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HONG KONG BAR ASSOCIATION

Comment on the LRC Consultation Paper On

Hearsay in Criminal Proceedings

Introduction

1 The Bar was invited to consider issues arising from the Consultation Paper issued by the Law Reform Commission on behalf of a Sub-Committee of the Law Reform Commission of Hong Kong on Hearsay in Criminal Proceedings, (the sub-committee). [1]

2 For ease of reference, the issues noted by the Bar are reproduced sequentially in so far as this is possible, in accordance with the order adopted by the sub-committee's 'Summary of Recommendations'.[2]

Overview of the Bar's position on Recommendations by the LRC Sub-Committee

3 In the consultation paper, the sub-committee recommends that, as a general rule, the present rule against the admission of hearsay evidence should be retained, but that there should be greater scope to admit hearsay evidence in specific circumstances. The Bar agrees provided that this is not at the expense of the fundamental constitutional protections afforded to members of the community who are charged with criminal offences. The Bar considers that while there are features of the proposal made by the Sub-Committee which are sensible and well thought out, much more needs to be done to ensure those rights are protected.

4 The sub-committee recommends that hearsay evidence should be admissible:

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1 Consultation Paper , Government Printer November 2005 <http:www.hkjreform.gov.hk>

2 Ibid Chapter 12 pp 192 - 198

(a) if it falls within one of several common law exceptions to be preserved;

(b) if it falls within an existing statutory exception;

(c) if the parties agree; or

(d) under the court's discretionary power to admit hearsay in prescribed circumstances.

5 The sub-committee recommends that before the court is able to admit hearsay evidence under its discretionary power, the court must be satisfied on a balance of probabilities that it is "necessary" to admit the hearsay evidence and that that evidence is "reliable". Furthermore, the sub-committee believes that hearsay evidence should not be admitted if its prejudicial effect is out of proportion to its probative value. The major problem that the Bar sees with the scheme is that it fails to give proper emphasis on the right vested in members of the community which enshrined in the Bill of Rights and the Basic Law to cross-examine witnesses. The discretion vested in the courts in the proposed scheme is far too broad and runs the serious risk of producing inconsistent results. This leads to rulings on critical pieces of evidence - often pieces of evidence which might make a critical difference to the outcome of a case - dependent on the discretion of a court. One of the advantages of the current law is that while it is not always perfect in producing a just result, the current law is predictable in the outcomes it produces. There is also a problem criteria under which the scheme proposes to admit hearsay: these criteria are just too vague. These problems also apply under the proposed scheme in relation to hearsay evidence which an accused person seeks to introduce.

6 In short, the basic outline of the proposed scheme is good. However, the scheme fails to provide adequate safeguards against unjust and uncertain results.

Evaluation of the proposals by the Bar

Basic issues

7 The principal issue is simply stated: What is the case for change? Are the current rules so inimical to present day requirements of justice that they require change? Assuming there is some need for change in the hearsay rules, is what is proposed an appropriate option for Hong Kong?

8 The Bar strongly believes these questions must be viewed against the rights guaranteed to an accused person under the Basic Law. The most important of those rights at stake is the right to make full answer and defence. Of this, the most relevant and important component is the right to cross-examine. The concern is that the proposals will have the effect of permitting cases to proceed on evidence where a witness does not come to court and take responsibility for his or her testimony through the oath or affirmation and through the sanctions for giving false evidence. The Bar is firmly of the view these proposals will have the effect of cutting down this guarantee.

9 The trade-offs proffered by the sub-committee are a more flexible rule and the ability to prevent injustice to an accused. Equally, however, what also comes in this package is that the prosecution will be able to present evidence which would have been hitherto inadmissible. There are said to be safeguards. It is

critical to evaluate those safeguards by reference to the constitutional values at stake.

Six cardinal principles

10 In the course of considering whether changes to the law of hearsay are warranted and, if so, to what extent they were justified, the sub-committee enumerated six cardinal principles as follows:

(a) Evidentiary rules should, within the limits of justice and fairness to all parties, facilitate and not hinder the determination of relevant issues;

(b) 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;

(c) Evidentiary rules should be clear, simple, accessible, and easily understood;

(d) Evidentiary rules should be logical, consistent, and based on principled reasons;

(e) Questions of admissibility should be determinable within a fair degree of certainty prior to trial so that the legal adviser may properly advise the client on the likely trial outcome; and

(f) Evidence should keep up with the times and reflect the increasing global mobility of persons and modern advancements electronic communications.

