

**THE LAW REFORM COMMISSION OF HONG KONG**

**REPORT ON**

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

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**Report on  
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# Preface

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1. On 25 November 1998, in response to concerns as to the amount of court time spent on the hearing of objections in criminal trials to the admissibility of confession statements taken by law enforcement agencies from accused persons, the Law Reform Commission (the Commission) published its *Consultation Paper on the Procedure Governing the Admissibility of Confession Statements in Criminal Proceedings* (the consultation paper), to seek input from the community as to the preferred ways of improving the present court procedure governing the admissibility of confession statements in jury trials.

2. As matters relating to the substantive law and the procedures governing the questioning of suspects by law enforcement agencies had been dealt with in an earlier Commission report published in 1985 entitled the *Report on Confession Statements and their Admissibility in Criminal Proceedings*, the consultation paper confined itself to the procedural question as to how the admissibility of confession statements is determined at trial. Accordingly, the consultation paper did not venture into matters of substantive law, or of the procedures to be adopted for the questioning of suspects by law enforcement agencies.

3. One of the main catalysts for the consultation paper was concern at the substantial amount of court time spent on the hearing of evidence relevant to the admissibility of confession statements. Under the present system, much court time is spent by the judge sitting alone hearing the witnesses in a “trial within a trial” (or *voir dire*, as it is termed by lawyers) conducted in the absence of the jury to determine the special issue of “admissibility”, only to have the same witnesses called over again before the jury to consider the general issue of evidential weight once the confession statement is ruled admissible by the judge. Not infrequently the same evidence which is relevant to the issue of admissibility is also relevant to evidential weight and credibility of the accused, and the witnesses must testify twice, once before the judge sitting alone, and later in the jury’s presence.

4. It is against this background that the procedure governing the admissibility of confession statements at trial was re-examined in the consultation paper, to see if there were alternatives to the *voir dire* procedure so that court time and costs would be saved. Three options for reform were proposed as follows in the consultation paper:

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; and

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.

5. The three options for reform were not proposed solely for the purpose of reducing the time and resources spent in determining the admissibility of confession statements. It was also hoped that the procedure at trials involving a jury could be simplified and made more effective, while bearing constantly in mind the need to ensure fairness.

6. While the consultation paper sought comment principally on the specific options for procedural reform identified, it also invited general comments on other means of improving the present procedure governing the admissibility of confession statements in jury trials. The consultation period lasted from 25 November 1998 to 28 February 1999 and elicited responses from a range of individuals and organisations. In addition, the paper was discussed by the Fight Crime Committee and by participants at a Forum organised by the Faculty of Law of Hong Kong University. This report is the result of our careful consideration of all these responses, and of the detailed discussion within the Commission as to the best way forward.

7. We have been greatly assisted in our consideration of this subject by the advice and comments given by experts in this area of the law, both in Hong Kong and in a number of other jurisdictions. In Hong Kong, we are particularly grateful to all those who responded to our consultation paper. These individuals and organisations are listed at Annex 1. We wish to express our thanks also to the Hong Kong Police and the Independent Commission Against Corruption for their assistance in providing the statistical data contained in both the consultation paper and this report.

# Chapter 1

## A short history of the reference

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1.1 As noted in the preface, the consultation paper sought 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 endeavoured to identify ways to simplify trial procedure, and to reduce the extensive time and resources devoted in jury trials to the hearing of evidence on whether or not a confession statement was made voluntarily.

1.2 These concerns were not new. As far back as October 1985, the Commission had examined the issues raised by the determination of the admissibility of confession statements in its *Report on Confession Statements and their Admissibility in Criminal Proceedings* (the Report).

1.3 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. 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 (JP) 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 enable its prompt investigation), and to discourage objections to the admissibility of a confession statement being first raised at trial.

1.4 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 central recommendation for the setting up of a system of lay panelists (drawn from the ranks of JPs) to entertain early complaints from suspects.

1.5 Notwithstanding the Administration's rejection of the key element of the Commissioner's 1985 package of reforms, a number of improvements have since been made to the practices adopted in the taking of confession statements. The aim of these improvements was to provide greater protection to suspects whilst they were under investigation and interrogation by the law enforcement agencies.

1.6 One such improvement was the reflection of some of the Report's recommendations in the *Rules and Directions for the Questioning of Suspects and the Taking of Statements*<sup>1</sup> (the Rules and Directions), promulgated by the Secretary for Security in October 1992, which provide 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 (ICAC).

1.7 Since the publication of the Report, there has also been an 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.

1.8 The 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 dire*s 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 dire</i> s  | 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% |

<sup>1</sup> 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%  | -     | -    |

1.9 The ICAC “are absolutely convinced that [videotaping] is the fairest and most equitable means of recording interviews of suspects by law enforcement officers.”<sup>2</sup> 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.”

1.10 Videotaping of interviews by the Police was first introduced in 1993. There are currently 63 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 further seven are planned by April 2000, 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 1997<sup>3</sup>**

|   | 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%            |

<sup>2</sup> 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.

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

|  | High Court | District Court |
|--|------------|----------------|
| (j) Videotaped interviews not admitted into evidence     | 7          | 3              |
| (k) j as % of b  | 4%         | 2%             |
| (l) Non-videotaped interviews not admitted into evidence | 43         | 116            |
| (m) l as % of d  | 12%        | 8%             |

1.11 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 if the interview has been videotaped.

1.12 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 of misconduct in the questioning of a suspect made prior to the video-taped interview remains, and substantial court time is still devoted to the hearing of objections to the admissibility of confession statements.

1.13 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.

1.14 In the light of Mr Justice Litton's letter, we considered at the Commission meetings in April and June 1998 the existing procedure for the admission of confession statements in criminal proceedings and examined the approach adopted in a number of overseas jurisdictions. We concluded that the procedural aspects for the determination of the admissibility of confession statements at trial should be re-examined. The consultation paper and the consultation exercise conducted in the period between 25 November 1998 and 28 February 1999 were the results.

1.15 It is important to stress at the outset of this report, as we did in the consultation paper, that the scope of the consultation was restricted to the procedural question as to how the admissibility of a confession is determined at trial. This narrow scope of study was adopted because matters of substantive law and practice relevant to the questioning of suspects by the law enforcement agencies had already previously been addressed in our earlier Report.

## Chapter 2

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

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2.1 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:<sup>1</sup>

*“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.”*

2.2 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 same<sup>2</sup> and for the purposes of this report we use the term “confession” to include an admission.

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<sup>1</sup> At page 4.

<sup>2</sup> Bruce and McCoy, *Criminal Evidence in Hong Kong* (Issue 7, 1999), at A[1] of Division V. 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.

2.3 In essence, a confession can be made in writing or orally by a suspect to anyone. However, when it is made to a “person in authority”<sup>3</sup> such as a law enforcement officer involved in the investigation or the interview of a suspect, the confession should be preceded by a caution, as a suspect is entitled to remain silent on matters that might incriminate him. In any event, the content of this statement can be either partially or wholly incriminating in implicating the suspect in the offence(s) subsequently laid against him. In certain circumstances, the gestures, actions, conduct or demeanour (or, indeed, any reaction) of a suspect in the face of questions put to him could also amount to a confession.

2.4 In a trial, the prosecution may 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”**

2.5 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.

2.6 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.”*<sup>4</sup>

2.7 This definition of Lord Sumner was followed by the House of Lords in *Commissioners of Customs & Excise v Harz & Power*<sup>5</sup> and *DPP v Ping Lin*.<sup>6</sup> In *R v Sang*,<sup>7</sup> 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.

2.8 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’”.<sup>8</sup>

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<sup>3</sup> Persons in authority include employers, persons arresting the suspect, police and other investigating officer etc.

<sup>4</sup> [1914] AC 559, at 609.

<sup>5</sup> [1967] 1 AC 760.

<sup>6</sup> [1976] AC 574.

<sup>7</sup> [1980] AC 402, at 445.

<sup>8</sup> *R v Lam Yip-ying* [1984] HKLR 419.

2.9 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.”*

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

## **The court’s residual discretionary power**

2.11 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.”<sup>9</sup>*

2.12 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*

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<sup>9</sup> Cited above, at 434-435.

*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.”<sup>10</sup>*

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.”<sup>11</sup>*

2.13 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.”<sup>12</sup>*

2.14 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.

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

2.15 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:

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<sup>10</sup> Cited above, at 436-437.

<sup>11</sup> Cited above, at 436-437.

<sup>12</sup> [1984] HKLR 419, at 424.

*“... 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.”*<sup>13</sup>

2.16 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 not obtained voluntarily 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, 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’.”*<sup>14</sup>

2.17 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*

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<sup>13</sup> [1995] 1 HKCLR 327, at 327.

