

THE LAW REFORM COMMISSION OF HONG KONG

CONSULTATION PAPER ON

**THE PROCEDURE GOVERNING THE ADMISSIBILITY
OF CONFESSION STATEMENTS
IN CRIMINAL PROCEEDINGS**

This consultation paper can be found on the Internet at <http://www.info.gov.hk> during the consultation period.

Mr Peter Kwok Bun SIT, Government Counsel, was principally responsible for the writing of this consultation paper.

This Consultation Paper has been prepared by the Law Reform Commission. It does not represent the final views of the Law Reform Commission, and is circulated for comment and criticism only.

The Law Reform Commission would welcome submissions on the proposals contained in this Consultation Paper. You are invited to make your views known to the Law Reform Commission, in writing, by 28 February 1999. All correspondence should be addressed to :

*The Secretary
The Law Reform Commission
20th Floor, Harcourt House
39 Gloucester Road
Wanchai
Hong Kong*

Phone: (852) 2528-0472

Fax : (852) 2865 2902

E-mail address: reform@justice.gcn.gov.hk

It may be helpful for the Commission, either in discussion with others or in any subsequent report, to be able to refer to and attribute comments submitted in response to this Consultation Paper. Any request to treat all or part of a response in confidence will, of course, be respected, but if no such request is made, the Commission will assume that the response is not intended to be confidential.

Anyone who responds to this consultation paper will be acknowledged by name in the subsequent report. If an acknowledgement is not desired, please indicate so in your response.

THE LAW REFORM COMMISSION OF HONG KONG
CONSULTATION PAPER ON
THE PROCEDURE GOVERNING THE ADMISSIBILITY
OF CONFESSION STATEMENTS
IN CRIMINAL PROCEEDINGS

CONTENTS

Chapter

Introduction

Background
Video recording of interviews
A re-examination of procedural reform

1. Procedures governing the admissibility of admissions and confessions: the “*voir dire*” and the “alternative procedure”

A definition of “voluntariness”
The court’s residual discretionary power
The admissibility of a confession and the “*voir dire*” procedure
The admissibility of a confession and the “alternative procedure”

2. Comparative study of law and practice in other jurisdictions

Introduction
Australia
Canada
England and Wales
Malaysia
New Zealand
Scotland
Singapore
South Africa

3. Options for reform

Reasons for reform

Arguments in favour of continued use of the *voir dire*

Options for reform

Option A - Granting the court a discretion to direct that the question of admissibility be dealt with in the presence of the jury

Option B - Making the determination of the issue of admissibility of confession statements a matter for the jury in all cases

Option C - Granting the court a discretion to direct that the question of admissibility be dealt with in the presence of the jury, coupled with a lowering of the standard of proof for determining voluntariness to that of civil proceedings

Changing the standard of proof

Conclusion

Introduction

1. This consultation paper seeks comment on a number of options for reform of the way in which the admissibility of confession statements is determined in criminal cases. Specifically, it endeavours to identify ways to reduce the extensive time and resources devoted in jury trials to the hearing of evidence at a “trial within a trial” (or *voir dire*, as it is termed by lawyers) as to whether or not a confession statement was made voluntarily. It must be stressed at the outset that this paper is concerned only with that narrow compass of procedural reform, and does not attempt to examine substantive matters of law, or the procedures for taking statements from accused persons.

Background

2. In October 1985, in response to concerns as to the amount of court time which was devoted to the hearing of objections in criminal trials to the admissibility of statements taken by the police from accused persons, the Law Reform Commission published its *Report on Confession Statements and their Admissibility in Criminal Proceedings* (the Report).

3. The Report made a wide range of recommendations for reform, covering both substantive law and procedural matters. The Report looked not only at the procedure adopted in court for determining the admissibility of confession statements, but also at the practice adopted in the taking of such statements. Among the Report's recommendations was the establishment of a clear framework for the taking of confession statements from suspects. In addition, the Report recommended that, when the prosecution might wish to adduce at any subsequent trial evidence of a statement made by the accused, the accused should be brought before a Justice of the Peace within 24 hours of being charged, where he would be given the opportunity to raise any complaint as to his treatment since arrest. The record of the JP's interview would be tape recorded and would be admissible at trial. The purpose of the proposed scheme was to provide an early opportunity for the accused to raise any complaint of police impropriety, and so to enable its prompt investigation, and to discourage objections to the admissibility of a confession statement being first raised at trial.

4. It was always the Commission's stated intention that the proposals put forward in the Report should be treated as a package, and that one part of the scheme should not be implemented in the absence of another. Taken together, the Commission believed that the Report's recommendations would significantly reduce the amount of court time devoted to *voir dire* hearings, by reducing the frequency of objections to the admissibility of confession statements. In the event, the Administration rejected the Commission's recommendations. However, many of the Report's recommendations are in fact reflected in the *Rules and Directions For the*

*Questioning of Suspects And The Taking of Statements (the Rules and Directions)*¹ which were promulgated by the then Secretary for Security in October 1992 for the purpose of providing clear guidelines on the questioning and taking of statements from suspects by members of the Hong Kong Police Force, the Customs and Excise Department, the Immigration Department and the Independent Commission Against Corruption.

Video recording of interviews

5. A further significant development since the publication of the earlier Report has been the increasing use of video recording in the taking of statements from accused persons. The reasonable expectation would be that the use of such facilities would lead to a significant reduction in the number of objections taken at trial to the admissibility of confession statements. This would in turn reduce the amount of court time to be devoted to the hearing of objections to the admissibility of statements taken from accused persons.

6. The Independent Commission Against Corruption (ICAC) first began experiments with the videotaping of interviews in March 1989. In 1991, the video system became the established method of interviewing suspects, and progressively more interviewing facilities were made available. Since 1997, virtually all interviews have been conducted with the use of video. The number of *voir dire* hearings which have arisen from video recorded interviews are shown in Table 1 below, while Table 2 shows the equivalent figures arising from interviews recorded in writing over the same period.

Table 1 - No of *voir dices* arising from video recorded ICAC interviews

	1991	1992	1993	1994	1995	1996	1997
(a) Persons prosecuted	91	183	460	294	311	368	267
(b) No. of pleas of Not Guilty	42	79	83	129	145	211	159
(c) b as % of a	46.2%	43.2%	18%	43.9%	49.6%	57.3%	59.6%
(d) No. of <i>voir dices</i>	5	9	22	18	28	35	29
(e) d as % of b	11.9%	11.4%	26.5%	14%	19.3%	16.6%	18.2%
(f) No. admitted as evidence	4	9	17	15	20	10	23
(g) f as % of d	80%	100%	77.3%	83.3%	71.4%	28.6%	79.3%

¹ Published in Special Supplement No. 5 to the Hong Kong Government Gazette, 2 October 1992

Table 2 - No of *voir dires* arising from written records of ICAC interviews

	1991	1992	1993	1994	1995	1996	1997
(a) Persons prosecuted	8	12	89	13	55	69	-
(b) No. of pleas of Not Guilty	8	9	11	4	15	22	-
(c) b as % of a	100%	75%	12.4%	30.8%	27.3%	31.9%	-
(d) No. of <i>voir dires</i>	3	1	2	2	1	-	-
(e) d as % of b	37.5%	11.1%	18.2%	50%	6.7%	-	-
(f) No. admitted as evidence	1	0	2	2	1	-	-
(g) f as % of d	33.3%	0%	100%	100%	100%	-	-

7. The ICAC “are absolutely convinced that [videotaping] is the fairest and most equitable means of recording interviews of suspects by law enforcement officers.”² They point out that its advantages include the fact that “it is very difficult to dispute the actual content of an interview when the interview is recorded on videotape, and the lack of opportunity for suspects to make unfounded allegations - criminal or otherwise - against law enforcement officers in respect of the actual interviews.”

8. Videotaping of interviews by the Police was first introduced in 1993. There are currently 10 Video Interview Rooms to interview persons whose cases are likely to be heard in the District Court or the Court of First Instance of the High Court, and a total of 60 are planned by October 1998, with each major police station to be provided with at least one such facility. Table 3 shows a comparison between the rates of challenge to videotaped and non-videotaped interviews by the Police.

Table 3 - Comparison of challenges in court to videotaped and non-videotaped Police interviews in 1997³

	High Court	District Court
(a) Persons charged (Not all persons charged are interviewed)	542	1966
(b) Videotaped interviews	169	151
(c) b as % of a	31%	7.7%
(d) Non-videotaped interviews	346	1414
(e) d as % of a	63.9%	72%
(f) Videotaped interviews challenged	26	18
(g) f as % of b	15%	12%
(h) Non-videotaped interviews challenged	115	496
(i) h as % of d	33%	35%
(j) Videotaped interviews not admitted into evidence	7	3
	High Court	District Court
(k) j as % of b	4%	2%

² Extract from a letter to the Secretary to the Law Reform Commission of 5 August 1998. The Commission is indebted to the ICAC for providing the statistical data contained in Tables 1 and 2.

³ From information provided in a letter from the Police to the Secretary to the Law Reform Commission of 10 July 1998, for which the Commission is grateful.

(l) Non-videotaped interviews not admitted into evidence	43	116
(m) l as % of d	12%	8%

9. It is clear from both the ICAC and Police experience that the use of videotape has proved effective in reducing the number of challenges to the admissibility of confession statements, and that where objection is raised there is less likelihood that the statement will subsequently be rejected where the interview has been videotaped.

A re-examination of procedural reform

10. While the changes which have been introduced in respect of the questioning of suspects have had some impact on the frequency of *voir dire* proceedings, the problem remains that substantial court time has to be devoted to the hearing of objections to the admissibility of confession statements.