11 It is very difficult to disagree with any of these principles with the possible exception of item (b). The Bar thinks this item might be phrased more happily to make it plain that conviction of the innocent is not just something simply to be avoided or merely undesirable, but is something which is wholly unacceptable in and anathema to our system of justice. It is not acceptable to the Bar to view the possible conviction of the innocent as something like a mere cost of doing business. Whilst the Bar recognise that history demonstrates that there will be times when the innocent will be convicted, we believe that just as everyone who is involved in the criminal justice system must, by their conduct, strive to prevent the conviction of the innocent, the system of rules which govern the procedure by which criminal proceedings are conducted and the rules under which the system receives and considers information for the determination of criminal proceedings must be designed with this at the forefront of consideration.

12 These cardinal principles are not only an important tool for the evaluation of the existing system. Any proposed system must stand up well when evaluated against these principles. As the Bar think these principles are so important we venture to modify principle (b) as follows: Conviction of the innocent is unacceptable. All accused have a fundamental right to make full answer and defence to a criminal charge.

13 When set against those criteria, the sub-committee suggests that the current law of hearsay does not perform terribly well. That is a matter which is open for debate. The sub-committee has recited the well-known major horror stories about the strict application of the hearsay rule. These include *Sparks*[3]

[3] *Sparks v R* [1964] AC 964.

and *Kearley*.[4] In a very narrow sense the problems thrown up by these cases could be fixed easily. The problems in *Kearley* are not problems in Australia.[5] In any event, the correctness of *Kearley* was doubted in *S-J v Lui Kin-hong*.[6] *Sparks* is a little more intractable but the Bar has difficulty in believing that this could not be fixed other than by the fudge which the Privy Council actually applied to get the "right" result. However, the Report makes the point that it is hardly desirable to have a series of mini “fixes”. The Bar agrees that this is right.

14 It seems to the Bar that while a case can be made that the proposal is an advance over the current law by reference to cardinal principles (a), (c) and (d), there are serious questions about the efficacy of the proposals by reference to principles (b) and (e).

15 In relation to principle (f), the Bar doubt whether this should be the tail that wags the dog. There are plenty of things that can be done to improve the rules of evidence in criminal proceedings so as to keep up with the times and reflect the increasing global mobility of persons and modern communications without tinkering with the hearsay rules.

16 The Bar's concern about item (b) is multifaceted but one of the critical issues is whether either taken as a whole or by reference to individual proposals the right of the accused to confront and to cross-examine those who accuse him is or might be substantially diminished. These rights i.e. to cross-examine and to confront witnesses are fundamental incidents of the right to make full

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4 *R v Kearley* [1992] AC 228.

5 *R v Firman* (1989) 46 A Crim R 150.

6 (1999) 2 HKCFAR 510, [2000] 1 HKLRD 92, 1 HKC 95.

answer and defence. As will appear shortly, the Bar think that there is a risk that these rights are seriously undervalued in this proposal and there is a consequential substantial risk that these rights may not be appropriately valued when a court comes to exercise discretion in determining whether to admit hearsay under these proposals.

17 The Bar also make the point in due course that there is a high degree of discretion vested in the court which is built into the decision to admit evidence under these proposals. Discretion carries with it the risk of inconsistency which is the very opposite of the cardinal principles of consistency and predictability. As will shortly appear, that does not in any way mean that the Bar consider that the proposals are wholly without merit. However, the Bar think that a great deal more thought needs to be given to the proposal to ensure that the scheme does not prejudice the legitimate interests of the accused.

What is right with the hearsay rule?

18 While there things that are wrong with the hearsay rule, it is essential to recall that there is much right about the rule. Some of the consequences of the rule are:

- The truth of an assertion that offends the rule against hearsay cannot be tested by cross-examination of the person who saw the event the subject of the assertion.

- The demeanour of the person who saw or heard or experience the event the subject of the hearsay assertion cannot be observed in court.

- The use of hearsay would make fraudulent evidence easier to produce.

- The testimony of the person who saw the events is not under oath or affirmation. There are few effective sanctions against the person who saw the event if that person is not telling the truth. The only conceivable remaining sanctions might be a charge of perverting the course of justice or, if the hearsay was given in a police statement through section of the Crimes Ordinance, Cap 200: false written statements in criminal proceedings. It will be immediately seen that might well be an empty remedy.

19 The other aspect of the rule is that the outcome of the application of the rule is predictable. Those who criticise the rule characterised this feature of it as its inflexibility. However, predictability is, as the sub-committee report properly concedes, a desirable outcome.

