

THE LAW REFORM COMMISSION OF HONG KONG

REPORT

HEARSAY IN CRIMINAL PROCEEDINGS

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November 2009

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Preface

Terms of reference

1. In May 2001, the Chief Justice and the Secretary for Justice directed the Law Reform Commission:

To review the law in Hong Kong governing hearsay evidence in criminal proceedings, and to consider and make such recommendations for reforms as may be necessary.

The sub-committee

2. Following that referral, a sub-committee was appointed by the Commission. Its membership was:

Hon Mr Justice Stock (Chairman)	Justice of Appeal
But Sun Wai	Solicitor (from July 2006)
Peter Chapman	Senior Assistant Director of Public Prosecutions Department of Justice
Alan Hoo, SBS, SC, JP	Senior Counsel
Andrew Lam	Solicitor (until June 2006)
Gerard McCoy, SBS, QC, SC	Senior Counsel Professor of Law, City University of Hong Kong Adjunct Professor of Law, University of Canterbury, New Zealand
Anthony Upham	Associate Professor School of Law City University of Hong Kong
Hon Mr Justice Wright	Judge of the Court of First Instance
Simon Young	Associate Professor Faculty of Law University of Hong Kong

Working method

3. It was apparent from the sub-committee's introductory meeting on 30 August 2001 that the subject matter and the approach to it might be controversial, the question having been raised at that very first meeting whether there would be room for a minority report. It was agreed that the first question to address was whether there were any existing problems with the law as it now stood. The work of the committee became complex, requiring detailed study of the rationale for the rules and their exceptions, of criticisms made in common law jurisdictions of the present state of the law, whether those criticisms were valid in Hong Kong, and of solutions proposed elsewhere.

4. All this required preparation of papers by individual committee members, the co-option of further members, and the formation of subgroups to prepare suggested solutions and drafts. No fewer than 73 papers directed at specific issues of discussion were produced, and 19 plenary meetings of the sub-committee held, in the process of preparing a consultation paper setting out the sub-committee's provisional recommendations. That consultation paper was published in November 2005 and distributed widely within the legal profession.

5. A total of 39 responses to the consultation paper were received from the individuals and organisations listed at the Annex to this report. Those responses were carefully considered by the sub-committee in the course of formulating its final recommendations. We express our gratitude to the members of the sub-committee for the immense amount of work which they devoted to this project and we thank all those who took time to share with the sub-committee their views on this complex and controversial subject.

What is "the rule against hearsay"?

6. The rule against hearsay in criminal proceedings renders hearsay evidence generally inadmissible in criminal proceedings unless that evidence falls within one of the common law or statutory exceptions to the rule. 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*".¹ The need to exclude hearsay evidence when it is adduced to prove the truth of the original statement is mainly based on the assumption that indirect evidence might be untrustworthy and unreliable, particularly in so far as it is not subject to cross-examination. The law's requirement that only first hand testimony of the statement-maker can be admitted in evidence ensures that the witness's credibility and accuracy can be tested in cross-examination.

¹ R May, *Criminal Evidence* (Sweet & Maxwell, 3rd edition, 1995), at 179.

Criticisms of the rule and reform in other jurisdictions

7. Despite this rationalisation, the hearsay rule has been the subject of widespread criticism over the years from academics, practitioners and the Bench. One of the main criticisms is that the rule is strict and inflexible, and excludes hearsay evidence even if it is cogent and reliable.² The inadmissibility of hearsay evidence that is otherwise cogent and relevant to the determination of the guilt or innocence of an accused sometimes results in the exclusion of evidence which by standards of ordinary life would be regarded as accurate and reliable. This can result in absurdity and also in injustice.

8. The complexity of the rule and the lack of clarity of its exceptions have also been criticised. Lord Reid in *Myers v DPP*³ described the rule as "*absurdly technical*"⁴ and observed that "*it is difficult to make any general statement about the law of hearsay which is entirely accurate.*"⁵

9. In the light of these criticisms, proposals for reform have been put forward in every common law jurisdiction where the subject has been studied for the purpose of reform. As noted above, the law of hearsay is a topic which many other jurisdictions have recognised as being in need of attention. In each instance where a review has been carried out, there has been recognition of the need for change.

Report

10. This report sets out in Chapter 1 the history and nature of the rule against hearsay in criminal proceedings; examines in Chapter 2 the justification for the rule; sets out in Chapter 3 the present law that governs the admissibility of hearsay evidence in criminal proceedings; and examines in Chapter 4 the shortcomings of the existing law. Chapter 5 describes reforms that have been proposed or carried out in other common law jurisdictions; Chapter 6 explains the need for reform; Chapter 7 examines the notion of introducing safeguards as a condition for reform; and Chapter 8 presents a number of possible options for reform, with their respective advantages and disadvantages. Chapter 9 introduces the proposed model of reform ("the Core Scheme"); Chapter 10 deals with a number of special topics; Chapter 11 addresses the issue of human rights; and Chapter 12 summarises all our recommendations for reform.

² Bruce and McCoy, *Criminal Evidence in Hong Kong* (Butterworths, Issue 8, 1999), at [52] of Division IV.

³ [1965] AC 1001.

⁴ [1965] AC 1001, at 1019.

⁵ [1965] AC 1001, at 1019-20.

Chapter 1

Brief history of the hearsay rule

1.1 The rule against hearsay is a rule of admissibility historically applied by common law courts to all civil and criminal proceedings. The rule excludes from the trial evidence of statements made outside the courtroom where it is proposed to use them at trial to prove the facts narrated or asserted in them. Thus, the statement from a police witness, "The victim told me at the scene that the car that struck him was green", would be inadmissible to prove that the assailant's car was in fact green.

1.2 The hearsay rule is an exception to the general rule that all relevant evidence is admissible. As a common law rule that has existed for hundreds of years, it is integral to an adversarial system that places a premium on proof by live testimony from witnesses. While significant reforms of the rule were made in the context of civil proceedings in 1999, the law of hearsay has remained relatively constant in Hong Kong criminal proceedings. The present law can be described as an exclusionary rule that excludes a statement made outside the courtroom which is used to prove the truth of an assertion contained in the statement, unless a common law or statutory exception to the rule applies to make the statement admissible.

1.3 The rule against hearsay developed over many years. According to *"Kenny's Outlines of Criminal Law"*, the need to exclude hearsay evidence was first recognised in England as early as 1202.¹ There is no conclusive view as to the predominant rationale for the rule, as Colin Tapper observes:

*"No aspect of the hearsay rule seems free from doubt and controversy, least of all its history. Legal historians are divided between those who ascribe the development of the rule predominantly to distrust of the capacity of the jury to evaluate it, and those who ascribe it predominantly to the unfairness of depriving a party of the opportunity to cross-examine the witness."*²

1.4 Though the possible dangers of hearsay evidence were first recognised in England in the thirteenth century, hearsay evidence continued to be freely admitted.³ By the end of the fifteenth century, with a clearer distinction being drawn between the functions of jurors and witnesses, there began a growing recognition of the need to ensure greater reliability of

¹ J W Cecil Turner, *Kenny's Outlines of Criminal Law* (Cambridge University Press, 19th edition, 1966), at 498.

² C Tapper, *Cross and Tapper on Evidence* (Butterworths, 8th edition, 1995), at 565.

³ J W Cecil Turner, *Kenny's Outlines of Criminal Law* (cited above), at 498.

testimony from witnesses. It was from this time onwards that the rule excluding hearsay from witnesses began to take shape, and by 1660 hearsay evidence was "*only received after direct evidence had been given, and merely to corroborate it, and thus not admissible of itself.*"⁴ In the Auld report, it is said that the rule against hearsay in criminal proceedings developed at a time when "*the cards at trial were so stacked against defendants that judges felt the need to even the odds.*"⁵

1.5 In 1664, Lord Jeffreys CJ ruled that what a witness heard from a woman (who was not herself competent to give evidence) could not be given in evidence:

*"If she were here herself, if she did say it, and would not swear to it, we could not hear her; how then can her saying be evidence before us?"*⁶

1.6 By the beginning of the nineteenth century, the hearsay rule had become well established, and the emphasis shifted to definition of its range and the creation of exceptions to the rule.⁷ In this second phase of development of the hearsay rule, two alternative approaches competed with each other: one was that all hearsay should be excluded, subject to inclusionary exceptions; while the other was that relevant evidence should be admitted, subject to exclusionary exceptions.⁸ The former view prevailed and led to the establishment of the present hearsay rule and the creation of the various common law exceptions to the rule.

1.7 The English courts have been reluctant to create new exceptions to the rule, preferring the task to be done by the legislature. Lord Reid in the House of Lords case of *Myers v DPP* explained why it was necessary to leave reform for legislative intervention:

"But there are limits to what we can or should do. If we are to extend the law it must be by the development and application of fundamental principles. We cannot introduce arbitrary conditions or limitations: that must be left to legislation. And if we do in effect change the law, we ought in my opinion only to do that in cases where our decision will produce finality or certainty. If we disregard technicalities in this case and seek to apply principle and common sense, there are a number of other parts of the existing law of hearsay susceptible of similar treatment, and we shall probably have a series of appeals in cases where the existing technical limitations produced an unjust result. If we are to give a wide interpretation to our judicial functions questions of policy cannot be wholly excluded,

⁴ *R v Hulet* [1660] 5 St. Tr. 1185, at 1195, cited in J W Cecil Turner, *Kenny's Outlines of Criminal Law* (cited above), at 498.

⁵ Lord Justice Auld, *Review of the Criminal Courts of England and Wales Report*, October 2001, at 556.

⁶ *R v Braddon and Speke* [1684] 9 St. Tr. 1127 at 1189: *per* Lord Jeffreys CJ, quoted in J W Cecil Turner, *Kenny's Outlines of Criminal Law* (cited above), at 499.

⁷ C Tapper, *Cross and Tapper on Evidence* (cited above), at 566.

⁸ C Tapper, *Cross and Tapper on Evidence* (cited above), at 567.

*and it seems to me to be against public policy to produce uncertainty. The only satisfactory solution is by legislation following on a wide survey of the whole field, and I think that such a survey is overdue. A policy of make do and mend is no longer adequate.*⁹

1.8 Notwithstanding the strong dissenting opinions of Lords Pearce and Donovan in *Myers*, both of whom strongly favoured gradual judicial development of the rule, England has respected the majority view and enacted piecemeal reform whenever the need has arisen. In its most recent reforms, however, contained in the Criminal Justice Act 2003, the hearsay rule in criminal proceedings has been comprehensively reformed, making hearsay more freely admissible.¹⁰

1.9 While the Court of Final Appeal in Hong Kong has yet to decide the propriety of judicial reforms, the following *obiter dictum* in *Wong Wai-man v HKSAR* indicates that the view is taken that the proper path for reform is legislative:

*"It is true that it was only by a majority of three to two that the House of Lords held in Myers v DPP [1965] AC 1001 that it was for the Legislature, rather than the Judiciary, to create new exceptions to the hearsay rule. And in R v Khan (1990) 59 CCC (3d) 92, the Supreme Court of Canada preferred the approach of the minority in Myers v DPP. But it did so without referring to - and perhaps without the benefit of having cited to it - R v Blastland [1986] AC 41. In R v Blastland, all the other Law Lords hearing the appeal agreed with Lord Bridge of Harwich who (at p.52H) referred to the principle established in Myers v DPP 'never since challenged, that it is for the Legislature, not the Judiciary, to create new exceptions to the hearsay rule'. In Bannon v R (1995) 185 CLR 1, a case before the High Court of Australia, Brennan CJ said (at p.12) that the creation of a new exception to the hearsay rule 'would require a general review of the hearsay rule, its history, purpose and operation'. The Law Reform Commission would appear to be the best body suited to conduct such a general review."*¹¹

1.10 To date, the hearsay rule in respect of criminal proceedings has seen no comprehensive legislative review in Hong Kong, though the hearsay rule in Hong Kong civil proceedings was essentially abolished in 1999 following recommendations made by the Hong Kong Law Reform Commission.¹²

⁹ [1965] AC 1001, at 1021-1022.

¹⁰ *The Criminal Justice Act 2003* (c44) received royal assent on 20 November 2003.

¹¹ *Wong Wai-man & Others v HKSAR* (2000) 3 HKCFAR 322, at 328.

¹² See The Law Reform Commission of Hong Kong, *Report on Hearsay Rule in Civil Proceedings*, July 1996. At present, Part IV of the Evidence Ordinance (Cap 8) is the legislation which deals with the admissibility of hearsay evidence in civil proceedings. It was enacted by the Evidence (Amendment) Ordinance 1999 (Ord No 2 of 1999), which was passed by the Legislative Council on 13 January 1999.

Chapter 2

Justification for the hearsay rule

2.1 In *Teper v The Queen*, Lord Normand succinctly stated the underlying reasons for the hearsay rule:

*"The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination and the light, which his demeanour would throw on his testimony, is lost."*¹

The Supreme Court of Canada articulated similar reasons in terms of three "hearsay dangers":

*"the absence of an oath or solemn affirmation when the statement was made, the inability of the trier of fact to assess the demeanour and therefore the credibility of the declarant when the statement was made (as well as the trier's inability to ensure that the witness actually said what is claimed), and the lack of contemporaneous cross-examination by the opponent."*²

2.2 Which reason is the preponderant one is a moot point. For example, R W Baker accepts Phipson's point that *"no single principle can be assigned as having operated to exclude hearsay generally"*³, and it is probably safer to assume that a combination of reasons have played their part. On the other hand, A A S Zuckerman asserts that, *"[i]t is the unavailability of a hearsay declarant for cross-examination which constitutes the central reason for the exclusion of hearsay statements."*⁴

2.3 It is important to note that much hearsay evidence which is inherently reliable, because of the circumstances in which it came into being, nonetheless is excluded. Much hearsay evidence may be relevant and credible, though Bruce and McCoy point out that:

¹ [1952] AC 480 (PC), at 486. See also the similar views in the *Criminal Law Revision Committee, Eleventh Report, Evidence (General) (1972)*, at 133.

² *R v K G B* [1993] 1 SCR 740, at para 33.

³ R W Baker, *The Hearsay Rule* (Sir Isaac Pitman & Sons, Ltd. 1950), at 24.

⁴ A A S Zuckerman, *The Principles of Criminal Evidence* (Oxford: Clarendon Press, 1989), at 180-181.

*"Experience demonstrates that a witness relating an event he has seen, heard or otherwise experienced first hand is more likely to give an accurate account of that event than if he is relating what another person experienced."*⁵

Lord Bridge in *R v Blastland* makes the point that it is not mere unreliability that is of concern, but the lack of opportunity to test the evidence, particularly where lay tribunals are involved:

*"Hearsay evidence is not excluded because it has no logically probative value The rationale of excluding it as inadmissible, rooted as it is in the system of trial by jury, is a recognition of the great difficulty, even more acute for a juror than for a trained judicial mind, of assessing what, if any, weight can properly be given to a statement by a person whom the jury have not seen or heard and who has not been subject to any test of reliability by cross-examination.... The danger against which this fundamental rule provides a safeguard is that untested hearsay evidence will be treated as having a probative force which it does not deserve."*⁶

2.4 Professor Zuckerman reminds us of a fourth reason for excluding hearsay, in addition to the lack of cross-examination, the absence of an oath, and the lack of an opportunity to assess the witness's demeanour. While cross-examination has utilitarian value in testing the reliability of evidence, it also has intrinsic value in the notion of confronting one's accuser. In the United States, the accused's right of confrontation is of constitutional significance.⁷ Zuckerman writes:

"Hearsay is associated with unsubstantiated beliefs based on rumour, gossip, and specious word of mouth. Hence our belief that the accused should be judged on the evidence produced against him in court and not on the basis of public preconceptions explains the intuitive antagonism to hearsay. The right to confrontation in the Sixth Amendment of the United States constitution is, to some extent, an expression of this antagonism. This provision accords to an accused in a criminal trial the right 'to be confronted with the witnesses against him.' While there is no complete overlap between the right to confrontation and the hearsay rule it is clear that there is considerable similarity in the concerns behind these two measures. A further justification of the American right to confrontation is said to be 'its psychic value to litigants, who feel

⁵ Andrew Bruce and Gerard McCoy, *Criminal Evidence in Hong Kong* (Butterworths, Issue 8, 1999) at [1] of Division IV.

⁶ [1986] AC 41, at 53-54.

⁷ Detailed discussion of the United States position on the accused's right of confrontation can be found in the United States Supreme Court's decision in *Crawford v Washington*, 124 SCt 1354 (2004) and paragraphs 11.10 to 11.13 of this paper.

*that those giving evidence against them should do it publicly and face to face."*⁸

2.5 In summary, there appear to be two main justifications for the hearsay rule: firstly, the inability of the tribunal of fact to weigh and assess hearsay properly without the usual tests and safeguards of reliability, such as cross-examination, an oath or affirmation, and the opportunity to assess the witness's demeanour; and secondly, the admission of hearsay in the prosecution's case is antithetic to an accused's right of confrontation.

⁸ A A S Zuckerman, *The Principles of Criminal Evidence* Zimmerman (cited above), at 181-2.

Chapter 3

The present law

Scope of the hearsay rule

(A) *Statement and definition of the rule*

3.1 The classic statement of the hearsay rule is found in *Subramaniam v Public Prosecutor*:

*"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that a statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made."*¹

3.2 The definition laid down in *Subramaniam* has since been followed in Hong Kong.² In *Cross & Tapper on Evidence*, the rule against hearsay is stated in terms of the assertion contained in the statement:

"an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted".³

3.3 More recently, appellate courts in Hong Kong have cited the definition used in the Australian case of *Walton v The Queen*.⁴ In the Court of Final Appeal's consideration of *Wong Wai-man v HKSAR*, the *Walton* definition was cited as follows:

"The hearsay rule applies only to out-of-court statements tendered for the purposes of directly proving that the facts are as asserted in the statement" [emphasis in original].⁵

¹ [1956] 1 WLR 956, at 970.

² *HKSAR v Wong Wai-man* [2000] 1 HKLRD 473 (CA), at 479.

³ C Tapper, *Cross and Tapper on Evidence* (Butterworths, 8th edition, 1995), at 46.

⁴ (1989) 166 CLR 283 (HC).

⁵ *Wong Wai-man & Others v HKSAR* (2000) 3 HKCFAR 322, at 327. The Court of Appeal in *HKSAR v Or Suen Hong* [2001] 2 HKLRD 669, at 678, also cited this definition.

3.4 In *Oei Hengky Wiryo v HKSAR*, Mr Justice McHugh NPJ in the Court of Final Appeal explained the scope of the hearsay rule as follows:

"To determine whether the hearsay rule has been breached, it is necessary to determine the purpose for which evidence of an out-of-court statement is tendered. An out-of-court statement, made in the absence of a party, is not necessarily inadmissible. As long as its contents are not relied on to prove a fact recited or asserted, it will be admissible if it tends to prove a fact in issue or a fact relevant to a fact in issue. As Mr Justice Ferguson explained in 'Hearsay Evidence' (1927) 1 ALJ 195 at 196 in a passage cited with approval by Gleeson CJ and myself in Kamleh v The Queen (2005) 79 ALJR 541 at 544:

*'The hearsay rule does not forbid the proof of what somebody said out of Court. What it does forbid is the proof of a fact by telling what somebody said about that fact out of Court, a very different matter. Whether the evidence in any particular instance is admissible or not depends upon the question what fact it tends to prove'*⁶

3.5 Thus, if the purpose of adducing the statement is to prove the truth of an assertion contained in the statement then the hearsay rule will be triggered. But if the statement is being used as original evidence to prove a fact in issue then the hearsay rule will not be infringed. A statement can be used as original evidence to prove a fact in issue in one of two ways: directly or circumstantially. If the fact in issue was whether officer A gave the defendant a caution before taking his confession, then officer B, who was present at the time, is allowed to give evidence of what officer A said to the defendant as this could be direct evidence of a caution. Similarly, if the fact in issue was whether the victim threatened the defendant just before the alleged offence, a person present at the time is allowed to testify to what the victim said to the defendant as this would be direct evidence of a threat.

3.6 An out-of-court statement can also be an item of original circumstantial evidence used to prove a fact in issue. The Privy Council case of *Ratten v The Queen*⁷ offers a good illustration. In *Ratten*, the deceased was shot dead by her husband (the appellant), who was subsequently convicted of murder. The defence asserted at the trial that the gun had accidentally discharged while the appellant was cleaning it. On appeal, the Privy Council was asked to decide whether the evidence of a telephone operator who testified that she had received a call at the material time from a sobbing and hysterical woman calling from the home of the deceased and the appellant, asking for the police, would amount to hearsay. It was held that the telephone operator's testimony of a statement from a sobbing and hysterical female to "Get me the police, please" was not hearsay as the statement was original evidence of the female caller's state of mind or emotional state. It was

⁶ [2007] 1 HKLRD 568, at 584.

⁷ [1972] AC 378.

relevant as an item of circumstantial evidence that tended to rebut the appellant's defence of accident.⁸

3.7 The recounting by the telephone operator of the words of the female caller was not hearsay because the purpose of repeating the telephone message was merely to prove a factual situation (ie the fact that a call was made from a sobbing and hysterical female at a certain time and from a certain place), and not the truth of the content of the statement.⁹

(B) Implied assertions

3.8 In the House of Lords case of *R v Kearley*, a majority of the Law Lords confirmed that implied assertions came within the definition of hearsay.¹⁰ Most hearsay involves statements that contain an express assertion of facts. In *Kearley*, the majority held that even if there was neither an express nor intended assertion in the statement or conduct, the hearsay rule could still be infringed if proof of the fact in issue involved an implied assertion from the evidence.

3.9 In *R v Kearley*, the police arrested the defendant at his home after finding a small quantity of drugs and stolen property. While the police were still on the premises, a number of telephone calls were made to the house from persons wanting to buy drugs from the defendant. In addition, seven people called at the house asking for the appellant and offering to buy drugs for cash. None of the calls or visits was in the presence or hearing of the defendant. Kearley was charged with possessing drugs with the intention to supply. The evidence of the calls and visits (as observed by the testifying police officers) was tendered in evidence to prove the defendant's intention to supply at the time he was found in possession of the drugs. The majority held that to use this evidence for this purpose would infringe the hearsay rule. Lord Bridge summed up the legal position of implied assertions as follows:

"The speaker was impliedly asserting that he had been supplied by the defendant with drugs in the past. If the speaker had expressly said to the police officer that the defendant had supplied him with drugs in the past, this would clearly have been inadmissible as hearsay. When the only relevance of the words spoken lies in their implied assertion that the defendant is a supplier of drugs, must this equally be excluded as hearsay? This, I believe, is the central question on which this appeal turns. Is a distinction to be drawn for the purposes of the hearsay rule between express and implied assertions? If the words coupled with any associated action of a person not called as a witness are relevant solely as impliedly asserting a relevant fact, may

⁸ It also had a more obvious relevance in contradicting the appellant's evidence that no phone calls were made from the house at the relevant time other than his own call to the police after the shooting.

⁹ *Ratten* [1972] AC 378, at 387-388.

¹⁰ *R v Kearley* [1992] 2 AC 228 (HL).

evidence of those words and associated actions be given notwithstanding that an express assertion by that person of the same fact would only have been admissible if he had been called as a witness? Unless we can answer that question in the affirmative, I think we are bound to answer the certified question in the negative

*Again, as my noble and learned friends, Lord Ackner and Lord Oliver of Aylmerton, point out, the recent decision of your Lordships' House in Reg v Blastland [1986] AC 41 clearly affirms the proposition that evidence of words spoken by a person not called as a witness which are said to assert a relevant fact by necessary implication are inadmissible as hearsay just as evidence of an express statement made by a speaker asserting the same fact would be."*¹¹

3.10 The Hong Kong Court of Appeal in *R v Ng Kin-ye*¹² "reluctantly" held that the court was bound by the decision of the House of Lords in *Kearley*.

3.11 The Hong Kong Court of Appeal in *HKSAR v Or Suen-hong*¹³ revisited the decisions in *Kearley* and *Ng Kin-ye*. In *Or Suen-hong*, the applicant was charged with "being engaged in bookmaking" by "receiving bets by way of business", contrary to section 7(1)(a) of the Gambling Ordinance (Cap 148). On the night of his arrest, the applicant was seen by the police to have made 59 telephone calls from a flat. He was seen to have made notes after some of the calls. The police then entered the flat and seized a number of documents, some of which were later put before a prosecution expert in bookmaking for his opinion. Upon conviction, the applicant appealed on the ground, *inter alia*, that the prosecution expert witness was wrongly permitted to rely on the truthfulness of the contents of those documents as:

*"The contents of a document being hearsay made it inadmissible for the purpose of proving the truth of its contents and that therefore [the expert] ought not to [have] been permitted to form his opinion of [them]."*¹⁴

3.12 The Court of Appeal rejected this ground of appeal since the betting slips were not being adduced for a hearsay purpose:

"The purpose in this case of the production of the documentary exhibits was to show that the applicant was in possession of the paraphernalia of betting, namely, betting slips. There are other such paraphernalia, namely, the telephones and the coloured pens next to the telephones. Those documentary exhibits contained the format and the jargon of the business, and the

¹¹ [1992] 2 AC 228 (HL), at 243-245.

¹² [1994] 2 HKCLR 1.

¹³ [2001] 2 HKLRD 669.

¹⁴ [2001] 2 HKLRD 669, at 676.

purpose of proving their possession, their nature, their format and their jargon, was to show, together with other evidence, that the flat was the venue for the conduct of a business of the kind run by bookmakers. To that end these documents were, in our judgment, admissible evidence and did not breach the prohibition against hearsay evidence."¹⁵

3.13 In other words, the evidence of betting slips found in the possession of the appellant was original circumstantial evidence from which it could be inferred that he was receiving bets "*by way of a business*". The case was thus distinguished from *Kearley*. In *Oei Hengky Wiryo v HKSAR*, the Court of Final Appeal affirmed that an out-of-court statement not adduced for a hearsay purpose could be admitted into evidence from which relevant inferences could be drawn:

*"..... in a variety of contexts, out-of-court statements may be admissible in evidence, whether or not they were made in the presence of a party affected by its admission, and to show that inferences may properly be drawn from those statements both to prove a fact in issue or to provide a factual foundation for inferring a fact in issue. In some cases, the out-of-court statement may be used alone or in conjunction with other facts or statements to disprove a fact."*¹⁶

(C) Machine recorded information

3.14 The hearsay rule does not apply to statements containing information recorded by a machine. In *R v Spiby*, a machine-generated document showing phone calls being made from a certain hotel room in France to the defendant's telephone in England was admitted as evidence to link the defendant to the person staying in the hotel room.¹⁷ Use of the record for this purpose appeared to be taking the document for its apparent truth that calls were being made from a certain hotel room in France to a certain telephone number in England, thereby infringing the hearsay rule. However, the Court of Appeal held that the hearsay rule was not engaged because the information in the document was recorded by "*mechanical means without the intervention of a human mind*".¹⁸ Thus, documents containing machine recorded information do not come within the hearsay rule, assuming there is proof that the machine was operating properly during the material time.

3.15 This aspect of the hearsay rule explains why photographs or thermometer readings are admissible as real evidence without infringing the hearsay rule.

¹⁵ [2001] 2 HKLRD 669, at 677.

¹⁶ [2007] 1 HKLRD 568, at 587.

¹⁷ *R v Spiby* (1990) 91 Cr App R 186 (CA).

¹⁸ From JC Smith, "*The Admissibility of Statements by Computer*" [1981] Crim LR 387, at 390, cited with approval in *R v Spiby* (1990) 91 Cr App R 186 (CA). See also *Anthony David O'Shea v City of Coventry Magistrates' Court* 2004 WL 741858.

Common law exceptions to the hearsay rule

3.16 The early nineteenth century witnessed not only the firm establishment of the hearsay rule in England, but also the gradual creation by judges of the various common law exceptions to the rule. These common law exceptions were created to minimise the effects of a strict application of the rule in circumstances where cogent and reliable evidence would otherwise be excluded.

(A) *Admissions and confessions of an accused*

3.17 One of the most important exceptions to the hearsay rule is that for admissions and confessions made by an accused person. In a strict sense, the words "admission" and "confession" are slightly different in meaning. However, the law relating to their admissibility is the same.¹⁹ For the purposes of this paper we will use the term "confession" to include an "admission".

3.18 When, in the course of an investigation into a criminal offence, a suspect has made a statement to anyone that tends to incriminate him, the statement is known as a confession. A confession is usually made in writing or orally by a suspect to a person in authority,²⁰ but it can be made to anyone. The fact that a suspect chooses to remain silent in the face of an allegation put to him is insufficient to constitute a confession. There must be some other factor which shows that the accused accepts the allegation put to him before it can amount to a confession.²¹

3.19 If the prosecution wishes to use the confession for its truth to incriminate the statement maker, the hearsay rule will be engaged. There is, however, a common law exception that allows the statement to be admitted for this purpose. Courts and commentators have identified two competing rationales for this exception. The first rationale is that confessions have an inherent reliability since a person would not normally say things against his own interest unless they were true. The second rationale looks not to the statement's inherent reliability but to the fact that the accused, as a party to the proceedings, cannot complain about the inability to cross-examine his own confession; indeed, the prosecution cannot compel the accused to enter the witness box to give evidence. The first of these rationales is the more commonly adopted.

¹⁹ Andrew Bruce and Gerard McCoy, *Criminal Evidence in Hong Kong* (Butterworths, 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.

²⁰ Persons in authority include employers, person(s) arresting the suspect, police and other investigating officers etc.

²¹ See generally *R v Christie* [1914] AC 545 (HL).

3.20 It follows from the first rationale that a confession can only be used against the accused who made the confession and not against any of his co-accused. This is because the statement has inherent reliability only insofar as it is made against the interest of the confessor. In *Wong Wai Man & Others v HKSAR*, the Court of Final Appeal explained the position as follows:

*"The aspect of the rule against hearsay which often comes into play when a number of accused are tried together operates as follows. If any accused goes into the witness-box and testifies, his testimony is not hearsay and is evidence for and against his co-accused. Thus, if it implicates or otherwise undermines the position of any co-accused, then his testimony is evidence against such co-accused. That is the position in regard to testimony, ie what is said from the witness-box in the presence of, and subject to cross-examination by or on behalf of, the witness's co-accused. But the position is wholly different in regard to out-of-court statements. Such statements – which are called 'confessional statements' whether they come in the form of full confessions or partial admissions – are a common feature of criminal trials in our courts. Such a statement is not evidence against anyone other than the maker. A confessional statement frequently says things against not only the maker himself but his co-accused too. But in respect of his co-accused, such things are mere hearsay which must be ignored."*²²

In principle, those parts of the confession that do not have an incriminating tendency, such as exculpatory assertions, should not be admitted for their truth since the hearsay exception does not extend that far. The courts, however, have recognised the "mixed statement rule", which allows the exculpatory parts of a mixed statement (ie a statement having both inculpatory and exculpatory parts) to be admitted for their truth as an exception to hearsay. Fairness to the defendant has prompted this development of the rule. Nevertheless, recognising the lack of inherent reliability in self-serving exculpatory statements, the courts have found it appropriate to instruct lay jurors that the exculpatory parts may carry less weight than the incriminating parts.

3.21 Aside from these hearsay issues, there is another important factor that governs the admissibility of confessions. It has long been established (even before accused persons were competent to testify in their own defence) that, before a confession made to a person in authority can be admitted in evidence, the prosecution must prove beyond reasonable doubt that the confession was made voluntarily. An involuntary confession is one *"obtained by fear of prejudice or hope of advantage excited or held out by a person in authority [or] by oppression."*²³

²² [2000] 3 HKLRD 313, at 317.

²³ *DPP v Ping Lin* [1976] AC 574 (HL), at 600.

3.22 Voluntariness is of such great importance that even if the prosecution wishes to use the confession for a non-hearsay purpose (such as to show that the accused made a prior inconsistent statement), that will not be permitted if the prosecution has failed to establish that the confession was voluntarily given. The position is different, however, where a co-accused wishes to cross-examine another co-accused on the latter's confession. It is clear in Hong Kong that if the cross-examination does not infringe the hearsay rule (eg by using the confession as a prior inconsistent statement), the co-accused is entitled to use an involuntary confession for this purpose. The legal position in Hong Kong of allowing a co-accused to use another's involuntary confession for the hearsay purpose of exculpating himself is less clear. In England, it has been held that the English test of voluntariness as set out in the Police and Criminal Evidence Act 1984 must be satisfied before the co-accused can use the confession for this purpose.

3.23 Where a confession has satisfied the test of voluntariness and is otherwise admissible, the court retains a discretion to exclude the confession if either its probative value is outweighed by its prejudicial effect or its admission would infringe the defendant's privilege against self-incrimination.²⁴ Voluntary confessions excluded under the latter head of discretion tend to be those obtained by fraud or other misconduct, or, in the case of an undercover agent, by interrogation.

(B) Co-conspirator's rule

3.24 There is an exception to the general rule that the confession statement of an accused cannot be used against his or her co-accused. Where any party to a conspiracy or joint-enterprise has made an out-of-court statement, be it oral or documentary, in furtherance of the conspiracy or joint-enterprise which implicates a co-accused, the statement is admissible against both its maker and the parties to the joint-enterprise or conspiracy. This is known as the co-conspirator's rule and is an exception to hearsay that is based on principles of agency rather than on any inherent reliability in the statement or the circumstances in which the statement was made.²⁵

3.25 In *HKSAR v Tse Ching Ng*, the Court of Appeal cited with approval the explanation of the co-conspirator's rule in Hong Kong Archbold:

"Ordinarily, acts done or words uttered by an offender will not be evidence against a co-accused absent at the time of the acts or declarations. However, it is now well established that the acts and declarations of any conspirator made in furtherance of the common design may be admitted as part of the evidence against any other conspirator. Such acts and declarations may provide evidence not only of the existence, nature and extent of the conspiracy, but also of the participation in it of persons

²⁴ *Secretary for Justice v Lam Tat-ming* (2000) 3 HKCFAR 168.

²⁵ See generally *R v Alick Au* [1993] 2 HKC 219 at 225 (CA); *HKSAR v Booth* [1998] 1 HKLRD 890 (CFI); *HKSAR v Cheng Sui-wa* [2003] 4 HKC 571 (CA).

absent when those acts and declarations were made. This is known as the co-conspirator's rule."²⁶

(C) Statements of persons now deceased

3.26 The common law relaxed the hearsay rule for the prior statements of persons who by the time of trial had passed away. There was no general test for admitting the hearsay statements of persons now deceased. Instead exceptions developed on an *ad hoc* basis and were confined to specific situations. Three of the more well-established exceptions applicable to criminal proceedings are described below.

Dying declarations

3.27 Under this common law exception, the conduct or statement (be it oral or in writing) of a victim who was under a settled, hopeless expectation of death at the time when the statement was made or conduct performed would be admissible as evidence of the cause of the victim's death in the trial of a person charged with murder or manslaughter.

3.28 The rationale for this exception was that a person aware of his imminent death would be most unlikely to fabricate any last words:

*"declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone: when every motive of falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice."*²⁷

Declarations in the course of duty

3.29 Where an oral or written statement was made by a person who was under a duty to do so because of his or her occupation, trade, business or profession, the statement is admissible for its truth when the person subsequently dies.

3.30 Sir Rupert Cross explained the position as follows:

"In criminal cases the oral or written statement of a deceased person made in pursuance of a duty to record or report his acts is admissible evidence of the truth of such contents of the statement as it was his duty to record or report, provided that the record or report was made roughly contemporaneously with the

²⁶ Hong Kong Archbold (2004), at para 36-60, cited at CACC 361/2004, at para 63.
²⁷ *Regina v Woodcock* (1789) 1 Leach 500, 352, at 353.

doing of the act, and provided the declarant had no notice to misrepresent the facts."²⁸

3.31 The authorities make it clear that the deceased must be under a specific duty to make, record or report the declaration in question, and that the content of the declaration must be related to the duty of the deceased. Where the deceased was under no duty to produce the declaration, the exception would not apply. In *R v O'Meally* it was held that a statement made by a deceased person in the course of duty is not admissible in evidence unless the duty is specific and twofold: a duty to do a particular act and to record or report it when done.²⁹

Declarations against proprietary interest

3.32 In *R v Rogers*,³⁰ it was held that a statement made by a person of a fact which he knew to be against his pecuniary or proprietary interest would, upon that person's death, be admissible in criminal proceedings as evidence of that fact. For the statement to be admitted, the court must be satisfied that the deceased had had the means of knowing the facts as contained in the declaration and that he knew that the declaration was against his interest. Moreover, the declaration must be against either the pecuniary or proprietary interest of the deceased at the time when the statement was made.

3.33 The exception is limited to declarations against the declarant's own pecuniary or proprietary interest, and does not extend to admissions as to criminal liability.³¹

(D) *Res gestae*

3.34 The doctrine of *res gestae* was explained in *R v Bond*:

*"Evidence is necessarily admissible as to acts which are so closely and inextricably mixed up with the history of the guilty act itself as to form part of one chain of relevant circumstances, and so could not be excluded in the presentment of the case before the jury without the evidence being thereby rendered unintelligible."*³²

3.35 The rationale for this exception is two-fold. First, a person who makes a statement that is so intertwined with the actions or events at the time would rarely have had an opportunity to fabricate the statement. Secondly, it would be artificial, if not practically impossible, to require the jury to ignore the spontaneous words of a person whose observed contemporaneous actions would be admissible.

²⁸ Sir Rupert Cross, *Cross on Evidence* (Butterworths, 5th edition, 1979), at 560.

²⁹ [1952] VLR 499.

³⁰ [1994] 158 JP 909.

³¹ *Sussex Peerage Case* (1844) 11 Cl & Fin 85.

³² [1906] 2 KB 389, at 400.

3.36 Historically, courts applied the *res gestae* exception only when the statement was made at exactly the same time as the conduct in question was taking place. The modern law has become less formalistic and more aligned with the underlying rationale of the exception. In *R v Andrews*, the House of Lords held that where the victim related to a witness an account of the attack which was so unusual or startling or dramatic as to dominate the thoughts of the victim so as to exclude the possibility of concoction or distortion, and the statement was made in conditions of approximate but not exact contemporaneity, evidence of what the victim said would be admissible as to the truth of the facts recited under the *res gestae* exception.³³

3.37 Unlike dying declarations, the doctrine of *res gestae* is not confined to statements made by a person who subsequently dies. More recently, the English Court of Appeal has held that the *res gestae* exception is not subject to a rider that disallows its application if the declarant is an available witness at the time of trial.³⁴ In this case involving a son's assaults on his elderly mother, the prosecution chose not to call the mother as a witness (even though she was available), opting instead to use her highly incriminating *res gestae* statements. The reason for not calling the mother was that by the time of trial she had recanted her original statements and was then supporting her son. The Court of Appeal held that while there was nothing in the law of hearsay to prevent the admission of the *res gestae* statements, it was possible that the trial court might consider the admission of the evidence would have an adverse effect on the fairness of the proceedings and, consequently, pursuant to section 78 of the Police and Criminal Evidence Act 1984, refuse to admit it.³⁵ Hong Kong courts do not have a similar statutory power to exclude. Any exclusion of the statement would be governed by the court's residual power at common law to exclude.

(E) Statements made in public documents

3.38 A common law hearsay exception exists to admit statements in a public document for their truth. For such statements to be admitted, they must be made by a public officer³⁶ who was under a duty to make inquiry or who had personal knowledge of the matters stated, recorded or reported in the document. The document must be kept in a place to which the public is permitted access. A public document was defined in *Sturla v Freccia* as:

*"a document that is made for the purpose of the public making use of it – especially where there is a judicial or quasi-judicial duty to inquire. Its very object must be that the public, all persons concerned in it, may have access to it."*³⁷

³³ [1987] AC 281.

³⁴ See *R v W* [2003] EWCA Crim 1286.

³⁵ *R v W* [2003] EWCA Crim 1286, at para 21.

³⁶ Under section 3 of the Interpretation and General Clauses Ordinance (Cap 1), a public officer is defined as any person holding an office of emolument under the Government, whether such office is permanent or temporary.

³⁷ [1880] 5 App Cas 623, at 623.

3.39 The rationale for the exception was that the truthfulness of the statement could be presumed from the nature of the document and the manner in which it was made. It would be both impractical and unnecessary to require the statement maker to be a witness since he could not generally be expected to recollect of the matters described in the document.

(F) Statements made in previous proceedings

3.40 In criminal proceedings, where a witness cannot testify because of death, critical illness, insanity, or because he is being kept out of the way by the opposite party, the common law allowed his evidence in previous proceedings to be admitted provided certain conditions were met. The English Court of Appeal in *R v Hall*³⁸ explained why evidence of relevant previous proceedings was admissible as an exception to the hearsay rule:

*"... we think it plain that a deposition properly taken before a magistrate on oath in the presence of the accused and where the accused had had the opportunity of cross-examination was at least since 1554 admissible at common law in criminal cases if the original deponent was dead, despite the absence of opportunity to observe the demeanour of the witness. The only difference between such a deposition and the transcript of evidence given at a previous trial is that the transcript is not signed by the witness. Provided it is authenticated in some other appropriate way, as by calling the shorthand writer who took the original note, there seems no reason to think that such a transcript should not be equally receivable in evidence."*³⁹

3.41 The rationale for this common law exception was the relative guarantee of truth provided by the fact that the person had testified under oath and had been cross-examined in the earlier proceedings. The exception stemmed also from necessity, in that the witness was unavailable to testify in the later proceedings.

(G) Opinion evidence

3.42 An opinion may be based on matters or information which a person was told or taught by another, or which he has acquired from some other source, such as reading the works of others. Thus, an opinion expressed by a witness in court may be hearsay in nature.

3.43 The indiscriminate exclusion of opinion evidence would, however, be impracticable. There are many instances where witnesses are bound to express an opinion. For instance, a witness might say that he was able to see the detail of an incident clearly as the day was bright and the

³⁸ [1973] 1 QB 496.

³⁹ [1973] 1 QB 496, at 504.

weather was fine. The words "bright" and "fine" are expressions of opinion. In addition, strict adherence to the rule prohibiting the expression of an opinion would also prohibit experts from expressing an opinion on matters of which neither the judge nor the jury have specialist knowledge.

3.44 There are therefore practical reasons for admitting opinion evidence as an exception to the hearsay rule in certain specific circumstances where the evidence is reliable and cogent. Accordingly, expert witnesses are permitted at common law to express an opinion on their area of expertise where the matter upon which the opinion is expressed is outside the knowledge and experience of the tribunal of fact:

"the law recognises exceptions to the hearsay rule and one of those exceptions applies to expert witnesses who are entitled to express opinions based on information, published or unpublished and usually in written form, received from other experts. Medical textbooks constitute a prime example. The relevant information must be of a type generally and reasonably relied upon and falling for evaluation within the relevant field of expertise. As was stated by Wells, J in a very similar case to this -

'It is now well settled that an expert, within proper limits, must be permitted to treat as a working truth data which he learns about from other experts.'
Reid v Kerr (1974) 9 SASR 367 at p. 390⁴⁰

Statutory exceptions to the hearsay rule

3.45 In Hong Kong, statutory exceptions to the hearsay rule are mainly to be found in the Evidence Ordinance (Cap 8) (the Ordinance), which provides a number of general exceptions for various forms of documentary evidence. Other more specific exceptions are scattered among various criminal law related Ordinances. There are over 100 different statutory hearsay exceptions that may be of relevance in Hong Kong criminal proceedings. However, for the purposes of this paper, we examine only the major statutory exceptions found in the Ordinance that are applicable in criminal proceedings.

(A) Depositions

3.46 Sections 70 and 73 of the Ordinance provide a scheme for admitting depositions of persons who are unable to be witnesses at the time of trial. They represent an extension of the common law exceptions for persons now deceased. Both sections are notorious for their lack of readability. This is understandable since their origins lie in English provisions enacted in the mid-1800s.

⁴⁰

The Queen v Wan Pui-hay [1994] 2 HKCLR 47 (CA), at 48-9.

3.47 Under section 70 of the Ordinance, the deposition of a person whom the prosecution is unable to produce at trial as a witness shall be received in evidence, provided certain conditions are satisfied. Section 70 provides that, before admitting the deposition, the court must first be satisfied that the witness cannot be produced because:

- i. he is dead;
- ii. he is absent from Hong Kong;
- iii. it is impracticable to serve process on him;
- iv. he is too ill to travel;
- v. he is insane;
- vi. he is being kept out of the way by means of the procurement of the accused;
- vii. he is resident in a country which prohibits his departure, or which he refuses to quit; or of the inability to find him at his last known residence in Hong Kong.

3.48 Evidence of the deposition will be admitted if these conditions are met and:

*"... if it also appears from the certificate of the magistrate or other officer hereinafter mentioned that such person was examined before a magistrate, or other officer to whom the cognizance of the offence appertained, and that the usual oath was administered to him prior to his examination, and that the examination was taken in the presence of the person accused, and that he, or his counsel or solicitor, had a full opportunity of cross-examining such person, and that the evidence so taken was reduced into writing and read over to and signed by him and also by the magistrate or other officer as aforesaid"*⁴¹

3.49 The obvious advantage of section 70 is that prior evidence of a deponent obtained under oath in the presence of a magistrate or an authorised officer, with the full opportunity for the defence to cross-examine the deponent, can now be received in evidence. The downside of the section, however, is that no reciprocal provision has been made for the defence. In a situation where the defence is unable to provide at trial a witness for reasons similar to those stated in section 70, and where the testimony of the witness might help to exculpate the accused of the allegation laid against him, that evidence will nevertheless be excluded.

3.50 Section 73 of the Ordinance provides, subject to certain conditions, that a written statement taken by a magistrate on oath of a person who is dangerously ill and unable to travel shall be admitted in evidence. In taking the statement, the magistrate must be satisfied that the person is "able

⁴¹ Section 70 of the Evidence Ordinance (Cap 8).

and willing to give material information relating to an indictable offence or to a person accused thereof." Section 73 provides that:

"... if afterwards, on the trial of any offender or offence to which the [statement] may relate, the person who made the said statement is proved to be dead, or if it proved that there is no reasonable probability that such person will be able to attend and give evidence at the trial, it shall be lawful to read such statement in evidence, either for or against the person accused, without further proof thereof, if the same purports to be signed by the magistrate by or before whom it purports to be taken, and provided it is proved, to the satisfaction of the court, that reasonable notice of the intention to take such statement has been given to the person (whether prosecutor, or person accused) against whom it is proposed to be read in evidence, and that such person, or his counsel or solicitor, had or might have had, if he had chosen to be present, full opportunity of cross-examining the person who made the same."

3.51 In contrast to section 70, section 73 may be invoked by either the prosecution or the defence as long as there is a dangerously ill person who *"is able and willing to give material information relating to an indictable offence or to a person accused thereof"*. The deposition obtained under section 73 shall be admitted in evidence *"either for or against the person accused"*.

3.52 Another set of deposition provisions that have relevance in criminal proceedings are those that apply to children and mentally incapacitated persons in section 79E of the Criminal Procedure Ordinance (Cap 221). For children, the provision only applies for offences of sexual abuse, cruelty, or involving an assault, injury or threat to the child. For both these categories of vulnerable witnesses, it is also necessary to show that either the trial will be unavoidably delayed or exposure to the full trial would endanger the physical or mental health of the witness.⁴² Similar to sections 70 and 73, the defendant must be given an opportunity to cross-examine the deponent at the time the deposition is taken.

(B) Business records

3.53 Section 22 of the Ordinance is the principal provision governing the admission of business records in criminal proceedings. Section 22(1) provides that a documentary statement shall be admitted in any criminal proceedings as *prima facie* evidence of any fact it contains if:

"(a) direct oral evidence of that fact would be admissible in those proceedings; and

⁴²

See section 79E(1) & (2) of the Criminal Procedure Ordinance (Cap 221).

- (b) *the document is or forms part of a record compiled by a person acting under a duty from information supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information; and*
- (c) *the person who supplied the information -*
 - (i) *is dead or by reason of his bodily or mental condition unfit to attend as a witness;*
 - (ii) *is outside Hong Kong and it is not reasonably practicable to secure his attendance;*
 - (iii) *cannot be identified and all reasonable steps have been taken to identify him;*
 - (iv) *his identity being known, cannot be found and all reasonable steps have been taken to find him;*
 - (v) *cannot reasonably be expected (having regard to the time which has elapsed since he supplied or acquired the information and to all the circumstances) to have any recollection of the matters dealt with in that information; or*
 - (vi) *having regard to all the circumstances of the case, cannot be called as a witness without his being so called being likely to cause undue delay or expense."*

3.54 Section 22 originally dealt mainly with the admission of trade and business records but was amended in 1984 to its present form. Section 22 renders admissible any "*statement contained in a document which is or forms part of a record*". However, documents generated by a computer cannot be admitted under section 22 as they are subject to a separate regime contained in section 22A.

3.55 Section 22B(4) provides that, for the purposes of section 22, the definitions of "document" and "statement" are to be found in Part IV of the Ordinance. Under section 46 of Part IV of the Ordinance, a "document" is defined as "*anything in which information of any description is recorded*", while a "statement" is defined as "*any representation of fact or opinion, however made*". The meaning of the term "record" was considered in *R v Jones & Sullivan*⁴³ where a "record" was held to be:

"... a history of events in some form which is not evanescent. How long the record is likely to be kept is immaterial; it may be something which will not survive the end of the transaction in question, it may be something which is indeed more lasting than

⁴³

[1978] 66 Cr App R 246.

*bronze, but the degree of permanence does not seem to us to make or mar the fulfilment of the definition of the word 'record.'"*⁴⁴

3.56 Section 22 relaxes the rigidity of the common law rules so far as the admission of private documents is concerned. At common law, not only must the original of the document be produced, but the document itself must also have been executed, adopted or otherwise connected with a party or person relevant to the case. Under section 22, a statement contained in a private document can be admitted if it is, or forms part of, a record compiled by a person acting under a duty from information supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matter dealt with in that information. In such circumstances, the statement can be tendered as evidence of the truth of its contents.

3.57 Section 22(3) makes provision for multiple hearsay. It provides that a statement can be admitted under section 22 even where the information supplied to the compiler of the statement was itself hearsay. To satisfy section 22(3), however, each person in the chain transmitting the information must have acted under a duty. There is no need for the original supplier who had personal knowledge of the information to be acting under a duty. His personal knowledge of the matter dealt with in the information would be sufficient for the purposes of section 22.

3.58 The general common law principle requiring the original of a private document to be tendered is further relaxed by section 22B (1), which provides that a statement under section 22 may be proved by the production of the document itself or a copy of the document, "*whether or not that document is still in existence.*"

(C) Computer records

3.59 Section 22A(1) of the Ordinance provides for the admission of computer records in criminal proceedings. Under this section, a computer generated document will be admitted as *prima facie* evidence of its contents if direct oral evidence of those contents would be admissible and the following conditions specified in section 22A(2) are satisfied:

- "(a) *that the computer was used to store, process or retrieve information for the purposes of any activities carried on by any body or individual;*
- (b) *that the information contained in the statement reproduces or is derived from information supplied to the computer in the course of those activities; and*

⁴⁴ [1978] 66 Cr App R 246, at 250.

- (c) *that while the computer was so used in the course of those activities -*
 - (i) *appropriate measures were in force for preventing unauthorized interference with the computer; and*
 - (ii) *the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents."*

3.60 Computer evidence may also be admitted under section 22A(3) if direct oral evidence of the particular facts would be admissible in the proceedings and:

- "(b) *it is shown that no person (other than a person charged with an offence to which such statement relates) who occupied a responsible position during that period in relation to the operation of the computer or the management of the relevant activities -*
 - (i) *can be found; or*
 - (ii) *if such a person is found, is willing and able to give evidence relating to the operation of the computer during that period;*
- (c) *the document was so produced under the direction of a person having practical knowledge of and experience in the use of computers as a means of storing, processing or retrieving information; and*
- (d) *at the time that the document was so produced the computer was operating properly or, if not, any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents".*

3.61 A computer document will not be admitted under section 22A(3) on behalf of the accused if the accused held a responsible position during the relevant period in relation to the computer's operation. Subsections 22A(5) and (6) make provision for a certificate as to, *inter alia*, the fulfilment of the requirements of section 22A(2) to be admitted if it purports to be signed by a person occupying a responsible position in relation to the operation of the computer.

