

## CONSULTATION PAPER ON HEARSAY IN CRIMINAL PROCEEDINGS

### EXECUTIVE SUMMARY

The Sub-committee's approach to this topic is to consider the following questions:

- whether the shortcomings of the existing hearsay law in criminal proceedings are serious enough to warrant its reform;
- if reform is called for, what safeguards are a prerequisite for any reform;
- what are the possible options for reform;
- whether the proposed model of reform (which consists of a Core Scheme and a series of proposals on special topics) is sufficient to address the most pressing shortcomings of the present law; and
- whether the recommendations in the Consultation Paper are compatible with the laws guarding the fundamental rights and freedoms in Hong Kong.

#### Terms of reference

1. In May 2001, the Chief Justice and the Secretary for Justice directed the Law Reform Commission:

*"To review the law in Hong Kong governing hearsay evidence in criminal proceedings, and to consider and make such recommendations for reforms as may be necessary."*

2. A sub-committee was appointed under the chairmanship of the Hon Mr Justice Stock to consider the subject. The consultation paper on *"Hearsay in Criminal Proceedings"* is the result of the sub-committee's detailed consideration of the subject. The consultation paper sets out the sub-committee's proposals for reform of the law of hearsay in criminal proceedings and seeks to elicit comment on those proposals.

#### What is "the rule against hearsay"?

3. A simple explanation of the term "hearsay" would be that *"when A tells a court what B has told him, that evidence is called hearsay"*.<sup>1</sup> The rule

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1 R May, *Criminal Evidence* (Sweet & Maxwell, 3<sup>rd</sup> edition, 1995), at 179.

against hearsay renders hearsay evidence inadmissible in criminal proceedings, unless it falls within one of the exceptions to the rule. The basis for excluding hearsay evidence is the assumption that indirect evidence might be untrustworthy and unreliable particularly insofar as it is not subject to cross-examination.

4. The rule excludes from the trial statements made outside the courtroom where the purpose of adducing the statement is to prove the truth of an assertion it contains. Thus, a statement by a police witness that: "The victim told me that the car which struck him was green", would be inadmissible to prove that the car was in fact green.

## Chapter 1 - Brief history of the hearsay rule

5. The need to exclude hearsay evidence was first recognised in England in the thirteenth century. The rule continued to develop over the years with the growing recognition of the need to ensure greater reliability of testimony from witnesses. By the beginning of the nineteenth century, the hearsay rule had become well established, and the emphasis shifted to definition of its range and the creation of exceptions to the rule.<sup>2</sup> In this second phase of development of the hearsay rule, two alternative approaches competed with each other: one was that all hearsay should be excluded, subject to inclusionary exceptions; while the other was that relevant evidence should be admitted, subject to exclusionary exceptions.<sup>3</sup> The former view prevailed and led to the establishment of the present hearsay rule and the creation of the various common law exceptions to the rule.

6. In England, the many criticisms of the hearsay rule in criminal proceedings finally led to the enactment of the Criminal Justice Act 2003<sup>4</sup> which reformed the hearsay rule and made hearsay evidence more freely admissible in criminal proceedings.

7. Reforms in Hong Kong have been introduced on a more *ad hoc* basis, designed not to replace the common law rules but instead to co-exist with them. The hearsay rule in Hong Kong civil proceedings, however, was essentially abolished in 1999 following recommendations made by the Hong Kong Law Reform Commission.<sup>5</sup>

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2 C Tapper, *Cross and Tapper on Evidence* (Butterworths, 8th edition, 1995), at 566.

3 C Tapper, *Cross and Tapper on Evidence* (cited above), at 567.

4 The Criminal Justice Act 2003 (c44) received royal assent on 20 November 2003.

5 See The Law Reform Commission of Hong Kong, *Report on Hearsay Rule in Civil Proceedings* (Topic 3), July 1996. At present, Part IV of the Evidence Ordinance (Cap 8) is the legislation which deals with the admissibility of hearsay evidence in civil proceedings. It was enacted by the Evidence (Amendment) Ordinance 1999 (Ord. No. 2 of 1999), which was passed by the Legislative Council on 13 January 1999.

## Chapter 2 - Justification for the hearsay rule

8. A number of justifications for the hearsay rule have been advanced over the years, and which of these is the preponderant one is a moot point. It is probably safer to assume that a combination of reasons have played their part in the rule's development. The principal justifications put forward are that:

- hearsay evidence is not the best evidence and is not delivered on oath;
- the unavailability of the hearsay declarant means that the court is unable to assess his demeanour and therefore his credibility;
- a hearsay declarant is unavailable for cross-examination; and
- the admission of hearsay in the prosecution's case is antithetic to an accused's right to confront the witnesses against him.

## Chapter 3 - The present law

9. The present law governing the admissibility of hearsay evidence at criminal trials is set out in *Subramaniam v Public Prosecutor*<sup>6</sup>:

*"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that a statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made."*<sup>7</sup>

10. Generally, most hearsay involves statements that contain an express assertion of facts by the original statement-maker. Implied assertions of fact, however, also fall within the scope of the hearsay rule and are thus inadmissible even if the evidence is cogent and reliable by everyday standards. The House of Lords' decision in *R v Kearley*<sup>8</sup> illustrates this point. In *R v Kearley*, the police arrested the defendant at his home after finding a small quantity of drugs and stolen property. While the police were at the house, a number of telephone calls were received in which the callers asked to speak to the defendant and to be supplied with drugs. A number of persons wanting to buy drugs from the defendant also called at the house

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6 [1956] 1 WLR 956.

7 [1956] 1 WLR 956, at 970.

8 [1992] 2 AC 228 (HL).

while the police were there. Kearley was charged with possessing drugs with the intention to supply. The evidence of the calls and visits (as observed by the testifying police officers) was tendered in evidence to prove the defendant's intention to supply at the time he was found in possession of the drugs. The majority in the House of Lords held that to use this evidence for this purpose would infringe the hearsay rule. No distinction should be drawn between evidence of words spoken by a person not called as a witness which are said to assert a relevant fact by necessary implication and evidence of an express statement asserting the same fact: both are hearsay and inadmissible.<sup>9</sup> In Hong Kong, the Court of Appeal in *R v Ng Kin-yee*<sup>10</sup> "reluctantly" held that the court was bound by the decision of the House of Lords in *Kearley*, which continues to be the law and excludes from the court's consideration implied assertions.

11. The hearsay rule does not apply to statements containing information recorded by a machine. Photographs or thermometer readings, for instance, are admissible as real evidence without infringing the hearsay rule.

### ***Common law exceptions to the hearsay rule***

12. A number of exceptions to the hearsay rule were developed over time to mitigate the sometimes harsh effects of a strict application of the rule. Some of the major exceptions are set out below.

- ***Admissions and confessions of an accused***

13. There is a common law exception to the hearsay rule which allows evidence of a confession statement made by the accused to a person in authority to be admitted in evidence where the prosecution has proved beyond reasonable doubt that the statement was voluntarily made. The confession can only be used against the accused who made the confession and not against any co-accused.

- ***Co-conspirator's rule***

14. There is an exception to the general rule that the confession statement of an accused cannot be used against his co-accused in relation to co-conspirators. Where any party to a conspiracy or joint-enterprise has made an oral or documentary out-of-court statement in furtherance of the conspiracy or joint-enterprise which implicates a co-accused, the statement is admissible against both its maker and the parties to the joint-enterprise or conspiracy.