Recommendations 9A - D and 10 – The 'Core Scheme'

20 The sub-committee's core recommendations are set out in Recommendations 9A-D and 10 of the consultation paper. Recommendation 9A proposes that, where the four exceptions, all previous common law rules relating to the admission of hearsay evidence be replaced with a single statutory discretionary power to admit hearsay evidence if it is both necessary and reliable, **(Recommendation 9A)**. [7]

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[7] Ibid para. 12.10 p. 193

21 Further, that only four common law exceptions will be preserved for reasons specific to each exception, **(Recommendation 9B)**. [8] These exceptions are:

- admissions, confessions and statements against interest made by an accused person;
- acts and declarations made during the course of and in furtherance of a joint enterprise or a conspiracy;
- opinion evidence; and
- evidence admissible upon an application for bail.

22 The Bar considers that, on the assumption that the core scheme is acceptable, that it is appropriate to retain the foregoing rules.

23 In assessing the 'reliability' criterion, the sub-committee recommends that the ambit of factors listed for consideration be widened to include the presence of "supporting evidence", **(Recommendation 9D)**. [9]

24 The sub-committee further provides that in cases where prosecution hearsay evidence has been admitted, the judge should have a discretionary power to direct a verdict of acquittal where upon an overview of the prosecution evidence once adduced, it appears necessary in view of the condition and effect of the evidence to do so, **(Recommendation 9C)**. [10]

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8 Ibid para. 12.11 p.193

9 Ibid para. 12.13 p. 193

10 Ibid para. 12.12 p.193

25 The sub-committee concludes that a "Core Scheme" be adopted as a whole as the "main vehicle" for reforming the law of hearsay in Hong Kong criminal proceedings. The core scheme envisages admitting hearsay in only one of four ways: by consent of the parties; as an existing statutory exception; as a preserved common law exception; or under the (new) general discretionary power to admit hearsay, **(Recommendation 10)**. [11]

26 The recommendations arising from the package of proposals incorporated in the "Core Scheme" give rise to a number of issues of concern to the Bar, of which the following are important:

27 It is within the core scheme that the protection of the accused needs to be more focused. Whilst it is probably implicit in the proposals that a judge could not exercise his discretion in favour of an application by the prosecution to admit hearsay evidence if this would diminish a fair trial for the accused, the Bar thinks it is at least highly desirable that the criteria for admissibility the much more explicit. The Bar recommends that it be made explicit that such evidence may not be admitted on the application of the prosecution unless it is affirmatively demonstrated that the evidence proposed to admit will not substantially diminish the right of the accused to cross examine, the right to a fair trial and so on.

28 The Bar considers such an approach to be far preferable to the open-textured series of matters that a Court would be required to take into account. The approach which the Bar favours forces the court to reject evidence sought to be admitted at the instance of the prosecution unless it can exclude certain

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11 Ibid para. 12.14 p.193

detriments which may be suffered by an accused. This is no mere matter of emphasis.

Implied Assertions

29 **Proposal 1** of the Core Scheme takes steps to remove implied assertions from the ambit of the exclusionary rule. The Sub-Committee recommends that the common law rule that excludes implied assertions as hearsay be abrogated. **(Recommendation 13)** [12]

30 However, the sub-committee recognizes that there may be cases where implied assertions are unreliable, for example, in their analysis of the case of *R v Kearley*, where a majority of the House of Lords held that implied assertions came within the definition of hearsay. [13] For this reason, the sub-committee invites views on the alternative that implied assertions should remain within the definition of hearsay, to be admitted only if the conditions of necessity and threshold reliability are met. **(Recommendation 13)** [14]

31 As already indicated, the Bar is concerned that due to the inequality of resources, a rule permitting admissibility of implied assertions should be approached with caution. If the exclusionary rule is to be abrogated, this should be limited to the extent that implied assertions can only be admissible if all the pre-conditional tests of admissibility are met.

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12 Ibid para. 12.17 p.193; see also paras. 9.6-9.8 pp 112 - 113

13 *R v Kearley* [1992] 2 AC 228 (HL); *R v Blastland* [1986] AC 41 (HL); *R v Ng Kin-yee* [1994] 2 HKCLR 1

14 Paras. 9.6 - 9.8 and para 12 17

32 At the heart of the Core Scheme is the new discretionary power under **Proposal 7** to admit hearsay evidence if five preconditions are met: 1st, the declarant has to be adequately identified; 2nd, oral testimony of the evidence would have been admissible; 3rd & 4th, the necessity and threshold reliability criteria have been satisfied; and 5th, that the probative value of the evidence exceeds its prejudicial effect, **(Recommendation 22)**.[15]

33 It is recommended that the new discretionary power to admit be the main vehicle by which to admit hearsay evidence in criminal proceedings.