3.62 In contrast to section 22, which requires the original supplier of information to have personal knowledge of the matters dealt with in that information, section 22A does not seem to impose such a requirement. Indeed, section 22A(9) permits information to be supplied to a computer by means of "*any appropriate equipment*" such as by another machine. What is

required is that the information was stored, processed, or retrieved for the purposes of any activities carried on by any body or individual and that the information was supplied to the computer in the course of the relevant activities.

3.63 Another significant feature of section 22A is that there is no requirement for the person entering the information into a computer to be under any duty to do so. This contrasts with section 22, where the compiler of the document must be under a duty to do so.

(D) Banking records

3.64 Section 20 of the Ordinance provides for the admission in evidence of a copy of any entry or matter recorded in a banker's record. This section also applies to any document or record used in the ordinary business of an overseas bank designated by the Financial Secretary under section 19B(1) of the Ordinance. Once admitted, these documents will be *prima facie* evidence of the matters they record. The banker's record will be admitted if:

- "(a) *it is proved -*
 - (i) *that such entry was made or matter recorded in the ordinary course of business; and*
 - (ii) *that such record is in the custody or control of the bank; and*
- (b) *except in the case of a copy made by any photographic process and subject to subsection (3), it is proved by some person who has examined the copy with the original entry, that the copy has been examined with the original entry and is correct.*⁴⁵

3.65 Where the record is kept by means of a computer, section 20(3) provides that it is not necessary to prove the matters to which subsection 20(1)(b) refers if it is proved:

- "(a) *that the document was so produced under the direction of a person having practical knowledge of and experience in the use of computers as a means of storing, processing or retrieving information;*
- (b) *that during the period when the computer was used for the purpose of keeping such record, appropriate measures were in force for preventing unauthorized interference with the computer; and*

⁴⁵ Section 20(1) of the Evidence Ordinance (Cap 8).

- (c) *that during that period, and at the time that the document was produced by the computer, the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents".*

3.66 Section 2 of the Ordinance defines "bank" and "banker's records" as follows:

"'bank' means any corporation, company, or society established by charter or under or by virtue of any Act of Parliament or Ordinance, lawfully carrying on the business of bankers, or any foreign banking company carrying on business in Hong Kong.

'banker's record' includes –

- (a) *any document or record used in the ordinary business of a bank; and*
- (b) *any record so used which is kept otherwise than in a legible form and is capable of being reproduced in a legible form."*

3.67 Section 20 was enacted to bring the law governing the admission of banking documents more in line with present-day banking practices. It relaxed the common law need for the production of original documents in evidence, so that a copy of any entry or matter recorded in a banker's record could be admitted, so long as the conditions laid down in subsections 20(1)(a) and (b) were complied with.

3.68 An example of what qualifies a document to be a "banker's record" for the purposes of section 20 can be found in *R v Law Ka-fu*⁴⁶ where Power VP held that credit card sales slips would be admissible under section 20, on the basis that credit card sales slips are used in the ordinary business of banks and are normally in the custody and control of the bank. They are records of transactions of a bank forming part of the bank's record which is generally resorted to by banks to monitor credit card transactions.

(E) Public documents

3.69 To provide greater flexibility in the admission of public documents, section 18 of the Ordinance was enacted to enable copies, as opposed to originals, of public documents to be tendered in evidence, subject to certain safeguards as to the authenticity of the copied documents. Where any book or other document *"is of such a public nature as to be admissible in evidence on its mere production from the proper custody"*, it will be admitted:

⁴⁶ [1996] 1 HKC 333.

"provided it is proved to be an examined copy or extract or provided it purports to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted".⁴⁷

3.70 A statutory hearsay exception for admitting prints of public documents contained in microfilm or microfiche format is found in section 39 of the Ordinance.

(F) Official documents

3.71 Section 19 of the Ordinance provides for the admission in evidence of specified documents receivable in evidence in court⁴⁸ or before the Legislative Council or any of its committees. Section 19 provides as follows:

"Whenever, by any enactment, any certificate, official or public document, or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, by-law, entry in any register or other book, or of any other proceeding is receivable in evidence of any particular in the court or before the Legislative Council or any committee thereof, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the enactment, without any proof of the seal or stamp when a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence."

(G) Other notable documentary hearsay exceptions

3.72 Under section 19A of the Ordinance, any document purporting to be signed by the Chief Secretary, and certifying that any foreign document attached thereto has been received by the Chief Secretary in connection with any criminal proceedings, shall be admitted in evidence in those proceedings together with the document attached thereto, without further proof, as *prima facie* evidence of the facts contained in such documents.

⁴⁷ Section 18 of the Evidence Ordinance (Cap 8).

⁴⁸ Under section 2 of the Evidence Ordinance, the word "court" includes the Chief Justice and any other judges, also every magistrate, justice, officer of any court, commissioner, arbitrator, or other person having, by law or by consent of parties, authority to hear, receive, and examine evidence with respect to or concerning any action, suit, or other proceeding civil or criminal, or with respect to any matter submitted to arbitration or ordered to be inquired into or investigated under any commission.

3.73 Section 19AA provides that any document purporting to bear the fiat, authorisation, sanction, consent or authority of the Chief Executive, or any other public officer necessary for the commencement of any prosecution shall, until the contrary is proved, be received as evidence in any proceedings without proof being given that the signature to such fiat, authorisation, sanction, consent or authority is that of the Chief Executive or such public officer.

3.74 Section 23 of the Ordinance allows the admission in evidence in criminal proceedings of a copy of the records of the Hong Kong Observatory, while sections 24 and 24A provide respectively for the admission of documents purporting to be records of the testing of and accuracy of chronometers and speed measuring apparatus.

3.75 Section 25 of the Ordinance allows the admission of a certificate by a Government Chemist as to any article or substance submitted to him, while section 26 makes provision for the admission of a certificate as to the processing or enlargement of exposed film.

3.76 Under section 27 of the Ordinance, a translation of a document written in a language other than English or Chinese shall be admitted in evidence in any criminal proceedings if it has been certified as an accurate translation by a person appointed by the Chief Justice under section 27(2).

3.77 Section 28 of the Ordinance makes provision for the admission of records of the testing of the accuracy, inspection and servicing of a vehicle's speedometer, a radar device or a weighing device.

3.78 Under section 29 of the Ordinance, where any Ordinance authorises or requires any document to be served or any notice to be given by post or by registered post, a certificate to that effect shall be admitted in any criminal or civil proceedings before any court without further proof as *prima facie* evidence of its contents. On the production of such a certificate, the court before which it is produced shall, until the contrary is proved, presume that the facts stated therein relating to the posting of the document or notice specified therein are true.

3.79 Section 29A of the Ordinance allows the admission of a certified transcript of a record in a language other than English or Chinese in any criminal or civil proceedings.

Chapter 4

Cardinal principles and the shortcomings of the present law

4.1 The task of considering and making recommendations for reform of the hearsay rule involved, as an initial exercise, consideration of the rule itself in its implementation, as well as the application of the exceptions to it and, thus, whether its implementation resulted in any shortcomings. Recommendations for reform would only be necessary were shortcomings in the rule established.

Widespread criticism of the common law position

4.2 The experience of other jurisdictions with similar regimes is that the existing hearsay rule with its haphazardly developed exceptions has many anomalous consequences, resulting in probative, reliable evidence being excluded from consideration by the tribunal with the real potential for injustice to the public interest, including the interest of the accused. Criticisms are widespread and longstanding, emanating from judges, academic writers and law reform bodies:

1. Cross & Tapper:

*"The hearsay rule has often been regarded as one of the most complex and most confusing of the exclusionary rules of evidence. Lord Reid said that it was 'difficult to make any general statement about the law of hearsay which is entirely accurate.' Both its definition, and the ambit of exceptions to it were unclear. It led to the exclusion of much reliable evidence, and, on that account, exceptions were created ad hoc, often without full consideration of their implications."*¹

2. The Auld report:

"95 The rule against hearsay in criminal proceedings, like many other past and present rules of inadmissibility in that jurisdiction, has its origin in the late 18th and early 19th centuries when the cards at trial were so stacked against defendants that judges felt the need to even the odds. In civil matters, it has been abolished completely. On one view, it tends to exclude weak evidence and to ensure that a defendant may question his accusers, thus preserving the oral character of

¹ C Tapper, *Cross and Tapper on Evidence* (Butterworths, 9th edition, 1999), at 529.

the English trial. On the other, it is capable of being too restrictive so as to work injustice either way, and, in its artificiality, interferes with the smooth running of the trial process.

96 *It is common ground that the present law is unsatisfactory and needs reform. It is complicated, unprincipled and arbitrary in the application of a number of the many exceptions. It can exclude cogent and let in weak evidence. It wastes court time in requiring it to receive oral evidence when written evidence would do. And it confuses witnesses and prevents them from giving their accounts in their own way.*

...

103 *... The need and form of reform of the rule against hearsay should be approached from the fundamental standpoints that rules of evidence should facilitate rather than obstruct the search for truth and should simplify rather than complicate the trial process. Inherent in a search for truth is fairness to the defendant and his protection from wrongful conviction - but it should not be forgotten that the present rule can operate unfairly against a defendant as well as the prosecution."*²

3. Lord Griffiths in *R v Kearley*:

*"In my view the criminal law of evidence should be developed along common sense lines readily comprehensible to the men and women who comprise the jury, and bear the responsibility for the major decisions in criminal cases. I believe that most laymen if told that the criminal law of evidence forbade them even to consider such evidence as we are debating in this appeal would reply 'Then the law is an ass' ... The hearsay rule was created by our judicial predecessors and if we find that it no longer serves to do justice in certain conditions then the judges of today should accept the responsibility of reviewing and adapting the rules of evidence to serve present society."*³

4. Lamer CJ in *R v Smith*:

"... the approach that excludes hearsay evidence, even when highly probative, out of the fear the trier of fact will not understand how to deal with such evidence, is no longer appropriate. In my opinion, hearsay evidence of statements made by persons who are not available to give evidence at trial ought generally to be admissible, where the circumstances under which the statements were made satisfied the criteria of necessity and reliability set out in Khan and subject to the residual discretion of the trial judge to exclude the evidence

² The Right Honourable Lord Justice Auld, *Report: Review of the Criminal Courts of England and Wales* (The Stationery Office, 2001), at 556-557 and 559-560.

³ [1992] AC 228, at 236-237.

*when its probative value is slight and undue prejudice might result to the accused."*⁴

5. Professor Zuckerman:

*"The hearsay rule fulfils neither of these conditions [conformity with common sense and certainty in application] ... The rule is at odds with common sense and as a result our judges have had to resort to numerous ploys to arrest the more extreme excesses of its operation. These efforts have made the rule more flexible and have rightly made admissibility more dependent on probative force than on conformity to the legal definition, but this only helps, in turn, to call into question the benefits to be gained from the continued existence of the rule."*⁵

6. Bruce & McCoy:

*"The rule has attracted a good measure of criticism. Probably, the strongest criticism of the law is that the rule operates so as to exclude evidence where a witness who can speak directly about relevant events is unavailable, but that witness has either made a record or has told another person of those events (the latter being available to testify) in circumstances where one would, in ordinary life, regard the recording or relating of the event to be reliable. The rule has been described by Lord Reid as 'absurdly technical'. Diplock LJ once confessed the rule has 'little to do with common sense'. Another serious criticism is that the rule applies with equal force to both prosecution and the defence and on the basis that it is presently applied may exclude evidence upon which the accused may rely to establish his innocence."*⁶

7. The New Zealand Law Commission:

*"... in its present form the law of evidence is a patchwork of disparate elements that have never been co-ordinated and whose effect is frequently disputed by experts. Problems resulting from ancient rules of the judge-made common law, themselves often neither precise nor readily accessible, have been met by ad hoc statutory reforms which have in turn presented difficulties of construction and of scope."*⁷

⁴ (1992) 75 CCC (3d) 257, at 273-274.

⁵ A A S Zuckerman, *The Principles of Criminal Evidence* (Oxford: Clarendon Press, 1989), at 183.

⁶ Bruce and McCoy, *Criminal Evidence in Hong Kong* (Butterworths, Issue 20, 2004), at [5]- [50] of Division IV.

⁷ NZ Law Commission, *Evidence: Reform of the Law* (1999), Report 55 – Vol 1, at xvii.

8. The English Law Commission:

*"There is no unifying principle behind the rule and this gives rise to anomalies and confusion. Court time is wasted because of the lack of clarity and complicated nature of the rule. Cogent evidence may be kept from the court, however much it may exonerate or incriminate the accused, because the fact-finders are not trusted to treat untested evidence with the caution it deserves, but if hearsay is admitted there is nothing to prevent them from committing on it alone. Witnesses may be put off by interruptions in the course of their oral evidence. Whether evidence will be let in or not is unpredictable because of the reliance on judicial discretion."*⁸

9. The Scottish Law Commission identified

"... two principal disadvantages. First it may result in injustice by depriving the court of information which would be of value in ascertaining the truth...[T]he rule offends against the general principle that all relevant evidence should be admissible. Secondly, the technicality of the rule offends against the general principle that the law should be as clear and simple as possible.

*We note that the evidence which is excluded by the rule not only is relevant, but also may well be reliable. It seems to us impossible to assert as a general proposition that hearsay evidence is necessarily less reliable than direct evidence."*⁹

10. Professor R D Friedman's reasons for reforming the hearsay rule (referred to by the New Zealand Law Commission):

*"The [rule against hearsay] excludes much evidence that is helpful to the truth determining process; it fails to identify that hearsay which should be excluded to protect the fundamental rights of a criminal defendant; it creates unnecessary costs, as parties must arrange for the testimony of witnesses in situations where secondary evidence would suffice; it confuses judges, lawyers, and students; and it creates contempt for evidentiary law, because it fails to reflect values for which most people have respect, and so often it is ignored in practice ... [H]earsay law, where it exists, should be radically transformed and liberalised."*¹⁰

⁸ English Law Commission, *A Consultation Paper: Evidence in Criminal Proceedings: Hearsay and Related Topics* (1995), Consultation Paper No 138, at para 7.84.

⁹ Scottish Law Commission, *Evidence: Report on Hearsay Evidence in Criminal Proceedings* (1995), Scot Law Com No 149, at paras 3.20 and 3.21.

¹⁰ Friedman, "Confrontation Rights of Criminal Defendants" in Nijboer and Reintjes (eds), *Proceedings of the First World Conference on New Trends in Criminal Investigation and Evidence* (Open University of the Netherlands, 1997) 533, quoted in NZ Law Commission, *Evidence: Reform of the Law* (1999), Report 55 – Vol 1, at para 45. The information in this footnote is obtained from footnote 8 of Report 55 – Vol 1.

Is Hong Kong exceptional?

4.3 Despite all these comments and this history, the suggestion was made at an early stage of the sub-committee's deliberations that there was in Hong Kong no difficulty with the application of the hearsay rule. The sub-committee was told that the Law Society's Criminal Law and Procedure Committee saw no need for reform, this at a stage when none of the issues had been studied by them. It was suggested, too, that the Bar should be consulted about the need for reform at the outset of our deliberations. The majority of the committee thought this premature and that it would be better for the profession to comment after, rather than before, a study. It was suggested that the problem here was minimised by the fact that most cases were tried by magistrates who, where the interests of justice so required, paid little attention to the rule. The suggestion was further made that there was no evidence that any injustice had been occasioned to defendants in Hong Kong by reason of the hearsay rule and, specifically, by reason of exclusion of third-party confessions.

4.4 The suggestion that the hearsay rule provides no difficulties in Hong Kong is to suggest that the longstanding difficulties of the hearsay rule recognised throughout the common law world are, for some undefined reason, managed here with an ease that the rest of the world finds difficult to achieve, and that the illogicalities and injustices to which we will later refer in detail in this report are of no significance in Hong Kong. No reason is put forward for this ability supposedly unique to Hong Kong, save the suggestion that most of our trials are not before juries. Our research has shown that in all jurisdictions where there has been a call for reform, a large percentage of trials take place before tribunals without juries. The suggestion assumes that in cases before professional tribunals the rules somehow lose their irrational aspects and their potential for injustice. In any event, juries try the most serious cases. The fact that numerically most of the cases are tried by the lower courts will be of little comfort to the High Court defendant who wishes to adduce helpful and reliable evidence, or to the public interest in seeing effective prosecutions based on reliable evidence in serious cases. If indeed magistrates or judges sitting alone adopt a loose approach to the rule to ensure that the justice of the matter is met, then the law is demonstrably deficient, for it means that the gaps are being addressed not by law reform but by ignoring the law.

4.5 The problem with hearsay is not only a problem of understanding the basic rules and their application. The rule and its exceptions are well recognised as unusually complex. The difficulties which have resulted in reform across the common law world have not been driven solely, or even mainly, by questions of comprehension. There are more fundamental problems to which this paper refers in detail; and which apply to trials at all levels. The further suggestion that there is no need for reform because no one can pinpoint an example of a miscarriage of justice in Hong Kong is a suggestion which misses the point of principle. That a miscarriage of justice can result from the non-production of reliable evidence is self evident; and it is also self evident that our present laws preclude in certain

instances the admission of reliable cogent evidence. We do not think society should wait for an actual miscarriage of justice in Hong Kong before starting upon the road to prevent one.

4.6 Concerns were also expressed that the object of this reform exercise may be to secure the conviction of more people; or to strengthen the hand of prosecutors. This was not what triggered the reference to the Commission. Our terms of reference are to ascertain whether the law is in need of reform and, if so, what reform should be effected in the interests both of defendants, and of the proper prosecution of cases, where such reform is demanded and is justifiable and is hedged about by proper safeguards. It should be borne in mind that one of the key motivations for reform in all the common law jurisdictions which have examined the problem is the protection of the innocent. Comfort might also be drawn from the fact that the jurisdictions which have been engaged in these exercises have impeccable credentials when it comes to ensuring the protection of the innocent.

Principles of reform and the identification of shortcomings

4.7 We have identified a number of cardinal principles which should apply to all evidence rules, including the hearsay rule. These cardinal principles are as follows:

1. Evidentiary rules should, within the limits of justice and fairness to all parties, facilitate and not hinder the determination of relevant issues.
2. Conviction of the innocent is always to be avoided. All accused have a fundamental right to make full answer and defence to a criminal charge.
3. Evidentiary rules should be clear, simple, accessible, and easily understood.
4. Evidentiary rules should be logical, consistent, and based on principled reasons.
5. Questions of admissibility should be determinable with a fair degree of certainty prior to trial so that the legal adviser may properly advise the client on the likely trial outcome.
6. Evidence law should reflect increasing global mobility and modern advancements in electronic communications.

Shortcomings

4.8 We have tested the existing law against each of these cardinal principles. We concluded that under each of these principles, the present rule exhibited shortcomings, some of greater consequence than others.

4.9 We have been conscious throughout our deliberations of the necessity to keep in mind the advantages of, and the original rationale for, the hearsay rule: the great importance of the right to challenge the accuracy of evidence, for the exercise of which the ability to confront and cross-examine a witness is a key consideration. So, too, confrontation is said to be salutary to the witness and also gives to the proceedings, and to an accused, a sense of justice being seen to be done. Amongst other dangers of admitting hearsay are the risk that a trier of fact might place too much weight on hearsay; the risk of misunderstanding or misperception by the witness hearing the declaration; the risk of fabrication by the witness; and the risk of faulty memory of the witness.

(1) Evidentiary rules should, within the limits of justice and fairness to all parties, facilitate and not hinder the determination of relevant issues

4.10 The present hearsay rules do not assist, and in some instances they hinder, the determination of relevant issues. A primary criticism of the present law in criminal proceedings is that the exceptions to the exclusionary rule are too restrictive and narrow in scope. As a result, evidence which is otherwise cogent and reliable is excluded from consideration.

4.11 While the exceptions go some way to mitigate the harsh consequences of the hearsay rule, they provide only a partial solution. The effect of the rule is to exclude evidence because of its characteristics, without regard to whether or not it is reliable. A legal framework which emphasises reliability, rather than the nature of the evidence, would seem more in tune with the aim of determining fairly the guilt or innocence of the accused.

4.12 One area in which the hearsay rule arguably excludes cogent evidence is in respect of implied assertions. In *R v Kearley*,¹¹ the House of Lords ruled that evidence of telephone calls to the accused from persons inquiring as to the supply of drugs was inadmissible, as evidence of the calls would amount to an implied assertion that the accused was a supplier of drugs. The House ruled that an implied assertion was hearsay (and thus inadmissible) in the same way as evidence from an express assertion. The Hong Kong Court of Appeal reached the same conclusion in *R v Ng Kin-yee*¹² in respect of telephone calls making inquiries about bookmaking.

4.13 The justification for excluding implied assertions from the court's consideration is that there exists no logical distinction between an "implied assertion" and one that is express. An inference of guilt from an implied assertion would be as dangerous as one drawn from an express assertion made by a person who is not in court to testify. However, this overlooks the fundamental distinction that implied assertions concern the conduct of persons who do not intend to make the assertion in question. For example, in *Kearley*, none of the callers intended to convey the message that the

¹¹ [1992] AC 228.

¹² [1994] 2 HKCLR 1.

defendant was a supplier of drugs. Indeed, it was the unintended and genuine nature of their conduct that gave this evidence considerable probative force. Unfortunately, the rule excluding implied assertions is heavily formalistic and unable to give effect to the substance of the evidence.

4.14 Despite common roots, the rule has been interpreted differently in Australia. For example, in *R v Firman* the Supreme Court of South Australia held that telephone calls consisting of inquiries for drugs by potential customers were relevant as they tended to prove the existence of an illegal activity and the accused's involvement in it. The court held that:

*"The making of such inquiries and offers by a number of people tends to prove the carrying on of a business. If such inquiries or offers are directed to a particular premises, they tend to prove the carrying on of the business at those premises. If they are directed to a particular person, they tend to prove the carrying on of the business by that person. The purpose for which the evidence was tendered was therefore not to prove the truth of anything stated by the telephone callers but to prove the fact of the making of the inquiries or offers."*¹³

4.15 The English Law Commission's 1997 report had this to say:

*"Where there is an implied assertion, a fact not explicitly asserted is inferred from words or conduct which may or may not themselves be an assertion: for example, they may take the form of a question, or a greeting. In ordinary life it is common for a fact to be inferred from the fact that a person is behaving as if it were true. If this reasoning is not permitted, it follows that much relevant evidence is excluded."*¹⁴

4.16 Triers of fact are routinely required to assess the weight to be placed upon different portions of the evidence tendered during a trial: there seems to be no reason, in logic, why they could not be entrusted with performing such an exercise with evidence of this nature. That said, we acknowledge that sight should never be lost of the risk in admitting relevant but untested hearsay evidence.

4.17 The decision in *R v Harry*¹⁵ provides another example of how justice can be sabotaged by the strict application of the hearsay rule. The defence wished to cross-examine a prosecution witness about certain telephone calls which were made to the flat in which the accused and his co-accused lived and in which a large quantity of cocaine was found. The reason for cross-examining the witness was to show that the co-accused was in fact the drug dealer, as the great majority of the calls were for the co-accused and those calls were about the prospective sales of cocaine. It was held that the

¹³ [1989] 46 A Crim R 150, at 153.

¹⁴ English Law Commission report, *Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997), Law Com No 245, at para 4.20.

¹⁵ (1988) 86 Cr App R 105 (CA).

defence should not be permitted to cross-examine the witness as the purpose of the cross-examination was to prove in a hearsay way that the co-accused, and not the accused, was in fact the drug dealer.

4.18 Similarly in *R v Yick Hin-tong*,¹⁶ the Benefit Investment Company was held to have been the publisher of certain books on the basis that the company's name was printed on those books. On appeal, it was held that the magistrate had erred in relying on what was printed on the books. In allowing the appeal, O'Connor J expressed his frustration with the law and said:

*"The evidence that the books carried in print the information that Benefit Investment Co was the printer, being an assertion made otherwise than by a witness in court, and not being within an exception to the hearsay rule, was not admissible as to the truth of the matter asserted, that Benefit Investment Co was the printer. That conclusion is not in accord with everyday experience, nor has it anything in common with common sense. Nevertheless, it is the law, and on that ground, the appeals on charges A, C, D and E will be allowed."*¹⁷

4.19 A commonplace demonstration of the absurdity of the present hearsay rule is that a person cannot give evidence of his own age, because he does not know when he was born; someone else must have told him. As Kaufman JA in *R v La Chapelle*¹⁸ noted: *"If it is hearsay for a person to testify as to his own date of birth, the same reasoning would exclude him from testifying as to the identity of his own parents."*

(2) Conviction of the innocent is always to be avoided. All accused have a fundamental right to make full answer and defence to a criminal charge

4.20 Perhaps the weightiest criticism of the hearsay rule is its inability to yield for evidence that might exculpate an innocent person wrongly accused of a serious offence. The case of *Sparks v Regina* is a classic example.¹⁹ In this case, the three-year old victim girl, who was too young to testify, told her mother shortly after the incident that the person who molested her was a "coloured boy". The statement was inadmissible even though the statement probably would have exculpated Sparks, a white American Air Force staff sergeant. We note that the Bar Association in its response to the sub-committee's consultation paper acknowledged the problems illustrated by *Sparks* but, while criticising the scheme proposed, did not put forward an alternative solution.

¹⁶ [1991] 1 HKC 441.

¹⁷ [1991] 1 HKC 441, at 444.

¹⁸ (1978) 38 CCC (2d) 369, 372 (Que CA).

¹⁹ [1964] AC 964 (PC)

4.21 *R v Blastland* is another classic example.²⁰ The accused was alleged to have killed a young boy. There were, however, a number of persons who were prepared to testify that shortly after the killing of the young boy another person known as "M" had told them that a young boy had been murdered. The circumstances were such that M's knowledge of the killing raised an inference that he had himself committed the murder. The trial judge ruled that as the purpose of calling the witnesses was to prove by inference that it was M who had committed the crime, the evidence had to be rejected as it was hearsay and inadmissible.

4.22 The English Law Commission referred to the decision in *Blastland* in their 1997 report and remarked:

*"... if the evidence shows that there is a possibility that someone else committed the crime alone, and the jury cannot dismiss that possibility, then they cannot be sure of the accused's guilt, and therefore should not convict. The fact that someone else has confessed to the offence is logically relevant to the issue of whether the defendant committed it: this is so whether the other person is a co-defendant who gives evidence, a co-defendant who exercises the right not to give evidence, a co-defendant who is tried separately, or a person who is never caught or never prosecuted. Moreover, it will normally be impossible for a defendant to adduce the oral evidence of the person who has confessed, because that person could rely on the privilege against self incrimination."*²¹

4.23 Wigmore described this aspect of the hearsay rule as a "*barbarous doctrine*".²² In England, it appears that, in practice, the problem presented in *Blastland* can be solved by both parties agreeing to admit the hearsay statement (see the recent case of *R v Greenwood*²³). However, such a solution is technically not possible under the present Hong Kong laws (see paragraphs 9.40 and 9.41 below for a discussion of this problem).

4.24 Whilst recognising the increased possibility of fabrication in circumstances such as those in *Blastland*, depriving an accused of the right to adduce evidence of third-party confessions arguably may constitute an erosion of his fundamental right to make full answer and defence to a criminal charge.

4.25 Another example, though less well known than the previous two, is the startling case of *R v Schwarz*, considered by the South Australian Supreme Court.²⁴ The appellant was charged with murder. The immediate cause of the deceased's death was tetanus but the prosecution alleged that the accused had caused death by wounding the deceased in the foot with a

²⁰ [1986] AC 41.

²¹ English Law Commission Report 245 (cited above), at para 4.11.

²² Wigmore, *Evidence*, Vol 5, at para 1477, quoted in Andrew Bruce and Gerard McCoy, *Criminal Evidence in Hong Kong* (Butterworths, Issue 7, 1999), at [53] of Division VI.

²³ *R v Greenwood* [2005] 1 Cr App R 7 (CA)

²⁴ *R v Schwarz* [1923] SASR 347 (FC)

garden fork, thereby introducing tetanus germs into his body. The deceased died 11 days after he received the wounds. The doctor who attended the deceased the day after the incident was called as a witness by the Crown. He was asked by counsel for the accused "*Did deceased tell you anything on that occasion as to how the wounds were caused?*"²⁵ The prosecution objected to this question on the basis that it would generate a statement by the deceased which was hearsay. The South Australian Full Court examined the law in some depth and concluded that: (1) the statement could not be part of the *res gestae* as it was not made during or immediately after the commission of the offence, but the next day; (2) the statement was not made in the presence of the accused; (3) the statement could not be a dying declaration because after the deceased had been stabbed in the foot he certainly had no belief that he would some ten days later die from infection; (4) there was no possibility that the statement was made by the deceased in the course of duty and in the ordinary course of business; and (5) it was argued that the statement was made by the deceased person and was wholly or in part against his pecuniary or proprietary interests. The judgment turns on that issue.

4.26 The South Australian Full Court ruled that the statement was wholly inadmissible. An additional part of the evidence also ruled inadmissible was what the doctor said to the following effect:

"He (the deceased) told me that he came out of this place and hit Schwarz twice with a stick over the head, that Schwarz ran away, that he took up the fork as he was running and threw it behind him towards the deceased, but he was sure Schwarz did not intend to injure him and he hoped Schwarz would not get into any trouble with the Police over it as it was not his fault".

4.27 This extraordinarily important and valuable evidence given by the deceased was ruled to be inadmissible on the murder trial as it did not fit any recognised category of admissibility as an exception to the hearsay rule. That decision was affirmed by the South Australian Full Court.

4.28 In Hong Kong, there is at least one reported case in which injustice akin to that seen in *Blastland*, *Sparks* and *Schwarz* almost resulted. In *HKSAR v Au Yuen-mei* (No 2), the accused and her husband were charged with drug trafficking offences.²⁶ On arraignment, the husband pleaded guilty. At the accused's trial, the court had to consider whether the husband's statement admitting to forcing the accused to carry the drugs was admissible. The court ultimately admitted the statement by extending the principles set down in *R v Myers*.²⁷ It remains to be seen if the decision will be upheld by higher authority but clearly the court was trying to avoid an injustice wrought by the inflexible hearsay rule.

²⁵ *R v Schwarz* [1923] SASR 347 (FC), at 348.

²⁶ *HKSAR v Au Yuen-mei* (No 2) [2004] 4 HKC 130 (CFI) decided on 12 Nov 1999.

²⁷ *R v Myers* [1998] AC 124 (HL). The recent English case of *R v Lawless and Lawson* [2003] EWCA Crim 271 (CA) would seem contrary to this decision.

4.29 There are many other cases in which cogent defence evidence has been excluded by the hearsay rule. Some of these include:

- *R v Harry*:²⁸ telephone calls from drug buyers asking for the co-accused could not be adduced by the accused, who was charged together with the co-accused with drug trafficking offences.
- *R v Thomson*:²⁹ defendant, who was charged with procuring an illegal abortion, was not allowed to adduce evidence that the pregnant woman (now deceased) had stated that she had performed the operation by herself.
- *The Queen v Chow Ching-fuk*:³⁰ accused and his brother were charged with joint possession of morphine for the purposes of trafficking; brother's statement exculpating accused made when caught red-handed with the drugs could not be admitted in the accused's defence.
- *The Queen v Yiu Man-chung*:³¹ accused and co-accused were passenger and driver, respectively, in a car stopped by the police; one knife was found under the driver's seat, another under the passenger's seat; co-accused's statement claiming that both knives were his own inadmissible at trial, at which co-accused failed to appear.

(3) Evidentiary rules should be clear, simple, accessible, and easily understood

4.30 Cross & Tapper begin the chapter on hearsay as follows:

*"The hearsay rule has often been regarded as one of the most complex and most confusing of the exclusionary rules of evidence. Lord Reid said that it was 'difficult to make any general statement about the law of hearsay which is entirely accurate.'"*³²

4.31 The cumulative effect of the absurdities caused by the illogicality of the hearsay rule caused Lord Griffiths to remark in *Kearley*:

*"... most layman if told that the criminal law of evidence forbade them even to consider such evidence as we are debating in this appeal would reply 'Then the law is an ass'."*³³

²⁸ *R v Harry* (1988) 86 Cr App R 106 (CA).

²⁹ *R v Thomson* [1912] 3 KB 19 (CCA).

³⁰ *The Queen v Chow Ching-fuk* [1994] 2 HKCLR 212 (CA).

³¹ *The Queen v Yiu Man-chung* [1996] 312 HKCU 1 (SC).

³² C Tapper, *Cross and Tapper on Evidence* (Butterworths, 9th edition, 1999), at 529.

³³ [1992] AC 228, at 236-237.

4.32 If judges and lawyers have difficulty understanding the hearsay rule, there must be doubt as to the ability of a jury to understand, and to apply properly, instructions on how to consider hearsay evidence. However, empirical evidence of jury understanding in this regard is difficult to obtain given the secrecy of jury deliberations. When hearsay evidence is admitted for non-hearsay purposes, the jury must be told how the evidence can and cannot be used. Given the complexities of the hearsay rule, the danger that juries will misuse such evidence is a real one. There are numerous situations where a jury will hear or receive evidence with the often confusing instruction that they can use the evidence for one purpose but not another.

4.33 The rule is often divorced from common sense, displaying a fixation with formal categorisation.

4.34 The difficulty which lawyers and judges often have in applying the hearsay rule is evidence that the rule is complex and not easily understood. Recent cases continue to illustrate how easily judges and lawyers can form different understandings of what is hearsay and how statutory exceptions should be applied.³⁴ The sheer bulk of text devoted to the subject in text books on evidence is also indicative of the difficulties which the rule occasions.

4.35 A contributing factor to this complexity is that the law cannot be determined from a single source but must be searched out in a host of separate legislative provisions and court rulings. The law is not easily accessible to either judge or advocate. In addition, many of the long-standing statutory exceptions in the Hong Kong Evidence Ordinance (Cap 8) are drafted in opaque and confusing language.

4.36 Courts from different common law jurisdictions have understood and applied the rule differently. Questions as basic as the definition of hearsay have attracted extensive judicial consideration and debate.

(4) Evidentiary rules should be logical, consistent, and based on principled reasons

4.37 The most consistent objection to the admissibility of hearsay evidence emphasises the inability to test the evidence through cross-examination, the lack of opportunity to see the witness's demeanour, and the unsworn character of the statement.

4.38 Thus, logically, exceptions to the hearsay rule should be based on the non-existence of one or more of these dangers. However, this is not the case. While for the most part the existing exceptions do operate on this basis, there are significant gaps. Not every situation where one or more of the hearsay dangers is lacking is covered by an exception to the hearsay rule.

³⁴ See generally *Secretary for Justice v Lui Kin-hong* [1999] 2 HKCFAR 510; *Wong Wai-man & Others v HKSAR* [2000] 3 HKLRD 313 (CFA); *HKSAR v Or Suen-hong* [2001] 2 HKLRD 669 (CA).

The exceptions themselves have been arbitrarily defined with little flexibility. The limited scope of some exceptions often cannot be explained in terms of the rationale for the exception.

4.39 *Phipson on Evidence* classifies the exceptions into five major groups of cases. They are:

" ... (a) cases based on the axiom that what a man says against his own interest is likely to be true, (b) cases based on the intrinsic reliability of public records, (c) cases recognizing that where a witness is dead, it may be better to admit evidence of what he said than to deprive the court of all proof, (d) cases recognizing the force of common knowledge, where a fact is reputed among those who ought to know it, but its source is unknown, and (e) cases where the contemporaneity of the statement is itself some guarantee of its reliability."³⁵

4.40 A further problem concerns the validity of the rationale for particular exceptions. For instance, assumptions concerning human behaviour, on which some of the exceptions were based, may not necessarily be true or accepted today.

4.41 Examples of illogicalities abound:

1. **Refreshing memory** The practice of allowing a witness to refresh his memory from an earlier note or statement is an obvious example: the practice requires the trier of fact then to accept the evidence from the less reliable "refreshed" witness instead of receiving the more reliable contemporaneous written source used to refresh the witness. If the witness is not refreshed, the hearsay rule has no exception to receive the written statement instead.
2. **Declarations against interest** This exception only extends to declarations against pecuniary and proprietary interest and not to those against penal interest. Conversely, the Supreme Court of Canada in *R v O'Brien* extended the exception to statements against penal interest for the logical reason that: "*A person is as likely to speak the truth in a matter affecting his liberty as in a matter affecting his pocketbook.*"³⁶
3. **Dying declarations** This exception is arbitrarily narrow, extending only to cases of murder and manslaughter. It is also confined to statements made under a settled and hopeless expectation of death. A third arbitrary limitation of the rule is that the declaration can only be proof of the declarant's cause of

³⁵ M N Howard, Roderick Bagshaw, Peter Crane, Katharine Grevling, Daniel Hochberg, Charles Hollander and Peter Mirfield (eds), *Phipson on Evidence* (Sweet & Maxwell, 15th ed, 2000), at 660.

³⁶ (1977), 35 CCC (2d) 209, at 214.

death. There seems to be no logical justification for these restrictions. A further illogicality exists: a dying declaration in which the victim named his assailant would be admissible, but not a similar declaration in which a person on the verge of death confessed to his crime.

4. **Res gestae** The spontaneous and contemporaneous conduct, opinion or statement of a person who is not available to give evidence may be admitted as evidence where the conduct, opinion or statement was so closely and inextricably bound up with the history of the guilty act itself as to form a part of a single chain of relevant evidence. The evidence admitted may be used not only as evidence of truth but also as evidence of the person's state of mind or emotional state at the relevant moment. Such a situation may leave little opportunity for concoction but there may exist other reliability problems as statements made in the heat of the moment may be particularly prone to distortion, perhaps unwittingly, as the perceptions of both the declarant and the testimonial witness may be coloured by the emotion of the moment. Moreover, courts have also held that out-of-court statements evidencing the declarant's state of mind do not come within the definition of hearsay. This confusion obscures rather than clarifies the extent and rationale of the exception.
5. **Documentary and computer records** The Court of Final Appeal has criticised sections 22 and 22A of the Evidence Ordinance (Cap. 8) suggesting the need for legislative reform.³⁷
6. **Negative assertions** The English Law Commission noted the illogicality that

*"It seems that, if an inference is drawn from a document, it is hearsay, but if an inference is drawn from the non-existence of a document or entry, it is direct evidence."*³⁸

Negative inferences from the absence of a record are permissible, whereas positive inferences from the record are not: *Shone*.³⁹

7. **Evidence is admitted to prove state of mind or a belief, rather than the fact or the suggested fact to which the belief is directed** If it is rational and probative to draw the inference of fact from the state of mind (that X not only was in fear but had good reason to fear) a rule which prevents the trier of fact from doing so appears illogical. It is then valid to consider whether, in any event and despite all directions to the contrary, it is realistic

³⁷ See *Secretary for Justice v Lui Kin-hong* [1999] 2 HKCFAR 510, discussed further in Chapter 10 below.

³⁸ English Law Commission Consultation Paper No 138 (cited above), at para 2.31.

³⁹ [1983] 76 Cr App R 72.

to expect that a jury will do anything else but draw the inference of fact.

8. **Recent complaints** If a recent complaint is to be regarded not as proof of truth of the content of the statement but only as evidence of consistency, there seems little logic (as opposed to theoretical justification) that it be so only in cases of sexual assault. Once again, it is then valid to consider whether, in any event and despite all directions to the contrary, it is realistic to expect that a jury will do anything other than treat a recent complaint as evidence of the truth of the complaint.
9. **Implied assertions** Where there is no intention to assert a fact when a comment is made, the implied assertion might well be regarded as self-authenticating.⁴⁰
10. **Previous inconsistent statements** A previous inconsistent statement is not evidence of the truth of its contents, even though on the facts of a particular case common sense might dictate that the previous statement was obviously true or more reliable than the subsequent oral evidence.
11. **Previous consistent statements** There is much to be said for the view that to regard previous consistent statements as going only to the issue of credibility is illogical.
12. **Witness's demeanour** It is now recognised that over-emphasis has been placed in the past on the demeanour of a witness testifying in court. Demeanour can be a misleading guide to veracity.

(5) Questions of admissibility should be determinable with a fair degree of certainty prior to trial so that the legal adviser may properly advise the client on the likely trial outcome

4.42 Given the complexity of the rule and its exceptions, and the various illogicalities, there is often considerable uncertainty as to whether evidence is admissible or not. Perhaps the most uncertain area concerns the very question of whether or not the out-of-court assertion is being used for a hearsay purpose.

4.43 This uncertainty is accentuated by the reality that Hong Kong courts are no longer bound by English authorities and, it may be said, appear willing to establish an independent body of law for Hong Kong. In recent appellate decisions, Hong Kong courts have noted the criticisms of the English *Kearley*⁴¹ decision and strongly recommended legislative reform of the law.

⁴⁰ English Law Commission Report 245 (cited above), at para 4.23.
⁴¹ [1992] AC 228.

4.44 When out-of-court statements are admitted for a non-hearsay purpose they will always be subject to the trial judge's residual discretion to exclude them where the risk that the jury will misuse the evidence (ie use it for its hearsay purpose) exceeds the probative value of that evidence. In making its discretionary decision, the court must also assess the degree to which the prejudicial effect can be overcome by a clear instruction to the jury.

(6) Evidence law should reflect increasing global mobility and modern advancements in electronic communications

4.45 The increasing mobility of the world's population and the delays inherent in criminal proceedings present significant challenges to the law's insistence that witnesses give oral evidence. The situation is particularly acute in Hong Kong, where business and leisure visitors abound, and where many residents have established connections with the mainland and overseas.

4.46 The law of hearsay has failed to adjust to the social reality of increasing global mobility. Rather than relaxing the rule, the law has obliged parties to expend significant time and resources in bringing witnesses back to the trial jurisdiction. If the accused does not have the necessary resources, this evidentiary avenue of defence is lost.

4.47 While the law now permits video-link evidence to be taken from overseas witnesses in certain circumstances, this presupposes that it is possible to locate the potential witness and that his co-operation is forthcoming. If location proves impossible, or the witness is unwilling to co-operate, the evidence is lost as a result of the hearsay rule, even if statements were made by the witness prior to his departure from the trial jurisdiction.

4.48 The law of hearsay also fails to address the electronic recording of communications. Recorded telephone conversations and messages, video and digital video tape recordings, emails, website information, instant messaging, the short messaging service on mobile devices and digital voice recording devices are all methods of communication which can be distinguished from oral hearsay on the basis that there is no question of the reliability of the medium of the message reflecting what was actually said.

Chapter 5

International developments

Introduction

5.1 The shortcomings of the existing hearsay rule which we have identified in Chapter 4 are not peculiar to Hong Kong. Those problems have also been the subject of criticism and debate in numerous other jurisdictions. In this chapter, we look at the approach which has been adopted overseas, referring not only to enacted legislation, but also to proposals for reform.

The international trend

5.2 While not all jurisdictions that have reformed their hearsay law have completely abolished the exclusionary rule and rendered hearsay generally admissible, there is a growing trend towards relaxation of the hearsay rule to make it more flexible and more equitable. This has been done both through the creation of more exceptions to the rule and by giving the courts a discretion to admit cogent and reliable hearsay that does not fall within the stated exceptions. The result has generally been greater clarity and simplicity in the law.

5.3 In Australia, for example, the Evidence Act (Commonwealth) 1995 has set out the exceptions to the hearsay rule and specified the situations where the hearsay rule will not apply, greatly enhancing the accessibility of the law.

5.4 In Canada, a number of decisions reached by the Supreme Court have led to the development of a more flexible and logical set of hearsay rules. As noted in our earlier discussion, cogent and reliable evidence can be excluded from the court's consideration because of the strict and inflexible application of the traditional hearsay law. The Supreme Court of Canada improved this aspect of the law by ruling that hearsay evidence may be admissible if the twin tests of "necessity" and "threshold reliability" have been satisfied. Thus, in Canada, new exceptions to the hearsay rule can be created if the requirements of "necessity" and "threshold reliability" are met. Evidence will be admitted under the traditional hearsay exceptions only if it, too, satisfies the tests of necessity and reliability.

5.5 In England and Wales, a review of the hearsay law by the English Law Commission led to the enactment of the Criminal Justice Act 2003. In its report in 1997, the English Law Commission recommended that the general rule against hearsay should be retained, subject to specific exceptions, with a limited inclusionary discretion to admit hearsay evidence

not falling within any other exception.¹ This recommendation was significant as it marked England's departure from its traditional view that hearsay evidence not falling within any of the stated exceptions must be excluded from the court's consideration, regardless of how relevant or how reliable the evidence might be, and regardless of how unfair that might be to the party seeking to rely on the evidence. Lord Justice Auld in a quite separate report, however, went further and recommended that there should be

*"further consideration of the reform of the rule against hearsay, in particular with a view to making hearsay generally admissible subject to the principle of best evidence, rather than generally inadmissible subject to specified exceptions as proposed by the Law Commission."*²

5.6 In 1999 the New Zealand Law Commission recommended that hearsay evidence should be admitted if it was reliable, and if it was necessary to do so. Hearsay evidence would accordingly become generally admissible, subject to the criteria of necessity and reliability. The New Zealand Law Commission's recommendations were subsequently enacted in the Evidence Act 2006, which came into force on 1 August 2007. The New Zealand approach is different from that of the English Law Commission, which had recommended the retention of a general rule against hearsay, subject to specified exceptions, with a limited inclusionary discretion.

5.7 In Scotland, the Scottish Law Commission confirmed that the traditional preference for direct oral evidence over hearsay should be preserved, but recommended that hearsay evidence should be admitted if there were truly insurmountable difficulties in obtaining the evidence from the statement-maker personally, on oath or affirmation in the presence of the jury and subject to cross-examination.³ Many of the Scottish Law Commission's recommendations were subsequently incorporated in the Criminal Justice (Scotland) Act 1995.⁴

5.8 In South Africa, the South African Law Commission recommended that hearsay evidence should be admissible if the party against whom that evidence was to be adduced agreed to its admission, or if the person upon whose credibility the probative value of that evidence depended himself testified at the proceedings.⁵ Furthermore, the South African Law Commission recommended that the court should be given a discretion to allow hearsay evidence in certain circumstances.⁶ These recommendations

¹ English Law Commission report, *Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997), Law Com No 245, at paras 6.53 and 8.136.

² The Right Honourable Lord Justice Auld, *Report: Review of the Criminal Courts of England and Wales* (The Stationery Office, 2001), at 560.

³ Scottish Law Commission, *Evidence: Report on Hearsay Evidence in Criminal Proceedings* (1995), Scot Law Com No 149, at para 4.48.

⁴ The Criminal Justice (Scotland) Act 1995 was repealed and substantially re-enacted by the Criminal Procedure (Scotland) Act 1995.

⁵ South African Law Commission, *Report on the review of the law of evidence* (1986), Project 6, reference number: ISBN 0 621 11348 4, at 48.

⁶ South African Law Commission report, Project 6 (cited above), at 48.

were subsequently incorporated into the Law of Evidence Amendment Act 1988, moving the law away from the traditional hearsay rule.

Reforms proposed or adopted in other jurisdictions

Australia

5.9 In 1979, the Australian Law Reform Commission (ALRC) was tasked to review the law applicable to proceedings in federal courts and courts of the territories. An interim report and a final report were respectively published by the ALRC in 1985 (ALRC 26) and 1987 (ALRC 38). The Evidence Act (Commonwealth) 1995 (The 1995 Commonwealth Act), which came into force on 18 April 1995, implemented the majority of the ALRC's proposals. The significance of the 1995 Commonwealth Act has been summarised by Odgers as follows:

*"As the Federal Minister for Justice stated in March 1995, the 'Evidence Act 1995 is one of the most important reforms in the administration of justice in Australia'. Its importance is not limited to the federal sphere. Within months of passing of the Commonwealth Act, virtually identical legislation was enacted in New South Wales and it is possible that other jurisdictions in Australia will follow the path to a uniform evidence law."*⁷

5.10 Section 59(1) of the 1995 Commonwealth Act provides for the exclusion of hearsay evidence as follows:

"Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation."

5.11 Although the 1995 Commonwealth Act has established a hearsay rule which excludes evidence of a previous representation unless it falls within one of the exceptions provided in the Act, the specific exceptions and the exceptional circumstances under which hearsay evidence is to be admitted are so different in scope and magnitude from those of the traditional hearsay law that to associate the two approaches as being similar would seem inappropriate. The specific exceptions under which hearsay is admissible under the 1995 Commonwealth Act are as follows:

- evidence relevant for a non-hearsay purpose (section 60);
- first-hand hearsay in:
 - civil proceedings, if the maker of the representation is unavailable (section 63) or available (section 64);
 - criminal proceedings, if the maker of the representation is unavailable (section 65) or available (section 66);

⁷

S Odgers, *Uniform Evidence Law* (LBC Information Services, 4th edition, 2000), at xliii.

- business records (section 69);
- tags and labels (section 70);
- telecommunications (section 71);
- contemporaneous statements about a person's health, etc. (section 72);
- evidence as to marriage, family history or family relationship (section 73);
- evidence as to public or general rights (section 74);
- use of evidence in interlocutory proceedings (section 75);
- admissions (section 81);
- representations about employment or authority (section 87(2));
- exceptions to the rule excluding evidence of judgments and convictions (section 92(3));
- character and expert opinion about accused persons (sections 110 and 111)

5.12 Apart from these specific exceptions, the 1995 Commonwealth Act further provides that in certain situations where reliability and cogency of the evidence can be ascertained the hearsay rule would have no application. Thus, where the maker of a previous representation is unavailable⁸ to give evidence in criminal proceedings about an asserted fact, section 65(2) of the 1995 Commonwealth Act provides that the hearsay rule does not apply to evidence of a previous representation given by a person who saw, heard, or otherwise perceived the representation being made if the representation was made (a) under a duty; (b) when (or shortly after) the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; (c) in circumstances that make it highly probable that the representation is reliable; or (d) against the interests of the person who made it at the time it was made.

5.13 Section 65(2) of the 1995 Commonwealth Act is significant as it moves the law away from the traditional practice of excluding hearsay evidence that does not fall within any of the common law or statutory exceptions, regardless of how cogent or reliable the evidence might be, and regardless of how unjust or unfair that might be to the party concerned.

⁸ Clause 4(1) of Part 2 of the *Dictionary of the Evidence Act (Commonwealth) 1995* provides that for the purposes of the Act, a person is taken not to be available to give evidence about a fact if (a) the person is dead; or (b) the person is, for any reason other than the application of section 16 (competence and compellability: judges and jurors), not competent to give the evidence about the fact; or (c) it would be unlawful for the person to give evidence about the fact; or (d) a provision of this Act prohibits the evidence being given; or (e) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or to secure his or her attendance, but without success; or (f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give evidence, but without success. Clause 4(2) provides that in all other cases the person is taken to be available to give evidence about the fact.

5.14 Section 65(8) of the 1995 Commonwealth Act provides yet another situation where the hearsay rule would have no application. Under the section, the defendant is allowed to adduce hearsay evidence where certain requirements are met, providing that the other party would be permitted to adduce hearsay evidence to qualify or to explain the hearsay evidence so adduced by the defendant.⁹ According to section 65(8), the hearsay rule does not apply to:

- "(a) oral evidence of a previous representation adduced by a defendant if the evidence is given by a person who saw, heard, or otherwise perceived the representation being made; or*
- (b) a document tendered as evidence by a defendant so far as it contains a previous representation, or another representation to which it is reasonably necessary to refer in order to understand the representation."*

5.15 The practical effect of section 65(8)(a) and (b):

*"... is that first-hand hearsay in oral or documentary form is not excluded by the hearsay rule when adduced by the defendant in criminal proceedings (so long as the person who made the previous representation is not available to give evidence)."*¹⁰

5.16 Section 65(9) of the 1995 Commonwealth Act provides that:

"If evidence of a previous representation about a matter has been adduced by a defendant and has been admitted, the hearsay rule does not apply to evidence of another representation about the matter that:

- (a) is adduced by another party; and*
- (b) is given by a person who saw, heard or otherwise perceived the other representation being made."*

5.17 The practical effect of section 65(9) is that it allows another party to adduce hearsay evidence to qualify or to explain a representation admitted under section 65(8)(a).¹¹ Odgers illustrates the effect of the provision in the following words:

⁹ Section 65(9)

¹⁰ S Odgers, *Uniform Evidence Law* (cited above), at 145.

¹¹ S Odgers, *Uniform Evidence Law* (cited above), at 145.