<sup>14</sup> At pages 4-5.

*as a criterion of the weight and value, if any, of the statement as evidence of the guilt of the accused.”<sup>15</sup>*

2.18 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.

2.19 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.”<sup>16</sup>*

2.20 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.

2.21 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.

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<sup>15</sup> [1982] AC 204, at 221.

<sup>16</sup> Page 5 of the Report.

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.

2.22 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, although 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.”<sup>17</sup>*

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.

## **The admissibility of a confession and the “alternative procedure”**

2.23 As mentioned earlier in this chapter, the main reason for excluding the jury from the *voir dire* proceedings is the concern that if they

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<sup>17</sup> Cited above, at 223.

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 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".

2.24 The "alternative procedure" was approved in *Ho Yiu-fai & others v R*.<sup>18</sup> 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 gave evidence on the issue of*

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[1970] HKLR 415.

*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.”<sup>19</sup>*

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<sup>19</sup> Bruce and McCoy, *Criminal Evidence in Hong Kong* (Issue 8, 1999), at [953] of Division V.



- (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.”*

3.2 Section 189 distinguishes two situations. If the “preliminary question” to be determined is whether the evidence in question constitutes an admission, or whether an admission is to be admitted, the jury must not be present (section 189(2)). If the “preliminary question” relates to any other matter, the jury must not be present unless the court so orders (section 189(4)). The factors which the court must take into account in determining whether a jury should be permitted to be present are set out in section 189(5) of the 1995 Act.

3.3 It is clear from section 189 that the jury cannot be present when the admissibility of a confession statement is determined. There is no discretion left with the court to allow a jury to be present during the *voir dire* on

that issue. This contrasts with the Australian Law Reform Commission's recommendation in 1987 in its Report on *Evidence* that:

*"...it should be a matter for the trial judge whether the jury should be present while such questions are determined but, in general, the jury should be excluded where questions arise as to the admissibility of evidence of admissions or of evidence allegedly obtained illegally or improperly."*<sup>2</sup>

3.4 Section 142 of the 1995 Act provides that the standard of proof in relation to the preliminary question of the admissibility of confession evidence should be the civil standard of a balance of probabilities. Section 142 provides as follows:

*"(1) Except as otherwise provided by this Act, in any proceeding the court is to find that the facts necessary for deciding:*

- (a) a question whether evidence should be admitted or not admitted, whether in the exercise of a discretion or not; or*
- (b) any other question arising under this Act;*

*have been proved if it is satisfied that they have been proved on the balance of probabilities.*

*(2) In determining whether it is so satisfied, the matters that the court must take into account include:*

- (a) the importance of the evidence in the proceeding; and*
- (b) the gravity of the matters alleged in relation to the question."*

3.5 This provision is essentially the same as that proposed by the Australian Law Reform Commission in its *Evidence* report, save for the addition in the Act of section 142(2)(b).<sup>3</sup> The Commission had recommended that:

*"For both civil and criminal trials, where the admissibility of evidence depends upon the proof of facts, the standard of proof of those facts should, unless special provision is elsewhere made, be the civil standard having regard to the importance of the evidence sought to be admitted."*<sup>4</sup>

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<sup>2</sup> Australian Law Reform Commission, *Report on Evidence* (Report No 38), 1987, at paragraph 245.

<sup>3</sup> See clause 138 of the draft Bill at Appendix A of the Report, referred to above, at 197.

<sup>4</sup> At paragraph 236.

3.6 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

3.7 The New Zealand Evidence Law Reform Committee’s *Report on Confessions*<sup>5</sup> conveniently summarises the position in Canada in relation to confession statements:

*“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

3.8 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*

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<sup>5</sup> Evidence Law Reform Committee, New Zealand, *Report on Confessions*, (February 1987), at page 15.

*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 (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.”*

3.9 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.

3.10 It was said in *R v Anderson*<sup>6</sup> 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:<sup>7</sup>

*“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*

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<sup>6</sup> [1929] 21 Cr. App. R. 178, at 183.

<sup>7</sup> [1982] AC 204, at 223.

*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.”*<sup>8</sup>

3.11 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 Director of Public Prosecutions of Hong Kong has pointed out<sup>9</sup> 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 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.

3.12 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*”.<sup>10</sup> 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*).<sup>11</sup> 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.

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<sup>8</sup> Cited above.

<sup>9</sup> The DPP's views were set out in his note dated 28 February 1998 to the Secretary to the Law Reform Commission.

<sup>10</sup> Bruce and McCoy, *Criminal Evidence in Hong Kong* (Issue 3, 1996), at [905]-[950] of Division V.

<sup>11</sup> [1987] 2 All ER 668.

3.13 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

3.14 The law relating to confessions in Malaysia is contained in the Evidence Act 1950.<sup>12</sup> 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.<sup>13</sup> The court will only treat a statement as a confession if the accused admits to the elements of the offence (ie the intention to commit the crime, and the commission of the unlawful act).<sup>14</sup>

3.15 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 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.”*

3.16 The “inducement, threat or promise” referred to in section 24 is not restricted to physical harassment. It may take the form of statements by the interrogator.<sup>15</sup> In *Lim Kim Tjok v Public Prosecutor*,<sup>16</sup> 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.<sup>17</sup>

3.17 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 & Ors*,<sup>18</sup> the court held that the circumstances of the case pointed to a doubt as to the voluntary nature of the confessions made by the accused. The accused had been held in police custody throughout and:

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<sup>12</sup> Act 56 of 1950.

<sup>13</sup> *The Annotated Statutes of Malaysia: Evidence Act 1950 (1996 Issue)*, notes to [17].

<sup>14</sup> 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.

<sup>15</sup> *The Annotated Statutes of Malaysia*, notes to [24].

<sup>16</sup> [1978] 2 MLJ 94.

<sup>17</sup> *The Annotated Statutes of Malaysia*, notes to [24].

<sup>18</sup> [1971] 1 MLJ 199.

*“ .it was the investigating officer who took the two accused to the magistrate and it was known and understood throughout not only by the accused but also by the magistrate that the two accused were going back into police custody where in fact they remained for quite some time after the making of the confessions.”*<sup>19</sup>

In the circumstances, there was “reason to apprehend that the influence of the police was still continuing on the mind of the accused” and the confessions could not be admitted.

3.18 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 law in the Federation of Malaysia or any part of it.<sup>20</sup> 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.<sup>21</sup>

3.19 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 the confession. In *Public Prosecutor v Law Say Seck & Ors*<sup>22</sup> 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 126(1) of the Code was almost the same as section 24 of the Evidence Act. The court stressed that the person confessing should be left to narrate his story as a whole without any interference. The magistrate’s duty was only to record what the accused said or wished to say. The magistrate did 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.”<sup>23</sup>

## **New Zealand**

3.20 In New Zealand, a *voir dire* in relation to a 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

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<sup>19</sup> Cited above, at 201.

<sup>20</sup> *The Annotated Statutes of Malaysia*, notes to [25].

<sup>21</sup> See *Eng Sin v Public Prosecutor* [1974] 2 MLJ168.

<sup>22</sup> Cited above, at 199.

<sup>23</sup> Cited above, at 201.

proceedings will be heard in the absence of the jury. 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.

3.21 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.”*

3.22 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.”*<sup>24</sup>

3.23 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.

## Scotland

3.24 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”*<sup>25</sup> 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.”*<sup>26</sup>

3.25 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*.<sup>27</sup> Since its introduction it has been the subject of considerable criticism, and the

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<sup>24</sup> Evidence Law Reform Committee, New Zealand, *Report on Confessions*, (February 1987), at page 7.

<sup>25</sup> Walker and Walker, *The Law of Evidence in Scotland* (1964), at paragraph 46.

<sup>26</sup> *Hartley v HM Advocate* 1979 SLT 26, at 28.

<sup>27</sup> [1954] JC 66.

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.

3.26 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.”*<sup>28</sup>

3.27 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.”*<sup>29</sup>

3.28 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.”*<sup>30</sup>

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<sup>28</sup> *Criminal Procedure According to the Law of Scotland*, (6th ed.), at 453-454.

<sup>29</sup> 1975 SLT (Notes) 17, at 18.

<sup>30</sup> 1977 JC 23, at 28.

3.29 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.”<sup>31</sup>*

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.

3.30 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

3.31 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 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.

3.32 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

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<sup>31</sup> Section 36(8) of the Criminal Procedure (Scotland) Act 1995.

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.

3.33 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 this is also led in the main trial.

3.34 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 Africa<sup>32</sup>

3.35 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.

3.36 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)).

3.37 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.