11. In a letter to the Secretary of the Commission of 12 January 1998, Mr Justice Litton suggested that it would be timely for the Commission to re-examine the issue of admissibility of confession statements afresh. He pointed out that criminal trial judges hold the view that the process by which the question of admissibility of confession statements is considered separate from evidential weight is unsatisfactory. This is particularly so in jury trials. Much court time is at present spent by the judge sitting alone hearing the witnesses in a *voir dire* to determine admissibility, only to have the same witnesses called over again before the jury to consider the question of evidential weight, once the confession statement is admitted.

12. In the light of Mr Justice Litton's letter, the Commission considered at its meetings in April and June 1998 the existing procedure for the admission of confessions statements in criminal proceedings and examined the approach adopted in a number of overseas jurisdictions. They concluded that the procedural aspects of the determination of the admissibility of confession statements at trial should be re-examined. This consultation paper is the result. It endeavours to set out in Chapter 1 as background information the existing law and procedures that govern the admissibility of confession statements; examines in Chapter 2 the relevant procedures adopted by a number of overseas jurisdictions, and in Chapter 3 presents a number of possible options, with their respective advantages and disadvantages, for procedural reform. It should be stressed at the outset that this paper confines itself to the procedural question as to how the admissibility of confession statements is determined at trial, and does not venture into matters of substantive law, or of the procedures to be adopted for the questioning of suspects by law enforcement agencies.

13. At this stage, the Commission has reached no firm view as to which of these options should be pursued, and the present paper is issued to provoke public discussion on the issues raised. The Commission welcomes views on this paper and the options for reform it presents.

Chapter 1 - Procedures governing the admissibility of admissions and confessions: the “*voir dire*” and the “alternative procedure”

1.1 The nature of confession statements is set out in a chapter entitled “*A Layman’s Introduction to the Admissibility of Confession Statements*” in the Commission’s earlier Report:⁴

“When, in the course of an investigation into a criminal offence, a suspect has made a statement to the police tending to show that he has committed that offence, the statement is known as a confession. If the suspect is subsequently charged with committing the offence, the prosecution may wish to use that statement as evidence in support of its case against the defendant. However, before the prosecution can use that statement as evidence against a defendant who objects to it being put in evidence, the trial judge has to decide whether to allow the prosecution to do so, or, as lawyers would say, the trial judge has to rule whether the statement is admissible in evidence. In order to be able to rule that the confession is admissible, the judge has to be satisfied that the confession was made by the defendant voluntarily. He decides that question after hearing evidence from witnesses about the circumstances in which the defendant made the confession. If, after hearing that evidence, the judge is not entirely satisfied that the confession was made voluntarily, he has to rule that the confession is inadmissible in evidence. The prosecution cannot use it as evidence against the defendant, and what may be a very important part of its case against him is lost.”

1.2 In a strict sense, the words “admission” and “confession” are slightly different in meaning. However, the law relating to their admissibility in evidence is the same⁵ and for the purposes of this paper we use the term “confession” to include an admission.

1.3 In essence, a confession can be made in writing or orally by a suspect to a “person in authority”.⁶ The content of this statement can be either partially or wholly incriminating implicating the suspect in the offence(s) subsequently laid against him. In certain circumstances, the gesture, action, conduct, demeanour (or, indeed, any reaction) of a suspect in the face of questions put to him could also amount to a confession.

⁴ At page 4.

⁵ Bruce and McCoy, *Criminal Evidence in Hong Kong* (Issue 3, 1996), at paragraph A[1] of Division V, at V1. According to Bruce and McCoy, the words admission and confession are often treated as having a slightly different meaning. “Confession” is often treated as a full and detailed admission.

⁶ Persons in authority include employers, persons arresting the suspect, police and other investigating officer etc.

1.4 In a trial, the prosecution might wish to adduce a confession as evidence of the guilt of an accused. In general, a confession can only be admitted in evidence if the trial judge is of the opinion that the statement has been obtained from the accused “voluntarily” .

A definition of “voluntariness”

1.5 It is a fundamental principle that for a confession to be admitted as evidence for the jury’s consideration, the trial judge must be sure, or be satisfied beyond reasonable doubt in a trial within a trial (known by lawyers as a *voir dire*), that the confession was made “voluntarily” by the defendant.

1.6 In *Ibrahim v R*, Lord Sumner defined the concept of “voluntariness” as follows:

“It has long been established as a positive rule of English Criminal law, that no statement by the accused is admissible against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.”⁷

1.7 This definition of Lord Sumner was followed by the House of Lords in *Commissioners of Customs & Excise v Harz & Power*⁸ and *DPP v Ping Lin*.⁹ In *R v Sang*,¹⁰ Lord Salmon held that a confession obtained as a result of threats or promises would be unfair to the accused. A confession statement obtained in such a way would be inadmissible as evidence.

1.8 These judicial decisions are followed in Hong Kong and it is clear that “a statement is involuntary, and so inadmissible, if it was obtained by threats, promises, oppression or ‘deception’ ”.¹¹

1.9 The test for “voluntariness” set out in the line of authorities quoted above is reflected in the Rules and Directions. Note (e) to the Rules and Directions provides as follows:

“... it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.”

1.10 In short, a confession obtained by force, threat of force, hope of advantage or oppression exercised or held out by a person in authority such as a

⁷ [1914] AC 559, at 609.

⁸ [1967] 1 AC 760.

⁹ [1976] AC 574.

¹⁰ [1980] AC 402, at 445.

¹¹ Bruce and McCoy, *Criminal Evidence in Hong Kong* (Issue 3, 1996), at paragraph V [202] of Division V, at V73.

police officer involved in the investigation or the interview of a suspect will render the statement inadmissible.

The court's residual discretionary power

1.11 Even where a confession is voluntarily made, a trial judge may exercise his residual discretionary power to refuse to admit the confession if he is of the opinion that on all the evidence before him, or in the light of all the material circumstances, it would be unfair to the defendant to admit the confession in evidence. In *R v Sang*, Lord Diplock explained how this discretion should be exercised:

*“ So I would hold that there has now developed a general rule of practice whereby in a trial by jury the judge has a discretion to exclude evidence which, though technically admissible, would probably have a prejudicial influence on the minds of the jury, which would be out of proportion to its true evidential value.”*¹²

1.12 In the same judgment, however, Lord Diplock held that this discretion should seldom be exercised:

*“ ... the function of the judge at a criminal trial as respects the admissibility of evidence is to ensure that the accused has a fair trial according to law. It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. If it was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with. What the judge at the trial is concerned with is not how the evidence sought to be adduced by the prosecution has been obtained, but with how it is used by the prosecution at the trial. A fair trial according to law involves ... that there should be excluded from the jury information about the accused which is likely to have an influence on their minds prejudicial to the accused which is out of proportion to the true probative value of admissible evidence conveying that information.”*¹³

He went on:

*“ ... the fairness of a trial according to law is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted. However much the judge may dislike the way in which a particular piece of evidence was obtained before proceedings were commenced, if it is admissible evidence probative of the accused's guilt it is no part of his judicial function to exclude it for this reason.”*¹⁴

¹² [1980] AC 402, at 434, 435.

¹³ *Ibid*, at 436,437

¹⁴ *Ibid*, at 436, 437.

1.13 The principle that such a residual discretion of the judge should be sparingly used was again restated in *R v Lam Yip-ying*:

*“The power to exclude confessions on the ground of unfairness should seldom be employed. First, because it involves the judge in withdrawing relevant and admissible evidence from the jury, whose function it is to weigh such evidence. Secondly, because in almost all cases, the kind of conduct which would constitute ‘unfairness’ should already have excluded the confession as involuntary.”*¹⁵

1.14 Although a breach of the various provisions of the Rules and Directions would not automatically lead to the exclusion of a confession (as the Rules and Directions are rules of practice for the guidance of law enforcement officers, rather than rules of law), that breach might be a factor to be considered by the trial judge in any exercise of his discretion to exclude the confession on the grounds that its prejudicial effect outweighed its probative value.

The admissibility of a confession and the “voir dire” procedure

1.15 We turn now to consider the relevant procedure currently adopted in the Court of First Instance of the High Court where an accused is tried by a judge and a jury. Where the prosecution has indicated its intention to produce a confession in evidence, it is the duty of the prosecution to prove beyond reasonable doubt that the confession was obtained voluntarily. In *R v CHU Chi-kwong*, it was held that:

*“... the burden of proof lay throughout on the prosecution to prove that the alleged confession was voluntary; and it was open to an accused, even where the accused denied making any confession, to ask the trial judge to rule (either in a voir dire or during the trial) on the admissibility of the alleged confession.”*¹⁶

1.16 In the case where the admissibility of the confession statement is not objected to or challenged by the defence, the statement would generally be admitted once the relevant prosecution witness, usually the statement taker, has testified to the voluntariness of the statement. The usual ground for objection by the defence is that the statement was obtained involuntarily from the accused. The question of whether or not the statement is admissible is a question of law, and as such must be decided by the judge, rather than by the jury, who are masters of fact. Admissibility is normally determined in the absence of the jury following a *voir dire*, and this procedure is outlined in the Commission’s earlier Report:

“Where a criminal trial is being conducted before a jury and the judge has to decide whether a confession is admissible, he hears evidence on the matter and makes his ruling normally in the absence of the jury. When that question is about to arise in the course of the trial, the judge, at the request or with the consent of the defence, asks the jury to withdraw and to remain out of court until he has made his ruling. If,

¹⁵ [1984] HKLR 419, at 424.