*"Thus, for example, if the defence adduces evidence of a third party confession under s 65(8)(a), the prosecution may adduce evidence from a person who heard the making of the alleged confession that the third party also made other statements which qualified or explained in some way the confession."*¹²

5.18 Where the maker of a previous representation is available to give evidence about an asserted fact and that person has been or is to be called to give evidence, section 66(2) of the 1995 Commonwealth Act provides that the hearsay rule does not apply to evidence of the representation that is given either by that person or a person who saw, heard, or otherwise perceived the representation being made if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation. Odgers in his commentary explains that an example of the application of this provision would be the admissibility of evidence of a complaint made soon after the alleged offence, and that unlike common law; the provision is not restricted to complaints of sexual assault.¹³ Also, the evidence will be admissible to support the credibility of the complainant.

5.19 Section 67 of the 1995 Commonwealth Act provides that subsections 63(2), 64(2) and 65(2), (3) and (8) do not apply unless the party seeking to adduce the evidence has given reasonable notice in writing to every other party of his intention to adduce the evidence.

5.20 To avoid the admission of hearsay evidence which would result in injustice caused to any party to the proceedings, sections 135 and 137 of the 1995 Commonwealth Act provide that the court has discretion to exclude evidence which would otherwise be admissible under one of the exceptions. Section 135 provides that:

"The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might (a) be unfairly prejudicial to a party; or (b) be misleading or confusing; or (c) cause or result in undue waste of time."

Section 137 offers an additional safeguard to the interests of an accused by providing that *"In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant."*

5.21 Another interesting provision relating to the general discretion the 1995 Commonwealth Act has provided for judges appears in section 136 of the Act, which gives the court discretion to limit the use to be made of evidence *"... if there is a danger that a particular use of the evidence might: (a) be unfairly prejudicial to a party; or (b) be misleading or confusing."*

¹² S Odgers, *Uniform Evidence Law* (cited above), at 145.

¹³ S Odgers, *Uniform Evidence Law* (cited above), at 146-147.

Canada

5.22 The Canadian courts have shown a willingness to adapt the rule to suit changing circumstances. They have shown themselves in sympathy with the approach suggested by Lord Pearce and Lord Donovan for the minority in *Myers*.

5.23 These dissenting views were adopted and followed by the Supreme Court of Canada in *Ares v Venner*, where the court ruled that:

*"Although the views of Lords Donovan and Pearce are those of the minority in the Myers case, I am of the opinion that this Court should adopt and follow the minority view rather than resort to saying in effect: 'This judge-made law needs to be restated to meet modern conditions, but we must leave it to parliament and the ten legislatures to do the job.'"*¹⁴

5.24 In *R v Khan*, the Supreme Court of Canada set out a two-fold test which Canadian courts are required to follow when the facts of a case are such that a new exception to the rule is called for. The court favoured the two-fold test of "necessity" and "reliability" for the following reasons:

*"It is preferable to adopt a flexible approach to the admission of hearsay evidence which meets the requirements of necessity and reliability rather than attempting to expand the spontaneous declaration exception to the hearsay rule. The first question should be whether reception of the hearsay statement is reasonably necessary As regards the reliability requirement the court would have to take into consideration many factors such as timing, demeanour, personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement. The matters relevant to reliability will vary with the child and with the circumstances and are best left to the trial judge. Accordingly, hearsay evidence of a child's statement on crimes committed against the child should be received, provided that the guarantees of necessity and reliability are met, subject to such safeguards as the judge may consider necessary and subject always to considerations affecting the weight that should be accorded to such evidence."*¹⁵

5.25 Apart from endorsing the "necessity" and "reliability" tests, the court in *Khan* also provided a critical analysis of the hearsay rule and held that hearsay evidence previously inadmissible under the traditional hearsay rule might now be admitted:

¹⁴ (1970) 14 DLR (3d) 4, at 16.

¹⁵ (1990) 59 CCC (3d) 92, at 94.

"The hearsay rule has traditionally been regarded as an absolute rule, subject to various categories of exceptions, such as admissions, dying declarations, declarations against interest and spontaneous declarations. While this approach has provided a degree of certainty to the law on hearsay, it has frequently proved unduly inflexible in dealing with new situations and new needs in the law. This has resulted in courts in recent years on occasion adopting a more flexible approach, rooted in the principle and the policy underlying the hearsay rule rather than the strictures of traditional exceptions".¹⁶

5.26 In *R v Smith*, the Supreme Court of Canada reaffirmed its previous proposition that the Canadian courts would not follow the traditional practice of excluding hearsay evidence unless it falls within one of the stated exceptions. The court said:

"This court has not taken the position that the hearsay rule precludes the reception of hearsay evidence unless it falls within established categories of exceptions Indeed, in our recent decision in R v Khan we indicated that the categorical approach to exceptions to the hearsay rule has the potential to undermine, rather than further, the policy of avoiding the frailties of certain types of evidence which the hearsay rule was originally fashioned to avoid."¹⁷

5.27 The court in *Smith* did not refute the established categories of exceptions to the hearsay rule¹⁸ but concluded that where the circumstances were such that the tests of "necessity" and "reliability" had been satisfied, hearsay evidence ought generally to be admissible, subject to the residual discretion of the judge to exclude evidence where its prejudicial effect outweighed its probative value. Lamer CJC held as follows:

"To conclude, as this court has made clear in its decisions in Ares v Venner ... and R v Khan the approach that excludes hearsay evidence, even when highly probative, out of the fear that the trier of fact will not understand how to deal with such evidence, is no longer appropriate. In my opinion, hearsay evidence of statements made by persons who are not available to give evidence at trial ought generally to be admissible, where

¹⁶ (1990) 59 CCC (3d) 92, at 100.

¹⁷ (1992) 75 CCC (3d) 257, at 267.

¹⁸ In *R v Starr* (1998) 123 CCC (3d) 145, at 155-156, Monnin JA explained that hearsay evidence can be received either as an exception to the hearsay rule, or where the evidence meets the tests of necessity and reliability and that the probative value of the evidence outweighs its possible prejudice. Monnin JA further referred to *R v Smith* and stated that Lamer CJC in that case had too concluded that the established exceptions to the hearsay rule were to be recognised in Canada. At page 156, Monnin JA said: "*Lamer CJC then goes on to conclude his analysis in the following manner (at pp 926-27): The 'present intentions' or 'state of mind' exception to the hearsay rule has been recognised in the Canadian law of evidence as well ... statements made by a dying person found admissible to prove how the death occurred ... statements made by an estranged husband found relevant to his intention to resume cohabitation with his wife, and therefore to his wife's pecuniary interest in his continuing life.*"

the circumstances under which the statements were made satisfied the criteria of necessity and reliability set out in Khan, and subject to the residual discretion of the trial judge to exclude the evidence when its probative value is slight and undue prejudice might result to the accused. Properly cautioned by the trial judge, juries are perfectly capable of determining what weight ought to be attached to such evidence, and of drawing reasonable inferences therefrom."¹⁹

5.28 After the Supreme Court of Canada's decision in *Khan* (1990), *Smith* (1992) and *R v KGB*²⁰ (1993), it was established that judges in Canada could admit hearsay evidence if it met the criteria of necessity and threshold reliability (referred to by the courts as "the principled approach"). This development was welcomed by most judges, prosecutors and defence counsel. However, the principled approach has not been without its complications. With each inroad into the traditional hearsay rule, new issues have arisen and been litigated to determine the application of the principled approach. Indeed, in *R v Starr*,²¹ the relationship between the principled approach and the traditional exceptions to the hearsay rule was considered. The majority of the court (5:4) ultimately held that while the traditional exceptions existed alongside the principled approach, they must be rationalised by adopting the necessity and threshold reliability criteria. In other words, if evidence was to be admitted under a traditional exception, it must also meet the conditions of necessity and threshold reliability. Thus, where the traditional exceptions to the hearsay rule conflict with the criteria set out in the principled approach, the principled approach prevails, and evidence otherwise admissible under the traditional exceptions will be excluded. The Canadian law governing the admissibility of hearsay evidence was summarised by Iacobucci J in *Starr* as follows:

*"In future cases where it is sought to revisit the applicability of traditional hearsay exceptions, in the clear majority of cases, the presence or absence of a traditional exception will be determinative of admissibility. Evidence falling within a traditional exception is presumptively admissible. Traditional hearsay exception should be interpreted in a manner consistent with the requirement that hearsay evidence may only be admitted if it is necessary and reliable. However, in some rare cases, it may also be possible under the particular circumstances of a case for evidence clearly falling within an otherwise valid exception nonetheless not to meet the principled approach's requirements of necessity and reliability, thus requiring exclusion of the evidence. The party challenging the admissibility of evidence falling within a traditional exception will bear the burden of proving that the evidence should nevertheless be inadmissible."*²²

¹⁹ *R v Smith* (1992) 75 CCC (3d) 257, at 273-274.

²⁰ (1993) 79 CCC (3d) 257.

²¹ (2000) 147 CCC (3d) 449.

²² (2000), 147 CCC (3d) 449, at 452.

5.29 Since *Starr*, the Canadian Supreme Court has had several more occasions to revisit and apply the principled approach to admitting hearsay evidence.²³ The most significant of these is *R v Khelawon* in which the court clarified the underlying justification for the principled approach.²⁴

England and Wales

5.30 As noted earlier in this paper, the Criminal Justice Act 2003 implemented many of the recommendations put forward in the English Law Commission's 1997 report on *Hearsay and Related Topics*. The Act was passed and received Royal Assent on 20 November 2003. Section 132 of the Act came into force on 29 January 2004, while sections 114 to 131 and 133 to 136 came into force on 4 April 2005. The law previously governing the admissibility of documentary evidence set out in sections 23 to 28, Schedule 2, and paragraphs 2 to 5 of Schedule 13 of the Criminal Justice Act 1988 (the 1988 Act) was repealed with effect from 4 April 2005. Despite their repeal, the relevant provisions of the 1988 Act will nonetheless be examined here for the purpose of illustrating why reforms of the hearsay law were called for in England and Wales.

The Criminal Justice Act 1988

5.31 The Criminal Justice Act 1988 relaxed the application of the hearsay rule to some extent, but only insofar as it related to documentary evidence. The prohibition on oral hearsay remained unchanged.

5.32 Under section 23 of the 1988 Act, a statement made in a document by a statement-maker who was unavailable in court to testify would be admitted in evidence. Only first-hand documentary hearsay would be admissible under the section, which did not allow, for instance, A to give evidence of a statement made by B as to what C had said. Subject to the requirements set out in subsections (2) and (3), a statement made by a person in a document would be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by that person would have been admissible. The court had a discretion to direct that the statement should not be admitted, however, if the court was of the opinion that "*in the interests of justice*" the statement should be excluded.²⁵

5.33 Section 23(2) and (3) set out the circumstances in which a statement could be admitted. Section 23(2) referred to the following circumstances:

- the statement-maker was dead;

²³ See *R v Khelawon* (2006) 215 CCC (3d) 161; *R v Couture* (2007) 220 CCC (3d) 289; *R v Devine* (2008) 232 CCC (3d) 1; *R v Blackman* (2008) 232 CCC (3d) 233.

²⁴ *R v Khelawon* (2006) 215 CCC (3d) 161.

²⁵ See section 25 of the 1988 Act.

- the statement-maker was unfit to attend as a witness because of his bodily or mental condition;
- the statement-maker was outside the United Kingdom, and it was not reasonably practicable to secure his attendance; or
- the statement-maker could not be found despite all reasonable steps having been taken to find him.

The circumstances mentioned in section 23(3) were as follows:

- the statement was made to a police officer or some other person charged with the duty of investigating offences or charging offenders; and the statement-maker did not give oral evidence through fear or because he was kept out of the way.

5.34 The statement referred to in section 23 had to be made by the statement-maker, or approved by him. Accordingly, it has been suggested²⁶ that a witness statement written by a police officer but signed by the witness in his handwriting would also satisfy the test.

5.35 Section 24(1) provides that a statement in a document will be admissible in criminal proceedings as evidence of any fact of which direct oral evidence would be admissible, subject to the following conditions:

- "(i) *the document was created or received by a person in the course of a trade, business, profession, or other occupation, or as holder of a paid or unpaid office; and*
- (ii) *the information contained in the document was supplied by a person (whether or not the maker of the statement) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with.*"

5.36 While section 23 applied only to first-hand hearsay, section 24 deals with multiple hearsay, as the information contained in the document might pass through more than one person before it was finally made or created. Section 24(2) provides that the information contained in the document could be supplied either directly or indirectly. However, if the information was supplied indirectly, each person through whom the information was transmitted must have received it either in the course of a trade, business, profession or other occupation, or as a holder of a paid or unpaid office. The supplier of the information, on the other hand, must have (or may reasonably be supposed to have had) personal knowledge of the matters contained in the document, and each of the persons to whom the information was supplied must have received it in the course of a trade, etc.

²⁶

English Law Commission, *A Consultation Paper: Evidence in Criminal Proceedings: Hearsay and Related Topics* (1995), Consultation Paper No 138, at para 4.9.

5.37 Section 26 required leave of the court to be obtained to admit a statement prepared for the purposes of pending or contemplated criminal proceedings or of a criminal investigation which would be otherwise admissible under section 23 or 24. The court could only give leave if it was of the opinion that the statement ought to be admitted in the interests of justice. In considering whether the admission would be in the interests of justice, the court had to have regard:

- (i) to the contents of the statement;
- (ii) to any risk, having regard in particular to whether it was likely to be possible to controvert the statement if the person making it did not attend to give oral evidence in the proceedings, that its admission or exclusion would result in unfairness to the accused or, if there was more than one, to any of them; and
- (iii) to any other circumstances that appeared to the court to be relevant.

5.38 The case of *Bedi*²⁷ highlighted an anomaly in section 24. In *Bedi*, it was held that the employee of a credit card company who recorded a report of a lost or stolen card was the maker of the statement, as the employee was creating the document in the course of a trade, etc. Accordingly, the document containing the statement would be admissible under section 24 as the employee was the maker of the record. The form completed by the card-owner in reporting the loss of the credit-card was inadmissible under section 24, however, as the card-owner was not creating or receiving the document in the course of a trade, etc. This led the English Law Commission to remark in their 1997 report that:

*"The effect is that, where an oral statement is made by one person to another person who records it in the course of business for the purpose of criminal proceedings or a criminal investigation, the record is admissible if the person recording it cannot remember the matter stated – even if the person who made the oral statement can. This appears to be a drafting oversight and cannot have been the intention of Parliament."*²⁸

5.39 As noted above, the admission of documents pursuant to sections 23 and 24 was not automatic. Section 25 granted the court a discretion to reject an otherwise admissible hearsay document tendered under section 23 or 24 if the court was of the opinion that, having regard to all the circumstances, it was not in the interests of justice for the statement to be admitted. In exercising this discretionary power, section 25(2) provides that the court must have regard to:

- the nature and source of the document and any other relevant circumstances while determining its authenticity;

²⁷ (1992) 95 Cr App R 21.

²⁸ English Law Commission Report 245 (cited above), at para 4.39.

- the extent to which the document appears to supply evidence which would otherwise not be readily available;
- the relevance of the evidence; and
- any risk that the admission or exclusion of the document would result in unfairness to the accused.

5.40 The considerations which sections 25 and 26 require the court to take into account in exercising its discretionary power imply an assumption that this evidence would be adduced by the prosecution and not by the defence.²⁹ The interests of the prosecution appear to have been overlooked. For example, section 25(2)(d) only referred to the risk of unfairness to the accused.

5.41 The rationale behind the English provisions was explained in the case of *Cole*:

*"The overall purpose of the provisions of sections 25 and 26 of the 1988 Act is ... to widen the power of the court to admit documentary hearsay evidence while ensuring that the accused receive[s] a fair trial. In judging how to achieve the fairness of the trial a balance must on occasions be struck between the interests of the public in enabling the prosecution case to be properly presented and the interest of a particular defendant in not being put in a disadvantageous position, for example by the death or illness of a witness. The public of course also has a direct interest in the proper protection of the individual accused. The point of balance, as directed by Parliament, is set out in the sections."*³⁰

5.42 The English Law Commission expressed concern that the appearance of objectivity given by the application of the factors listed in sections 25 and 26 to the court's exercise of its discretion was more apparent than real. The Commission's 1995 consultation paper noted *"that different judges reach different conclusions about whether or not untested evidence should be admitted - and a similar divergence of approach appears in decisions of the Court of Appeal."*³¹ A similar conclusion was reached in the 1997 report where it was said that *"The problem of arbitrary justice is a very real one."*³²

²⁹ English Law Commission Report 245 (cited above), at para 4.40.

³⁰ [1990] 2 All ER 108, at 115, *per* Ralph Gibson LJ.

³¹ English Law Commission Consultation Paper No 138 (cited above), at para 7.78.

³² English Law Commission Report 245 (cited above), at para 4.31.

The English Law Commission's recommendations

5.43 The 1997 report put forward some 50 recommendations for reform. The main thrust of the report was that there should be a general rule against hearsay, subject to specified exceptions, combined with a limited inclusionary discretion.³³

5.44 The English Law Commission (the English Commission) proposed that the exception provided under section 23(2) of the 1988 Act allowing documentary hearsay to be admitted where the statement-maker could not be presented in court should extend to oral as well as documentary hearsay. The English Commission argued that this "unavailability" exception should not be confined to documentary hearsay because there was no reason to believe that oral evidence was always less cogent or reliable than documentary evidence.³⁴

5.45 The English Commission recommended that the unavailability exception should not be available unless the person who made the statement was identified to the court's satisfaction,³⁵ and that it should not be extended to a statement of any fact of which the declarant could not have given oral evidence at the time when the statement was made.³⁶ It also recommended that the exception should not apply where the declarant's oral evidence of the fact stated would itself have been hearsay, and would have been admissible only under the unavailability exception or one of the common law exceptions that it recommended should be preserved.³⁷ Furthermore, the English Commission recommended that a person should not be allowed to adduce a statement under the unavailability exception where he himself (or a person acting on his behalf) had caused the declarant's unavailability in order to prevent the declarant from giving oral evidence.³⁸

5.46 The English Commission recommended that the unavailability exception should apply where the declarant:

- (i) is dead;³⁹
- (ii) is unfit to be a witness because of his or her bodily or mental condition;⁴⁰
- (iii) is outside the United Kingdom and it is not reasonably practicable to secure his or her attendance;⁴¹ or
- (iv) cannot be found, although such steps as it is reasonably practicable to take to find him or her have been taken.⁴²

³³ English Law Commission Report 245 (cited above), at para 6.53.

³⁴ English Law Commission Report No 245 (cited above), at para 8.4.

³⁵ English Law Commission Report No 245 (cited above), at para 8.8.

³⁶ English Law Commission Report No 245 (cited above), at para 8.17.

³⁷ English Law Commission Report No 245 (cited above), at para 8.23.

³⁸ English Law Commission Report No 245 (cited above), at para 8.30.

³⁹ English Law Commission Report No 245 (cited above), at para 8.35.

⁴⁰ English Law Commission Report No 245 (cited above), at para 8.36.

⁴¹ English Law Commission Report No 245 (cited above), at para 8.39.

⁴² English Law Commission Report No 245 (cited above), at para 8.43.

5.47 Where a person does not give (or does not continue to give) oral evidence in the proceedings through fear, the English Commission recommended that a record of his statement should be admissible with the leave of the court.⁴³

5.48 The English Commission recommended that statements falling within the business documents exception under section 24 of the 1988 Act should be automatically admissible, but that the court should be given the power to direct that a statement was not admissible as a business document if the court was satisfied that the statement's reliability was doubtful.⁴⁴

5.49 The Commission recommended that the current law governing the admissibility of admissions, confessions, mixed statements and evidence of reaction should be preserved.⁴⁵ It also proposed that hearsay evidence should be admissible if all parties to the proceedings agreed to its being admitted.⁴⁶

5.50 The Commission further recommended the retention of the common law "*res gestae*" exception by which a statement is admissible as evidence of any matter stated if the statement:

- (a) was made by a person so emotionally overpowered by an event that the possibility of concoction or distortion could be disregarded;⁴⁷
- (b) accompanied an act which could be properly evaluated as evidence only if considered in conjunction with the statement;⁴⁸
- (c) related to a mental state (such as intention or emotion);⁴⁹
- (d) related to a physical sensation.⁵⁰

5.51 It also recommended the retention of the common law rule that a statement made by a party to a common enterprise is admissible against another party to the enterprise as evidence of any matter stated.⁵¹

5.52 The English Commission considered the following exceptions served useful functions and should be retained:⁵²

- (i) published works dealing with matter of a public nature as evidence of facts of a public nature stated in them;⁵³

⁴³ English Law Commission Report No 245 (cited above), at para 8.69.

⁴⁴ English Law Commission Report No 245 (cited above), at para 8.77.

⁴⁵ English Law Commission Report No 245 (cited above), at para 8.92.

⁴⁶ English Law Commission Report No 245 (cited above), at para 8.150.

⁴⁷ English Law Commission Report No 245 (cited above), at para 8.121.

⁴⁸ English Law Commission Report No 245 (cited above), at para 8.124.

⁴⁹ English Law Commission Report No 245 (cited above), at para 8.126.

⁵⁰ English Law Commission Report No 245 (cited above), at para 8.129.

⁵¹ English Law Commission Report No 245 (cited above), at para 8.131.

⁵² English Law Commission Report No 245 (cited above), at para 8.132.

⁵³ English Law Commission Report No 245 (cited above), at para 8.132.

- (ii) public documents as evidence of facts stated in them;⁵⁴
- (iii) records as evidence of facts stated in them;⁵⁵
- (iv) evidence relating to a person's age or date or place of birth;⁵⁶
- (v) reputation as evidence of a person's good or bad character;⁵⁷
- (vi) reputation or family tradition as evidence of pedigree or the existence of marriage, the existence of any public or general right, or the identity of any person or thing;⁵⁸ and
- (vii) informal admissions made by an agent.⁵⁹

5.53 The English Commission recognised the need for a "safety-valve", and recommended that there should be a limited discretion to admit hearsay evidence not falling within any other exception, and said:

*"We recognize that we are introducing the risks of inconsistency and unpredictability which accompany judicial discretion, but believe that without such a discretion the proposed reforms would be too rigid: some limited flexibility must be incorporated. As we have said, our purpose is to allow for the admission of reliable hearsay which could not otherwise be admitted, particularly to prevent a conviction which that evidence would render unsafe. We remain convinced that the safety-valve is needed."*⁶⁰

5.54 The Commission recommended that the inclusionary discretion should be available to both the prosecution and the defence,⁶¹ and should apply to both oral and documentary hearsay, and to both first-hand and multiple hearsay.⁶² This inclusionary discretion should be available if the court was satisfied that, despite the difficulties there might be in challenging the statement, its probative value was such that the interests of justice required its admission.⁶³

5.55 The Commission then proposed a number of safeguards to protect the interests of those against whom hearsay evidence was to be adduced. These included a recommendation that the party seeking to rely on a hearsay statement should where possible apply for its admission before the trial, and where this was not possible, at the earliest practicable opportunity.⁶⁴ Rules of court should require a party to give notice of his intention to adduce hearsay evidence.⁶⁵ The English Commission also recommended that where

⁵⁴ English Law Commission Report No 245 (cited above), at para 8.132.
⁵⁵ English Law Commission Report No 245 (cited above), at para 8.132.
⁵⁶ English Law Commission Report No 245 (cited above), at para 8.132.
⁵⁷ English Law Commission Report No 245 (cited above), at para 8.132.
⁵⁸ English Law Commission Report No 245 (cited above), at para 8.132.
⁵⁹ English Law Commission Report No 245 (cited above), at para 8.132.
⁶⁰ English Law Commission Report No 245 (cited above), at para 8.136.
⁶¹ English Law Commission Report No 245 (cited above), at para 8.149.
⁶² English Law Commission Report No 245 (cited above), at para 8.141.
⁶³ English Law Commission Report No 245 (cited above), at para 8.141.
⁶⁴ English Law Commission Report No 245 (cited above), at para 11.11.
⁶⁵ English Law Commission Report No 245 (cited above), at para 11.7.

a hearsay statement was admitted and the maker of the statement did not give evidence, certain specified types of evidence should be admissible to challenge the credibility of the statement-maker.⁶⁶ Where the court was satisfied that the probative value of a hearsay statement was substantially outweighed by the risk that its admission would result in undue waste of time, the court should have the power to refuse to admit the statement.⁶⁷

5.56 The Commission recommended that where the case against the accused was based wholly or partly on a hearsay statement, and the evidence provided by the statement was so unconvincing that, considering its importance to the case against the accused, the accused's conviction of the offence would be unsafe, the magistrates should be required to acquit, or the judge should be required to direct the jury to acquit.⁶⁸

Review of the Criminal Courts of England and Wales

5.57 In his 2001 *Review of the Criminal Courts of England and Wales* (the Auld report), Lord Justice Auld proposed that hearsay should be made generally admissible, and that fact-finders should be trusted to assess the appropriate weight to be given to the evidence.⁶⁹ This proposal differed from the English Law Commission's recommendation that hearsay should remain generally inadmissible, subject to specified exceptions and a limited inclusionary discretion.

5.58 Lord Justice Auld observed that although the implementation of the English Law Commission's recommendation would:

*"... relax some of the rigidity of the present rule through a widening of the exceptions and the introduction of the limited inclusionary discretion ... , their implementation would not significantly change the present landscape nor, ... remove much of the scope for dispute that disfigures and interrupts our present trial process."*⁷⁰

5.59 Lord Justice Auld continued:

*"In my view, this difficult subject should be looked at again, I suggest by the body that I have recommended should be established to undertake the reform and codification of our law of criminal evidence. It would also have the benefit of the impressive Report in 1999 of New Zealand Law Commission and its Draft Code for criminal and civil evidence."*⁷¹

⁶⁶ English Law Commission Report No 245 (cited above), at para 11.22.

⁶⁷ English Law Commission Report No 245 (cited above), at para 11.18.

⁶⁸ English Law Commission Report No 245 (cited above), at para 11.32.

⁶⁹ The Right Honourable Lord Justice Auld, *Report: Review of the Criminal Courts of England and Wales* (cited above), at 560.

⁷⁰ The Right Honourable Lord Justice Auld, *Report: Review of the Criminal Courts of England and Wales* (cited above), at 559.

⁷¹ The Right Honourable Lord Justice Auld, *Report: Review of the Criminal Courts of England and Wales* (cited above), at 559.

5.60 The Auld report recommended:

"further consideration of the reform of the rule against hearsay, in particular with a view to making hearsay generally admissible subject to the principle of best evidence, rather than generally inadmissible subject to specified exceptions as proposed by the Law Commission; and

*in this respect, as with evidence in criminal cases generally, moving away from rules of inadmissibility to trusting fact finders to assess the weight of the evidence."*⁷²

The Criminal Justice Act 2003

5.61 Section 114 (1) of the 2003 Act provides for the admissibility of hearsay evidence as follows:

"In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if –

- (a) any provision of this Chapter or any other statutory provision makes it admissible,*
- (b) any rule of law preserved by section 118 makes it admissible,*
- (c) all parties to the proceedings agree to it being admissible, or*
- (d) the court is satisfied that it is in the interests of justice for it to be admissible."*

5.62 Although section 114(1) does not change the general exclusionary effect of the hearsay rule, the exceptions to that rule have been extended by paragraphs (c) and (d).

5.63 Where a witness is unavailable, section 116 of the 2003 Act provides that a statement by that witness, not made in oral evidence in the proceedings, will be admissible if the witness:

- (a) is dead;
- (b) is unfit to be a witness because of his bodily or mental condition;
- (c) is outside the United Kingdom and it is not reasonably practicable to secure his attendance;
- (d) cannot be found although such steps as it is reasonably practicable to take to find him have been taken;

⁷²

The Right Honourable Lord Justice Auld, *Report: Review of the Criminal Courts of England and Wales* (cited above), at 560.

- (e) through fear does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence.

Section 116(5) provides that these conditions will not be treated as satisfied if they are caused by the party who is seeking to adduce the evidence in support of his case.

5.64 Section 117(1) of the 2003 Act provides that a statement contained in a business or other document is admissible if:

- (a) oral evidence given in the proceedings would be admissible as evidence of that matter,
- (b) the requirements of subsection (2) are satisfied, and
- (c) the requirements of subsection (5) are satisfied in a case where subsection (4) so requires.

The requirements of subsection (2) are satisfied if:

- (a) the document or the part containing the statement was created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office,
- (b) the person who supplied the information contained in the statement (the relevant person) had or may reasonably be supposed to have had personal knowledge of the matter dealt with, and
- (c) each person (if any) through whom the information was supplied from the relevant person to the creator or recipient of the document received the information in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office.

Section 117(3) provides that the creator of the document and the supplier of the information may be the same person.

5.65 Section 117(4) requires the conditions in subsection (5) to be satisfied if the statement was prepared for the purposes of pending or contemplated criminal proceedings, or for a criminal investigation, but was not obtained under specific provisions relating to overseas evidence.⁷³ The requirements of subsection (5) are satisfied if:

- (a) any of the five conditions mentioned in section 116(2) is satisfied (absence of relevant person, etc), or

⁷³ Subsection (4)(b) provides that the statement must not have been obtained "*pursuant to a request under section 7 of the Crime (International Co-operation) Act 2003 ... or an order under paragraph 6 of Schedule 13 to the Criminal Justice Act 1988 ...*"

- (b) the relevant person cannot reasonably be expected to have any recollection of the matters dealt with in the statement (having regard to the length of time since he supplied the information and all other circumstances).

5.66 Section 117(7) allows the court to direct that a statement is inadmissible if its reliability is doubtful in view of its contents, the source of the information it contains, the circumstances in which the information was supplied, or the circumstances in which the document was created.

5.67 Section 118(2) abolishes the common law rules governing the admissibility of hearsay evidence in criminal proceedings, save for the rules specifically saved by the section. The permitted categories of hearsay which are preserved are as follows:

- specified public information (published works dealing with matters of a public nature, public documents, records, evidence of a person's age or date or place of birth)
- evidence of a person's reputation for the purpose of proving his good or bad character
- evidence of reputation or family tradition for the purpose of proving pedigree or the existence of a marriage, the existence of any public or general right, or the identity of any person or thing
- *res gestae*
- confessions or mixed statements
- admissions by agents
- statements made by a party to a common enterprise as against another party to the enterprise
- expert evidence

5.68 The 2003 Act incorporates a number of safeguards in relation to the admission of hearsay evidence. Section 126 allows the court to refuse to admit a hearsay statement if the court is satisfied that the case for excluding the statement substantially outweighs the case for its admission. Section 125 provides that if on a defendant's trial before a judge and jury the court is satisfied at any time after the close of the prosecution case that the case against the defendant is based wholly or partly on a hearsay statement and the evidence provided by the statement is so unconvincing that the conviction of the defendant would be unsafe, the court must either direct the jury to acquit or, if it considers that there ought to be a retrial, discharge the jury. Section 132(3) of the 2003 Act provides that rules of court may require a party proposing to tender hearsay evidence to serve on each party to the proceedings such notices and particulars of the evidence as may be prescribed.

5.69 While the hearsay provisions have been considered by quite a number of Court of Appeal decisions since entering into force, they have yet to go before the House of Lords.⁷⁴

New Zealand

5.70 In its two-volume report on *Evidence* (the New Zealand report) in 1999, the New Zealand Law Commission expressed the view that the hearsay rule "*should operate to exclude evidence only if there are sound policy reasons for so doing.*"⁷⁵ The Commission added that its aim was to increase the admissibility of relevant and reliable evidence, and it believed its recommendations "*will provide a principled and much simplified approach to hearsay evidence.*"⁷⁶

5.71 The New Zealand report suggested that the admissibility of hearsay evidence should be based on two considerations: reliability and necessity.⁷⁷ The "reliability approach" calls for an inquiry into the circumstances in which the hearsay statement was made while the "necessity approach" calls for an inquiry into the reasons for the unavailability of the statement-maker.⁷⁸ The Evidence Act 2006, which came into force in 2007, implemented the majority of the New Zealand Law Commission's recommendations in respect of hearsay. The Commission's "necessity:" and "reliability" requirements are set out in section 18 of that Act, which provides that a hearsay statement is admissible if:

- "(a) *the circumstances relating to the statement provide reasonable assurance that the statement is reliable and*
- (b) *either:*
 - (i) *the maker of the statement is unavailable as a witness; or*
 - (ii) *the judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.*"

5.72 The New Zealand Law Commission considered its approach to reform of the hearsay rule to be consistent with the view of Chief Justice Lamer in *R v Smith* that:

⁷⁴ Some recent cases include *R v Scorch* [2008] EWCA Crim 1786; *Williams v Vehicle and Operator Services Agency* [2008] EWHC 849 (Admin); *R v Y* [2008] EWCA Crim 10; *R v C* [2007] EWCA Crim 3463.

⁷⁵ NZ Law Commission, *Evidence: Reform of the Law* (1999), Report 55 – Vol 1, at para 47.

⁷⁶ NZ Law Commission Report 55 – Vol 1 (cited above), at para 48.

⁷⁷ NZ Law Commission Report 55 – Vol 1 (cited above), at para 49.

⁷⁸ NZ Law Commission Report 55 – Vol 1 (cited above), at 15-17.

*"[H]earsay evidence of statements made by persons who are not available to give evidence at trial ought generally to be admissible, when the circumstances under which the statements were made satisfy the criteria of necessity and reliability and subject to the residual discretion of the trial judge to exclude the evidence when its probative value is slight and undue prejudice might extend to the accused. Properly cautioned by the judge, juries are perfectly capable of determining what weight ought to be attached to such evidence, and of drawing reasonable inferences therefrom."*⁷⁹

5.73 The New Zealand Commission set out its recommendations in the form of an Evidence Code, accompanied by a detailed commentary. Section 4 of the Code defines the term "hearsay" to mean a statement⁸⁰ that:

- "(a) was made by a person other than a witness;⁸¹ and*
- (b) is offered in evidence at the proceeding to prove the truth of its contents."*

The definition of hearsay in section 4(1) of the Evidence Act 2006 is in identical terms. The effect of this definition is that evidence which one testifying witness gives about a previous statement made by another testifying witness is no longer hearsay, nor is evidence which a witness gives about his own previous statement. The rationale behind this approach is that there will be an opportunity to cross-examine the original statement-maker, and the main reason for excluding the evidence as hearsay therefore falls away.⁸² The definition of "statement" as provided in section 4 of the Code (and section 4(1) of the Evidence Act 2006) excludes what are known as "implied" or "unintended" assertions from the operation of the hearsay rule. Such assertions may therefore be admissible under the Code without a reliability or necessity inquiry (subject to exclusion under section 8 of the Code (and of the subsequent 2006 Act) on the basis of unfair prejudice or that their admission would needlessly prolong the proceedings) for the fact-finders to draw inferences from evidence of reported conduct.⁸³

5.74 Under section 19 of the Code, hearsay evidence is admissible if the "*circumstances relating to the hearsay statement provide reasonable assurance that the statement is reliable*"; the notice requirements under section 20 of the Code have been complied with; and either no party has objected to the admission of the statement as evidence, or the statement-maker is unavailable as a witness, or requiring the statement-maker to be a

⁷⁹ (1992) 75 CCC (3d) 257, at 273-274.

⁸⁰ A "statement" under section 4 of the Code (and section 4(1) of the Evidence Act 2006) is defined as (a) a spoken or written assertion by a person of any matter; or (b) non-verbal conduct of a person that is intended by that person as an assertion of any matter: NZ Law Commission, *Evidence: Evidence Code and Commentary* (1999), Report 55 - Vol 2, at 20.

⁸¹ The term "witness" is defined in section 4 of the Code (and section 4(1) of the Evidence Act 2006) as a person who gives evidence and is able to be cross-examined in a proceeding: NZ Law Commission Report 55 – Vol 2 (cited above), at 24.

⁸² NZ Law Commission Report 55 – Vol 2 (cited above), at paras C18 and C19.

⁸³ NZ Law Commission Report 55 – Vol 1 (cited above), at para 51.

witness would cause undue delay or expense. Section 18 of the Evidence Act 2006 is to the same effect. Section 22 of the Act makes provision for the giving of notice. A party who proposes to offer a hearsay statement in criminal proceedings must give written notice to every other party, stating, *inter alia*, the name of the maker of the statement, the contents of the hearsay statement (if made orally) or a copy of the statement (if made in writing). Depending on the grounds under which it is sought to adduce the hearsay statement, the notice must also state the circumstances relating to the statement that provide reasonable assurance of its reliability. Section 22(5) of the Act allows the judge to dispense with the notice requirements if no party is "*substantially prejudiced*" by the failure to give notice, or if compliance with the requirements was "*not reasonably practicable in the circumstances*", or if "*the interests of justice so require*."

5.75 Section 16 of the Code defines the "*circumstances relating to the statement*" as including:

- "(a) *the nature and contents of the statement; and*
- (b) *the circumstances in which the statement was made; and*
- (c) *any circumstances that relate to the truthfulness of the maker of the statement; and*
- (d) *any circumstances that relate to the accuracy of the observation of the maker of the statement.*"⁸⁴

The terms of the definition of "*the circumstances relating to a statement by a person who is not a witness*" in section 16(1) of the Evidence Act 2006 are essentially the same.

5.76 Referring to section 16(1)(a) of the Code, the New Zealand Law Commission suggested that the nature of the statement could include whether the statement was first-hand or multiple hearsay.⁸⁵ The Commission noted, however, that the number of times a statement is repeated is sometimes, but by no means always, indicative of its reliability.⁸⁶ For this reason, each case should be treated on its merits, and a statement's admissibility would be based not on whether the statement was first-hand or multiple hearsay, but rather whether the circumstances relating to the statement were reliable enough to justify its admission.

5.77 The New Zealand Law Commission considered that its "necessity" (or "unavailability") test was in line with the common law approach. Section 16(2) of the Code provides that the maker of a statement is "*unavailable as a witness*" if he:

⁸⁴ NZ Law Commission Report 55 – Vol 2 (cited above), at 44 and 46.

⁸⁵ NZ Law Commission Report 55 – Vol 2 (cited above), at paras C76.

⁸⁶ NZ Law Commission Report 55 – Vol 1 (cited above), at para 69.

- "(a) *is dead; or*
- (b) *is outside New Zealand and it is not reasonably practicable for him or her to be a witness; or*
- (c) *is unfit to be a witness because of age or physical or mental condition; or*
- (d) *cannot with reasonable diligence be identified or found; or*
- (e) *is not compellable to give evidence.*"⁸⁷

The definition of "*unavailable as a witness*" in section 16(2) of the Evidence Act 2006 is in identical terms.

5.78 Section 17 of the Code provides that:

"Hearsay is not admissible except

- (a) *as provided by this Subpart or any other Act; or*
- (b) *where this Code provides that this Subpart does not apply and the hearsay is both relevant and not otherwise inadmissible under this Code."*

Section 17 of the Evidence Act 2006 makes provision to identical effect.

5.79 The commentary to the Code interprets section 17 to mean that hearsay made admissible by other Code provisions must nevertheless comply with the hearsay rules unless the operation of the hearsay rules is expressly excluded.⁸⁸

5.80 Prior to the enactment of the Evidence Act 2006, the New Zealand Court of Appeal had already liberalised the hearsay rule by recognising a common law discretion to admit hearsay, following the spirit and approach of the Canadian courts. In *R v Manase*, the Court of Appeal summarised this discretionary approach as follows:

"Whether to admit hearsay evidence under the general residual exception therefore turns on three distinct requirements: relevance, inability and reliability.

- (a) **Relevance.** *This is not strictly a requirement directed to this exception to the hearsay rule. Rather it is an affirmation and a reminder of the overriding criterion for the admissibility of all and any evidence. It is a self-contained issue. The evidence in question either has sufficient relevance or it does not. The same test applies as would have applied to the primary (ie non-hearsay) evidence.*

⁸⁷ NZ Law Commission Report 55 – Vol 2 (cited above), at 46.

⁸⁸ NZ Law Commission Report 55 – Vol 2 (cited above), at C83.

(b) **Inability.** *This requirement will be satisfied when the primary witness is unable for some reason to be called to give the primary evidence. If the primary witness is personally able to give that evidence, it will seldom, if ever, be appropriate to admit hearsay evidence simply because the witness would prefer not to face the ordeal of giving evidence or would find it difficult to do so. To adopt that approach would be to tilt the balance too far against the accused or opposite party who is thereby deprived of the ability to cross-examine.*

(c) **Reliability.** *The hearsay evidence must have sufficient apparent reliability, either inherent or circumstantial, or both, to justify its admission in spite of the dangers against which the hearsay rule is designed to guard. We use the expression "apparent reliability" to signify that the Judge is the gatekeeper and decides whether to admit the evidence or not. If the evidence is admitted, the jury or Judge, as trier of fact, must decide how reliable the evidence is and therefore what weight should be placed on it. If a sufficient threshold level of apparent reliability is not reached, the hearsay evidence should not be admitted. The inability of a primary witness to give evidence is not good reason to admit unreliable hearsay evidence.*

As a final check, as with all evidence admitted before a jury, the Court must consider whether hearsay evidence which otherwise might qualify for admission should nevertheless be excluded because its probative value is outweighed by its illegitimate prejudicial effect."⁸⁹

5.81 This "final check" is reflected in section 8(1) of the Evidence Act 2006, which provides that:

"... the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will:

- (a) have an unfairly prejudicial effect on the proceeding; or*
- (b) needlessly prolong the proceeding."*

Section 8(2) provides that in determining whether the probative value of evidence would be outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, "*the Judge must take into account the right of the defendant to offer an effective defence.*" Section 8 of the Act reflects the terms of section 8 of the New Zealand Law Commission's Code, save that section 8(1)(a) of the latter refers to a risk that the evidence

⁸⁹

[2001] 2 NZLR 197, at 206 paras 30-31 (CA). See Peter Sankoff, "Gazing into the Hearsay Crystal Ball – Will New Zealand Adopt the Canadian Approach to the Residual Exception for Hearsay?" [2002] NZLJ 250 for a comparison of the New Zealand and Canadian approaches. The requirements for admitting hearsay evidence mentioned in *R v Manase* were recently considered in the Privy Council case of *Howse v The Queen* [2005] UKPC 30.

will have "an unfairly prejudicial effect on the outcome of the proceeding."⁹⁰ The difference does not appear significant. In explaining section 8(1)(a) of the Code, the Commission said:

*"... the test for excluding unfairly prejudicial evidence is not met if the evidence is simply adverse to the interests of, say, a defendant in a criminal proceeding, since any evidence from the prosecution is going to be prejudicial to the defendant. The evidence must be unfairly prejudicial. There must be an undue tendency to influence a decision on an improper or illogical basis, commonly an emotional one; for instance, graphic photographs of a murder victim when the nature of the injuries is not in issue. Evidence will also be unfairly prejudicial if it is likely to mislead the jury; for example, if it appears far more persuasive than it really is, as is occasionally the case with some types of expert and statistical evidence. ... Whether evidence has an unfairly prejudicial effect must be considered in terms of the proceeding as a whole and not just from the point of view of a particular party or a defendant."*⁹¹

5.82 Since coming into force in 2007, the hearsay provisions in the Evidence Act 2006 have only been considered in a few cases and have not yet been considered by the New Zealand Supreme Court.⁹² In *R v Holtham*,⁹³ the court held that unanswered text messages which appeared to be requests to buy drugs were not hearsay and, in this case, were relevant and not of undue prejudicial effect. In reaching that conclusion, the judge considered the definitions of "statement" and "hearsay" in section 4(1) of the Evidence Act 2006 and decided that intention to assert was implicit in the definitions of "assertion" and "statement." Implied assertions in the form of written or spoken words were therefore excluded by the term "*spoken or written assertion*": "*An essential characteristic of an assertion is that the person asserting is intending to make a statement, or assert a fact or opinion.*"

Scotland

5.83 In 1995, the Scottish Law Commission published its report on *Hearsay Evidence in Criminal Proceedings* (the Scottish report), containing its recommendations for reform of this area of the law.⁹⁴ In formulating its proposals for reform, the Scottish Law Commission was guided by the following general principles, which it set out at the beginning of its report:

⁹⁰ NZ Law Commission Report 55 – Vol 2 (cited above), at 32.

⁹¹ NZ Law Commission Report 55 – Vol 2 (cited above), at C59.

⁹² See *Jones v NZ Police* [2008] NZHC 175; *The Queen v Pope & Pope* [2008] NZCA 284; *R v Vagaia* [2008] NZHC 306; *The Queen v Lenaghan* [2008] NZCA 123.

⁹³ HC, Nelson CRI 2006-042-2569, 21 December 2007, referred to in the New Zealand Law Journal, March 2008, at 70.

⁹⁴ Scottish Law Commission Report 149 (cited above).

- The rules of evidence should be as clear and simple as possible;
- The rules of evidence should reflect the nature and serve the purpose of the criminal trial;
- The rules of evidence should seek to achieve reasonable expedition, the avoidance of needless expense and a reasonable degree of certainty; and
- All relevant evidence should be generally admissible.⁹⁵

5.84 The Scottish Law Commission explained:

"Our approach will be to confirm the traditional preference for direct oral evidence over hearsay but to provide for the prosecution and for the defence new categories of exceptions to the hearsay rule which would allow hearsay evidence of a statement to be admitted if there were truly insurmountable difficulties in the way of obtaining the evidence of the maker of the statement from the maker personally on oath or affirmation in the presence of the jury and subject to cross-examination."⁹⁶

5.85 For a statement to be admissible by virtue of any of the recommended exceptions to the hearsay rule, the Scottish report concluded it must either be contained in a document or be given in oral evidence in court by a witness who had direct personal knowledge of the making of the statement.⁹⁷ The Commission considered that only first-hand hearsay should be admissible in respect of a statement made orally or by conduct, and observed:

"We do not think it would be satisfactory to exclude oral evidence of the making of a statement by words or conduct. In England and Wales oral evidence is not admitted under Part II of the Criminal Justice Act 1988, which provides only for the admission of 'first-hand' documentary evidence. Commentators have questioned why the scope of the Act should be limited in that way. The principal disadvantage of hearsay is the same for both oral and documentary evidence: it is not possible to test by cross-examination of the alleged maker of the statement whether he actually made it and, if he did, what he meant and whether he was lying or mistaken. It does not seem justifiable to assume that all first-hand documentary evidence is more reliable than statements made orally, no matter how clear a witness's evidence would be as to the terms in which an oral statement had been made.

⁹⁵ Scottish Law Commission Report 149 (cited above), at paras 2.27-2.30.

⁹⁶ Scottish Law Commission Report 149 (cited above), at para 4.48.

⁹⁷ Scottish Law Commission Report 149 (cited above), at para 5.24.

*If, however, oral evidence of the making of an oral statement is to be admissible, we consider that such evidence should only be the first-hand evidence of a witness who personally heard the statement being made, telling the court what he or she heard. Where A has made an oral statement which is heard by B, it should be possible for B to tell the court what he heard A say. It should not be possible, however, to call C to give evidence that B had told him what A said, because the court would generally have no means of assessing the weight to be attached to B's statement".*⁹⁸

5.86 This recommendation is reflected in section 259(1)(d) of the Criminal Procedure (Scotland) Act 1995, which provides that, subject to satisfying the other provisions of the Act, a hearsay statement contained in a document or testified to by a witness who has direct personal knowledge of the making of the statement is admissible as evidence in criminal proceedings.⁹⁹

5.87 The Scottish Law Commission proposed that "*hearsay should be admissible only if the difficulties in the way of obtaining a person's evidence are truly insurmountable, and if a number of safeguards against abuse are in place.*"¹⁰⁰ Section 259(2) of the Criminal Procedure (Scotland) Act 1995 follows closely the approach adopted by the Scottish Law Commission, and provides that a hearsay statement will only be admitted if the statement-maker:

- "(a) is dead or is, by reason of his bodily or mental condition, unfit or unable to give evidence in any competent manner;*
- (b) is named and otherwise sufficiently identified, but is outwith the United Kingdom and it is not reasonably practicable to secure his attendance at the trial or to obtain his evidence in any other competent manner;*
- (c) is named and otherwise sufficiently identified; but cannot be found and all reasonable steps which, in the circumstances, could have been taken to find him have been so taken;*
- (d) having been authorised to do so by virtue of a ruling of the court in the proceedings that he is entitled to refuse to give evidence in connection with the subject matter of the statement on the grounds that such evidence might incriminate him, refuses to give such evidence; or*
- (e) is called as a witness and either –*

⁹⁸ Scottish Law Commission Report 149 (cited above), at paras 5.22 and 5.23.

⁹⁹ Section 259 of the Criminal Procedure (Scotland) Act 1995 re-enacts section 17 of the Criminal Justice (Scotland) Act 1995. The latter Act has been repealed in its entirety.

¹⁰⁰ Scottish Law Commission Report 149 (cited above), at para 5.31.

- (i) *refuses to take the oath or affirmation; or*
- (ii) *having been sworn as a witness and directed by the judge to give evidence in connection with the subject matter of the statement refuses to do so"*

5.88 A hearsay statement will be admissible as evidence of any matter which it contains if evidence of that matter would have been admissible if given by direct oral evidence by the statement-maker himself.¹⁰¹ A further requirement for admissibility is that the statement-maker would have been a competent witness at the time the statement was made.¹⁰² These provisions reflected the Scottish Law Commission's recommendations.¹⁰³

5.89 To prevent possible abuse of the admissibility provisions by a party to the proceedings, section 259(3) of the Criminal Procedure (Scotland) Act 1995 provides that if the unavailability of the statement-taker is caused by the party tendering the statement for the purpose of preventing the statement-maker from giving evidence, the statement will not be admissible.

5.90 As regards testing of the credibility and reliability of a statement-maker, the Scottish report recommended that where a statement is admissible under any of the proposed exceptions, evidence relevant to the credibility and reliability of the statement-maker should be admissible. This is reflected in section 259(4) of the Criminal Procedure (Scotland) Act 1995. Under section 259(8) of that Act, for the purposes of determining any matter upon which the judge is required to be satisfied under section 259(1), the judge may draw any reasonable inference from the circumstances in which the statement was made or otherwise came into being, or from any circumstances, including the form and contents of the document in which the statement is contained.

5.91 Section 260 of the Criminal Procedure (Scotland) Act 1995 makes provision for the admission of a witness's prior statements. To be admissible, the prior statement must be contained in a document and must be adopted by the witness as his evidence in the course of giving evidence. It is also necessary that at the time the statement was made, the person who made it would have been a competent witness in the proceedings. Prior statements contained in a precognition on oath or made in other proceedings (whether civil or criminal, and whether in the United Kingdom or elsewhere) are, by virtue of section 260(4), not admissible "*unless sufficiently authenticated.*"

5.92 The Scottish report proposed that its recommendations should not apply to a statement made by an accused, and this is reflected in section 261(1) of the Criminal Procedure (Scotland) Act 1995, which provides that sections 259 and 260 do not apply to a statement made by the accused. However, section 261(2) provides that evidence of a statement made by one

¹⁰¹ Criminal Procedure (Scotland) Act 1995, section 259(1)(b).

¹⁰² Criminal Procedure (Scotland) Act 1995, section 259(1)(c).

¹⁰³ Scottish Law Commission Report 149 (cited above), at para 5.28.

accused shall be admissible by virtue of section 259 at the instance of another accused in the same proceedings as evidence in relation to that other accused. If the first-mentioned accused does not give evidence, he will be deemed under 261(3) to be a witness refusing to give evidence in connection with the subject matter of the statement as mentioned in section 259(2)(e).

5.93 A party intending to adduce evidence of a statement pursuant to any of the exceptions must give written notice before the trial to every other party to the proceedings.¹⁰⁴

South Africa

5.94 The present law governing the admissibility of hearsay evidence in South Africa is to be found in section 3 of the Law of Evidence Amendment Act 1988 (the 1988 Act). Prior to the enactment of section 3, the English common law hearsay rule¹⁰⁵ and certain statutory exceptions to documentary hearsay were in force in South Africa. Accordingly, "hearsay evidence" prior to the 1988 Act was defined as:

*"... oral or written statements made by persons who are not parties and who are not called as witnesses and which are tendered for the purpose of proving the truth of such statements."*¹⁰⁶

5.95 The pre-1988 South African hearsay law, however, was considered to be too rigid, as hearsay evidence was inadmissible unless it fell within a common law exception or a statutory provision.¹⁰⁷

5.96 In 1986, the South African Law Commission recommended that changes be made to the hearsay law:

"Hearsay evidence should be defined as evidence the probative value of which depends upon the credibility of any person other than the person giving such evidence."

