

立法會
Legislative Council

LC Paper No. CB(4)718/16-17(08)

Ref : CB4/PL/AJLS

Panel on Administration of Justice and Legal Services

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 27 March 2017**

**Measures for protecting mentally incapacitated persons
during court proceedings**

Purpose

This paper provides background information on the measures for protecting mentally incapacitated persons during court proceedings and information on the law reform relating to hearsay evidence. It also summarizes the major views and concerns expressed by members of the Panel on Administration of Justice and Legal Services ("the Panel") during previous discussions on this subject.

Background

Measures for protecting mentally incapacitated persons during court proceedings

2. According to the Administration, the Department of Justice ("DoJ") has established procedures in handling the prosecution of cases involving vulnerable witnesses.¹ "The Statement on the Treatment of Victims and Witnesses" sets out the principles and guidelines regarding how the rights of witnesses, including mentally incapacitated persons ("MIPs"), should be protected, e.g. where justified, prosecutors should make appropriate applications to the court to enable witnesses to give evidence outside the courtroom through a televised link to the courtroom,

¹ Source: DoJ's press release on "Statement by DoJ on decision to withdraw prosecution" issued on 27 October 2016.

and admission of video-recorded interviews as evidence-in-chief of witnesses who are MIPs.

Consultations on hearsay in criminal proceedings

3. According to the Law Reform Commission ("LRC")², 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' ". Under the existing law, hearsay evidence is inadmissible in criminal proceedings unless it falls within one of a number of common law or statutory exceptions. The principal justification for the exclusion of hearsay is that, since the evidence is presented to the court second-hand by someone other than the original statement-maker, there is no opportunity for the other side to test the reliability of the evidence by cross-examining the original statement-maker as to what was actually said.

4. The LRC released a consultation paper on hearsay in criminal proceedings in 2005, proposing that the existing rule which prohibits the admission of hearsay evidence in criminal proceedings should be reformed and that the court should be given the discretion to admit hearsay evidence where it is satisfied the admission of that evidence is "necessary" and the evidence "reliable".

5. A total of 39 responses to the consultation paper were received. The majority of respondents agreed that there was a need for reform of the law of criminal hearsay in Hong Kong, albeit views differed on the nature and extent of reform required. Having considered the responses received, the LRC published the Report on Hearsay in Criminal Proceedings ("the Report") in November 2009.

6. In respect of the recommendations in the Report published in November 2009, DoJ takes prosecution against cases involving MIPs seriously. According to DoJ,¹ it will be helpful in avoiding the situation where prosecution cannot proceed/continue to proceed as a result of a MIP not being able to appear in court to give evidence if the law reform can be implemented. The protection of rights and interests of persons with disabilities would be further enhanced.

² LC Paper No. CB(2)891/05-06(02)

Recommendations made by the LRC in the Report

7. The Report sets out 42 recommendations and 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. A Core Scheme is recommended to be adopted as a whole as the major vehicle for reforming the law of hearsay in criminal proceedings. (Please refer to **Appendix I** for details.)

8. The Report recommends that, as a general rule, the present rule against the admission of hearsay evidence should be retained but there should be greater scope to admit hearsay evidence in specific circumstances. Hearsay evidence should be admissible:

- (a) if it falls within an existing statutory exception;
- (b) if it falls within one of several common law exceptions to be preserved;
- (c) if the parties agree; or
- (d) if the court is satisfied that it is "necessary" to admit the hearsay evidence and that it is "reliable".

9. The admission of hearsay will be "necessary" only in certain specified circumstances, such as where the declarant is dead, or cannot be found, or refuses to testify on the ground of self-incrimination. The party applying to admit hearsay evidence under the discretionary power must prove the condition of necessity to the required standard of proof, which will be "beyond reasonable doubt" if the party applying is the prosecution, and "on a balance of probabilities" if the party applying is the defence.

10. In determining whether the evidence is "reliable" for the purposes of admission, the court must have regard to all circumstances relevant to the apparent reliability of the statement, including the nature and contents of the statement, the circumstances in which it was made, and factors that relate to the truthfulness of the declarant. Hearsay evidence will not be admitted unless its probative value exceeds its prejudicial effect.

11. The Report also stresses 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.

The Government responses to the Report

12. The Prosecutions Division of DoJ was generally supportive of most of the recommendations and proposals in the Report and a team was set up within the DoJ to consider implementation of the Report. Furthermore, a half-day legal discussion about the Report with the two legal professional bodies and other stakeholders was held in May 2012 so as to solicit views on the reform as proposed in the Report.