Necessity

34 The criterion of "necessity" (**Proposals 7(c), 9 and 10)** provide that the condition of necessity will be satisfied only where:

- the declarant is dead, category (a);
- the declarant is unfit to be a witness, category (b);
- 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, category (c);
- where the declarant cannot be found and it is shown that all reasonable steps have been taken to find him, category (d);
- where a declarant appears at trial but refuses to testify on the ground of self-incrimination, category (e); or

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15 Paras. 9.31 and 12.26 - 12.27

- 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, category (f).

35 The proposals are also encapsulated in **Recommendation 25**. [16]

36 The Bar considers there to be matters of concern in respect of proposal 9 categories (c), (e) and (f).

37 **Proposal 9 category (c)** means that the party relying on this condition will need to exercise reasonable diligence in either arranging for the declarant's return to Hong Kong or for giving testimony by live television link. [17] It will be noted that the burden, both physical and financial, that this condition seeks to impose will place compliance beyond the reach of the majority of criminal litigants. The resources available to the prosecution are not similarly restricted. It is to be recalled that individual defendants do not have mutual legal assistance arrangements with other countries with all the relevant compulsory powers that almost always attach to such arrangements.

38 Whether or not it is practicable to secure the attendance of the declarant of a hearsay statement as a pre-condition of 'necessity' will, by necessity differ between the prosecution and the defence. Methods, such as video link, may be available but these are expensive to set up. What is practicable to the prosecution with their resources may not be practicable to the defendant with limited resources. Accordingly the Bar thinks that it should be required that a court must when considering an attempt by the accused have hearsay

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16 Paras. 9.35 - 9.41 and 12.30

evidence admitted consider the resources reasonably available to the accused. It may be that reasonable diligence does import this concept. However, it does not hurt to make it explicit.

39 **Proposal 9 (e)** provides that the condition of necessity will be met in circumstances whereby the declarant appears as a witness, but refuses to testify in the ground of self-incrimination. [18] It would appear that the key rationale to this proposal appears to lead from the admittedly rare and unusual situation in which a third-party declarant has admitted an offence exculpating the defendant. However, the Bar thinks that this proposal would have a wider impact than this and would not be limited to a third-party declarant having admitted an offence which might exculpate an accused person. It seems to the Bar that this would radically rearrange the landscape in relation to all accomplice witnesses.

40 The Bar is concerned not to manufacture circumstances whereby hearsay statements of a declarant unwilling to testify on these grounds should be considered. The difficulty lays not so much in the situation protecting rare injustice to an accused, but in the much more widespread use of otherwise hearsay statements of informants, undercover agents and persons giving evidence under immunity from prosecution. Accordingly, the Bar are of the view that the proposal as presently formulated is ill-considered and unwise.

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17 Para 9.36

18 Para 9.38

41 **Proposal 9 (f)** provides that the statement of a declarant who cannot genuinely remember the matters to be dealt with in his proposed evidence be admissible.

42 The Bar endorses the Sub Committee's apparent concern that declarants will seek to abuse this condition by feigning loss of memory. Reliability of the witness' testimony becomes dependant upon the note recorded at the time. Professional witnesses, Police officers and the like will take full advantage whereas the reliability of past recollection recorded by lay witnesses is likely to be, correspondingly, weak.

43 The likely consequence of this is that trials will merely become a paper exercise in a variety of ways. When cross-examined about some matter, the witness would be, under this proposal, able to retreat to the answer "I cannot remember anything about the topic upon which you now cross-examine me and all I can say is that what is in my statement is the truth." It may not have been an intended consequence of this proposal, but the Bar see that there are real threats to the effectiveness of cross examination in this proposal.

44 The other aspect of this which is worrying is that prosecution witnesses, such as policeman and "professional" witnesses are by their training required to write things down about what they have seen and heard and experienced at the outset. Vital witnesses for the defence may not be so trained. There is a real risk that a criminal trial will become weighted in favour of those who are more likely to get pen to paper earlier.

Threshold Reliability

45 The threshold reliability criterion is set out in **proposals 7(c), 11 and 12**.

46 Under **proposal 11**, **(see also Recommendation 26),** the criterion will be satisfied where "the circumstances provide a reasonable assurance that the statement is reliable". [19]

47 Under **proposal 12**, **(see also Recommendation 27),** the Sub-committee recommends the court determines the criterion, "having regard to all the circumstances relevant to the statement's apparent reliability", including five distinct factors:

- the nature and content of the statement, factor (a);
- the circumstances in which the statement was made, factor (b);
- any circumstances which relate to the truthfulness of the declarant, factor (c);
- any circumstances relating to the accuracy of the observations of the declarant, factor (d);
- whether the statement is supported by other admissible evidence, factor (e); and
- the absence of cross-examination of the declarant at trial. [20]

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19 Para 9.42 and 12.31

20 Paras. 9.42 - 9.52 and 12.32

48 The first four factors, **proposals 12 (a) - (d)**, arise from the criteria formulated under the New Zealand Law Commission's Code. The Bar concurs that these are standard precautionary conditions of reliability. However, the real question is what assurance do these factors provide of reliability. Many of the factors are essentially vague. Many of the factors could possible invite a circularity of reasoning *i.e.* it is reliable because I think it is reliable.