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9 *R v Kearley*, cited above, at 245.

10 [1994] 2 HKCLR 1.

- **Statements of persons now deceased**

- (i) *Dying declarations*

15. The conduct or statement (be it oral or in writing) of a victim who was under a settled, hopeless expectation of death at the time when the statement was made or conduct performed is admissible as evidence of the cause of the victim's death in the trial of a person charged with murder or manslaughter.

- (ii) *Declarations in the course of duty*

16. Where an oral or written statement was made by a person who was under a duty to do so because of his occupation, trade, business or profession, the statement is admissible for its truth when the person subsequently dies.

- (iii) *Declarations against proprietary interest*

17. A statement made by a person of a fact which he knew to be against his pecuniary or proprietary interest would, upon the death of the person, be admissible in criminal proceedings as evidence of that fact.

- **Res gestae**

18. The doctrine of *res gestae* was explained in *R v Bond*<sup>11</sup>:

*"Evidence is necessarily admissible as to acts which are so closely and inextricably mixed up with the history of the guilty act itself as to form part of one chain of relevant circumstances, and so could not be excluded in the presentment of the case before the jury without the evidence being thereby rendered unintelligible."*<sup>12</sup>

19. Unlike dying declarations, the doctrine of *res gestae* is not confined to statements made by a person who subsequently dies and is therefore unable to testify at trial. Evidence falling within the doctrine of *res gestae* would not be disallowed merely because the declarant is still an available witness at the time of trial.

- **Statements made in public documents**

20. A statement made in a public document can be admitted as an exception to the hearsay rule if it was made by a public officer<sup>13</sup> who was under a duty to make inquiry or who had personal knowledge of the matters

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11 [1906] 2 KB at 389.

12 [1906] 2 KB 389, at 400.

13 Under section 3 of the Interpretation and General Clauses Ordinance (Cap 1), a public officer is defined as any person holding an office of emolument under the Government, whether such office is permanent or temporary.

stated, recorded or reported in the document. The document must be kept in a place to which the public is permitted access.

- ***Statements made in previous proceedings***

21. In criminal proceedings, where a witness is unable to testify because of death, critical illness, insanity, or because he is being kept out of the way by the opposite party, his evidence in previous proceedings may be admitted provided certain conditions are met.

- ***Opinion evidence***

22. An opinion expressed by a witness in court may be hearsay in nature, but the indiscriminate exclusion of opinion evidence would be impracticable. For instance, a witness might say that he was able to see the detail of an incident clearly as the day was bright and the weather was fine. The words "bright" and "fine" are expressions of opinion. Strict adherence to the hearsay rule would also prohibit an expert from expressing an opinion on matters which he was told or taught by someone else, or that he has acquired from some other source, such as through reading other source materials or the works of others. The common law therefore allows opinion evidence to be admitted as an exception to the hearsay rule where the evidence is reliable and cogent.

### ***Statutory exceptions to the hearsay rule***

23. Apart from the principal common law exceptions to the hearsay rule outlined above, there are over one hundred statutory provisions creating exceptions to the application of the hearsay rule to criminal proceedings in Hong Kong. The principal exceptions are to be found in the Evidence Ordinance (Cap 8) (the Ordinance) and these are set out below.

- ***Depositions***

24. Sections 70 and 73 of the Ordinance provide a scheme for admitting depositions of persons who are unable to be witnesses at the time of trial. They represent an extension of the common law exceptions for deceased persons.

25. Under section 70 of the Ordinance, the deposition of a person whom the prosecution is unable to produce at trial as a witness shall be received in evidence, provided one or more of the following conditions is satisfied:

- i. he is dead;
- ii. he is absent from Hong Kong;
- iii. it is impracticable to serve process on him;
- iv. he is too ill to travel;

- v. he is insane;
- vi. he is being kept out of the way by means of the procurement of the accused;
- vii. he is resident in a country which prohibits his departure, or which he refuses to quit; or of the inability to find him at his last known residence in Hong Kong.

26. The obvious advantage of section 70 is that prior evidence of a deponent for the prosecution obtained under oath in the presence of a magistrate or an authorised officer, with the full opportunity for the defence to cross-examine the deponent, can now be received in evidence. The downside of the section, however, is that no reciprocal provision has been made for the defence. In a situation where the defence is unable to provide at trial a witness for reasons similar to those stated in section 70, and where the testimony of the witness might help to exculpate the accused, that evidence will nevertheless be excluded.

27. Section 73 of the Ordinance provides, subject to certain conditions, that a written statement taken by a magistrate on oath of a person who is dangerously ill and unable to travel shall be admitted in evidence. In contrast to section 70, section 73 may be invoked by either the prosecution or the defence as long as there is a dangerously ill person who "*is able and willing to give material information relating to an indictable offence or to a person accused thereof*". The deposition obtained under section 73 shall be admitted in evidence "*either for or against the person accused*".

28. Another set of deposition provisions that have relevance in criminal proceedings is those that apply to children and mentally incapacitated persons in section 79E of the Criminal Procedure Ordinance (Cap 221). For children, the provision only applies to offences of sexual abuse, cruelty, or involving an assault, injury or threat to the child. It is also necessary to show in respect of both these categories of vulnerable witnesses that either the trial will be unavoidably delayed or exposure to the full trial would endanger the physical or mental health of the witness.<sup>14</sup> As in the case of sections 70 and 73, the defendant must be given an opportunity to cross-examine the deponent at the time the deposition is taken.

- ***Business records***

29. Section 22 of the Ordinance provides that, under specified conditions, a documentary statement shall be admitted in any criminal proceedings as *prima facie* evidence of any fact it contains.

30. Section 22 of the Ordinance renders admissible any "*statement contained in a document which is or forms part of a record*". However, documents generated by a computer cannot be admitted under section 22 as

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14 See section 79E(1) & (2) of the Criminal Procedure Ordinance (Cap 221).

they are subject to a separate regime contained in section 22A of the Ordinance.

31. Section 22 relaxes the rigidity of the common law rules so far as the admission of private documents is concerned. At common law, not only must the original of the document be produced, but the document itself must also have been executed, adopted or otherwise connected with a party or person relevant to the case. Under section 22, a statement contained in a private document can be admitted if it is, or forms part of, a record compiled by a person acting under a duty from information supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matter dealt with in that information. In such circumstances, the statement can be tendered as evidence of the truth of its contents.

32. Section 22(3) makes provision for multiple hearsay. It provides that a statement can be admitted under section 22 even where the information supplied to the compiler of the statement was itself hearsay. To satisfy section 22(3), however, each person in the chain transmitting the information must have acted under a duty. There is no need for the original supplier who had personal knowledge of the information to be acting under a duty. His personal knowledge of the matter dealt with in the information would be sufficient for the purposes of section 22.

