

Hong Kong Law of Evidence

“Take nothing on its looks; take everything on evidence.
There is no better rule.”

Charles Dickens (1812 – 1870), *Great Expectations*

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About the Author

Andra le Roux-Kemp is an Associate Professor at the Lincoln Law School, University of Lincoln (UK). Her scholarship centres on the situatedness of law and explores the theoretical and practical dynamics of legal change in its various spatial and temporal localities. She was awarded a Y-rating as a Promising Young Researcher by the National Research Foundation of South Africa in 2016, and is, at the time of this publication, finalising a transdisciplinary and mixed-method study on the recognition of remorse in law, as part of a research project funded by the Hong Kong Research Grants Council.

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Preface

This book sets out the basic principles of the Law of Evidence in Hong Kong, for both criminal and civil legal proceedings. To a large extent, the laws in Hong Kong still resemble those of England and Wales prior to the handover of Hong Kong to the People's Republic of China on 1 July 1997. Moreover, contemporary legal developments in commonwealth jurisdictions, most notably that of England and Wales, Canada, and Australia, continue to guide law reform and development in Hong Kong. This ongoing synergy that exists between the legal system of Hong Kong and the laws England and Wales - both in terms of Hong Kong's legal heritage as well as in terms of legal developments to date - will be evident from the materials and discussions presented in this book. Significant departures from and variations on the laws of England and Wales in Hong Kong, will also be highlighted, as these reflect how the laws of Hong Kong have developed over time to meet the unique needs and interests of the Hong Kong people and its criminal justice system.

The text is accessible to a wide range of persons interested in the Law of Evidence in Hong Kong. First and foremost, the text offers a comprehensive, detailed, and systematic exposition of the relevant principles, practices, and case law relating to the Law of Evidence in Hong Kong Special Administrative Region. Selected topics are also presented in a comparative perspective, providing a bird's eye view of the present analogous legal position in the laws of England and Wales, and other jurisdictions. The aim of these analogous comparative perspectives is to offer the reader a richer and more contextualised understanding of the Law of Evidence in Hong Kong, in terms of both its legal heritage and present geographical and legal-political reality. A synergy of legal theory, statutory law, case law, and legal comparison, ultimately culminates in a text that can be described as a *vade mecum*; the most comprehensive and detailed source on the Hong Kong Law of Evidence to date. Students of law and related disciplines, researchers, and legal professionals will find this a useful resource, whether it is for the purpose of studying towards a degree, conducting research, or preparing for trial.

The contents of this book - providing a comprehensive and detailed exposition on the Hong Kong Law of Evidence - is methodically disseminated across fourteen chapters, which are thematically collated in five Parts. Part A of this book consists of two chapters and provides a detailed overview and introduction to the general principles and core concepts of the Law of Evidence. The history and development of the Law of Evidence are also covered in the first of these two chapters, as this background remains important for understanding some of the seemingly idiosyncratic evidential principles and rules which apply to this day. The second chapter covers those rare instances where proof is possible without any evidence having been presented. The next five chapters form Part B of the book and essentially deal with the admissibility of relevant evidence in criminal and civil proceedings. First, the core concepts of *relevance* and

admissibility are defined and explained, before the relevance and admissibility of various types of evidence are dealt with to its full extent, and also in comparative perspective. For example, Chapter Four of Part B deals with character evidence and the focus of Chapter Five is on opinion evidence. With regard to opinion evidence, Chapter Five also includes an overview and discussion of the relevant Rule from the United States of America Federal Rules of Evidence. A thorough-going knowledge of the principles underpinning this Rule is of paramount importance when dealing with novel (scientific) evidence in the courtroom, as well as forensic evidence (the topic of Chapter Twelve). Chapter Six deals with similar fact evidence and previous consistent, as well as previous inconsistent statements. In this chapter, particularly interesting developments in the Hong Kong Law of Evidence is considered; legal developments that depart from and/or expand upon the laws of England and Wales. Part B of this book concludes with Chapter Seven focussing on one of the more challenging areas of the Law of Evidence; informal admissions and confessions. Given the significance of the unique facts and circumstances of each and every case where it is submitted that a valid and admissible informal admission or confession had been made, this Chapter Seven not only includes an extensive discussion of case law from the Hong Kong Special Administrative Region, but also case law from other jurisdictions.

While the primary focus of Part B of this book is on the admissibility of relevant evidence, the focus of Chapters Eight and Nine - forming Part C of the book - is on the exclusion of evidence otherwise deemed relevant. In Chapter Eight, topics like public interest immunity and private privilege are considered. And particularly important is the extensive exposition on legal professional privilege. Chapter Nine focuses on the so-called exclusionary rule in the Law of Evidence, and the Hong Kong position in this regard is juxtaposed with that of other jurisdictions, including the United States of America, Canada, South Africa, and the laws of England and Wales. Part D consists only of one chapter, Chapter Ten, dealing with the notoriously cumbersome evidentiary rules and principles relating to hearsay evidence. While noting the extensive legal reform of evidentiary rules and principles relating to hearsay evidence in most common law (and hybrid) jurisdictions, this chapter nonetheless provides an overview of the most important common law exceptions to the hearsay rule, which (may) still find application not only in Hong Kong, but also elsewhere, and especially in criminal legal proceedings.

Part E provides an extensive exposition on all the various types of evidence and the unique evidentiary rules and principles that apply to the admissibility of each. For example, Chapter Eleven covers oral evidence, real evidence, documentary evidence, as well as electronic evidence, while Chapter Twelve is exclusively devoted to forensic evidence. The types of forensic evidence included in this first edition of this book on the Hong Kong Law of Evidence are DNA evidence and questioned documents. These two types of forensic evidence were selected for inclusion in Chapter Twelve based on their prevalence in Hong Kong case law. It is envisaged, as Forensic

Law gain more prominence in the laws and legal system of the Hong Kong Special Administrative Region, that the types of forensic evidence discussed in this Chapter will, in future editions of this book, also expand.

Chapter Thirteen (Part F) deals in a comprehensive manner with all evidentiary matters relating to witnesses, including the competence and compellability of witnesses, refreshing the memory of witnesses, impeaching the credibility of witnesses, and special measures for dealing with vulnerable witnesses in a courtroom setting. Finally, Chapter Fourteen (Part G) concludes this book on the Hong Kong Law of Evidence, with an overview on the evaluation of evidence. The discussion in this final chapter includes a critical exposition on inferential reasoning, and specifically with reference to the standards of proof (also discussed in Chapter One).

This book on the Hong Kong Law of Evidence is the second in a three-part series – the *Criminal Justice Series* of Wolters Kluwer Hong Kong - focusing on the Hong Kong criminal justice system. The first book in this series was published in April 2019 and focusses on the Hong Kong Law of Criminal Procedure and the third book in this series (to be published in 2020) will focus on Hong Kong Criminal Law. All three books in this series have been conceived and developed as a comprehensive and integrated collection on the Hong Kong criminal justice system. Cross-references between the first book on the Hong Kong Law of Criminal Procedure, and this second book on the Hong Kong Law of Evidence are already included where relevant, and further references across all three books in this series will be added in subsequent editions of the *Criminal Justice Series*.

For this second book in this series on the Hong Kong Law of Evidence every effort was made to state the law as at August 2019.

Dr. Andra le Roux-Kemp
August 2019

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