



Submissions on “Consultation Paper on Hearsay in Criminal Proceedings”

The Law Society’s Criminal Law & Procedure Committee has carefully considered the proposals put forward by the LRC Subcommittee in its Consultation Paper on Hearsay in Criminal Proceedings. Whilst the Committee recognizes there are certain limited shortcomings in the existing rule, it does not think the fundamental changes as proposed under the Core Scheme are warranted or desirable.

In considering the need for reform of the hearsay rule in criminal proceedings, one should be ever mindful of the fundamental difference that exists between criminal and civil proceedings. The fact that convictions in criminal proceedings could result in the loss of liberty of a citizen requires totally different procedural and evidential rules should be in place to properly safeguard the interests of innocent citizens accused of criminal offences.

The criminal justice system in Hong Kong recognizes this and is structured on the basis that the standard of proof is far higher in criminal proceedings than in civil proceedings. The prosecution must therefore not only prove its case, but prove it “*beyond reasonable doubt*”, whereas the standard of proof in civil proceedings is “*on a balance of probabilities*”.

The hearsay rule in criminal proceedings is another such fundamental safeguard built into the system to protect the citizen. The rule preserves the right of an accused citizen to test the truth of prosecution evidence by cross-examination in open court. In effect, the hearsay rule excludes evidence that cannot be so tested.

Essentially, whilst the stated aim of Core Scheme (“the Scheme”) is to retain this exclusionary rule against hearsay evidence, the discretionary power given to the court as one of the four ways to admit hearsay evidence will, in reality, bring about a general relaxation of this exclusionary rule.

The Committee therefore has grave concerns about the Scheme for the following reasons:

- it is inherently dangerous to rely on hearsay evidence: hearsay evidence is not delivered on oath and so its credibility cannot be tested by way of cross-examination, nor can the court assess the demeanour of the declarant.
- this Committee recognizes and adheres to the stated principle outlined in the Consultation Paper that “*all accused have a fundamental right to make full answer and defence to a criminal charge*”. The Committee is therefore most concerned by the proposition that the absence of cross-examination of the declarant be only one of the many factors to be considered by the court when exercising a discretion to admit hearsay evidence.
- there is no compelling reason to introduce a wholesale reform in the hearsay rule: the Committee has been presented with no empirical data, nor has the Society’s membership brought to the Committee’s attention any cases where serious miscarriages of justice in Hong Kong have occurred as a result of the present hearsay rule.
- the wide discretion given to the court to admit hearsay evidence does not provide for greater clarity or certainty than the existing rule: whilst one stated objective for reform is that of clarity and certainty in the law, the proposal to give wide discretion to the court could lead to greater uncertainty in the law and make it even more difficult for lawyers to provide proper advice to their clients on the strength of the evidence against them. If these proposals are adopted, it will also inevitably lead to a lengthy period of litigation and an increase in the number of appeals before the parameters of the new law can be established.
- the proposal will give rise to a surge of pre-trial applications and hearings on the admissibility of hearsay evidence. This will inevitably cause delay in bringing cases to court, prolong the trial process and will consequently have funding implications for defendants, the Legal Aid Department, and the Duty Lawyer Service.
- the existing disparity of arms between the resources and funding of prosecution and the defence will be exacerbated. The defence will rarely if ever have the resources to investigate matters relevant to the factors to be considered by the court when exercising its discretion to admit hearsay evidence.
- there is the concern that the criminal standard of proof on the prosecution will be diluted. Paragraph 8 of the Scheme recommends that the burden of proof to satisfy the admission of hearsay evidence criteria is “*balance of probabilities*”. Furthermore, the assertion in Paragraph 11 of the Scheme: “*the condition of threshold reliability will be satisfied where the circumstances provide a reasonable assurance that the statement is reliable*” fails to establish any standard of reasonableness.

The Committee supports the aims of the reform to the extent that it seeks to rationalize the different provisions that make up the hearsay rule but doubts whether the Scheme can achieve this. In place of the Scheme, the Committee recommends:

1. the existing exclusionary hearsay rule should be preserved undiluted;
2. the existing specific exceptions to the hearsay rule should be consolidated for greater clarity.

The Committee appreciates the concern that the codified law might not cover all circumstances and hard cases and possible injustice may still exist. However, given there is in reality no parity of arms between the prosecution when the defence will not have the same power and resources as the prosecution to collect evidence, whether hearsay or otherwise, if the wish is to administer justice, the right of the accused must be preserved. The Committee would agree to a very limited discretion being given to the court to admit what would otherwise be inadmissible hearsay evidence as a “*safety valve*” for the benefit of the defendants in circumstances where there is the possibility of a grave and substantive injustice if that evidence is excluded.

**The Criminal Law & Procedure Committee
The Law Society of Hong Kong**

26 April 2006