Hearsay evidence should be admissible if the party against whom such evidence is to be adduced agrees to such admission or if the person upon whose credibility the probative value of such evidence depends himself testifies at such proceedings."

*The court should have a discretion to allow hearsay evidence in certain circumstances."*¹⁰⁸

¹⁰⁴ Criminal Procedure (Scotland) Act 1995, section 259(5).

¹⁰⁵ Schwikkard, Skeen, Van Der Merwe, *Principles of Evidence* (Juta & Co Ltd, 1997), at 155.

¹⁰⁶ *S v Holshausen* 1984 4 SA 852(A). The source of this quote is from Schwikkard, Skeen, Van Der Merwe, as above, at 156.

¹⁰⁷ Schwikkard, Skeen, Van Der Merwe, cited above, at 156.

¹⁰⁸ South African Law Commission report, Project 6 (cited above), at 48.

5.97 These three recommendations were reflected in section 3 of the 1988 Act. Under section 3(4) of the 1988 Act, the term "hearsay evidence" is given a new meaning and is defined as "... evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence."

5.98 Under section 3(1) of the 1988 Act, hearsay evidence is inadmissible unless:

- "(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
- (b) the person upon whose credibility the probative value of such evidence depends himself testifies at such proceedings; or
- (c) the court, having regard to –
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice."

5.99 The result would appear to be that there are now three different ways through which hearsay evidence can be admitted in South Africa. Admission can be by way of consent (section 3(1)(a)); or where the person upon whose credibility the probative value of such evidence depends himself testifies (section 3(1)(b)); or by way of judicial discretion (section 3(1)(c)). It should be noted that although the common law exceptions have now been abolished under the new law, the courts are entitled under section 3(1)(c)(vii) of the 1988 Act to take into account these common law exceptions in exercising their discretion to admit hearsay evidence.¹⁰⁹

¹⁰⁹

Schwikkard, Skeen, Van Der Merwe (cited above), at 162.

Chapter 6

The need for reform

6.1 After considering the law as it stands at present, examining its identified shortcomings and having the benefit of the local and international commentary on the sub-committee's consultation paper, we have concluded that a clear case for reform has been made out. At the same time, we recognise that any reform must incorporate effective safeguards, as unrestricted relaxation of the rules may run counter to the interests of justice as a whole, whether those of accused persons or of the community.

6.2 We are equally convinced that any new formulation of the law of hearsay should be capable of being tested against identifiable objectives. First among these is the need to provide a unified set of rules which can be easily understood and consistently applied, thus making the law clear, simple and accessible.

6.3 Present rules relating to hearsay evidence may be difficult to locate and, once located, to comprehend. Much of the law of evidence is to be found in reported decisions, supplemented in some instances by statutory provisions. There remains, even today, ongoing debate as to the exact content of the common law exceptions to the hearsay rule. The existing rules are irrational and have developed on a piecemeal, case by case, basis which does not best serve the interests of justice. The proposed reforms would provide a system of logical rules and principle leading to rationalisation and clarification of the law.

6.4 The public interest is as much served by the exclusion of false evidence fabricated against an accused person as it is by the exclusion of evidence fabricated by another to exonerate an accused. Conversely, it cannot be in the public interest to exclude evidence which is cogent and reliable merely on the basis that it fails to satisfy a rigid application of the hearsay rule. We have set out in Chapter 4 the numerous criticisms of the present law which have been expressed by the courts and by authoritative writers on the law. We have also identified some of the more startling consequences of the application of the hearsay rule as presently formulated. Our examination in Chapter 5 of the law and proposals for reform in other jurisdictions make it clear that no leading common law jurisdiction which has examined the hearsay rule has concluded other than that the existing law demands reform. We are in no doubt that the case for reform in Hong Kong is irresistible.

6.5 The existing rules are largely inflexible, unable to address situations that arise in a rapidly-evolving community. A reform of the rules would permit of sufficient flexibility to cope with situations outside

predetermined categories but using a methodology within a structured framework.

6.6 Examples are abundant under the present regime of evidence which is relevant to an issue being excluded by the inflexible operation of existing rules. Whether such a situation is, in itself, or results in, a miscarriage of justice we view it as obvious that evidence which is relevant to an issue and is needed in respect of that issue should be admissible, subject to appropriate safeguards.

6.7 Moreover the effect of the present rules is to exclude evidence which is reliable or the reliability of which may be tested. The contemplated reform would facilitate the admission of evidence found to be reliable but maintain the exclusion of that found to be unreliable.

6.8 We are of the view that the proposed reforms will result in the admissibility of relevant and reliable evidence, where need exists for such evidence, at the same time as providing a comprehensible and principled approach to that admissibility.

6.9 Although views differed on the nature and extent of reform required, the majority of those who responded to the sub-committee's consultation paper agreed that there was a need for reform of the law of criminal hearsay in Hong Kong. The Bar Association, while disagreeing with elements of the proposed model for reform, stated:

"Like the sub-committee, the Bar think that doing nothing is not an acceptable option."

It is notable, however, that whilst making that concession yet disagreeing with the proposals in the consultation paper, the Bar Association offers no suggestions for reform. Its response is that:

"... the approach of the Hong Kong community has always been far more cautious [than other jurisdictions] when it comes to changes to the law in relation to criminal proceedings. Perhaps so far as the Bar is concerned, the best explanation of this is not so much the innate conservatism of those who practise in the area as much as the realisation that in this field we are dealing with the liberty of the subject."

If the implication is that jurisdictions such as Canada, New Zealand, South Africa and the United Kingdom are less astute in their concern for the liberty of the subject, that is a suggestion which in our opinion does not withstand scrutiny. The Association goes on to suggest that there is a "*compelling case for [the model recommended by the consultation paper] to be reworked to meet the concerns that have been expressed*" by the Association; yet the Association offers no alternative model whatsoever.

6.10 The Hong Kong Human Rights Commission conceded that there were shortcomings in the existing hearsay law in criminal proceedings but contended that:

*"To plug the present loopholes, the preferred way is to introduce changes through case law in the common law system with different cases distinguished by the court."*¹

6.11 We have already indicated that we do not favour this kind of piecemeal approach to reform and we are fortified in our view by the submissions from two Canadian judges with experience of the shortcomings of just such a judicial approach to reform in Canada. Mr Justice Rosenberg said:

"... here in Canada we have been going through fifteen years of radical reform of the hearsay rule through changes in the common law. The statutory approach that is suggested in the [Consultation] Paper should result in a more coherent and accessible scheme."

His views were echoed by Mr Justice Ewaschuk, who said:

"Your approach is in keeping with the modern trend to avoid piecemeal unconnected change in law reform. A principled approach is preferable."

We reiterate our conclusion that reform via a principled legislative scheme is the right way for Hong Kong.

6.12 Both the Bar Association and the Hong Kong Human Rights Commission stressed the importance of the rights guaranteed to an accused person under Articles 39 and 87 of the Basic Law and Article 14 of the International Covenant on Civil and Political Rights (ie equality before the law, the right to a fair trial and the right of an accused to examine the witnesses against him). They expressed concern that the reforms proposed would allow cases to proceed on the basis of statements made by a person who was not subject to cross-examination in court. The Bar Association considered that:

"... one of the critical issues is whether either taken as a whole or by reference to individual proposals the right of the accused to confront and to cross-examine those who accuse him is or might be substantially diminished. These rights, ie to cross-examine and to confront witnesses, are fundamental incidents of the right to make full answer and defence. [T]he Bar think that there is a risk that these rights are seriously undervalued in this proposal."

¹ English translation of original submission made in Chinese.

6.13 We are well aware of the human rights implications of the reforms we propose and address these in detail in Chapter 11 of this report. We are satisfied that our proposed scheme complies fully with the relevant human rights provisions and, as explained at paragraph 9.103 below, that it incorporates sufficient substantive and procedural safeguards to prevent injustice to either the prosecution or defence.

6.14 As we observed earlier, the majority of those who commented on the consultation paper agreed that there was a need to reform the law of criminal hearsay in Hong Kong. Some of the views expressed have been reproduced below:

"For my part, I accept the submission that there is a clear case for reform indeed that there is compelling evidence of the need for reform."

Hon Mr Justice Lunn, Judge of the Court of First Instance

"I agree that the law relating to the rule excluding hearsay evidence needs amendment. At present the rule, as you have said in the [consultation paper], is capable of injustice. It prevents juries on occasion from hearing evidence that they would in all common sense expect to hear and could properly evaluate. People evaluate such information in their daily lives and there is no reason to think they lose that ability once in a courtroom....."

....Having sat on a number of lengthy and sometimes complex tribunal hearings over the last four years where hearsay evidence is accepted without remark I can vouch for the advantages of allowing such evidence to be admitted. In my view, the dangers expressed by the opponents of allowing the present common law exclusionary rule to be relaxed are usually more imagined than real."

Hon Mr Justice McMahon, Judge of the Court of First Instance

"... I would express my admiration for all those who are involved in producing this consultation paper which represents a gallant effort to rationalise a most difficult area of the common law."

I agree that a major overhaul is long overdue and in principle I agree with the recommendation that the reform should be based on the New Zealand model with modifications."

Hon Mr Justice Pang, Judge of the Court of First Instance

"Surely none can dispute that it is high time that the rule against hearsay in criminal proceedings be examined, overhauled and reformed for the inflexibility of the rule has long baulked against good sense and justice."

Her Honour Judge Chua, Judge of the District Court

".... the report, in my opinion, rightly identifies areas of the law in respect of hearsay that need reform. The most cogent examples exist where the present rule can be seen to have worked to the disadvantage of the defendant."

... the other major common law jurisdictions have all appreciated a need for reform and it is crucial for the state of criminal justice in Hong Kong that we keep up. I can see a real prospect that the interests which seek to preserve the status quo will see us fall behind."

His Honour Judge Line, Judge of the District Court

"I give my strong support to the proposals of the Sub-committee of the Law Reform Commission on Hearsay in Criminal Proceedings...."

The option of doing nothing is simply untenable. This has been recognised in virtually every other leading common law jurisdiction. Hong Kong's practice and procedure has grown from the same roots. The recognition in other similar jurisdictions of the need to change must surely be the clearest indication of what is needed in Hong Kong. Why should Hong Kong be different?

... I agree with the approach of the Sub-committee in adopting a modified form of the New Zealand scheme."

Deputy Judge Mackintosh, Deputy Judge of the Court of First Instance

"As a magistrate and previously a barrister I would wholeheartedly support recommendation 1. No one can argue the rule as it is now is [not] convoluted and complex. It is often misunderstood and wrongly applied by members of the Profession and the Bench. Referring to paragraph 4.3 of [the consultation paper], I cannot comment for other magistrates but far from ignoring the hearsay rule my experience is that the prosecutors and defence do not properly know how to apply and argue the rule. It is often not tackled when appropriate for fear of showing miscomprehension. I often find myself, as the bench,

bringing it up to ensure fairness in the trial. If there are occasions where the rule is ignored in the interest of justice then clearly that demonstrates a need for reform."

Ms Amanda Woodcock, Magistrate

"Your analysis of the complexity of existing law, coupled with striking and surely indefensible anomalies such as s 70 of the Evidence Ordinance not applying to the defence ..., more than vindicates the need for reform in my estimation."

Professor Paul Roberts, University of Nottingham Law School

"... the present law relating to hearsay evidence in criminal proceedings in Hong Kong could and should be simplified and rationalised."

Ms Janice Brabyn, Department of Law, University of Hong Kong

Recommendation 1

As there is compelling evidence supporting a need for reform, we recommend that the existing law of hearsay in Hong Kong criminal proceedings be reformed comprehensively and coherently according to a principled, logical and consistent system of rules and principles.

Chapter 7

Safeguards as a condition for reform

7.1 As indicated in Chapter 6, we regard any reform of the law relating to the admissibility of hearsay evidence as being necessarily subject to effective safeguards against potentially undesirable consequences arising from that admissibility.

7.2 Very few, if any, common law jurisdictions have recommended or adopted provisions which admit hearsay in criminal proceedings without any safeguards. The range of safeguards adopted is diverse, and we have identified and propose a number of essential safeguards as a pre-requisite for the introduction of any reform. Paramount amongst these is the necessity to guard against the admission of evidence:

- (a) which may cause injustice to the accused;
- (b) which is unnecessary in the context of the issue to be decided; or
- (c) the reliability of which
 - i is not obviously apparent by virtue of its provenance or setting; or
 - ii in other cases, cannot be tested.

7.3 We hold the view that if these safeguards are assured injustice to an accused person, as well as to the prosecution, will be avoided, for inherent in these safeguards is the protection of fundamental rights.

7.4 We further recognise that any reform must avoid:

- (a) conferring too wide a discretion on the tribunal to admit hearsay evidence, which could lead to inconsistency of approach;
- (b) the possibility for abuse of the new rules by either the prosecution or the defence;
- (c) undue proliferation of issues of admissibility;
- (d) undue prolongation of hearings;
- (e) distortion of the tribunal's fact finding process; and
- (f) the admissibility of multiple hearsay.

It is also axiomatic that any reform must be compatible with the Basic Law, the Hong Kong Bill of Rights Ordinance (Cap 383), and the International Covenant on Civil and Political Rights as applied to Hong Kong.

7.5 Particular consideration was given by the sub-committee as to whether different standards of admissibility should be applied where the defence, as opposed to the prosecution, seeks to introduce hearsay evidence. That issue was considered both by the English Law Commission¹ and the Australian Law Reform Commission.²

7.6 In the sub-committee's deliberations leading up to the consultation paper, the majority was of the view that the identified safeguards render any differential treatment unnecessary; that such a provision would run contrary to the general principle of symmetry in the trial process; and that rules of evidence should apply evenly and equally to all parties. A minority of the sub-committee, however, held the view that the rules should apply with different, and more permissive, effect to the defence.

7.7 As will be discussed more fully below, the sub-committee came to a new position in light of the comments on the consultation paper, particularly from the Hong Kong Bar Association, that emphasised the inequality of resources of the prosecution and most defendants. With these concerns in mind it was felt that the prosecution should be put to a higher standard of proof (consistent with the usual burden and standard of proof in criminal proceedings) than the defence when attempting to admit hearsay under the new proposals. This would also be true where the prosecution was attempting to adduce hearsay evidence of aggravating factors in sentencing.

7.8 Where the oral testimony of a declarant is important and necessary, but the declarant is unavailable, substitute hearsay evidence should only be considered admissible if the unavailability of the declarant is regarded as a pre-requisite to such admissibility.

7.9 Simple unavailability of the declarant would not be a ground *per se* for admissibility, the potential evidence still having to satisfy the general test of reliability proposed. Nor would unwillingness on the part of a declarant to attend to testify orally equate to unavailability of that declarant.

7.10 The application of the "best evidence" principle requires a party to adduce the oral non-hearsay testimony of witnesses if it is reasonably obtainable. In the situation where oral testimony is unobtainable, the party seeking to introduce the hearsay evidence would be required still to produce the hearsay evidence that it possesses that offers the tribunal of fact the best opportunity to see and hear the declarant.

¹ English Law Commission report: *Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997), Law Com No 245, at paras 5.30-5.31 and 5.41.

² Australian Law Reform Commission, *Evidence* (1987), Report No 38, at para 139.

7.11 We addressed the situation where a number of persons are jointly charged and one of the accused wishes to tender hearsay evidence advantageous to his case but prejudicial to that of a co-accused. We take the view that such a situation is not infrequently encountered in respect of non-hearsay evidence and is addressed by the tribunal's ability to order a separation of trials.

Recommendation 2

We recommend that any reform of the existing law of hearsay in Hong Kong criminal proceedings must have built-in safeguards that protect the rights of defendants and ensure the integrity of the trial process.

Chapter 8

Options considered and the version recommended

The proposed model of reform

8.1 The present law of hearsay in Hong Kong criminal proceedings can be described in terms of a model having the following three components:

- (a) a blanket rule of exclusion ("exclusionary rule")
- (b) a fixed number of specific common law and statutory exceptions to the exclusionary rule (what may be termed "pigeonhole exceptions"); and
- (c) the absence of a judicial discretion to admit evidence caught by the exclusionary rule ("no discretion to admit").

8.2 The question of reform requires an examination of each of these components. As regards the first component, the most basic question to consider is whether to keep the exclusionary rule or to discard it along the lines of the reform of civil hearsay. Even if the exclusionary rule is kept, should the scope of application be narrowed by, for example, restricting the definition of hearsay evidence or the types of proceedings in which the rule should operate?

8.3 A consideration of the "pigeonhole exceptions" also raises a number of important issues. Should the common law exceptions be abolished, or codified, or left as they are? If they are codified, should individual exceptions be widened to remove any anomalous restrictions? Are the existing statutory exceptions satisfactory or are there reasons to reform some or all of them? Should new "pigeonhole exceptions" be enacted? Possible reform of the third component requires consideration of two main issues: whether to codify a discretion to admit and, if so, what form should it take?

8.4 Given the many possible answers to each question (and the ways in which those answers may be combined), the number of possible options for reform is enormous. The sub-committee identified and considered 14 different options for reform. It was readily determined that a number of these options were unacceptable for various reasons. Three main options became the subject of further debate and consideration. In the result, a consensus was reached on a single proposed model of reform. The proposed model of reform, described in greater detail in the next chapter, recommends the following:

- (a) redefining hearsay evidence so that it no longer includes implied assertions;
- (b) retaining the exclusionary rule;
- (c) abolishing the common law exceptions to the hearsay rule, except those relating to admissions, confessions and statements against interest made by an accused, acts and declarations in furtherance of a joint or common enterprise or conspiracy, expert opinion evidence, evidence admissible upon application for bail, evidence admissible in sentencing proceedings (except when the prosecution is relying on hearsay evidence to prove an aggravating factor), public information, reputation as to character, reputation or family tradition, *res gestae*, and admissions by agents;
- (d) enacting a core scheme that confers a discretion on the trial judge to admit hearsay evidence on the basis of a defined test of necessity and threshold reliability;
- (e) incorporating sufficient safeguards within the core scheme to protect the innocent from being convicted and to prevent the integrity of the trial process from being compromised;
- (f) repealing certain statutory exceptions, substantially modifying others, and adding new exceptions, particularly for prior consistent statements and evidence admitted by consent.

8.5 The views expressed by those responding to the sub-committee's consultation paper were carefully considered and have been taken into account in revising some details of the proposed scheme. The overall framework outlined above remains unchanged, however, as we believe that it satisfies the cardinal principles for reform set out at paragraph 4.7 above and no comprehensive alternative model was presented to the sub-committee in the course of consultation.

Rejected options and proposals

The polar extremes: no change and free admissibility

8.6 Having identified the numerous shortcomings of the present law and recognising the repeated criticisms of that law by distinguished jurists and academics in the common law world, including those who commented on the consultation paper, we conclude that maintaining the *status quo* is not a realistic option.

8.7 At the other extreme, we also do not recommend the abolition of the exclusionary rule and the unrestricted free admissibility of relevant hearsay evidence. Indeed, even after its significant reform, hearsay evidence

in civil proceedings may still be excluded, albeit in exceptional circumstances.¹ In the context of criminal proceedings, there are good reasons for ensuring that the admission of hearsay evidence remains the exception and does not become the norm. The reasons for retaining the exclusionary rule include the following:²

- (a) without it, evidence would "*not need to meet any standard of reliability, nor to be unavailable in any other form, in order to be admitted*" and there would be no safeguards against dubious and unreliable hearsay;³
- (b) free admissibility "*fails to attach any importance to the need for cross-examination*";⁴
- (c) the lack of opportunity for the defence to cross-examine admitted hearsay of any type would arguably infringe rights protected under the Basic Law and Hong Kong Bill of Rights Ordinance;
- (d) fact-finders would be exposed to evidence of unidentified persons;⁵
- (e) fact-finders would be exposed to multiple hearsay. The "*dangers of inaccuracy and ambiguity increase with the number of times a story is repeated*";⁶
- (f) the direction that the judge would have to give to the jury in respect of multiple hearsay evidence could be extremely complicated. A jury is likely to be easily confused by such a direction;⁷
- (g) free admissibility would "*leave the court open to a vast amount of evidence, much of it superfluous*". This would unduly prolong hearings;⁸
- (h) free admissibility would encourage a lax approach to investigation and prosecution; and

¹ Under section 47 of the Evidence Ordinance (Cap 8), relevant hearsay evidence in civil proceedings is presumptively admissible while the court maintains a narrow discretion to exclude the evidence if a party against whom the evidence is adduced objects and the court is satisfied that the exclusion is not prejudicial to the interests of justice.

² Many of these reasons are taken from the English Law Commission's report, *Evidence in Criminal Proceedings: Hearsay and Related Topics*, Report No 245, June 1997, Chapter 6.

³ English Law Commission report: *Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997), Law Com No 245, at para 6.3.

⁴ English Law Commission Report 245 (cited above), at para 6.9.

⁵ English Law Commission Report 245 (cited above), at para 6.11.

⁶ English Law Commission Report 245 (cited above), at para 6.11.

⁷ English Law Commission Report 245 (cited above), at para 6.12.

⁸ English Law Commission Report 245 (cited above), at para 6.13.

- (i) policing fabricated evidence, including exculpatory evidence, would be particularly difficult.

8.8 For the above reasons, options just short of these two extreme positions are also unsatisfactory. One option would be to remove some of the existing anomalies with the statutory exceptions to hearsay without any major changes to the general structure of the law. But this kind of minor tinkering, though a step in the right direction, is insufficient on its own to address all the shortcomings of the existing law. In accordance with the terms of reference, we believe in principle that reform of hearsay in criminal proceedings can and should be more comprehensive. As mentioned in Chapter 1, courts are not in an ideal position to effect comprehensive and systematic change to the law. It is worth repeating the sentiments expressed by the Court of Final Appeal on the question of reform:

*"In R v Blastland, all the other Law Lords hearing the appeal agreed with Lord Bridge of Harwich who (at p.52H) referred to the principle established in Myers v DPP 'never since challenged, that it is for the Legislature, not the Judiciary, to create new exceptions to the hearsay rule'. In Bannan v R (1995) 185 CLR 1, a case before the High Court of Australia, Brennan CJ said (at p.12) that the creation of a new exception to the hearsay rule 'would require a general review of the hearsay rule, its history, purpose and operation'. The Law Reform Commission would appear to be the best body suited to conduct such a general review."*⁹

8.9 One member of the sub-committee in the pre-consultation paper deliberations had expressed an initial interest in the option of free admissibility, subject to a residual discretion to exclude. This was a proposal based on the present law governing civil hearsay. After some discussion, the sub-committee unanimously agreed that this option had insufficient safeguards to address the concerns listed in paragraph 8.7 above. With one notable exception, all of the comments received on Recommendation 3 of the consultation paper, which is repeated below, were in favour of the recommendation.¹⁰

⁹ *Wong Wai-man & Others v HKSAR* (2000) 3 HKCFAR 322, at 328.

¹⁰ Professor John Jackson of Queen's University, Belfast expressed this viewpoint in his comments on the consultation paper: "I would tend to approach the issue from somewhat different perspective which would be that all relevant evidence including hearsay should be admissible unless there are strong grounds made out for exclusion, always allowing that the court should have a discretion, akin to rule 403 of the Federal Rules of Evidence in the United States, to exclude logically relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Adopting this approach, any evidence, including hearsay, which satisfies this test would be prima facie admissible unless there are strong grounds for exclusion... I would consider that the Commission should lean further towards a free admissibility approach to hearsay in criminal proceedings subject to compliance with a new code of practice requiring the police to preserve evidence and make declarants available for cross-examination where possible."

Recommendation 3

We recommend that the polar extreme options of no change or free admissibility, or options just short of these extreme positions, be rejected. We believe these options either inadequately address the shortcomings in the law or, at the other extreme, have insufficient safeguards.

Best available evidence

8.10 The option of freely admitting the best available evidence was referred to in the Auld report as follows:

*"Professor John Spencer ... argued that there should be a generally inclusionary system subject to a 'best available evidence' principle. That is, each side would be obliged to produce the original source of the information if the source is still available."*¹¹

From *"the fundamental standpoints that rules of evidence should facilitate rather than obstruct the search for truth and should simplify rather than complicate the trial process"*, Lord Justice Auld believed there was merit in making relevant hearsay evidence generally admissible subject to the best available evidence principle.¹² However, the English Law Commission rejected this option because it effectively required judges and magistrates to assume an inappropriate inquisitorial role in ensuring that the best available evidence was brought before the court.¹³ The Law Commission also believed that *"it would be difficult to ensure that the parties respected the obligation to produce the source of their evidence where possible."*¹⁴ The Law Commission's views were reflected in the hearsay reform proposals contained in the English Criminal Justice Act 2003.¹⁵

8.11 This option was unanimously rejected by the sub-committee. In addition to the reasons given by the Law Commission, we believe that this option has insufficient safeguards to prevent the admission of unreliable evidence. As Mr Justice Ewaschuk of the Superior Court of Justice in Ontario, Canada, stated in his written comments on the consultation paper: *"I agree that the 'best available evidence option' should be rejected because it may well result in the admissibility of inherently unreliable evidence both for the prosecution and the defendant."* Furthermore, this option is likely to lead to considerable unproductive time being spent, both pre-trial and during trial, on determining whether an item of evidence is the "best available".

¹¹ The Right Honourable Lord Justice Auld, *Report: Review of the Criminal Courts of England and Wales* (The Stationery Office, 2001), at 558.

¹² The Right Honourable Lord Justice Auld, *Report: Review of the Criminal Courts of England and Wales* (cited above), at 559-560.

¹³ English Law Commission Report 245 (cited above), at paras 6.19, 6.22, 6.24.

¹⁴ English Law Commission Report 245 (cited above), at paras 6.27, 6.20.

¹⁵ Criminal Justice Act 2003 (UK) (c44), sections 114-136.

Recommendation 4

We recommend that the "best available evidence option" be rejected, for it is impractical for the parties to comply with, difficult for the court to enforce without becoming inquisitorial, contains insufficient safeguards, and may contribute to inefficient use of court time.

Discretion to admit only defence hearsay

8.12 The proposal to give the defence more liberal rights than the prosecution to adduce hearsay evidence was considered by both the Scottish and English Law Commissions.¹⁶ In the interest of avoiding wrongful convictions, the Scottish Commission noted that some countries have relaxed the hearsay rule more for the defence than the prosecution.¹⁷ For example, under the Federal Australian Evidence Act 1995, statements of unavailable witnesses adduced by the defence can be admitted without having to satisfy a separate reliability condition which prosecution evidence would have to surmount.¹⁸ The Supreme Court of Canada, in defining the scope of a common law declaration against penal interest exception, held that evidence admitted under this exception could only be used to exculpate the defendant rather than for purposes of inculpation.¹⁹

8.13 It is often thought that the proposal is required by international human rights norms. In respect of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention"), the English Law Commission noted that

*"... although Article 6(3)(d) puts limits on the extent to which the prosecution may make use of hearsay evidence, nothing in Article 6 restricts the use of hearsay evidence by the defence."*²⁰

¹⁶ See Scottish Law Commission, *Evidence: Report on Hearsay Evidence in Criminal Proceedings* (1995), Scot Law Com No 149, at paras 4.22, 4.27-4.32 and the English Law Commission Report 245 (cited above), at paras 5.24-5.41, 8.148-8.149, 12.2-12.8, Recomm 48 (at para 12.8).

¹⁷ Scottish Law Commission Report 149 (cited above), at paras 4.27 - 4.30.

¹⁸ See Evidence Act 1995 (Australia), sections 65(2) and (8). See also the supporting comments for this approach from the Australian Law Reform Commission in their interim and final reports: Evidence: Australian Law Reform Commission, *Evidence* (1987), Report No 38, at paras 128 and 139(b); Australian Law Reform Commission, *Evidence* (1985), Report No 26 (Interim) Vol 1, at paras 679, 692.

¹⁹ See *Lucier v R* (1982) 132 DLR (3d) 244 (SCC).

²⁰ See English Law Commission Report 245 (cited above), at paras 5.24. Article 6(3)(d) provides that "[e]veryone charged with a criminal offence has the following minimum rights:...(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;".

But while it is one thing to say that a restrictive exclusionary rule impairs a defendant's right to make full answer and defence, it is another thing to say that an equitable relaxation of the same rule for the prosecution will inevitably infringe a defendant's fair trial rights. In their respective reports, both the English and Scottish Law Commissions came to the same conclusion that a reformed hearsay rule that applies in the same manner to both defence and prosecution evidence will not infringe the European Convention so long as there are sufficient safeguards against the conviction of the innocent.²¹

8.14 The Scottish Law Commission rejected the idea of differential treatment for prosecution and defence, being unconvinced of its necessity or desirability. The Commission wrote:

*"One consideration is that curious results might follow. The prosecution might be entitled to cross-examine a defence witness on hearsay evidence he had given in chief which the prosecution, had they led him as a witness, would not have been entitled to elicit from him. In a trial where there were co-accused, one accused might be entitled to elicit from a defence witness hearsay evidence implicating a co-accused which the prosecution would not have been entitled to lead."*²²

Aside from these practical problems, the Scottish Law Commission also felt that it was:

*"... necessary to maintain or improve, as far as possible, the effectiveness of the criminal justice system not only in acquitting the innocent but also in convicting the guilty."*²³

The English Law Commission agreed, and expressed concern at the ease with which a guilty defendant could be acquitted by raising a reasonable doubt through *"the use of manufactured or very low quality hearsay"*.²⁴

8.15 Despite some initial interest by one member, the sub-committee ultimately rejected the option of allowing a discretion to admit only defence hearsay. We agree with both the English and Scottish Law Commissions that in principle differing standards of admissibility for different parties are unacceptable. As all of the shortcomings of the present hearsay rule impede the prosecution, as well as the defence, to ignore the difficulties facing the former would be unsatisfactory. The public interest requires cogent and reliable prosecution evidence to be received by the tribunal of fact in coming to an accurate verdict, particularly in cases involving serious crimes.

²¹ See English Law Commission Report 245 (cited above), at paras 5.24, 5.33-5.41; Scottish Law Commission Report 149 (cited above), at para 4.32.

²² Scottish Law Commission Report 149 (cited above), at para 4.32.

²³ Scottish Law Commission Report 149 (cited above), at para 4.32.

²⁴ English Law Commission Report 245 (cited above), at para 12.5.

8.16 The Canadian case of *R v Khan* provides an example of the possible injustice that could result for the prosecution.²⁵ In this case, the defendant, a medical doctor, was charged with sexually assaulting a 3½ year old girl while her mother was in an adjacent private room. Shortly after leaving Dr Khan's office, the mother noticed a wet spot visible on the girl's clothing, which was subsequently found to contain semen and saliva. When asked about it, the daughter, in language that bore the stamp of reliability, disclosed the sexual assault. Had the Supreme Court of Canada not liberalised the hearsay rule in this case to allow the admission of the child's disclosure to her mother, the case could never have been brought since the child was incompetent to testify at trial.

8.17 To say that the opportunities to admit hearsay evidence should apply equally to all parties does not mean there cannot be different standards of proof applied to the prosecution and defence. As we elaborate below, and particularly at Recommendation 30, we believe there are good reasons to require a higher standard of proof when it is the prosecution which intends to use the new proposal for admitting hearsay evidence.

Recommendation 5

We recommend that any reforms of the law of hearsay in criminal proceedings should apply in the same manner to both the prosecution and defence, although allowances for differences in the standard of proof are justifiable.

Broad discretion to admit - the South African model

8.18 In 1988, South Africa reformed its hearsay rule by abolishing the common law exceptions and replacing them with a single discretionary scheme, which applied in both civil and criminal proceedings.²⁶ The heart of the scheme is that the court must consider seven enumerated criteria in deciding whether the evidence should be "*admitted in the interests of justice*".²⁷ These seven criteria are:

- (i) the nature of the proceedings;
- (ii) the nature of the evidence;
- (iii) the purpose for which the evidence is tendered;
- (iv) the probative value of the evidence;
- (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

²⁵ (1990), 59 CCC (3d) 92 (SCC).

²⁶ See Law of Evidence Amendment Act, 45 of 1988 (SA), section 3.

²⁷ Section 3(1)(c) of the Law of Evidence Amendment Act, 45 of 1988 (SA).

- (vi) any prejudice to a party which the admission of such evidence might entail; and
- (vii) any other factor which should in the opinion of the court be taken into account.²⁸

8.19 The Supreme Court of Appeal of South Africa has observed that:

*"The 1988 Act was ... designed to create a general framework to regulate the admission of hearsay evidence that would supersede the excessive rigidity and inflexibility – and occasional absurdity – of the common law position. In the result ... the 1988 Act retained 'the common laws caution' about receiving hearsay evidence, but 'altered the rules governing when it is to be received and when not', principally by glossing the common law exceptions with the general criteria of relevance, weight and the interests of justice ..."*²⁹

8.20 We generally believe the South African scheme has merit in terms of its simplicity and its ability to address the inflexibility and irrationality of the existing law. However, the sub-committee was concerned about the open-endedness of the discretion (ie *"admitted in the interests of justice"*). There were three general concerns. Without greater direction as to how to apply and weigh the enumerated factors, there is a risk that courts could reach inconsistent admissibility decisions. This in turn would contribute to uncertainty in the law, at least until a higher court provides the necessary guidance on the application of the discretion. As Mr Justice Ewaschuk of Canada noted in his response to the consultation paper, *"the test of 'in the interests of justice' for the admissibility of hearsay evidence is too open-ended and too subjective. It permits of personal value-judgment and is often referred to as 'palm-tree justice'"*.

8.21 The third and related concern is the potential to invite an increased number of unmeritorious attempts to admit hearsay due to ignorance, confusion or mistake about the law. In the result, we thought it was possible to devise a scheme, imbued with the spirit of the South African model, but offering clear signposts in the interests of certainty and consistency in decision-making, protection for the rights of the accused, and respect for the integrity of the trial process.

²⁸

Section 3(1)(c) of the Law of Evidence Amendment Act, 45 of 1988 (SA).

²⁹

State v Ndhlovu, 2002 (2) SACR 325 (SCA) citing also from *Makhathini v Road Accident Fund*, 2002 (1) SA 511 (SCA).

Recommendation 6

We recommend that the South African model, which admits hearsay on an entirely discretionary basis "*in the interests of justice*", be rejected because of concerns with the open-endedness of the discretion.

The three main options

Option 1 ("the English model"): wide "pigeonhole exceptions" with a narrow discretion to admit

8.22 In 1997, the English Law Commission published a comprehensive report with recommendations for reforming the hearsay rule in criminal proceedings. The recommendations were adopted in England in the Criminal Justice Act 2003, which received royal assent on 20 November 2003. The new reforms have the following distinctive components (hereinafter collectively referred to as "the English model"):

- (a) a re-definition of hearsay evidence that excludes from its ambit implied assertions;³⁰
- (b) preservation of some established common law exceptions, such as public information, reputation, *res gestae*, confessions and admissions, common enterprise, and expert evidence;³¹
- (c) admissibility of hearsay statements from five categories of unavailable witnesses (the declarant is dead, unfit to be a witness, outside the United Kingdom, cannot be found, or is unavailable due to fear). Unavailability due to fear can only be the basis of discretionary admission "*in the interests of justice*";³²
- (d) admissibility of written police statements of persons who cannot reasonably be expected to have any recollection of the matters dealt with in the statement;³³
- (e) a narrow residual discretion to admit hearsay "*in the interests of justice*";³⁴
- (f) a discretion to exclude hearsay evidence if "*to admit it would result in [an] undue waste of time*";³⁵

³⁰ See Criminal Justice Act 2003 (UK), section 115(3).

³¹ Criminal Justice Act 2003 (UK), section 118.

³² Criminal Justice Act 2003 (UK), section 116.

³³ Criminal Justice Act 2003 (UK), section 117(5)(b).

³⁴ Criminal Justice Act 2003 (UK), section 114(1)(d).

³⁵ Criminal Justice Act 2003 (UK), section 126(1).

- (g) the judge's power in jury trials to stop the case where a conviction based wholly or partly on unconvincing hearsay evidence would be unsafe.³⁶

8.23 While we agree with certain aspects of the English Law Commission's proposals, we have reservations about others, particularly the breadth of the exception for unavailable witnesses and the terms of the residual discretion to include.

8.24 Under the English model, a declarant's out-of-court statement is automatically admissible if he is satisfactorily identified and

- (a) is dead;
- (b) is unfit to be a witness because of his bodily or mental condition;
- (c) is outside the United Kingdom and it is not reasonably practicable to secure his attendance;
- (d) cannot be found although reasonably practicable steps have been taken to find him; or
- (e) cannot reasonably be expected to have any recollection of the matters dealt with in a written statement made for the purpose of a criminal investigation.³⁷

Further, with the leave of the court, out-of-court statements of a person who through fear does not give oral testimony of the relevant evidence may be admitted if the person is satisfactorily identified and it is in the interests of justice to do so.³⁸

8.25 Statements admitted under these exceptions do not come with any guarantees as to reliability. The principle behind their admission is merely necessity due to the absence of the declarant's oral evidence at trial. These exceptions, although offering a fair degree of certainty and consistency in decision-making, have an over-inclusive effect by allowing in all types of relevant evidence, including unreliable hearsay evidence. The English model has three mechanisms to correct this over-inclusiveness. First, there is the express preservation of the power under section 78 of the Police and Criminal Evidence Act 1984 (PACE) to exclude evidence affecting the fairness of the trial. Secondly, there is a newly enacted discretionary power to exclude hearsay evidence under section 126(1) of the Criminal Justice Act 2003. Section 126 of the Criminal Justice Act 2003 provides as follows:

³⁶ Criminal Justice Act 2003 (UK), section 125(1).

³⁷ These conditions paraphrase the actual terms of the legislation found in the Criminal Justice Act 2003, at sections 116(1) & (2) and 117(1), (2), (4) & (5).

³⁸ See Criminal Justice Act 2003 (UK), section 116(2)(e), (3) & (4).

"(1) In criminal proceedings the court may refuse to admit a statement as evidence of a matter stated if:

(a) the statement was made otherwise than in oral evidence in the proceedings, and

(b) the court is satisfied that the case for excluding the statement, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence.

(2) Nothing in this Chapter prejudices

(a) any power of a court to exclude evidence under section 78 of the Police and Criminal Evidence Act 1984 (c 60) (exclusion of unfair evidence), or

(b) any other power of a court to exclude evidence at its discretion (whether by preventing questions from being put or otherwise)."

Finally, there is another new power of the judge in jury trials to stop the case at any time after the completion of the prosecution's case if the case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceedings, and the hearsay evidence is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe.³⁹

8.26 Hong Kong, however, has none of these statutory mechanisms, particularly section 78 of PACE.⁴⁰ Furthermore, we believe that if "pigeonhole exceptions" are to be used, they need to provide more assurances as to the reliability of the evidence. Following the common law tradition, categorical exceptions to hearsay must clearly set out those circumstances and conditions that capture the inherent reliability of the evidence to be admitted.

8.27 Given the breadth of the exception for unavailable witnesses, the new discretion to admit hearsay was intended by the Law Commission to be used only in narrow circumstances. Where a hearsay statement does not fit within any of the specific exceptions, the judge has a power to admit the statement in the interests of justice, such as where, for example, the evidence was particularly cogent of the defendant's innocence. Section 114 of the Criminal Justice Act 2003 sets out the terms of the power as follows,

³⁹ See paragraphs 9.80 and 9.83 below, and sections 125(1) and 126(2)(a) of the Criminal Justice Act 2003.

⁴⁰ Section 78 confers a power on the court to exclude evidence if "*having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.*"

"(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if —

...

- (d) the court is satisfied that it is in the interests of justice for it to be admissible.*

(2) In deciding whether a statement not made in oral evidence should be admitted under subsection (1)(d), the court must have regard to the following factors (and to any others it considers relevant) —

- (a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;*
- (b) what other evidence has been, or can be, given on the matter or evidence mentioned in paragraph (a);*
- (c) how important the matter or evidence mentioned in paragraph (a) is in the context of the case as a whole;*
- (d) the circumstances in which the statement was made;*
- (e) how reliable the maker of the statement appears to be;*
- (f) how reliable the evidence of the making of the statement appears to be;*
- (g) whether oral evidence of the matter stated can be given and, if not, why it cannot;*
- (h) the amount of difficulty involved in challenging the statement;*
- (i) the extent to which that difficulty would be likely to prejudice the party facing it."*

8.28 Notwithstanding the enumerated list of factors to consider in section 114(2), the main difficulty lies with the vague terms of the discretion in section 114(1)(d). As with the South African model, in respect of which we summarised our concerns at paragraphs 8.20 and 8.21 above, the open-ended nature of this discretion does not sufficiently safeguard against the dangers of hearsay evidence. With nine non-exhaustive factors to consider, trial courts will still want guidance on how these factors are to be weighed in applying the discretion. Until proper guidance is given by the appellate courts, some uncertainty in the law and inconsistent decisions are inevitable. Though the Law Commission envisaged this discretion being exercised in narrow circumstances, the language of the power provides little assurance that this will be the case. Indeed, it was this concern, stated most clearly by Lord Thomas of Gresford in the excerpt below, which led a majority of the

members of the House of Lords to vote in favour of removing this discretion from the original Bill:

*"the discretion is handed over entirely to the court as to whether the hearsay evidence should be admitted, subject only to subsection (2), where there are certain factors for the judge to bear in mind. Members of the Committee may feel that they are fairly obvious matters, but the provisions are extremely vague and broad and introduce into the law of evidence in criminal cases hearsay evidence wholesale. It can never be certain for a defendant that he will not face evidence of this sort; whether a judge admits it or not, it will be a matter for application, either pre-trial or during the trial. We object in principle to the introduction of hearsay evidence of that type."*⁴¹

We echo these concerns and favour a more rigorous and specifically defined discretionary power that is expressly tailored to the underlying principles for admitting hearsay evidence.

8.29 Professor Paul Roberts of the University of Nottingham agreed with these concerns with the English model in his comments on the consultation paper:

"I would endorse your decision not to replicate the admissibility framework introduced in England and Wales by the Criminal Justice Act 2003, which I regard as excessively complex and, possibly, insufficiently robust against the dangers of admitting unreliable hearsay. Issues surrounding hearsay evidence arise routinely in criminal proceedings, on a day-to-day basis, and sometimes with little warning or time for counsel or judges to prepare to deal with them. It is therefore essential that these rules of admissibility are clear, concise and comprehensible to the legal professionals who apply them. The English Criminal Justice Act does not fare well when tested against standards of clarity, simplicity and ease of comprehension and application."

⁴¹

House of Lords Hansard, 18 Sept 2003, col 1108. But on 18 and 19 Nov 2003, in the post-third reading consideration of the House of Lords' amendments, members of both Houses agreed to restore the discretion using tighter language, namely a change from the terms, "*satisfied that, despite the difficulties there may be in challenging the statement, it would not be contrary to the interests of justice for it to be admissible*", to "*satisfied that it is in the interests of justice for it to be admissible*". See House of Lords Hansard, 19 Nov 2003, col 2005.

Recommendation 7

We recommend that Option 1 (the English model) be rejected for two main reasons: its categories of automatic admissibility provide insufficient assurances of reliability and the terms of the residual discretion to admit hearsay are too open-ended and vague.

Option 2 ("the United States model"): codification

8.30 The present United States federal law sets out a detailed and comprehensive codified scheme for the admission of hearsay evidence in both civil and criminal proceedings.⁴² This scheme has the following essential components:

- (a) a re-definition of hearsay evidence that excludes implied assertions;⁴³
- (b) retention of the blanket exclusionary rule in codified form;⁴⁴
- (c) abolition of the common law exceptions;⁴⁵
- (d) a codification of 28 "pigeonhole exceptions", most based on the old common law exceptions. Statutory exceptions are divided into two categories: those applicable where the availability of the declarant as a witness is immaterial, and those applicable where such availability is material but the declarant is unavailable;⁴⁶
- (e) a residual discretion to admit hearsay where the statement has "*equivalent circumstantial guarantees of trustworthiness*" to the "pigeonhole exceptions" and
 - (i) the statement is offered as evidence of a material fact;
 - (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
 - (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.⁴⁷

⁴² See Federal Rules of Evidence (US), Art VIII, Rules 801-807.

⁴³ See Federal Rules of Evidence (US), Art VIII, at Rule 801(a)-(c).

⁴⁴ See Federal Rules of Evidence (US), Art VIII, at Rule 802.

⁴⁵ See Federal Rules of Evidence (US), Art VIII, at Rule 802.

⁴⁶ See Federal Rules of Evidence (US), Art VIII, at Rules 803 & 804.

⁴⁷ See Federal Rules of Evidence (US), Art VIII, at Rule 807.

8.31 The US model takes a comprehensive approach to reform and uses precise and tight language to minimise uncertainty and abuse of the scheme. The US model essentially puts the common law of hearsay on a statutory basis while adding a much needed residual discretion to admit. In contrast to the South African and English models, this discretion requires that the judge find "*equivalent circumstantial guarantees of trustworthiness*" before exercising the discretion, a test that members found more attractive.

8.32 During the sub-committee's deliberations, it readily became apparent that the task of codifying each of the common law exceptions would be a major one.⁴⁸ Doubts were cast on the feasibility of such an exercise. It was generally felt that it would not be possible to cater for all justifiable circumstances. There was also concern that new statutory provisions might give rise to a new set of interpretative problems, with possible ramifications beyond the law of hearsay, such as the law of confessions and statements of witnesses. If a key aim of reform is to simplify the law and render it more coherent, then it would seem sensible to minimise (rather than increase or maintain) the number of "pigeonhole exceptions".

8.33 We identified two alternatives to full codification of existing exceptions. If, because of shared rationales, existing exceptions were covered by the terms of an inclusionary discretion, the existing exceptions could simply be abolished. The idea that any specific exceptions should be subordinate to the general principles that underlie the admissibility of hearsay has already been reflected by the courts in Canada. In a series of important decisions, the Supreme Court of Canada recognised a common law judicial discretion to admit hearsay according to the principles of necessity and reliability. In 2000, the court had to confront the question of the relationship between the new principled approach and the existing common law exceptions.⁴⁹ The majority of the court held that if the traditional exceptions to hearsay are to co-exist with the principled approach, where there is conflict between a traditional exception and the principled approach, the former must be "[p]roperly modified to conform to the principled approach".⁵⁰ By analogy, a newly enacted principled discretion to admit hearsay should generally supplant overlapping exceptions.

8.34 Codification also assumes that there is a need to abolish the common law in its entirety. It ignores the possibility that some common law rules work perfectly well and can be left alone. The English model employs this strategy of retaining some of the existing law. As we discuss more fully below, we believe the strategy of preserving some common law exceptions is preferable to codifying or abrogating them.⁵¹

⁴⁸ Note the New Zealand Law Commission's comment that this would be an "exceptionally difficult task": see Law Commission, *Preliminary Paper No 15, Evidence Law: Hearsay, A discussion paper* (Wellington: Law Commission, 1991), at 17.

⁴⁹ See *R v Starr* (2000) 147 CCC (3d) 449 (SCC).

⁵⁰ See *R v Starr* (2000) 147 CCC (3d) 449 (SCC), at 531.

⁵¹ See above note 31.

Recommendation 8

We recommend that Option 2 (the United States model) be rejected because full codification of the existing exceptions cannot cater for all justifiable situations.

Option 3 ("the New Zealand Law Commission model"): discretion based on necessity and reliability

8.35 In 1999, the New Zealand Law Commission published its *Evidence Code and Commentary* which contained proposals to replace the common law of hearsay with a statutory scheme.⁵² The core components of the scheme include:

- (a) a re-definition of hearsay so that it does not include implied assertions;⁵³
- (b) retention of the blanket exclusionary rule in codified form;⁵⁴
- (c) abolition of the common law exceptions;⁵⁵
- (d) discretion to admit hearsay if the circumstances relating to the hearsay statement provide reasonable assurance that the statement is reliable, and either the maker of the statement is unavailable as a witness or requiring the maker of the statement to be a witness would cause undue delay or expense.⁵⁶

8.36 The New Zealand Parliament enacted these proposals in the Evidence Act 2006, which came into force on 1 August 2007.⁵⁷ Section 16(1) defines the "*circumstances*" relating to the statement made by a person who is not a witness to include:

- (a) the nature of the statement; and
- (b) the contents of the statement; and
- (c) the circumstances that relate to the making of the statement; and
- (d) any circumstances that relate to the veracity of the person; and

⁵² See New Zealand Law Commission, *Evidence: Evidence Code and Commentary* (1999), Report 55 – Vol 2.

⁵³ See definitions of "hearsay" and "statement" in section 4 of the NZ Law Commission Report 55 – Vol 2 (cited above), at 10, 13 & 20 and para C22. See above Chapter 5 as well.

⁵⁴ See section 17 of the NZ Law Commission Report 55 – Vol 2 (cited above), at 48.

⁵⁵ See section 17 of the NZ Law Commission Report 55 – Vol 2 (cited above), at 48.

⁵⁶ See section 19 of the Law Commission Report 55 – Vol 2 (cited above), at 52.

⁵⁷ See Evidence Act 2006 Commencement Order 2007 (2007/190).

- (e) any circumstances that relate to the accuracy of the observation of the person.⁵⁸

Section 16(2) defines "*unavailable as a witness*" to mean that the maker of the statement

- (a) is dead; or
- (b) is outside New Zealand and it is not reasonably practicable for him or her to be a witness; or
- (c) is unfit to be a witness because of age or physical or mental condition; or
- (d) cannot with reasonable diligence be identified or found; or
- (e) is not compellable to give evidence.⁵⁹

8.37 In its discussion paper on hearsay published in 1991, the New Zealand Law Commission explained why it felt it was necessary to abolish all the common law exceptions and leave admissibility generally to the discretionary approach:

"Even...with the addition of a residual exception, we consider that an approach based on categories would be unduly restrictive. Categories frequently prove either over-inclusive or, more commonly, under-inclusive. As a result the courts often find themselves unable to confine the categories within their natural boundaries. They are either shrunk or stretched in particular cases to ensure that unreliable evidence is excluded and reliable evidence admitted, and there are frequently technical arguments about the scope of the categories. These problems will continue even if the categories are framed more broadly than at present.

...

*In criminal proceedings the best path in our view is to replace all the present hearsay exceptions (including res gestae) with a single broad exception for hearsay evidence which has reasonable assurance of reliability... Such an approach has the advantage of enabling decisions on admissibility to be made directly on the basis of underlying principle. In essence, this takes the residual exception in the [US] Federal Rules to its logical conclusion."*⁶⁰

8.38 Before the New Zealand Law Commission's proposals had become law, the New Zealand Court of Appeal had already liberalised the hearsay rule by recognising a common law discretion to admit hearsay,

⁵⁸ See section 16(1) of the Evidence Act 2006 (NZ), and compare with section 16(1) of the NZ Law Commission Report 55 – Vol 2 (cited above), at 44.

⁵⁹ See section 16(2) of the Evidence Act 2006 (NZ) and compare with section 16(2) of the NZ Law Commission Report 55 – Vol 2 (cited above), at 46.

⁶⁰ See NZ Law Commission, *Preliminary Paper No 15, Evidence Law: Hearsay, A discussion paper* (Wellington: Law Commission, 1991), at 16-17.

following the spirit and approach of the Canadian courts. In *R v Manase*, three distinct requirements of "relevance", "inability" and "reliability" were set out for the exercise of this discretion. Even if these requirements were satisfied, hearsay evidence would be excluded if its probative value was outweighed by its illegitimate prejudicial effect.⁶¹

8.39 Of all the options and models considered by the sub-committee, the New Zealand Law Commission model attracted the most support from sub-committee members. The strength of this model is its inclusionary discretion based on the principles of necessity and reliability, a logical reflection of principles underlying specific exceptions to the hearsay rule. This discretion introduces flexibility into the law, but with sufficient barriers to filter out undesirable hearsay evidence. With its defined terms and conditions, it provides a degree of guidance to judges in exercising the discretion.

