Extract from the minutes of the meeting of the Panel on Administration of Justice and Legal Services on 23 January 2006

X X X X X X X X X X

VII. Consultation Paper on Hearsay in Criminal Proceedings published by the Hearsay in Criminal Proceedings Sub-committee of the Law Reform Commission

(Consultation Paper on Hearsay in Criminal Proceedings published by the Hearsay in Criminal Proceedings Sub-committee

LC Paper No. CB(2)891/05-06(01) – Executive Summary of Consultation Paper on Hearsay in Criminal Proceedings

LC Paper No. CB(2)891/05-06(02) – Press release issued by the Law Reform Commission on 30 November 2005 concerning the publication of the Consultation Paper)

57. Mr Justice STOCK, Chairman of the Hearsay in Criminal Proceedings Sub-committee of the Law Reform Commission of Hong Kong, briefed members on the Core Scheme which was the Sub-committee's proposed model of reform of the law of hearsay in criminal proceedings in Hong Kong. The 16 proposals in the Core Scheme were detailed in pages 108 to 111 of the Consultation Paper on Hearsay in Criminal Proceedings published by the Sub-committee.

58. Mr Justice STOCK said that the Sub-committee noted the following concerns about the proposed Core Scheme –

(a) the Core Scheme would undermine the rule of law;

(b) it was not necessary to reform the law of hearsay in criminal proceedings in Hong Kong; and

(c) only the prosecutors and not the defendants could benefit from the implementation of the Core Scheme.

59. Mr Justice STOCK further said that the response from the Sub-committee to the above concerns was as follows –

(a) the existing hearsay law, which had been developed a long time ago, had become very complex and irrational. Reform of the law was therefore necessary. The Sub-committee had not proposed anything new but had only tried to rationalise the existing law;

Action

(b) the Sub-committee had examined the existing hearsay law in Hong Kong and identified shortcomings of the existing hearsay rule. The problems encountered by other common law jurisdictions with the hearsay rule also prevailed in Hong Kong. Details of the analysis were given in Chapter 4 of the Consultation Paper. The Sub-committee had concluded that the law was in need of reform; and

(c) Mr Gerard McCOY, Member of the Sub-committee, had prepared a summary of six cases to illustrate that the admission of hearsay evidence could assist both the prosecutors and defendants in criminal proceedings.

60. Mr Gerard McCOY briefed members on the six cases which illustrated that the admission of hearsay evidence could facilitate the upholding of justice. Mr McCOY explained that in three of those cases, the prosecutors would have benefited from the admission of hearsay evidence while in the other three cases, the innocence of the defendants could have been proved with the admission of the hearsay evidence. A summary of the cases was tabled at the meeting.

(*Post-meeting note* : The summary of the cases was issued to members vide LC Paper CB(2)980/05-06(01) after the meeting.)

Issues raised

61. Mr Andrew BRUCE of the Hong Kong Bar Association informed members that the Bar Association was still formulating its views on the Consultation Paper, and would provide its submission to the Sub-committee before the end of the consultation period. Mr BRUCE said that while the Bar Association agreed that there were good reasons to improve the existing hearsay law, it had the following concerns –

(a) the unavailability of a hearsay declarant for cross-examination, which was the right of the other party to the proceedings to challenge the accuracy of evidence;

(b) the issue of uncertainty and the risk of inconsistency in the application of the principles of admitting hearsay evidence by different courts and judges, since admission of hearsay evidence was to be determined by the court under its discretionary power; and

(c) the standard of proof imposed on parties to establish the right in producing hearsay evidence.

62. The Chairman requested the Bar Association to provide a copy of its submission to the Sub-committee for the Panel's reference in due course.

63. The Chairman said that the reform recommended by the Sub-committee was a major change to an important part of the law. While people might agree that there

Action

was a need for reform, there was concern that uncertainty and abuse might be introduced to the law on hearsay, if the rigid hearsay rule was to be removed and the court was to be given discretion to admit hearsay evidence.

64. Mr Justice STOCK responded that some members of the Sub-committee had raised similar concerns among which the right of cross-examination was the key issue. To address all these concerns, the Sub-committee had insisted that established and identified effective safeguards be devised against potentially undesirable consequences arising from admissibility of hearsay evidence.