- **Computer records**

33. Under section 22A(1) of the Ordinance, a computer generated document will be admitted as *prima facie* evidence of its contents if direct oral evidence of those contents would be admissible and the following conditions are satisfied:

- "(a) *that the computer was used to store, process or retrieve information for the purposes of any activities carried on by any body or individual;*
- (b) *that the information contained in the statement reproduces or is derived from information supplied to the computer in the course of those activities; and*
- (c) *that while the computer was so used in the course of those activities-*
  - (i) *appropriate measures were in force for preventing unauthorized interference with the computer; and*
  - (ii) *the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents."*



34. Computer evidence may also be admitted under section 22A(3) if direct oral evidence of the particular facts would be admissible in the proceedings and:

"(b) *it is shown that no person (other than a person charged with an offence to which such statement relates) who occupied a responsible position during that period in relation to the operation of the computer or the management of the relevant activities-*

(i) *can be found; or*

(ii) *if such a person is found, is willing and able to give evidence relating to the operation of the computer during that period;*

(c) *the document was so produced under the direction of a person having practical knowledge of and experience in the use of computers as a means of storing, processing or retrieving information; and*

(d) *at the time that the document was so produced the computer was operating properly or, if not, any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents."*

- **Banking records**

35. Section 20 of the Ordinance provides for the admission in evidence of a copy of any entry or matter recorded in a banker's record, so long as the conditions laid down in subsections 20(1)(a) and (b) are complied with. This section also applies to any document or record used in the ordinary business of an overseas bank designated by the Financial Secretary under section 19B(1) of the Ordinance. Once admitted, these documents will be *prima facie* evidence of the matters they record.

- **Public documents**

36. Section 18 of the Ordinance enables copies, as opposed to originals, of public documents to be tendered in evidence, subject to certain safeguards as to the authenticity of the copied documents. A statutory hearsay exception for admitting prints of public documents contained in microfilm or microfiche format is found in section 39 of the Ordinance.

- **Official documents**

37. Section 19 of the Ordinance provides for the admission in evidence of certain specified documents which are receivable in evidence in court<sup>15</sup> or before the Legislative Council or any of its committees.

- **Other notable documentary hearsay exceptions**

38. Under section 19A of the Ordinance, any foreign document certified by the Chief Secretary for Administration as having been received by him in connection with any criminal proceedings shall be admitted in evidence in those proceedings, without further proof, as *prima facie* evidence of the facts it contains.

39. Section 19AA provides that any document purporting to bear the fiat, authorisation, sanction, consent or authority of the Chief Executive, or any other public officer necessary for the commencement of any prosecution shall, until the contrary is proved, be received as evidence in any proceedings without proof as to the authenticity of the signature.

40. Section 23 of the Ordinance allows the admission in evidence in criminal proceedings of a copy of the records of the Hong Kong Observatory, while sections 24 and 24A provide respectively for the admission of documents purporting to be records of the testing and accuracy of chronometers and speed measuring apparatus.

41. Section 25 of the Ordinance allows the admission of a certificate by a Government Chemist as to any article or substance submitted to him, while section 26 makes provision for the admission of a certificate as to the processing or enlargement of exposed film.

42. Under section 27 of the Ordinance, a translation of a document written in a language other than English or Chinese shall be admitted in evidence in any criminal proceedings if it has been certified as an accurate translation by a person appointed by the Chief Justice under section 27(2).

43. Section 28 of the Ordinance makes provision for the admission of records of the testing of the accuracy, inspection and servicing of a vehicle's speedometer, a radar device or a weighing device.

44. Under section 29 of the Ordinance, where any Ordinance authorises or requires any document to be served or any notice to be given by post or by registered post, a certificate to that effect shall be admitted in any criminal or civil proceedings before any court without further proof as *prima*

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15 Under section 2 of the Evidence Ordinance, the word "court" includes the Chief Justice and any other judges, also every magistrate, justice, officer of any court, commissioner, arbitrator, or other person having, by law or by consent of parties, authority to hear, receive, and examine evidence with respect to or concerning any action, suit, or other proceeding civil or criminal, or with respect to any matter submitted to arbitration or ordered to be inquired into or investigated under any commission.

*facie* evidence of its contents. On the production of such a certificate, the court will presume, until the contrary is proved, that the certificate's details as to the posting of the document or notice are true.

45. Section 29A of the Ordinance allows the admission of a certified transcript of a record in a language other than English or Chinese in any criminal or civil proceedings.

## **Chapter 4 - Cardinal principles and the shortcomings of the present law**

46. Chapter 4 examines the various shortcomings of the hearsay rule and its exceptions and notes that there has been widespread and longstanding criticism of the rule in other jurisdictions, from judges, academic writers and law reform bodies. The existing hearsay rule, with its haphazardly developed exceptions, has many anomalous consequences, resulting in probative, reliable evidence being excluded from consideration by the tribunal with real potential for injustice to the public interest, including the interest of the accused.

47. The decision in *Sparks v R*<sup>16</sup> provides an example of how justice can be sabotaged by the strict application of the hearsay rule. In this case, the three-year old victim girl, who was too young to testify, told her mother shortly after the incident that the person who molested her was a "coloured boy". The statement was inadmissible even though the statement would have exculpated the defendant, Sparks, a white American Air Force staff sergeant. *R v Blastland*<sup>17</sup> is another example. The accused was alleged to have killed a young boy. There were, however, a number of persons who were prepared to testify that shortly after the killing another person known as "M" had told them that a young boy had been murdered. The circumstances were such that M's knowledge of the killing raised an inference that he had himself committed the murder. The trial judge ruled that as the purpose of calling the witnesses was to prove by inference that it was M who had committed the crime, the evidence had to be rejected as it was hearsay and inadmissible.

48. In considering whether the existing hearsay law should be changed, and if so to what extent, the Sub-committee has identified a number of cardinal principles which it considers should be reflected in any rule of evidence. These cardinal principles are as follows:

- i. Evidentiary rules should, within the limits of justice and fairness to all parties, facilitate and not hinder the determination of relevant issues.

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16 [1964] AC 964.

17 [1986] AC 41.

- ii. Conviction of the innocent is always to be avoided. All accused have a fundamental right to make full answer and defence to a criminal charge.
- iii. Evidentiary rules should be clear, simple, accessible, and easily understood.
- iv. Evidentiary rules should be logical, consistent, and based on principled reasons.
- v. Questions of admissibility should be determinable with a fair degree of certainty prior to trial so that the legal adviser may properly advise the client on the likely trial outcome.
- vi. Evidence law should keep up with the times and try to reflect the increasing global mobility of persons and modern advancements in electronic communications.

49. The Sub-committee concluded that, measured against these principles, the present hearsay rule and its exceptions exhibited significant shortcomings.

50. Many of the exceptions to the hearsay rule have been criticised for their restrictive nature and the narrowness of their scope. The absurdities caused by the strict application of the hearsay rule has led Wigmore<sup>18</sup> to describe the rule as a "*barbarous doctrine*"; and Lord Griffiths to remark in *Kearley* that:

" ... most layman if told that the criminal law of evidence forbade them even to consider such evidence as we are debating in this appeal would reply 'Then the law is an ass'. "<sup>19</sup>

51. The hearsay rule has been widely criticised for the fact that it is complex and difficult to understand. The law is not easily accessible. It cannot be determined from a single source but must instead be sought in a host of separate legislative provisions and court rulings.

52. The rule against hearsay is frequently criticised for being illogical, inconsistent, and without any principled basis. Examples include the following are:

(i) Refreshing memory

A witness is allowed to refresh his memory from an earlier note or statement. The court will admit the witness's "refreshed" evidence, but if the witness is not refreshed, there is no exception to the hearsay rule to allow the original written statement to be admitted instead.