¹⁶ [1995] 1 HKCLR 327, at 327.

after hearing the evidence on the matter, the judge rules that the confession is admissible, the jury is asked to return to court and the confession is put before them for their consideration as part of the evidence against the defendant. If on the other hand the judge rules that the confession is inadmissible, the jury, on their return to court, is not told anything about a confession having been made by the defendant. The judge has ruled that the confession cannot be used in evidence so the jury cannot be allowed to consider it or even know that a confession was made. Lawyers call that part of the proceedings when the jury is out of court ' a trial within a trial' or ' a voir dire' .”¹⁷

1.17 The practice was summarised by the Privy Council in *Ajodha v The State (P.C.)*:

“In a simple case, where the sole issue is whether the statement, admittedly made by the accused, was voluntary or not, it is a commonplace that the judge first decides that issue himself, having heard evidence on the voir dire, normally in the absence of the jury. If he rules in favour of admissibility, the jury will then normally hear exactly the same evidence and decide essentially the same issue albeit not as a test of admissibility but as a criterion of the weight and value, if any, of the statement as evidence of the guilt of the accused.”¹⁸

1.18 Thus, when the admissibility of a confession is challenged or objected to by the defence, the prosecution must adduce evidence by calling witnesses to testify as to the circumstances leading to the giving of the confession statement. On hearing all the evidence relating to the circumstances in which the defendant made the confession, the trial judge can proceed to rule on the admissibility of the confession. As explained earlier, a confession will be ruled inadmissible if the trial judge is of the opinion that the prosecution has failed to prove beyond reasonable doubt that the confession was given voluntarily by the accused. On the other hand, if the trial judge is satisfied that the confession was given voluntarily by the accused, it would generally be admitted in evidence against the accused, save where the judge has exercised his residual discretionary power to exclude otherwise admissible evidence.

1.19 The reason for excluding the jury from court while the trial judge is hearing evidence relevant to admissibility is that:

“If members of the jury remained in court, they would learn that the defendant had made a confession and perhaps also what he had said in it. If the judge then ruled that the confession was inadmissible, he would have to tell them to ignore the confession when they came to decide whether the defendant was guilty or not. The jury would find it extremely difficult to put out of their minds the fact that the defendant had confessed. Even if each one of them did manage to put that fact out of his mind, there would always remain the lurking suspicion that the jury had taken into account against the defendant a matter which was not allowed to form part of the prosecution’ s case against him.”¹⁹

¹⁷ The Report, at pages 4-5.

¹⁸ [1982] AC 204, at 221.

¹⁹ Page 5 of the Report.

1.20 Normally, a *voir dire* on the “special issue” of admissibility of a confession statement is held before a jury is empanelled as the defence would in most cases indicate in the pre-trial review its intention to object. However, there is nothing to prevent the holding of a *voir dire* after the jury has been empanelled.

1.21 In a *voir dire*, only matters relevant to the circumstances in which the defendant had made the confession will be heard. In other words, only evidence relevant to the “special issue” as opposed to the “general issue” of guilt or innocence of the accused will be heard by the trial judge in the absence of the jury. If the confession is ruled admissible, the witnesses testify again in the main trial in the presence of the jury on matters leading to the obtaining of the confession. The jury then decides on the weight to be attached to this testimony, the credibility of each witness, and the truth of the confession before they finally decide on the guilt or innocence of the accused. The defence is entitled to lead evidence in the main trial before the jury that the accused had not in fact made the statement, or that its content was fabricated by the law enforcement officer, or that the statement made by the defendant was untrue as he was compelled to give the statement under threat, force or inducement. In these circumstances, evidence relevant to the admissibility of the confession which was previously presented by witnesses in the *voir dire* will have to be adduced again for the consideration of the jury. On this occasion, however, the question to be determined is not the *admissibility* of the statement (which is a decision for the judge alone) but the *weight* to be attached to the statement. The result, nevertheless, is that the same witnesses must be called twice to give substantially the same evidence: once in the *voir dire* and again in the trial proper. It was the consequent lengthening of the trial process which prompted an examination of the problem by the Commission and the proposals contained in the Commission’s earlier Report.

1.22 The *voir dire* conducted in the absence of the jury is not a mandatory procedure. On the defence’s request, the question of admissibility of a confession can be dealt with in the presence of the jury albeit the issue of admissibility, being a question of law, remains to be decided by the judge. In *Ajodha v The State*, it was held that:

“Though the case for the defence raises an issue as to the voluntariness of a statement in accordance with the principles indicated earlier in this judgment, defending counsel may for tactical reasons prefer that the evidence bearing on that issue be heard before the jury, with a single cross-examination of the witnesses on both sides, even though this means that the jury hear the impugned statement whether admissible or not. If the defence adopts this tactic, it will be open to defending counsel to submit at the close of the evidence that, if the judge doubts the voluntariness of the statement, he should direct the jury to disregard it, or, if the statement is essential to sustain the prosecution case, direct an acquittal. Even in the absence of such a submission, if the judge himself forms the view that the voluntariness of the statement is in doubt, he should take the like action proprio motu.”²⁰

However, it is rare for a request to be made to hold a *voir dire* in the presence of the jury and the usual practice is for the *voir dire* to be conducted in their absence.

²⁰ *Ibid*, at 223.

The admissibility of a confession and the “alternative procedure”

1.23 As mentioned earlier in this chapter, the main reason for excluding the jury from the *voir dire* proceedings is the concern that if they remain in court when the issue of admissibility is heard, and the confession is subsequently ruled inadmissible, they may find it extremely difficult to put out of their minds the fact that the defendant had confessed. However, for cases heard and adjudicated by a single judge without a jury, the situation is different. The magistrates courts and the District Court in Hong Kong are courts presided over by a single judge. In these courts, the trial magistrates and judges are judges both of law and facts. They are professional judges and are presumed to be able to put out of their minds the fact that a defendant had confessed should they rule on hearing the relevant evidence that the confession is inadmissible as it was obtained involuntarily. A special procedure called the “alternative procedure” is generally adopted in these courts which avoids the need to call on the same witness to give evidence twice where a confession is challenged. Although parties in these courts are still entitled to have the special issue of admissibility of a confession dealt with in a “*voir dire*”, the prevailing practice is that most cases are dealt with by way of the “alternative procedure”.

1.24 The “alternative procedure” was approved in *Ho Yiu-fai & others v R*.²¹ Under this procedure, the judge or the magistrate records any objection to the admission of the confession at the time when the prosecution seeks to adduce it in evidence. The confession is marked “provisional prosecution exhibit” and the magistrate or the judge then proceeds to hear evidence from all prosecution witnesses, both on the special issue of admissibility of the confession and on the general issue of the guilt or innocence of the accused. The prosecution witnesses are then cross-examined by the defence on matters arising from both issues. After the prosecution witnesses have completed their testimony on both issues, the magistrate or the judge proceeds to rule on whether there is a case to answer for the accused in respect of the special issue of admissibility. If there is a case to answer on the special issue, the accused can elect to give evidence or to call upon his own witnesses to give evidence. However, at this stage, the evidence to be given by the accused or his witnesses, both in examination-in-chief and cross-examination, is restricted to matters relevant to the special issue of admissibility of the confession and does not extend to the general issue of guilt or innocence. When the defence evidence on the special issue has been heard, the magistrate or the judge rules on the question of admissibility. If the confession is ruled admissible, it is admitted in evidence as a “prosecution exhibit”. The prosecution then formally closes its case and the trial continues in the normal way, with the accused electing whether or not he and any defence witnesses will give evidence on matters relating to the general issue. Bruce and McCoy explain:

“Following the ruling on the admissibility of the admission or confession in cases using the alternative procedure, the case for the prosecution closes. From that point, the procedure of the trial is the same as a normal criminal trial. The only exception is that a practice has developed that if the accused or a witness called by the accused

²¹ [1970] HKLR 415.

gave evidence on the issue of admissibility of the admission or confession, and again gives evidence on the general issue, the court simply allows the accused or the witness called by him to confirm their earlier testimony rather than having the evidence given on the admissibility issue repeated again. However, that renders him liable to further cross-examination either on matters germane to the facts and circumstances concerning the special issue as well as topics relevant to the general issue. If the accused does not choose to testify in the general issue the testimony he gave in the alternative procedure is not available on the general issue.”²²

depends on the court finding that a particular fact exists, the question whether that fact exists is, for the purposes of this section, a preliminary question.