49 With the fifth factor, **proposal 12 (e)**, the Sub-Committee departs from the New Zealand Code and takes a contrary position. The Sub-Committee considers that supporting evidence can and should be considered in assessing threshold reliability. It should be noted, however, that the absence or presence of supporting evidence is not determinant in the sense that this is a prerequisite condition. [21]

50 The Sub-Committee is of the view that although supporting evidence will provide some assurance of a statement's reliability, it does not intend that the absence of such evidence should affect the determination of threshold reliability if, on the basis of other factors, the threshold has been met. This is because, "to include the absence of supporting evidence as an independent factor will inevitably lead to the undesirable consequence that hearsay is excluded after having weighed the ultimate reliability of the evidence".

51 The Bar is of the view that the inclusion of the supporting evidence factor is therefore redundant. In circumstances whereby the absence of supportive evidence is not determinative of reliability if, on the basis of other factors the

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[21] Paras. 9.48 - 9.49

threshold has been met, then it is the satisfaction of the other factors which is determinative. The Bar is of the view that relevant admissible evidence stands on its' own. The danger is that the presence of seemingly 'supporting' evidence indirectly colours and promotes the admission of hearsay evidence in circumstances whereby on the basis of other factors, the threshold might not be met. There is a real danger of circular reasoning.

52 The Bar is also of the view that a far greater stress needs to be placed on the ability of an accused person to cross-examine. It is a constitutional right and a critical incident of the right to a fair trial. Accordingly, it should not be relegated to a mere factor to be considered along with everything else. The Bar have averted to this already and need not repeat what has been said above. The Bar are firmly of the view that unless this concern is properly addressed these proposals are, for the absence of such treatment, fatally flawed. In the Canadian case of *R v Lyttle* [2004] SCC 5, it was observed that:

> *Cross-examination may often be futile and sometimes prove fatal, but it remains nonetheless a faithful friend in the pursuit of justice and an indispensable ally in the search for truth. At times, there will be no other way to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed.*

53 This quotation emphasises the real and practical forensic problem that confronts every accused when talking about the impact of the absence of cross-examination. The reality is that often you cannot point to precisely what the effect will be because you do not know until you have cross-examined. That is why, the Bar considers it is vitally important that the whole burden of this discretion should be reversed so that hearsay evidence will not

54 The factor concerning the nature of the statement and the circumstances in which it was taken is, at its kindest, elusive. Witness statements taken from a declarant by investigatory agencies are problematic. Experience suggests that there is significant danger in cases whereby the declarant is interviewed, a statement is prepared and then on another day the witness comes back and signs the statement. Unless the declarant is a person who reads the statement carefully, insists on it being accurate and re-affirms the content rather than taking the easy way and simply signing there is a danger that the contents are more interpretative than real. The collective experience of many members of the Bar is not encouraging in this regard.

55 Further, if the statement is taken early in the proceedings it may be that the real issues are not appreciated. Much depends on the competence or integrity of the statement taker. As far as competence is concerned, this includes a concern that the statement taker appreciates what is relevant and is able to ensure that all relevant information is taken down. While integrity is largely self-evident as a concern, the risk that the statement taker only takes down that which is favourable to his "side" is too real to be ignored. Also of relevance is the declarant's state of mind and relationship with the law enforcement agency. He may be anxious to avoid arrest or to extricate himself from trouble. The same criticism can be made of a variety of other statements including those taken by the legal advisers to the accused. The concern cannot be only with prosecution generated statements.

56 It is to be noted in this context that traditionally the common law regarded with less suspicion the spontaneous statement and hence the common law exception suffering from the inapt name of the *Res Gestae*. The rationale for the exception was clearly the notion that something was more likely to be reliable when it was spontaneous. Reflection on the part of a witness imports a multitude of dangers - including reflection as to self interest.

57 Factor (d) concerns circumstances concerning the accuracy of the observations of the declarant. This is too narrow. The accuracy may be there - but the context may not.