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18 Wigmore, *Evidence*, Vol 5, at para 1477, quoted in Andrew Bruce and Gerard McCoy, *Criminal Evidence in Hong Kong* (Butterworths, Issue 7, 1999), at [53] of Division VI.

19 [1992] AC 228, at 236-237.

(ii) Declarations against interest

In Hong Kong, this exception only extends to declarations against pecuniary and proprietary interest but not to those against penal interest. The Supreme Court of Canada in *R v O'Brien*<sup>20</sup> extended the exception to statements against penal interest for the logical reason that: "*A person is as likely to speak the truth in a matter affecting his liberty as in a matter affecting his pocketbook.*"<sup>21</sup>

(iii) Dying declarations

This exception is arbitrarily narrow, extending only to cases of murder and manslaughter. It is also confined to statements made under a settled and hopeless expectation of death. A third arbitrary limitation of the rule is that the declaration can only be proof of the declarant's cause of death. There seems to be no logical justification for these restrictions. A further illogicality is that a dying declaration in which the victim named his assailant would be admissible, but not a similar declaration in which a person on the verge of death confessed to his crime.

(iv) Res gestae

The spontaneous and contemporaneous conduct, opinion or statement of a person who is not available to give evidence may be admitted as evidence where the conduct, opinion or statement was so closely and inextricably bound up with the history of the guilty act itself as to form a part of a single chain of relevant evidence. The evidence admitted may be used not only as evidence of truth but also as evidence of the person's state of mind or emotional state at the relevant moment. While there may be little opportunity for concoction in such circumstances, there may be other problems of reliability, as statements made in the heat of the moment may be particularly prone to distortion, perhaps unwittingly, as the perceptions of both the declarant and the testifying witness may be coloured by the emotion of the moment. Moreover, courts have also held that out-of-court statements evidencing the declarant's state of mind do not come within the definition of hearsay. This confuses rather than clarifies the extent and rationale of the exception.

(v) Negative assertions

The English Law Commission noted the illogicality that

*"It seems that, if an inference is drawn from a document, it is hearsay, but if an inference is*

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20 (1977), 35 CCC (2d) 209.

21 (1977), 35 CCC (2d) 209, at 214.

*drawn from the non-existence of a document or entry, it is direct evidence.*<sup>22</sup>

Negative inferences from the absence of a record are permissible, whereas positive inferences from the record are not.

(vi) Proof of state of mind

Evidence can be admitted to prove state of mind or a belief, rather than the fact, or the suggested fact, to which the belief is directed. But if it is rational and probative to draw the inference of fact from the state of mind (not only that X was in fear but that he had good reason to fear) it is illogical to apply a rule which prevents the trier of fact from doing so. It is then valid to consider whether it is realistic to expect that a jury will do anything else but draw the inference of fact.

(vii) Recent complaint

There seems little logic in restricting the admissibility of evidence of recent complaint only to cases of sexual assault. Once again, it is then valid to consider whether, in any event and despite all directions to the contrary, it is realistic to expect that a jury will do anything other than treat a recent complaint as evidence of the truth of the complaint.

(viii) Implied assertions

Where there is no intention to assert a fact when a comment is made, the implied assertion might well be regarded as self authenticating.<sup>23</sup>

(ix) Previous inconsistent statements

A previous inconsistent statement is not evidence of the truth of its contents, even though on the facts of a particular case common sense might dictate that the previous statement was obviously true or more reliable than the subsequent oral evidence.

(x) Previous consistent statements

There is much to be said for the view that to regard previous consistent statements as going only to the issue of credibility is illogical.

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22 Law Commission, *A Consultation Paper: Evidence in Criminal Proceedings: Hearsay and Related Topics* (1995), Consultation Paper No 138, at para 2.31.

23 Law Commission, *Report: Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997), Law Com No 245, at para 4.23.

53. The complexity and illogicalities of the rule and its exceptions result in considerable uncertainty, not least in some instances of determining the very question of whether or not the out-of-court assertion is being used for a hearsay purpose. In recent appellate authorities, Hong Kong courts have noted the criticisms of the English *Kearley*<sup>24</sup> decision while strongly advising legislative reform of the law.

54. Furthermore, the law of hearsay has made little if any accommodation in response to the social reality of increasing global mobility. Rather than relaxing the rule, the law has forced parties to conform, which in most cases means the expenditure of significant resources and time to locate and transport witnesses back to the trial jurisdiction.

55. The existing law of hearsay also fails adequately to take account of advances in the electronic recording of communications. Recorded telephone conversations and messages, video and digital video tape recording, email, website information, instant messaging, short messaging service on mobile devices, digital voice recording devices are all examples of types of communication distinguishable from oral hearsay on the basis that the reliability problem in the transmission of what in fact was said is absent. Whilst both types of hearsay suffer from the potential untrustworthiness of the maker (whose evidence cannot be tested in court), electronically recorded hearsay contains a reliable record of the communication, whereas oral hearsay suffers from the additional reliability problem of trying to determine precisely what the declarant said.

## **Chapter 5 - International developments**

56. The shortcomings of the existing hearsay law are not peculiar to Hong Kong. Those problems have also been the subject of criticism and debate in numerous other jurisdictions. Chapter 5 reviews the different approaches adopted overseas to reform the hearsay law by referring not only to enacted legislation, but also to proposals for reform.

57. Rather than completely abolishing the exclusionary rule and rendering hearsay generally admissible, most jurisdictions which have reformed their law have favoured a relaxation of the hearsay rule to make it more flexible and more equitable. This has been done both through the creation of more exceptions to the rule and by giving the courts a discretion to admit cogent and reliable hearsay that does not fall within the stated exceptions. The result has generally been greater clarity and simplicity in the law.

58. In Australia, for example, the Evidence Act (Commonwealth) 1995 sets out the exceptions to the hearsay rule and specifies the situations where the hearsay rule will not apply.

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24 [1992] AC 228.

59. In Canada, a number of decisions reached by the Supreme Court have led to the development of a more flexible and logical set of hearsay rules. The Supreme Court of Canada has ruled that hearsay evidence may be admissible if the twin tests of "necessity" and "threshold reliability" have been satisfied. Evidence will be admitted under the traditional hearsay exceptions only if it, too, satisfies the tests of necessity and reliability.

60. The English Law Commission recommended that the general rule against hearsay should be retained, subject to specific exceptions, with a limited inclusionary discretion to admit hearsay evidence not falling within any other exception.<sup>25</sup> This recommendation was significant as it marked England's departure from its traditional view that hearsay evidence not falling within any of the stated exceptions must be excluded from the court's consideration, regardless of how relevant or how reliable the evidence might be, and regardless of how unfair that might be to the party seeking to rely on the evidence. The cumulative effect of critical reviews of the hearsay law in England led to the enactment of the Criminal Justice Act 2003, which provides an overall and comprehensive reform of the law.

61. In 1999 the New Zealand Law Commission recommended that hearsay evidence should be admitted if it was reliable, and if it was necessary to do so. Hearsay evidence would accordingly become generally admissible, subject to the criteria of necessity and reliability.