- (2) *If there is a jury, a preliminary question whether:
 - (a) *particular evidence is evidence of an admission, or evidence to which section 138 (Discretion to exclude improperly or illegally obtained evidence) applies, or*
 - (b) *evidence of an admission, or evidence to which section 138 applies, should be admitted,*is to be heard and determined in the jury' s absence.*
- (3) *In the hearing of a preliminary question about whether a defendant's admission should be admitted into evidence (whether in the exercise of a discretion or not) in a criminal proceeding, the issue of the admission's truth or untruth is to be disregarded unless the issue is introduced by the defendant.*
- (4) *If there is a jury, the jury is not to be present at a hearing to decide any other preliminary question unless the court so orders.*
- (5) *Without limiting the matters that the court may take into account in deciding whether to make such an order, it is to take into account:
 - (a) *whether the evidence to be adduced in the course of that hearing is likely to be prejudicial to the defendant, and*
 - (b) *whether the evidence concerned will be adduced in the course of the hearing to decide the preliminary question, and*
 - (c) *whether the evidence to be adduced in the course of that hearing would be admitted if adduced at another stage of the hearing (other than in another hearing to decide a preliminary question or, in a criminal proceeding, a hearing in relation to sentencing).**
- (6) *Section 128 (8) does not apply to a hearing to decide a preliminary question.*
- (7) *In the application of Chapter 3 to a hearing to determine a preliminary question, the facts in issue are taken to include the fact to which the hearing relates.*
- (8) *If a jury in a proceeding was not present at a hearing to determine a preliminary question, evidence is not to be adduced in the proceeding of evidence given by a witness at the hearing unless:
 - (a) *it is inconsistent with other evidence given by the witness in the proceeding, or*
 - (b) *the witness has died."**

2.4 The position is that the determination of questions of fact upon which the admissibility of evidence depends should be made by the trial judge on a *voir dire*, even where the fact is also a fact in issue (subsections (1) and (2)). The jury should generally be excluded from a *voir dire* considering the admissibility of admissions, although this should be subject to the discretion of the trial judge (subsections (2) and (4)). However, if the court orders that the jury is to be present during the *voir dire*, evidence adduced in the *voir dire* should be able to be used in the trial, subject to the exclusionary rules, without the need to repeat it (subsection (5)(c)). It should be noted, however, that Section 189 of the Evidence Act 1995 did not abrogate from the common law principles as to the circumstances in which it is appropriate to conduct a *voir dire* hearing.²⁸

2.5 In Australia, *voir dire* proceedings in relation to confession statements have been rare. This might be due to the lower standard of proof required of the prosecution in the determination of whether the confession statement was made voluntarily. In *Wendo v R* the High Court of Australia held that:

*“in determining whether a confession statement was made voluntarily, the standard of proof to be applied by the trial judge is not that of proof beyond reasonable doubt. It is a mistake to transfer the general propositions as to proof beyond reasonable doubt laid down in Woolmington v DPP [1935] A.C. 462 from their application to the issues before the jury to incidental matters of fact which the judge must decide.”*²⁹

2.6 Thus, in Australia, the standard of proof required at the *voir dire* in criminal cases is the civil standard of a balance of probabilities, and not the higher criminal standard of proof beyond reasonable doubt currently adopted by other common law jurisdictions such as Hong Kong and England. As the Evidence Act 1995 is a recent enactment, it remains to be seen whether the Act would affect the frequency with which *voir dire* proceedings are held in respect of the issue of voluntariness.

2.7 According to the Office of the New South Wales Director of Public Prosecutions, there is some similarity between the “alternative procedure” and the *voir dire* procedure in judge alone trials. Under section 32 of the Criminal Procedure Act, trials in the District and Supreme Courts can be heard by a judge alone. A judge sitting alone is obliged to conduct a *voir dire* when issues as to the admissibility of confessions are raised by the defence. However, once the judge has heard the evidence and the objections during the *voir dire* hearing, it is not the practice to require the parties to call the same evidence again.

Canada

²⁸ *R v Salindera*, (Unrep) Court of Criminal Appeal 25 October 1996.

²⁹ 37 A.L.J.R. 77, at 77.

2.8 The position of Canada in relation to confession statements is succinctly summarised in the New Zealand Evidence Law Reform Committee's *Report on Confessions*.³⁰

"In recent years, the Supreme Court of Canada has limited the voluntariness rule by the doctrine of reliability or trustworthiness. In R v Wray [1971] SCR 272 the majority held that a part of an otherwise inadmissible confession, which is confirmed by real evidence discovered as a result of the same confession, is admissible; the reason being that the unreliability of that part has been removed. Also, the majority in Alward and Mooney v The Queen [1978] 1 SCR 559 approved the voluntariness rule in the following terms:

' The true test, therefore, is did the evidence adduced by the Crown establish that nothing said or done by any person in authority, could have induced the accused to make a statement which was or might be untrue because thereof'

It appears that the Canadian Supreme Court has now entirely replaced the voluntariness rule with the reliability rationale alone."

England and Wales

2.9 In England, the admissibility of confession statements is now largely governed by the Police and Criminal Evidence Act 1984 ("PACE"). Section 76 of PACE provides that:

"(1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.

(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained -

- (a) by oppression of the person who made it; or*
- (b) in consequences of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,*

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession

³⁰ Evidence Law Reform Committee, New Zealand, *Report on Confessions*, (February 1987), at page 15.

(notwithstanding that it may be true) was not obtained as aforesaid.

- (3) *In any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, the court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in subsection (2) above.”*

2.10 As in Hong Kong, whenever a confession is challenged by the defence, the prosecution is obliged to prove beyond reasonable doubt that the confession was not obtained in the manner referred to in subsection (2) above. In addition, the court's power under subsection (3) to require proof on its own motion of the voluntary nature of any confession statement provides protection to the unrepresented defendant, who may be unaware that he has the right to raise objection to the admissibility of the confession.

2.11 It was said in *R v Anderson*³¹ that there were seldom any circumstances in which a jury could be asked to leave the court in order that statements might be made in their absence, save where this was done at the request or with the consent of the defence. Lord Bridge set out in *Ajodha v The State* the appropriate procedure for dealing with challenges to the admissibility of a confession statement:³²

“In the normal situation which arises in the vast majority of trials where the admissibility of a confession statement is to be raised, prosecuting counsel will not mention the statement in his opening to the jury, and at the appropriate time the judge will conduct a trial on the voir dire to decide on the admissibility of the statement; this will normally be in the absence of the jury, but only at the request or with the consent of the defence.”

As in Hong Kong, the question of whether or not the hearing on admissibility will be held in the presence of the jury is a matter for the defence. As Lord Bridge pointed out in *Ajodha*, the defence may:

*“... for tactical reasons prefer that the evidence bearing on that issue be heard before the jury, with a single cross-examination of the witnesses on both sides, even though this means that the jury hear the impugned statement whether admissible or not.”*³³

2.12 Our understanding is that counsel for the defence in England are far less ready to call for the issue of admissibility to be dealt with in the absence of the jury than is the case in Hong Kong. The DPP of Hong Kong has pointed out³⁴ that in England, *voir dire* proceedings in relation to confession statements are rare. Where the defence challenge the admissibility of a confession statement, they do not generally opt for a *voir dire*, but instead ventilate the question of admissibility together with the general issue before the jury. The view seems to be that the challenge

³¹ (1929) 21 Cr. App. R. 178 at 183.

³² [1982] AC 204, at 223.

³³ *Idem*.

³⁴ The DPP's views were set out in his note dated 28 February 1998 to the Secretary of Law Reform Commission.

should be made but once, and before the jury. The judge tells the jury that if they conclude that the confession was obtained by improper means, they should attach no weight to it. Private counsel seem averse to litigating the issue twice, once before the judge alone, and then again before the jury. This may be because they do not want to give prosecution witnesses the opportunity of a dress rehearsal before they give their evidence in front of the jury.

2.13 The *voir dire* procedure is used both in the Crown Court, where the judge sits with a jury, and in the magistrates' court, where there is no jury and the court is presided over by a single professional magistrate or three lay magistrates. Bruce and McCoy suggest that the "*alternative procedure does operate in proceedings in the magistrates' courts*".³⁵ In the magistrates' court, the prosecution will adduce the evidence in the normal way, but the defence is then given the opportunity to call evidence on the admissibility issue alone. The prosecution may not go into the contents of the confession if they are not relevant to the question of admissibility. The prosecution case can then continue and the magistrates must give a decision regarding admissibility before or at the end of the prosecution case (*R v Liverpool Juvenile Court, exp R*³⁶). If the magistrates decide to admit the confession, they do not have to hear the evidence of the circumstances of the confession all over again, unless, of course, it is relevant to the issues of fact.

2.14 Section 78 of PACE provides the court with a discretion to exclude evidence which would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

Malaysia

2.15 The law relating to confessions in Malaysia is contained in the Evidence Act 1950.³⁷ Section 17(2) of the Act defines a confession as "*an admission made at any time by a person accused of an offence, stating or suggesting the inference that he committed that offence*". The Act separates admissions from confessions. There is however a connection between the two. An admission is the genus whereas a confession is a specie of an admission applicable to criminal cases.³⁸ The court will only treat a statement as a confession if the accused admits to the elements of the offence, i.e. the intention to commit the crime, and the commission of the unlawful act.³⁹

2.16 Section 24 of the Evidence Act 1950 provides that:

"A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the court to

³⁵ See *Criminal Evidence in Hong Kong* (Issue 3, 1996), at V [905]-[950] of Division V.

³⁶ [1987] 2 All ER 668.

³⁷ Act 56 of 1950.

³⁸ *The Annotated Statutes of Malaysia: Evidence Act 1950* (1996 Issue), notes to [17].

³⁹ See *Anadagoda v R* [1962] MLJ 289; *Lemanit v Public Prosecutor* [1965] 2 MLJ 26; *Zamzuri bin Nazari v Public Prosecutor* [1995] 4 CLJ 540.

have been caused by any inducement, threat or promise having reference to the charge against the accused, proceeding from a person in authority and sufficient in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him.”