8.40 However, there are three modifications to the model which we recommend. First, a number of common law exceptions should be preserved. In its consultation paper, the sub-committee recommended the preservation of three exceptions in relation to confessions, the co-conspirators exception and expert opinion evidence. In the case of a confession, it would be illogical for a judge to engage the reliability test, particularly where the statement may not be reliable at all inasmuch, for example, as it places blame on others.⁶² In the case of the co-conspirators exception, its basis is the principle of agency which renders the application of the Core Scheme we propose inappropriate.⁶³ A number of those who commented on this aspect of our proposals, however, favoured the retention of a wider range of the existing common law exceptions. Mr Justice Rosenberg pointed out that in Canada when one of the parties seeks to admit hearsay evidence that does not fall within one of the established exceptions, the trial judge must conduct a *voir dire* to determine whether the evidence is necessary and reliable. This may entail lengthy proceedings, with full rights of examination and cross-examination and the opportunity to call evidence on both sides. Mr Justice Rosenberg concluded that:

"there is considerable value in maintaining the existing exceptions to reduce the use of court time. Most of the exceptions can be justified on the basis of necessity and reliability in any event."

Also referring to the Canadian experience, Scott Hutchison observed that:

"An important element of the Canadian approach has ... been an openness to re-evaluate the existing hearsay exceptions on a rule-by-rule basis. If a party wishes to challenge either the general parameters of the rule, or its application in a particular

⁶¹ [2001] 2 NZLR 197, at 206 paras 30-31 (CA).

⁶² See para. 9.21 below.

⁶³ See para. 9.23 below. The Supreme Court of Canada has recently held, however, that the hearsay statements of co-conspirators adequately meet the threshold standards of unavailability and reliability: see *R v Mapara* (1005) 195 CCC (3d) 255 (SCC).

case, they may do so on the basis of the principled analysis which had animated the reform of the general rule in the first place. That is, a party can argue that a particular rule does not, in general, or in a particular case, serve the objective of ensuring that necessary reliable evidence is admitted and that unnecessary or unreliable evidence is excluded."

8.41 We have considered in more detail the common law exceptions to the hearsay rule preserved in England by virtue of section 118(1) of the Criminal Justice Act 2003. That section preserved the exceptions relating to public information, reputation as to character, reputation or family tradition, admissions by agents and statements made by one party against another in relation to a common enterprise. On reflection, and taking account of the views expressed on consultation, we consider that more common law exceptions should be preserved as this would provide greater certainty and predictability to practitioners, save court time and avoid an abrupt change in the law.⁶⁴

8.42 Secondly, as an ultimate safeguard against possible miscarriages of justice, we believe it is necessary to confer on the judge a power to direct a verdict of acquittal in certain cases where prosecution hearsay evidence is admitted. We explain this proposal further in the next Chapter.

8.43 Thirdly, we believe that extrinsic evidence which corroborates or contradicts the truth of the hearsay statement should be considered by the trial judge in applying the reliability criterion. Under the New Zealand Law Commission's model, the judge only considers whether "*the circumstances relating to the hearsay statement*" provide reasonable assurance that the statement is reliable.⁶⁵ Evidence and circumstances unrelated to the statement but confirmatory of its truth cannot be considered by the judge in assessing the reliability precondition. In its discussion paper, the Law Commission explained its imposition of this restriction for "*both logical and practical reasons*":

"[I]logically, the general strength of the case does not affect the reliability of individual items of evidence. Indeed, if the distinction is not made, hearsay which the circumstances relating to the statement indicate to be reliable, may tend to be held inadmissible because other evidence is contradictory or neutral. From a practical point of view, drawing the distinction also enables the court to consider a reasonably limited set of circumstances when determining whether the statement should be admitted (although it will still be necessary on occasions for the judge to hold a voir dire). Moreover, limiting the relevant circumstances to those relating to the statement means that

⁶⁴ See the more detailed discussion on this at paragraphs 9.21 to 9.37 below.

⁶⁵ See section 19(a) of the NZ Law Commission Report 55 – Vol 2 (cited above), at 52.

*admissibility can be determined at the time the statement is offered in evidence.*⁶⁶

8.44 Our view on this issue is that the trial judge should have a greater degree of flexibility in drawing upon evidence that can support the threshold reliability criterion. We believe that the essence of this criterion is the requirement that the judge be satisfied of reasonable assurances as to the statement's veracity. We do not believe that such assurances should be artificially restricted to the circumstances surrounding the making of the statement. Logic and common sense dictate that evidence and circumstances corroborative of the facts asserted in a statement can help assure a person of the probable truth of those facts.

8.45 Further, we do not believe that the inclusion of supporting evidence as only an additional factor to consider on threshold reliability will interfere with the proper function of the judge *vis-à-vis* the jury. The determination of whether there are reasonable assurances of the statement's veracity is clearly a threshold issue and is analytically distinct from the question, which the jury is left to decide, of whether the statement is in fact true. However, we recognise that there is a risk that the province of the jury may be infringed if the judge looks to the absence of supporting evidence as a basis for excluding statements which might otherwise have sufficient threshold reliability. This is a practice we do not endorse. In principle, we believe that if the circumstances surrounding the making of the statement confer sufficient threshold reliability, the absence of supporting evidence should not preclude the satisfaction of this criterion.

8.46 Finally, on the question of whether admissibility can be determined at the time the evidence is adduced if supporting evidence becomes an included factor, we believe the answer to this will remain affirmative.

8.47 In the sub-committee's consultation paper, it was noted that this was a controversial issue as a majority of the justices on the US Supreme Court in *Idaho v Wright* had rejected this more flexible approach.⁶⁷ It was also noted that five of the judges on the Supreme Court of Canada in *R v Starr* endorsed the US approach.⁶⁸ Subsequent to the publication of the consultation paper, the Supreme Court of Canada revisited the issue and this time the court unanimously accepted the flexible approach to reliability that allows consideration of supporting evidence in assessing reliability.

8.48 In *R v Khelawon*, the Supreme Court of Canada made a breakthrough in its hearsay jurisprudence by recognising a functional approach to the reliability criterion. Justice Charron explained that the reliability requirement was met in two different ways:

⁶⁶ See NZ Law Commission, Preliminary Paper No 15 (cited above), at 18.

⁶⁷ *Idaho v Wright*, 110 SCt 3139 (1990). See also paras 8.36 to 8.40 of the consultation paper.

⁶⁸ *R v Starr* (2000) 147 CCC (3d) 449 (SCC), at paras 215-7.

"One way is to show that there is no real concern about whether the statement is true or not because of the circumstances in which it came about. Common sense dictates that if we can put sufficient trust in the truth and accuracy of the statement, it should be considered by the fact finder regardless of its hearsay form..."

*Another way of fulfilling the reliability requirement is to show that no real concern arises from the fact that the statement is presented in hearsay form because, in the circumstances, its truth and accuracy can nonetheless be sufficiently tested... [C]ommon sense tells us that we should not lose the benefit of the evidence when there are adequate substitutes for testing the evidence."*⁶⁹

Thus, under this approach extrinsic evidence that supports the truth and accuracy of the statement becomes relevant and admissible to the reliability inquiry.

8.49 Justice Charron also expressly stated that certain passages in *Starr* should no longer be followed and that the minority position in *Idado v Wright* was to be preferred.⁷⁰ *Khelawon* is an important and persuasive judgment which has helped to fortify the position adopted in the consultation paper.

Recommendation 9

9A. We recommend a modified version of Option 3 (the New Zealand Law Commission model) as the proposed model of reform. We accordingly recommend that, save for those statutory provisions and common law rules respectively mentioned in proposals 4 and 5 of the Core Scheme, the admission of hearsay evidence should be based on a single statutory discretionary power to admit hearsay evidence if it is both necessary and reliable.

9B. We recommend that only those common law exceptions provided in proposal 5 of the Core Scheme be preserved.

9C. We recommend that in cases where prosecution hearsay evidence has been admitted, the judge should have the power to direct a verdict of acquittal where upon an overview of the prosecution evidence once adduced, it would be unsafe to convict the accused.

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R v Khelawon (2006) 215 CCC (3d) 161, at paras 62-3.

⁷⁰

R v Khelawon (2006) 215 CCC (3d) 161, at paras 93-100.

9D. The New Zealand Law Commission model proposes that the judge, in assessing the reliability criterion, only considers "circumstances relating to the statement". We recommend that the ambit of listed factors to be considered under this criterion be widened to include the presence of supporting evidence.

Chapter 9

Proposed model for reform: the Core Scheme

Overview of proposed model

9.1 Our proposed model for reform consists of the Core Scheme and a series of proposals on special topics. The Core Scheme is a package of proposals aimed at addressing the most pressing shortcomings of the present law. The special topics address important hearsay related topics, including out-of-court statements of witnesses testifying orally in court (known as "viva voce" witnesses), existing statutory hearsay exceptions, and hearsay evidence in non-trial proceedings. This chapter is principally concerned with the Core Scheme while Chapter 10 addresses the special topics.

9.2 There are four critical points that must be kept in mind when considering the terms of the Core Scheme:

- (a) The Scheme is presented as a package proposal rather than a series of individual proposals. In the deliberations and work of the sub-committee, each part of the package was delicately structured and balanced against other parts of the package. This is not to say, strictly speaking, that the Scheme must be taken as a whole or rejected. Nor is it to say that individual parts of the package cannot be subject to further consideration and refinement. Rather, the point is simply that the Scheme must be read and understood holistically, as a system for the fair and principled admission of hearsay evidence.
- (b) While the terms of the Scheme do not purport to be precise legislative language, its construction was certainly prepared with legislative logic and structure in mind. Certain expressions were chosen with the specific intention of being directly transplanted into legislation. Those words and phrases are specifically highlighted in the proposed Core Scheme below.
- (c) The Scheme is a product of the best ideas and practices from the pre-eminent common law jurisdictions around the world that have applied the hearsay rule in criminal proceedings. It has benefited from this wealth of international experience and commentary.

- (d) The Scheme has been tested against the safeguards identified in Chapter 7. It is recommended as the model that most effectively addresses the shortcomings in the existing law while adhering to the safeguards required by adversarial proceedings and fair trial standards.

The proposed Core Scheme

9.3 The Core Scheme is a package of 15 proposals, the terms of which are stated below. The passages in bold italics are words or phrases that were the subject of particular discussion by the sub-committee and which they intended to be adopted in any legislation.

The Core Scheme

1. Hearsay means a statement that:
 - (a) was made by a person (the declarant) other than a witness;
 - (b) is offered in evidence at the proceedings to prove the truth of its content;¹ and
 - (c) is a written, non-written or oral communication which was intended to be an assertion of the matter communicated.
2. Hearsay evidence may not be admitted in criminal proceedings except under the terms of these proposals.
3. Unless otherwise stipulated, all previous common law rules relating to the admission of hearsay evidence (including the rule excluding statements containing implied assertions) are abolished.
4. Nothing contained in these proposals shall affect the continued operation of existing statutory provisions that render hearsay evidence admissible.
5. The common law rules that relate to admissibility of the following evidence are not affected by these proposals:
 - (a) admissions, confessions, and statements against interest made by an accused;
 - (b) acts and declarations made during the course and in furtherance of a joint or common enterprise or conspiracy;
 - (c) expert opinion evidence;²
 - (d) evidence admissible upon application for bail;

¹ Paras (a) and (b) of proposal 1 are taken from the New Zealand Code, section 4: New Zealand Law Commission, *Evidence: Evidence Code and Commentary* (1999), Report 55 - Vol 2, at 10.

² This is intended to preserve the rules by which experts in the tendering of evidence may refer to and rely upon research and expert findings of others.

- (e) evidence admissible in sentencing proceedings, except when the prosecution is relying on hearsay evidence to prove an aggravating factor;
 - (f) public information;
 - (g) reputation as to character;
 - (h) reputation or family tradition;
 - (i) *res gestae*; and
 - (j) admissions by agents.
6. (a) Hearsay evidence shall be admitted ***where each party in relation to whom the evidence is to be adduced agrees to its admission for the purposes of those proceedings.***³
- (b) An agreement under this proposal may with the leave of the court be withdrawn in the proceedings for the purposes of which it is made.
7. Hearsay evidence not admitted under proposals 4, 5 or 6 is admissible only where:
- (a) ***the declarant is identified to the court's satisfaction;***
 - (b) oral evidence given in the proceedings by the declarant would be admissible of that matter;
 - (c) ***the conditions of***
 - (i) ***necessity and***
 - (ii) ***threshold reliability***
 stipulated in proposals 8 to 12 below are satisfied; and
 - (d) ***the court is satisfied that the probative value of the evidence is greater than any prejudicial effect it may have on any party to the proceedings.***⁴
8. The condition of necessity will be satisfied only:
- (a) where the declarant is dead;
 - (b) ***where the declarant is unfit to be a witness, either in person or in any other competent manner, at the proceedings because of his age or physical or mental condition;***
 - (c) where the declarant is outside Hong Kong and it is not reasonably practicable to secure his attendance, or to ***make him available for examination and cross-examination in any other competent manner,***⁵
 - (d) where the ***declarant cannot be found and it is shown that all reasonable steps have been taken to find him;*** or

³ This proposal is inspired by section 3(1)(a) of the South African Law of Evidence Amendment Act, 45 of 1988.

⁴ This was the subject of much discussion in the Sub-committee, and summarised in paragraphs 9.65 to 9.78 of this report.

⁵ The expression "*in any other competent manner*" is presently used in the Criminal Procedure (Scotland) Act 1995 (c46), section 259(2)(b), which was derived from clause 1(1)(b) of the proposed Criminal Evidence (Scotland) Bill in the Scottish Law Commission's report no 149 (Dec 1994).

- (e) where the declarant refuses to give evidence in circumstances where the declarant would be entitled to refuse to testify on the ground of self-incrimination.
9. The condition of necessity will not be satisfied ***where the circumstances said to satisfy the condition have been brought about by the act or neglect of the party offering the statement, or someone acting on that party's behalf.***
 10. The burden of proving the condition of necessity is on the party applying to admit the hearsay evidence. In the case of the prosecution, the standard of proof is beyond reasonable doubt, and in the case of the defence, the standard is on the balance of probabilities.
 11. ***The condition of threshold reliability will be satisfied where the circumstances provide a reasonable assurance that the statement is reliable.***⁶
 12. In determining whether the threshold reliability condition has been fulfilled, ***the court shall have regard to all circumstances relevant to the statement's apparent reliability, including:***
 - (a) ***the nature and contents of the statement;***
 - (b) ***the circumstances in which the statement was made;***
 - (c) ***any circumstances that relate to the truthfulness of the declarant;***
 - (d) ***any circumstances that relate to the accuracy of the observation of the declarant;***⁷ and
 - (e) ***whether the statement is supported by other admissible evidence.***
 13. Rules of court are to be made that a party give notice of his intention to adduce hearsay evidence under proposal 7; that evidence is to be treated as admissible if notice has been properly served, and no counter notice has been served; that the failure to give notice means that the evidence will not be admitted save with the court's leave; that where leave is given, the tribunal of fact may draw inferences, if appropriate, from the failure to give notice; and that the failure to give notice may attract costs.
 14. Where in any proceedings hearsay evidence is admitted by virtue of these proposals:

⁶ The wording of proposal 11 is partly based on the New Zealand Code, section 19(a): New Zealand Law Commission Report 55 – Vol 2, at 52.

⁷ Proposals 12(a) to (d) are taken from the New Zealand Code, section 16 (1)(a)-(d): New Zealand Law Commission report 55 – Vol 2, at 44 and 46.

- (a) any evidence which, if the declarant had given evidence in connection with the subject matter of the statement, would have been admissible as relevant to his credibility as a witness shall be admissible for that purpose in those proceedings; and
 - (b) evidence tending to prove that the declarant had made a statement inconsistent with the admitted statement shall be admissible for the purpose of showing that the declarant has contradicted himself.⁸
15. (a) ***At the conclusion of the case for the prosecution, or at any time thereafter, in any proceedings in which hearsay evidence is admitted under proposal 7 of the Core Scheme, the court shall direct the acquittal of an accused against whom such evidence has been admitted under the terms of these proposals where the judge considers that, taking account of the factors listed at proposal 15(b), and notwithstanding the fact that there is a prima facie case against the accused, it would be unsafe to convict the accused.***
- (b) ***In reaching its decision under this proposal, the court shall have regard to:***
- (i) ***the nature of the proceedings;***
 - (ii) ***the nature of the hearsay evidence;***
 - (iii) ***the probative value of the hearsay evidence;***
 - (iv) ***the importance of such evidence to the case against the accused;⁹ and***
 - (v) ***any prejudice to an accused which may eventuate consequent upon the admission of such evidence.¹⁰***

⁸ Proposals 15(a) and (b) are based on section 259(4)(a) and (c) of the Criminal Procedure (Scotland) Act 1995, which was derived from clause 1(5)(a) and (c) of the Criminal Evidence (Scotland) Bill annexed to the Scottish Law Commission's Report 149 (Dec 1994): Scottish Law Commission, *Evidence: Report on Hearsay Evidence in Criminal Proceedings* (1995), Scot Law Com No 149, at 96. These statutory exceptions to existing exclusionary rules are important safeguards.

⁹ This factor is derived from section 125(3)(b)(ii) ("*considering its importance to the case against the person*") of the Criminal Justice Act 2003 (UK) (c44), which implements proposed clause 14(1)(b) of the Criminal Evidence Bill in the English Law Commission's Report 245 (June 1997): English Law Commission report: *Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997), Law Com No 245, at 214.

¹⁰ Proposals 16(b)(i)-(iii) and (v) are based on section 3(1)(c) of the South African Law of Evidence Amendment Act, 45 of 1988.

Recommendation 10

The Core Scheme envisages admitting hearsay in only one of four ways: an existing statutory exception (proposal 4), a preserved common law exception (proposal 5), consent of the parties (proposal 6), or the general discretionary power to admit hearsay (proposal 7).

We recommend that the Core Scheme, as set out in this report, be adopted as a whole as the main vehicle for reforming the law of hearsay in Hong Kong criminal proceedings.

Explanation

Definition of "hearsay" (proposal 1)

9.4 Proposals 1(a) and (b) contain the familiar two part definition of hearsay applied at common law.¹¹ Hearsay is an out-of-court statement used to prove the truth of its content. The language of these two clauses is based on the definition of "hearsay" in section 4 of the New Zealand Code. As was noted in the commentary to that section, this definition of hearsay does not include out-of-court statements made by a witness to the proceeding.¹² While such statements, when admitted for the truth of their contents, also give rise to hearsay concerns, there tend to be additional considerations that apply when the statement maker is present as a witness and available for cross-examination. Thus, hearsay statements of witnesses are treated separately as a discrete issue discussed in Chapter 10.

9.5 Proposal 1(c) specifies that hearsay must exist in written or non-written (such as oral) communication. While this clearly implies that the communication be in the form of words, the intention is not to confine hearsay only to verbal communication. Non-verbal communication in the form of conduct can also be assertive and should come within the definition. Examples of non-verbal conduct containing hearsay include the nodding of one's head or pointing of one's finger.

Recommendation 11

We recommend that the definition of hearsay in the Core Scheme should not include prior statements made by a witness who is available to testify in the trial proceedings.

¹¹ See the famous statement in *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 (PC), at 970.
¹² See New Zealand Law Commission Report 55 – Vol 2 (cited above), at paras C18 -19.

Recommendation 12

We recommend that the definition of hearsay should include written and non-written, and verbal and non-verbal, communication.

Implied assertions outside the definition (proposal 1)

9.6 Proposal 1(c) only brings communication "*which was intended to be an assertion of the matter communicated*" within the definition of hearsay. The intention of this proposal is to exclude "implied assertions" from the definition of hearsay and, in conjunction with proposal 3, to abrogate the common law rule that excluded "implied assertions" as hearsay. This proposal follows the steps taken by other countries to remove implied assertions from the ambit of the exclusionary rule.¹³ Underlying this reform is the recognition that implied assertions do not intend to convey a communication to another person, and thus the risk of fabrication is substantially reduced. Without the need to consider the sincerity of the declarant, the task of weighing the evidence containing the implied assertion becomes easier for the tribunal of fact.

9.7 The sub-committee's consultation paper sought views on the alternative of retaining implied assertions within the definition of hearsay and admitting them only if the conditions of necessity and threshold reliability were met. The views of those responding to the paper were divided on this issue, with strong opinions either way. Mr Justice McMahon favoured the alternative formulation suggested in the consultation paper of retaining implied assertions within the definition of hearsay, to be subject to the same necessity and reliability tests as express hearsay. He said:

"If the finding of the jury is to be based on information provided by a third party declarant it seems irrelevant to me what form the information is in, ie whether it be an express statement or whether it be an implied statement. The important thing is not the form the statement takes, but the reliability of the information conveyed by the statement. If an implication is drawn from a hearsay statement in my view that statement should be

¹³ Most recently, see the Criminal Justice Act 2003 (UK), section 115(3) which statutorily reverses the majority's decision in *R v Kearley* [1992] 2 AC 228 (HL). That section provides that a matter stated is hearsay if one of the purposes of the person making the statement is "*to cause another person to believe the matter ... or to cause another person to act or a machine to operate on the basis that the matter is as stated.*" The provision was applied in *R v Singh* [2006] EWCA Crim 660 (CA). See also the reforms in the United States (Federal Rules of Evidence, Art VIII, R 801), and proposed New Zealand Code, section 4. In Canada, the exclusion of implied assertions has largely been ignored by the judiciary, see eg DM Paciocco & L Stuesser, *The Law of Evidence*, 3rd ed (Toronto: Irwin Law, 3rd edition 2002) footnote 4-12 and accompanying text. See also the definition of hearsay in section 59(1) of the Federal Evidence Act 1995 (Australia).

subjected to the same threshold reliability test as an express hearsay statement."

9.8 In contrast, Professor Paul Roberts "*strongly endorsed*" the original proposal that implied assertions be removed from the scope of hearsay altogether. He considered that *Kearley* was wrongly decided and that:

"... the hearsay rule cannot be coherently applied to 'implied assertions' in the sense in which that phrase is invoked in this context. If asking a question involves an 'implied assertion', then so does any purposive human conduct – and virtually all evidence potentially becomes hearsay."

Professor Roberts concluded that: "*Reversing the theoretically confounding impact of Kearley is an essential first step to putting hearsay law back on a coherent and practically serviceable basis.*"¹⁴

9.9 One concern highlighted in the consultation paper was that there might be cases where implied assertions were unreliable, such as where a telephone caller might seek to incriminate another by a *Kearley* type series of calls. In this example, however, if it could be established that the calls were purposely being made to incriminate or "set up" the accused then the assertion would cease to be an implied one. The caller would be "intending" to make the assertion that the accused was a drug supplier and thus, under proposal 1, the caller's conduct and statements would be treated as hearsay for the purposes of the Core Scheme. Where the implied assertion is not the product of intention, it will not be hearsay and we believe that the tribunal of fact can safely be left to evaluate the strengths and weaknesses of the evidence.

9.10 Without intending to draft precise legislative language, it should be noted that the use of the word "statement" was not intended to have any additional meaning beyond that contained in clauses (a), (b) and (c) of proposal 1.

Recommendation 13

We recommend that the common law rule that excludes implied assertions as hearsay be abrogated.

¹⁴

See also the criticisms of implied assertions in Professor John Spenser's book, *Hearsay Evidence in Criminal Proceedings* (Portland, OR: Hart Publishing, 2008), at paras 1.17 and 1.41 - 1.42.

Multiple hearsay (proposal 1)

9.11 The Core Scheme treats "multiple hearsay" in generally the same way it is currently treated under the common law. The definition of "hearsay" in proposal 1 encompasses all levels of hearsay. Accordingly, the prohibition against the admission of hearsay in proposal 2 applies to all levels of hearsay, whether first-hand, second-hand, or more remote.

9.12 However, except when the parties against whom the evidence is to be admitted agree, there is no "one-shot" admissibility of multiple hearsay under the Scheme. In other words, as was the case under the common law, it is proposed that multiple hearsay should continue to be admissible only if each level of hearsay comes within an exception to the exclusionary rule.

9.13 Take the example of a witness (W) giving evidence about the colour of a car. W says, "*Albert (A) told me the car was green because Bob (B), who was the only one who saw the car, told him so.*" If this statement is to be admissible evidence to prove that the car was green, it requires admitting two levels of hearsay: first, what A said to W was true (ie B in fact told certain things to A), and second, what B said to A was true (ie B really saw the green car). It is proposed that each level of hearsay must be separately admissible under the terms of the proposed Core Scheme.

Recommendation 14

We recommend that multiple hearsay be admissible under the Core Scheme only if each level of hearsay itself satisfies the Scheme's tests for admissibility.

Definition of "criminal proceedings" (proposal 2)

9.14 The Core Scheme is intended to apply to "criminal proceedings", according to proposal 2. The definition of "criminal proceedings" should include all proceedings that presently apply the common law exclusionary rule, such as trial proceedings, *voir dire* proceedings, and committal proceedings.¹⁵ Proceedings that do not presently adopt the exclusionary rule will not be affected by the Core Scheme. Such proceedings include bail hearings,¹⁶ confiscation hearings where the defendant has died or absconded,¹⁷ forfeiture hearings under Part IVA of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405),¹⁸ and civil contempt proceedings.¹⁹

¹⁵ For comparison, see section 134(1) of the new Criminal Justice Act 2003 (UK), which defines "criminal proceedings" as "*criminal proceedings in relation to which the strict rules of evidence apply*".

¹⁶ See also proposal 5(d) which makes this intention clear.

¹⁷ See *Secretary for Justice v Lee Chau-ping* [2000] 1 HKLRD 49 (CFI).

¹⁸ See *Secretary for Justice v Lin Xin-nian* [2001] 2 HKLRD 851 (CA).

¹⁹ See *Aqua-Leisure Industries Inc. v Aqua Splash Ltd. (No 2)* [2002] 1 HKLRD 241 (CFI).

Recommendation 15

We recommend that the Core Scheme apply only to those criminal proceedings that currently apply the common law hearsay rule.

9.15 It is at present unclear whether the hearsay rule applies to sentencing proceedings in Hong Kong.²⁰ Generally speaking, we believe that since the jury is not involved in the sentencing process, the sentencing judge should have a fair degree of discretion to receive a wide range of relevant evidence on sentencing. In practice, documents and reports containing information about the offender and the impact of the offence are often admitted as evidence. Sentencing proceedings, particularly in the lower courts, should in principle be expeditious rather than involve protracted disputes on factual issues. It is in the interest of both offenders and society that an appropriate sentence be imposed in a timely manner after conviction and rules of evidence should facilitate this as much as possible.

9.16 However, it is recognised that, since aggravating factors relied upon by the prosecution can have a direct bearing on the length of a custodial sentence, greater evidential safeguards should apply to evidence of such factors.²¹ Thus, we propose that where the prosecution wishes to adduce evidence of aggravating factors that the defence does not admit, the evidence insofar as it is hearsay should only be admissible if it comes within the terms of the Core Scheme. This issue is discussed more fully at paragraphs 10.90 to 10.102 below.

9.17 In its response to the consultation paper, the Hong Kong Police Force expressed concern at the practical difficulties which this proposal might cause. The police pointed out that the information furnished in support of an application for enhancement of sentence under section 27 of the Organised and Serious Crimes Ordinance (Cap 455) often consisted of statistical data. There would be difficulties in identifying the multiplicity of declarants involved in such data to the court's satisfaction, as required by proposal 7(a) of the Core Scheme. Mr Justice McMahon also questioned whether the proposal was workable:

"Factors and materials in sentencing are so wide ranging hearsay inevitably enters into every sentencing proceeding. In my view requiring the prosecution to prove hearsay evidence under an evidential provision so as to prove an aggravating fact opens the door to undue complication of proceedings which presently in Hong Kong (unlike other jurisdictions) work very well."

²⁰ Compare *HKSAR v Ma Suet-chun* [2001] 4 HKC 337, which held that hearsay was admissible, with *R v Cheung Ching-kwong* [1986] HKC 109 (CA).

²¹ See *R v Gardiner* (1982) 140 DLR (3d) 612 (SCC); *R v Newton* (1982) 4 Cr App R (S) 388.

9.18 It is not our intention that sentencing proceedings should be unnecessarily prolonged or complicated. In our view, however, the gravity of proceedings at the sentencing stage is no different from that when determining guilt or innocence and the admissibility of hearsay at the sentencing phase should be on the same basis as in the guilt-determination phase. The proposal for the admissibility of hearsay at trial is predicated on relevance, necessity and reliability, and incorporates innate safeguards.

Recommendation 16

We recommend that the Core Scheme should apply in sentencing proceedings only when the prosecution is relying on hearsay evidence to prove an aggravating factor.

9.19 We believe, however, that extradition proceedings should be included in the definition of "criminal proceedings" in proposal 2. Extradition proceedings are equivalent to domestic committal proceedings in which the strict rules of evidence apply. While section 23 of the Fugitive Offenders Ordinance (Cap 503) provides a statutory hearsay exception that allows for hearsay in extradition proceedings, we believe the Core Scheme should be applied to admit hearsay evidence, whether adduced by the defence or prosecution, that does not come within section 23. This issue is discussed more fully at paragraphs 10.103 to 10.105.

Recommendation 17

We recommend that the Core Scheme should apply to extradition proceedings.

Exclusionary rule retained (proposal 2)

9.20 Proposal 2 retains the common law exclusionary rule against hearsay evidence, as that term is defined in proposal 1.²² Proposal 2 also makes clear that the Core Scheme is meant to be the exclusive vehicle for the admission of hearsay in criminal proceedings. As mentioned earlier, the Core Scheme envisages the admission of hearsay in one of four ways: an existing statutory exception (proposal 4), a preserved common law exception (proposal 5), consent of the parties (proposal 6), or the general discretionary power to admit hearsay (proposal 7).

²² See above Chapter 8, paragraph 8.7, where the justification for keeping the general exclusionary rule is discussed.

Recommendation 18

We recommend the codification of the exclusionary rule as the starting point in the Core Scheme.

Effect on the common law (proposals 3-5)

9.21 Proposals 3 and 5 abolish all existing common law rules relating to the admission of hearsay evidence, except those that relate to the admissibility of:

- (a) admissions, confessions, and statements against interest made by an accused;
- (b) acts and declarations made during the course and in furtherance of a joint or common enterprise or conspiracy;
- (c) expert opinion evidence;
- (d) evidence admissible upon application for bail;
- (e) evidence admissible in sentencing proceedings, except when the prosecution is relying on hearsay evidence to prove an aggravating factor;
- (f) public information;
- (g) reputation as to character;
- (h) reputation or family tradition;
- (i) *res gestae*; and
- (j) admissions by agents.

9.22 The abolition of all previous common law rules includes the rule excluding "implied assertions" as hearsay.²³

9.23 The list of existing common law exceptions chosen for retention was intended to be minimal because, as explained in Chapter 8, exceptions whose rationale for admissibility was based on the principles of necessity and reliability would become redundant under the terms of the Core Scheme.²⁴ The list of retained exceptions is somewhat longer than that originally proposed in the consultation paper and is now more in line with the exceptions listed in section 118(1) of the Criminal Justice Act 2003 in England. As outlined below, the retained exceptions were chosen for specific reasons, such as their settled and well-established character, their particular underlying rationales, or because their removal would have potential implications beyond the law of hearsay.

²³ See also the related discussion of "implied assertions" in paragraphs 9.6 to 9.10 above.

²⁴ All of these common law exceptions have also been retained in England in section 118(1) of the Criminal Justice Act 2003.

9.24 **Admissions and confessions (proposal 5(a)).** At common law, an admission or confession made by an accused is an exception to the hearsay rule. The exception applies by simply determining if the statement is against the defendant's interest without any further inquiry into its apparent reliability. The mixed statement rule extends the exception to statements that contain both exculpatory and inculpatory parts.²⁵ Before a confession is admissible, the prosecution must prove beyond reasonable doubt that it was made voluntarily.²⁶ As a statement against interest, once admitted, it can only be used against the maker of the statement and not against any co-accused.²⁷ But, according to the majority's decision in *R v Myers*, co-accused B is entitled to use co-accused A's confession to exculpate himself even if the prosecution is not relying on the confession.²⁸ The only precondition to using the confession in this way is proving the confession was made voluntarily.²⁹ In *Myers*, the House of Lords also affirmed the common law rule that a co-accused has an absolute right to call evidence to defend himself, even if that evidence is prejudicial to another co-accused, and the court has no discretion to try to balance the rights of the two co-accused.

9.25 Given the many specialised rules and principles governing the admission of confessions, we believe it is desirable for the common law in this area to continue to operate on its own independent of the Core Scheme. We believe the rationale for this exception (ie that statements against one's penal interest have inherent reliability) is sound.³⁰ We also accept the established mixed statement rule which, in fairness to an accused, admits both the exculpatory and inculpatory parts of his confession but permits a distinction to be drawn in the weight to be placed upon each. To subject all confessions to a new inquiry of necessity and threshold reliability could generate unnecessary litigation and prolong proceedings.

9.26 **Co-conspirators' rule (proposal 5(b)).** It is well established at common law that everything said or done by a co-conspirator in the execution or furtherance of the conspiracy is admissible as an exception to the hearsay rule against all the members of the conspiracy.³¹ But since the rationale for this rule lies primarily in principles of agency, it would be inappropriate to subject this evidence to the Core Scheme, which requires necessity and threshold reliability as preconditions to admissibility.

²⁵ See *Li Defan & Another v HKSAR* (2001) 4 HKCFAR 323 (CFAAC).

²⁶ See *Chau Ching-kay v HKSAR* [2003] 1 HKLRD 99 (CFA).

²⁷ See *Wong Wai-man & Others v HKSAR* [2000] 3 HKLRD 313 (CFA).

²⁸ *R v Myers* [1998] AC 124 (HL).

²⁹ See Lord Slynn's decision in *R v Myers* [1998] AC 124 (HL), at 136. In *R v Lawless and Lawson* [2003] EWCA Crim 271 (CA), it was suggested that the ruling should be confined to cases where only one of two persons (both co-accused before the court) could have committed the offence.

³⁰ Some critics have challenged this rationale and have suggested that the true reason for admitting confessions is because the defendant cannot complain about the lack of opportunity to cross-examine when it is he alone who decides whether the opportunity should exist. See JC Smith, *Criminal Evidence* (Sweet & Maxwell: London, 1995), at 97; *Evans v The Queen* (1993) 85 CCC (3d) 97, at 104. Indeed, this rationale may help to explain the *ratio decidendi* in *Myers* [1998] AC 124 (HL).

³¹ See *HKSAR v Cheng Sui-wa* [2003] 4 HKC 571 (CA); *R v Alick Au* [1993] 2 HKC 219 (CA); *HKSAR v Booth* [1998] 1 HKLRD 890 (CFI).

9.27 In *R v Chang*,³² the Ontario court considered whether the co-conspirator's exception to hearsay conformed to the principled approach to hearsay, an evaluation that was necessitated following the Supreme Court of Canada's decision in *R v Starr*.³³ In the result, the court held that the common law exception (as it exists in Canada) satisfied the conditions of necessity and threshold reliability. In respect of the latter condition, the court began its analysis with the following observations about the exception:

"[T]he co-conspirators' rule is a long-recognized and well-entrenched feature of criminal conspiracy trials. The rule is steeped in common law history and similar approaches have been a fundamental part of the law of evidence in Canada, the United States, Great Britain, Australia and New Zealand for many years.

*The broad acceptance of the rule, of course, cannot validate it under the principled approach. However, it can safely be asserted that for generations courts have proceeded on the basis that hearsay statements of co-conspirators made in furtherance of a conspiracy can be used as affirmative evidence that an accused is a member of the conspiracy. The significance of the history of the rule is simply that one should start the re-evaluation exercise with respect for the experience and wisdom of the ages. The co-conspirators' rule was no doubt developed and applied with a view to assisting the truth-seeking process and to achieving fair and just results in criminal conspiracy cases. Implicit in the rule is the assumption that it is safe to permit a trier of fact to use hearsay that comes within the three-step Carter process. One should discard a rule that has achieved such broad acceptance only with reluctance."*³⁴

9.28 More importantly, the court considered the "in furtherance of the conspiracy" requirement as an important safeguard providing a guarantee of trustworthiness to the statement. It explained its reasoning in these terms:

"The rule does not permit the trier of fact to consider idle conversation, or narrative description of past events. Rather, the trier may only rely on acts or declarations that further the common interest, which are the very acts and declarations the parties themselves are likely to have relied upon in seeking to achieve the common goal.

³² *R v Chang* (2003) 173 CCC (3d) 397 (OntCA).

³³ *R v Starr* (2000) 147 CCC (3d) 449.

³⁴ *R v Chang* (2003) 173 CCC (3d) 397 (OntCA), at paras 112 - 113. The reference to the Carter process is a reference to *R v Carter* [1982] 1 SCR 938, which establishes the Canadian test for admissibility on terms somewhat different from the test applied in Hong Kong.

Those types of statements have the reliability-enhancing qualities of spontaneity and contemporaneity to the events to which they relate. Other hearsay exceptions recognize that people are more likely to be truthful when speaking spontaneously with less opportunity for contrivance. By way of example, it is presumed, absent circumstances of suspicion, that a statement of future intention refers to what a person intends to do and that a record prepared during the ordinary course of business is likely to be accurate.

*Indeed, the 'in furtherance' requirement imbues co-conspirators' declarations with res gestae type qualities. 'In furtherance' declarations are the very acts by which the conspiracy is formulated or implemented and are made in the course of the commission of the offence. See, for example, R v Pilarinos (2002), 2 CR (6th) 273 (BCSC); R v Keen, [1999] EWJ No. 5578 (QL) (CA (Crim Div))."*³⁵

A majority of the judges in the Supreme Court of Canada approved of this reasoning in *Regina v Mapara*.³⁶ We agree with this reasoning and consider it desirable to keep the co-conspirators' rule as part of the common law separate from the Core Scheme.

9.29 **Expert opinion evidence (proposal 5(c)).** It is well-established in England and Hong Kong that expert witnesses are entitled to draw on the works of others in their field of expertise as part of the process of arriving at a conclusion.³⁷ This proposal aims to preserve this settled and well-established common law exception, which in practice is applied with little controversy.

9.30 **Evidence admissible upon application for bail (proposal 5(d)).** This proposal makes clear that the Core Scheme was not intended to apply to bail hearings, which are presently conducted without applying the strict rules of evidence. The proposal may be redundant if there is a clear definition that excludes "bail proceedings" from the meaning of "criminal proceedings" in proposal 2.

9.31 **Evidence admissible in sentencing proceedings, except when the prosecution is relying on hearsay evidence to prove an aggravating factor (proposal 5(e)).** This proposal reflects the intention of Recommendation 16 discussed earlier in this chapter that the hearsay rule should continue not to apply in sentencing proceedings, save where the prosecution seeks to prove an aggravating factor.

³⁵ *R v Chang* (2003) 173 CCC (3d) 397 (OntCA), at paras 121 - 123.

³⁶ 2005 SCC 23

³⁷ See *R v Adadom* (1983) 76 Cr App R 48 (CA); *R v Somers* (1964) 48 Cr App R 11 (CCA); *The Queen v Wan Pui-hay* [1994] 2 HKCLR 47 (CA), at 48 - 49; *R v Leung Chi-kin* [1970] HKLR 25 (FC).

9.32 **Public information (proposal 5(f)).** Section 118(1) of the English Criminal Justice Act 2003 includes within the scope of this exclusion published works dealing with matters of a public nature (such as histories, scientific works, dictionaries and maps), public documents (such as public registers, and returns made under public authority with respect to matters of public interest), records (such as the records of certain courts, treaties, Crown grants, pardons and commissions) and evidence relating to a person's age or date or place of birth. Excluding this evidence from the application of the Core Scheme does not run the risk of causing injustice to the accused or of infringing any of the other principles set out at the start of Chapter 7.

9.33 **Reputation as to character (proposal 5(g)).** This is intended to reflect the existing rule that in criminal proceedings evidence of a person's reputation is admissible for the purpose of proving his good or bad character. A similar provision is contained in section 118(1) of the English Criminal Justice Act 2003.

9.34 **Reputation or family tradition (proposal 5(h)).** Evidence as to reputation or family tradition will not fall within the Core Scheme where it is led in criminal proceedings prove or disprove, *inter alia*, pedigree or the existence of a marriage.

9.35 **Res gestae (proposal 5(i)).** Section 118(1) of the English Criminal Justice Act 2003 provides that a statement is admissible as evidence of any matter stated if:

"(a) the statement was made by a person so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded;

(b) the statement accompanied an act which can be properly evaluated as evidence only if considered in conjunction with the statement; or

(c) the statement relates to a physical sensation or a mental state (such as intention or emotion)."

9.36 Specific provision for *res gestae* evidence is necessary to allow its continued admission in criminal proceedings. While the circumstances in which a *res gestae* statement is made might satisfy the Core Scheme's test of "threshold reliability", they may not meet the "necessity" test. The existing common law exception to the hearsay rule for *res gestae* evidence is not confined to statements made by a person who has subsequently died.

9.37 **Admissions by agents (proposal 5(j)).** Again, as with proposals 5(f) to (i), this exclusion mirrors one in section 118(1) of the Criminal Justice Act 2003 in England and Wales.

Recommendation 19

We recommend the abrogation of all common law rules governing the admission of "hearsay evidence" in "criminal proceedings", as those are defined in the Core Scheme, with the exception of the rules governing the admissibility of admissions, confessions, and statements against interest made by an accused, acts and declarations in furtherance of a joint or common enterprise or conspiracy, expert opinion evidence, evidence in bail proceedings, evidence in sentencing proceedings (except when the prosecution relies on hearsay evidence to prove an aggravating factor), public information, reputation as to character, reputation or family history, *res gestae*, and admissions by agents.

Continued operation of existing statutory exceptions (proposal 4)

9.38 Proposal 4 makes clear that existing statutory exceptions to the common law hearsay rule continue to operate alongside the Core Scheme. There are many statutory exceptions in the Evidence Ordinance, the Criminal Procedure Ordinance and other Ordinances that are of relevance to criminal proceedings. These exceptions were often enacted to serve a specific need or purpose.³⁸ With one exception, we believe that existing statutory exceptions should be left undisturbed.

9.39 The one exception is section 79 of the Evidence Ordinance, which we believe is flawed in many respects. This section provides that in:

"any prosecution for murder or manslaughter any medical notes or report by any Government medical officer which purport to relate to the deceased shall be admissible in evidence upon proof of the handwriting of such Government medical officer, and upon proof of his death or absence from Hong Kong."

It is not clear why this exception should be restricted to cases of murder or manslaughter, to medical notes or reports of only Government doctors, and to cases where the doctor has died or is absent from Hong Kong (a seriously ill doctor within Hong Kong would not qualify). More objectionable is that the exception appears to be only available to the prosecution. In view of these anomalies, we believe there is no justification for retaining section 79 and that the admissibility of medical notes or reports should be governed by the Core Scheme and other statutory exceptions, such as section 22 of the Evidence Ordinance.

³⁸ See, for example, Part VIIIA of the Evidence Ordinance (Cap 8) (overseas evidence obtained via mutual legal assistance arrangements] and Part IIIA of the Criminal Procedure Ordinance (Cap 221) (special procedures for vulnerable witnesses).

Recommendation 20

With the exception of section 79 of the Evidence Ordinance (Cap 8), which should be repealed, we recommend the retention of all existing statutory provisions that enable the admission of hearsay evidence.

Admission by consent (proposal 6)

9.40 The present law prevents the prosecution and defence from agreeing to facts which they are not in a position to prove by admissible oral evidence.³⁹ Thus, a hearsay statement made by a declarant, who is no longer available to testify as a witness, could not be included in an agreed statement of facts between the parties.

9.41 In common with many other law reform agencies, we consider this an anomaly and an unjustified restriction. We believe that if the party or parties in relation to whom the evidence is to be adduced agree to a fact, there should be no impediment to the inclusion of that fact in an agreed statement presented to the court. Facts agreed to in this manner can only be withdrawn with leave of the court.

Recommendation 21

We recommend the admission of hearsay evidence if the party or parties in relation to whom the evidence is to be adduced consent to the admission.

New discretionary power to admit hearsay (proposal 7)

9.42 The central innovation in the Core Scheme is the discretionary power to admit hearsay if five conditions are satisfied. Subject to the prior proposals, the power is intended to be an exclusive one, since proposal 7 states that hearsay evidence is admissible only where the five specific requirements set out in proposal 7 are satisfied. The five preconditions to exercising the discretionary power are explained below.

³⁹ See section 65C of the Criminal Procedure Ordinance (Cap 221) and *R v Coulson* [1997] Crim LR 886 (CA).

Recommendation 22

At the heart of the Core Scheme is the discretionary power to admit hearsay evidence if five preconditions are met: the declarant has been adequately identified; oral testimony of the evidence would have been admissible; the necessity and threshold reliability criteria have been satisfied; and the probative value of the evidence exceeds its prejudicial effect.

We recommend that this discretionary power to admit be the main vehicle by which to admit hearsay evidence in criminal proceedings.

9.43 **Identification of the declarant (proposal 7(a)).** The first prerequisite to the exercise of the discretionary power in proposal 7 is that the declarant be adequately identified. This requirement acts as a safeguard by keeping out, in practice, statements made by "fleeting witnesses" or, more problematic, "concocted witnesses". This identification requirement (together with the notice requirement in proposal 13) will allow parties to make more effective use of proposal 14 which widens the scope of admissible evidence bearing on the credibility of the declarant. The requirement is also found in many other law reform proposals and enactments.⁴⁰

9.44 As to how precisely the declarant must be identified, we believe this is best left to the discretion and good sense of the court. There should be at least sufficient details to rule out the possibility that the declarant's identity has been fabricated.

Recommendation 23

We recommend that the declarant be identified to the court's satisfaction before the discretionary power to admit can be exercised.

9.45 **Oral evidence would be admissible (proposal 7(b)).** This prerequisite states that the hearsay evidence, if given in oral testimony by the declarant, would be admissible. In other words, the evidence must not be barred by other evidentiary rules if it is to be admitted under proposal 7. To some extent, this requirement is made redundant by proposal 4, which expressly preserves the rules of admissibility under other laws. Furthermore, this requirement also prevents multiple hearsay from being considered in a

⁴⁰ See Criminal Justice Act 2003 (UK), section 116(1)(b).

"one-shot" analysis. The statements of each declarant would have to be admissible on their own if the multiple hearsay is to be admitted.

Recommendation 24

We recommend that hearsay evidence should be otherwise admissible before it can be admitted under the discretionary power.

9.46 **The "necessity" criterion (proposals 7(c), 8 & 9).** The necessity criterion is met if there are good reasons why the declarant's testimony cannot be made available at the time of trial. In proposal 8, we reduce these good reasons into six categories. The necessity criterion will only be satisfied if the reason falls within one of these six categories. The underlying principle running through these categories is that the condition of necessity should not turn on the whim or discretion of the declarant to testify. Necessity generally requires either physical or mental inability to testify, either as a witness appearing at trial or by any other competent means. In this respect, we endorse the following two judicial pronouncements on the restricted meaning of necessity:

"This requirement will be satisfied when the primary witness is unable for some reason to be called to give the primary evidence. If the primary witness is personally able to give that evidence, it will seldom, if ever, be appropriate to admit hearsay evidence simply because the witness would prefer not to face the ordeal of giving evidence or would find it difficult to do so. To adopt that approach would be to tilt the balance too far against the accused or opposite party who is thereby deprived of the ability to cross-examine."⁴¹

"It is not sufficient for the Crown to simply show that a witness is not compellable because he or she is out of the jurisdiction, to satisfy the necessity requirement. Efforts should be made to pursue other options (teleconferencing or taking commission evidence are two) before one reaches the conclusion that admitting evidence by way of hearsay statement is necessary. Necessity cannot be equated with the unavailability of a witness. Rather, it must be shown that hearsay is the only available means of putting the evidence before the court..."⁴²

9.47 Death and ill health (categories (a) & (b)) are accepted sufficient reasons for a finding of necessity. The ill health condition also requires a showing that there was no other competent manner (eg live television link) of

⁴¹ See *R v Manase* [2001] 2 NZLR 197 (CA), at 206.

⁴² See *R v O'Connor* (2002) 170 CCC (3d) 365 (Ont CA), at para 57.

securing the declarant's live testimony before the court.⁴³ The declarant's presence outside of Hong Kong will not be enough in itself to satisfy the necessity condition. It will also be necessary to show that it was "*not reasonably practicable to secure his attendance, or to make him available for examination and cross-examination in any other competent manner*" (category (c)). In practice, this will mean that the party relying on this condition will need to exercise reasonable diligence in either arranging the declarant's return to Hong Kong or for the giving of his testimony by live overseas television link.⁴⁴

9.48 The inability to locate the declarant will also be a basis for establishing necessity (category (d)). However, because of the potential for easy abuse of this category, a high due diligence standard is imposed. The party relying on this condition must show "*that all reasonable steps have been taken to find*" the declarant. While not every conceivably possible step must be taken to locate the declarant, the taking of only some reasonable steps will be insufficient.

9.49 As originally presented in the sub-committee's consultation paper, category (e) was restricted to declarants who appeared at trial but refused to testify on grounds of self-incrimination.⁴⁵ On further reflection, we think that that is too restrictive and that this category and proposal 9(e) from which it stems should extend to circumstances where the declarant refuses to give evidence, regardless of whether or not he has appeared at trial.

9.50 The consultation paper included as category (f) circumstances where the declarant has genuinely forgotten the events recorded in his earlier statement, even after having had the opportunity to use the statement to refresh his memory. On further consideration, we have concluded that this category overlaps with Recommendation 39B and C and is therefore unnecessary.

9.51 We have not included "witnesses in fear" in the list of categories⁴⁶ as we believe that including this class of witnesses would require too great an exercise of discretion by the court in determining whether the condition had been fulfilled. Cross-examination of the declarant would be particularly desirable in such cases. We consider that the existing provisions in Part IIIA of the Criminal Procedure Ordinance (Cap 221) that permit witnesses in fear to give their evidence by way of a live television link should be the primary means of enabling the evidence of such witnesses to be taken.

⁴³ Part IIIA of the Criminal Procedure Ordinance (Cap 221) provides for alternative methods of obtaining the testimony of mentally incapacitated persons. This proposal is aligned with the English approach to sections 23 & 26 of the Criminal Justice Act 1988 (UK), see *R v Radak* [1999] 1 Cr App R 187 (CA).

⁴⁴ Part IIIB of the Criminal Procedure Ordinance (Cap 221), which was enacted on 25 June 2003 but has yet to come into force, provides for the receipt of live overseas TV link evidence in Hong Kong criminal trials.

⁴⁵ Similar proposals have been adopted in Scotland (see section 259(2)(d) of the Criminal Procedure (Scotland) Act 1995 (c46) and Scottish Law Commission Report 149 (cited above), at para 5.59-5.62 and the United States (see Federal Rules of Evidence, Rule 804(a)(1)).

⁴⁶ By contrast, see section 116(2)(e), (3) & (4) of the Criminal Justice Act 2003 (UK). But hearsay statements made by witnesses in fear are only admissible on a discretionary basis.

9.52 Under proposal 9, the condition of necessity will not be satisfied where the circumstances said to satisfy the condition of necessity have been brought about by the party himself, or by someone acting on his behalf. The party or agent can bring about such circumstances either by positive acts or neglect. This proposal gives effect to the principle that a party should not be allowed to benefit from his own wrongdoing. It is a qualification found in most law reform proposals elsewhere.⁴⁷

Recommendation 25

We recommend that the necessity condition should only be satisfied where the declarant is genuinely unable to provide testimony of the hearsay evidence and not merely unwilling to do so.

In particular, the necessity condition will only be satisfied if the declarant:

- (a) is dead;**
- (b) is physically or mentally unfit to be a witness;**
- (c) is outside Hong Kong and it is not reasonably practicable to secure his attendance;**
- (d) cannot be found after all reasonable steps have been taken to find him; or**
- (e) refuses to give evidence on the ground of self-incrimination.**

9.53 **The "threshold reliability" criterion (proposals 7(c), 11 & 12).** Under proposal 11, the "threshold reliability" criterion will be satisfied "*where the circumstances provide a reasonable assurance that the statement is reliable*". Under proposal 12, the court is provided with further guidance on how to determine this criterion. The court must have "*regard to all circumstances relevant to the statement's apparent reliability*", including five distinct factors that relate to the circumstances surrounding the making of the statement and the presence of any admissible supporting evidence.

9.54 The name of this reliability criterion was the subject of debate amongst members of the sub-committee. A working group of the sub-committee favoured qualifying "reliability" with a term such as "threshold" or

⁴⁷ See section 116(5) of the Criminal Justice Act 2003 (UK); Federal Rules of Evidence, Rule 804(a); Criminal Procedure (Scotland) Act 1995 (c 46), section 259(3); New Zealand Code, section 16(3); NZ Law Commission Report 55 – Vol 2 (cited above), at 48.