58 Recently the US Supreme Court dealt with an appeal against a conviction where a hearsay statement was admitted outside recognised common law and statutory exceptions where the sole basis for admissibility was that the statement was 'reliable'.[22] At issue was the 6th amendment to the US Constitution which provides that "*In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him*." The case involved a charge of assault. The defence was self-defence. The evidence that the prosecution sought to admit was the wife of the accused's statement to the police which, if accepted would have done damage to the defence case. (The wife was, of course, ineligible to testify against the accused. Hence the need to introduce her statement.) The statement was said to be admissible under a previous decision of the US Supreme Court which was, in the result, overruled. Scalia J for the Court observed in relation to the right to cross-examination which is plainly implied in the 6th Amendment:

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22 *Crawford v Washington* (2004) 541 US 36.

Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

The Roberts [i.e. the test being overruled by this decision] test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one. In this respect, it is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability.

59 This carries with it the implication that the proposals might be vulnerable to constitutional challenge as violating Article 14 of the ICCPR. When dealing with reliability Scalia J observed:

Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable; the nine-factor balancing test applied by the Court of Appeals below is representative. See, e.g., People v. Farrell, 34 P.3d 401, 406—407 (Colo.

2001) (eight-factor test). Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them.

He added:

The unpardonable vice of the Roberts test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.

Scalia J concluded:

Roberts' failings were on full display in the proceedings below. Sylvia Crawford made her statement while in police custody, herself a potential suspect in the case. Indeed, she had been told that whether she would be released "depend[ed] on how the investigation continues." App. 81. In response to often leading questions from police detectives, she implicated her husband in Lee's stabbing and at least arguably undermined his self-defense claim. Despite all this, the trial court admitted her statement, listing several reasons why it was reliable. In its opinion reversing, the Court of Appeals listed several other reasons why the statement was not reliable. Finally, the State Supreme Court relied exclusively on the interlocking character of the statement and disregarded every other factor the lower courts had considered. The case is thus a self-contained demonstration of Roberts' unpredictable and inconsistent application.

Each of the courts also made assumptions that cross-examination might well have undermined. The trial court, for example, stated that Sylvia Crawford's statement was reliable because she was an eyewitness with direct knowledge of the events. But Sylvia at one point told the police that

she had "shut [her] eyes and … didn't really watch" part of the fight, and that she was "in shock." App. 134. The trial court also buttressed its reliability finding by claiming that Sylvia was "being questioned by law enforcement, and, thus, the [questioner] is … neutral to her and not someone who would be inclined to advance her interests and shade her version of the truth unfavorably toward the defendant." Id., at 77. The Framers would be astounded to learn that ex parte testimony could be admitted against a criminal defendant because it was elicited by "neutral" government officers. But even if the court's assessment of the officer's motives was accurate, it says nothing about Sylvia's perception of her situation. Only cross-examination could reveal that.

We have no doubt that the courts below were acting in utmost good faith when they found reliability. The Framers, however, would not have been content to indulge this assumption. They knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people; the likes of the dread Lord Jeffreys were not yet too distant a memory. They were loath to leave too much discretion in judicial hands. By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable, and, while that might be a small concern in run-of-the-mill assault prosecutions like this one, the Framers had an eye toward politically charged cases like Raleigh's great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear. It is difficult to imagine Roberts' providing any meaningful protection in those circumstances.

60 This citation warns of the dangers involved in open-ended tests for admissibility bases on vague, imprecise and value-laden (but popular) notions such as proportionality. Even if the Scalia analysis is too extreme, it lends force to the importance of cross-examination as a right and that the current proposals fail to give appropriate weight to that right.

Issues Arising from Recommendation 2 – General Safeguards

61 The Sub-Committee 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). [23]

62 In Chapter 7, the Sub-Committee identifies and proposes a number of pre-requisite safeguards to guard against what it considers to be potentially undesirable consequences arising from the proposed reform.24

63 As a general point, the Bar has noted with concern that, notwithstanding the proposed safeguards, the key proposals are essentially dependant upon the application of a core scheme founded in the exercise of judicial discretion. Discretion, it is argued, often has a tendency to promote the antithesis of clarity and certainty in the trial process.

64 The Bar is concerned with an approach which by introducing more discretion might result in inconsistency of application. There is a concern that different judges will exercise their discretion in different ways and that this may lead to

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[23] Consultation Paper, para. 2.3, p 192

an uneven and inequitable application of the scheme. Accepting that there must be an element of discretion, however, the Bar is further concerned with the manner in which such evidence will be treated. The advantage of the current law is that, for all its faults, it is certain and, for the most part, predictable. A scheme with broad discretions may result in uncertainty: the parties to criminal proceedings will not be able to predict with certainty what the outcome in terms of admissibility will be. The Bar consider that the scope of the discretion should be reduced by making the core requirements more focused.