62. The Scottish Law Commission confirmed that the traditional preference for direct oral evidence over hearsay should be preserved, but said that hearsay evidence should be admitted if there were truly insurmountable difficulties in obtaining the evidence from the statement-maker personally, on oath or affirmation in the presence of the jury and subject to cross-examination.<sup>26</sup> Many of the Scottish Law Commission's recommendations were subsequently incorporated in the Criminal Justice (Scotland) Act 1995<sup>27</sup>.

63. The South African Law Commission recommended that hearsay evidence should be admissible if the party against whom that evidence was to be adduced agreed to its admission, or if the person upon whose credibility the probative value of that evidence depended himself testified at the proceedings.<sup>28</sup> Furthermore, the South African Law Commission recommended that the court should be given a discretion to allow hearsay evidence in certain circumstances.<sup>29</sup> These recommendations were subsequently incorporated into the Law of Evidence Amendment Act 1988, moving the law away from the traditional hearsay rule.

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25 Law Commission Report No 245 (cited above), at paras 6.53 and 8.136.

26 Scottish Law Commission, *Evidence: Report on Hearsay Evidence in Criminal Proceedings* (1995), Scot Law Com No 149, at para 4.48.

27 *The Criminal Justice (Scotland) Act 1995* was repealed and substantially re-enacted by the *Criminal Procedure (Scotland) Act 1995*.

28 South African Law Commission, *Report on the review of the law of evidence* (1986), Project 6, reference number: ISBN 0 621 11348 4, at 48.

29 South African Law Commission Report, Project 6 (cited above), at 48.



## Chapter 6 - The need for reform

64. The Sub-committee has concluded that the present hearsay law should be reformed, but that unrestricted relaxation of the hearsay rules without the introduction of adequate safeguards may not be in the interests of either an accused person or of the public at large. The Sub-committee proposes that while irrelevant and unreliable hearsay evidence should be excluded, relevant and reliable hearsay evidence should be admitted, where need exists for such evidence, at the same time providing a comprehensible and principled approach to that admissibility.

65. Accordingly, the Sub-committee recommends that the existing law of hearsay in Hong Kong criminal proceedings be reformed comprehensively and coherently according to a principled, logical and consistent system of rules and principles. **(Recommendation 1)**

## Chapter 7 - Safeguards as a condition for reform

66. Allied to the Sub-committee's recognition of the need to reform the hearsay law is its insistence that established and identified effective safeguards should be devised against potentially undesirable consequences arising from such admissibility. The Sub-committee considers it a prerequisite to any reform that there be mechanisms to guard against the admission of evidence

- (a) which may cause injustice to the accused;
- (b) which is unnecessary in the context of the issue to be decided; or
- (c) the reliability of which
  - i. is not obviously apparent by virtue of its provenance or setting; or
  - ii. in other cases, cannot be tested.

67. The Sub-committee believes that if the requirements of "necessity" and "reliability" are satisfied injustice to an accused person, as well as to the public at large, will be avoided.

68. The Sub-committee further recognises that the implementation of any system of reform must also contain safeguards against:

- (a) conferring too wide a discretion on the tribunal for the admission of hearsay evidence, which could lead to inconsistency of approach;
- (b) abuse by either the prosecution (for example, by tendering tainted inculpatory hearsay evidence) or an accused person (for

example, by tendering a fabricated third party confession) of the relaxed rules;

- (c) undue proliferation of issues of admissibility;
- (d) undue prolongation of hearings;
- (e) distortion of the tribunal's fact finding process; and
- (f) the admissibility of multiple hearsay.

69. The Sub-committee accordingly recommends that any reform of the existing law of hearsay in Hong Kong criminal proceedings must have built-in safeguards that protect the rights of defendants and ensure the integrity of the trial process. **(Recommendation 2)**

## **Chapter 8 - Options for reform**

70. Fourteen different options for reform were initially identified and considered by the Sub-committee. These were narrowed down to three options for further consideration by the Sub-committee. Consensus was eventually reached on a model for reform which:

- (a) retains the exclusionary rule ;
- (b) redefines hearsay evidence so that implied assertions no longer fall within the definition of hearsay;
- (c) abolishes the common law exceptions, except those relating to confessions, admissions, statements against interest, statements in furtherance of a conspiracy, and opinion evidence;
- (d) enacts a core scheme that confers a discretion on the trial judge to admit hearsay evidence on the basis of a defined test of necessity and threshold reliability;
- (e) incorporates sufficient safeguards to protect the innocent from being convicted and to prevent the integrity of the trial process from being compromised;
- (f) repeals certain statutory exceptions, substantially modifies others, and adds new exceptions, particularly for prior consistent statements and evidence admitted by consent.

### ***Rejected options and proposals***

71. The options and proposals rejected by the Sub-committee are provided below for reference:

- ***The polar extremes: no change and free admissibility***

72. The Sub-committee recommends that the polar extreme options of no change or free admissibility, or options just short of these extreme positions, be rejected, on the grounds that the first option inadequately

addresses the shortcomings in the law while the other has insufficient safeguards. **(Recommendation 3)**

- ***Best available evidence***

73. The Sub-committee recommends that the “best available evidence option” be rejected, as the Sub-committee considers it is impractical for the parties to comply with, difficult for the court to enforce without becoming inquisitorial, contains insufficient safeguards, and may contribute to inefficient use of court time. **(Recommendation 4)**

- ***Discretion to admit only defence hearsay***

74. The Sub-committee recommends that this option be rejected, as any reforms in the law of hearsay should apply in the same manner to both the prosecution and defence. **(Recommendation 5)**

- ***Broad discretion to admit (“the South African model”)***

75. The Sub-committee recommends that the South African model, which admits hearsay on an entirely discretionary basis “in the interests of justice”, be rejected because of concerns with the open-endedness of the discretion. **(Recommendation 6)**

### ***The three main options***

76. As mentioned above, the Sub-committee isolated for further consideration three main options for reform. These options, and the reasoning behind the Sub-committee's preferred option, are as follows:

- ***Option 1 (“the English model”): Wide specific exceptions with a narrow residual discretion to admit***

77. The Sub-committee rejected the English model for two main reasons: its categories of automatic admissibility provide insufficient assurances of reliability and the terms of the residual discretion to admit hearsay are too open-ended and insufficiently defined. **(Recommendation 7)**

- ***Option 2 (“the United States model”): Codification***

78. The Sub-committee rejected the United States model because it did not consider that it would be possible adequately to cater for all justifiable situations. **(Recommendation 8)**

- ***Option 3 (“the New Zealand Law Commission model”): Discretion based on necessity and reliability***

79. Of all the options and models considered by the Sub-committee, the New Zealand Law Commission model attracted the most support from members. The strength of this model is its inclusionary discretion based on

the principles of necessity and reliability. This discretion introduces flexibility into the law, but with sufficient barriers to filter out undesirable hearsay evidence. With its defined terms and conditions, it provides a fair degree of guidance to judges in exercising the discretion.