Major views raised at the Panel meetings

13. Major views and concerns expressed by members and the Hong Kong Bar Association ("the Bar Association") at the meetings of the Panel on 23 January 2006 and 23 April 2012 regarding the LRC's recommendations in reforming the hearsay rule are summarized below.

Views of the Bar Association

14. At the Panel meeting on 23 April 2012, the Bar Association stated its view that as defence counsel, their duty was to cross-examine witnesses to ensure a fair trial for the accused. They raised the following concerns of members of the Bar Association:

- (a) unavailability of a hearsay declarant for cross-examination of witnesses, which was the right of the other party to the proceedings to challenge the accuracy of evidence;
- (b) admission of hearsay evidence might complicate and create uncertainties for the criminal proceedings and thereby put the unprepared defendants at a disadvantaged position and would undermine the defence counsel's ability to defend the case;
- (c) the proposed discretionary power vested in the court to admit hearsay in prescribed circumstances in meeting the necessity and threshold reliability criteria might run the risk of producing inconsistent results;

- (d) the condition of necessity was considered beneficial to the prosecution in particular where a witness in favour of the prosecution could not be located, which would easily satisfy the condition as specified in item (d) of proposal 8 of the Core Scheme; and
- (e) adequate safeguards should be put in place to ensure the rights of the public who were charged with criminal offences, including different standards of proof should be imposed on parties to establish the right in producing hearsay evidence, since it was the nature of criminal proceedings that the burdens and standards of proof of different parties were fundamentally asymmetrical.

Standard of proof and safeguards

15. Having regard to the Bar Association's concern mentioned in paragraph (e) above, the LRC revised its original proposal and proposed in its Report that in the case of the prosecution, the standard of proof was beyond reasonable doubt while in the case of the defence, the standard was on the balance of probabilities.

16. In reply to a member's enquiry about the situation where the prosecution's case against the defendant was wholly based on hearsay evidence or otherwise the facts of the case could not be established, the Bar Association was of the view that criminal proceedings should not be instituted solely based on hearsay evidence on the ground that its admissibility would be subject to the discretion of the court, and other supporting evidence for prosecution should also be available.

17. The Administration further advised that hearsay evidence could be of critical importance in considering whether there was sufficient evidence to institute the criminal proceeding. This was also the case for confession statement of the accused which might be the main evidence for prosecution albeit its admissibility would be decided by the court.

18. A representative of the Bar Association considered that there was a mechanism in place regarding the admissibility of confession statements in criminal proceedings to ensure voluntariness of confessions; for admission of hearsay evidence, adequate safeguards should be put in place to ensure the rights of the public who were charged with criminal offences. The Bar Association also held the view that there was a clear difference between relying solely on hearsay evidence to prove the guilt

of a defendant and relying on the defendant's own admission statement as the main evidence.

19. As regard the safeguards in relation to the admission of hearsay evidence, the Administration pointed out that according to proposal 15 of the Core Scheme, the court shall direct the acquittal of an accused against whom such evidence had been admitted under the terms of the proposals where the judge considered that it would be unsafe to convict the accused. A representative of the Bar Association expressed concern that once the court was convinced that the hearsay statement was both necessary and reliable according to proposal 7 of the Core Scheme, and in the absence of an opportunity to have the hearsay statement cross-examined, it was unlikely that the court would consider, at the end of the trial, that a conviction of the accused would be unsafe.

20. A member expressed concern at the Panel meeting on 23 January 2006 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. The LRC noted all these concerns among which the right of cross-examination was the key issue.

21. The LRC 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 LRC clarified that it did not intend to demean the importance of the right of cross-examination. The right to cross-examine opposing witnesses and the right to confront one's accuser were the most important rights of the defendants. The LRC insisted on the introduction of safeguards to ensure that these rights would not be impinged on by the admission of hearsay evidence. The LRC assured members 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 were not out of proportion to its probative value.

Core Scheme

22. At the Panel meeting on 23 January 2006, a member was concerned 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. The LRC replied 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. The LRC 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.