65. Regarding the question of cross-examination, Mr Justice STOCK pointed out that exceptions could be made to the hearsay rule under the existing hearsay law. Hearsay evidence could be admitted if the court was satisfied that the evidence was reliable in the absence of cross-examination and would not affect the fairness of the proceedings. The courts in New Zealand applied tests on the admission of hearsay evidence in this respect in their model of reform. Mr Justice STOCK clarified that the Sub-committee did not intend to demean the importance of the right of cross-examination. The Sub-committee agreed that hearsay evidence should not be admitted if its admission might cause injustice to the accused.

66. Regarding the question of the court's discretionary power to admit hearsay evidence, Mr Justice STOCK said that the Sub-committee had examined a lot of options. He explained that a body of case laws would be built up so that the use of discretion would eventually be reduced.

67. Mr Alan HOO, Member of the Sub-committee, supplemented that the Sub-committee considered the right to cross-examine opposing witnesses and the right to confront one's accuser the most important rights of the defendants. The Sub-committee had insisted on the introduction of safeguards to ensure that these rights would not be impinged on by the admission of hearsay evidence. Referring to paragraph 7 of the terms of the Core Scheme in page 109 of the Consultation Paper, Mr HOO explained that hearsay evidence would only be admissible where, among other things, the conditions of necessity and threshold reliability were satisfied, and the court was satisfied that any prejudicial effect it might have on any party to the proceedings was not out of proportion to its probative value. According to paragraph 12 in page 110 of the Consultation Paper, in determining whether the threshold reliability condition had been fulfilled, the court should have regard to all circumstances relevant to the evidence's apparent reliability, including the absence of cross-examination of the declarant at trial.

68. Mr Martin LEE noted that the proposed Core Scheme was a product of the ideas and practices from different common law jurisdictions that had applied the hearsay rule in criminal proceedings. He expressed concern whether there would be inconsistency among the proposals in the Core Scheme as they were adopted from different overseas models, and whether the whole Core Scheme would function effectively.

Action

69. Mr Simon YOUNG, Member of the Sub-committee, explained that most of the proposals in the Core Scheme were formulated based on the New Zealand model of reform which in turn followed the approach of the Canadian courts. New Zealand was in the process of enacting the proposals for reform made by the New Zealand Law Commission. Mr YOUNG added that the Sub-committee had also made reference to other common law jurisdictions in formulating some of the proposals in the Core Scheme.

70. Mr Justice STOCK added that the Sub-committee had examined the strengths and weaknesses of the reform models in other jurisdictions thoroughly before formulating its recommendations on the model to be adopted in Hong Kong. He stressed that the Core Scheme was a package of proposals rather than a series of individual proposals. It was intended to be read and understood holistically.

71. Mr Martin LEE pointed out that in a lot of common law jurisdictions where Christianity was a prominent religion, people believed that to make a false oath was a sin. However, the people in Hong Kong might not take an oath so seriously, since most of them were not Christians. He expressed concern that the difference in culture might affect the effective operation of the proposed Core Scheme in Hong Kong. He also considered it more difficult to apply the principles of the admission of hearsay evidence proposed by the Sub-committee in criminal cases than in civil cases, because defendants in criminal cases were presumed to be innocent unless convicted in a court of law.

72. Referring to paragraph 2.4 in page 8 of the Consultation Paper, Mr Justice STOCK said that the Sub-committee had considered the reasons for excluding hearsay evidence, including the lack of cross-examination and the absence of an oath. He further explained that in the exceptions to the hearsay rule described in pages 19 to 22 of the Consultation Paper, hearsay evidence was admitted in the absence of cross-examination, because it was believed that the evidence was intrinsically reliable. Mr Justice STOCK reiterated that hearsay evidence would not be admissible, if witnesses were available to give evidence at trials, or unless the conditions of necessity and threshold reliability were satisfied.

73. The Chairman said that consultation on the Consultation Paper was still in progress. The Law Reform Commission would publish the final report on the outcome of the consultation exercise. The Chairman added that since the proposed reform was an important issue, it was necessary to consult the public and examine the proposals carefully.

X X X X X X X X X X