"*prima facie*" to distinguish this initial test for admissibility from the fact-finder's ultimate responsibility for determining reliability.⁴⁸

9.55 As between "threshold reliability" and "*prima facie* reliability", one view within the group was that the concept of "*prima facie*" was well-established and appeared to capture appropriately what was envisaged, whereas inserting a new concept of "threshold" could generate unnecessary litigation. Further it was felt that the use of the familiar term "*prima facie*" would render it unnecessary to list factors that should be taken into account, leaving the court a greater degree of latitude to draw upon relevant factors. However, following discussions in the sub-committee, the prevailing view was that "threshold reliability" signified a stronger test and when combined with statutory indicia as to its meaning, it would be likely to provide a better safeguard against too loose an approach to admissibility. In other words, to admit evidence merely because on its face it appeared reliable was considered not enough.

9.56 The definition of the "threshold reliability" criterion was also the subject of some discussion in the sub-committee. Various formulations, some taken from the jurisprudence and law reform proposals of other jurisdictions, were examined.⁴⁹ Ultimately, the sub-committee found the formulation in the New Zealand Law Commission's Code the most attractive. Under the New Zealand Code, the reliability criterion is satisfied if "*the circumstances relating to the hearsay statement provide reasonable assurance that the statement is reliable*".⁵⁰ Besides its simplicity, the definition has the advantage of making clear that the judge should not assess the ultimate reliability of the evidence, but rather whether there are sufficient assurances in the circumstances to believe that the statement is reliable. The sub-committee considered the word "assurance" to be particularly apt because it implied a reasonably high threshold which was appropriate for such a criterion.

⁴⁸ In the Canadian jurisprudence on hearsay, the terms 'threshold reliability' and 'ultimate reliability' are used to mark this distinction.

⁴⁹ Some of the other formulations considered included:

1. "*where the statement carries such apparent circumstantial or inherent reliability as in the opinion of the court justifies its admission*" *R v Manase* [2001] 2 NZLR 197 (CA), at 206.
2. "*where by reason of its circumstantial and inherent reliability it is of such apparent probative weight that no injustice is caused by its admission*" [Zuckerman formulation, see English Law Commission report: *Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997), English Law Com No 245, at para 6.35.
3. "*where it appears more probative on the point for which it is offered than any other evidence which proponent can secure through reasonable efforts*" [US Federal Rules of Evidence, Rule 807].
4. "*where, having regard to the contents of the statement and the circumstances in which it was made, and to the risk that its admission or exclusion will result in unfairness to any party to the proceedings, the court considers that it is in the interest of justice to admit it*" [clause 5(8) of the Draft Criminal Evidence Bill in Appendix A of English Law Commission Report 245 (cited above).
5. "*where it appears to the court that the circumstances of its making are such that there is a strong likelihood that it is reliable*".
6. "*where it appears to the court by reason of the circumstances of its making that it is sufficiently reliable to merit its being heard*".

⁵⁰ See section 19(a) of the Code: NZ Law Commission Report 55 – Vol 2 (cited above), at 52.

9.57 As already discussed at paragraphs 8.35 to 8.49 above, we have decided to propose a definition that is slightly different from the New Zealand Code's formulation. Our proposal defines the threshold reliability criterion as being "*where the circumstances provide a reasonable assurance that the statement is reliable*". We have omitted the phrase "*relating to the hearsay statement*" because of the position we have taken on what factors may be considered in assessing this criterion. As we propose that evidence extrinsic to the statement but supporting its truth (eg corroborative evidence) should be a mandatory factor to consider, we have felt the need to keep the definition more general and not confined to "*circumstances relating to the hearsay statement*".

9.58 The sub-committee's original list of the mandatory factors to be considered contained over 20 items. After further discussion, the sub-committee decided that it would be preferable to list fewer factors, and in general terms. This approach would leave it to courts to flesh out specific applications of each factor according to the facts of each case. Furthermore, it is recognised that long statutory lists of criteria carry the danger that they tend to be treated as all embracing and exclusive.

9.59 The first four factors (proposals (12(a)-(d))) are taken directly from the New Zealand Code.⁵¹ Each factor succinctly identifies an important dimension to the relevant "*circumstances relating to the statement*" or "*circumstantial guarantees of trustworthiness*", which is the test applied in Canada. The fifth factor ("*whether the statement is supported by other admissible evidence*") does not appear in the New Zealand Code, because it flows from the contrary position we have taken from that of the New Zealand Law Commission. As discussed in the last chapter (see paragraphs 8.43 to 8.49), we take the position that supporting evidence can and should be considered in assessing threshold reliability. We have not chosen to use the word "corroboration" in this context, given its now defunct status. The use of the notion "supporting evidence" is not only consistent with modern trends but its meaning is broader than corroboration, and it does not connote a prerequisite condition.

9.60 It is our intention that the presence of supporting evidence will provide some assurance of the statement's reliability. However, the absence of such evidence should not affect the determination of threshold reliability if, on the basis of the other factors, the threshold has been met. This is because to include the absence of supporting evidence as an independent factor will inevitably lead to the undesirable consequence that hearsay is excluded after having weighed the ultimate reliability of the evidence. Indeed, this understanding is consistent with the approach to common law exceptions to hearsay, which did not allow judges to refuse to apply the exception if there was insufficient supporting evidence. For example in *Nembhard v The Queen*, the Privy Council considered whether a strict corroboration warning was required in a case where the only identification evidence was found in a dying

⁵¹ See section 16(1) of the Code, which lists only these four factors to consider: NZ Law Commission Report 55 – Vol 2 (cited above), at 44 and 46.

declaration of the deceased.⁵² In rejecting this suggestion, notwithstanding the analogies to *R v Turnbull*, the Board made the following comments in favour of a more flexible approach:

"[T]he question in this part of the case is simply whether the need for care in assessing the significance of a dying declaration requires that a jury should be specifically directed that it would be dangerous to convict on that evidence in the absence of corroboration.

...

[A]dequate and proper directions to a jury do not require nor depend upon the strait-jacket of previous enunciation by the higher courts of some precisely worded formula. Certainly a jury must be given adequate assistance in respect of those questions of fact and law that seem to require it. But in general this is a responsibility that can be sufficiently discharged by the application of fairness and the good common sense of the judge.

*Some attempt was made by counsel to argue by analogy that the comparatively recent example of the decision in Reg v Turnbull [1977] QB 224 justified the definition of a new rule of law as to the need for corroboration in the area of dying declarations. But their Lordships accept neither the analogy nor its application in the present case. Turnbull does not purport to change the law. It provides a most valuable analysis of the various circumstances which commonsense suggests or experience has shown may affect the reliability of a witness's evidence of identification and make it too dangerous in some of the circumstances postulated to base a conviction on such evidence unless it is supported by other evidence that points to the defendant's guilt. Turnbull sets out what the judgment itself described as 'guidelines for trial judges' who are obliged to direct juries in such cases. But those guidelines are not intended as an elaborate specification to be adopted religiously on every occasion. A summing up, if it is to be helpful to the jury should be tailored to fit the facts of the particular case and not merely taken ready-made 'off the peg.' In any event in the present context their Lordships regard it as unnecessary and believe it would be a mistake to lay down some new rule, whether of practice or of law, that then might have to be followed almost verbatim before a judge could feel sure that he had discharged his general duty to leave with the jury a clear consciousness of their need for care in assessing the significance of a dying declaration."*⁵³

⁵²

See *Nembhard v The Queen* [1981] 1 WLR 1515 (PC).

⁵³

Nembhard v The Queen [1981] 1 WLR 1515 (PC), at 1518-1520.

9.61 After lengthy deliberation, and notwithstanding the contrary view of the Bar Association, the majority of the sub-committee agreed to delete from the list of factors put forward in its consultation paper *"the absence of cross-examination of the declarant at trial."* The Bar Association was of the view that:

"a far greater stress needs to be placed on the ability of an accused person to cross-examine. It is a constitutional right and a critical incident of the right to a fair trial. Accordingly, it should not be relegated to a mere factor to be considered along with everything else."

In contrast, a number of those who responded to the consultation paper argued that the absence of cross-examination is a matter which is relevant to the weight to be given to the evidence, rather than its admissibility. In Mr Justice Lunn's view, if the purpose of proposal 12 was to establish threshold reliability admissibility only, then proposal 12(f) (the absence of cross-examination) did *"not sit well with (a)-(d), which are matters directly so relevant."* The absence of cross-examination, he went on, *"seems to me ... a matter relevant to the weight to be given to the evidence but not to its admissibility."*

9.62 Professor Myrna Raeder observed that the inclusion of the absence of cross-examination as a factor in assessing threshold reliability would increase the likelihood of inconsistent decisions, with some judges viewing this as the defining factor and others not. There is in addition some difficulty in asking judges, in effect, to guess what effect cross-examination might have had on the declarant's evidence. In many circumstances (such as in respect of business or commercial records) it may be possible to say with some confidence that cross-examination of the maker of the statement would be unlikely to make any material difference to the tribunal of fact's assessment of the truth of the statement's contents. In other circumstances, however, any attempt to anticipate what the effect of cross-examination of a particular witness might be must be purely speculative.

9.63 So far as we are aware, none of the legislative schemes for reform of the law of hearsay in other jurisdictions includes a provision that the inability to cross-examine the declarant is a factor bearing on the admissibility of the hearsay statement. Taking account of all of these considerations, a majority of the sub-committee consider that the absence of cross-examination of the declarant at trial should not be included as a factor in assessing threshold reliability.

9.64 It should be noted that the umbrella clause in proposal 12 (ie *"the court shall have regard to all circumstances relevant to the statement's apparent reliability, including-"*) was not intended to add or subtract from the enumerated factors.

Recommendation 26

We recommend that the threshold reliability condition should only be satisfied where the circumstances provide a reasonable assurance that the statement is reliable.

Recommendation 27

We recommend that in assessing this condition, the court must have regard to the nature and contents of the statement, the circumstances in which the statement was made, the truthfulness of the declarant, the accuracy of the observations of the declarant and the presence of supporting evidence.

9.65 **The proportionality criterion (proposal 7(d)).** As a residual check, the trial judge must apply the familiar discretion to determine if the prejudicial effect the statement may have on any party to the proceedings exceeds its probative value. In *Secretary for Justice v Lam Tat Ming*, Chief Justice Li articulated the common law residual discretion to exclude prosecution evidence in these terms:

*"The judge may in his discretion exclude admissible evidence where its prejudicial effect is out of proportion to its probative value. And he may in his discretion exclude admissible evidence where it is so unreliable that no jury (or a judge when sitting alone as a judge of fact) properly directed may convict."*⁵⁴

The precise terms of a proportionality criterion was the subject of much discussion in the sub-committee. It formed perhaps the single largest area of debate. The general issue which divided opinions was whether it was necessary and appropriate to formulate the discretion in terms beyond the traditional probative-prejudicial formulation used to describe the common law residual discretion, by making express reference to the "right to cross-examine" and/or the "interests of justice".

9.66 Two members of the sub-committee took the view that, although the conditions of necessity and reliability might adequately define the "probative" weight of the hearsay evidence in question, a condition of "proportionality" should be introduced so that "no injustice" would result from the deprivation of cross-examination. This condition should stipulate *"that the admission of the hearsay is a proportionate measure causing no injustice to the accused, having regard to the nature of the allegations and all the evidence adduced by the prosecution thereunder"*. In their view this would

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Secretary for Justice v Lam Tat-ming (2000) 3 HKCFAR 168, at 179.

serve to safeguard the accused from a criminal conviction based on only a paper trial. The "probative" nature of any hearsay evidence would not be allowed to outweigh any injustice that might result from the accused being deprived of the opportunity to cross-examine his accuser. Any measure to introduce hearsay evidence would therefore be proportionate to the effects of any deprivation of the accused's cardinal and fundamental right to cross-examine at his trial. This safeguard would be an extension of the residual discretion a criminal judge always has "*to exclude evidence where the prejudicial effect outweighs its probative value*". The prejudicial effect was contemplated as arising where the hearsay evidence forms the main or essential evidence against an accused (eg the only evidence in respect of any essential element of the offence); where the offence is serious (eg indictable); and where the accused needs to cross-examine such evidence (ie where cross-examination is material). The requirement to consider "proportionality" would ensure that hearsay would only be admitted (even if there could be shown to be necessity and reliability) where no injustice would be caused to the accused.

9.67 The sub-committee discussed the need for an express reference to "cross-examination" and where such reference should be made. The sub-committee discussed the merits and demerits of different formulations before arriving unanimously at the present proposal 7(d), which is aimed at preserving the existing common law power, while making clear that it applies to evidence adduced by all parties. This proposal is probably an extension of the common law position, which historically was not applicable to defence evidence.⁵⁵ When the discretion is applied to defence evidence, the prejudicial effect lies in the potential that the jury may misuse the evidence by, for example, irrationally acquitting the accused in order to punish the prosecution witnesses for misconduct or other misdeeds.

9.68 It is well established that the justification for providing a residual discretion to exclude otherwise admissible evidence is to ensure a fair trial for the accused.⁵⁶ The right to cross-examine witnesses, while of critical importance, is but one component of the right to a fair trial. Cross-examination is important to the extent that it is necessary to ensure a fair trial for the accused, but there may be circumstances in which it is neither needed nor material. Indeed, this has been the underlying philosophy of the common law of hearsay for hundreds of years. Evidence is admitted under traditional common law exceptions to hearsay (eg *res gestae*, dying declarations) because of the inherent reliability of such evidence.

9.69 There was concern by the majority that express reference to cross-examination as a circumstance might lead to unrealistic submissions about the potential benefit in each case of cross-examination and a consequential undermining of the scheme. As with the traditional common

⁵⁵ *Lobban v Regnam* [1995] 2 CR App R 573 (PC). But not all countries have adopted this position. See for example Canada, *Regina v Seaboyer* [1991] 2 SCR 577.

⁵⁶ In *Secretary for Justice v Lam Tat-ming* [2000] 2 HKLRD 431 (CFA), the Chief Justice said: "[t]he Judge has the overriding duty to ensure a fair trial for the accused according to law. For this purpose, he has what should be regarded as a single discretion to exclude admissible evidence ... whenever he considers it necessary to secure a fair trial for the accused."

law exceptions to hearsay, the conditions of necessity and threshold reliability act as substitutes for the opportunity to cross-examine. This is how these two pre-requisite criteria are understood in other jurisdictions. In Canada, Chief Justice Lamer described this idea in these words:

*"[t]he history of the common law exceptions to the hearsay rule suggests that for a hearsay statement to be received, there must be some other fact or circumstance which compensates for, or stands in the stead of the oath, presence and cross-examination. Where the safeguards associated with non-hearsay evidence are absent, there must be some substitute factor to demonstrate sufficient reliability to make it safe to admit the evidence."*⁵⁷ [emphasis added]

9.70 In *R v Manase*, the New Zealand court stated:

*"[t]he single issue which the Court in Bain saw as deriving from the concepts of sufficient relevance and reliability, was equated with whether the dangers inherent in hearsay evidence were reasonably displaced. That, in a sense, is the ultimate policy issue."*⁵⁸ [emphasis added]

The commentary to the New Zealand Code also recognises that the key to protecting an accused's fair trial right is to have a sufficiently protective reliability condition:

*"If a hearsay statement forms part of the prosecution case and is crucial to proving a defendant's guilt, a judge will want to ensure that the circumstances relating to the statement give such assurance of reliability that the defendant's right to a fair trial will not be jeopardized by his or her inability to cross-examine the maker of the statement."*⁵⁹

9.71 The Core Scheme goes beyond what exists or has been proposed in Canada and New Zealand and provides an additional safeguard. This is contained in the power of the judge to direct an acquittal even where there is a *prima facie* case (see proposal 15). This extraordinary power provides the ultimate protection for an accused whose conviction hinges on hearsay evidence admitted under the Core Scheme. This safeguard will help to prevent miscarriages of justice and ensure that the overall scheme is consistent with constitutional human rights standards. The rationale for this proposal is explained at paragraphs 9.92 to 9.102 below.

9.72 We also believe that the inclusion in paragraph 7(d) of a residual power to exclude evidence, formulated in terms of the "right to cross-examine" or "the interests of justice", would be likely in practice to lead to the abuse of the scheme and to undermine the objectives of reform. Use of the inherently

⁵⁷ *R v B (KG)* (1993), 79 CCC (3d) 257, at 288.

⁵⁸ *R v Manase* [2001] 2 NZLR 197 (CA), at 205.

⁵⁹ NZ Law Commission Report 55 – Vol 2 (cited above), at 53.

vague phrase "the interests of justice" in a discretionary power will lead to uncertainty, and the phrase "right to cross-examine" is likely to lead to regular non-contextual exhortations to exclude, regardless of the rationale of the principles which enable reliable hearsay to be admitted without any prejudice to a fair trial. When asked to consider the importance of cross-examination as a criterion of admissibility, judges will recognise this importance by excluding the evidence. But such an approach overvalues cross-examination and loses sight of the underlying rationale for cross-examination, which is to ensure a fair trial.

9.73 Finally, we believe that such a discretionary power would lead to an undesirable proliferation of litigation since this limb of the scheme would be likely to be argued in every case where hearsay was tendered. Indeed, such a discretionary power could overwhelm the significance of the other pre-conditions to admissibility. The whole scheme could very well degenerate to the single question of whether it would be desirable to have cross-examination of the evidence. This would undermine not only the scheme but also the purposes of reform.

9.74 In the recent cases of *Al-Khawaja and Tahery v the United Kingdom*⁶⁰ the European Court of Human Rights considered whether the fact that key prosecution evidence had been in the form of a written statement by a witness who did not give evidence in person at trial amounted to a violation of Article 6(1) and (3)(d) of the European Convention on Human Rights. Those provisions state:

- "1. *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...*
- 3. *Everyone charged with a criminal offence has the following minimum rights: ...*
 - (d) *to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."*

In the case of *Al-Khawaja*, the written statement had been that of a witness who had committed suicide, while in the case of *Tahery* the witness was alive but had been afraid to give evidence in person. In both cases, the convictions of the accused were based solely or to a decisive degree on the evidence of the absent witnesses.

9.75 In giving its judgment, the European Court of Human Rights said that the starting point for the court's assessment of whether there had been a breach of Article 6(1) and (3)(d) was set out in the earlier judgment of *Luca v Italy*:

⁶⁰ [2009] ECHR 110.

*"If the defendant has been given an adequate and proper opportunity to challenge the depositions either when made or at a later stage, their admission in evidence will not in itself contravene Article 6(1) and (3)(d). The corollary of that, however, is that where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6."*⁶¹

In the absence of special circumstances, the European Court of Human Rights doubted whether any counterbalancing factors would be sufficient to justify the admission of an untested statement which was the sole or decisive basis for a conviction. The court found in the case of both *Al-Khawaja* and *Tahery* that there had been a violation of Article 6(1) and (3)(d) of the Convention.

9.76 We have considered the Core Scheme in the light of the European Court of Human Rights' ruling in *Al-Khawaja and Tahery v the United Kingdom* and we are satisfied that our proposals would comply. First, proposal 12(e) requires the court in assessing threshold reliability to consider, among other factors, whether the statement is supported by other admissible evidence. Both the 1988 and 2003 UK legislation relevant to this case admitted hearsay on the ground of necessity alone without a requirement of threshold reliability.

9.77 Secondly, under proposal 15, the court must direct the acquittal of the accused if it considers it would be unsafe to convict the accused. In reaching that decision, one of the factors which the court must take into account is the importance of the hearsay evidence to the case against the accused.⁶² A similar safeguard exists under the 2003 UK legislation but there was no mention of this in the European Court's decision in *Tahery's* case.

9.78 Thirdly, our decision not to include fear as a basis for satisfying the necessity criterion means that cases like *Tahery* would not arise under our proposals. Based on the differences between our proposals and the scheme under consideration in *Al-Khawaja*, this judgment, in our view, does not adversely affect the reforms proposed in this report.

9.79 *Al-Khawaja and Tahery v the United Kingdom* was considered by the Court of Appeal in England in 2009 in *R v Horncastle*, *R v Marquis* and *R v Carter*.⁶³ These three cases each raised issues as to the proper approach to hearsay evidence in the light of Articles 6(1) and 6(3)(d) of the European Convention on Human Rights. In the first case, the witness was

⁶¹ No 33354/96, EHCR 2001, at para 40.

⁶² See proposal 15(b)(iv).

⁶³ [2009] EWCA Crim 964; [2009] All ER (D) 211. Leave to appeal to the House of Lords was granted.

dead but had made a full written statement before death; the witness in the second case had refused to attend out of fear for her life if she did; and the third case concerned business records in a large public company. The Court of Appeal held that the *“undoubted starting point is that the admissibility of evidence is a matter for the national court”* and *“the primary role of the European Court of Human Rights is to determine whether, overall, the trial was fair.”*⁶⁴ It was necessary to distinguish between cases of anonymous witnesses and identified but absent witnesses. The Criminal Justice Act 2003 was concerned with identified but absent witnesses, and did not permit the admission of the evidence of anonymous witnesses. Having reviewed the European Court’s own case law, the Court of Appeal concluded that the right to confront witnesses for the prosecution under Article 6(3)(d) was not an absolute one:

*“If it were, there would be no exception and there would be a prohibition upon all hearsay evidence, whether crucial or otherwise. As we have set out, the case law demonstrates that the right to confront a witness can in certain limited circumstances be restricted, provided that the trial is fair and the rights of the defence respected. In considering whether the trial is fair, a legitimate justification for the admission of the absent witness’s statement must be established and appropriate counterbalancing measures must be taken to ensure that the defendant is not placed at an unfair disadvantage and his rights respected. The adequacy of such counterbalancing measures can only be judged by the criterion whether the proceedings as a whole are fair...”*⁶⁵

9.80 The Court of Appeal held that where the hearsay evidence was demonstrably reliable, or its reliability could properly be tested and assessed, and the rights of the defence were respected, there were (in the language of the European Court of Human Rights) sufficient counterbalancing measures and the trial was fair. Article 6(3)(d) did not create any absolute right in an accused to have every witness against him present to be examined and the balance struck by the 2003 Act was a legitimate one and wholly consistent with the European Convention. The provisions in the 2003 Act on hearsay evidence were therefore consistent with Article 6(3)(d) and were not further qualified by a separate test relating to whether the evidence was sole or decisive in the case.⁶⁶

⁶⁴ [2009] EWCA Crim 964, cited above, at para 32.

⁶⁵ [2009] EWCA Crim 964, cited above, at para 56.

⁶⁶ See also para 79 in [2009] EWCA Crim 964: *“There is nothing in our view in the judgment of the ECtHR in Al-Khawaja considered in the light of a full analysis of the CJA 2003 that leads us to conclude that this court was wrong in the result it reached in a number of its decisions in relation to art.6 and art.6(3)(d) There is therefore no reason which justifies us departing from the conclusions in that line of authority binding on us, particularly in the light of their approval in the opinion of the Privy Council given by Lord Bingham of Cornhill in Grant v The Queen at paragraphs [17(2) and (3) [see [2007] 1 AC 1].”*

Recommendation 28

We recommend that the probative value of the hearsay evidence must always be greater than any prejudicial effect it may have on any party before it can be admitted under the discretionary power.

9.81 The Core Scheme as presented in the sub-committee's consultation paper included a provision that:

"a statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless there are sufficient confirmatory circumstances that clearly indicate the trustworthiness of the statement."

This proposal was strongly criticised by a number of those who responded to the consultation paper. It was suggested that the basic Core Scheme was sufficiently robust to deal with the problem of fabricated third party confessions. Professor Paul Roberts of the University of Nottingham questioned the need for *"this additional layer of complexity, which also arguably runs the risk of precipitating miscarriages of justice, when the basic scheme already contains safeguards to ensure that only reliable hearsay is admitted as and where necessary."* There was also concern expressed at the uneven application of the proposed provision as between defence and prosecution, and a general view that tribunals of fact, whether juries or judges sitting alone, were well able to detect manufactured defences. In the light of these various views, we have deleted this proposal from the Core Scheme.

9.82 **Notice requirement (proposal 13).** The notice requirement in respect of hearsay evidence to be adduced under proposal 7 is an essential procedural safeguard in the Core Scheme, and is a standard proposal appearing in the law reform initiatives of other jurisdictions. While the precise terms of the notice requirements will be provided for in the rules of court, we believe they should generally reflect the following principles:

- (a) there should be sufficient particulars given of both the identity of the declarant and the substance of the hearsay evidence to give opposing parties a fair opportunity to investigate and prepare to meet the evidence;
- (b) the notice requirement should be the same for both the prosecution and defence;
- (c) failure to give proper notice will have consequences (eg evidence inadmissible, jury directed as to available inference if evidence admitted, costs incurred); and

- (d) the court retains a narrow discretion in the interests of justice to waive the strict application of the notice requirement.

Recommendation 29

We recommend that rules of court be made to require the party applying to admit hearsay evidence under the discretionary power in proposal 7 to give timely and sufficient notice to all other parties to the proceedings.

9.83 **Burden and standard of proof (proposal 10).** As the admission of hearsay remains the exception under the Core Scheme, it makes sense to maintain the common law position that the party seeking to bring the evidence within this exception must carry the burden.

9.84 As to the question of what standard of proof should apply to hearsay exceptions, our original proposal in our consultation paper was that this should be on the balance of probabilities and the same standard should apply to both prosecution and defence. In making that recommendation we took the view that establishing whether or not particular hearsay evidence satisfies the conditions to fall within a hearsay exception does not involve the proof of matters generally decisive of guilt. We have revised that position, however, in the light of the responses to the consultation paper.

9.85 The Bar Association in particular took issue with our original proposal and pointed out that the standards of proof applied in criminal proceedings are fundamentally asymmetrical as between the defence and the prosecution. It was also argued that it could not always be said that establishing the pre-conditions for admissibility of hearsay evidence did not involve matters generally decisive of guilt: there might well be circumstances in which the hearsay evidence would conclusively establish the defendant's guilt. The sub-committee considered the responses on this issue carefully and concluded that a distinction could be drawn in this regard between the tests for necessity and threshold reliability. While the former related to facts which required an appropriate standard of proof to be established, the latter required the judge to satisfy himself that the circumstances provided a "reasonable assurance" that the statement was reliable. In the circumstances, we have concluded that the standard of proof which must be satisfied by the prosecution in respect of the necessity test is beyond reasonable doubt, and in the case of the defence it is on the balance of probabilities.

Recommendation 30

We recommend that the party applying to admit hearsay evidence under the discretionary power in proposal 7 has the burden of proving 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.

Admission of evidence relevant to credibility and reliability of declarant (proposal 14)

9.86 Where hearsay is admitted under the Core Scheme, proposal 14 makes clear that the tribunal of fact can receive evidence of the declarant's credibility and reliability where that evidence would have been admissible had the declarant testified as a witness. This proposal is important since, under ordinary common law rules of admissibility, evidence of the declarant's credibility might not be admitted since the declarant is not a witness in the proceedings, and his credibility would not, strictly speaking, be in issue.

9.87 This approach follows that of the Scottish Law Commission's *Evidence: Report on Hearsay Evidence in Criminal Proceedings*,⁶⁷ which stated:

*"... it is important, in the interests of fairness, to take account of the absence of the opportunity to cross-examine by enabling the opposing party, as far as possible, to attack the credibility and reliability of the maker on the same grounds as would have been available if he had been called as a witness."*⁶⁸

9.88 Proposal 14(a) makes admissible evidence relevant to the declarant's credibility to the extent it would have been admissible had the declarant testified. Proposal 14(b) shares the same purpose by making admissible other statements of the declarant that are inconsistent with the hearsay statement admitted. As recognised in the Scottish report, proposal 14(b) is probably subsumed under proposal 14(a) but a separate provision is useful "for the sake of clarity".⁶⁹

9.89 In relation to proposal 14(a), it is helpful to note the Scottish report's observation that:

⁶⁷ See clause 1(5)(a) and (c) of the proposed Criminal Evidence (Scotland) Bill in the Scottish Law Commission Report 149 (cited above) at 96, which was later enacted as section 259(4)(a) and (c) of the Criminal Procedure (Scotland) Act 1995.

⁶⁸ See Scottish Law Commission Report 149 (cited above) at para 6.12.

⁶⁹ See Scottish Law Commission Report 149 (cited above) at para 6.18.

*"... in England and Wales evidence admissible under paragraph (a) may include evidence of bias, previous convictions, bad reputation for veracity or mental or physical condition tending to show unreliability, all of which would tend to reflect unfavourably on his credibility; and evidence of a previous consistent statement by the witness, which is admissible in order to rebut a suggestion that his evidence has been fabricated."*⁷⁰

In light of the Court of Final Appeal's decision in *HKSAR v Wong Sau-ming*, proof that the declarant had lied as a witness in a prior proceeding may be added to this list.⁷¹

9.90 The Scottish report also provides the following useful note of relevance to our proposal 14(b):

*"Further, he may have made the inconsistent statement before or after he made the statement admitted under [the proposals], and he may have made it in any manner - orally, or in a document, or by conduct. The party against whom the statement is adduced has the advantage not only of leading evidence of the inconsistent statement but also of the fact that the maker, being absent, cannot explain the inconsistency. On the other hand the inconsistent statement is not admissible as evidence of its truth unless it falls within an exception to the hearsay rule."*⁷²

9.91 Finally, a testifying accused who relies on proposal 14 to attack the credibility of the declarant will probably lose the protection given by section 54 of the Criminal Procedure Ordinance against questioning about his criminal antecedents or bad character.⁷³ That section's protection is lost if *"the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution"*.⁷⁴ In *R v Martin (Vance)*, the English Court of Appeal held that the phrase *"witnesses for the prosecution"* in the equivalent English provision meant *"a person with material evidence to give"*, even if that person was not a testifying witness at trial.⁷⁵ In *Martin*, imputations made against a person whose deposition was admitted under section 23 of the Criminal Justice Act 1988, a statutory hearsay exception, were enough to trigger the loss of section 54's protection for the defendant. While *Martin* has not been directly applied in Hong Kong, it remains good authority in England. As *Cross and Tapper* underline, the interpretation *"reflects a policy of reducing the incentive to dissuade witnesses from testifying, by removing a possible advantage of so doing."*⁷⁶

⁷⁰ Scottish Law Commission Report 149 (cited above) at para 6.13.

⁷¹ *HKSAR v Wong Sau-ming* [2003] 2 HKLRD 90 (CFA).

⁷² Scottish Law Commission Report 149 (cited above), at para 6.18.

⁷³ Section 54(1)(f) of the Criminal Procedure Ordinance (Cap 221) protects defendants in cross-examination from questions about prior convictions and bad character.

⁷⁴ Section 54(1)(f)(ii) of the Criminal Procedure Ordinance (Cap 221).

⁷⁵ See *R v Martin* [1997] 2 Cr App R 178 (CA), at 187. See also *R v Carter* (1996) 161 JP 207.

⁷⁶ Cross & Tapper, 9th ed, at 405.

Recommendation 31

Where hearsay evidence is admitted under the discretionary power, we recommend that evidence relevant to the declarant's credibility (including other inconsistent statements), which would have been admissible had the declarant testified as a witness, be admitted.

Power to direct verdict of acquittal (proposal 15)

9.92 Proposal 15 widens the ambit of the trial judge's power to direct a verdict of acquittal at the end of the prosecution's case where hearsay evidence has been admitted under proposal 7 of the Core Scheme. It is an extraordinary power as it involves the judge looking at more than the sufficiency of evidence under the traditional test for a submission of "no case to answer". In a case where hearsay is admitted under proposal 7 of the Core Scheme and an application is made under proposal 15, the court must look to a multitude of facts to decide whether it is in the interests of justice for the case to proceed. At the heart of proposal 15 is the responsibility of the judge to remove the case from the jury where there is a significant risk that the continuation of the case could result in a miscarriage of justice. But, at the same time, the judge must not overstep the proper function of the tribunal of law and usurp the role of the jury.

9.93 Proposal 15 acts as a fundamental safeguard within the Core Scheme by maintaining an overall degree of proportionality. It should not be confused with the proportionality criterion in proposal 7(d) which requires a balancing of the hearsay statement's probative value and prejudicial effect in isolation from the other evidence in the case. While proposal 15 also involves balancing, it analyses the hearsay statement against the backdrop of the entire case for the prosecution as it has in the event emerged and requires the judge to consider whether the defence should be called upon to answer the prosecution's case. A number of factors are relevant to this assessment.

9.94 The reference to "*the nature of the proceedings*" in proposal 15(b)(i) requires the judge to consider whether the case is before a jury, where there is a greater risk of the prejudicial effect of evidence tainting the fact-finding process, or before a professional judge alone, where the capacity to keep any prejudicial effect in check is greater. In considering "*the nature of the hearsay evidence*" (proposal 15(b)(ii)), the judge will need to assess the form in which it exists, how accurately it is recorded, the presence of other evidence supporting its truth, and its ultimate reliability. This is part of the task of assessing its probative value.

9.95 The judge, of course, must have in mind the probative value and prejudicial effect of the hearsay evidence (proposals 15(b)(iii) & (v)). The probative value refers to how strongly the hearsay evidence tends to prove

the fact in issue. The prejudicial effect refers to the risk that the jury will misuse the evidence in ways harmful to the accused (eg by giving it more weight than it deserves, by using it for an improper purpose, or by using it to punish the accused, having been inflamed by its nature).

9.96 Up to this point, these factors are the same as those considered under the "proportionality" test in proposal 7(d). However, it is the requirement in proposal 15(b)(iv) that the judge must consider the relative importance of the hearsay evidence to the case against the accused which distinguishes proposal 15(b) from proposal 7(d). The greater the importance of the hearsay evidence, the greater may be the need for the accused to have the opportunity to challenge that evidence by cross-examination. But since cross-examination is impossible, the question becomes how adequately is this absent opportunity to test the evidence catered for in the assurances of reliability or in the overall probative value of the hearsay evidence. Thus, in a jury trial, where the hearsay evidence plays a significant role in the prosecution's case, there would seem to be a good basis for exercising the proposal 15 power if either the threshold reliability of the hearsay statement is low or its probative value is only minimally more than its prejudicial effect. In other words, in jury trials where the hearsay evidence has only barely passed either the threshold reliability or proportionality test in proposal 7, the case should be halted if that evidence plays a significant role in the prosecution's case, in the sense that proof of one or more of the ingredients of the offence turns solely on the acceptance of the hearsay evidence. The same approach should still be applied in non-jury trials but it is likely to be exercised on rarer occasions.

9.97 This proposal to create a new power to direct an acquittal is not without precedent. The English Law Commission made a similar recommendation in its report on hearsay. This has now been implemented in section 125 of the Criminal Justice Act 2003. Under present English law as provided in section 125(1) of the Criminal Justice Act 2003, the judge in a jury trial has the power to direct the jury to acquit at any time after the completion of the prosecution's case if the following two conditions are satisfied:

- (a) the case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceedings, and
- (b) the evidence provided by the statement is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe.

9.98 One of the main motivating factors for the English Law Commission in recommending this provision was the concern for defendants' rights under the European Convention of Human Rights. In the English Law Commission's consultation paper it was suggested that, due to human rights concerns, it would be necessary to allow the court the power to stop the case "... where hearsay is the only evidence of an element of the offence".⁷⁷ The

⁷⁷ English Law Commission, *A Consultation Paper: Evidence in Criminal Proceedings: Hearsay and Related Topics* (1995), Consultation Paper No 138, at para 9.5.

Commission provisionally proposed that "*unsupported hearsay should not be sufficient proof of any element of the offence*".⁷⁸ However, several leading academics and jurists were critical of this requirement, believing that it set the bar too high in complying with Convention standards. The Law Commission found these criticisms "*very persuasive*", and in its final report withdrew this proposal and concluded that the proposed safeguards, particularly the power (now enacted) to stop the case where evidence was unconvincing, were sufficient to comply with Convention norms.⁷⁹ At paragraph 5.40 of its final report, the Commission wrote:

*"We are satisfied that such safeguards, and in particular the duty on the court to acquit or direct an acquittal if the case depended wholly or substantially on unconvincing hearsay evidence such that a conviction would be unsafe, would provide adequate protection for the accused."*⁸⁰

9.99 Our formulation of the power to direct an acquittal in proposal 15 differs from that adopted in the English Criminal Justice Act 2003. Unlike the English scheme for the admission of hearsay, our proposed Core Scheme would require hearsay evidence adduced under proposal 7 to satisfy a test of threshold reliability before its admission. It is arguable, therefore, that the situation envisaged by the second condition for the exercise of the power to direct an acquittal under section 125(1) (namely, that the statement "*is so unconvincing*" that conviction would be unsafe) should not in practice arise under our proposals. Instead, proposal 15 is intended to deal with the situation where, notwithstanding the fact that the hearsay evidence has satisfied the threshold reliability test, it would nevertheless be unsafe to convict the accused, taking account of, amongst other things, the role of the hearsay evidence and its importance to the prosecution case. It is that which proposal 15 is intended to reflect. Our original formulation of this proposal in the consultation paper gave a discretion to the judge to direct a verdict of acquittal where he considered it would be unsafe to convict the accused. On reflection, and in the light of responses to the consultation paper, we believe that if the trial judge is satisfied as to the conditions set out in proposal 15, a direction to acquit should be an obligation rather than a matter of choice. Proposal 15 has been revised accordingly.

9.100 As we discuss below in Chapter 11, we believe that proposal 15 will play a critical role in ensuring that the overall scheme complies with constitutional human rights norms in Hong Kong.

9.101 Proposal 15 is intended to apply only where hearsay evidence has been admitted under proposal 7 of the Core Scheme. It might be argued, however, that the scope of this safeguard should be widened so that it applies in respect of all hearsay evidence, including evidence admitted under the statutory or preserved common law exceptions to the hearsay rule. We have considered and rejected this alternative for a number of reasons. Firstly,

⁷⁸ English Law Commission consultation paper no 138 (cited above), at para 9.5.

⁷⁹ English Law Commission Report 245 (cited above), at para 5.39.

⁸⁰ English Law Commission Report 245 (cited above), at para 5.40.

hearsay admitted under the new test of necessity and reliability differs from that admitted under the statutory or preserved common law exceptions. Some exceptions have different rationales for admissibility, such as the co-conspirator's exception whose rationale is one of agency. With other exceptions there are less concerns with the hearsay dangers: for example, with the confession exception the defendant cannot complain about the absence of cross-examination. Some statutory exceptions may already have additional safeguards that were included by the legislature at the time of enactment. Secondly, there is existing jurisprudence relating to the statutory and preserved common law exceptions, which have operated hitherto without the need for a discretion such as that in proposal 15. For example, a case such as *Nembhard v The Queen*⁸¹ carefully contemplated the concerns with convicting for murder when the only evidence of identification was from a dying declaration. Thirdly, a human rights challenge was made to a statutory hearsay exception in *Tse Mui Chun v HKSAR*⁸² but without success. There have been no successful challenges to other existing exceptions since the Hong Kong Bill of Rights Ordinance came into force in 1991. Given the result in *Tse Mui Chun* and the relevant principles discussed in Chapter 11, we believe the existing exceptions that we recommend preserving without a proposal 15 safeguard comply with Hong Kong's Basic Law and Bill of Rights. However, the new necessity and threshold reliability test contained in proposal 7 is untried and, without the proposal 15 safeguard, might be open to challenge. Finally, in our view, applying the proposal 15 discretion to all hearsay would increase the scope for unmeritorious applications and risk lengthening the criminal trial process unnecessarily.

9.102 Conversely, it might be suggested that the scope of proposal 15 should be narrowed so that it applies only to trials before a jury. That is the approach adopted in England in respect of section 125 of the Criminal Justice Act 2003. We have considered and rejected this option as well. In our view, it is preferable to err on the side of caution and to provide an accused with greater protection than may be necessary by applying proposal 15 to all criminal trials, no matter the venue. The court can be relied on to refuse unmeritorious applications for dismissal. In addition, applying the same rules to both jury and non-jury trials avoids unnecessary complexity and any perception that the protection offered to an accused might depend on the prosecutor's choice of trial venue.

Recommendation 32

We recommend the addition of a new power requiring the trial judge, at the conclusion of the prosecution's case or any time thereafter, to direct a verdict of acquittal of an accused against whom hearsay evidence has been admitted under the discretionary power in proposal 7 of the Core Scheme where the judge considers that, taking

⁸¹ [1981] 1 WLR 1515 (PC).
⁸² (2003) 6 HKCFAR 601.

account of the factors listed at proposal 15(b), and notwithstanding the fact that there is a *prima facie* case against the accused, it would be unsafe to convict the accused.

The factors listed at proposal 15(b) to which the judge must have regard in deciding whether to exercise this power are 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 that hearsay evidence.

Safeguards check

9.103 As we have set out in Chapter 7 above, we believe that any significant liberalisation in the hearsay rule must be accompanied by sufficient substantive and procedural safeguards to prevent injustice to either the prosecution or defence. The safeguards ensure that, notwithstanding the inability to cross-examine admissible hearsay evidence, the court will still reach a verdict that is safe and reliable. At the same time, the safeguards must be balanced and cannot be so onerous as to defeat the objects of reform. Nor should they be so loose as to invite abuse that compromises the integrity of the trial process in terms of undue delay or a proliferation of unmeritorious issues. We believe the safeguards we have adopted, as summarised and listed below, achieve this proper balance:

- (a) *multiple hearsay is only admissible if each level of hearsay comes within an exception, including the proposed discretionary power to admit (proposals 4 & 7(b));*
- (b) *the declarant must be satisfactorily identified before his hearsay statement can be admitted under the discretionary power (proposal 7(a));*
- (c) *discretionary admissibility also requires the satisfaction of three main preconditions: necessity, threshold reliability and proportionality (proposal 7);*
- (d) *necessity requires not merely the unavailability of the declarant as a witness but also a genuine inability to provide the hearsay evidence in oral testimony (proposal 8);*
- (e) *a party seeking to admit evidence under the discretionary power will be precluded from doing so if he caused the*

circumstances said to satisfy the necessity condition (proposal 9);

- (f) the burden of satisfying the condition of necessity is on the party applying to admit the hearsay evidence. In the case of the prosecution, the standard of proof is beyond reasonable doubt, and in the case of the defence the standard is on the balance of probabilities (proposal 10);*
- (g) threshold reliability requires a demonstration of reasonable assurances that the statement is reliable. Such assurances are found, primarily, in the circumstances surrounding the making of the statement, and in any evidence supporting the truth of the statement (proposals 11 & 12);*
- (h) the hearsay evidence must have inherent proportionality in that its probative value must be greater than its prejudicial effect. This precondition applies to hearsay adduced by all parties (proposal 7(d));*
- (i) a party wishing to adduce hearsay under the discretionary power must give adequate notice to all other parties to the proceedings. Failure to give adequate notice will preclude the application, support an adverse inference if the evidence is admitted and/or have cost consequences (proposal 13);*
- (j) parties may adduce evidence relevant to the declarant's credibility and reliability to the extent permissible had the declarant testified as a witness (proposal 14); and*
- (k) the trial judge must halt the trial at the end of the prosecution's case if the hearsay evidence plays a significant role in proving the defendant's guilt yet its assurances of reliability are low or its probative value only minimally outweighs its prejudicial effect (proposal 15).*

Chapter 10

Special topics

Banking, business and computer records

10.1 The content of entries appearing in non-public records is governed, in the absence of statutory provisions, both by provisions against hearsay and by the primary evidence rule, effectively rendering them inadmissible save under special circumstances.

10.2 There do not appear to be any conceptual difficulties with the existing statutory exceptions to the hearsay rule. They are recognised as being necessary and working with no obvious disadvantages. The requirement that the original document itself must be produced, together with the further requirement that it must have been adopted or executed or connected with a party (or other person relevant) to the issues before the court, has been relaxed in respect of certain defined categories of records.

10.3 Specific legislation has been introduced in the Evidence Ordinance (Cap 8) in respect of copies of the content of:

- (1) entries or matters recorded in a banker's record (section 20);
- (2) similar entries or records where a bank has ceased business (section 20A);
- (3) documentary records made by a person "under a duty" to make them – generally referred to as "business records" (sections 22 and 22B); and
- (4) documents produced by a computer (sections 22A and 22B).

10.4 The common theme of each section is that the production of the record/document concerned constitutes *prima facie* proof of its contents, provided that there has been compliance with the conditions leading to its creation. It is necessary to turn briefly to each category of document.

Bankers' records

10.5 The admissibility of a banker's record is governed by section 20. A "bank" and a "banker's record" are defined in section 2. Further, section 19B enables the Financial Secretary to "designate" a foreign bank carrying or having carried on business outside Hong Kong, whereupon the provisions of section 20 are extended to its records.

10.6 The definition requires that the document/record which it is sought to produce is one which is used in the ordinary course of business of the bank. In *R v Law Ka-fu* the history of the definition was related:

*"The enactment recognized that the records which banks use today are very different from those used in former times. Today the records of banks, which they use to carry out their ordinary business, are composed of tapes, microfilms, computer printouts and, we are satisfied, as we set out below, fax transmissions. We note that even before the amendment the admissibility of the information in the banker's record was in no way governed by whether or not it had come to be recorded in the banker's books as a result of hearsay. As long as the requirements were satisfied, regardless of whether it was the result of hearsay, it was admissible. Once the entry was made in the banker's book, whether it came from the bank's employee or any other source, it was admissible."*¹

10.7 In considering whether credit card transaction slips completed by the merchant but then forwarded to the bank for its use became part of the bank's records the court said:

*"... once they were sent to the bank and placed in its records they must, we are satisfied, be regarded as documents in the bank's record and the matters referred to therein are matters recorded in the ordinary course of the bank's business. The slips, like any other matter in the bank's records, were clearly there to be referred to and acted upon by the bank's employees."*²

10.8 Section 20(1)(a) requires that the entry concerned be made or recorded in the "*ordinary course of business*" of the bank and be in its custody and control. Other than where the copy to be produced has been made by a photographic process or generated by a computer, the copy is required to have been compared with the original entry and to be certified to be correct. Production of computer-generated records is subject to substantially the same requirements as for any computer-generated document (see paragraphs 10.22 to 10.35 below).

10.9 Although the content of the original records of a bank would otherwise themselves be hearsay, the provisions of this section permit not only the production of the records as *prima facie* proof of the entries but of copies of those entries. The English Law Commission recommended the retention of the exception to the hearsay rule in respect of bankers' records and especially recommended the retention, without amendment, of the

¹ [1996] 1 HKC 333, at 339.

² in *R v Law Ka-fu* (cited above), at 340.

Bankers' Books Evidence Act 1879, sections 3 and 4 of which are of similar practical effect.³

10.10 Bankers' records are to be regarded as a distinct category of documents possessing particular features, especially reliability. Notionally their records would otherwise be capable of being produced under section 22 or section 22A. Our view is that this constitutes a sound reason for not extending the provisions of section 20 to other institutions.

Recommendation 33

We recommend that the exception in respect of bankers' records be retained but that its implementation should form part of the general exception in regard to the production of records as appears in Recommendations 34, 35 and 36 below.

"Business" records

10.11 The ambit of section 22 of the Evidence Ordinance (Cap. 8), as qualified by reference to section 22B, is obviously substantially wider than merely business records. The section only applies where it is sought to prove the truth of the content of the record, not where it is sought to use the document for any other purpose.

10.12 It was the decision in *Myers v DPP*⁴ that spurred the introduction of statutory provisions for the admission of business records. The House of Lords held that records found in the accused's possession of engine numbers of various vehicles, the entries having been made by unidentifiable employees, were inadmissible hearsay. The House of Lords held that the prosecution was required to call each of the employees to testify to the making of the various entries, but allowed that each such employee would have been entitled to refer to the records themselves to "refresh" his memory if necessary.

10.13 The Criminal Evidence Act 1965 introduced provisions in terms similar to those which presently prevail in Hong Kong. The English legislation has been amended several times. Under section 68 of the Police and Criminal Evidence Act 1984 it remained a stipulation that only records made by a person acting under a "duty" were admissible. However, that was changed by section 24 of the Criminal Justice Act 1988 which now governs the position in England in respect of criminal proceedings.

³ English Law Commission, *Report on Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997), Law Com No 245, at para 8.103.

⁴ [1965] AC 1001 (HL)

10.14 The proposals contained in the Bill leading to the 1988 Act closely resembled the provisions of the Civil Evidence Act 1968, with control over the admissibility of hearsay evidence exercised by affording the court the discretion to exclude evidence which was found not in the interests of justice to admit (ie an exclusionary discretion). The proposals in the Bill went beyond earlier recommendations which had recommended an inclusionary discretion. Neither survived the Bill's passage.

10.15 A particular feature of the 1988 Act is that it no longer includes a requirement that the person making the record or entry must have acted under a "duty", the only stipulation being that:

"(i) ... the document was created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office; and

(ii) the information contained in the document was supplied by a person ... who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with."

10.16 In its review of the law of hearsay the English Law Commission recommended that automatic admissibility be retained for business documents, in the broadest sense, subject to a discretion vested in the court to direct that a document not be admissible if the statement's reliability is doubtful.⁵

10.17 There are specific legislative provisions in other common law countries which permit of admissibility of records made in the course of trade or business but which also dispense with the concept of the maker of the record acting under a "duty".⁶ Views within the sub-committee differed as to the retention of the necessity for the record to have been compiled by a person acting under a duty. The majority were in favour of dispensing with such a requirement, expressing the view that the over-riding consideration of inherent reliability rendered such a requirement redundant.

10.18 Section 22 was introduced in Hong Kong by way of amendment in 1984. Its predecessor had been limited primarily to the admissibility of records made during the carrying on of a business or trade. Section 22 now provides for the *prima facie* admissibility of a fact contained in a statement in a document subject to:

- (1) direct oral evidence of that fact being admissible in those proceedings; and
- (2) the document forming part of a record compiled by a person acting under a duty from information supplied by a person (whether acting under a duty or not) who had, or may

⁵ English Law Commission Report 245 (cited above), at para 8.77.

⁶ For example, section 221 of the South African Criminal Procedure Act 51 of 1977.

reasonably be supposed to have had, personal knowledge of the matters dealt with in that information; and

- (3) the person who supplied the information either not being available to testify or its being unrealistic to expect him to testify for defined reasons.

10.19 Where the information was supplied through an intermediary each person through whom it was supplied must also have been acting under a duty (section 22(3)). "*Acting under a duty*" includes a reference to a person acting in the course of any occupation or employment, or for the purposes of any paid or unpaid office held by him.

10.20 Section 22 is subject to the provisions of section 22B. This permits of a copy of a document, rather than the original, being admissible (section 22B(1)). The court is empowered to draw inferences from, amongst other things, the form and contents of the document in which the statement is contained (section 22B(2)). Section 22B(3) makes specific provision in respect of factors affecting the weight to be attached to the statement in the document, while section 22B(4) imports into criminal proceedings certain definitions contained in the provisions relating to hearsay in civil proceedings. Those definitions are of particular significance in respect of storage media.

10.21 One of the factors which the Court of Final Appeal was required to consider in *Secretary for Justice v Lui Kin-hong*⁷ was whether it was permissible to have regard to the content of the document itself when determining whether its contents were admissible under section 22. The court found that it was so permissible, the phrase "*is admitted*" being construed as "*is the subject of an application to be admitted*".⁸ The draftsmanship of section 22B(2) in particular came in for criticism.

Computer records

10.22 This is by far the most complex aspect of this area. There have been legislative attempts to keep pace with the changing methods and systems of business practices and commerce. Even these modest efforts have been overtaken regularly by changes in technology. It is a field which is the subject of ongoing consideration, with differing solutions proposed, in diverse jurisdictions.

10.23 In Canada the Uniform Law Conference of Canada proposed a Uniform Electronic Evidence Act which uses the term "electronic records" instead of the usual terms "computer evidence" or "computer output".⁹ An

⁷ [2000] 1 HKLRD 92.

⁸ Per Lord Hoffman, 107B/109D.

⁹ 1. *In this Act,*

(a) "*data*" means representations, in any form, of information or concepts.

(b) "*electronic record*" means data that is recorded or preserved on any medium in or by a computer system or other similar device, that can be read or perceived by a person

"electronic record" would encompass data on magnetic strips on cards, data contained in smart cards (the new identity cards being issued by the Department of Immigration would fall into this category), computer-generated faxes or hard copies of electronic mail.

10.24 The Canadian proposal requires the party seeking to introduce a computer record into evidence to discharge:

"the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be"

whilst the court is also required to consider the "reliability" of the record keeping system.