23. A member noted 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. In the light of this, the member was concerned that the difference in culture might affect the effective operation of the proposed Core Scheme in Hong Kong, as most of the Hong Kong people were not Christians and they might not take an oath so seriously. The LRC explained that it had considered the reasons for excluding hearsay evidence, including the lack of cross-examination and the absence of an oath. In the exceptions to the hearsay rule described in the consultation paper released in 2005, hearsay evidence was admitted in the absence of cross-examination, because it was believed that the evidence was intrinsically reliable. The LRC 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.

Recent developments

24. The Administration will brief members at the meeting to be held on 27 March 2017 on the measures adopted by the prosecutions for protecting MIPs in criminal proceedings as well as the working draft bill to be released for consultation for the implementation of the recommendations of LRC's Report.

Relevant papers

25. A list of relevant papers is in the **Appendix II**.

Council Business Division 4
Legislative Council Secretariat
22 March 2017

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 proceedings to prove the truth of its content; 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 criminal proceedings 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 or common enterprise or conspiracy;
 - (c) expert opinion evidence;
 - (d) evidence admissible upon application for bail;
 - (e) evidence admissible in sentencing proceedings, except when the prosecution is relying on hearsay evidence to prove an aggravating factor;
 - (f) public information;
 - (g) reputation as to character;
 - (h) reputation or family tradition;
 - (i) *res gestae*; and
 - (j) admissions by agents.
6.
 - (a) Hearsay evidence shall be admitted where each party in relation to whom the evidence is to be adduced agrees to its admission for the purposes of those proceedings.
 - (b) An agreement under this proposal may with the leave of the court be withdrawn in the proceedings for the purposes of which it is made.
7. Hearsay evidence not admitted under proposals 4, 5 or 6 is admissible only where:

- (a) the declarant is identified to the court's satisfaction;
- (b) oral evidence given in the proceedings by the declarant would be admissible of that matter;
- (c) the conditions of
 - (i) necessity and
 - (ii) threshold reliabilitystipulated in proposals 8 to 12 below are satisfied; and
- (d) the court is satisfied that the probative value of the evidence is greater than any prejudicial effect it may have on any party to the proceedings.

8. 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 age or 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;
- (d) where the declarant cannot be found and it is shown that all reasonable steps have been taken to find him; or
- (e) where the declarant refuses to give evidence in circumstances where the declarant would be entitled to refuse to testify on the ground of self-incrimination.

9. 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.

10. The burden of proving the condition of necessity is on the party applying to admit the hearsay evidence. In the case of the prosecution, the standard of proof is beyond reasonable doubt, and in the case of the defence, the standard is on the balance of probabilities.

11. The condition of threshold reliability will be satisfied where the circumstances provide a reasonable assurance that the statement is reliable.

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; and

- (e) whether the statement is supported by other admissible evidence.

13. Rules of court are to be made that a party give notice of his intention to adduce hearsay evidence under proposal 7; 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.
14. Where in any proceedings 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.
15.
 - (a) At the conclusion of the case for the prosecution, or at any time thereafter, in any proceedings in which hearsay evidence is admitted under proposal 7 of the Core Scheme, the court shall 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 15(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 reaching its decision 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; and
 - (v) any prejudice to an accused which may eventuate consequent upon the admission of such evidence.

Appendix II

Measures for protecting mentally incapacitated persons during court proceedings

List of relevant papers

| Date of meeting | Meeting | Minutes/Paper | LC Paper No. |
|-----------------|---|--|--|
| 23.1.2006 | Panel on Administration of Justice and Legal Services | Executive Summary of Consultation Paper on Hearsay in Criminal Proceedings | CB(2)891/05-06(01) http://www.legco.gov.hk/yr05-06/english/panels/ajls/papers/aj0123cb2-891-1e.pdf |
| | | Press release issued by the Law Reform Commission on 30 November 2005 concerning the publication of the Consultation Paper | CB(2)891/05-06(02) http://www.legco.gov.hk/yr05-06/english/panels/ajls/papers/aj0123cb2-891-2e.pdf |
| | | Minutes of meeting | CB(2)1491/05-06 http://www.legco.gov.hk/yr05-06/english/panels/ajls/minutes/aj060123.pdf |
| 23.4.2012 | | Administration's paper on "LRC Report on Hearsay in Criminal Proceedings" | CB(2)1729/11-12(01) http://www.legco.gov.hk/yr11-12/english/panels/ajls/papers/aj0423cb2-1729-1-e.pdf |
| | | Minutes of meeting | CB(2)2856/11-12 http://www.legco.gov.hk/yr11-12/english/panels/ajls/minutes/aj20120423.pdf |