

**Consultation Paper on the Procedure Governing the Admissibility of
Confession Statements in Criminal Proceedings published by the
Law Reform Commission in November, 1998.**

Comments of the Hong Kong Bar Association

1. The Bar does not support any of the options put forward in the Paper.
2. The Bar suggests maintaining the status quo of the procedure now in operation.
3. The Bar agrees with the reasons stated in paragraph. 3.12 to 3.16 of the Paper for maintaining the status quo.
4. The Bar disagrees with paragraph. 3.5 of the Paper because
 - (i) Only when the statement is ruled admissible then there would be a "duplication" of evidence.
 - (ii) Even when a statement is ruled admissible, the "duplication" of the evidence is limited since the issue and emphasis in Voir Dire proceedings is voluntariness and admissibility, whereas those in the general issues before the Jury is truth, accuracy and reliability of the contents of the statement.
 - (iii) If the issue of voluntariness and admissibility are tried before the Jury but the statement is subsequently ruled inadmissible, it would be a waste of the jury's time in listening to inadmissible evidence which would only be confusing to the Jury and prejudicial to the accused.
 - (iv) Time and costs must always be of a secondary concern only when big principle of justice is in question.

(v) If witnesses ever change their evidence in the main trial from that in the Voir Dire, no doubt counsel would cross-examine them as far as relevant and there is no question of the jury missing anything. On the other hand, the Jury should not be bothered with irrelevant inconsistencies.

5. The Bar disagrees with paragraph 3.6 of the Paper because the law and practice at present is that once the confession is ruled inadmissible, the jury is not told at all of its existence and speculation by the jury simply plays no part in our system.

6. The Bar disagrees with paragraph 3.7, 3.8, 3.9 and 3.10 because our existing practice is a matter of law based on sound policy considerations.

In Wong Kam Ming Vs.,R.(1980) AC 247, Lord Hailsham of St. Marylebone on behalf of the Privy Council said at p.261, "Any civilized system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilized society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions. It is therefore of very great importance that the courts should continue to insist that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary."

In The Queen v. Lam Chi Ming and other [1991] HKLR 191, Lord Griffiths on behalf of the Privy Council said on p.197, "Their Lordships are of the view that the more recent English cases established that the rejection of an improperly obtained confession is not dependent only upon possible unreliability but also upon the principle that a man cannot be compelled to incriminate himself and upon the importance that attaches in a civilized society to proper behavior by the police towards those in their custody. All three of these factors have combined to produce the rule of law applicable in Hong Kong as well as in England that a confession is not admissible in evidence unless the prosecution establish that it was voluntary. This, perhaps the most fundamental rule of the English criminal law, now finds expression in England in s. 76 of the Police and Criminal Evidence Act 1984 and never did admit of the exception to be found in the Indian and Ceylon Criminal Codes and in a few of the cases in the late 18th and early 19th century."

Lord Griffiths further said on p.198-199, "The privilege against self- incrimination is deep rooted in English law and it would make a grave inroad upon it if the police were to believe that if they improperly extracted admissions from an accused which were subsequently shown to be true they could use those admissions against the accused for the purpose of obtaining a conviction. It is better by far to allow a few guilty men to escape conviction than to compromise the standards of a free society."

Thus maintaining civil liberty in a civilized society and prevention of abuse by the investigating authority is even more important than the truth or falsity of a particular confession. The separation of functions between

Judges and jury in relation to the 2 jobs has been working well. We need professional judges to continue carrying out the 1st function as a fundamental and/or additional protection of our civilized system and civil liberty, which is far too important to be taken away by any means.

7. The Bar disagrees with paragraph. 3.11 of the paper because our practice now is that Voir Dire are heard before juries are empanelled so the worry is not justified.

8. If the issue of admissibility is to be heard before a jury, there would be a great temptation on the investigating officers to force out or fabricate confessions from Defendants so as to "poison" the jury because even if the confession is subsequently ruled inadmissible, those officers can rest assured that the adverse effect against the Defendant is already there in the Jury's mind.

9. Practically it is not desirable to have a Voir Dire be heard before the jury because there are many matters which are relevant as to admissibility of the confession but prejudicial to the Defendant if the Jury hear it. For example, it is not uncommon that police officers are alleged to threaten not to give methadone treatment to drug addict Defendants if they do not confess. Another example is allegation that a police officer tells a Defendant something like "Since you have so many criminal convictions, if you don't confess the judge would only believe me and not you." The defence would not have a free hand if the admissibility issue is tried before a jury.

10. Since the Bar supports maintaining the status quo the Bar does not think it is necessary to discuss which option is better than the others.

11. The Bar recommends that the Law Reform Commission and the Administration should revisit the proposal in the 1985 Law Reform Commission Report on the same subject as to additional safeguards on proper procedure before trial rather than trying to take away existing fundamental rights of Defendants and fundamental protection of our civilized system and civil liberty.

18th January, 1999.