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

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<sup>32</sup> 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.

sober 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)).

3.39 The Criminal Procedure Act further distinguishes between the admissibility requirements for admissions and confessions.<sup>33</sup> 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.

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<sup>33</sup> "Admission" and "confession" are often treated as having a slightly different meaning. "Confession" is often treated as a full and detailed admission: see Bruce and McCoy, *Criminal Evidence in Hong Kong* (Issue 7, 1999), at A[1] of Division V.

## Chapter 4

### Options for reform

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4.1 As noted in the preface to this report, the consultation paper issued in November 1998 was prompted by concerns that the existing procedure for determining the admissibility of confession statements in criminal proceedings was deficient, in particular because of the time and resources consumed by the *voir dire*. The consultation paper set out the arguments for and against change and concluded by presenting three options for reform of the procedure currently adopted. We will return to these three options later, but begin by briefly re-stating the main arguments set out in the consultation paper for and against reform, referring in the course of that discussion to the views expressed by those who responded to the consultation paper.

#### Arguments in favour of reform

##### *Duplication of evidence*

4.2 The principal argument in favour of finding alternatives to the *voir dire* is that to do so would eliminate the duplication of evidence which the existing system necessitates, with a consequent saving in 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.

4.3 In response, it was pointed out by a number of those who responded to the consultation paper that it was misleading to refer to the same issue being tried twice as there were in fact two different issues to be dealt with: the admissibility of the confession statement was a matter for the judge, while the reliability of the witnesses and of the statement itself were matters for the jury.

4.4 It was further argued that the administrative advantage of reducing court time and costs should not be achieved at the expense of jeopardising the accused person's right to a fair trial. Under the present *voir dire* procedure where the issue of voluntariness is dealt with in the absence of

the jury, the accused can testify freely on the special issue of voluntariness without fear that that evidence would adversely affect the later determination of his guilt by the jury. The presence of the jury in the proceedings determining the issue of voluntariness would deprive the accused of his right to testify freely. In an extreme case, he might choose not to challenge the admissibility of the confession statement for fear of the consequences. As JUSTICE observed,<sup>1</sup> “*saving court time is only a means to an end. It must not be elevated to become an end in itself.*”

4.5 One respondent suggested to us that if the end is cost saving, section 17 of the Costs in Criminal Cases Ordinance (Cap. 492) can be used to deal with any unnecessary time wasted on *voir dire*s. Section 17 provides that:

*“Where at any time in the course of criminal proceedings a court or a judge is satisfied that costs have been incurred in respect of the proceedings by a party to the proceedings as a result of an unnecessary or improper act or omission by or on behalf of the other party to the proceedings, the court or the judge may, after hearing all such parties, order that all or part of the costs so incurred shall be paid to the first mentioned party to the proceedings by the other party to the proceedings.”*

### ***Danger of unfounded prejudice***

4.6 The consultation paper pointed out that 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 therefore be better to let the jury hear all the evidence, and allow the judge to direct the jury to disregard any evidence which is subsequently 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.

4.7 The Bar disagrees with this argument on the basis that once a confession is ruled inadmissible the jury would not be told of its existence. As the jury are generally empanelled subsequent to the hearing of the *voir dire*, they would not be aware of the fact that there had been a challenge to the admissibility of the statement.

### ***Illogical to assume jury cannot disregard confessions ruled inadmissible***

4.8 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

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<sup>1</sup> In a letter to the Secretary to the Commission dated 25 February 1999.

of evidence or impropriety are true, or might be true, they should place no weight upon the confession. They thus see the 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.

4.9 The jury would invariably be 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.”*

4.10 The consultation paper suggested that it was 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.

4.11 The Complaints Against Police Office (CAPO) is among those who agree with this view. CAPO considers<sup>2</sup> that as people in Hong Kong are becoming more knowledgeable and better educated, the jury are, as arbiters of the credibility of the evidence laid before them, in general capable of putting out of their minds evidence arising from an inadmissible confession.

4.12 The majority of those who commented on the consultation paper, however, take an opposing view and believe that juries would be prejudiced by evidence relevant to a confession that is later ruled inadmissible by the trial judge. These respondents argue that the present *voir dire* procedure ensures that lay jurors are not asked to put out of their minds the highly prejudicial evidence arising from a confession statement which is subsequently ruled inadmissible. Instead, the decision is left to a judge, who is professionally trained to separate inadmissible evidence from other admissible evidence when he comes to decide on the guilt or otherwise of an accused. The difficulty for a lay juror to disregard evidence of an inadmissible confession would be particularly acute where the statement is ruled inadmissible mainly on technical grounds.

4.13 It was further suggested to us that even if the jury were able to cast from their minds the inadmissible evidence, there would always be a lurking suspicion that the jury had considered matters which were not allowed to form part of the prosecution's case. Some respondents saw a double

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<sup>2</sup> In a letter to the Secretary to the Commission dated 28 February 1999.

hazard in allowing the jury's presence in the *voir dire* proceedings: the danger that the jury would be prejudiced by inadmissible evidence and the impossibility of ascertaining whether or not the jury had been so prejudiced. In addition, the Legal Aid Department referred to the possibility that the jury might interpret a ruling that a confession statement is admissible as an indication that one or more prosecution witnesses are worthier of belief than those called by the defence. That could prove prejudicial to the accused when the general issue of guilt is tried before the same jury.

4.14 To the assertion that jurors should be able to disregard the evidence of an inadmissible confession since they are already expected (on appropriate direction from the trial judge) to set aside other irrelevant and inadmissible testimony which does on occasion go before the jury, barrister Stuart Cotsen remarks<sup>3</sup>:

*"[t]here is a real risk that a jury hearing of an accused's previous convictions will not be capable upon direction of disregarding it. The same for evidence that he was a 'target' of the police. These are well established and there are many more examples. How can it then be argued that a jury is capable of disregarding a confession and there is no risk of placing a confession later ruled inadmissible before it?"*

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

4.15 The consultation paper pointed out that 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 could be argued that 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.

4.16 The Bar, among others, responded that the existing practice of entrusting judges alone to rule on the issue of admissibility is based on sound policy considerations. The Bar points out that the admissibility of a confession is a question of law, and not a question of fact for the jury, and there is therefore nothing to substantiate the claim that the *voir dire* procedure has usurped the jury's function as arbiters of credibility. Once a confession is "ruled in" by the judge, the jury will have the opportunity to assess the credibility of the witnesses. To that extent, the jury remain the sole arbiters of credibility in respect of a confession which has been ruled admissible by the judge.

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<sup>3</sup>

In a letter to the Secretary to the Commission dated 25 February 1999.

## ***Possible negative effect on the jury of exclusion***

4.17 Reference was made in the consultation paper to the Australian Law Reform Commission's Interim Report on *Evidence* which listed a number of considerations suggesting that the jury need not or should not always be sent out during the hearing of admissibility of confessions.<sup>4</sup> It was suggested that the jury's attitude to the court and the parties might be adversely affected if the jury is repeatedly excluded from what are apparently important decisions.

4.18 Those who disagreed with this view pointed out that since the admissibility of a confession statement is generally dealt with before the commencement of the trial proper, there is little basis for this concern.

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

### ***Avoids potential prejudice to the accused***

4.19 The main argument in favour of retention 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 that 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. This view was strongly supported by a significant number of those who responded to the consultation paper, including both the Law Society and the Bar.

4.20 The Bar referred to the Privy Council decision in *Wong Kam Ming v R* to support the assertion that the judiciary must be accorded some means of excluding confessions obtained by improper means. Lord Hailsham in *Wong Kam Ming* held that:

*“Any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of each statement, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions. It is therefore of very great importance that the courts should continue to insist that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was*

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<sup>4</sup> *Evidence Interim Report*, (Report No 26, Vol. I), Australian Law Reform Commission, 1985, at paragraph 1035.

*not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary.”<sup>5</sup>*

4.21 The Law Society expressed concern at the possibility of prejudice if the jury were to hear evidence of a confession which was subsequently ruled inadmissible and argued that the jury should not be expected to engage in the “gymnastics” required to exclude from their minds allegations which they have already heard.

### ***Avoids effective dilution of the right to silence***

4.22 The consultation paper 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. Lord Fraser expressed the concern in *R v Brophy*:

*“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.”<sup>6</sup>*

4.23 The Law Society, among others, supported this view and argued that the accused should not give evidence at the *voir dire* with the residual fear that his testimony would adversely affect the jury’s impression of him when they are to arrive at a verdict. Equally, the accused should be able to testify in the *voir dire* without being compelled by circumstances to testify in the main trial for the sole purpose of changing the jury’s adverse impression of him as a result of his testimony in the *voir dire*. Those consequences would effectively impair the accused’s right to silence at trial.