80. The Sub-committee recommends the adoption of the New Zealand Law Commission model (which proposes to replace all common law exceptions to hearsay with a single statutory discretionary power to admit hearsay evidence if it is both necessary and reliable) as the proposed model for reform, subject to three modifications. **(Recommendation 9A)**

81. Firstly, the Sub-committee believes that the common law exceptions in relation to confessions, co-conspirators exception and opinion evidence should be preserved. **(Recommendation 9B)**

82. Secondly, as an ultimate safeguard against possible miscarriages, the Sub-committee believes that in a case where prosecution hearsay has been admitted it is necessary to confer on the judge a power to direct a verdict of acquittal where upon an overview of the prosecution evidence once adduced it appears necessary to do so. **(Recommendation 9C)**

83. Thirdly, the New Zealand Law Commission model proposes that the judge, in assessing the reliability criterion, only consider "circumstances relating to the statement". The Sub-committee recommends that the ambit of listed factors to be considered under this criterion be widened to include the presence of supporting evidence. **(Recommendation 9D)**

## **Chapter 9 - The proposed model of reform - the core scheme**

84. The Sub-committee's proposed model of reform is made up of a **Core Scheme and a series of proposals on special topics**. The Core Scheme is a package of proposals aimed at addressing the most pressing shortcomings of the present law. It is a product of the best ideas and practices from the pre-eminent common law jurisdictions that have applied the hearsay rule in criminal proceedings. It has been tested against the safeguards considered in Chapter 7, and is designed specifically to address the shortcomings in the existing law.

85. The Core Scheme is presented as a package proposal rather than a series of individual proposals. It is intended to be read and understood holistically. Any proposals for the further consideration and refinement of the individual parts of the package are, of course, most welcome.

86. Certain words or phrases used in the Core Scheme were deliberately used by the Sub-committee and are intended to be directly transplanted into legislation. These words or phrases are in bold italics in the following text of the Core Scheme

## The Core Scheme

1. Hearsay means a statement that
  - (a) was made by a person (the declarant) other than a witness;
  - (b) is offered in evidence at the proceeding to prove the truth of its content;<sup>30</sup> and
  - (c) is a written, non-written or oral communication which was intended to be an assertion of the matter communicated.
2. Hearsay evidence may not be admitted in a criminal proceeding except under the terms of these proposals.
3. Unless otherwise stipulated, all previous common law rules relating to the admission of hearsay evidence (including the rule excluding statements containing implied assertions) are abolished.
4. Nothing contained in these proposals shall affect the continued operation of existing statutory provisions that render hearsay evidence admissible.
5. The common law rules that relate to admissibility of the following evidence are not affected by these proposals:
  - (a) admissions, confessions, and statements against interest made by an accused;
  - (b) acts and declarations made during the course and in furtherance of a joint enterprise or conspiracy;
  - (c) opinion evidence;<sup>31</sup>
  - (d) evidence admissible upon application for bail.
6.
  - (a) Hearsay evidence shall be admitted **where each party against whom the evidence is to be adduced agrees to its admission for the purposes of those proceedings.**<sup>32</sup>
  - (b) An agreement under this proposal may with the leave of the court be withdrawn in the proceedings for the purpose of which it is made.
7. Subject to the provisions of proposal 13 below, hearsay evidence is admissible only where –
  - (a) **the declarant is identified to the court's satisfaction;**
  - (b) oral evidence given in the proceeding by the declarant would be admissible of that matter;
  - (c) **the conditions of**
    - (i) **necessity and**
    - (ii) **threshold reliability**

30 Paras (a) and (b) of proposal 1 are taken from the New Zealand Code, section 4: Law Commission, *Evidence: Evidence Code and Commentary* (1999), Report 55 - Vol 2, at 10.

31 This is intended to preserve the rules by which experts in the tendering of evidence may refer to and rely upon research and expert findings of others.

32 This proposal is inspired by section 3(1)(a) of the South African *Law of Evidence Amendment Act*, 45 of 1988.

- stipulated in proposals 9 to 13 below are satisfied; and
- (d) ***the court is satisfied that any prejudicial effect it may have on any party to the proceedings is not out of proportion to its probative value.***<sup>33</sup>
8. The burden of proof is on the party adducing the hearsay evidence to satisfy the conditions in proposal 7 on a balance of probabilities.
9. The condition of necessity will be satisfied only:
- (a) where the declarant is dead;
- (b) ***where the declarant is unfit to be a witness, either in person or in any other competent manner, at the proceedings because of his physical or mental condition;***
- (c) where the declarant is outside Hong Kong and it is not reasonably practicable to secure his attendance, or to ***make him available for examination and cross-examination in any other competent manner,***<sup>34</sup>
- (d) where the ***declarant cannot be found and it is shown that all reasonable steps have been taken to find him;***
- (e) where the declarant appears as a witness and refuses to testify on the ground of self-incrimination; or
- (f) where the declarant, after having a reasonable opportunity to refresh his memory, does not have an independent recollection of the matters dealt with in the proposed evidence.

33 This was the subject of much discussion in the Sub-committee, and summarised in paragraphs 9.51 to 9.61 of this Consultation Paper.

34 The expression "in any other competent manner" is presently used in the *Criminal Procedure (Scotland) Act 1995* (c46), section 259(2)(b), which was derived from clause 1(1)(b) of the proposed Criminal Evidence (Scotland) Bill in the Scottish Law Commission's Report No 149 (Dec 1994).

35 The wording of proposal 11 is partly based on the New Zealand Code, s19(a): Law Commission Report 55 – Vol 2, at 52.

36 Proposals 12(a) to (d) are taken from the New Zealand Code, s16 (1)(a)-(d): Law Commission Report 55 – Vol 2, at 44 and 46.

37 Generally, where the circumstances are such that the cross-examination of the declarant at trial would make a material difference to the ultimate reliability of the hearsay statement, then the absence of such cross-examination would mean that the statement is unable to meet the test of threshold reliability. See for example the circumstances in *R v Hamer* [2003] 3 NZLR 757 (CA), particularly para. 31.

38 This provision reflects serious concerns in various Commissions' reports, and reported cases, with safeguarding against easy abuse by fabricated exculpatory statements of third parties. See discussion in Chapter 9 of the Consultation Paper.

39 Proposals 15(a) and (b) are based on *Criminal Procedure (Scotland) Act 1995* (c46), section 259(4)(a) and (c), which was derived from the clause 1(5)(a) and (c) of the proposed Criminal Evidence (Scotland) Bill in the Scottish Law Commission's Report No 149 (Dec 1994): Scottish Law Commission, *Evidence: Report on Hearsay Evidence in Criminal Proceedings* (1995), Scot Law Com No 149, at 96. These statutory exceptions to existing exclusionary rules are important safeguards.

40 This factor is derived from section 125(3)(b)(ii) ("considering its importance to the case against the person") of the *Criminal Justice Act 2003* (UK) (c44), which implements proposed clause 14(1)(b) of the Criminal Evidence Bill in the English Law Commission's Report No 245 (June 1997): Law Commission, *Report: Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997), Law Com No 245, at 214.

41 Proposals 16(b)(i)-(iii) and (v) are based on s3(1)(c) of the South African *Law of Evidence Amendment Act*, 45 of 1988.