Recommendations 5 (and 31) – Burden & Standard of Proof

65 The sub-committee recommends that, "any reforms of the law of hearsay in criminal proceedings should apply in the same manner to both the prosecution and the defence." (**Recommendation 5**) [25]

66 The sub-committee rehearses the rationale behind this recommendation in Chapters 7 and 8. In Chapter 7, the sub-committee reports that particular consideration was given to the issue of whether different standards of admissibility should be applied where the defence, as opposed to the prosecution, seeks to introduce hearsay evidence. It was noted that the issue was considered by both the English Law Commission and Australian Law Reform Commission. 26

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24 Ibid Chapter 7 pp 80 - 82

25 Ibid para. 12.6, p 192

26 Ibid para. 7.5 p.81

67 The majority of the sub-committee was of the view that the identified safeguards render such differential unnecessary; that such a provision would run contrary to the general principle of symmetry in the trial process; and that rules of evidence should apply evenly and equally to all parties. However, a minority of the sub-committee held the view that the rules should apply with different, and more permissive, effect to the defence. [27]

68 The sub-committee concludes that burden of proving the preconditional admissibility of hearsay evidence rests with the party adducing the evidence and the standard shall be the balance of probabilities, including where the prosecution relies on aggravation for the enhancement of sentence.[28]

69 In particular, the sub-committee recommends, "that the party applying to admit hearsay evidence under the discretionary power must satisfy all the preconditions to admissibility *on a balance of probability*" (emphasis added), **(Recommendation 31)**.[29]

70 The sub-committee argues that although the question of what standard of proof should apply has rarely been addressed by other law reform agencies, they recognise that establishing whether or not particular hearsay evidence satisfies the conditions to fall within the hearsay exception does not involve the proof of matters generally decisive of guilt and that, "it is only the proof of facts that directly or circumstantially bear on the elements and particulars of the offence charged that will be decisive of guilt", (emphasis added). For this reason, the Sub-committee believes, it would be too high a standard to

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27 Ibid para. 7.6 p.81

28 Ibid paras. 9.67 - 9.68 p.136

require proof beyond a reasonable doubt of each precondition before the evidence can be admitted.

71 The Bar profoundly disagrees with this conclusion. The Bar considers that the sub-committee's proposal is both bad policy and is likely to be unconstitutional. The very nature of criminal proceedings is that the burdens and standards of proof are fundamentally asymmetrical. This is true both as to the general issue and where admissibility of evidence is concerned. Currently in determining the admissibility of statements against interest, (itself a category of hearsay evidence and one which if admitted in evidence is generally decisive of guilt), the prosecution is required to prove such a statement as voluntary beyond reasonable doubt. The Bar queries why the standard is recommended to be any lesser in relation to hearsay statements? The interest of the accused in having evidence admitted is to raise a reasonable doubt as to the case for the prosecution. It is at least anomalous that in order to have such evidence become admissible for that purpose and to that standard of proof, it would be necessary to establish the underlying facts to a higher standard of proof.

72 The sub-committee currently recommends that where the prosecution seeks to prove factual matters in support of the admission of hearsay, it must do so on the balance of probability. This is inconsistent with the standard of proof on the main issue of innocence or guilt, where it is sufficient for an accused to raise a mere doubt. If symmetry of the trial process is an objective, the Bar queries why the same standards should not apply to the admissibility of hearsay.

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[29] Ibid para. 12.36 p.195

73 The Bar noted that in cases such as *R v. Kearley*, (see below), where the Police seek to rely on surveillance evidence of telephone calls made to a particular subscriber, they have the power not only to conduct such enquiry but also to arrest, search and summon witnesses, etc. There are no corresponding powers or facilities available to an accused. The resulting "inequality of arms" is reflected in the respective standards of proof and these should not readily be abrogated. This aspect must be reconsidered.

Recommendation 29 - Third-party Confessions

74 As a precautionary measure against "manufactured confessions", the Sub-Committee recommends that exculpatory admissions by persons not party to the proceedings must be supported by "sufficient confirmatory evidence" before being admitted under the discretionary power. [30]

75 The Bar queries the creation of a higher threshold for this category of evidence. Experience dictates this type of hearsay happens only very rarely. Why is it treated differently to other forms of hearsay under the regime? This proposal on the part of the sub-committee would appear to fly in the face of cardinal principle (b).