### ***Options other than the abolition of the voir dire may achieve the same end***

4.24 The consultation paper pointed out that if the principal objective was to save court time, the videotaping of confessions might provide a less controversial option. The consultation paper observed that the practice by the Police and the ICAC of videotaping confessions has reduced significantly the number of challenges to the admissibility of confessions. While the heavy

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<sup>5</sup> [1980] AC 247, at 261.

<sup>6</sup> [1982] AC 476, at 482.

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 serious cases which are likely to be heard in the District Court or the Court of First Instance of the High Court.

4.25 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 consultation 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. While the wider use of videotape would be expected to reduce the number of challenges to the admissibility of confession statements, that does not justify the abolition of the *voir dire*. As the Legal Aid Department says<sup>7</sup>:

*“That from now on all cautioned statements of defendants are to be video recorded is no justification to abolish the voir dire proceedings altogether. A defendant’s allegations of malpractice are likely to continue to be made, in respect of improprieties which may have taken place before the video recording began.”*

## **The options for reform**

4.26 The consultation paper sought the community’s views on the following three 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; and
- 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.

4.27 Written responses were received to the consultation paper from around 50 individuals and organisations. The latter included bodies such as the Law Society, the Bar Association, JUSTICE and the Hong Kong Human Rights Monitor, as well as Government departments including the Police, Customs and Excise and Legal Aid. In addition, comments were elicited on

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<sup>7</sup> In a letter to the Secretary to the Commission dated 2 March 1999.

the consultation paper from the Legislative Council's Panel on Administration of Justice and Legal Services, from members of the Fight Crime Committee and from participants at a forum organised by the Faculty of Law of the Hong Kong University. It is fair to say that the majority of those who responded were against each of the three options for reform proposed. The general arguments in favour of the *status quo* have been outlined in the preceding paragraphs. We now examine each of the consultation paper's options in turn in the light of the responses to the consultation paper.

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

4.28 The principal concern which prompted our consideration of the procedure for determining the admissibility of confession statements was the considerable amount of court time which has to be spent in dealing with objections to the admissibility of confession statements. The view was expressed that it is unsatisfactory to have the question of admissibility of a confession considered separately from its evidential weight and effect, particularly so in jury trials. Much time is spent 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.

4.29 The consultation paper suggested 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. 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.

4.30 Option A proposed 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 support of this option, it was pointed out in the consultation paper that 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.

4.31 To put into effect this proposal for change, amendments to the Criminal Procedure Ordinance (Cap. 221) along the following lines were suggested:

- “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.”*

4.32 In favour of this option, the consultation paper pointed out that providing the trial judge with a discretion as to whether the question of admissibility should be heard in the presence of the jury would ensure that the accused is 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. Option A would place the decision as to whether or not to hold a *voir dire* in the hands of the trial judge.

4.33 Only one of those who responded to our consultation paper was in favour of Option A. He considered, however, that the discretion proposed should only be exercised in exceptional circumstances, such as where the allegations of impropriety are straightforward or the only evidence of guilt is the confession itself.

4.34 Understandably, some of the respondents' arguments against this option are essentially those stated in the general arguments presented earlier in this chapter and we do not intend to repeat details of these arguments here.

### ***Judges' discretion undermines uniformity***

4.35 The key feature of Option A is that it provides the trial judge with a discretion to adopt the alternative procedure in a jury trial. This option was in general treated with suspicion by those who commented on the consultation paper. The main objection lies in the fear that the exercise of judicial discretion would undermine uniformity since there are no clear guidelines as to how the discretion is to be exercised. Allied to this is the concern that the introduction of this additional element of judicial discretion may prompt a multiplicity of appeals, particularly in cases where the trial judge insists on exercising his discretion to allow the issue of voluntariness to be deliberated before the jury in the face of an objection raised by the defence.

### ***Unlikely that the jury can ignore a rejected confession***

4.36 As explained earlier in this chapter, the danger of having the jury present at the *voir dire* proceedings lies in the potential prejudice to the accused. Those who reject Option A believe that the risk is too great that jurors will not be able to put out of their minds the prejudicial nature of a confession which is ruled inadmissible. It is, they argue, better to ensure that the accused receives a fair hearing from the jury on the substantive issue by uniformly excluding the jury from the hearing to determine the admissibility of the confession statement.

4.37 It was suggested by one respondent that a particular difficulty may arise when there is in the same trial more than one accused with confession statements to contest. In those circumstances, if the trial judge in the jury's presence withdraws the statement of one accused but not that of another, the jury may give undue weight to the statement admitted, reflecting the fact that that accused's assertion that the confession was not voluntary has been rejected.

4.38 Equally unfair to the accused would be the case where the statement of the co-accused has implicated him in the commission of the offence. The withdrawal of the statement by the judge could not remove the fact that the jury had already seen and heard the statement, and any incriminating evidence it contained.

### ***Inhibition of the accused's testimony on the issue of voluntariness***

4.39 Some respondents are also concerned that if the jury were present at the hearing on admissibility, the accused might be deterred from giving evidence on that issue because of fears that by so doing he might evoke an adverse reaction from the jury.

### ***Causing injustice to both parties***

4.40 The possible injustice to the accused which Option A might cause has already been canvassed earlier in this chapter. There is also a risk of injustice to the prosecution, however. If the judge rejects a confession statement, this might be taken by the jury as reflecting adversely on the prosecution witnesses, not only in respect of the question of voluntariness but also on the substantive issue.

### ***Saving of time and costs insufficient justification for removing protection provided by voir dire***

4.41 The cumulative effect of these possible injustices led many of the respondents to conclude that the saving of court time and costs is insufficient to justify the adoption of Option A. Ms Corinne Remedios, a barrister, accordingly observes:<sup>8</sup>

*“The potentially grave injustice to a defendant of a jury relying on an inadmissible confession cannot be sacrificed in order to achieve a more efficient or economical Court system. The interests of justice must be weighted in the accused’s favour.”*

### ***Effective dilution of the right to silence***

4.42 A number of respondents were concerned that the jury, who would be present in the *voir dire* proceedings as a result of Option A, might speculate as to why the accused did not give evidence in the main trial when he had earlier given evidence in the *voir dire*. The jury might infer guilt from the accused’s exercise of his right to silence. This indirectly undermines the accused’s right to silence, as he might feel compelled under the circumstances to elect to give evidence in the main trial.

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

4.43 This option goes further than 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. While the majority of those who responded to the consultation paper were against any of the three options for change presented in that paper, of those who favoured change, most opted for Option B.

4.44 One argument for change presented in the consultation paper was that there seemed little justification for the view that the jury are incapable

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<sup>8</sup> In a letter to the Secretary to the Commission dated 24 February 1999.

of putting out from their minds a confession which they have themselves ruled was not voluntarily given and is therefore inadmissible, when the current procedure expects them to be capable of assessing post-*voir dire* the weight to be given to an admissible 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 the jury a lack of sophistication that has little validity in today's Hong Kong. The ICAC observed<sup>9</sup> that as jurors in Hong Kong are made up of an average cross-section of the community a properly directed jury:

*“... should be more than capable of making an objective assessment of the voluntariness and fairness of a confession, without being ‘tainted’ by knowledge of the issues if the confession were subsequently ruled inadmissible ... We believe that making the question of admissibility of confession statements a matter for the jury in all cases would be preferable to allowing courts a discretion to direct that the question of admissibility be dealt with in the presence of the jury. A consistently uniform procedure, we feel, would be fairer, almost by definition.”*

4.45 The consultation paper pointed out that Option B had 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 must be presumed that they would believe in the correctness of their own decision. There would therefore be no question of jurors being prejudiced by evidence relating to a confession which they have themselves ruled inadmissible. In giving their support to Option B, the Immigration Department agreed<sup>10</sup> that since juries are presumed capable of assessing the weight to be accorded to a confession admitted in evidence, there is little reason for the view that they are incapable of putting out from their minds evidence of a confession which they have themselves ruled inadmissible under this option.

4.46 The consultation paper suggested that Option B could be said to provide 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, the accused 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. The consultation paper pointed out that it was difficult to discern why the latter circumstances should not be equally capable of decision by a properly instructed jury.

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<sup>9</sup> In a letter to the Secretary to the Commission dated 11 February 1999.

<sup>10</sup> In a letter to the Secretary to the Commission dated 26 February 1999.

4.47 One respondent who supported this argument remarked that it was impracticable to require the jury to draw a distinction between the issues of admissibility of a confession statement and the weight to be attached to it. He suggested that the two issues should be merged, and that all confession statements should be made admissible before the jury. It would then be a matter for the jury as to what weight should be given to them (the issues of voluntariness and fairness could be canvassed at that stage). This would obviate the need for a *voir dire* altogether.