10. The condition of necessity will not be satisfied ***where the circumstances said to satisfy the condition have been brought about by the act or neglect of the party offering the statement, or someone acting on that party's behalf.***
11. ***The condition of threshold reliability will be satisfied where the circumstances provide a reasonable assurance that the statement is reliable.***<sup>35</sup>
12. In determining whether the threshold reliability condition has been fulfilled, ***the court shall have regard to all circumstances relevant to the statement's apparent reliability, including –***
  - (a) ***the nature and contents of the statement;***
  - (b) ***the circumstances in which the statement was made;***
  - (c) ***any circumstances that relate to the truthfulness of the declarant;***
  - (d) ***any circumstances that relate to the accuracy of the observation of the declarant;***<sup>36</sup>
  - (e) ***whether the statement is supported by other admissible evidence; and***
  - (f) ***the absence of cross-examination of the declarant at trial.***<sup>37</sup>
13. A statement ***tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless there are sufficient confirmatory circumstances that clearly indicate the trustworthiness of the statement.***<sup>38</sup>
14. Notice - Rules of Court are to be made for the giving of notice; that evidence is to be treated as admissible if notice has been properly served, and no counter notice has been served; that the failure to give notice means that the evidence will not be admitted save with the court's leave; that where leave is given, the tribunal of fact may draw inferences, if appropriate, from the failure to give notice; and that the failure to give notice may attract costs.
15. Where in any proceeding hearsay evidence is admitted by virtue of these proposals –
  - (a) any evidence which if the declarant had given evidence in connection with the subject matter of the statement, would have been admissible as relevant to his credibility as a witness shall be admissible for that purpose in those proceedings; and
  - (b) evidence tending to prove that the declarant had made a statement inconsistent with the admitted statement shall be admissible for the purpose of showing that the declarant has contradicted himself.<sup>39</sup>
16. (a) ***At the conclusion of the case for the prosecution in any proceedings in which hearsay evidence is admitted, the court may direct the acquittal of an accused against whom such***

*evidence has been admitted under the terms of these proposals where the judge considers that, taking account of the factors listed at proposal 16(b), and notwithstanding the fact that there is a prima facie case against the accused, it would be unsafe to convict the accused.*

- (b)** *In exercising its discretion under this proposal, the court shall have regard to*
- (i)** *the nature of the proceedings;*
  - (ii)** *the nature of the hearsay evidence;*
  - (iii)** *the probative value of the hearsay evidence;*
  - (iv)** *the importance of such evidence to the case against the accused;<sup>40</sup> and*
  - (v)** *any prejudice to an accused which may eventuate consequent upon the admission of such evidence.<sup>41</sup>*

87. The Sub-committee recommends that the Core Scheme, as set out above, be adopted as a whole as the main vehicle for reforming the law of hearsay in Hong Kong criminal proceedings. **(Recommendation 10)**

#### ***Recommendations arising from the Core Scheme***

88. There are a total of 16 proposals in the Core Scheme. Proposal 1 purports to define the scope of "hearsay". Under proposal 1(c), a hearsay statement would include written and non-written, and verbal and non-verbal, communication. **(Recommendation 12)** Proposal 1 excludes from the definition of "hearsay" out-of-court statements made by a witness. The Sub-committee thus recommends that the definition of hearsay in the Core Scheme should not include prior statements made by a witness who is available to testify in the trial proceedings. **(Recommendation 11)**

89. As proposal 1(c) only brings communication "which was intended to be an assertion of the matter communicated" within the definition of hearsay, "implied assertions" would therefore be excluded from the proposed definition of hearsay. The effect of proposal 1(c), together with that of proposal 3 which calls for the abrogation of the common law rule that excluded "implied assertions" as hearsay, would be to render implied assertions admissible. **(Recommendation 13)**

90. As regards multiple hearsay, the Sub-committee recommends in **Recommendation 14** that this would be admissible under the Core Scheme only if each level of hearsay satisfies the Core Scheme's test for admissibility.

91. The Sub-committee recommends that the Core Scheme should apply only to those criminal proceedings that currently apply the common law hearsay rule. **(Recommendation 15)** The Core Scheme would apply in sentencing proceedings only when the prosecution is relying on hearsay evidence to prove an aggravating factor. **(Recommendation 16)**



92. The Sub-committee recommends that the Core Scheme would apply to extradition proceedings. **(Recommendation 17)**

93. The common law exclusionary rule against hearsay evidence is to be retained (see proposal 2), and the Sub-committee recommends that codification of the exclusionary rule should be the starting point for the Core Scheme. **(Recommendation 18)**

94. Proposal 2 specifies that the Core Scheme is meant to be the exclusive vehicle for the admission of hearsay in criminal proceedings. Under the Core Scheme hearsay evidence would only be admitted in one of four ways:

- (a) if it falls within one of the preserved common law exceptions (proposal 5 and **Recommendation 19**);
- (b) if it falls within an existing statutory exception (proposal 4 and **Recommendation 20**);
- (c) by consent of the parties (proposal 6 and **Recommendation 21**);  
or
- (d) by exercise of the court's general discretionary power to admit hearsay (proposal 7 and **Recommendation 22**).

95. The Sub-committee recommends that five conditions must be satisfied before hearsay can be admitted under the general discretionary power referred to in proposal 7. These are that:

- the declarant has been adequately identified (**Recommendation 23**);
- oral testimony of the evidence would have been admissible (**Recommendation 24**);
- the “necessity” and “threshold reliability” criteria have been satisfied (**Recommendations 25, 26 and 27**); and
- the probative value of the evidence exceeds its prejudicial effect (**Recommendation 28**).

96. The Sub-committee recommends that this discretionary power to admit should be the main vehicle by which hearsay evidence is to be admitted in criminal proceedings. **(Recommendation 22)** The party applying to admit hearsay evidence under the discretionary power would bear the burden of satisfying on a balance of probabilities all the conditions for admissibility. **(Recommendation 31)**

97. The “necessity” criterion would only be satisfied where the declarant is genuinely unable to provide testimony of the hearsay evidence and not merely unwilling to do so. The condition will therefore only be satisfied if the declarant

- (a) is dead;
- (b) is physically or mentally unfit to be a witness;
- (c) is outside Hong Kong and it is not reasonably practicable to secure his attendance;

- (d) cannot be found with reasonable diligence;
- (e) refuses to answer on the grounds of self-incrimination; or
- (f) cannot recall the matters to be dealt with in his proposed evidence. **(Recommendation 25)**

98. The Sub-committee recommends that the “threshold reliability” condition should only be satisfied where the circumstances provide a reasonable assurance that the statement is reliable. In making this assessment, the court must have regard to the nature and contents of the statement, the circumstances in which the statement was made, the truthfulness of the declarant, the accuracy of the observations of the declarant, the presence of supporting evidence, and the absence of cross-examination of the declarant at trial.

99. The Sub-committee recommends that the probative value of the hearsay evidence must always be greater than any prejudicial effect it may have on any party before it can be admitted under the discretionary power.