2.17 Inducement, threat or promise in section 24 is not restricted to physical harassment. It may take the form of statements by the interrogator.⁴⁰ In *Lim Kim Tjok v Public Prosecutor*,⁴¹ it was held that the words “*you better tell the truth*” vitiated the confession. The words “*any advantage or avoid any evil of a temporal nature*” in section 24 means that the accused’s confession will remain voluntary if the inducement, threat or promise is spiritual or religious in context.⁴²

2.18 The inducement, threat or promise need not be express but may be implied from the circumstances of the case. In *Public Prosecutor v Law Say Seck & Anor*,⁴³ the two accused had no desire of their own to be produced before the magistrate to make a confession. They had remained in police custody even after the second accused had broken down and the first accused had agreed to confess. They still remained at the Special Branch lock up. The second accused was brought from the Special Branch to the magistrate and both the accused knew they were going back to the police.⁴⁴ Sharma J therefore held that the circumstances of this case pointed to a doubt as to the voluntary nature of the confession and the statements were therefore not admissible. There was reason to apprehend that the influence of the police was still continuing on the mind of the accused when they confessed before the magistrate. The confession could have very little weight.⁴⁵

2.19 Section 25(1) provides that subject to any express provision in written law, no confession made to a police officer below the rank of Inspector shall be proved against a person accused of an offence. Written law includes the common law and any custom or usage having the force of laws in the Federation of Malaysia or any part of it.⁴⁶ Under section 26(1), subject to any express provision in written law, no confession made by a person in the custody of a police officer, unless made in the immediate presence of a President of a Sessions Court or Magistrate, shall be proved against that person. Custody in this sense does not necessarily mean a formal arrest. It is sufficient that the accused person cannot go as he wishes.⁴⁷

The magistrate’s duty in taking a confession

2.20 The magistrate is obliged to satisfy himself that the statement the accused is about to make is not influenced by any form of inducement, threat or promise and there must be a real endeavour by the magistrate to find out the object of

⁴⁰ *The Annotated Statutes of Malaysia, op cit*, notes to [24].

⁴¹ [1978] 2 MLJ 94.

⁴² *The Annotated Statutes of Malaysia, op cit*, notes to [24].

⁴³ [1971] MLJ 199 at 201.

⁴⁴ [1971] MLJ 199.

⁴⁵ [1971] 1 MLJ 199 at 201.

⁴⁶ *The Annotated Statutes of Malaysia, op cit*, notes to [25].

⁴⁷ See *Eng Sin v Public Prosecutor* [1974] 2 MLJ 168.

the confession: *Public Prosecutor v Law Say Seck & Anor.*⁴⁸ In *Law Say Seck*, the question raised was the admissibility of statements made by the accused under section 126(1) of the Straits Settlements Criminal Procedure Code to a magistrate. Section 126(1) provided that a police magistrate might record any confession made to him before trial. Section 125(1) of the Code was almost the same as section 24 of the Evidence Act. The effect of that section was that a confession obtained by the use of any inducement, threat or promise would be inadmissible.

2.21 Sharma J said the person confessing should be left to narrate his story as a whole without any interference. The person confessing should also be allowed to give full details of the crime. The magistrate's duty is only to record what the accused says or wishes to say. The magistrate does not play the role of an investigating officer. His questions must be in pursuance of a real endeavour to find out the object of the confession.⁴⁹

New Zealand

2.22 In New Zealand, voluntariness remains one of the key tests of admissibility of confession statements in criminal trials. The standard of proof to be applied by the trial judge is the criminal standard of proof beyond reasonable doubt.

2.23 This test is subject to section 20 of the Evidence Act 1908 which provides:

“A confession tendered in evidence in any criminal proceedings shall not be rejected on the ground that a promise or threat or any inducement (not being the exercise of violence or force or other form of compulsion) has been held out to or exercised upon the person confessing, if the judge or other presiding officer is satisfied that the means by which the confession was obtained were not in fact likely to cause an untrue admission of guilt to be made.”

2.24 Thus, in New Zealand, “*to be admissible the accused's confession must be proved by the prosecution, beyond reasonable doubt, to have been voluntarily made or, if it is not voluntary, to be saved by section 20 of the Evidence Act 1908.*”⁵⁰

2.25 Lastly, the trial judge has a discretion to exclude a confession statement which is found to have been voluntarily made but which was obtained by means which are considered unfair to the defendant.

2.26 In New Zealand, a *voir dire* in relation to confession statement takes place when an objection to admissibility is raised by the defence or when the trial judge calls for a *voir dire* on his own initiative; and the proceedings will be heard in the absence of the jury.

⁴⁸ [1971] 1 MLJ 199.

⁴⁹ [1971] 1 MLJ 199 at 2001.

⁵⁰ Evidence Law Reform Committee, New Zealand, *Report on Confessions*, (February 1987), at page 7.

Scotland

2.27 In Scotland, the test of admissibility of any self-incriminating statement by the accused is one of “fairness”: “[the] simple and intelligible test which has worked well in practice is whether what has taken place has been fair or not.”⁵¹ What is fair is a question of the particular circumstances of each case, and the rights of the accused must be balanced against the public interest in the administration of justice. Indeed, there has been “a steady move towards liberalisation so that justice must, of course, be done to the criminal, but equally justice must be done to the interest of the public and law and order.”⁵²

2.28 Where unfairness is alleged at a jury trial in the taking of a statement from the accused, the issue may be examined in a trial within a trial from which the jury are excluded. The trial within a trial was introduced in Scotland only in the 1950’s, by the case of *Chalmers v HM Advocate*.⁵³ Since its introduction it has been the subject of considerable criticism, and the circumstances in which it is used have been steadily eroded. Where the trial within a trial procedure is adopted, it follows essentially the same course as in Hong Kong.

2.29 There are significant differences, however, in the basis for the judge’s ruling on admissibility. Crucial to this is the fact that the question of what amounts to unfairness is apparently not a question of law, but one of fact and degree, and as such is properly the preserve of the jury. Renton and Brown observe:

*“Whether or not a trial judge can in practice reject statements as inadmissible, and withhold them from the jury, on the basis of his own assessment of the evidence of the circumstances in which they were made, he is not obliged, and indeed it may be in law that he is not entitled, to withhold them unless two requirements are satisfied. The first is that there is no conflict of evidence as to the circumstances in which the statements were obtained, and the second is that it is abundantly clear on undisputed evidence that they were obtained unfairly. While it remains the law that in the end of the day the Crown have to satisfy the jury that the statements were obtained fairly, the defence may be able to have them withheld from the jury only by showing that on any view of the evidence they were indisputably obtained unfairly.”*⁵⁴

2.30 The position described by Renton and Brown reflects two decisions in particular. In *Murphy v HM Advocate*, Lord Wheatley said:

*“In considering whether the presiding judge erred in his decision at the trial within the trial it must be borne in mind (1) that if an issue turns on credibility it is for the jury to decide the issue and not the judge; (2) that if two possible interpretations can properly be put on the situation, one of which falls into the category of fairness and the other into the category of unfairness, the judge should leave the determination of that issue to the jury.”*⁵⁵

⁵¹ Walker and Walker, *The Law of Evidence in Scotland* (1964), at paragraph 46.

⁵² *Hartley v HM Advocate* 1979 SLT 26, at 28.

⁵³ [1954] JC 66.

⁵⁴ *Criminal Procedure According to the Law of Scotland*, (6th ed.), at 453-454.

⁵⁵ 1975 SLT (Notes) 17, at 18.

2.31 In *Balloch v HM Advocate*, Lord Wheatley said:

*“A judge who has heard the evidence regarding the manner in which a challenged statement was made will normally be justified in withholding the evidence from the jury only if he is satisfied on the undisputed relevant evidence that no reasonable jury could hold that the statement had been voluntarily made and had not been extracted by unfair or improper means.”*⁵⁶

2.32 The consequence of this development of the law is that the use of the trial within a trial has dwindled almost to the point of extinction. Its demise has been assisted by an additional procedural factor: the introduction of a new form of Judicial Examination by the Criminal Justice (Scotland) Act 1980. In proceedings on indictment, the accused must be brought before the court on the first court day after arrest. At this preliminary appearance, or at a subsequent appearance before the accused is “Fully Committed” for trial (which is generally eight days after his first appearance) the prosecutor may question the accused, *inter alia*, on any alleged extra-judicial confession made by him to or in the hearing of a police officer which is relevant to the charge, whether or not it is a full admission. A copy of the written record of any such admission must previously have been served on the accused and provided to the judge. Strict limits apply to the questions which the prosecutor may ask, and the accused may decline to answer any question put to him. At the subsequent trial:

*“his having so declined may be commented upon by the prosecutor, the judge presiding at the trial, or any co-accused, only where and in so far as the accused (or any witness called on his behalf) in evidence avers something which could have been stated appropriately in answer to that question.”*⁵⁷

The practical effect of Judicial Examination is to give the accused an early opportunity to allege unfairness in the taking of any confession statement, while at the same time reducing the likelihood of objections being raised for the first time at trial.

2.33 One further point worth noting in relation to the Scottish approach to the admissibility of confessions is that once the accused has been charged, he may not be questioned further by the police regarding the offence with which he has been charged. There is not, as in Hong Kong, an exception to allow, for instance, questioning where necessary to prevent or minimise harm or loss to some other person or the public: the prohibition in Scotland is absolute, and extends to answers given to questions about information subsequently obtained by the police.

Singapore

2.34 There is no statutory procedure for the conduct of a *voir dire* in Singapore. Singapore adopts the common law practice of a *voir dire* where the prosecution will adduce evidence on the issue of admissibility only, followed by the

⁵⁶ 1977 JC 23, at 28.

⁵⁷ Section 36(8) of the Criminal Procedure (Scotland) Act 1995.

defence' s evidence on this point. At the end of the *voir dire*, the prosecution may then continue to adduce evidence on the general issue.

2.35 A *voir dire* is necessary whenever the admissibility of a confession is challenged, provided that the dispute over the admissibility is not confined to a pure point of law, but is one which requires the calling of evidence of the accused person and other witnesses in support of or against the admissibility of the confession. Examples of situations where the admissibility of a confession is challenged include the following: when a statement is challenged on grounds that it was made under threat, inducement, promise (found in the proviso to Section 122(5) of the Criminal Procedure Code (Chapter 68)) or oppression; or when a statement is made to a police officer below the rank of Sergeant.

2.36 Trial by jury was abolished in Singapore in 1969. The trial judge will decide on the general issue and on the issue of admissibility, if it arises. However, evidence adduced in the *voir dire* will not be admissible as evidence in the main trial, unless the same is led in the main trial.

