal proceedings as *prima facie* evidence of any fact it contains if:

> *(c) the person who supplied the information -*
>
> *(i) is dead or by reason of his bodily or mental condition unfit to attend as a witness;*

35. There is no reference as to "age" in the current Evidence Ordinance.

36. The Law Society is of the view that "age" would have been covered by the factor of "mental condition". The Law Society proposes to remove "age" as one of the standalone factors in considering whether the declarant is unfit to be a witness, either in person or in another competent manner.

Section 55Q(1)(c)

37. Section 55Q(1)(c) provides that the condition of necessity is considered fulfilled in respect of the admission of hearsay evidence in any proceedings if the declarant is outside Hong Kong and neither of the following is reasonably practicable—

(i) securing the declarant's attendance at the proceedings;

(ii) making the declarant available for examination and cross-examination in another competent manner in the proceedings.

38. We note that there is no mention of the condition of "making the declarant available for examination and cross-examination in another competent manner in the proceedings" under section 22 of the Evidence Ordinance (Cap. 8) for the admission of documentary records in criminal proceedings as prima facie evidence of any fact. Given the wide coverage of condition (i), condition (ii) appears to provide an unnecessary condition of necessity. The Law Society proposes to remove condition (ii) from section 55Q(1)(c).

39. As mentioned in our 2017 submission, the wording "reasonably practicable" does not accommodate the fact that many defendants, such as people with ordinary means legally aided or not, would be able to afford the costs of the exercise of taking evidence overseas. The Law Society invites the DOJ to consider the suitability of the abovementioned wording in section 55Q(1)(c).

Section 55Q(1)(e)

40. Section 55Q(1)(e) provides that the condition of necessity is considered fulfilled in respect of the admission of the hearsay evidence in any proceedings if the declarant refuses to give oral evidence in connection with the statement in the proceedings in circumstances where the declarant would be entitled to refuse on the ground of self-incrimination in the event that the party applying for a permission for the purposes of section 55P(1) is the accused himself.

41. The proposed provision does not anticipate the difficult situation of the trial of the accomplices together. For example, if this provision is applied in a jointly charged scenario, D1 makes a cautioned statement incriminating himself by saying that he committed the crime on his own alone. Although D1's cautioned statement is ruled inadmissible for being involuntary, D2 may rely on condition (e) to ask for the admission of D1's ruled-out involuntary cautioned statement. D1's interest would be prejudiced in such situation.

42. We also wish to highlight the following mention in paragraph 3.22 of the LRC report:

> "3.22 Voluntariness is of such great importance that even if the prosecution wishes to use the confession for a non-hearsay purpose (such as to show that the accused made a prior inconsistent statement), that will not be permitted if the prosecution has failed to establish that the confession was voluntarily given. The position is different, however, where a co-accused wishes to cross-examine another co-accused on the latter's confession. It is clear in Hong Kong that if the cross-examination does not infringe the hearsay rule (e.g. by using the confession as a prior inconsistent statement), the co-accused is entitled to use an involuntary confession for this purpose. **The legal position in Hong Kong of allowing a co-accused to use another's involuntary confession for the hearsay purpose of exculpating himself is less clear.** In England, it has been held that the English test of voluntariness as set out in the Police and Criminal Evidence Act 1984 must be satisfied before the co-accused can use the confession for this purpose." **(emphasis added)**

43. As there is an uncertainty in common law position in Hong Kong as to whether it is permissible for a co-accused to use another's involuntary confession for the hearsay purpose of exculpating himself, the Law Society recommends amending section 55Q(1)(e) as "if the party applying for a permission for the purposes of section 55P(1) is the accused—the declarant refuses to give oral evidence in connection with the statement in the proceedings in circumstances where the declarant would be entitled to refuse on the ground of self-incrimination **and that the declarant does not make any objection thereto**", so as to protect the right of the co-accused not to be incriminated by his involuntary confession.

Condition of threshold reliability – section 55R

44. In our letter of July 2020, we indicated that the Law Society noted the DOJ's views concerning the assessment of "threshold reliability". The DOJ also mentioned that it did not consider it appropriate to depart from the view of the Hearsay in Criminal Proceedings Sub-committee of the LRC.

45. In reviewing the 2026 Bill, the Law Society considers it suitable to expressly state the standard for "a reasonable assurance that the hearsay evidence is reliable" under section 55R(1). For example, we proposed in our 2017 submission to add a new subsection which would state "*in deciding whether there is a reasonable assurance of reliability, the threshold reliability test is a stronger test than prima facie reliability and the Court should not admit hearsay evidence merely because on its face it appears reliable*."

46. As mentioned in our 2017 submission, a better alternative could be to apply section 55O(4) of the 2018 Bill, which is similar to section 55Q(3) of the 2026 Bill, to section 55R, so that the same standard of proof would apply to the assurance of reliability (beyond reasonable doubt standard for the Prosecution, balance of probability standard for the Defence).

47. Now that the DOJ has decided to depart from two of the LRC's recommendations regarding the subject of exclusion of hearsay evidence, we ask that the DOJ to reconsider our proposal to introduce the assessment of "threshold reliability" in the 2026 Bill.

48. The Law Society also awaits the DOJ's elaboration on the policy intent of its proposed amendments in sections 55P(2) and 55Q(5) of the 2018 Bill, which are now sections 55R(2) and 55S(6) of the 2026 Bill, to substitute "must have regard" with "may have regard only".

49. As mentioned in our letter of July 2020, we cited the example of section 55P(2)(e) of the 2018 Bill, which is now section 55R(2)(e) of the 2026 Bill – "whether the statement is *supported* by other admissible evidence in the proceedings". The Law Society awaits the DOJ's reply on the position if the statement is *contradicted* by other admissible evidence, and whether that evidence should be admissible.

Subsequent exclusion of hearsay evidence admitted with court's permission – section 55S

50. The Law Society has noted the DOJ's departure from the LRC's recommendations in section 55S and is generally agreeable with the new approach.

51. Having said so, the Consultation Paper has stated that the proposed section 55S would "uphold the fundamental separation of roles between the judge and jury". However, given that the judge would be the person to allow the admission of the hearsay evidence, as mentioned in paragraph 26 above, we invite the DOJ to consider whether the Court's permission is needed for the withdrawal of the hearsay evidence notice.

Certain common law rules relating to exceptions to rule against hearsay preserved – section 55T

52. There appears to be no express wording in the section to state whether the parties relying on common law rules have to go through the notice mechanism as set out in Division 3 of the 2026 Bill. We should be grateful for the DOJ's clarification in this regard.

Multiple hearsay – section 55X

53. While the LRC had recommended that multiple hearsay be admissible only if each level of hearsay is admissible[6], the Law Society maintains our long-held grave reservations on whether multiple hearsay should be admitted in the first place. We propose that section 55X should be removed from the 2026 Bill.

CONCLUDING REMARKS

54. The Law Society is aware that the Government intends to introduce the 2026 Bill into the LegCo within the first half of 2026. We ask that our above views be carefully considered and thoroughly addressed before finalising the 2026 Bill for scrutiny by the LegCo.

55. As the 2026 Bill will overhaul our present rules on hearsay evidence which have been practice for a long period of time, the DOJ should provide briefings to legal practitioners specialised in criminal law about the new rules before they come into operation.

The Law Society of Hong Kong
10 March 2026

[6] See Recommendation 14 of the LRC report on Hearsay in Criminal Proceedings