100. In addition to the conditions set out in proposal 7, the Sub-committee further recommends that in specific circumstances there should be additional conditions which should be satisfied before the court exercises its discretion to admit hearsay evidence:

- As a means to safeguard against manufactured third-party confessions, the Sub-committee recommends that exculpatory hearsay evidence of admissions or confessions by persons not party to the proceedings should be supported by sufficient confirmatory evidence before being admitted under the discretionary power. **(Recommendation 29)**
- The Sub-committee recommends that rules of court be made to require the party applying to admit hearsay evidence under the discretionary power to give timely and sufficient notice to all other parties to the proceedings. **(Recommendation 30)**

101. Where hearsay evidence is admitted under the discretionary power, it is recommended that evidence relevant to the declarant's credibility (including other inconsistent statements), which would have been admissible had the declarant testified as a witness, be admitted. **(Recommendation 32)**

102. The Sub-committee recommends the addition of a new power for the trial judge, at the conclusion of the prosecution's case, to direct a verdict of acquittal of an accused against whom hearsay evidence has been admitted under the discretionary power. This new discretionary power would only operate where the judge considers that, taking account of a number of factors, including the nature of the proceedings, the nature of the hearsay evidence, the probative value of the hearsay evidence, the importance of such evidence to the case against the accused and any prejudice to an accused resulting from the admission of the hearsay evidence, and notwithstanding the

fact that there is a *prima facie* case against the accused, it would be unsafe to convict the accused. **(Recommendation 33)**

## Chapter 10 - Proposals on special topics

103. As mentioned earlier, the proposed model of reform consists of **the Core Scheme and a series of proposals on special topics**. The proposals on special topics are summarised in the paragraphs that follow.

104. As regards banking records, the Sub-committee recommends that the exception to the hearsay rule in respect of bankers' records be retained but that its implementation should form part of the general exception in regard to the production of records as appears in Recommendations 35, 36 and 37. **(Recommendation 34)**

105. As regards business and computer records, the Sub-committee recommends that the exceptions in respect of business records and computer records be retained, with the primary aim being to simplify the production of all records, with existing legislation relating to non-computerised records being replaced by a single section that applies to all documents irrespective of their varying nature. **(Recommendation 35)**

106. In relation to computerised records, the Sub-committee recommends that: (1) separate regimes should apply to data stored or generated in the course of business and that stored or generated for non-business purposes; and (2) specific consideration should be given to, *inter alia*, the implications arising from the storage (and retrieval) of data outside of Hong Kong and the integrity of such data. **(Recommendation 36)**

107. The Sub-committee also recommends that records complying with the proposed legislation should be automatically admissible, but that the court should have a discretion to refuse to admit a document where the court is satisfied that the statement's reliability is doubtful. **(Recommendation 37)**

108. As regards prior inconsistent statements, the Sub-committee recommends that prior inconsistent statements of witnesses should continue (as at present) to be inadmissible for the truth of their content. However, this should be reconsidered if and when law enforcement agencies adopt a general practice of recording witness statements by reliable audio-visual means. **(Recommendation 38)**

109. In respect of prior consistent statements, the Sub-committee recommends that:

- where prior consistent statements are admitted under existing common law exceptions (eg prior identification, recent complaint, rebutting recent fabrication), they should also be admitted for their substantive truth **(Recommendation 39A)**;

- prior statements used by witnesses to refresh their memory should be admitted for their substantive truth (**Recommendation 39B**);
- prior statements of a witness who genuinely cannot recall the events recorded in the statement should be admitted for their substantive truth if the witness confirms his belief that he was telling the truth when he made the statement (**Recommendation 39C**);
- the prior identification exception should be extended to persons, objects and places generally (**Recommendation 39D**);
- the “recent complaint” exception should be extended to all victim offences and to complaints made as soon as could reasonably be expected after the alleged conduct. We also recommend further study of recent complaint evidence to assess the desirability of abolishing this exception and replacing it with a narrower one that admits complaint evidence only for the purpose of narrative, in the sense of describing how the charge came to be laid (**Recommendation 39E**).<sup>42</sup>

110. In liberalising the admissibility laws governing prior statements, many law reformers have expressed concern that if juries are provided with prior written statements they may attach greater weight in their deliberations to such statements than to the oral evidence presented by the witness in court. Indeed, in complex and lengthy cases, it is likely that jury members may forget the witness's oral evidence and rely exclusively on the written prior statement as that witness's evidence. For these reasons, the Sub-committee recommends the inclusion of an express provision that the physical record of an admitted prior statement should be removed from the jury's possession during their deliberations, unless the judge finds that the jury would be substantially assisted by receiving and reviewing the physical record. (**Recommendation 40**)

111. A concern was expressed in the Sub-committee that with the adoption of the Core Scheme, disputes concerning the admission of hearsay might delay and prolong trial proceedings. The Sub-committee recommends that the possibility should be considered of having pre-trial determinations of admissibility, coupled with interlocutory appeals on the admissibility issue. (**Recommendation 41**)

112. The admissibility of hearsay in the sentencing phase of a criminal trial was considered as part of the revision of the existing hearsay law. The Sub-committee recommends that the new legislation should specifically address the admissibility of hearsay in sentencing, along lines which conform with the Sub-Committee's general recommendations for change to the existing law (**Recommendation 42A**), and that the new legislation should also specifically state that in all courts, in the sentencing phase, any disputed

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42 Canada undertook reforms of this nature in the early 1980s. See Canadian Criminal Code, section 275 and *Regina v JEF* (1993) 85 CCC (3d) 457 (OntCA).

issue of fact or matter of aggravation must be proved by the prosecution beyond reasonable doubt. **(Recommendation 42B)**

## **Chapter 11 - Human rights implications**

113. In its assessment of whether the proposals and recommendations of the Consultation Paper would infringe the fundamental rights and freedoms provided by law in Hong Kong, the Sub-committee examined both the domestic laws (ie the Basic Law of the Hong Kong SAR and the Hong Kong Bill of Rights) and international human rights jurisprudence. The Sub-committee concluded that the admission of incriminating hearsay evidence is not *per se* a violation of the right to a fair trial. The Sub-committee believes that whether there is a violation depends on the full circumstances of the case and the application of the proportionality test.

114. The admission of incriminating hearsay evidence denies the accused the opportunity to cross-examine the maker of the statement in every case. However, the Sub-committee believes that this is not determinative of proportionality. Instead, the focus of attention should be on whether the law provides sufficient safeguards to prevent miscarriages of justice and unsafe convictions in the vast majority of cases. To have safeguards which could prevent miscarriages in all cases would be, if not impossible to achieve, an unrealistically high standard to attempt to achieve. With this objective in mind, the Sub-committee has tried to include sufficient safeguards in the Core Scheme to prevent miscarriages of justice and unsafe convictions. Under the Core Scheme, safeguards exist both when the evidence is admitted and after the close of the prosecution's case. The safeguards which apply at time of admission of the evidence are intended to ensure that only hearsay evidence with reasonable assurances as to its reliability (and no viable means of being admitted as direct oral testimony) will be admitted.<sup>43</sup> In applying the threshold reliability test, judges must consider the degree to which, if at all, the absence of cross-examination as a factor is likely in the particular instance to affect reliability. At the close of the prosecution's case, there is the ultimate safeguard of the judge's power to direct a verdict of acquittal having considered the prosecution's case as a whole. In exercising this discretionary power, the judge will no doubt have in mind the risk of a wrongful conviction.

### **Invitation to comment**

115. The Sub-committee invites comments principally on the specific options and recommendations made in the Consultation Paper, and welcome thoughts on any other means of improving the present law governing the admissibility of hearsay evidence in Hong Kong. The Sub-committee remains open-minded on the best way forward, and welcomes views on the Consultation Paper and the recommendations for reform it presents.

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43 See para 9.84 in Chapter 9 of the Consultation Paper for a list of the individual safeguards.

116. You may send your comments on the paper by email to:

*hklrc@hkreform.gov.hk*

or by post to:

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