2.37 The alternative procedure is not used in Singapore. According to the Attorney-General' s Chambers of Singapore, there has not been any recent reform in the *voir dire* procedure, nor any proposed reform of the subject.

South Africa⁵⁸

2.38 Under the Criminal Procedure Act 1977 strict admissibility requirements are imposed in respect of confessions. The purpose of this is to prevent a false confession being used as evidence, to protect an accused against improper investigatory methods, and to prevent the violation of the proper administration of justice in accordance with civilised legal norms.

2.39 A confession is admissible if it is proved to have been made freely and voluntarily by the accused who was in his sound and sober senses and without having been unduly influenced (section 217(1) of the Criminal Procedure Act). A confession made to a peace officer (a police official without the rank of Officer) is inadmissible unless it is confirmed and reduced to writing in the presence of a magistrate or a justice of the peace (police officer) (proviso to section 217(1)(a)).

2.40 A second proviso to section 217(1)(b) provides that a confession made in the first instance to a magistrate and reduced to writing by him, or in the second instance confirmed and reduced to writing in his presence, is admissible as evidential material upon the mere production of such document, provided it appears from the document that the name of the person making the statement corresponds to that of the accused. Where an interpreter is used, the document must also bear a certificate by the interpreter to the effect that he so acted.

2.41 It is furthermore presumed, unless the contrary is proved, that the confession was made voluntarily, while the accused was in his sound and sober

⁵⁸ See generally paragraphs 9.36 to 9.40 of South African Law Commission, *Interim report on the simplification of criminal procedure*, Project 73, (August 1995) on which this general account of the South African legal position is based.

senses and without any undue influence, provided it appears from the document that the confession has been so made (proviso to section 217(1)(b)).

2.42 The Criminal Procedure Act further distinguishes between the admissibility requirements for admissions and confessions.⁵⁹ Section 219A of the Act provides that an extra-judicial admission by someone with regard to the commission of an offence, if it does not constitute a confession to the offence, is admissible evidence provided it is proved that the admission was made voluntarily. The section also provides that where the admission is made to a magistrate or is confirmed and reduced to writing in his presence, it is by its mere production admissible under the same circumstances and conditions that apply to confessions.

⁵⁹ 'Admission' and 'confession' are often treated as having a slightly different meaning. 'Confession' is often treated as a full and detailed admission: see Andrew Bruce and Gerard McCoy, *Criminal Evidence in Hong Kong*, 2nd Ed, Butterworths (1991), at paragraph 5-1.

Chapter 3 - Options for reform

Reasons for reform

3.1 In its opening pages, the Report identified particular areas of concern where the Commission believed the current laws and procedures relating to confession statements and their admissibility in criminal proceedings were deficient. One of the most important of these was that:

“A disproportionate amount of Court time and both public and private money is expended on determining the admissibility of confession statements in criminal trials.”⁶⁰

3.2 This related directly to the use of the *voir dire* in jury trials as a means of determining the admissibility of confession statements in criminal cases. The Commission included in the Report statistical data which clearly showed not only that there was extensive use of the *voir dire* in Hong Kong, but also that the extent of that use was far higher than in England and Wales:

“The figures ... show that in High Court trials before a judge and a jury in which the prosecution seeks to rely on a confession as part of its case, the voir dire procedure is used in 90% of them. In the District Court the equivalent figure is 88%. ...In the High Court the voir dire procedure succeeds in 18.5% of the cases in which it is initiated. In the District Court the equivalent figure is 43%. An approximate comparison can be made with recent, though limited, figures in England. There, in Crown Court trials, which always take place before a judge and a jury, the voir dire is used in only 10.5% of cases in which the prosecution wants to put in evidence the defendant's confession. Of those cases the success rate is 14% The difference between the Hong Kong and English figures is startling, even allowing for the fact that an accurate comparison cannot be made from the figures available. In England, of those cases where the prosecution seeks to rely on a confession, the defence succeeds in having the confession excluded in 1.5% of them. In Hong Kong the equivalent figure is at least 25% and possibly as high as 34.0%.”⁶¹

3.3 Since the Report was published, a significant development has been the increased use of video to record statements taken from accused persons. Figures provided by the Police and ICAC (shown at Tables 1 to 3 in the Introduction to this paper) indicate that the use of video recording has led to a substantial reduction in the number of challenges to confession statements. The ICAC figures reveal that for the years 1995 to 1997, there was a *voir dire* held in respect of between 16.6% and 19.3% of cases proceeding to trial. In all these cases the interview had been video recorded. For the Police, the figures available for 1997 show there were challenges to 15% of the video recorded interviews put forward in High Court trials. Where

⁶⁰ The Report, at page 1.

⁶¹ Pages 7 and 8 of the Report.

interviews are not video recorded, Police figures for 1997 indicate that 33% of interviews were challenged in the High Court.

3.4 Despite the reduction in *voir dire*s as a result of wider use of video recording, the limited figures available in the earlier Report (referred to in paragraph 3.2 above) indicate that even where the interview is video recorded, the proportion of *voir dire*s in Hong Kong remains some 50% higher than that in England and Wales (Of course, not all interviews are so recorded, and the limited resources available to the Police mean that it is unlikely that comprehensive video recording will be implemented for some time to come.) Even where the figures for the use of the *voir dire* to be comparable to those in England, there remain valid reasons for considering whether the use of the *voir dire* is either necessary or desirable. Other jurisdictions such as Scotland have long rejected its use with no suggestion that that has led to any unfairness to the accused. In the following paragraphs we outline the principal arguments for and against the continued use of the *voir dire*

Duplication of evidence

3.5 The principal argument in favour of finding alternatives to the *voir dire* is the saving of court time and costs. Not infrequently the same evidence which is relevant to the issue of admissibility is also relevant to weight or credibility, and time would be saved by taking the evidence in the presence of the jury. Under the alternative procedure, for instance, the same issue need not be tried twice, once before the judge sitting alone, and later in the jury's presence. The duplication of evidence which is involved in a *voir dire* also provides the witnesses with an opportunity to change their evidence in the main trial after they have seen how they were cross-examined in the *voir dire*, with no opportunity for the jury to test the two versions, since they will hear only the second.

Danger of unfounded prejudice

3.6 Where evidence is excluded after a *voir dire*, the jury are left not knowing just what it was, and it may not have been as bad as they imagine. It would be better to let the jury hear all the evidence, and allow the judge to direct the jury to disregard any evidence which is ruled inadmissible, rather than to run the risk that the jury are influenced by speculative doubts as to the nature of the evidence which was denied them.

Illogical to assume jury cannot disregard confessions ruled inadmissible

3.7 The Director of Public Prosecutions (the DPP)⁶² points out that if a preliminary challenge to a confession is unsuccessful in Hong Kong, it can be repeated before a jury. The jury are not aware, when it is challenged before them, that the judge has already ruled it to be admissible. They are directed in terms that if they conclude that allegations of fabrication of evidence or impropriety are true, or might be true, they should place no weight upon the confession. They thus see the

⁶² The DPP's views were set out in his note dated 28 February 1998 to the Secretary of the Law Reform Commission.

confession, and are treated as being capable of disregarding it if they conclude it is, or might be, the product of malpractice. To that extent, therefore, it is clear that as matters currently stand juries do see confessions which it may be incumbent upon them in the course of their deliberations to set at naught.

3.8 The DPP has also pointed out that the jury are invariably directed in terms such as:

“The question is whether you are sure that the accused made a true confession. If you are not, then ignore the alleged confession. If you are sure that the accused made it, then you are concerned with the truth of the confession. You should look at all the circumstances in which it was made. Any pressure on an accused to make a confession lessens the reliability of any confession he makes.”

3.9 The DPP takes the view that it is but a small step for juries to hear evidence relating to admissibility as well as weight: if they are treated as being capable of disregarding an improperly obtained confession when they retire at the conclusion of the trial, they ought equally to be capable of putting out of their minds a confession statement which comes before them on a hearing as to admissibility, but is then ruled by the judge to be inadmissible in law.

The voir dire usurps the jury's function as arbiters of credibility

3.10 The jury, not the judge, decide what credibility and weight to attach to the evidence led before them at a criminal trial. The *voir dire* procedure, however, excludes the jury from assessing the credibility of the evidence led in relation to the voluntariness of the confession statement. It runs counter to the general principle of criminal trial procedure to leave the assessment of the credibility of the witnesses in relation to this one issue a matter for the judge, rather than the jury.

Possible negative effect on the jury of exclusion

3.11 The ALRC Interim Report listed a number of considerations which suggest that the jury need not or should not always be sent out during the hearing of admissibility of confessions.⁶³ One of these was that it might have an adverse effect on the jury's attitude to the court and the parties if it is repeatedly excluded from what are apparently important decisions.

Arguments in favour of continued use of the *voir dire*

⁶³ *Evidence Interim Report*, (Report No 26, Vol. I), Australian Law Reform Commission, 1985 paragraph 1035.

3.12 In answer to the shortcomings of the present procedure set out in the previous paragraphs, there are arguments which favour the continuation of the existing reliance on the *voir dire*.

Potential prejudice to the accused

3.13 The main argument in favour of the existing procedure in jury trials is that it avoids the risk that the jury may be prejudiced by hearing evidence about a confession which is subsequently ruled inadmissible by the trial judge. While the professional judge is able to remove consideration of such inadmissible evidence from his mind when reaching a verdict, members of the jury may find it harder to do so and inadmissible evidence which is prejudicial to the accused may colour their judgment. It could therefore be argued that the trial within a trial is justified as the lesser of two evils, and that as it prevents the jury hearing prejudicial and inadmissible evidence it is the preferable course.

