

Press release

Consultation on hearsay in criminal proceedings

A Law Reform Commission sub-committee today (30 November) released a consultation paper on hearsay in criminal proceedings.

The paper proposes that the existing rule which prohibits the admission of hearsay evidence in criminal proceedings should be reformed and that the court should be given a discretion to admit hearsay evidence where satisfied on a balance of probabilities that the admission of that evidence is “necessary”, and that that evidence is “reliable”.

A simple explanation of the term hearsay would be that “when A tells a court what B has told him, that evidence is called ‘hearsay’”.

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

A major criticism of the hearsay rule, however, 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, the various present exceptions to the rule are complex and uncertain.

These problems are not unique to Hong Kong. A number of common law jurisdictions have already reviewed the law and recommended or enacted changes.

Mr Justice Stock, the chairman of the Commission’s Hearsay Sub-committee, said that the sub-committee had examined the law and proposals for reform in all the major common law jurisdictions, and had concluded that the present hearsay law should be reformed.

“We realise, however, that it would not be in the interests of either an accused person or of the public at large to reform the hearsay rules without adopting adequate safeguards,” said Mr Justice Stock. “We think the scheme we are putting forward strikes the appropriate balance.”

The sub-committee 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 sub-committee 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.

The sub-committee proposes that hearsay evidence should be admissible:

- (a) if it falls within one of several common law exceptions to be preserved;
- (b) if it falls within an existing statutory exception;
- (c) if the parties agree; or
- (d) under the court's discretionary power to admit hearsay in prescribed circumstances.

Before the court is able to admit hearsay evidence under its discretionary power, it must be satisfied on a balance of probabilities that it is "necessary" to admit the hearsay evidence, and that that evidence 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.

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 if its prejudicial effect is out of proportion to its probative value.

In order to give greater protection to an accused person against whom a *prima facie* case has been made out, where hearsay evidence has been admitted, the trial judge should have the power to direct a verdict of acquittal of the accused at the end of the prosecution's case if the judge considers that, taking account of a number of factors, including the nature of the proceedings, the nature of the hearsay evidence, the probative value of the hearsay evidence, the importance of such evidence to the case against the accused and any prejudice to an accused resulting from the admission of the hearsay evidence, it would be unsafe to convict.

The sub-committee 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.

Mr Justice Stock said that the recommendations in the consultation paper were put forward for consideration by the public, and did not represent the sub-committee's final conclusions.

The sub-committee invites comments principally on the specific options and recommendations set out in the consultation paper, but would welcome any other proposals to improve the present law governing the admissibility of hearsay evidence in criminal proceedings.

The consultation period will last until 28 February 2006.

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