10.25 The New Zealand Law Commission devised a rule which covered all forms of storage, including sound and video recordings. Their concern was to avoid a situation where the form of the document produced from a machine (in the broad sense) was a bar to its being received in court. The New Zealand Commission's rule provides a presumption that the machine *"did what that party asserts it to have done"*.¹⁰

10.26 The admissibility in Hong Kong of the content of documents generated by computer is presently governed by section 22A, read with section 22B. The definition of "computer" in section 22A(12) of the Evidence Ordinance (Cap. 8) is:

"...any device for storing, processing or retrieving information, and any reference to information being derived from other information is a reference to its being derived therefrom by calculation, comparison or any other process."

This definition is capable of amendment by Legislative Council resolution to encompass devices performing functions of a similar character.¹¹ Different media are used for storage of data. It is our view that section 22A(12)'s definition of computer is wide enough to encompass all forms of media, especially when read with the definition of "document" contained in section 46.

10.27 Section 22A of Cap 8 was described in *Lui Kin-hong* as a *"remarkable provision"*. Particular criticism was made of the lack of a provision (similar to that which appears in section 22) that the information on

or a computer system or other similar device. It includes a display, printout or other output of that data, other than a printout referred to in sub-section 4(2).

(c) *"electronic records system" includes the computer system or other similar device by or in which data is recorded or preserved, and any procedures related to the recording and preservation of electronic records.*

¹⁰ NZ Law Commission, *Evidence: Reform of the Law* (1999), Report 55 - Vol 1, at para 527 *et seq*; *Evidence: Evidence Code and Commentary* (1999), Report 55 - Vol 2, at 265; *Evidence Code* section 121.

¹¹ For a comprehensive review of legislative provisions in other jurisdictions, see *Computer output as evidence: consultation paper* - Technology Law Development Group, Singapore Academy of Law, September 2003.

the computer was input by a person who had personal knowledge of the facts. A possible explanation for this shortcoming may be found in the fact that section 22A which introduced in 1984, at the same time as the amendment to section 22. At that time, automated input into computers was only beginning to gain momentum: for example, individual credit card transactions were frequently processed by hand and the bank's copies of the transaction slips retained to be processed later. A batch of such slips would then be delivered to the bank where the information contained in the slips would be input by an employee of the bank. Plainly, the person inputting that information would not have any knowledge of the facts represented by the transaction slips and a requirement similar to that in section 22 may well have frustrated the purpose of the section.

10.28 Nowadays, the employee who concludes the transaction, or a co-employee, processes the entry at the time of the transaction and it is that entry which automatically is entered into the eventual record, which would meet the requirements of any condition similar to that contained in section 22.

10.29 Similarly, there is no requirement in section 22A that the person who entered the information into the computer was under a duty to do so.

10.30 We recognise the necessity to distinguish between computer records stored, maintained or generated in the course of a business undertaking where there would be a greater propensity towards reliability and those stored, maintained or generated in a non-business environment. The necessity for a distinction has also been recognised in deliberations in Singapore.¹² We also recognise that records generated entirely by a computerised system without any human intervention would be admissible as real evidence and not affected by the hearsay rule.

10.31 Section 22A allows the production in evidence of documents generated by the computer as *prima facie* proof of the truth of their contents, subject to a variety of stipulated conditions. The computer which generates the document must have been used to "*store, process or retrieve information for the purposes of any activities carried on by any body or individual*", and that information must have been supplied to the computer in the course of those activities. There must be evidence that "*appropriate*" measures were in force to prevent unauthorised interference with the computer and that it was either operating properly or, if not, was malfunctioning in a way such as would not affect the production of the document or accuracy of its contents.

10.32 A distinction appears to be drawn between a single entry in a computer and entries over a period. In the latter event (section 22A(3)(c)), the document produced by the computer must have been produced under the direction of a person having practical knowledge and experience of computer operation.

¹² *Computer output as evidence: consultation paper* (cited above), at para 3.102.

10.33 The provisions relating to the production of computer-generated documents contain an important exception: a statement contained in a computer-generated document is not admissible in evidence either for or against an accused if that accused had occupied a "*responsible position*" in relation to that computer or the "*relevant activities*" as defined. The section further provides for the proof of the various conditions to be furnished by way of certificate and stipulates the procedure to be followed.

10.34 Broadly similar requirements to facilitate proof of computer-generated records are to be found in the various Acts in the Australian States of South Australia,¹³ Queensland¹⁴ and Victoria.¹⁵

10.35 Given the lengthy procedures required for amendment of existing or introduction of new legislation, the prospects of the legal system catching up to, let alone keeping pace with, technological developments appears remote. We consider that piecemeal legislation in an attempt to do so is undesirable.

Recommendation 34

We recommend that the exceptions in respect of business records and computer records be retained with the primary aim being simplification of the production of all records, with existing legislation relating to non-computerised records being replaced by a single section that applies to all documents irrespective of their varying nature.

Recommendation 35

Insofar as computerised records are concerned:

- (1) separate regimes should apply to data stored or generated in the course of business and that stored or generated for non-business purposes; and**
- (2) specific consideration should be given to, *inter alia*, the implications arising from the storage of data outside of Hong Kong (and its retrieval) and the integrity of such data.**

¹³ South Australia Evidence Act 1929.

¹⁴ Queensland Evidence Act 1977.

¹⁵ Victoria Evidence Act 1958.

Recommendation 36

Records complying with the proposed legislation will be automatically admissible subject to a discretion vested in the court to direct that a document not be admissible if the court is satisfied that the statement's reliability is doubtful.

Recommendation 37

We recommend further study of the topic of documentary and digital evidence as a whole, both as to the requirements for admissibility and the formalities or procedures for adducing such evidence in the trial process.

Prior statements of witnesses

10.36 Under present Hong Kong law, the prior statements of a witness are generally inadmissible in criminal proceedings. There are a few exceptions to this rule, but none of these exceptions permit the use of the statement for its truth. A witness who admits to making, or is shown to have made, a prior *inconsistent* statement may be cross-examined about the prior statement but only for the purposes of impeaching credibility due to the fact of the inconsistency.¹⁶

10.37 A witness's prior statement, which is *consistent* with his or her testimony, may not be revealed except in three narrow circumstances: to rebut an allegation of recent fabrication; to show a recent complaint was made by a female sexual offence complainant; and to reinforce an identification of the defendant at trial by reference to a prior identification. A statement admitted under any of these exceptions cannot be used for its substantive truth. A witness who fails to recall material evidence may be allowed to refer to his or her prior statement for the purpose of refreshing memory, but the prior statement itself does not become evidence.

10.38 As reflected in the Core Scheme, we have adopted an approach to reforming criminal hearsay that proceeds from two basic principles: the prohibition against hearsay should remain, but hearsay evidence may be admitted if the party adducing the evidence satisfies a number of preconditions, which include necessity and threshold reliability. Accordingly, under this approach, neither necessity nor threshold reliability can alone justify admitting hearsay evidence. It is only the combination of necessity (due to the inability of obtaining the declarant's oral testimony) with a reasonable assurance of the statement's reliability that justifies the admission of hearsay evidence, notwithstanding its inherent dangers (eg it is untested by

¹⁶ See sections 12-14 of the Evidence Ordinance (Cap 8).

cross-examination, lack of oath or affirmation, inability to see witness's demeanour).

10.39 The admission of a witness's prior statement for truth is not addressed by the Core Scheme for two reasons. First and foremost, the definition of hearsay evidence excludes statements made by a witness to the proceedings. Secondly, a witness who recalls the matters contained in the prior statement does not come within any of the categories of necessity. Yet the admission of such a statement carries with it similar hearsay dangers. However, there is one important difference between a witness's prior statement and other forms of hearsay evidence. When considering a witness's prior statement, the tribunal of fact will have the benefit of seeing the witness subjected to cross-examination at the time of trial. While the ideal of contemporaneous cross-examination is not achievable, it may be that in some circumstances cross-examination at trial can provide some degree of assurance of reliability.

10.40 Following the approach to reform reflected in the Core Scheme, we will need to consider how the threshold reliability condition should be applied when the necessity condition has not been met, but the declarant is available for cross-examination. There are also a number of other considerations beyond the hearsay dangers, such as concerns about fabrication, efficient use of judicial resources, and improving jury understanding, that will need to be addressed. Prior inconsistent statements and prior consistent statements each present different challenges and will be discussed separately.

Prior inconsistent statements

10.41 The approach to reforming the rules governing the admissibility of prior inconsistent statements across common law countries varies considerably. The various approaches can be roughly divided into three different groups: (a) free admissibility (eg New Zealand Law Commission proposal, England, Queensland, Australia (federal)), (b) discrete reliability assurances (eg US, Scotland), and (c) general threshold reliability assurance (eg Canada, US, South Australia).

(a) Free admissibility

10.42 In 1999, the New Zealand Law Commission proposed making prior inconsistent statements admissible for their truth without any restriction. This was done by defining "hearsay" so that it did not include previous statements of testifying witnesses.¹⁷ As will be seen below, the Commission believed that only the admissibility of previous consistent statements should be restricted. There is not much discussion as to why the Commission made this recommendation, other than a statement that where the declarant is

¹⁷ Section 4 of the *Evidence Code* (at NZ Law Commission Report 55 – Vol 2 (cited above), at 10) defines "hearsay" as "a statement that (a) was made by a person other than a witness; and (b) is offered in evidence at the proceeding to prove the truth of its contents."

available for cross-examination (irrespective of how effective that cross-examination might be) the previous statement should not be considered hearsay.¹⁸

10.43 The English Criminal Justice Act 2003 adopted in full the English Law Commission's 1997 reform proposals in relation to previous statements. Under section 119 of that Act, previous inconsistent statements of witnesses are freely admissible for their truth. Section 119(1) provides:

"If in criminal proceedings a person gives oral evidence and –

(a) he admits making a previous inconsistent statement,
or

(b) a previous inconsistent statement made by him is
proved by virtue of section 3, 4 or 5 of the Criminal
Procedure Act 1865,

the statement is admissible as evidence of any matter stated of
which oral evidence by him would be admissible."

10.44 In making this recommendation, the Law Commission believed fact-finders should be allowed to treat the earlier statement as the true version:

" ... if jurors or magistrates are trusted to decide that a witness
has lied throughout, and to disregard that witness's testimony,
why should they not be free to decide that the witness's previous
statement was correct, and to take as reliable the parts of the
*testimony that they find convincing?"*¹⁹

10.45 The Commission noted the Criminal Law Revision Committee's observation in 1972 that *"what is said soon after the events in question is likely to be at least as reliable as the evidence given at the trial, if not more so."*²⁰ The Commission also doubted whether fact-finders actually appreciated or observed the distinction between a statement going to credit and one going to the issue.²¹ One final reason that the Commission cited was an anomaly in relation to frightened witnesses because English law allowed the statement of an absent frightened witness to be admitted for truth, but not if the frightened witness became hostile. However, this rationale is inapplicable to Hong Kong since under our present law and the Core Scheme, there is no hearsay exception for admitting statements of absent witnesses in fear.²²

¹⁸ See NZ Law Commission Report 55 – Vol 2 (cited above), at paras C18-C19.

¹⁹ English Law Commission Report 245 (cited above), at para 10.89.

²⁰ English Law Commission Report 245 (cited above), at para 10.91.

²¹ English Law Commission Report 245 (cited above), at para 10.90.

²² In respect of frightened and vulnerable witnesses generally, we have concluded that the existing scheme under Part IIIA of the Criminal Procedure Ordinance (Cap 221) remains the most suitable vehicle for getting their evidence before the court.

10.46 Since the 1970s, Queensland has allowed prior inconsistent statements to be freely admitted for truth.²³ Under its legislation, factors such as whether the statement was made "*contemporaneously with the occurrence of ... the facts*" or whether the maker "*had any incentive to conceal or misrepresent the facts*" are factors of weight.²⁴

10.47 In 1995, Australia followed Queensland's example and the recommendations of its Law Reform Commission by making prior inconsistent statements freely admissible for truth. This was indirectly effected by the terms of section 60 of the Evidence Act 1995, which rendered the hearsay exclusionary rule inapplicable to previous statements otherwise admissible for non-hearsay purposes:

"The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation."

10.48 In *Adam v The Queen*, the High Court of Australia (Gleeson CJ, McHugh, Kirby and Hayne JJ.) described section 60 in these terms:

"It is true, of course, that the result differs from what would be the result at common law, the difference being that, by s 60 of the Act, the prior statements would be admitted as evidence of the truth of their contents. But that difference brought about by s 60 was one of the significant alterations in the rules of evidence that the Act was intended to effect. No longer were tribunals of fact to be asked to treat evidence of prior inconsistent statements as evidence that showed no more than that the witness may not be reliable. The prior inconsistent statements were to be taken as evidence of their truth. Thus, far from the result being, as the appellant asserted, bizarre or unintended, it is the intended operation of the Act."²⁵

10.49 Interestingly, in an earlier case in which it was sought to admit under section 60 a prior inconsistent statement containing an implied admission from the accused, the High Court held that the admission was not admissible to incriminate the accused.²⁶ In this case, involving an armed robbery, the witness made a statement to the police that the accused admitted to him that he had "fired two shots" and was running from the police because he had just done a "job". There was evidence that the accused made this admission shortly after the robbery. At trial, the witness could not recall having any conversation with the accused. The High Court gave the following reasons for holding that the statement could not be used as an admission to incriminate the accused:

²³ See Evidence Act 1977, section 101.

²⁴ Evidence Act 1977, section 102.

²⁵ 207 CLR 96, at para 37.

²⁶ *Lee v The Queen* 195 CLR 594.

"It was only the representations made by Mr Calin [ie the witness] to the police that were relevant for a purpose referred to in s 60: the purpose being to prove that Mr Calin had made a prior inconsistent statement and that his credibility was thus affected. The hearsay rule was rendered inapplicable to Mr Calin's representations, but not to the representations allegedly made by the appellant. And, of course, the representations allegedly made by the appellant were not admissible under the confession exceptions to the hearsay rule created by s 81 because the evidence of these confessional statements was not first hand.

To put the matter another way, s 60 does not convert evidence of what was said, out of court, into evidence of some fact that the person speaking out of court did not intend to assert. And yet that is what was done here. Evidence by a police officer that Mr Calin had said, out of court, that the appellant had said that he had done a job was treated as evidence that the appellant in fact had done a job - a fact which Mr Calin had never intended to assert. (Of course, it would be different if Mr Calin had said in evidence in court that the appellant had said he had done a job. Then the representation made out of court would be the appellant's, not Mr Calin's.)

It follows that evidence that Mr Calin had earlier reported that the appellant had confessed was not evidence of the truth of that confession. It should not have been received at the trial of the appellant, as it was, as evidence establishing that the appellant had committed the offence."²⁷

As will be seen below, the result reached in this case is somewhat different from that reached in the Canadian case of *Regina v KGB*.

10.50 In the report that led to the above reform, the Australian Law Reform Commission wrote that a "*schizophrenic task*" was imposed on a court where evidence of a previous statement was relevant to the two purposes of establishing that the statement was made (the permissible purpose) and of establishing the truth of what was said (the impermissible purpose).²⁸ It was said that to require the tribunal of fact to use the statement for one purpose but not the other involved "*the drawing of unrealistic distinctions*".²⁹ The Commission reported that the distinction had been "*ruthlessly criticized by eminent scholars and judges as 'pious fraud', 'artificial', basically 'misguided', 'mere verbal ritual' and an 'anachronism that still impeded[s] our pursuit of truth'*".³⁰ It also cited one academic who described the practice as "*an area of choice Gobbledegook*".³¹ As with the English Law

²⁷ *Lee v The Queen* 195 CLR 594, at paras 28 - 30.

²⁸ Australian Law Reform Commission, *Evidence* (1985), Report 26 (Interim) Vol 1, at para 334.

²⁹ Australian Law Reform Commission Report 26 (Interim) Vol 1 (cited above), at para 685.

³⁰ Australian Law Reform Commission Report 26 (Interim) Vol 1 (cited above), at para 334.

³¹ Australian Law Reform Commission Report 26 (Interim) Vol 1 (cited above), at para 334.

Commission, the Australian Commission argued that "*statements made closer in time to the subject matter of the dispute may be more trustworthy than evidence at the trial and should not be excluded.*"³²

(b) *Discrete reliability assurances*

10.51 Several jurisdictions have required some assurances of reliability, however minimal, before permitting a prior inconsistent statement to be used for its truth. In these jurisdictions, the assurances take the form of discrete preconditions, which can be easily applied by a court. For example, in the United States, a prior inconsistent statement is not subject to the hearsay rule and thus admissible for truth if the "*declarant [who] testifies at the trial*", "*is subject to cross-examination concerning the statement*", and the statement is "*inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition*".³³ Unlike those in the third group, countries within this group do not impose a general test of threshold reliability before admitting the statement, but rather use discrete preconditions.

10.52 Interestingly, in Scotland, while recommending that prior consistent statements should be freely admitted if adopted by the witness, the Scottish Law Commission felt that more restrictions were needed when it came to prior inconsistent statements. In 1995, Scotland implemented the Commission's recommendations (made in 1994) in relation to the reform of hearsay. The Commission recommended substantive admissibility only if the statement was made in a precognition on oath or in prior proceedings.³⁴ As explained in the excerpt below from the Commission's report, concerns about miscarriages of justice for defendants backed this more restrictive approach:

" The present general rule that a witness's prior inconsistent statement may be admissible only to indicate the unreliability of his testimony, and not as evidence of the matters stated in it, has often been questioned. As we have already observed, however, if such statements were to be admissible as evidence of the facts stated, an accused could be convicted on the basis of such statements. In R v Hall, a case in Queensland where the law allows a witness's prior inconsistent statement to be adduced as evidence of the facts it contains, the appellant's co-accused, who had pleaded guilty to the charge at an early stage of the trial, was called as a witness by the Crown, but proved

³² Australian Law Reform Commission Report 26 (Interim) Vol 1 (cited above), at para 334.

³³ See Federal Rules of Evidence, Rule 801(d)(1). During the drafting process, there were conflicting views on whether preconditions of reliability were necessary. At one point, the House Committee required both an oath and cross-examination at the time that the statement was made. The Senate Judiciary Committee, however, rejected both the oath and the cross-examination requirements, restoring what had originally been proposed. The final Rule reflected a compromise, and although it again required the statement to have been under oath, it did not require cross-examination, and thus included grand jury testimony. See generally MH Graham, "*Employing Inconsistent Statements for Impeachment and as Substantive Evidence: A Critical Review and Proposed Amendments of Federal Rules of Evidence 801(d)(1)(A), 613, and 607*" (1977), 75 Mich L Rev 1565.

³⁴ Criminal Procedure (Scotland) Act 1995, section 260.

hostile. The Crown therefore called police witnesses to prove a prior inconsistent statement in which he had implicated the appellant. The Queensland Court of Criminal Appeal upheld the accused's subsequent conviction. In another Queensland case, *Siedofsky*, the accused was charged with sexual offences against his stepdaughter. After she had stated in evidence that she could not remember certain events, she was declared an adverse witness and the Crown adduced a prior inconsistent statement which supported the charges. She said at some stages that she could not remember the events narrated in the statement, and at others that they were untrue. The jury nevertheless convicted the accused and the Queensland Court of Criminal Appeal dismissed his appeal, although they observed that 'the unusual combination of circumstances called for considerable caution'.

While in each of these cases the course taken by the Crown may have been justifiable on pragmatic grounds and may have led to a just result, it is a course which, in general, we would view with some uneasiness. Unless and until statements by witnesses to the police come to be reliably recorded on audio or video tape, it is quite possible that through error or even malpractice there could be attributed to witnesses, and accepted by the jury, prior statements implicating the accused which were dangerously misleading because they had not been correctly recorded in writing. The necessity of preventing, as far as possible, any miscarriage of justice which might be so caused⁴⁸ has led us to recommend that the only prior statements which should be admissible as evidence of the truth of their contents, irrespective of whether they are adopted or repudiated by the witness, should be statements made in precognitions on oath or in other proceedings.³⁵

10.53 The Scottish Law Commission felt that the oath requirement was important not only because it meant the statement maker was obliged to tell the truth, but more importantly, "*he made the statement in formal proceedings under the control of the judge whose duty it was to see to it that the interrogation of the witness was fair and he was not subjected to any improper pressure.*"³⁶ There was "*even more reason*" to admit a statement made by the witness in a prior proceeding.³⁷

10.54 The Scottish Commission also considered whether video-recorded statements should form a third exception. While acknowledging a "*very strong case*" for admitting such statements, the Commission ultimately declined to make this recommendation, mainly because, at the time, there did not exist a "*general practice of making video recordings of police interviews*

³⁵ Scottish Law Commission, *Evidence: Report on Hearsay Evidence in Criminal Proceedings* (1995), Scot Law Com No 149, at paras 7.18 and 7.19.

³⁶ Scottish Law Commission No 149 (cited above), at para 7.21.

³⁷ Scottish Law Commission No 149 (cited above), at para 7.25.

with potential witnesses" and it was not worthwhile recommending something *"which could have no practical worth"*.³⁸ We will return to the significance of video-recorded statements below in the context of the judicial reforms undertaken in Canada.

(c) *General threshold reliability assurance*

10.55 Canada has not undertaken legislative reform in this area. Instead, in 1993 the Supreme Court of Canada, on its own, reformed the traditional common law prohibition against using prior inconsistent statements for truth by applying the principled approach to hearsay it had developed in earlier cases.³⁹ In *Regina v KGB*, the accused was a young offender charged with second degree murder. While walking home in Scarborough, the victim and his brother become involved in a fight with four young people who had come from a passing car. In the course of the fight, one of the four persons pulled a knife and stabbed the victim in the chest. The four fled the scene. Two weeks later, three young men involved in the incident were interviewed separately by the police. Each was accompanied by a parent and each was advised of his right to counsel and right to silence (one had a lawyer accompanying him). All the interviews were videotaped. In their statements, the three young men told the police that the accused (ie the fourth person) had made statements to them in which he acknowledged stabbing the deceased with a knife. At trial, the three witnesses refused to adopt their earlier statements. They admitted making the statements but said they had lied about the accused's incriminating statements because they wanted to exculpate themselves. The only other identification evidence implicating the accused at trial was some very weak evidence from the victim's brother. The youth court judge acquitted the accused and, after an unsuccessful appeal by the Crown to the Court of Appeal, the Supreme Court of Canada allowed the Crown's further appeal and held that the prior statements of the witnesses could have been admissible for their truth.

10.56 In reaching its decision, the court held that prior inconsistent statements should be substantively admissible on a principled basis applying the criteria of reliability and necessity, after appropriate adaptation and refinement.⁴⁰ In the circumstances of this case, the court found that the reliability criterion may have been met because the hearsay dangers were adequately compensated for by the opportunity to cross-examine the witnesses at trial, the opportunity to see the statement-maker's demeanour on the video-recording, and the presence of the parent at the time of the interview. The necessity criterion had been met because a recanting witness could not provide evidence of the same value as a non-recanting witness.

10.57 While the court recognised that an oath or affirmation, followed by a warning of possible prosecution for perjury, was the *"best indicium of reliability"*, it was not prepared to make this an absolute requirement:

³⁸ Scottish Law Commission No 149 (cited above), at para 7.33.

³⁹ *R v KGB* (1993) 79 CCC (3d) 257 (SCC).

⁴⁰ Cory J (with L'Heureux-Dube J agreeing) wrote a separate concurring decision which will not be discussed here.

*"I do not wish to create technical categorical requirements duplicating those of the old approach to hearsay evidence. It follows from Smith that there may be situations in which the trial judge concludes that an appropriate substitute for the oath is established and that notwithstanding the absence of an oath the statement is reliable. Other circumstances may serve to impress upon the witness the importance of telling the truth, and in so doing provide a high degree of reliability to the statement. While these occasions may not be frequent, I do not foreclose the possibility that they might arise under the principled approach to hearsay evidence."*⁴¹

10.58 In deciding to change the common law, it was apparent that the court was highly influenced by the advantages of modern technology, particularly video-recorded evidence:

*"All of these indicia of credibility, and therefore reliability, are available to the trier of fact when the witness' prior statement is videotaped. During the course of the hearing, counsel for the appellant screened a brief excerpt from the videotape of one of the interviews. In the main portion of the television screen is a medium-length shot of the witness facing the camera and seated across a table from the interviewing officer, showing the physical relationship between the two people. In one upper corner is a close-up of the witness' face as he or she speaks, capturing nuances of expression lost in the main view. Along the bottom of the screen is a line showing the date and a time counter, with the seconds ticking off, ensuring that the continuity and integrity of the record is maintained. The audio-visual medium captures other elements of the statement lost in a transcript, such as actions or distinctive motions which the witness demonstrates (as in this case), or answers given by nodding or shaking the head. In other words, the experience of being in the room with the witness and the interviewing officer is recreated as fully as possible for the viewer. Not only does the trier of fact have access to the full range of non-verbal indicia of credibility, but there is also a reproduction of the statement which is fully accurate, eliminating the danger of inaccurate recounting which motivates the rule against hearsay evidence. In a very real sense, the evidence ceases to be hearsay in this important respect, since the hearsay declarant is brought before the trier of fact."*⁴²

10.59 Finally, in making the point that cross-examination at trial can often remedy the lack of contemporaneous cross-examination, the court made the following comments:

⁴¹ *R v KGB*, (cited above), at 290.

⁴² *R v KGB*, (cited above), at 292.

*"Whereas the police can easily administer a warning and oath, and videotape a statement in the course of a witness interview, it would restrict the operation of a reformed rule to judicial or quasi-judicial proceedings to require contemporaneous cross-examination, and thereby severely restrict the impact of a reformed rule. Consider the facts of the present case: when the three witnesses were interviewed by the police, no one had yet been charged with an offence. Who could have cross-examined the witnesses at that point? How could cross-examination have been effective before the case to be met was known? These and other practical difficulties in requiring contemporaneous cross-examination tip the balance in favour of allowing cross-examination at trial to serve as a substitute. Again, we must remember that the question is not whether it would have been preferable to have had the benefit of contemporaneous cross-examination, but whether the absence of such cross-examination is a sufficient reason to keep the statement from the jury as substantive evidence. Given the other guarantees of trustworthiness, I do not think that it should be allowed to be a barrier to substantive admissibility. Of course, it will be an important consideration for the trier of fact in deciding what weight to attach to the prior inconsistent statement, and it is likely that opposing counsel will stress the absence of such cross-examination to the trier of fact."*⁴³

10.60 Canada appears to have reformed its law more gradually with an approach entailing greater uncertainty than in other jurisdictions where there has been legislative reform. To admit prior inconsistent statements for their truth, Canadian courts must still apply a general threshold test of reliability and necessity. But, in practice, where the police administer a warning and/or oath prior to taking a video-recorded statement and the witness is available to be cross-examined at trial, the courts are likely to admit the prior inconsistent statement when the witness has turned hostile or uncooperative.

10.61 In the United States, there is a second method to admit a prior inconsistent statement for truth where the first method (ie a statement given under oath) is inapplicable. Like in Canada, courts in the federal US have a residual discretion to admit hearsay evidence if it meets the conditions in Rule 807 of the Federal Rules of Evidence:

"A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general

⁴³

R v KGB, (cited above), at 294.

purposes of these rules and the interests of justice will best be served by admission of the statement into evidence..."

10.62 Finally, another more discretionary approach is applied in South Australia.⁴⁴ It appears to make all prior statements presumptively admissible for truth, leaving courts a narrow discretion to exclude the statements under one of three possible limbs. Section 45B of the Evidence Act 1929 provides:

- "(1) An apparently genuine document purporting to contain a statement of fact, or written, graphical or pictorial matter in which a statement of fact is implicit, or from which a statement of fact may be inferred shall, subject to this section, be admissible in evidence.*
- (2) A document shall not be admitted in evidence under this section where the court is not satisfied that the person by whom, or at whose direction, the document was prepared could, at the time of the preparation of the document have deposed of his own knowledge to the statement that is contained or implicit in, or may be inferred from, the contents of the document.*
- (3) A document shall not be admitted in evidence under this section if the court is of the opinion-*
 - (a) that the person by whom, or at whose direction, the document was prepared can and should be called by the party tendering the document to give evidence of the matters contained in the document; or*
 - (b) that the evidentiary weight of the document is slight and is outweighed by the prejudice that might result to any of the parties from the admission of the document in evidence; or*
 - (c) that it would be otherwise contrary to the interests of justice to admit the document in evidence.*
- (4) In determining whether to admit a document in evidence under this section, the Court may receive evidence by affidavit of any matter pertaining to the admission of that document in evidence.*
- (5) For the purpose of determining the evidentiary weight, if any, of a document admitted in evidence under this section, consideration shall be given to the source from which the document was produced, the safeguards (if any) that have been taken to ensure its accuracy, and any other relevant matters.*
- (6) In this section-*

⁴⁴

See Evidence Act 1929, section 45B.

'document' means-

- (a) any original document; or*
- (b) any reproduction of an original document by photographic, photostatic or lithographic or other like process."*

(d) Reform proposal

10.63 Given this lack of uniformity amongst different countries, in arriving at our reform proposals, we have looked very closely at what would be appropriate for Hong Kong. There were divided views expressed in relation to our conclusion in the consultation paper that there should be no changes to the existing law that makes prior inconsistent statements of witnesses inadmissible for the truth of their content. Mr Justice Ewaschuk argued against this approach:

"I would strongly recommend that a prior inconsistent statement of a witness be admissible for the truth of its content. The witness is available for examination and cross-examination as to the inconsistency. The trial judge may also declare the witness to be hostile or adverse. The function of a jury is to seek truth and they should determine whether the witness told the truth in the prior inconsistent statement or at trial."

10.64 Those views were echoed by Professor Myrna Raeder, who pointed out that:

"When defendants or complainants with questionable credibility can no longer offer previous statements that are favourable to their position, the loss of such hearsay is significant, particularly if someone else was the declarant. Similarly, while witnesses who made previous statements inconsistent with their testimony at trial can be impeached, [proposal 14] appears to prohibit the former statements from being admitted for their truth, whether or not they would have previously fit into a different hearsay exception."

10.65 In contrast, Mr Justice McMahon agreed with the sub-committee's original proposal and did not see that either inconsistent or consistent prior statements should be admitted when the witness who made them was available for questioning:

"There is no necessity for the statements to be admitted when the witness can give oral testimony about the subject matter of the evidence."

He went on to observe that there was a tendency for witnesses when giving evidence simply to adopt a prior witness statement without criticism or qualification.

10.66 We have carefully considered the various views expressed on this issue but maintain the original view that it is not advisable to adopt a free admissibility approach, or even one that requires discrete reliability assurances. There are four reasons for this. First, we share the same concerns as the Scottish Law Commission about the possibility that a jury might ignore a witness's oral testimony in court (which could sometimes be directly exculpatory, rather than merely neutral) and convict the defendant on the strength of that witness's hearsay statement alone. In such a situation, even under the terms of the Core Scheme, there would be a strong basis for directing a verdict of acquittal.

10.67 Related to this concern is the fact that law enforcement agencies in Hong Kong do not as a general practice electronically record witness statements. Without such recordings, inaccuracies in the original statement, and influence applied or editing conducted by law enforcement officers, even if entirely innocent, will not be made known to the tribunal of fact.

10.68 Thirdly, the experience of those working in the Hong Kong criminal justice system suggests that inaccurately recorded or influenced witness statements are not uncommon. This problem becomes accentuated when statements are translated from one language to another, which is a procedure common in Hong Kong.

10.69 Lastly, the contemporaneous cross-examination of the witness at trial can sometimes be ineffective as, for example, where the witness either denies making the earlier statement or claims to have forgotten he had made the statement.⁴⁵ In such circumstances, having the witness present is no more useful than if the witness had died or was otherwise unable to testify. The inability to cross-examine the hearsay statement remains the same.

10.70 For all the above reasons, especially the second and third, we do not believe it is advisable to change the present law which makes prior inconsistent statements not admissible for the truth of their contents. But we do believe that this issue should be reconsidered if and when law enforcement agencies in Hong Kong adopt a universal practice of reliably recording witness statements by audio-visual means.

⁴⁵ It appears Hong Kong has had its share of derailed prosecutions due to recanting witnesses. From 1992 to 1995, three murder trials collapsed due to witnesses who gave testimony contrary to their earlier statements. In the same period, 27 District Court cases (22 due to contradictory evidence and five due to lapse of memory) met the same fate. See *"Witnesses Claiming to Have Lapse of Memory"*, Proceedings of the Hong Kong Legislative Council, 14 June 1995, at 4394 - 8.

Recommendation 38

We recommend no changes to the existing law that makes prior inconsistent statements of witnesses inadmissible for the truth of their content. However, this should be reconsidered if and when there is an established general practice by law enforcement agencies of recording witness statements by reliable audio-visual means.

Prior consistent statements

10.71 Reforming the law governing prior consistent statements presents similar but more difficult issues than those with prior inconsistent statements. The concern is less with the traditional hearsay dangers. This is because the witness will most likely be prepared to adopt the contents of the prior statement, thereby presenting little if any resistance to effective cross-examination about the circumstances of that statement. Thus, the opportunity to cross-examine the declarant at trial will generally be enough to compensate for the hearsay dangers.

10.72 However, the free admissibility of prior consistent statements presents serious challenges to the very integrity of a criminal trial. If parties are allowed simply to tender a witness's prior statement as admissible evidence, the practice of witnesses giving oral testimony during examination-in-chief could be significantly changed. If prior statements start to assume such significance, there is a risk that fabricated statements may be tendered. The risk of fabricated statements may require the judge to assume a gatekeeper role to screen out unreliable evidence before it goes to the jury.

10.73 The free admissibility of prior consistent statements might also prolong trials, since witnesses may have made several earlier statements. Will the new admissibility rule require the court to hear not only from the witness but also from all those who heard the witness make the prior statement(s)? Not only would such a rule unnecessarily delay trials, but it could also give rise to a significant amount of irrelevant evidence. Additionally, the influx of irrelevant or otherwise collateral information could skew the jury's attention from the main issues in the case.

10.74 We note that other jurisdictions have tended to be more restrictive in admitting prior consistent statements. Indeed, in those jurisdictions such as Canada where reform of the hearsay rule has been undertaken via the courts, prior consistent statements remain generally inadmissible for truth. In the jurisdictions which have relaxed the rule through legislation (or have proposed legislating to do so), there is a significant degree of variation. Table 1 below outlines the various reforms adopted in other jurisdictions, beginning with those that have relaxed the rule to the greatest extent.

Table 1: Reform of prior statements rule in other jurisdictions

Jurisdiction	Law
<p>Scotland</p>	<p>Criminal Procedure (Scotland) Act 1995</p> <p>260.—(1) Subject to the following provisions of this section, where a witness gives evidence in criminal proceedings, any prior statement made by the witness shall be admissible as evidence of any matter stated in it of which direct oral evidence by him would be admissible if given in the course of those proceedings.</p> <p>(2) A prior statement shall not be admissible under this section unless —</p> <ul style="list-style-type: none"> (a) the statement is contained in a document; (b) the witness, in the course of giving evidence, indicates that the statement was made by him and that he adopts it as his evidence; and (c) at the time the statement was made, the person who made it would have been a competent witness in the proceedings. <p>(3) For the purposes of this section, any reference to a prior statement is a reference to a prior statement which, but for the provisions of this section, would not be admissible as evidence of any matter stated in it.</p> <p>(4) Subsections (2) and (3) above do not apply to a prior statement—</p> <ul style="list-style-type: none"> (a) contained in a precognition on oath; or (b) made in other proceedings, whether criminal or civil and whether taking place in the United Kingdom or elsewhere, <p>and, for the purposes of this section, any such statement shall not be admissible unless it is sufficiently authenticated.</p>
<p>Australia (federal)</p>	<p>Evidence Act 1995</p> <p>60. Exception: evidence relevant for a non-hearsay purpose</p> <p>The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation.</p> <p>66. Exception: criminal proceedings if maker available</p> <p>(1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.</p> <p>(2) If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:</p> <ul style="list-style-type: none"> (a) that person; or (b) a person who saw, heard or otherwise perceived the representation being made; <p>if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.</p> <p>(3) If a representation was made for the purpose of indicating the evidence that the person who made it would be able to give in an Australian or overseas proceeding, subsection (2) does not</p>

Jurisdiction	Law
	<p>apply to evidence adduced by the prosecutor of the representation unless the representation concerns the identity of a person, place or thing.</p> <p>(4) A document containing a representation to which subsection (2) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.</p>
<p>England and Wales</p>	<p>Criminal Justice Act 2003</p> <p>120. Other previous statements of witnesses</p> <p>(1) This section applies where a person (the witness) is called to give evidence in criminal proceedings.</p> <p>(2) If a previous statement by the witness is admitted as evidence to rebut a suggestion that his oral evidence has been fabricated, that statement is admissible as evidence of any matter stated of which oral evidence by the witness would be admissible.</p> <p>(3) A statement made by the witness in a document—</p> <ul style="list-style-type: none"> (a) which is used by him to refresh his memory while giving evidence, (b) on which he is cross-examined, and (c) which as a consequence is received in evidence in the proceedings, is admissible as evidence of any matter stated of which oral evidence by him would be admissible. <p>(4) A previous statement by the witness is admissible as evidence of any matter stated of which oral evidence by him would be admissible, if—</p> <ul style="list-style-type: none"> (a) any of the following three conditions is satisfied, and (b) while giving evidence the witness indicates that to the best of his belief he made the statement, and that to the best of his belief it states the truth. <p>(5) The first condition is that the statement identifies or describes a person, object or place.</p> <p>(6) The second condition is that the statement was made by the witness when the matters stated were fresh in his memory but he does not remember them, and cannot reasonably be expected to remember them, well enough to give oral evidence of them in the proceedings.</p> <p>(7) The third condition is that—</p> <ul style="list-style-type: none"> (a) the witness claims to be a person against whom an offence has been committed, (b) the offence is one to which the proceedings relate, (c) the statement consists of a complaint made by the witness (whether to a person in authority or not) about conduct which would, if proved, constitute the offence or part of the offence, (d) the complaint was made as soon as could reasonably be expected after the alleged conduct, (e) the complaint was not made as a result of a threat or a promise, and (f) before the statement is adduced the witness gives oral evidence in connection with its subject matter.

Jurisdiction	Law
	<p>(8) For the purposes of subsection (7) the fact that the complaint was elicited (for example, by a leading question) is irrelevant unless a threat or a promise was involved.</p>
New Zealand	<p>Evidence Act 2006</p> <p>35 Previous consistent statements rule</p> <p>(1) A previous statement of a witness that is consistent with the witness's evidence is not admissible unless subsection (2) or subsection (3) applies to the statement.</p> <p>(2) A previous statement of a witness that is consistent with the witness's evidence is admissible to the extent that the statement is necessary to respond to a challenge to the witness's veracity or accuracy, based on a previous inconsistent statement of the witness or on a claim of recent invention on the part of the witness.</p> <p>(3) A previous statement of a witness that is consistent with the witness's evidence is admissible if:</p> <ul style="list-style-type: none"> (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and (b) the statement provides the court with information that the witness is unable to recall.
United States (federal)	<p>Federal Rules of Evidence</p> <p>Rule 801. Definitions</p> <p>...</p> <p>(d) Statements which are not hearsay. A statement is not hearsay if -</p> <p>(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person.</p>
Queensland (Australia)	<p>Evidence Act 1977</p> <p>101. Witness's previous statement, if proved, to be evidence of facts stated</p> <p>(1) Where in any proceeding--</p> <ul style="list-style-type: none"> (a) a previous inconsistent or contradictory statement made by a person called as a witness in that proceeding is proved by virtue of section 17, 18 or 19;16 or (b) a previous statement made by a person called as aforesaid is proved for the purpose of rebutting a suggestion that the person's evidence has been fabricated; <p>that statement shall be admissible as evidence of any fact stated therein of which direct oral evidence by the person would be admissible.</p> <p>(2) Subsection (1) shall apply to any statement or information proved by virtue of section 94(1)(b) as it applies to a previous inconsistent or contradictory statement made by a person called as a witness which is proved as mentioned in subsection (1)(a).</p>

Jurisdiction	Law
	<p>(3) Nothing in this part shall affect any of the rules of law relating to the circumstances in which, where a person called as a witness in any proceeding is cross-examined on a document used by the person to refresh the person's memory, that document may be made evidence in that proceeding, and where a document or any part of a document is received in evidence in any such proceeding by virtue of any such rule of law, any statement made in that document or part by the person using the document to refresh the person's memory shall by virtue of this subsection be admissible as evidence of any fact stated therein of which direct oral evidence by the person would be admissible.</p>

10.75 The English Law Commission agreed with the rationale for excluding prior consistent statements stated by *Cross and Tapper*:

*"The necessity of saving time by avoiding superfluous testimony and sparing the court a protracted inquiry into a multitude of collateral issues which might be raised about such matters as the precise terms of the previous statement is undoubtedly a sound basis for the general rule."*⁴⁶

10.76 Accordingly, the Commission rejected a proposal to make all previous consistent statements admissible:

"[Many commentators] took the very strong view that this option would let in large quantities of unnecessary and irrelevant material. They stressed that only relevant evidence is admissible, and that any reform of the rule against previous statements should not invite irrelevant evidence. ...

We considered this option in the light of the argument that the court would not permit previous statements to be admitted unless they were relevant. We foresee long arguments on the relevance of particular statements, and we believe a better way would be to define the cases where such evidence could be relevant, such as to rebut an allegation of recent invention.

*Those who opposed this option [of free admissibility] were also concerned that trials would focus on statements in documents, rather than on oral evidence. This concern gains force from the doubts about the quality of witness statements generally. We find the reasoning of those unhappy with this option very persuasive, and have therefore decided to reject it."*⁴⁷

⁴⁶ English Law Commission Report 245 (cited above), at para 10.12.

⁴⁷ English Law Commission Report 245 (cited above), at paras 10.32 - 10.34.

10.77 Similarly, the New Zealand Law Reform Commission also rejected a free admissibility approach, stating that the intention behind its proposal was to *"prevent the parties from inundating the courts with voluminous amounts of repetitive material in order to shore up a witness's consistency."*⁴⁸

10.78 While rejecting the option of free admissibility, the English Law Commission nevertheless noted the many problems with the existing exceptions (eg rebutting an allegation of recent fabrication, recent complaint, and prior identification) to the prior statements rule. The Commission considered it unrealistic to expect the tribunal to use the statement for only the non-hearsay purpose, while ignoring the facts contained in it. There was also strong criticism of the anomalies surrounding the "recent complaint" exception. The Commission felt that if the tribunal was to receive a prior statement for a non-hearsay purpose under the existing exceptions, it should also be allowed to use that statement for truth.

10.79 Table 1 suggests that this position appears to be well-accepted amongst the various jurisdictions cited. Since statements admissible under an existing exception would already be heard by the tribunal, there is no question of inviting further superfluous evidence to be inflicted on the court. The Australian Law Reform Commission has argued that, even if the extension led to an increase in time and cost, *"the advantage of being able to consider such statements without the mental gymnastics required by present law is sufficient to outweigh such increases."*⁴⁹

10.80 The English Law Commission argued that the exception allowed for documents used by witnesses to refresh their memory should be extended. The case for doing so was made strongly by Lord Justice Auld in his 2001 report reviewing the procedure of the criminal courts of England and Wales:

"Every day, in courts all over the country, police officers are permitted to give evidence by reference to their notebooks of matters of which they could not possibly be expected to have any independent recollection. Often, they freely acknowledge their total dependence on their note when the point is put to them by way or as a result of a challenge from the defence advocate. Yet, they are still expected, when giving evidence, to go through the charade of seemingly not reading their notebooks, but only glancing at them from time to time when their memory needs jogging. The understandable reality is, of course, that they have usually spent time, shortly before going into the witness box, reading and re-reading their notes so that, at best, their evidence is a test of their short-term memory of what they have just read. So, for all practical purposes, the note, though not physically admissible, becomes the evidence in chief. The absurdity of all this is aggravated by the usual and recognized practice that a witness may also refresh his memory

⁴⁸ NZ Law Commission Report 55 - Vol 2 (cited above), at para C167.

⁴⁹ Australian Law Reform Commission Report 26 (Interim) Vol 1 (cited above), at para 685.

shortly before going into the witness box by reading a non-contemporaneous written statement if he has made one.

... testimony should be an exercise in truthfulness rather than a test of long or short term memory. At present the rules seem to me to have more to do with gamesmanship than the criminal burden of proof or the reliability of evidence. In their application to prosecution witnesses, in respect of whose evidence the point mostly arises, the defence may do their best to deprive a witness of access to his statement in the witness box in the hope that he will not keep to it, whereupon they will confront him with the inconsistency and make much of it with the jury. If, notwithstanding such denial of access to his witness statement, the witness does keep to it, the defence can keep the consistency from the jury. In either case, his credibility or accuracy falls to be tested by what he said nearer the event alongside what he says in the witness box. If he has had the opportunity to read his statement before going into the witness box, he will tell the truth or lie as he did in the witness statement; if the former, the only casualty of justice may be the weakness of his short term memory.

... all previous statements should be admissible regardless of the existence or extent of the witness's memory, leaving their weight, along with the oral evidence of the witness after testing in cross-examination, a matter for determination by the tribunal.⁵⁰

The Criminal Evidence Act 2003 adopted the Law Commission's earlier recommendation, rather than extending the exception as proposed by Lord Justice Auld.

10.81 We agree with the proposals put forward by the English Law Commission, now enacted in the Criminal Evidence Act 2003, and recommend their adoption in Hong Kong. Those proposals are consistent with our approach to reform and would rationalise the law by removing historical anomalies and other impractical distinctions.

10.82 The sub-committee's consultation paper had originally proposed that prior statements used by witnesses to refresh their memory should be admitted for their substantive truth, as should prior statements of a witness who genuinely cannot recall the events recorded in the statements. Reservations were expressed about both these proposals by a number of those commenting on the consultation paper. In particular, there was concern in relation to the first of these proposals that prior consistent statements might be given undue weight and their production might become a matter of routine, reducing the importance of the witness's spoken evidence in court. As to the second, there was a risk that a witness might fabricate his original statement

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The Right Honourable Lord Justice Auld, *Report: Review of the Criminal Courts of England and Wales* (The Stationery Office, 2001), at paras 81, 84 and 90 of Chapter 11.

and subsequently claim no recollection of the events. On reflection, we have concluded that these two proposals should be deleted.

10.83 A further proposal in the consultation paper which prompted adverse comment was the suggestion that the "recent complaint" exception, which currently only applies in relation to sexual offences, should be extended to all victim offences. It was pointed out by Ms Janice Brabyn of the University of Hong Kong that the essence of many sexual offence trials was a straight credibility contest between the complainant and the alleged offender. In such circumstances, evidence of recent complaint was particularly relevant, but the same could not be said generally of other victim offences. We note that section 120(7) of the Criminal Justice Act 2003 in England (quoted above in the table of legislation following paragraph 10.71) provides a general exception in respect of recent complaint evidence, implementing a recommendation of the English Law Commission. Nevertheless, we now think that the question of a possible general extension of the recent complaint exception along these lines requires separate study.

Recommendation 39

We recommend the following proposals to reform the law in relation to prior consistent statements:

- 39A** where prior consistent statements are presently admitted under existing common law exceptions (eg prior identification, recent complaint, rebutting recent fabrication), they should also be admitted for their substantive truth;
- 39B** prior statements used by witnesses to refresh their memory should not be admitted for their substantive truth;
- 39C** the prior identification exception should be extended (in addition to persons) to objects and places generally;
- 39D** the question of whether the recent complaint exception should be extended to all victim offences and to complaints made as soon as could reasonably be expected after the alleged conduct should be further studied together with the question of abolishing the recent complaint exception and replacing it with a narrower one that admits complaint evidence only for the purpose of narrative, in the sense of describing how the charge came to be laid.⁵¹

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Canada undertook reforms of this nature in the early 1980s. See Canadian Criminal Code, s275 and *Regina v JEF* (1993) 85 CCC (3d) 457 (Ont CA).

Other issues

10.84 In liberalising the admissibility laws governing prior statements, many law reformers have also noted the attendant risks of leaving admitted prior statements in the hands of lay tribunals. There is a concern that if juries were given the written statements and allowed to make reference to them directly during deliberations, they might give them undue weight. Indeed, in complex and lengthy cases, there is a risk that jury members might no longer remember the witness's oral evidence, and might instead rely exclusively on the written prior statement as that witness's evidence.

10.85 Lord Justice Auld recognised the problem in the following passage from his report:

"There is the danger ... of a statement, whether in documentary, audio-recorded or video-recorded form, carrying much greater authority with a lay fact finder than in the impermanent forms of hearing the statement read and/or seeing it in the course of the evidence and/or in oral reminders of it by the advocates and the judge. If, for example, a jury were left to take a prosecution witness's statement to their retiring room when considering their decision with only oral reminders of the judge in his summing-up of the defence inroads on it in cross-examination, there is a danger that the printed words in front of them would carry more weight. This danger also arises in relation to evidence presented by electronic means, such as computer graphics or virtual reality simulations. One way of dealing with it would be to make the reading of the statement or the playing of the recording in the course of the trial evidence of the facts to which it relates, but not to permit the jury to have it in any permanent form. This is the solution adopted in the United States Federal Rules of Evidence, which admit prior statements into evidence, subject to certain conditions, but by 'reading it into evidence' and not by way of an exhibit unless offered by an adverse party, the object being to deny the jury the statement in their jury room during deliberation.

*This may become less of a problem with the march of science when all courts are equipped with facilities for the transcription, searching and ready production in electronic or hard copy form of oral evidence, but that is not likely to be achievable everywhere for some time.*⁵²

10.86 We believe these comments are sensible and equally apt in the context of Hong Kong jury trials.

⁵² The Right Honourable Lord Justice Auld, *Report: Review of the Criminal Courts of England and Wales* (cited above), at paras 93 - 4 of Chapter 11.

Recommendation 40

We recommend the inclusion of an express provision that makes the physical record of an admitted prior statement presumptively removed from the jury's possession in their deliberations, unless the judge finds that the jury would be substantially assisted by receiving and reviewing the physical record.

Pre-trial procedures

10.87 A concern was expressed in the sub-committee that, with the adoption of the Core Scheme, litigious issues concerning the admission of hearsay would inevitably delay and prolong trial proceedings. Consideration was given to whether there may be any advantage in having a system of pre-trial determination of admissibility by the trial judge, coupled with an interlocutory appeal mechanism to the Court of Appeal on the admissibility issue. We understand that this is a procedural device applied in New Zealand.

10.88 However, in Hong Kong there is a concerted effort by the courts to discourage collateral litigation in criminal cases, which is viewed as disruptive to the judicial process to the disadvantage of effective decision-making and the disruption of the system as a whole.⁵³ We note, moreover, that no facility exists at present for interlocutory appeals against decisions to admit evidence under one of the existing exceptions to the hearsay rule.

10.89 In the end, we felt that while the idea had some notional merit, the creation of an interlocutory appeal process in respect of hearsay evidence alone would run counter to the current approach. Any challenge to a decision concerning the admissibility of hearsay evidence could properly be dealt with in the ordinary course of an appeal, should a conviction eventuate.

Recommendation 41

We recommend that no specific regime be introduced for appeals against decisions on the admissibility of hearsay evidence.

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Yeung Chui Pong v HKSAR [2008] 3 HKLRD 1, at paras 67 – 70.

Sentencing

10.90 In *HKSAR v Ma Suet-chun*⁵⁴ the Court of Appeal in Hong Kong held that a sentencing court in determining the prevalence of an offence and/or locality of offence, for the purpose of enhancing the sentence to be imposed, may take into account statistical and other information supplied by the police, even though that information would not be admissible by the rules of criminal evidence. In short, on the basis of hearsay evidence an enhanced sentence may be imposed. The Court of Appeal accordingly rejected orthodox admissibility law in favour of admitting material of ostensible reliability and credibility.

10.91 The court in *Ma Suet-chun* considered section 27(11)(b) of the Organised and Serious Crimes Ordinance (Cap 455), which provides that, subject to other criteria, the sentencing court may impose an enhanced sentence where that court is "*satisfied beyond reasonable doubt*" as to any information furnished in support of the enhancement application. One of the statutory criteria under section 27(2)(c) is "*the prevalence of that specified offence*". In *Ma Suet-chun* the prosecution adduced police data of the number of reported offences of the same general type as that under consideration by the trial judge. The data consisted of the number of reports of crime of the same type/technique of alleged offence made to the police in different areas of Hong Kong. That data was a compilation of individual complaints which had not been tested to establish whether they were genuine as to the event or as to the amount said to have been defrauded. On the face of it, the evidence was hearsay, because the truth of the underlying complaints was necessarily being relied upon for the purposes of giving the data meaningful content. Unless substantiated, the complaints had no testimonial efficacy.