### ***Option B a less flexible option***

4.48 Some of those who argued against Option B pointed out that it was a less flexible alternative than Options A or C, which would at least allow a residual discretion for the judge to conduct the *voir dire* in the absence of the jury. Option B ruled out such a possibility. The jury would always hear the confession, whatever their conclusion as to voluntariness might ultimately be.

### ***Prejudice to the accused***

4.49 The possibility of juries blurring the general issue of truthfulness with the special issue of voluntariness, to the prejudice of the accused, was raised among others by Mr Harry Macleod, Deputy Director of Public Prosecutions, who observed that<sup>11</sup>:

*“In hearing a voir dire in which they are the arbiter of facts, it would not be wholly surprising for the jury to form a judgment as to the authenticity and truth of a confession, even though those issues may not necessarily be germane to the issue they have to decide, i.e. voluntariness. If they were to conclude that the confession was not voluntary, they may nevertheless have formed the view that the confession was both authentic and true. This view would be more sharply focused and entrenched than if they had been mere spectators of a voir dire conducted pursuant to Option A or C. It is submitted that in such circumstances it would be extremely difficult for the jury to exclude the confession from their minds.”*

### ***Discourages the accused from giving evidence on the general issue***

4.50 A general concern was expressed by those who object to Option B that the jury's ruling on the issue of admissibility might be taken as an “indication” of the jury's attitude to the credibility of the accused and his witnesses. An adverse ruling might discourage the accused from giving

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<sup>11</sup> In a note to the Director of Public Prosecutions dated 6 February 1999.

further evidence on the general issue as he might consider that the jury would disbelieve his evidence by virtue of their “ruling in” of the confession statement.

### ***Jurors would become judges of law***

4.51 Some respondents expressed concern that allowing the jury (who are judges of fact) to rule on the special issue of admissibility (which is a question of law) would usurp the judge’s function. The issue of admissibility is a complex one, involving legal considerations which might be asking too much of lay jurors who are neither professionally qualified nor trained to take up the task.

4.52 It was argued by some that the practical effect might well be that juries admit all confessions as evidence, a view summarised by barrister Mr John Dunn:

*“The implementation of Option B would not mean in practice that juries would actually decide upon the admissibility of confessions. The true effect of Option B would be that all confessions would be admitted into evidence and juries would then simply decide how much weight they placed upon them.”<sup>12</sup>*

### ***The accused would always have a case to answer***

4.53 Mr Dunn argued that even if the prosecution witnesses have all been discredited in cross-examination and there is grave suspicion that the confession was not voluntarily obtained, the case would nevertheless continue to its formal conclusion. In the same letter, Mr Dunn remarked:

*“Presumably the jury would not be called upon at any time to make a formal ‘ruling’ on admissibility, and in any case they could not do so until the end of the trial when they had heard all the evidence from both sides. This means that both the Prosecution and the Defence would have to conduct the entire trial without knowing whether this crucial piece of evidence (frequently the only piece of evidence) would be admitted or not. If the Prosecution case is such that it will inevitably fail without the confession evidence, which is not uncommon, then if the confession is rejected by the judge after a voir dire, the trial will end after a successful defence submission at the close of the Prosecution case. It is submitted that it is clearly in the interests of justice that if the prosecution cannot establish even a prima facie case, then the trial should not continue and the defendant should not remain in jeopardy, but should be discharged. If however the judge does not know whether or not the confession*

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<sup>12</sup>

In a letter to the Secretary to the Commission dated 20 February 1999.

*will be adjudged admissible by the jury, then how can he make a sensible decision on whether or not in law the Prosecution has made out a prima facie case? Presumably he must rule, in accordance with R. v Galbraith that where there is evidence on which the jury could convict if they believe the witnesses, then he must let the case go on.”*

4.54 If the intention of Option B is to save court time and costs, it would have failed in its purpose. Even though the only evidence against the accused is a confession which is ultimately ruled inadmissible, a full trial must nevertheless be conducted. Under the present system, if the confession is ruled inadmissible at the conclusion of the *voir dire*, the trial need not continue further.

### **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**

4.55 Option C in the consultation paper differed from the discretion proposed in Option A in that, under the former, 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. However, the judge would be given the authority to exercise his discretionary power to take into account practical considerations. Option A, however, 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. Under Option C, the determination of the admissibility of evidence would in general be made by the trial judge in a *voir dire* in the jury's absence, though the judge would have a discretion to direct that the matter be dealt with in the presence of the jury. 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.

4.56 Option C also differs from Option A in that it proposed that the standard of proof required of the prosecution in proving the voluntariness of a confession statement should be on the balance of probabilities, and not the higher criminal standard of proof beyond reasonable doubt currently adopted in Hong Kong. This standard of proof had been described as a “variable civil standard” since it allows the standard applied by the court to take into account the nature and importance of the preliminary question of fact, in order to deter improper conduct by the law enforcement agencies.

4.57 Only one of those who responded to our consultation paper was in favour of the adoption of Option C, though there were some who favoured other options who also argued that the standard of proof should be changed.

One such was the Immigration Department, who argued<sup>13</sup> that the change would not necessarily remove from the accused the greater protection now enshrined in the present conditions governing the admissibility of confession statements. They explained that even if the statement is admitted on the basis of the civil standard, the jury at the end of the day must still be satisfied beyond reasonable doubt that the accused is guilty, before a conviction can be returned.

4.58 The Hong Kong Democratic Foundation also gave their support to a change in the standard of proof:

*“..particularly bearing in mind that in voir dices the prosecution is called upon to prove a negative - that is that the statement has not been improperly procured, that there has not been force used, nor duress, nor an offer of advantage. And we say this also conscious of the fact that there is a ‘long-stop’ in that the prosecutions case as a whole still has to be proved beyond all reasonable doubt.”*

4.59 A similar view was expressed by the Complaints Against Police Office (CAPO)<sup>14</sup>, who commented that the lowering of the standard of proof to that of civil proceedings would not affect the fact that the prosecution's case must stand up to the scrutiny of the judge, or the judge and jury.

### ***Prejudice to the accused***

4.60 The general consultation responses suggesting that the jury's presence in *voir dire* proceedings would be prejudicial to the accused apply equally to Option C. For some, those reservations are exacerbated by the changing of the standard of proof to the balance of probabilities.

4.61 The arguments on this point have been fully canvassed earlier in this chapter. Suffice to say that those opposed to Option C considered that it presented as great a risk of prejudice to the accused as the other alternatives proposed. The principal concern is as to the jury's ability to cast from their minds inadmissible and prejudicial evidence heard in relation to the *voir dire* proceedings.

### ***The two standards of proof would confuse the jury***

4.62 Specifically in relation to the proposal to lower the standard of proof, some respondents doubted if an untrained jury would be able to discern the different requirements arising from the criminal and civil standards of proof. The time devoted by judges to explaining the criminal standard provides an indication of the complexities involved. To burden the jury in

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<sup>13</sup> In a letter to the Secretary to the Commission dated 26 February 1999.

<sup>14</sup> In a letter to the Secretary to the Commission dated 28 February 1999.

addition with a different standard of proof for one aspect of the proceedings might prove too taxing on the jury.

### ***Inadequate protection for the accused***

4.63 A number of respondents argued that a lowering of the standard of proof would significantly reduce the existing protection against abuse by the law enforcement agencies. Under the present system, the prosecution is required to prove beyond reasonable doubt in the *voir dire* that the confession statement was obtained voluntarily, before the statement can be admitted in evidence before the jury. Should the standard of proof be lowered, argued some respondents, confession statements which would otherwise be held inadmissible under the present criminal standard would be made admissible for the jury who in turn might return a guilty verdict on an accused who would otherwise be acquitted. Barrister Mr Joseph W.Y. Tse observed<sup>15</sup>:

*“This option can achieve nothing except to remove the safeguards of a defendant in a trial. If the standard of proof is lowered, it can be foreseen without any difficulty that almost all challenges to a statement would be unsuccessful. Judges would have no difficulty in being satisfied of the voluntary nature of statements. That would be the same as if a defendant had no right to challenge a statement at all. The law enforcement agencies would in turn be encouraged to rely more heavily on getting confessions from suspects. The consequences would be that there would be more and more cases involving a voir dire and practically all of them would turn out to be a futile exercise of useless challenges.”*

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<sup>15</sup> In a letter to the Secretary to the Commission dated 25 February 1999.