Recommendation 30 – Notice

76 The Bar concur that rules of the Court should be required to ensure that the party applying to admit hearsay evidence gives timely and sufficient notice to the other parties of their intention. Unless properly enforced, the Bar

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[30] Para. 12.34

anticipate that, similar to the provisions under s.65B of the CPO, such requirements will be observed more in the breach than compliance.

Recommendation 33 – Discretion to Order Acquittal

77 The sub-committee provides two alternative formulations of a new power enabling the trial judge to make an order of acquittal at the close of the prosecution case where in the circumstances specified it would be unsafe to convict the accused. The first formulation has regard to the factors set out in proposal 16(b) to the consultation paper,[31] the second being modeled on section 125(1) of the Criminal Justice Act 2003.[32]

78 The Bar suggests that perhaps a more equitable solution would be to place the burden on the prosecution to justify the probity of the evidence, rather than for the accused to demonstrate it to be unsafe. In so far as it meets this end, the Bar considers the formulation under section 125(1) of the Criminal Justice Act 2003 to be the more appropriate.

Recommendations 32, 38, 39 & 40 – Treatment of Prior Consistent and Inconsistent Statements[33]

79 The Bar is concerned that the Sub-Committee appears not to have recognized the rationale for exclusion of prior consistent statements is that merely because someone has said something before or often should not be given disproportionate weight. If the current **Recommendations 39A – 39D** were adopted, there is a danger that the introduction of prior consistent statements

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31 Page 111

32 Para. 12.38

33 Para, 12.37, 12.43 – 45 pp. 196-7

by a witness for the prosecution might become a matter of routine. This would serve to reverse the current position, whereby prior consistent statements are restricted to rebuttal of allegations put in a particular way.

80 In particular, the provision at **Recommendation 39C** that prior statements of persons who cannot 'genuinely' recall the events recorded in their statement be admissible as the substantive truth, "if the witness confirms he was telling the truth when he made the statement" invites police officers and other professional witnesses to forget, as a matter of convenience, the contents.

81 **Recommendation 39E** proposes extending the common law exception in relation to 'recent complaint' to all, "victim offences and to complaints made as soon as reasonably be expected after the alleged conduct."[34]

82 The Bar queries the term "victim offences" and seeks clarification of the justification to extend the exception.

Other considerations in relation to the report

83 Although this did not form part of their terms of reference, the Sub-Committee does not appear to have given great consideration to the treatment of hearsay evidence once such evidence is admitted. If the scheme is to achieve consistent application, it is important that direction be given as to how the Court should direct the jury and/or itself in relation to the use of such evidence. Unless the reforms arrive "packaged" together with Standard Directions governing the exercise of this discretion by Judges, or the use of

[34] Para. 12.44

hearsay evidence by the Jury, then the protection previously afforded an accused might be abrogated. The Bar were therefore keen to note what instruction it is intended the jury receive when considering evidence admitted under the conditions set out in the new "Core Scheme". The Bar do not think it is acceptable simply to wave this away with the answer that this is a matter for the judges so let us all see what they come up with. On the assumption that the scheme proposed (or a variant of it) comes into operation in Hong Kong, the treatment of hearsay evidence once it is admitted seems to the Bar to be of approximately equal importance to the issues concerning whether or not to admit the evidence at all.

The case for change

84 History demonstrates that the law in relation to hearsay has developed on a fairly piecemeal basis. In times when it was open to charges to modify the common law, substantial changes were made to the law permitting exceptions to the basic hearsay rule. Over time, there have been a number of statutory changes to the law in this regard. These have proceeded on a piecemeal basis – at least in the sense that none of the changes could be characterised as an omnibus reform of the law. Generally, changes have generally proceeded on a topic-by-topic basis. This can be seen, for example, in relation to banking and commercial documents. Although Hong Kong has mirrored changes in the law of hearsay in relation to civil proceedings, this is the first time Hong Kong has considered a major change to the law of hearsay in criminal proceedings. The approach of the Hong Kong community has always been far more cautious when it comes to changes to the law in relation to criminal proceedings. Perhaps, so far as the Bar is concerned, the best explanation of

this is not so much the innate conservatism of those who practise in the area as much as the realisation that in this field we are dealing with the liberty of the subject. This proposal is not dealing with disputes between subjects but disputes between subject and the State. Amongst other things, that carries with it the implication of an approximate inequality of resources.

85 Like the sub-committee, the Bar think that doing nothing is not an acceptable option. However, if Hong Kong were to adopt this untested model, the Bar think there is a compelling case for it to be re-worked to meet the concerns that have been expressed in this paper.

Hong Kong Bar Association

4 May 2006