LETTERHEAD OF City University of Hong Kong

2 September 1998

Mrs Percy Ma
Clerk to Bills Committee
Legislative Council Building
8 Jackson Road, Central
Hong Kong

Dear Mrs Ma

Bills Committee on Evidence (Amendment) Bill 1998

Thank you for your letter of 30 July 1998, asking for our views on the Evidence (Amendment) Bill 1998.

I am pleased to enclose the comments prepared by Mr Tony Upham and Mr Francis Burkett, both Associate Professors of our Law School, for the Bills Committee's consideration. Mr Upham and Mr Burkett are available to meet the Committee on 17 September 1998. Their contact numbers are 27887672 and 27887233 respectively.

Yours sincerely

Mr David Smith
Acting Dean
School of Law
DS/EC/0109???

Enc

cc Mr Tony Upham
Mr Francis Burkett

We are both in agreement that, as set out in Chapter 6.1 Law Reform Commission's Report on Hearsay Rule in Civil Proceedings:

> *"Subject to safeguards, in civil proceedings whether held with or without a jury, evidence should not be excluded on the ground that it is hearsay and that both first-hand hearsay and multiple hearsay should be admissible."*

In our experience as practitioners of law and as teachers of law we concur that the Civil Evidence Acts 1968 and 1972 and Parts IV and V of the Evidence Ordinance (which bring the provisions of those Acts into the law of Hong Kong) are unwieldy and unnecessarily complex.

If the test of admissibility of evidence is its relevance to the issues in the particular case then, where the trial is before a professional judge, there is a strong case for allowing into the trial any evidence which is relevant and thereby assists in the determination of that issue.. The judge is able to assess the appropriate weight to be given to it. As the Report stresses, most civil trials will be before a judge.

Nevertheless it must be desirable that the nature of any evidence to be adduced should be categorised (e.g. as hearsay) at as early a stage of the litigation as possible. This not only would assist the court (and thereby save time and costs) but also allow the litigants to make an early assessment of the strengths/weaknesses of their cases.

The Bill does not stipulate any point in the litigation at which this categorisation process should be done. It is an essential process given the desirability of allowing a party to have the maker of a hearsay statement available for cross-examination. The LRC considered this a necessary provision in the 'local context' (5.40) and hence s.48 of the Bill. In respect of the problem of categorisation the LRC envisages (5.35) this process being first formally undertaken before the listing judge (a comparatively late stage in the litigation process). The LRC therefore acknowledges the need for a categorisation process. It gives as the basis for dispensing with a notice procedure the proposed practice of asking at the setting down hearing whether makers of disclosed (in exchanged witness statements) hearsay will be required to give evidence. We see potential problems in this solution in respect of documentary hearsay. More importantly, for simply practical reasons we see considerable advantage to be gained by requiring practitioners to address their minds to this question at an earlier stage as would be necessitated by a notice procedure. In any event, the LRC recognised that some cases will benefit from an informal arrangement between the parties for notice, i.e a categorisation process (5.36 & 5.37). This assumes a degree of co-operation and judgment which may not exist throughout the profession. If it does not exist universally then it is

desirable that there be a legislative requirement for it. We do not believe that a possible penalty in costs will ensure the co-operation and judgment which is assumed. Indeed, the LRC recognises that costs sanctions are ineffective in the interlocutory context, they being reduced to insignificance in the overall costs of the action (5.40).

Significantly, the English Legislature resolved the problem with the simple provisions of s. 2 of the Civil Evidence Act, 1995 (requiring notice of reliance on hearsay evidence and particulars of it when requested; parties being able to exclude its provisions by agreement; a costs sanction for failure to comply). Its provisions create a duty to categorise whilst reserving to the parties the option of waiving the notice procedure. If after waiver consequential costs are incurred then they can justifiably be bome by the parties responsible. This must lead to a more consistent approach within the profession than can be expected from the 'informal arrangements' contemplated by the LRC. A consistent approach must be in the public interest.

Recognition by the LRC of 'trial by ambush' raises a very strong case for requiring advance notices of the intended use of hearsay. A notice procedure would, we feel, make it far easier for judges to sanction lawyers who allow themselves to be party to such practices which would anyway be reduced by the procedure.

Francis Burkett Anthony Upham