## Chapter 5

### Our conclusions and recommendations

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#### Reform of the *voir dire*

5.1 It is clear from the previous chapter that the general sentiment of the majority of those who commented on our consultation paper is against changing the present *voir dire* procedure governing the admissibility of confession statements. We note in particular that a substantial proportion of those legal practitioners who responded object to any of the options proposed. The Law Society, the Bar, the Prosecutions Division of the Department of Justice, the Legal Aid Department, JUSTICE, the Hong Kong Human Rights Monitor and the Hong Kong Young Legal Professionals Association were amongst those who rejected the three options for reform proposed.

5.2 In contrast, the ICAC, the Immigration Department, the Police and the Customs and Excise Department all supported Option B, as they believe that a properly directed jury should be capable of making an objective assessment of the voluntariness and fairness of a confession, without being tainted by knowledge of the issues when the confession is subsequently ruled inadmissible. There was no reason to suppose that a jury should be incapable of putting out from their mind evidence of a confession which they have themselves ruled inadmissible.

5.3 CAPO supported Option C, as they believe that the lowering of the standard of proof to that adopted in civil proceedings would not adversely affect the requirement that a confession must be proved to have been made voluntarily before it can be admitted in evidence.

5.4 We have considered carefully the views expressed by all those who responded to the consultation paper. In terms of pure numbers, those who are against change along the lines proposed in the consultation paper are in a comfortable majority. In reaching our conclusions, however, we have been persuaded by the strength of the arguments advanced by those who oppose change, rather than by mere weight of numbers. We agree that the primary consideration must be to ensure that the fairness of the present criminal process (and the protection it provides for an accused person against abuse) is not jeopardised by measures aimed at greater efficiency. We are persuaded that the *voir dire* provides an important protection to the rights of the accused, and acts as a disincentive to abuse by members of the law enforcement agencies. While there are undoubtedly adverse cost and

efficiency implications of the present procedure for determining admissibility of confession statements, those must be balanced with the need to adequately protect an accused person's rights.

5.5 We are further convinced by the suggestion made by a number of respondents that reform of the procedure for determining the admissibility of confession statements is to look at the problem from the wrong end: if adequate mechanisms are built in to prevent abuse at the time the confession is made, the need to rely on the *voir dire* becomes academic. With that in mind, we note the significant reduction in the number of challenges to confession statements following the introduction of video recording, and it seems reasonable to suppose that that trend will continue as the use of video recording becomes more widespread.

5.6 We would observe also in this regard that the adoption of the recommendations which we put forward in two of our earlier reports (on Confessions and Arrest) would in our view have put in place procedures which would have effectively removed the need for the *voir dire* in all but exceptional cases by:

- a) establishing a regulated framework for the supervision and treatment of persons in custody (the Arrest report); and
- b) providing an independent tribunal at an early stage of the criminal process before which an accused person could raise any complaint of improper conduct on the part of the law enforcement agencies in the taking of a confession statement (the *Confession* report).

It is to be regretted that the Administration has rejected the recommendations in one report (*Confessions*) and failed to implement key recommendations of the other (*Arrest*). We shall return to this later in this chapter.

**5.7 We accept the force of the arguments which have been advanced against each of the options for reform contained in our consultation paper. We have accordingly concluded that none of these options should be adopted, and we recommend that the present *voir dire* procedure governing the admissibility of confession statements should be retained.**

## **Other recommendations**

5.8 While the options contained in the consultation paper did not find general favour with respondents, a number of those who are not in favour of changing the present *voir dire* procedure concede that the high proportion of cases in which there is a challenge to the admissibility of the confession statement, and the considerable amount of court time and costs involved in determining admissibility, justify an attempt to identify improvements which

could be made to the existing system by which confession statements are obtained. A variety of improvement measures have been suggested by respondents who generally believe that, while the *voir dire* proceedings should be preserved to ensure fairness to the accused, the number of challenges to the admissibility of confessions could be reduced through other reform measures directed at the way in which confession statements are obtained by the law enforcement agencies. In the remainder of this chapter we set out suggestions for reform of this kind which we would recommend for adoption. A summary of other reforms proposed by those commenting on the consultation paper is at Annex 2.

### ***Greater use of audio or video recording of interviews***

5.9 In Chapter 1 of this report, mention was made of the positive effect of videotaping interviews conducted by the Police and ICAC. It is clear from the experience of the Police and ICAC that the use of videotape has proved effective in reducing the number of challenges to the admissibility of confession statements.

5.10 The practical procedure undertaken when an interview is videotaped minimises the likelihood that allegations of impropriety will be made at a later stage. At the start of a videotape interview, the interviewing officer will record on the videotape the location of the interview room, the date and time of the interview, and the identity of the interviewing officer and any other officers present in the interview room. The interviewee's consent to be video-interviewed without the presence of a legal representative will also be recorded on video. The interviewee will be told that three tapes will be made of the interview, one of which will be given to him or his legal representative. The interviewing officer will then caution the interviewee and remind him that he is not obliged to say anything unless he wishes to, and that whatever he says may be given in evidence. If there is a short break during the interview, the recording equipment will be kept running. Where the break is a long one, such as a meal break, the interview will be suspended and the time of suspension will be recorded by the interviewing officer on the tape. The interview tape will then be removed. When the interview recommences, a new tape will be used for the continued interview. Again, the interviewing officer will record on the tape the time of commencement of the continued interview.

5.11 If a new tape is required, the interviewing officer will inform the interviewee and record the time of cessation of recording on the first tape and the time of commencement of recording on the second tape. At the end of the interview, the interviewing officer will ask if there is anything the interviewee wishes to clarify or to add to his statement. The concluding time of the interview will be stated and recorded on video.

5.12 The Police themselves support the widespread use of videotaping of interviews, and the number of interview rooms with videotape facilities at police stations has increased in recent years to the current total of

63. These are used to interview persons whose cases are likely to be heard in the District Court or the Court of First Instance of the High Court. With a further of seven interview rooms planned by April 2000, each major police station will soon be provided with at least one such facility.

5.13 Although the proposal to videotape interviews of suspects is unlikely to fully cure the problems arising from the taking of confession statements, we are convinced that the number of challenges to the admissibility of confession statements could be reduced as a result, without diminishing the protection rightly given to the accused.

5.14 For these reasons, **we recommend the greater use of video recording of interviews. The use of videotape would be in the best interests of both the prosecution and the defence. On the one hand, officers of the law enforcement agencies would be protected from unwarranted allegations of wrongdoing at the time when the interview took place. The accused, in turn, would be protected from improper conduct on the part of law enforcement officers during the interview.**

5.15 We wish to commend the Police for their extension of videotaping facilities to an increased number of police stations and recommend that this process be continued further.

### ***Adoption of provisions similar to the Police and Criminal Evidence Act 1984***

5.16 While there is empirical evidence that the wider use of videotape has reduced the number of challenges to confession statements, no one would suggest that such challenges will disappear altogether. In giving its support to the wider videotaping of interviews, the Law Society, for instance, cautions that videotaping interviews might not be a total solution to the problem as it is still possible for a suspect to be forced, threatened, induced or improperly treated by the law enforcement agency prior to the commencement of the interview. Such improprieties are, of course, unlikely to be evident from the video recording.

5.17 We believe that this particular problem could be addressed by the introduction in Hong Kong of the relevant provisions of the English Police and Criminal Evidence Act 1984 (PACE). Our Report on Arrest (the Arrest Report) published in November 1992 examined in detail the provisions of PACE governing the powers to stop, search and arrest, and the rules regulating the questioning and treatment of suspects by the Police in England.

5.18 A number of those who responded to the consultation paper referred with approval to the changes which had been introduced in England and Wales by PACE and suggested that the introduction in Hong Kong of provisions similar to those in PACE would enhance the legitimate rights of the accused and render maltreatment of suspects less likely to occur. The result,

suggest these respondents, would be a substantial reduction in the number of challenges to the admissibility of confession statements.

5.19 Specifically, it was suggested that the relatively low rate of *voir dire* proceedings in England might be attributable to the enactment of PACE which, *inter alia*, had replaced the vague common law concept of “voluntariness” by a statutory code of practice which strictly controls the ways arrested persons are handled as well as the manner in which interviews of those arrested are conducted. In Hong Kong, the *Rules and Directions for the Questioning of Suspects and the Taking of Statements* offer guidance to the law enforcement agencies in this respect, but they are not mandatory and a breach would not necessarily render a confession inadmissible. The introduction of a statutory code of practice modelled on PACE would avoid this problem, since any significant breach of the code would result in the confession being rejected. It was argued that in England the rate of challenges to the admissibility of confession statements is far lower than in Hong Kong because the defence in England know that if the code has been strictly followed, there is little point in contesting admissibility. The practical effect, it is suggested, is that under such a clear system *voir dire* proceedings have virtually disappeared.