Avoids effective dilution of the right of silence

3.14 The DPP has pointed out that:

“there may be a situation where an accused wishes to give evidence on the admissibility issue but elects to remain silent on the case proper. The jury might form an adverse view of the accused in such circumstances. That, in turn, may make the accused reluctant to testify on the limited issue for fear of alienating the jury.”

3.15 In *R v Brophy*, Lord Fraser of Tullybelton said:

“It is of the first importance for the administration of justice that an accused person should feel completely free to give evidence at the voir dire of any improper methods by which a confession or admission has been extracted from him, for he can almost never make an effective challenge of its admissibility without giving evidence himself. He is thus virtually compelled to give evidence at the voir dire, and if his evidence were admissible at the substantive trial, the result might be a significant impairment of his so-called ‘right to silence’ at the trial.”⁶⁴

Other options may achieve the same end

3.16 If the principal objective is to save court time, the videotaping of confessions may provide a less controversial option. The practice of videotaping of confessions by the Police and the ICAC has (as was explained in the introduction to this paper) reduced significantly the number of challenges to the admissibility of confessions. While the heavy resources needed mean that it would be impractical to videotape all Police interviews of suspects, it is probable that this will eventually occur in relation to all major cases, meaning those which proceed to trial by jury.

⁶⁴ [1982] AC 476, at 482.

3.17 We would observe at this point that even if all interviews were videotaped, it is clear from the data provided by the Police and ICAC that there would still be challenges to admissibility which would (under current practice) necessitate a *voir dire*. In relation to the ICAC figures for 1997 quoted in the introduction to this paper, for instance, 18.2% of cases going to trial involved a *voir dire*. The grounds for challenge ranged from “*oppressive and leading questions*” to “*defendant was suffering from skin disease and was refused medication*”. In addition, even where the videotaped interview is scrupulously conducted, there remains scope for challenge by the accused of conduct before the formal interview began which would negate the voluntary nature of the taped interview.

3.18 There is one further point which we would mention in relation to the videotaping of interviews, and it is the concern expressed to us by the ICAC that the insistence of defence counsel that full transcripts of the interview be provided in every case represents (to quote the ICAC) a “*massive drain on resources*”. We are told by the ICAC that the preparation of a transcript and translation of a two hour interview can take as long as ten working days to complete. In the opinion of the ICAC, the problem is not insurmountable but requires the co-operation of the legal profession:

“Once a video interview has been conducted, a copy of the tape is supplied to the interviewee or his legal representative. If and when a decision is taken to prosecute the interviewee, investigators prepare a summary of the video interview, only including verbatim dialogue in respect of parts of the interview they consider to be incriminating, contentious or otherwise particularly material. After consideration by Government Counsel, a copy of the summary is served on the defence who are invited to either agree it, or make proposals for revision to include additional verbatim dialogue which they consider to be of particular relevance. The idea is that, through negotiation, it should be possible for both prosecution and defence to arrive at a summary of the interview which is not so time-consuming to prepare as a transcript, yet meets both their needs. The summary would then be adduced as evidence of the interview. In practice, though, barristers and solicitors representing defendants have, without exception, steadfastly refused to subscribe to this process, preferring instead to demand a transcript of the entire interview in every case.”⁶⁵

3.19 The ICAC argue that there should be an administrative or legislative requirement for defence lawyers to subscribe conscientiously to the objective of reaching consensus on the summary of interview. At first sight, we are sympathetic to the ICAC’s complaint, and would welcome the views of the public and the legal profession.

3.20 Reverting to consideration of the question of admissibility of confession statements, we believe that, notwithstanding the arguments for the status quo set out earlier in this chapter, a case for reform of the procedure in this area has been made out, not least because of the significantly higher number of *voir dire* hearings held in Hong Kong than overseas.

⁶⁵

From a letter to the Secretary of the Law Reform Commission of 5 August 1998

Options for reform

3.21 It is against this background that the Commission considers a re-examination of the issue of admissibility of confession statements in criminal trials is called for; albeit confining its focus on the narrower aspect of procedural reforms, rather than revisiting the broader issues of substantive law and practices. The purpose of this paper is to set out a number of options for reform for public consultation. It should be stressed that in doing so the Commission has not concluded in favour of one more than another, or set its face against options not explored in this paper. The community's views are sought on the way forward.

3.22 Before turning to consider the options for reform, it should be pointed out that this paper does not attempt to identify the reasons why, as we have seen earlier, both the proportion of challenges to confession statements and the numbers of contested cases in which resort is had to the *voir dire* procedure are significantly higher here than in England and Wales. To attempt such an analysis would be largely speculative. Nevertheless, one approach to the issue which would minimise the risk of improper conduct by the investigating authorities would be to adopt a more restrictive approach to the type of statements admitted. It might be that only statements recorded in a particular way, or by a particular person, or at a particular stage of the proceedings could be put forward in court. So, for instance, in Malaysia no confession is admissible if made to a police officer below the rank of Inspector, while in Scotland there is an absolute prohibition on questioning after charge. The use of videotaping reduces the likelihood of improper conduct; a regime which admitted only statements recorded in this way would undoubtedly reduce the use of the *voir dire*. While the imposition of restrictions on admissibility such as these would be likely to result in fewer challenges to admissibility, there would be significant resource implications in any such measures and we therefore have not included these in our range of options for reform.

3.23 Instead, we have concentrated on changes to the way in which the question of admissibility is dealt with at trial. There are, we believe, three main options for consideration, as follows:

- A) granting the court a discretion to direct that the question of admissibility be dealt with in the presence of the jury;**
- B) making the determination of the issue of admissibility of confession statements a matter for the jury in all cases; and**
- C) granting the court a discretion to direct that the question of admissibility be dealt with in the presence of the jury, coupled with a lowering of the standard of proof for determining voluntariness to that of civil proceedings.**

3.24 We would make one further observation before examining each of these options in turn. Concern was raised during discussions within the Commission that any reforms to the procedure for determining admissibility at trial which did not also ensure that there were deterrents against the improper questioning of suspects would be defective. It could be argued that if the law enforcement officer knew when questioning a suspect that there would be no *voir dire* he might be more likely to adopt improper methods. In answer, it must be borne in mind that any proposals for reform

of the law relating to the *voir dire* are directed at the very small proportion of criminal cases which are heard before a jury. For the vast majority of cases currently coming before the courts, there is no likelihood of a *voir dire* to temper the conduct of investigating officers. The absence of a *voir dire* does not mean, however, that the accused cannot fully ventilate in court any allegation he may have of improper conduct on the part of the law enforcement agencies.

Option A - Granting the court a discretion to direct that the question of admissibility be dealt with in the presence of the jury

3.25 In a letter to the Secretary of the Law Reform Commission dated 12 January 1998, Mr Justice Litton raised his concern at the considerable amount of court time which has to be spent in dealing with objections to the admissibility of confession statements. Mr Justice Litton holds the view that it is unsatisfactory to have the question of admissibility of a confession to be considered separately from its evidential weight and effect, particularly so in jury trials. Mr. Justice Litton points out that much time is wasted by the judge sitting alone hearing the witnesses in a *voir dire* to determine admissibility, only to have the witnesses called all over again before the jury to consider the question of evidential weight and effect once the statement is admitted. This is avoided in the magistrates courts and the District Court by the magistrates or the judge adopting the "alternative procedure" which enables them to disregard the statement as proof of guilt should they at the end of the day determine that voluntariness has not been established.

3.26 Mr Justice Litton argues that there is no reason why a similar procedure should not be adopted in jury trials. Under such a proposal, at the end of the prosecution case, the defendant can, if he so chooses, elect to testify solely on the issue of admissibility of an alleged confession, or he can elect to testify generally, or not at all. Mr Justice Litton further explains that should the judge, at any stage of the trial, rule that the statement is inadmissible, he would simply direct the jury to disregard it in their deliberations, and ensure that any written statements previously adduced in evidence by the prosecution are withdrawn. It is envisaged by Mr Justice Litton that this proposal for change would inevitably lead to the argument that the jury, having heard the relevant evidence central to the alleged confession, would be prejudiced against the defendant even if the statement is later ruled inadmissible by the judge, as jurors (unlike professional judges), are incapable of excluding that evidence from their minds. In response to this possible argument, Mr Justice Litton observes that there are many other instances where, in the course of a trial, inadmissible statements do go before the jury and the jury are subsequently instructed by the judge to disregard those matters.

3.27 Mr Justice Litton recommends that the trial judge should be given a discretion in the interests of justice to order the adoption of the alternative procedure in a jury trial. Such a discretion would give a free hand to the trial judge, who would not be bound to adopt the alternative procedure. If, for example, the prosecution case is weak without the disputed statements, and the evidence bearing on admissibility falls within a narrow compass, the judge might well not sanction the alternative procedure. In Mr Justice Litton's view, a system which requires the giving of the same evidence twice in the course of a criminal trial is neither efficient nor economical, and thus goes against the interests of justice.

