

LRC releases report on hearsay in criminal proceedings

The Law Reform Commission today (November xx) released a report proposing that the existing rule prohibiting the admission of hearsay evidence in criminal proceedings be reformed and that the court be given a discretion to admit hearsay evidence where it is satisfied that the admission of that evidence is “necessary” and the evidence “reliable”.

The law of hearsay has been reformed in a number of other common law jurisdictions. The report stresses that while reform is needed, any reform of the hearsay rules must incorporate adequate safeguards to protect the interests both of accused persons and of the community.

A simple explanation of the term “hearsay” as described in the report is that “when A tells a court what B has told him, that evidence is called ”hearsay”.

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

A major criticism of the hearsay rule is that it is too strict and inflexible, and sometimes results in the exclusion of evidence which, by the standards of ordinary life, would be regarded as accurate and reliable. In addition, some of the present exceptions to the rule are complex and uncertain.

The Commission proposes that while irrelevant and unreliable hearsay evidence should be excluded, relevant and reliable hearsay evidence should be admitted (where the need exists for such evidence) under a comprehensible and principled approach to that admissibility.

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

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

The admission of hearsay will be “necessary” only in certain specified circumstances, such as where the declarant is dead, or cannot be found, or refuses to testify on the ground of self-incrimination.

The party applying to admit hearsay evidence under the discretionary power must prove the condition of necessity to the required standard of proof, which will be “beyond reasonable doubt” if the party applying is the prosecution, and “on a balance of probabilities” if the party applying is the defence.

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

In order to give greater protection to an accused person where hearsay evidence has been admitted under the new discretionary power, the Commission recommends that the trial judge should have the power to direct a verdict of acquittal of the accused at any time after the conclusion of the prosecution’s case if the judge considers that taking account of a number of factors, including the nature of the hearsay evidence and the importance of that evidence to the case against the accused, it would be unsafe to convict.

The Commission also makes recommendations in relation to other specific aspects of hearsay, including the admissibility of banking, business and computer records, and prior statements of witnesses.

Copies of the report are available on request from the Secretariat of the Law Reform Commission at 20/F Harcourt House, 39 Gloucester Road, Wanchai, Hong Kong. The report can also be accessed on the Commission’s website at www.hkreform.gov.hk.