5.20 Section 35 of PACE introduced the concept of “designated police stations”. These are police stations which the chief officer of police has determined have adequate facilities for the purpose of detaining arrested persons. Each designated police station must have one or more “custody officers”. A custody officer must be of at least the rank of sergeant (section 36(3)). His duties are set out in sections 37 and 38 of PACE. In a nutshell, the custody officer must ensure that those in detention are treated in accordance with the Act and the related Codes of Practice, both as regards conditions and questioning and charging. A detailed written custody record must be kept in respect of each step taken in the prisoner’s period of detention. Section 40 provides that periodic reviews of the prisoner’s detention must be carried out. Where the prisoner has been arrested but not yet charged, the review must be carried out by an officer of at least the rank of inspector who has not been directly involved in the investigation.

5.21 Section 58 of PACE provides that a person arrested and held in police custody is entitled to consult a solicitor privately at any time. The Arrest Report described the section as “*arguably the most important protection conferred by PACE.*”<sup>1</sup> A request under section 58 must be permitted as soon as is practicable, save where the offence alleged is a serious arrestable offence and an officer of at least the rank of superintendent has authorised the suspension of that right. Where the offences are not serious arrestable offences, section 58 provides that the right of a person in police custody to consult a solicitor privately is unqualified.

5.22 We note that while some reforms have been introduced by the Administration in Hong Kong administratively since the publication of the

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<sup>1</sup> Report on Arrest by the Law Reform Commission of Hong Kong [Topic 25], page 142.

Arrest Report, and there are plans to introduce further legislative changes, key elements of the PACE scheme remain unimplemented. We agree with the views of those who responded to our consultation paper and urged full implementation of the Arrest Report's recommendations. In our view, the adoption of those reforms would significantly reduce the risk of abuse by law enforcement agencies, while at the same time minimising the likelihood of spurious complaints by detained persons of mistreatment by law enforcement officers. The result would, we believe, be a reduction in the number of challenges to admissibility at trial which necessitate a *voir dire*.

**5.23 We accordingly urge the Administration to implement in full and without further delay the recommendations of our earlier Arrest Report.**

### ***Summaries of interviews***

5.24 The consultation paper referred to a particular concern regarding videotaped interviews which had been raised by the ICAC. The ICAC had referred to the insistence of defence counsel on the provision of full transcripts of the interview in every case. This represents (to quote the ICAC) a "*massive drain on resources*". According to the ICAC<sup>2</sup>, a one-hour videotape will normally take an average of three working days to transcribe, and four working days to translate. Time is also needed for the translated transcript to be certified by the Judiciary's Translation/Certification Section, a process which may take up to 14 working days for magistrates' court cases and up to 28 working days for District Court cases. The ICAC further pointed out that a one-hour interview would generate on average about 125 pages of typewritten transcript. Before transcription, the transcriber first needs to read an interview summary to acquaint himself with the necessary background information. Periodically during the transcription process, he will need to refer to the summary to ensure accuracy, and may occasionally need to confer with the interviewing officer to clarify any doubt or confusion. When words spoken during the interview are indistinct, or where more than one person speaks at a time, it can be difficult to determine precisely what was said, or to whom. The tape has to be played back several times to help identifying who said what, and to whom. The translation process is equally time consuming.

5.25 In the opinion of the ICAC, the problem caused by the substantial amount of time needed to transcribe and translate videotape interviews was not insurmountable but required 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"*

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<sup>2</sup> In a letter to the Secretary to the Law Reform Commission dated 29 February 2000.

*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.”<sup>3</sup>*

5.26 The ICAC suggested 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. The ICAC believes that unless a summary can be agreed between the prosecution and defence, video-taped records of interview under caution would generally need to be both transcribed and translated into English. In advancing the suggestion, the ICAC explained<sup>4</sup>:

*“What should be helpful is some sort of mechanism to compel legal representatives to at least actively consider negotiation with the prosecution to produce mutually acceptable summaries of video recorded interview under caution ...*

*... we believe that a practice direction from the Hong Kong Judiciary would go a long way towards persuading lawyers who have no other incentive than the general public interest to seriously consider the need for transcriptions, and to make them accountable to the courts in instances where they appear to have been unreasonable in this respect.”*

5.27 While those who commented on this aspect of the consultation paper appreciated that providing a full transcript of the interview in every case required considerable resources, there was strong opposition to the suggestion that the parties should be obliged to agree a summary of the interview in place of the full transcript. It was argued that the defence needed to be made fully aware of precisely what the accused had said during the interview. A full transcript was necessary to ensure that vital points were not missed while viewing the tape of the interview. Many of these respondents consider it unrealistic to expect that the defence would be able in any significant number of cases to agree to a summary being produced in evidence, as the defence would almost invariably wish to refer to the full transcript if the voluntariness of the confession were raised as an issue at

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<sup>3</sup> In a letter to the Secretary to the Law Reform Commission of 5 August 1998.

<sup>4</sup> In a letter to the Secretary to the Law Reform Commission dated 11 February 1999.

trial. Accordingly, these respondents maintain that a full transcript is essential to do justice to the accused, and oppose any administrative or legislative stipulation requiring summaries of interviews unless the choice is left to the defence.

5.28 With regard to the considerable time and resources required to prepare a full transcript, it was pointed out by some respondents that time spent by the ICAC preparing a transcript before trial results in a saving of time for the court during trial. A full transcript benefits not only the defence, but must often be resorted to by the judge, particularly where the judge is not Chinese speaking and the interview is conducted in that language. It was also pointed out by some respondents that the problem could be minimised if efforts could be made, save for complex cases, to keep the interview short.

5.29 We agree that it is important that the defence maintain the right to have access to a full transcript of the video interview, rather than merely a summary, to ensure that the rights of the accused are not compromised and we do not therefore recommend the adoption of the ICAC's proposal. We nevertheless consider that defence counsel should in every case give fair consideration to the possibility of agreeing a summary of the interview, rather than automatically demanding a full transcript.

### ***Earlier defence disclosure of allegations of improprieties***

5.30 A number of respondents believe that early disclosure, and with some specificity, by the defence of what the issues in the *voir dire* would be, as well as advance disclosure of medical reports, would reduce much court time and costs incurred in the *voir dire* proceedings.

5.31 These respondents propose that either express power should be given to the court, or that a set of procedures should be established, so as to enable both the court and the prosecution to be properly informed at a time before the commencement of the trial of the details of the defence's allegations of any improper circumstances relating to the taking of the confession. It is argued that much court time could be saved as a result. Under the present practice, substantive allegations of impropriety on the part of the law enforcement officers are not unusually made only at the commencement of the hearing, resulting frequently in the adjournment of the case in order to accommodate incidental requests, such as time needed to arrange for the relevant police officers to be identified by the accused, or to arrange for expert witnesses such as doctors to comment on the truthfulness of the allegations.

5.32 We consider that much could be achieved by more effective use of the existing pre-trial review (PTR). The present *Practice Direction on Criminal Proceedings in the Court of First Instance*<sup>5</sup> sets out the matters of which counsel will be expected to inform the court at the PTR. Paragraph 6(f)

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<sup>5</sup> [1999] HKLRD (PD) 58, PD 9.3 at 58-60.

of Practice Direction 9.3 provides that defence counsel will be expected to inform the judge at the PTR as to “*whether objection is to be taken to the admissibility of any of the prosecution evidence, and how long the hearing of such objection is likely to take*”. We suggest that it would be useful to include in the Practice Direction a requirement that both the court and the prosecution should be properly and fully informed by the defence at the PTR of the specific details of any allegations of impropriety which relate to the taking of a confession statement.

5.33 We believe that the PTR should so far as is practicable be presided over by the judge to whom the trial of the case is to be assigned. This would reduce the time needed for the judge at trial to familiarise himself with any matters which have previously been raised at the PTR.

5.34 A practical measure which we consider would save court time would be a requirement (perhaps by way of practice direction) that the prosecution should prepare an index setting out the brief details of the contents of each interview in every case in which it is proposed to present evidence of more than one statement by the accused. This index should be provided to the court and defence counsel to assist at the PTR. Such an index would, we believe, help not only to clarify the issues to be contested at trial, but would also result in a more realistic and accurate estimation of the time needed for the *voir dire* and the trial proper. We believe that a more effective utilisation of the PTR would be achieved as a result. In addition, by identifying areas of contention at an early stage, all parties would be left with adequate time to make any necessary preparations in respect of the key issues (such as arranging for expert witnesses, and conducting legal research on any relevant point of law). This should in turn minimise the likelihood of any unnecessary wastage of court time arising from subsequent applications for adjournment.

