

## **Submissions of The Law Society’s Criminal Law & Procedure Committee on The Law Reform Commission’s “Consultation Report on Hearsay in Criminal Proceedings”**

The Law Society’s Criminal Law & Procedure Committee (“*the Committee*”) has reviewed the proposals put forward by the Law Reform Commission (“LRC”) in its Consultation Report on Hearsay in Criminal Proceedings and has the following observations:

### **Multiple Hearsay: Paragraph 1 of the Core Scheme and Recommendation 14**

Under paragraph 1 of the Core Scheme, “*Hearsay*” is proposed to be defined as:

*“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; and*
- (c) is a written, non-written or oral communication which was intended to be an assertion of the matter communicated”.*

The LRC stated in paragraph 9.11 of its Consultation Report that this definition of “*hearsay*” will encompass “*all levels of hearsay*” and recommends that multiple hearsay be admissible under the Core Scheme only if “*each level of hearsay*” itself satisfies the Scheme’s tests for admissibility.

The Committee has grave reservations on whether multiple hearsay should be admitted in the first place. The risk of multiple hearsay is made obvious by the Chinese Whisper Game when the person at the end of the line almost always tells a totally different story from the original story-teller. There is concern on whether admitting multiple hearsay would bring justice to a trial process.

Whilst the Consultation Report gives the impression that multiple hearsay is admissible under the existing common law rule and the LRC’s suggestion to apply the Core Scheme to each level of hearsay will actually work to tighten up the present admissibility rule for

multiple hearsay, Committee members in their collective experience have never come across a case where multiple hearsay has been introduced by either party to a proceedings. ***In response to Recommendation 14 of the Consultation Report, the Committee objects to the admission of multiple hearsay at all. The Committee would like to invite the Administration to highlight the relevant case law in which the court has admitted multiple hearsay under the common law rule.***

**Condition of Necessity: Paragraph 8 of the Core Scheme and Recommendation 25**

Under the proposed Core Scheme, the new court's discretionary power to admit hearsay evidence will be subject to, inter alia, the "Conditions of Necessity" being satisfied. The necessity criterion will be met if there are good reasons why the declarant's testimony cannot be made available at the time of trial and 5 necessity criteria are proposed in paragraph 8 of the Core Scheme for such purpose:

- (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;
- (d) where the declarant cannot be found and it is shown that all reasonable steps have been taken to find him; or
- (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.

The Committee has concern that the necessity criteria (c), (d) & (e) above could be easily subject to abuse.

On criterion (c), by adopting the word "*or*", it appears that there are 2 alternative ways the parties could satisfy the necessity condition under this ground: (1) witness is outside HK and it is not reasonably practicable to secure his attendance; and (2) witness is outside HK and it is not reasonably practicable to make him available for examination and cross-examination in any other competent manner.

The law enforcement agencies could thus easily make use of the first of the 2 alternative reasons stated in criterion (c), namely, "*outside Hong Kong and not reasonably practicable to secure attendance*", to allow a large number of witness statements to be adduced by witnesses who are overseas, but who ought to be cross-examined to ensure a fair trial even if there are other competent manner to make him available for examination and cross-examination. This criterion also allows the prosecution to decide on a relatively low threshold (i.e. "*reasonably practicable*") whether they have to call witnesses from outside Hong Kong.

On the second option stated in criterion (c), namely, "*outside HK and not reasonably practicable to make him available for examination and cross-examination in any other*

*competent manner*”, the Committee fails to see why hearsay evidence should be allowed at all if the prosecution can secure his return to HK or there are other competent manner to make the witness available for examination and cross-examination. Again, the query is: why a lower threshold of “*reasonably practicable*” should be introduced if there are other competent manners to make the witness available for examination and cross-examination in the first place.

The Committee has concern that this loose criterion (c) could just increase the possibility of false statement from a prosecution witness who does not wish to come to HK to testify and face the risk of being subject to perjury charge by giving evidence in court. Admission of hearsay evidence from an overseas witness should not be considered at all where the witness is in a place where there are other means to secure his giving of evidence.

A refusal to give evidence on the grounds of self-incrimination under criterion (e) would deny a defendant a chance to cross-examine a witness who may be an accomplice. It is believed that the presence of the witness in court is required, even if he wishes to claim a privilege against self-incrimination during the course of cross examination.

*The Committee has reservations on the necessity conditions (c), (d) and (e) proposed in Recommendation 25 and reserves the right to comment on the draft legislation in this regard to ensure that these conditions of necessity will not turn on the whim or discretion of the declarant to testify.*

**Business and Computerized Records: Recommendations 34 to 37**

*The Committee agrees that the topic of admissibility of documentary and digital evidence and the formalities or procedure for adducing such evidence in the trial process should be further reviewed as a whole and reserves its rights to make further comments on the final proposals.*

**The Law Society of Hong Kong  
The Criminal Law & Procedure Committee  
1 February 2011**