

LegCo Panel on Administration of Justice and Legal Services
Meeting on 23 June 2008

Opening Statement by the
Director of Public Prosecutions
in respect of Pre-trial Interviewing
of Witnesses by Prosecutors

Madam Chairman, Ladies and Gentlemen,

I welcome this opportunity to address the Panel on the pre-trial interviewing of witnesses by prosecutors ('PTWI').

2. The working group which will be examining this issue in 2009 is chaired by Ms. Anthea Pang, SADPP, who accompanies me today, together with Ms. Olivia Tsang, SGC.

3. The working group has yet to begin its deliberations. Once its report is finalised, its recommendations will be carefully considered. If the view is reached that the PTWI makes good sense, there will be full discussion with all interested parties before any decisions are taken to implement the PTWI.

4. What can be said at this early stage, is that major common law jurisdictions have adopted the PTWI, and its use is regarded as basic good practice. It is viewed in those jurisdictions as an additional safeguard against the prosecution of those who might otherwise have to stand trial as weak cases in which the reliability of key prosecution witnesses is questionable are weeded out at an early stage. Indeed, the preliminary researches of the working group have identified no common law jurisdiction in which the PTWI having been examined, has subsequently been rejected. Two months ago, England and Wales adopted the PTWI, and the example of that jurisdiction may prove instructive for the working group.

5. On 20 December 2004, Lord Goldsmith QC, then Her Majesty's Attorney General for England and Wales, issued his report on the use of the PTWI. In his introduction, Lord Goldsmith said :

Many members of the public would be surprised to learn that in England and Wales prosecutors are not entitled to interview witnesses before trial, even when they are key witnesses whose credibility may be critical to whether a prosecution should go ahead or not. The decision whether to go ahead is for the prosecutor. Yet he is not presently allowed, himself, to assess the reliability or credibility of that witness's evidence. Prosecutors in other countries would be similarly surprised.

For it is striking that it is only in England and Wales that prosecutors do not have direct access to witnesses even in order to assess their credibility and reliability – even though there is no reason why an impartial public prosecution service should not undertake this role. If my vision of the CPS as a world class prosecuting service, admired and respected, and seen by all as a champion for victims and justice is to be realised, this must change.

The prosecutor is in charge of the prosecution; it is for the prosecutor alone to decide which evidential issues are significant and which require further exploration. The responsibility for this is, rightly, placed in the hands of a qualified lawyer because it is recognised that they are skilled in assessing evidence. However, at present, prosecutors are required to reach fully informed decisions about whether there is sufficient evidence to proceed in a case – without it seems one essential element – the option of speaking to a witness to assess their credibility and reliability, where it is considered necessary to do so.

The public rightly expects prosecutors to prosecute criminal offences, robustly, promptly and fairly and to bring to trial only those against whom there is an adequate and properly prepared case (and whose prosecution is justified in the public interest) and that prosecutors have confidence in the reliability of the evidence. Logic dictates that this

expectation can only be met if prosecutors are able to interview witnesses about their evidence before trial.

I have therefore concluded, for the reasons set out in this paper, that the position ought to change so that prosecutors should have the ability in the future to interview witnesses.

6. Thereafter, a pre-trial witness pilot was conducted in northern England, and this was adjudged a success. On 27 November 2007, Baroness Scotland QC, Lord Goldsmith's successor as Attorney General for England and Wales, announced that henceforth prosecutors would have the opportunity to interview key witnesses about their evidence. She explained that the interview itself was designed to address three key purposes :

- To assess the reliability of the witness's evidence
- To assist the prosecutor in understanding complex evidence
- To explain court process and procedures.

Baroness Scotland said :

I am pleased to be announcing the national roll out of something that I truly believe will make a difference to strengthening cases, and play its part in improving witness support throughout the trial process. We have already made great progress across the criminal justice system since 2002 but this roll out, following the successful pilot, represents yet another step in our journey towards making the trial process the best it can be. I am particularly confident that this change in policy will be extremely valuable in cases where there are vulnerable witnesses.

7. In consequence, the PTWI was adopted throughout England and Wales from April 2008.

8. The introduction of the PTWI represents an important change in the prosecution service in England and Wales. Like their counterparts in other common law jurisdictions, prosecutors in that jurisdiction can now ask witnesses about evidential issues. Before the PTWI was adopted, the issue of the possibility of coaching or otherwise contaminating the evidence of the witness in the course of the PTWI was

carefully considered. In the event, the experience of the pre-trial witness pilot showed that this risk was minimal with training and guidance. The message to emerge from the pilot was that the PTWI is a valuable tool which should be used where necessary.

9. The attraction of the PTWI is said to lie in the opportunity it gives to prosecutors to assess for themselves, and not at second-hand, the reliability of the witness's evidence at an early stage in the proceedings and to make better informed decisions about cases. At the same time, everything is tape recorded, and this is regarded as a means of protecting the integrity of the interview.

10. In 2009, we will know what recommendations the working group will make, and the debate can begin. All interested bodies will be consulted if it is decided to take the PTWI scheme forward. As things stand, our minds are open, and the working group will carefully consider the pros and cons of the PTWI, as well as its relevance in Hong Kong.

11. If the PTWI is shown to be a scheme which has positive advantages for criminal justice, there can be no good reason why we should not be prepared to think outside the box in order to improve our system. It may seem incredible to some people that a prosecutor has to decide if a witness's evidence is capable of belief without having any direct contact with the witness to inform that decision. At the same time, there may be cogent arguments that if prosecutors interview witnesses before trial there may be risks. All such issues would need to be fully addressed in any consultation process. But that is still a long way off. For our part, we have open minds on the issue, and we await with interest the submission of the report by the working group in 2009.

I. Grenville Cross, SC
Director of Public Prosecutions
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