### ***Revisiting the recommendations contained in the Commission's 1985 Report***

5.35 The Bar and a number of others who responded to our consultation paper believed that the Commission should revisit the proposals and recommendations made in the 1985 *Report on Confession Statements and their Admissibility in Criminal Proceedings* (the Report). The Bar points out that additional safeguards should be provided to protect the rights of the accused, rather than to attempt to take away their existing rights and protections.

5.36 The central recommendation in the Report called for the establishment of a panel of lay panelists made up of Justices of the Peace, before whom the accused would be brought within twenty-four hours of having made a statement. The intention was that the accused would then have the opportunity to raise any complaint as to his treatment at the hands of the law enforcement agency.

5.37 The Commission recommended in the Report that where the prosecution intended to produce at trial evidence of statements made, and answers to questions given, by the accused or to produce in evidence the accused's failure to answer questions put to him by a law enforcement officer, the accused must be brought within 24 hours of being charged before a lay panelist who should, in the interview of the accused, inform the accused of his rights and inquire into the manner in which the accused had been treated by the law enforcement officers since the arrest. In this interview, the lay panelist should make known to the accused his independence from, and impartiality to, any law enforcement agency. The lay panelist should also specifically inform the accused that any failure on his part to report to the panelist in the interview any mistreatment by the law enforcement agency may result in any subsequent complaint being disbelieved. The lay panelist should also read to the accused any records of interviews and written statements allegedly given by him. The accused should then be asked to comment on the accuracy of these records. The lay panelist should also inform the accused in the interview of his right to deny involvement in the offence alleged should he consider himself innocent, or to admit his guilt and to offer assistance to the law enforcement agency with their investigation should he consider himself guilty of the offence charged. The lay panelist would also inform the accused that an early admission of guilt may attract more lenient treatment by the court. It was recommended that the interview of the accused by the lay panelist should be tape-recorded and that the record should be admissible in evidence as prima facie evidence of its contents.

5.38 Taken together the Commission believed that the Report's recommendations would significantly reduce the frequency of objections to the admissibility of confession statements, resulting in a reduction of court time devoted to *voir dire* hearings.

5.39 It was always the Commission's stated intention that the recommendations and 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. The system of lay panelists, however, was rejected by the Administration, partly because of concern that the very large number of additional JPs required would dilute the entire JP scheme.

5.40 **In the light of the Administration's rejection of the central recommendation of the Report, we consider that very little purpose would be served by our revisiting the Report again. While we do not ourselves favour re-visiting the Report, we nevertheless recommend in the light of the comments we have received that the Administration should itself reconsider its earlier rejection of the proposal to introduce a system of lay panelists.**

**List of those who commented on  
the consultation paper**

1. Ms Janice Brabyn
2. Mr Simon Bronitt
3. Mr A.A. Bruce SC
4. Mr Ricky Chan
5. Mr Cheng Huan SC
6. Mr K.C. Cheung
7. Ms Adriana N. Ching
8. Mr Peter Choy
9. Mr Christopher Coghlan
10. Mr Stuart Cotsen
11. Mr I Grenville Cross SC
12. Mr John Dunn
13. Mr David Fitzpatrick
14. Mr Clive Grossman SC
15. Mr Alan Hoo SC
16. Mr Michael Ko
17. Mr Simon K.C. Lam
18. Mr P.Y. Lo
19. Mr Harry Macleod
20. Mr Daniel Marash SC
21. Mr John Marray
22. Mr John McLanachan
23. Mr Maurice K F Ng
24. Mr M R Nunns
25. Mr Gary Plowman SC
26. Mr Kumar Ramanathan
27. Ms Corinne M D' A Remedios
28. Mr Rupert Spicer

29. Mr Michael Thomas SC
30. Mr David Tolliday-Wright
31. Mr Paul Hin Sum Tong
32. Mr Joseph W.Y. Tse
33. Mr Selwyn Yu
34. Buildings Department
35. Complaints Against Police Office, Hong Kong Police Force
36. Correctional Services Department
37. Duty Lawyer Service
38. Fight Crime Committee
39. Hong Kong Bar Association
40. Hong Kong Customs and Excise Department
41. Hong Kong Democratic Foundation
42. Hong Kong Human Rights Monitor
43. Hong Kong Police Force
44. Hong Kong Young Legal Professionals Association Limited
45. Immigration Department
46. Independent Commission Against Corruption
47. Judiciary Administrator' s Office
48. JUSTICE
49. Labour Department
50. Law Society of Hong Kong
51. Legal Aid Department
52. LegCo Panel on Administration of Justice and Legal Services

## **Suggestions made by those commenting on the consultation paper**

### **(1) *Greater use of audio or video recording of interviews***

A number of respondents argued that the greater use of audio or video recording of interviews would protect officers of the law enforcement agencies from unwarranted allegations of improper conduct at the time when the interview was conducted, while also protecting the accused from abuse by the law enforcement agencies.

### **(2) *Summaries of video-recorded interviews***

The ICAC suggested that administrative or legislative arrangements should be introduced to require the defence actively to negotiate with the prosecution to produce a mutually acceptable summary of the video-recorded interview for use at the trial. The ICAC argued that such measures would bring about a substantial saving of resources necessary to transcribe and translate the whole of the video-recorded interview.

### **(3) *Earlier defence disclosure of allegations of improprieties***

Suggestions were made that the defence should make early disclosure of all issues relevant to the admissibility of the any confession statement. Matters to be disclosed should include details of any defence allegations of improper circumstances relating to the taking of the confession, medical reports etc. Early disclosure would enable both sides to prepare fully for the hearing and avoid any wastage of court time through adjournment of the proceedings.

### **(4) *Revisiting the recommendations contained in the Commission's 1985 Report***

A number of respondents suggested that the proposals and recommendations made in the *1985 Report on Confession Statements and their Admissibility in Criminal Proceedings* should be revisited, and argued that these proposals and recommendations would provide additional safeguards to protect the rights of the accused.

**(5) Adoption of provisions similar to the English Police and Criminal Evidence Act 1984 (PACE)**

Enactment in Hong Kong of provisions similar to those in PACE was favoured by a number of respondents, together with adoption of the Codes of Practice contained in PACE.

**(6) Changing the wording currently used to caution suspects**

It was suggested by some respondents that the wording of the present caution should be changed, along the lines provided in Code E of the Codes of Practice at section 60 of PACE:

*“You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence.”*

**(7) The creation of an independent organisation to monitor the Police**

Some respondents argued that an independent body should be established to replace the present Complaints Against the Police Office.

**(8) Changing the police “pre-interview” procedure**

To provide additional protection to arrested persons from possible abuse by law enforcement officers, it was suggested by some respondents that an arrested person should be first interviewed in private by a “duty defence lawyer” before he is interviewed by the police. The interview by the police should then be conducted in the presence of the lawyer.

**(9) Legal empowerment of judges to reject a confession**

It was suggested that the *Rules and Directions for the Questioning of Suspects and the Taking of Statements* currently used in Hong Kong should be laid before the Legislative Council and approved, or referred to the Court of Appeal by the Secretary for Justice, to empower judges with clear authority to reject any statement where there has been a substantive breach of the *Rules and Directions*.

**(10) *Preparation of transcript by persons outside law enforcement agencies***

To avoid any possible conflict of interest, it was suggested that the transcript of a video-recorded interview should be prepared by persons outside law enforcement agencies.

**(11) *Admitting statement-taker's statement in evidence under section 65B of the Criminal Procedure Ordinance (Cap 221)***

It was suggested that court time could be saved by amending section 65B of the Criminal Procedure Ordinance to allow the admission of the written statements of law enforcement officers, subject to cross-examination.

**(12) *More stringent rules on particulars of objections***

In order to avoid groundless allegations concerning the admissibility of a confession statement, it was suggested that more stringent rules as to the particulars of objections should be designed and observed.

**(13) *Better use of the pre-trial review (PTR) procedure***

Suggestions were made that court time could be saved by a more effective use of the PTR procedure. It was suggested that alternatives to requiring a full transcript of a video-recorded interview should be discussed and agreed by the parties at the PTR. Officers relevant to the *voir dire* should be identified at the PTR, and the judge should ascertain at the PTR whether the defence would opt to run the *voir dire* before the jury. The defence should elect at the PTR for the alternative procedure, or for a separate *voir dire*.

**(14) *A new system to enhance protection for arrested persons***

It was suggested that a new system to enhance protection for arrested persons should be developed in consultation with the law enforcement agencies, the Bar Association and the Law Society. The system should then be tested over a trial period before deciding whether or not to proceed with any of the options proposed in the consultation paper.