3.28 To put into effect his proposal for change, Mr Justice Litton has suggested amendments to the Criminal Procedure Ordinance (Cap. 221) along the following lines:

1. *When, in the course of a trial, objection is taken to the admissibility of evidence sought to be adduced by the prosecution, the judge may, if he considers it expedient in the interests of justice so to do, order that the evidence may nevertheless be put before the court, subject to these provisions:*
 - (i) *The accused may elect to testify, and call witnesses, before the close of the prosecution case, relating solely to the admissibility of such evidence.*
 - (ii) *Where the judge considers that such evidence is not properly admissible he shall, before the close of the prosecution case, rule accordingly.*
2. *Where the judge has ruled in accordance with paragraph (ii) above, he shall forthwith direct the jury to disregard such evidence and shall direct that any written material relating thereto be withdrawn.*

3.29 The arguments for and against this proposal are essentially those set out at the beginning of this Chapter, though it is to be assumed that providing the trial judge with a discretion as to whether to hear the question of admissibility in the presence of the jury would provide safeguards to ensure that the accused was not unfairly prejudiced, a protection which would be lacking if such hearings automatically proceeded before the jury. As matters stand, it is up to the defence to decide whether or not a *voir dire* will be held, and in practical terms that effectively means that a *voir dire* is held in almost every jury case where objection is raised to the admissibility of a confession. Mr Justice Litton's proposal would place the decision as to whether or not to hold a *voir dire* in the hands of the trial judge.

Option B - Making the determination of the issue of admissibility of confession statements a matter for the jury in all cases

3.30 This option goes further than that proposed by Mr Justice Litton at Option A and calls for the abolition of the *voir dire* in all cases by making the question of admissibility a matter for the jury to decide. The general arguments for and against the use of the *voir dire* procedure set out earlier in this Chapter apply in respect of this option. In addition, however, it can be argued in its favour that there seems little

justification for the view that the jury are incapable of reaching this decision, or of putting from their minds evidence of a confession which they have themselves ruled was not voluntarily given, when the current procedure expects them nevertheless to be capable of assessing post *voir dire* the weight to be given to a confession on which competing evidence is presented as to the manner of its taking. The distinction is, it could be argued, unrealistic and artificial and assumes in members of the jury a lack of sophistication which has little validity in late 1990' s Hong Kong.

3.31 A further argument in favour of this option is that it has the effect of minimising and possibly removing the risk of jurors being prejudiced by evidence about a confession which is subsequently ruled inadmissible by the trial judge. Since the decision as to the admissibility of a confession is a matter for the jurors, they would logically readily disregard evidence which they have themselves considered to be inadmissible, as it is obvious that they would believe in the correctness of their own decision. Thus there would be no question of jurors being prejudiced by evidence relating to a confession which they have themselves ruled inadmissible.

3.32 We note that the law in Scotland has in effect developed along these lines, with the use of the *voir dire* procedure in jury trials virtually extinct and the admissibility of a confession for all intents and purposes a question of fact for the jury to decide.

3.33 Option B arguably provides a more rational approach to the way in which evidence of an alleged statement by the accused is handled. Under current procedure, if the accused denies making a statement at all, that is a matter of fact for the jury to decide. If, however, he concedes that a statement was made but claims that it was forced from him, the question of whether or not the statement was taken voluntarily is a matter of law for the judge to decide. It is difficult to discern why the latter circumstance should not be equally capable of decision by a properly instructed jury.

3.34 A final argument in favour of this particular option is that safeguards provided under the current laws and practices in Hong Kong are sufficient to obviate the need for continued use of the *voir dire* procedure and to justify leaving the question of admissibility to be determined by the jury.

Option C - Granting the court a discretion to direct that the question of admissibility be dealt with in the presence of the jury, coupled with a lowering of the standard of proof for determining voluntariness to that of civil proceedings

3.35 The Australian experience and their relevant legislation discussed in Chapter 2 offer a further option for reform.

3.36 In Australia, under section 189 of the Evidence Act 1995 (New South Wales), the determination of questions of fact upon which the admissibility of

evidence depends is in general heard and determined by the trial judge in a *voir dire*, in the jury's absence. The jury is generally excluded from the *voir dire* considering the admissibility of a confession, although this is subject to the discretion of the trial judge. If the court at the end of the day orders that the jury is to be present during the *voir dire*, evidence adduced in the *voir dire* may also be used in the trial, subject to the exclusionary rules, without the need to repeat it.

3.37 In Australia, the standard of proof required of the prosecution in proving the voluntariness of a confession statement is the civil standard of a balance of probabilities, and not the higher criminal standard of proof of beyond reasonable doubt currently adopted by other common law jurisdictions such as Hong Kong and England.

3.38 The principal difference between this option and option A is that, while option A would provide the trial judge with a largely unfettered discretion to direct that the question of admissibility be heard in the presence of the jury, section 189 implies that, as a general rule, a *voir dire* should be held in the absence of the jury, thus giving the judge a more limited discretion to proceed by way of the alternative procedure. In addition, our formulation of option A does not include a proposal to change the standard of proof required of the prosecution to that of a balance of probabilities.

3.39 The advantage to be gained from the implementation of this option is that the judge would be given the authority to exercise his discretionary power to take into account practical considerations, such as whether the evidence, if it were to be adduced before the jury on the question of admissibility, would be prejudicial to the defendant and whether that evidence would be admitted if adduced at another stage of the hearing.

3.40 It is submitted that this discretionary power provided to the judge would, in appropriate circumstances, greatly reduce the time needed for trial. Arguably, the lack of such a discretion leaves the trial judge with no choice but to require the witnesses to give their evidence twice on matters central to the confession.

Changing the standard of proof

3.41 As was pointed out earlier, the concern of this paper is to consider ways in which the current procedure for determining the admissibility of confession statements at trial could be improved. Arising from Option C above is the question of the standard of proof to be applied to issues of admissibility. The criminal standard of proof beyond reasonable doubt currently applies in Hong Kong, but in Australia the standard of proof required of the prosecution for determining the admissibility of confession statements is the lower civil standard of proof on the balance of probabilities. It is possible that a change in the standard of proof could be included as a part of Options A or B, and comments are invited on such an approach

3.42 It could be argued that the existing standard of proof beyond reasonable doubt imposes an unreasonable and onerous burden on the prosecution in that establishing the "voluntariness" of a confession statement effectively requires

the prosecution to prove a negative: that no undue force or influence was brought to bear on the accused. Proving a negative is notoriously difficult and should require proof only to the lower civil standard of a balance of probabilities. As was observed by the High Court of Australia in *Wendo v R*:

*“It is a mistake to transfer the general propositions as to proof beyond reasonable doubt laid down in Woolmington v DPP [1935] A.C. 462 from their application to the issues before the jury to incidental matters of fact which the judge must decide.”*⁶⁶

The argument in favour of the lower standard of proof is further discussed by Gillies:

*“This last principle, that the burden imposed upon the prosecution is governed by the criminal standard - one seemingly easy to state - itself admits of certain exceptions. No consistent principle for the identification of these exceptions can be pointed to, except the rather broad and non-conclusive negative proposition that these exceptions relate to the proof of intermediate facts, rather than the ultimate facts, upon which criminal liability is contingent. Thus, for example, the general common law evidential principle that involuntarily made confessions and admissions are not admissible against the accused, which principle imposes proof of voluntariness upon the prosecution, stipulates that this proof is to be according to the civil standard.”*⁶⁷

3.43 It follows that as the issue of admissibility is neither a jury question, nor does it involve the ultimate facts, the criminal standard of proof would be too onerous and too unreasonable to be required of the prosecution in its proving of an incidental matter of fact or an intermediate fact upon which criminal liability is not contingent. It is thus arguable that as the role of a judge in a *voir dire* is merely to decide whether there is a *prima facie* reason for admitting the statement, a lower civil standard would be appropriate, as the judge's decision on this special issue of admissibility does not go to criminal liability. However, once the statement is admitted, the jury must be satisfied that the confession statement, and the other ultimate facts upon which conviction is contingent, have been proved beyond reasonable doubt by the prosecution before a conviction can be secured. Thus, in *Wendo v R*, it was held that:

*“In criminal trials, as in civil cases, questions of fact frequently arise which must be determined by the trial judge before he decides whether to admit evidence for the consideration of the jury. Confessional statements are but one illustration of the type of evidence the tender of which may give rise to preliminary questions of fact which the judge must decide for himself. Other illustrations were given by Lord Denman C.J. in *Doe d. Jenkins v Davies* (1847). 10 Q.B. 314, at p.323, where His Lordship said: ‘There are conditions precedent which are required to be fulfilled before evidence is admissible for the jury. Thus an oath, or its equivalent, and competency, are conditions precedent to admitting viva voce evidence; and apprehension of immediate death to admitting evidence of dying declarations ...’ But proof of the fulfilment of these or any other conditions precedent to the admission of evidence is not required to be given beyond reasonable*

⁶⁶ 37 A.L.J.R. 77, at 77.

⁶⁷ Gillies, *Law of Evidence in Australia*, (1st ed., 1987), at 62.

doubt ... If the judge decides that there is a prima facie reason for admitting the evidence, it is for the jury or, in a case such as this, the judge sitting as a jury to determine what weight is to be given to it. It is then that the standard of proof beyond reasonable doubt has to be applied and it will often happen that, in applying that standard, the tribunal of fact will properly be asked to take into account evidentiary material placed before it which has earlier been elicited on the voir dire.”⁶⁸

3.44 The contrary argument is that lowering the standard of proof would mean removing from the accused the greater protection enshrined in the current condition for the admissibility of a confession statement. If the civil standard of proof were applied, the prosecution would find it easier to prove voluntariness, and the accused would be more readily exposed to incriminating evidence which would have been rendered inadmissible under the higher standard.

3.45 We do not express a concluded view on this issue, but would appreciate comment on whether a lowering of the standard of proof to determine voluntariness should be included as part of any of the proposed options for reform.

Conclusion

3.46 In concluding this consultation paper, we invite comment principally on the specific options for procedural reform which we have identified in this Chapter, but we would welcome thoughts on other means of improving the present procedure in jury trials for determining the admissibility of confession statements in criminal cases. The Commission remains open minded on the best way forward, and seeks input from the community as to the preferred option.

⁶⁸

37 A.L.J.R. 77, at 81-82.