England: hearsay admissible by prosecution in conspiracy sentencing

10.92 The Hong Kong Court of Appeal in *Ma Suet-chun* relied on the English case of *R v Patrick Smith*. In *Patrick Smith* (PS) the relevant sentencing issue arose in relation to the sentencing of PS, a conspirator. He had pleaded guilty. His two alleged co-conspirators (C and D) elected trial and were found guilty. The same judge presided at all aspects of the proceedings over PS, C and D. In sentencing PS, the judge stated that PS was the mastermind and had pressured C and D. This assertion was based on what the judge saw and heard and believed from the trial of C and D. PS appealed on the basis that the judge could not have taken into account the disputed facts in the trial of C and D in his case – facts which were hearsay in relation to PS and which negated his mitigation.

10.93 In a reserved judgment the Court of Appeal concluded that in a conspiracy sentencing had to be imposed on a consistent basis. Lord Lane LCJ said:

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[2001] 4 HKC 337 (CA).

*"In the judgment of this Court, the judge's primary task in a case such as this is to decide what were the facts of the conspiracy which involved the various defendants. He is not obliged nor would it be proper for him to sentence one conspirator on the basis of facts advanced by him and then to sentence the others on a totally disparate version of events advanced by them."*⁵⁵

10.94 But how is that basis to be achieved in separate but related proceedings? Lord Lane LCJ continued:

*"In deciding what the factual situation was he is not bound by the rules of admissibility which would be applicable in the trial of the issue of guilt or innocence. He can take into account the contents of witness statements or depositions; he can take into account evidence he may have heard in the trial of co-defendants. He must, however (and this is perhaps to state the obvious) bear in mind the danger that self-serving statements are likely to be untrue, that such statements have as a rule not been subjected to cross-examination and that the particular defendant whom he is sentencing may not have had the opportunity to put forward his version of events. The last danger can be avoided by giving the defendant the opportunity to give evidence if he wishes. As in the Newton case, the aim is to provide the judge with the fullest information possible, whilst at the same time ensuring that the particular defendant has every opportunity to present his side of the picture."*⁵⁶ [Emphasis added]

The English Court of Appeal appears to have accepted that in the special case of sentencing for conspiracy the strict rules of evidence do not apply. However, no full general principle appears to have been enunciated and the earlier decisions of *R v Robinson*⁵⁷ and *R v Wilkins*⁵⁸ to the opposite effect of *Patrick Smith* were not considered in that judgment.

Canada: hearsay admissible by prosecution in sentencing

10.95 The Hong Kong Court of Appeal in *Ma Suet-chun* also had regard to *R v Gardiner*,⁵⁹ where the Supreme Court of Canada considered the rules of evidence for the admissibility of evidence at sentencing. For the majority, Dickson J (later CJC) held that the burden of proof which the prosecution must sustain in advancing contested aggravating facts in a sentencing proceeding was proof beyond reasonable doubt.⁶⁰ He said:

⁵⁵ (1988) 87 Cr App R 393, at 398.

⁵⁶ (1988) 87 Cr App R 393, at 398.

⁵⁷ (1969) 53 Cr App R 314.

⁵⁸ (1978) 66 Cr App R 40.

⁵⁹ (1982) 140 DLR (3d) 612.

⁶⁰ (1982) 140 DLR (3d) 612, at 641 - 648.

"It is a commonplace that the strict rules which govern at trial do not apply at a sentencing hearing and it would be undesirable to have the formalities and technicalities characteristic of the normal adversary proceeding prevail. The hearsay rule does not govern the sentencing hearing. Hearsay evidence may be accepted where found to be credible and trustworthy. The judge traditionally has had wide latitude as to the sources and types of evidence upon which to base his sentence. He must have the fullest possible information concerning the background of the accused if he is to fit the sentence to the offender rather than to the crime."⁶¹ [Emphasis added]

Australia: no hearsay by prosecution in sentencing

10.96 By contrast, in the Australian case of *R v Traiconi*⁶² the position and principle was stated by Gleeson CJ as follows:

"Sentencing proceedings which are, as in the present case, usually extremely serious in their consequences, are proceedings in which the rules of admissibility of evidence are frequently relaxed by consent and often for the benefit of the person being sentenced, but if matters of aggravation are to be proved and relied upon in sentencing an offence, they are to be proved beyond reasonable doubt and by admissible evidence."⁶³
[Emphasis added]

10.97 Australian courts have repeatedly decided that hearsay is not admissible in sentencing. In *Morse v R*⁶⁴ a number of decisions to the same effect in different jurisdictions are discussed.

10.98 In a *Newton* hearing, to determine disputed facts upon which a sentence is to be based, only admissible evidence could be adduced to resolve important conflicts or ambiguities which the prosecution must establish or negative beyond reasonable doubt.⁶⁵ This is consistent with what Blair-Kerr J said in *R v Lo Yim-kai*:

"Why should proceedings for the determination of such vital facts affecting quantum of sentence be any less formal than proceedings for the ascertainment of guilt or innocence?"⁶⁶

⁶¹ (1982) 140 DLR (3d) 612, at 648. In 1995, the Canadian Parliament enacted the section 723(5) of the Criminal Code, RSC 1985, Chap C-46, to replace the decision in *Gardiner*. It provides that: "Hearsay evidence is admissible at sentencing proceedings, but the court may, if the court considers it to be in the interests of justice, compel a person to testify where the person (a) has personal knowledge of the matter; (b) is reasonably available; and (c) is a compellable witness."

⁶² (1990) 49 A Crim R 417 (NSW: CA).

⁶³ (1990) 49 A Crim R 417, at 418 - 419 (NSW: CA).

⁶⁴ [1977] WAR 151.

⁶⁵ (1982) 4 Cr App R (S) 388.

⁶⁶ [1966] HKLR 414, at 423.

New Zealand: no hearsay by prosecution in sentencing

10.99 The New Zealand Court of Appeal has also rejected in *R v Nuku*⁶⁷ and *R v Bryant*⁶⁸ the concept of hearsay being admissible at the instance of the prosecution at the sentencing phase.

Consistent law reform: conviction and sentencing

10.100 The real issue is not so much determining the present position at common law, but deciding what form a reformed law should take. If hearsay (with appropriate safeguards) is to be admissible at the conviction phase what conceptual objection can there be to its being equally admissible at the sentencing phase?

10.101 The proposal for the admissibility of hearsay at trial is predicated on relevance, necessity and reliability, and incorporates innate safeguards. We think the proposed legislation should specifically address the admissibility of hearsay at the sentencing phase, and that this should be admitted on the same basis as in the guilt-determination phase. There should be an express statutory statement, reflecting the common law, that the orthodox burden and standard of proof in relation to disputed issues of aggravation in the sentencing phase remains on the prosecution.

10.102 We note Lawton LJ's observation in *R v Sargeant* that:

*"Nothing gives a bigger sense of injustice to a convicted man than false statements being made about him after verdict".*⁶⁹

Recommendation 42

42A The new legislation should specifically address the issue of the admissibility of hearsay in sentencing in conformity with the general recommendations in this report for safeguarded change to the existing law.

42B The new legislation should also specifically state that in all courts, in the sentencing phase, any disputed issue of fact or matter of aggravation must be proved by the prosecution beyond reasonable doubt.

⁶⁷ [1969] NZLR 343, 345 (CA).

⁶⁸ [1980] 1 NZLR 264 (CA).

⁶⁹ (1974) 60 Cr App R 74, at 79.

Extradition

10.103 An issue arises as to whether the proposed reform of the law of hearsay will have any effect in relation to the law of extradition. We think the answer is straightforward. Extradition is regulated by the Fugitive Offenders Ordinance (Cap 503). That in turn requires a magistrate on the direction of the Chief Executive to hear and determine the request for extradition, in accordance with Part III of the Magistrates Ordinance (Cap 227), which provides a code for defended committal proceedings, where an accused is facing an indictable offence.⁷⁰

10.104 Our proposed reforms will apply to all criminal proceedings and they will therefore also apply to extradition proceedings, which are substantially aligned with defended committal proceedings. Under the proposed law, a magistrate in extradition proceedings will decide whether there is a *prima facie* case based on the evidence adduced. That evidence may include hearsay if it meets the demanding test for its admissibility that we have postulated. A magistrate hearing committal proceedings for a potential trial in Hong Kong will also be applying the same test in extradition (ie is there a *prima facie* case?)

10.105 In our view, the reforms we propose will apply to the law of extradition under the Fugitive Offenders Ordinance (Cap 503).

⁷⁰

For a review of the background to the Fugitive Offenders Ordinance, see the judgments of Stock J in *Cosby v Chief Executive HKSAR* [2000] 3 HKC 662, *Cosby v Government of United States of America*, [2000] 3 HKC 688.

Chapter 11

Human rights implications

Relevant human rights provisions in Hong Kong

11.1 The admission of an incriminating hearsay statement at the instance of the prosecution has human rights implications for the accused, who is unable to cross-examine and confront the maker of the statement. It is sometimes said that hearsay evidence potentially impinges on two distinct human rights: the right to cross-examine opposing witnesses and the right to confront one's accuser. To see them as distinct rights, the former must be treated as being instrumentally related to the enjoyment of a fair trial, while the latter values confrontation in and of itself, even if a fair trial is possible.

11.2 If the right to cross-examine serves only to guarantee a fair trial then its scope will be shaped by the multiplicity of interests (not only those of the accused) inherent in the notion of fair trial. The right of confrontation, on the other hand, is *prima facie* infringed by the admission of prosecution hearsay evidence, but some restrictions may be justified if reasonable and proportionate.

11.3 Whether the proposals in this report infringe fundamental rights and freedoms in Hong Kong will depend on the extent to which these two rights are constitutionally protected. This ultimately boils down to whether the following provisions of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (the Basic Law) and the Hong Kong Bill of Rights (section 8 of the Hong Kong Bill of Rights Ordinance (Cap 383)) are triggered:

Basic Law

Article 87

"In criminal and or civil proceedings in the Hong Kong Special Administrative Region, the principles previously applied in Hong Kong and the rights previously enjoyed by the parties to proceedings shall be maintained."

"Anyone who is lawfully arrested shall have the right to a fair trial by the judicial organs without delay and shall be presumed innocent until convicted by the judicial organs."

Article 39

"The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as

applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

Hong Kong Bill of Rights

Article 10

"Equality before courts and right to fair and public hearing

*All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."*

Article 11

"Rights of persons charged with or convicted of criminal offence

...

(2) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality —

...

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ..."

11.4 Unlike the United States Constitution, the right of confrontation is not expressly protected in Hong Kong's Basic Law or Bill of Rights.¹ Article 11(2)(e) of the Hong Kong Bill of Rights comes the closest by protecting the accused's right "*to examine, or have examined, the witnesses against him*". Violating this right will amount to an infringement of the International Covenant

¹

The Sixth Amendment of the US Constitution provides that in all criminal prosecutions, the accused shall enjoy the right "*to be confronted with the witnesses against him*".

on Civil and Political Rights as applied to Hong Kong, which in turn contravenes Article 39 of the Basic Law.

The accused's right to "examine the witnesses against him"

11.5 There are three possible interpretations of the Article 11(2)(e) right. The robust interpretation is to treat the right as a right to confront the statement-maker subject to reasonable restrictions. According to this interpretation, all incriminating hearsay evidence would *prima facie* infringe the right since by definition hearsay denies the defendant the opportunity to confront and examine the declarant.

11.6 The second interpretation construes the scope of the right more narrowly and literally. This interpretation would entitle the defendant to cross-examine the person who has personal knowledge of the making of the hearsay statement. In other words, it is a right to examine the person who heard the statement being made, but not a right to examine the actual statement maker. Under this interpretation, hearsay evidence would rarely infringe the right since trial procedures in Hong Kong's adversarial system normally already cater for this opportunity.

11.7 There is some indication that the courts in Hong Kong have adopted the second interpretation to the Article 11(2)(e) right. In *HKSAR v Tse Mui-chun*, the Court of Final Appeal considered an Article 11(2)(e) challenge to section 121 of the Copyright Ordinance (Cap 528), which allows the prosecution to use affidavit evidence containing hearsay to prove the subsistence of copyright in a copyright protected work.² The provision allowed the deponent to assert the subsistence of copyright without needing to have personal knowledge of this fact. It also provided a mechanism by which the defence could cross-examine the deponent during the trial. In rejecting the challenge, the court found that the opportunity to cross-examine the deponent was sufficient to satisfy the requirements of Article 11(2)(e). Specifically, the court held:

*"Section 121 deponents can be required to attend the trial court and give evidence. When they do they are subject to cross-examination. And we think that it would stretch the meaning of the word 'witnesses' in art. 11(2)(e) out of shape to read it as including persons from whom s. 121 deponents receive information. The trial court will assess the reliability of such information in the course of assessing the weight of the hearsay evidence based on it."*³

² *HKSAR v Tse Mui-chun* [2004] 1 HKLRD 351 (CFA)

³ *HKSAR v Tse Mui-chun* [2004] 1 HKLRD 351 (CFA), at para 36.

11.8 It would seem to follow from this decision that Article 11(2)(e) should be interpreted narrowly: insofar as it relates to documentary evidence, it requires a witness, who has knowledge of the making of the document, to be accessible to the defence for cross-examination.

11.9 Even if Article 11(2)(e) is conceived more broadly as a right to confront the declarant (ie the source of the incriminating evidence), it may still be subject to reasonable restrictions. For example, in *Regina v Chan Bing-for*, the Court of Appeal held that the Hong Kong Bill of Rights did not guarantee face to face confrontation in the context of live video-link evidence given by a child witness.⁴ The United States Supreme Court has held that "*the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.*"⁵ In *Ohio v Roberts*, the court emphasised that the Sixth Amendment's confrontation clause reflects a "*preference for face-to-face confrontation at trial*" but such confrontation is not required in all cases.⁶ The Sixth Amendment prohibits some but not all hearsay. The court held that if hearsay is to be admissible, the confrontation clause requires that the hearsay declarant be unavailable at trial and the hearsay statement bear adequate "*indicia of reliability*". Such reliability could be inferred if the evidence falls within a "*firmly rooted hearsay exception*" or if there are "*particularized guarantees of trustworthiness*".⁷

11.10 More recently, however, the United States Supreme Court has significantly widened the category of inadmissible hearsay caught by the Confrontation Clause. In *Crawford v Washington*, the court (by a majority of seven to two) reinterpreted the meaning of the Sixth Amendment and overruled *Ohio v Roberts*' indicia of reliability approach to the Confrontation Clause.⁸ In doing so, it laid down a "bright line" rule that categorically excludes "testimonial statements" of witnesses absent from trial unless the witness/declarant is unavailable and the accused has had a prior opportunity to cross-examine the declarant.⁹ Justice Scalia, writing the opinion of the court, did not exhaustively define "testimonial statement" but did state that the term applied "*at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.*"¹⁰ The decision

⁴ *R v Chan Bing-for* [1997] 2 HKC 205 (CA).

⁵ *Chambers v Mississippi*, 93 SCt 1038 at 1046 (1973). See also *Ohio v Roberts*, 100 SCt 2531 (1980); *Maryland v Craig*, 110 SCt 3157 (1990) and, generally, Andrew Choo, *Hearsay and Confrontation in Criminal Trials* (Oxford: Clarendon Press, 1996), at 181 - 185.

⁶ *Ohio v Roberts*, cited above, at 2537.

⁷ *Ohio v Roberts*, cited above, at 2539.

⁸ *Crawford v Washington*, 124 SCt 1354 (2004). In this case, the accused and his wife had visited the victim who allegedly on an earlier occasion had tried to rape the wife. During the visit, the accused stabbed the victim, thereby leading to charges of assault and attempted murder. Both the accused and wife gave separate statements to the police. There were similarities in the two statements but the wife's statement tended to undermine the accused's defence of self-defence, which he put forward in both his statement and at trial. The wife was not a competent witness at trial due to marital privilege. The prosecution succeeded in adducing her police statement as evidence against the accused. The Supreme Court held that there was an infringement of the Confrontation Clause since the wife's statement was clearly a testimonial one and the accused was never given the opportunity to confront the statement maker.

⁹ *Crawford v Washington*, cited above, at 1369.

¹⁰ *Crawford v Washington*, cited above, at 1374.

is strongly based on a historical analysis of the Framers' intention and on pre-twentieth century English and American authorities. As clearly seen in the following quotation, the Supreme Court was highly critical of the reliability approach which was described as being *"amorphous, if not entirely subjective"*:

*"Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.' Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined."*¹¹

For non-testimonial statements, presumably the *Ohio v Roberts* approach continues to apply, although the court does not resolve this point in *Crawford*.

11.11 The majority's decision in *Crawford* has attracted much critical commentary. It has been said that the decision reflects a theory of *"distrust of the government, especially the executive and legislative branches."*¹² The rule set down is said to be both "over-and-under-inclusive" since not all testimonial statements are unreliable and non-testimonial statements, which are outside the rule, may also be unreliable.¹³ The most significant criticism is directed at the historical reinterpretation of the confrontation clause and the founding of the testimonial/non-testimonial statement distinction. Chief Justice Rehnquist, dissenting with Justice O'Connor, wrote that the reinterpretation was *"not backed by sufficiently persuasive reasoning to overrule long-established precedent"*, and the distinction between the two categories of statements was *"no better rooted in history than [the] current doctrine"*.¹⁴ He stated further that neither the Supreme Court nor any other court had ever drawn a distinction between testimonial and non-testimonial statements, and he saw *"little value in trading...precedent for an imprecise approximation at this late date."*¹⁵ Sarah J Summers, in an article on the right to confrontation, concludes that the distinction *"- based as it is on a dated and ultimately erroneous view of the law of criminal procedure in continental*

¹¹ *Crawford v Washington*, cited above, at 1370-1.

¹² Dale A Nance, "Rethinking Confrontation After Crawford" [2004] 2(1) International Commentary on Evidence, Article 2, at 14.

¹³ H L Ho, "Confrontation and Hearsay: A Critique of Crawford" (2004) 8 International Journal of Evidence and Proof 147, at 161.

¹⁴ *Crawford v Washington*, cited above, at 1374.

¹⁵ *Crawford v Washington*, cited above, at 1376.

Europe – can only be characterised as arbitrary and thus unsatisfactory".¹⁶ The wisdom of basing a constitutional interpretation in the year 2004 on events and vague laws occurring in the late eighteenth century has also been questioned:

*"[The majority] is wrong to let the Clause be governed by the details of how such evils were addressed in late Eighteenth Century Anglo-American common law. Even if those cases were to provide comprehensive and unequivocal rules – which they don't – and even if we are to be governed by unstated specific intentions of the drafters or adopters of the Confrontation Clause – which we shouldn't – why should we suppose that these Framers not only agreed with, but intended to constitutionalize all or even most of the particulars of the common-law of that time? We may all agree that the Framers would have rejected an inquisitorial trial by affidavit, and we may surmise that, were they to have to choose, they would have preferred the common-law rules of the time (relating to what we would now call hearsay) to trial by affidavit. But that is a long way from a constitutional endorsement of the pattern of those common-law rules."*¹⁷

11.12 While *Crawford v Washington* represents a significant development in the international jurisprudence of hearsay, we believe it will have little influence on the human rights jurisprudence of Hong Kong. The decision in *Crawford* is deeply rooted in both the unique historical circumstances surrounding the enactment of the US Constitution and the US Supreme Court's method of constitutional interpretation. Hong Kong's constitutional human rights provisions, on the other hand, were forged in fundamentally different circumstances. Not only is there an absence of an express reference to confrontation in our provisions, but the same repulsion to the "civil-law mode of criminal procedures", as characterised by the US Supreme Court, cannot be found in the historical origins of our provisions. As exemplified by the jurisprudence of the Court of Final Appeal, Hong Kong's human rights provisions have a greater affinity to international human rights law and the human rights jurisprudence of common law countries with modern constitutional instruments.¹⁸ Furthermore, there appears to be no justifiable basis for marking out a testimonial/non-testimonial statement distinction within the context of Article 11(2)(e) of the Bill of Rights. The expression "*examine witnesses against him*" is broad enough to cover all declarants whose hearsay evidence is sought to be adduced by the prosecution. If the *Crawford* principles are applied to all hearsay declarants there could never be any exception to the exclusionary rule, which is an unacceptable position contrary to the common law and to modern standards.

¹⁶ Sarah J Summers, "The Right to Confrontation after *Crawford v Washington*: A 'Continental European' Perspective" [2004] 2(1) International Commentary on Evidence, Article 3, 13.

¹⁷ Dale A Nance, cited above, at 17.

¹⁸ See the approach to interpretation in cases such as *HKSAR v Ng Kung Siu & Another* [1999] 3 HKLRD 904 (CFA); *Shum Kwok-sheer v HKSAR* [2002] 2 HKLRD 793 (CFA); *Lau Cheong & Another v HKSAR* [2002] 2 HKLRD 612 (CFA).

11.13 Even if the *Crawford* notion of confrontation was to acquire some (if not full) acceptance in the jurisprudence of Hong Kong, we believe that with the many safeguards included within the Core Scheme, many of which are not found in US hearsay law, our proposals would still pass constitutional scrutiny.

11.14 There is a third possible interpretation of the Article 11(2)(e) right to examine witnesses. This is to treat the right as a component of the constitutional right to a fair trial. The Chief Justice captures this idea in the opening sentence to his judgment in *HKSAR v Wong Sau-ming*: "*A fundamental feature of a fair trial is the right to cross-examine witnesses.*"¹⁹ The analysis under this interpretation would be similar if not the same as the analysis according to the right to a fair trial under Article 87 of the Basic Law and Article 10 of the Hong Kong Bill of Rights.

11.15 It is well established that the notion of fair trial reflects a balance of interests, not exclusively those of the accused. For example, it was said by Lord Steyn in *R v A (No 2)*, which concerned the impact of a provision prohibiting cross-examination of a complainant's sexual history on an accused's fair trial rights under the Human Rights Acts 1999 (UK):

*"It is well established that the guarantee of a fair trial under article 6 is absolute: a conviction obtained in breach of it cannot stand. R v Forbes [2001] 1 AC 473, 487, para 24. The only balancing permitted is in respect of what the concept of a fair trial entails: here account may be taken of the familiar triangulation of interests of the accused, the victim and society. In this context proportionality has a role to play."*²⁰

11.16 Similarly, the Supreme Court of Canada has held that the right to a fair trial under the Canadian Charter of Rights and Freedoms should not be "*confused with a perfect trial, or the most advantageous trial possible from the defendant's perspective*".²¹ It is a trial that must be "*fundamentally fair*".²²

11.17 These sentiments are echoed in the Court of Final Appeal's consideration of the right to a fair trial under the Bill of Rights (Article 10) in *HKSAR v Lee Ming-tee & Another*.²³ In this case, at issue was not the right to cross-examine but the right against self-incrimination implicit in the right to a fair trial. The court accepted the Privy Council's compatibility test applied in *Brown v Stott*²⁴ as the "correct approach", stating:

"The proportionality test, which is part of the compatibility test, raises the question whether a fair balance has been struck between the general interests of the community in realizing the

¹⁹ *HKSAR v Wong Sau-ming* [2003] 2 HKLRD 90 (CFA), at para 1.

²⁰ *R v A (No 2)* [2002] 1 AC 45 (HL), at para 38.

²¹ *R v Find* (2001) 154 CCC (3d) 97 (SCC), at para 28. See also *Regina v O'Connor* [1995] 4 SCR 411, at para 193.

²² *R v Find* (cited above), at para 3.28.

²³ *HKSAR v Lee Ming-tee & Another* (2001) 4 HKCFAR 133.

²⁴ [2001] SLT 59

legislative aim and the protection of the fundamental rights of the individual."²⁵

11.18 Lord Steyn adopted the following "proportionality test" in *Regina v A (No 2)*:

"In determining whether a limitation is arbitrary or excessive a court should ask itself:

'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'

The critical matter is the third criterion."²⁶

11.19 The application of this proportionality test to incriminating hearsay evidence can find assistance from the European Court of Human Rights' jurisprudence, which has developed as a result of numerous complaints from persons convicted on hearsay evidence in civilian law systems that do not have an oral tradition of taking evidence. This jurisprudence has developed around Article 6(3)(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which, as seen below, is almost in the same terms as Article 11(2)(e) of the Hong Kong Bill of Rights:

"3. Everyone charged with a criminal offence has the following minimum rights: ...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him..."

11.20 Thus, the European cases will be useful for understanding the potential scope of the right to a fair trial and the right to reasonable confrontation under Hong Kong's Basic Law and Bill of Rights.

European jurisprudence on human rights and hearsay

11.21 The European Court of Human Rights and Commission have considered a number of complaints by convicted person alleging that their Article 6(3)(d) right has been infringed by the admission of hearsay in the trial or hearing. The outcomes have varied. Professor Andrew Choo describes

²⁵ *HKSAR v Lee Ming-tee & Another* (2001) 4 HKCFAR 133, at 176.

²⁶ *R v A (No 2)* [2002] 1 AC 45 (HL), at para 38.

the jurisprudence as having "*little predictive value*".²⁷ The question of infringement appears to depend on many factors including the nature of the evidence, the opportunities to challenge the evidence, and the presence of other evidence to support the conviction.

11.22 In a collection of papers published by JUSTICE, the British section of the International Commission of Jurists, for the Auld Review of the Criminal Justice System, Professor John Jackson provides a useful summary of the European Court's jurisprudence on hearsay and Article 6(3)(d).²⁸ For convenience, this helpful analysis is reproduced and adopted here with original footnotes intact:

"...the European Court has refined the right to examine witnesses in a number of ways which are relevant to reform of the hearsay rule in criminal proceedings.²⁹ A number of conclusions can be reached from the case law. First of all, it is clear that the prosecution can use the previous statements of witnesses as evidence of the facts stated, at least where the defence has the opportunity to question the witness at trial and the previous statement is not the only evidence of guilt.³⁰ This would seem to allow the prosecution to admit the previous inconsistent statements of hostile witnesses for the purpose of proving guilt. Similarly, it would seem that the prosecution can admit the previous consistent statements of witnesses for the purpose of proving guilt, for example the previous consistent statements of sexual complainants.

Secondly, the case law permits the prosecution to use the written statements of absent witnesses as evidence of guilt in certain circumstances. These statements can clearly be admitted if the defence has had the opportunity to question the witness in pre-trial proceedings.³¹ Even where this has not been possible, however, it would seem that such statements may be used to prove guilt and not render the trial unfair provided the witness is identified, the defence are given a chance to challenge the statements by means of 'adversarial argument' and they do not constitute the only evidence for conviction.³² A further condition in the case of jury trials would seem to be that the jury is warned about the general quality of uncross-examined evidence and as to any matter casting doubt on the

²⁷ Andrew Choo, "*Crawford v Washington*: A View from Across the Atlantic" [2004] 2(1) International Commentary on Evidence, Article 4, at 9.

²⁸ John Jackson, "Human Rights Issues for the Auld Review" in Kate Akester (ed), *Papers for the Auld Review of the Criminal Justice System* (London: JUSTICE, 2000), available online at <http://www.justice.org.uk/images/pdfs/cjs.pdf>. For other commentary, see Ben Emmerson & Andrew Ashworth, *Human Rights and Criminal Justice* (London: Sweet & Maxwell, 2001) 462 - 471; Craig Osborne, "Hearsay and the European Court of Human Rights" [1993] Crim LR 255.

²⁹ See I H Dennis, *The Law of Evidence* (London: Sweet & Maxwell, 1999), at 517 - 518.

³⁰ *X v FRG*, Appln 8414/78.

³¹ *Kostowski v Netherlands* (1990) 12 EHRR 434.

³² *Bricmont v Belgium* (1990) 12 EHRR 217, *Asch v Austria* (1993) 15 EHRR 597.

witness's credibility. In *Trivedi v UK*³³ a doctor was charged on several counts of false accounting and the prosecution relied on statements made by a certain patient whose condition subsequently deteriorated to such an extent that he was unfit to give evidence in court. The trial judge exercised his discretion to admit the statements under section 26 of the Criminal Justice Act 1988. The European Commission declared the application inadmissible on the ground that the trial judge had inquired into the witness's condition and had directed the jury to give less weight to the statements, defence counsel had had the opportunity to comment on the statements and there was other evidence on which the conviction was based. It has been argued that it is important not to infer from this decision that the hearsay provisions of the 1988 Act are Convention-proof.³⁴ The case does not alter the fact that the provisions on their face do not comply with Article 6(3)d and that judicial discretion cannot be relied upon to ensure compliance unless judges take account of the counter-balancing procedures to compensate for any incursion on defence rights.

Aside from the actual operation of the hearsay rule, the emphasis on the importance of not basing a conviction solely or mainly on evidence obtained by means of written statements raises the question whether the European Court is requiring corroboration of such statements before there can be a conviction on their basis. In its provisional recommendations for change the Law Commission originally considered that judges should be required to stop a case where hearsay was the only evidence of an element of an offence.³⁵ Commentators were able to persuade the Commission that the jurisprudence of the European Court does not regard the existence of supporting evidence as an essential condition for the admissibility of hearsay evidence and this recommendation was dropped in its final report.³⁶ The key point nevertheless remains that there are a number of decisions which seem to turn on whether 'suspect' evidence such as the evidence of anonymous witnesses or the statement of an absent witness (or in other contexts illegally obtained evidence or adverse inferences from silence) was the sole or main basis for the conviction. Ashworth has suggested that this is the court's way of responding to the conflict between the absolute rights in Art 6(3)d and the problems of enforcing the law in societies plagued by serious crime and fear.³⁷ This suggests that trial judges will have to take account of the strength of other evidence in each case and in the context of

³³ (unreported decision, App No 31700/96) digested at [1997] EHRLR 521.

³⁴ Ashworth, "Article 6 and the Fairness of Trials" [1999] Crim LR 261.

³⁵ English Law Commission, *A Consultation Paper: Evidence in Criminal Proceedings: Hearsay and Related Topics* (1995), Consultation Paper No 138.

³⁶ English Law Commission, *Report: Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997), Law Com No 245.

³⁷ *Op cit.*

*sections 23-26 of the Criminal Justice Act it has been argued that the statements of absent witnesses will have to be reduced to the level of an inferior form of evidence which can at best only corroborate other evidence.*³⁸

11.23 In the *Trivedi* case, discussed by Professor Jackson, it was alleged that the accused, a doctor, made claims for a number of medical visits to a certain elderly patient, which were not actually made. The two police statements given by the elderly patient were read in as evidence pursuant to section 23 of the Criminal Justice Act 1988, which provided that a statement made by a person in a document:

"shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if - ... the person who made the statement is ... by reason of his bodily or mental condition unfit to attend as a witness".

Section 26 of the same Act was also applicable as it provided that statements admissible by virtue of section 23 made for the purposes of a criminal investigation *"shall not be given in evidence ... without the leave of the court, and the court shall not give leave unless it is of the opinion that the statement ought to be admitted in the interests of justice"*. The section goes on to direct judges to consider the following when considering whether to grant leave:

- (i) the contents of the statement;
- (ii) any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them; and
- (iii) any other circumstances that appear to the court to be relevant.

11.24 The trial judge granted leave, noting that the statements had little probative value insofar as affirming on which dates the accused did and did not visit the patient. Instead, the statements were probative of the accused's suspicious behaviour in handing the patient a stack of prescription forms all prepared on the same day but having different dates printed on them. The judge found that the accused had *"every opportunity to give uncontroverted evidence ... about the reason for the writing out prescriptions in that way on one day."*³⁹

11.25 In declaring *Trivedi*'s application inadmissible for the reasons summarised by Professor Jackson above, the European Commission of Human Rights applied the following principles which had developed from the case law of the European Court and Commission:

³⁸ Birch, [1998] Crim LR 887 quoted in Ashworth, "Article 6 and the Fairness of Trials" (cited above).

³⁹ As reported in *Trivedi v United Kingdom* (unreported decision, App No 31700/96) digested at [1997] EHRLR 521.

*"The use of statements obtained at a pre-trial stage is not in itself inconsistent with paragraphs 3(d) and of Article 6 (Art. 6) of the Convention, provided that the rights of the defence have been respected. As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he was making his statements or at a later stage of the proceedings."*⁴⁰

11.26 On the question of whether the European Convention requires hearsay evidence to be corroborated or supported by other evidence before it can be used to convict, Professor Jackson refers to the English Law Commission's consideration of the issue in its 1997 report. In its final report, the Law Commission came to the conclusion that *"the Convention does not require direct supporting evidence where it is sought to prove a particular element of the offence by hearsay"*.⁴¹ The Commission was persuaded to adopt this position after receiving critical feedback to its consultation paper from a number of distinguished judges and academics, including Professor Andrew Choo, who submitted the following:

*"the court does not mean to be prescriptive about what is required to ensure compliance with Article 6(3)(d): the court does not really regard the existence of supporting evidence as an essential prerequisite to the admissibility of hearsay evidence adduced by the prosecution."*⁴²

Application of principles to the proposed model

11.27 It is clear from the domestic and international human rights jurisprudence discussed above that the admission of incriminating hearsay evidence is not *per se* a violation of the right to a fair trial, or even of the right of confrontation. Were that not so, the entire history of applying common law exceptions to the hearsay rule would be subject to constitutional doubt. Whether there is a violation is dependent on the full circumstances of the case and also the application of the proportionality test.

11.28 We have already set out the objectives of this reform in Chapter 6 above, and in light of the long running criticisms of the common law rules by distinguished international jurists and academics, it is clear that these objectives are pressing and substantial.

11.29 As for proportionality, there is no question that the admission of incriminating hearsay evidence denies the accused the opportunity to cross-examine the maker of the statement in every case. However, this is not determinative of proportionality. Instead, the focus of attention should be on

⁴⁰ Cited above.

⁴¹ English Law Commission Report 245 (cited above), at para 5.41.

⁴² English Law Commission Report 245 (cited above), at para 5.34.

whether the law has sufficient safeguards to prevent miscarriages of justice and unsafe convictions in the vast majority of cases. To have safeguards that could prevent miscarriages in all cases would be, if not impossible to achieve, an unrealistically high standard to try to achieve. Indeed, it would be setting a standard of perfect trials, rather than trials that are fundamentally fair.

11.30 Without undermining the objects of reform, we have tried to include sufficient safeguards in the Core Scheme to prevent miscarriages of justice and unsafe convictions. Safeguards exist at two points in time, both when the evidence is being admitted and after the close of the prosecution's case. The safeguards at the first point in time try to ensure that only hearsay evidence with reasonable assurances as to its reliability and no viable means of being admitted as direct oral testimony will be admitted.⁴³ At the second point in time, there is the ultimate safeguard of the judge's power to direct a verdict of acquittal having considered the prosecution's case as a whole. In exercising this power, the judge will no doubt have in mind the risk of a wrongful conviction.

11.31 We believe that our proposals to make prior consistent statements more freely admissible for their truth will meet the test of proportionality. Such statements are admitted whilst the declarant is testifying as a witness and available for full cross-examination. While in such circumstances there is no opportunity for contemporaneous cross-examination on the prior statement, we think that such a right is probably going too far, as was found in *R v KGB*.⁴⁴

11.32 Several important cases that were decided after the publication of the consultation paper have fortified our views on the issue of human rights compliance. In *Grant v The State*,⁴⁵ the Privy Council considered the constitutionality of the hearsay exception (modelled on the documentary hearsay exception in the English Criminal Justice Act 1988) under the Jamaican Constitution which provided that the accused "*shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court*". In finding that the provision was constitutional, Lord Bingham stated that it was ultimately a question of whether the "*legitimate interests of the defendant have been safeguarded*".⁴⁶ His Lordship found sufficient safeguards in the legislation even though this was an exception that only required proof of necessity without any assurances as to reliability.

11.33 In a number of decisions, the new UK hearsay provisions have been challenged under the Human Rights Act 1998. In *R v Cole*; *R v Keet*, the Court of Appeal held that there was no "*absolute rule that evidence of a statement cannot be adduced in evidence unless the defendant has an*

⁴³ See para 9.83 above for a list of the individual safeguards.

⁴⁴ [1993] 1 SCR 740.

⁴⁵ *Grant v The State* [2006] UKPC 2.

⁴⁶ *Grant v The State* [2006] UKPC 2, at para 17.

opportunity to examine the maker".⁴⁷ Furthermore, Lord Phillips went on to hold the following which is of importance to our proposals:

"Whenever the statement of a prosecution witness who cannot be called is read, the defendant will be denied the chance of cross-examination. This, of itself, does not make the trial process unfair. The judge will direct the jury in relation to the weight to be accorded to a statement that has not been given orally or tested in cross-examination and, if the defendant calls or gives oral evidence, that evidence, if it withstands cross-examination, is likely to carry more weight than the statement relied on by the prosecution.

Section 114 lists factors relevant to the interests of justice that the court must consider when admitting evidence under that section. It does not state expressly which way each individual factor is intended to cut. We consider the inference is that the more important and the more reliable the statement appears to be, the stronger the case for its admission."⁴⁸

11.34 This issue was considered by the European Court of Human Rights in the cases of *Al-Khawaja and Tahery v the United Kingdom*,⁴⁹ to which we have referred in Chapter 9. The question at issue before the European Court was whether the fact that key prosecution evidence had been in the form of a written statement by a witness who did not give evidence in person at trial amounted to a violation of Article 6(1) and (3)(d) of the European Convention on Human Rights. Those provisions state:

- "1. *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...*
3. *Everyone charged with a criminal offence has the following minimum rights: ...*
 - (d) *to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."*

In the case of *Al-Khawaja*, the written statement had been that of a witness who had committed suicide, while in the case of *Tahery* the witness was alive but had been afraid to give evidence in person. In both cases, the convictions of the accused were based solely or to a decisive degree on the evidence of the absent witnesses.

⁴⁷ *R v Cole; R v Keef* [2008] 1 Cr App R 5 at para 20. Compare with *R v Ian Jon Polley* [2008] EWCA Crim 260.

⁴⁸ *R v Cole; R v Keef* [2008] 1 Cr App R 5 at paras 38-39.

⁴⁹ [2009] ECHR 110.

11.35 In giving its judgment, the European Court of Human Rights said that the starting point for the court's assessment of whether there had been a breach of Article 6(1) and (3)(d) was set out in the earlier judgment of *Luca v Italy*:

*"If the defendant has been given an adequate and proper opportunity to challenge the depositions either when made or at a later stage, their admission in evidence will not in itself contravene Article 6(1) and (3)(d). The corollary of that, however, is that where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6."*⁵⁰

In the absence of special circumstances, the European Court of Human Rights doubted whether any counterbalancing factors would be sufficient to justify the admission of an untested statement which was the sole or decisive basis for a conviction. The court found in the case of both *Al-Khawaja* and *Tahery* that there had been a violation of Article 6(1) and (3)(d) of the Convention.⁵¹

11.36 As we observed in Chapter 9, the UK legislation which applied in *Al-Khawaja and Tahery v the United Kingdom* was very different in its effect from what we propose. In particular, the UK legislation admitted hearsay on the ground of necessity alone without a requirement of threshold reliability. In contrast, proposal 12(e) of our Core Scheme requires the court in assessing threshold reliability to consider, among other factors, whether the statement is supported by other admissible evidence. Of equal significance is proposal 15 of the Core Scheme, which requires the court to direct the acquittal of the accused if the court considers a conviction would be unsafe. In reaching that decision, one of the factors which the court must take into account is the importance of the hearsay evidence to the case against the accused.⁵² In addition, the fact that fear could not satisfy the necessity criterion under the Core Scheme means that cases like *Tahery* would not arise under our proposals.

⁵⁰ No 33354/96, EHCR 2001, at para 40.

⁵¹ But see the English Court of Appeal's subsequent decision in 2009 in *R v Horncastle*, *R v Marquis* and *R v Carter* (discussed at paragraphs 9.79 – 9.80 above) where it was held that the provisions of the Criminal Justice Act 2003 Act were consistent with Article 6(3)(d) and were not further qualified by a separate test relating to whether the evidence was sole or decisive in the case.

⁵² See proposal 15(b)(iv).

Chapter 12

Summary of recommendations

The need for reform

12.1 As there is compelling evidence supporting a need for reform, we recommend that the existing law of hearsay in Hong Kong criminal proceedings be reformed comprehensively and coherently according to a principled, logical and consistent system of rules and principles. (*Recommendation 1 – following paragraph 6.14*)

Safeguards as a condition for reform

12.2 We recommend that any reform of the existing law of hearsay in Hong Kong criminal proceedings must have built-in safeguards that protect the rights of defendants and ensure the integrity of the trial process. (*Recommendation 2 – following paragraph 7.11*)

Options considered and the version recommended

12.3 We recommend that the polar extreme options of no change or free admissibility, or options just short of these extreme positions, be rejected. We believe these options either inadequately address the shortcomings in the law or, at the other extreme, have insufficient safeguards. (*Recommendation 3 – following paragraph 8.9*)

12.4 We recommend that the "*best available evidence option*" be rejected, for it is impractical for the parties to comply with, difficult for the court to enforce without becoming inquisitorial, contains insufficient safeguards, and may contribute to inefficient use of court time. (*Recommendation 4 – following paragraph 8.11*)

12.5 We recommend that any reforms of the law of hearsay in criminal proceedings should apply in the same manner to both the prosecution and defence, although allowances for differences in the standard of proof are justifiable. (*Recommendation 5 – following paragraph 8.17*)

12.6 We recommend that the South African model, which admits hearsay on an entirely discretionary basis "*in the interests of justice*", be rejected because of concerns with the open-endedness of the discretion. (*Recommendation 6 – following paragraph 8.21*)

12.7 We recommend that Option 1 (the English model) be rejected for two main reasons: its categories of automatic admissibility provide insufficient assurances of reliability and the terms of the residual discretion to admit hearsay are too open-ended and vague. (*Recommendation 7 – following paragraph 8.29*)

12.8 We recommend that Option 2 (the United States model) be rejected because full codification of the existing exceptions cannot cater for all justifiable situations. (*Recommendation 8 – following paragraph 8.34*)

12.9 We recommend a modified version of Option 3 (the New Zealand Law Commission model) as the proposed model of reform. We accordingly recommend that, save for those statutory provisions and common law rules respectively mentioned in proposals 4 and 5 of the Core Scheme, the admission of hearsay evidence should be based on a single statutory discretionary power to admit hearsay evidence if it is both necessary and reliable. (*Recommendation 9A – following paragraph 8.49*)

12.10 We recommend that only those common law exceptions provided in proposal 5 of the Core Scheme be preserved. (*Recommendation 9B – following paragraph 8.49*)

12.11 We recommend that in cases where prosecution hearsay evidence has been admitted, the judge should have the power to direct a verdict of acquittal where upon an overview of the prosecution evidence once adduced, it would be unsafe to convict the accused. (*Recommendation 9C – following paragraph 8.49*)

12.12 The New Zealand Law Commission model proposes that the judge, in assessing the reliability criterion, only considers "*circumstances relating to the statement*". We recommend that the ambit of listed factors to be considered under this criterion be widened to include the presence of supporting evidence. (*Recommendation 9D – following paragraph 8.49*)

Proposed model for reform: the Core Scheme

12.13 The Core Scheme envisages admitting hearsay in only one of four ways: an existing statutory exception (proposal 4); a preserved common law exception (proposal 5); consent of the parties (proposal 6); or the general discretionary power to admit hearsay (proposal 7). We recommend that the Core Scheme, as set out in this report, be adopted as a whole as the main vehicle for reforming the law of hearsay in Hong Kong criminal proceedings. (*Recommendation 10 – following paragraph 9.3*)

12.14 We recommend that the definition of hearsay in the Core Scheme should not include prior statements made by a witness who is available to testify in the trial proceedings. (*Recommendation 11 – following paragraph 9.5*)

12.15 We recommend that the definition of hearsay should include written and non-written, and verbal and non-verbal, communication. *(Recommendation 12 – following paragraph 9.5)*

12.16 We recommend that the common law rule that excludes implied assertions as hearsay be abrogated. *(Recommendation 13 – following paragraph 9.10)*

12.17 We recommend that multiple hearsay be admissible under the Core Scheme only if each level of hearsay itself satisfies the Scheme's tests for admissibility. *(Recommendation 14 – following paragraph 9.13)*

12.18 We recommend that the Core Scheme apply only to those criminal proceedings that currently apply the common law hearsay rule. *(Recommendation 15 – following paragraph 9.14)*

12.19 We recommend that the Core Scheme should apply in sentencing proceedings only when the prosecution is relying on hearsay evidence to prove an aggravating factor. *(Recommendation 16 – following paragraph 9.18)*

12.20 We recommend that the Core Scheme should apply to extradition proceedings. *(Recommendation 17 – following paragraph 9.19)*

12.21 We recommend the codification of the exclusionary rule as the starting point in the Core Scheme. *(Recommendation 18 – following paragraph 9.20)*

12.22 We recommend the abrogation of all common law rules governing the admission of "hearsay evidence" in "criminal proceedings", as those are defined in the Core Scheme, with the exception of the rules governing the admissibility of admissions, confessions and statements against interest made by an accused, acts and declarations in furtherance of a joint or common enterprise or conspiracy, expert opinion evidence, evidence in bail proceedings, evidence in sentencing proceedings (except when the prosecution relies on hearsay evidence to prove an aggravating factor), public information, reputation as to character, reputation or family history, *res gestae*, and admissions by agents. *(Recommendation 19 – following paragraph 9.37)*

12.23 With the exception of section 79 of the Evidence Ordinance (Cap 8), which should be repealed, we recommend the retention of all existing statutory provisions that enable the admission of hearsay evidence. *(Recommendation 20 – following paragraph 9.39)*

12.24 We recommend the admission of hearsay evidence if the party or parties in relation to whom the evidence is to be adduced consent to the admission. *(Recommendation 21 – following paragraph 9.41)*

12.25 At the heart of the Core Scheme is the discretionary power to admit hearsay evidence if five preconditions are met: the declarant has been adequately identified; oral testimony of the evidence would have been admissible; the necessity and threshold reliability criteria have been satisfied; and the probative value of the evidence exceeds its prejudicial effect. We recommend that this discretionary power to admit be the main vehicle by which to admit hearsay evidence in criminal proceedings. (*Recommendation 22 – following paragraph 9.42*)

12.26 We recommend that the declarant be identified to the court's satisfaction before the discretionary power to admit can be exercised. (*Recommendation 23 – following paragraph 9.44*)

12.27 We recommend that hearsay evidence should be otherwise admissible before it can be admitted under the discretionary power. (*Recommendation 24 – following paragraph 9.45*)

12.28 We recommend that the necessity condition should only be satisfied where the declarant is genuinely unable to provide testimony of the hearsay evidence and not merely unwilling to do so. In particular, the necessity condition will only be satisfied if the declarant:

- (a) is dead;
 - (b) is physically or mentally unfit to be a witness;
 - (c) is outside Hong Kong and it is not reasonably practicable to secure his attendance;
 - (d) cannot be found after all reasonable steps have been taken to find him; or
 - (e) refuses to give evidence on the ground of self-incrimination.
- (*Recommendation 25 – following paragraph 9.52*)

12.29 We recommend that the threshold reliability condition should only be satisfied where the circumstances provide a reasonable assurance that the statement is reliable. (*Recommendation 26 – following paragraph 9.64*)

12.30 We recommend that in assessing this condition, the court must have regard to the nature and contents of the statement, the circumstances in which the statement was made, the truthfulness of the declarant, the accuracy of the observations of the declarant and the presence of supporting evidence. (*Recommendation 27 – following paragraph 9.64*)

12.31 We recommend that the probative value of the hearsay evidence must always be greater than any prejudicial effect it may have on any party before it can be admitted under the discretionary power. (*Recommendation 28 – following paragraph 9.80*)

12.32 We recommend that rules of court be made to require the party applying to admit hearsay evidence under the discretionary power to give timely and sufficient notice to all other parties to the proceedings. (*Recommendation 29 – following paragraph 9.82*)

12.33 We recommend that the party applying to admit hearsay evidence under the discretionary power has the burden of proving 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. (*Recommendation 30 – following paragraph 9.85*)

12.34 Where hearsay evidence is admitted under the discretionary power, we recommend that evidence relevant to the declarant's credibility (including other inconsistent statements), which would have been admissible had the declarant testified as a witness, be admitted. (*Recommendation 31 – following paragraph 9.91*)

12.35 We recommend the addition of a new power requiring the trial judge, at the conclusion of the prosecution's case or any time thereafter, to direct a verdict of acquittal of an accused against whom hearsay evidence has been admitted under the discretionary power where the judge considers that, taking account of the factors listed at proposal 15(b), and notwithstanding the fact that there is a *prima facie* case against the accused, it would be unsafe to convict the accused. The factors listed at proposal 15(b) to which the judge must have regard in deciding whether to exercise this power are 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 that hearsay evidence. (*Recommendation 32 – following paragraph 9.102*)

Special topics

12.36 We recommend that the exception in respect of bankers' records be retained but that its implementation should form part of the general exception in regard to the production of records as appears in Recommendations 34, 35 and 36 below. (*Recommendation 33 – following paragraph 10.10*)

12.37 We recommend that the exceptions in respect of business records and computer records be retained with the primary aim being simplification of the production of all records, with existing legislation relating to non-computerised records being replaced by a single section that applies to all documents irrespective of their varying nature. (*Recommendation 34 – following paragraph 10.35*)

12.38 Insofar as computerised records are concerned:

- (1) separate regimes should apply to data stored or generated in the course of business and that stored or generated for non-business purposes; and
- (2) specific consideration should be given to, *inter alia*, the implications arising from the storage of data outside of Hong Kong (and its retrieval) and the integrity of such data. (*Recommendation 35 – following paragraph 10.35*)

12.39 Records complying with the proposed legislation will be automatically admissible subject to a discretion vested in the court to direct that a document not be admissible if the court is satisfied that the statement's reliability is doubtful. (*Recommendation 36 – following paragraph 10.35*)

12.40 We recommend further study of the topic of documentary and digital evidence as a whole, both as to the requirements for admissibility and the formalities or procedures for adducing such evidence in the trial process. (*Recommendation 37 – following paragraph 10.35*)

12.41 We recommend no changes to the existing law that makes prior inconsistent statements of witnesses inadmissible for the truth of their content. However, this should be reconsidered if and when there is an established general practice by law enforcement agencies of recording witness statements by reliable audio-visual means. (*Recommendation 38 – following paragraph 10.70*)

12.42 We recommend the following proposals to reform the law in relation to prior consistent statements:

- where prior consistent statements are presently admitted under existing common law exceptions (eg prior identification, recent complaint, rebutting recent fabrication), they should also be admitted for their substantive truth; (*Recommendation 39A – following paragraph 10.83*)
- prior statements used by witnesses to refresh their memory should not be admitted for their substantive truth; (*Recommendation 39B – following paragraph 10.63*)
- the prior identification exception should be extended (in addition to persons) to objects and places generally; (*Recommendation 39C – following paragraph 10.83*)
- the question of whether the recent complaint exception should be extended to all victim offences and to complaints made as soon as could reasonably be expected after the alleged conduct should be further studied together with the question of abolishing the recent complaint exception and replacing it with a narrower one that admits complaint evidence only for the purpose of narrative, in the sense of describing how the charge came to be laid. (*Recommendation 39d – following paragraph 10.83*)

12.43 We recommend the inclusion of an express provision that makes the physical record of an admitted prior statement presumptively removed from the jury's possession in their deliberations, unless the judge finds that the jury would be substantially assisted by receiving and reviewing the physical record. *(Recommendation 40 – following paragraph 10.86)*

12.44 We recommend that no specific regime be introduced for appeals against decisions on the admissibility of hearsay evidence. *(Recommendation 41 – following paragraph 10.89)*

12.45 The new legislation should specifically address the issue of the admissibility of hearsay in sentencing in conformity with the general recommendations in this report for safeguarded change to the existing law. *(Recommendation 42A – following paragraph 10.102)*

12.46 The new legislation should also specifically state that in all courts, in the sentencing phase, any disputed issue of fact or matter of aggravation must be proved by the prosecution beyond reasonable doubt. *(Recommendation 42B – following paragraph 10.102)*

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