Speech by Mr Keith Yeung, SC, Director of Public Prosecutions

at the Closing Ceremony of the "Criminal Law Conference 2017"

on Saturday, 20 May 2017

Distinguished guests, ladies and gentlemen, friends,

1. David Leung SC said that he is the person between you and the door. Uncharacteristic of him, he was wrong. It is me. Now we are really towards the end of the programme. And it has been a very very long day. But I am sure, you, like me, are not tired. You have seen me fighting for air time, and I am quite prepared to go on for two more hours. No, of course I am not going to do that. But before I can release you, I still have to do a couple of things. Firstly, of course, I want to thank our guests Judge Young and Professor Ormerod, and our speakers, and all of you, our guests, being here sacrificing a precious Saturday, more and more precious these days, and to be here to share with us your views and give us this tremendous atmosphere. Can I invite you to give yourself a big hand? And secondly, it would be useful if we can have a short stock-take as to what we have discussed today.

2. We started off with the issue of "active case management". We all know it is closely related to our new Practice Direction 9.3, which is going to come into operation on 12 June this year. I have said this previously, and I adhere to this, that the practice direction is going to be the most important of its kind in the last 20 years. It is going to fundamentally change the philosophy in the preparation, presentation and listing of all cases in the Court of First instance. And perhaps more importantly, it also affects our

workload – so in that sense, it is extremely, extremely important. Now in many practical ways, milestone dates, tables, flowcharts etc., they are absorbingly important. But it is refreshing this morning for us to take a new look at the Practice Direction from a more international and philosophical prospective : should case management be, quoting Martin, adversarial or managerial? And also how we can strike a good balance between inviting the defence to tell us more so that we can achieve more, without the fair trial right being eaten or eroded into.

3. The discussions also exposed, in fact, three different matters. First, listing cases management for the purpose of enhancing listing. This is what Practice Direction version 9.3 to my understanding is seeking to do. It has no specific purposes of imposing obligation on the defense to disclose. That is another separate issue which no doubt we need to consider further. And the third separate issue is court room case management. Again, that has nothing to do with Practice Direction 9.3. No doubt we will have a lot of further discussions on the issue of case management in the time to come.

4. The second topic – "protecting the vulnerable in court". My friend, it is a sensitive and important issue. Taking matters further and taking matters forward on that topic require vision, compassion, and should I say, courage. We have engaged those issues and have talked to a number of interested parties. We heard first hand from victims as to how matters that we have never thought about would have affected them, giving them nightmares for months and months. Simple matters like after the traumatic event, the Police telling them that although they might be able to have a screen, nobody would know whether such requests would be granted until several months later, a couple of weeks before the trial. But then during

those several months, the victim would be there every night thinking whether she would have to repeat the ordeal in front of the very person whom she said had assaulted her. These are things that we have never considered as being important, but in fact affect 'life'. And I am pleased to report that in those regards, the prosecution, the Judiciary, the Police and also a lot of interested parties have been working together, and now mechanisms for the use of screens and special passageways are already in place. And further, legislative changes have now also been set in train for the expanded use live TV link, thanks to Eric's[1] suggestions.

5. We have done quite a bit. Given the overseas experience, more ought to be done. And in fact at this stage, citing what William had also cited, I refer to the case of *R v Lubemba*[2], that "*(i)t is now generally accepted that if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness, not the other way round."* It has a big ring of truth there. For my prosecution colleagues here, I will give you the citation so that next time whenever there is resistance from the defence to any of these protective mechanisms being employed, cite this case to them.

6. On the other hand, experience suggested that a lot of these practices would take quite a bit of time to implement. Legislative changes will take some time. In Hong Kong, the immediate option might be to implement the LRC's recommendations made in respect of hearsay evidence in criminal proceedings as soon as possible. That will surely be a big step towards

[1] Mr. Eric T.M. Cheung, Principal Lecturer, Department of Law, the University of Hong Kong.
[2] [2015] 1 WLR 1579, at para 45.

what I believe to be the right direction, so that in appropriate cases, personal attendance of the victims and the vulnerable can be averted. But having the privilege of speaking to Judge Young yesterday, one word of caution there : that in 2009 in the report, the LRC recommended the adoption of what they called the New Zealand Model. Nearly ten years down the line we are still taking about the New Zealand Model. But I realise now that the New Zealand Model has in fact moved on. So be careful then when we adopt what we believe to be the New Zealand Model, we have to be sure that it is the latest New Zealand Model, as opposed to that we studied 15 years ago. On the criminal hearsay reform, I really look forward to positive feedbacks from the Bar Association and the Law Society on the consultation paper that we have issued in April this year.

7. And in respect of the other matters that we can implement, like ground rules hearing, the pilot scheme and intermediary, we will continue to gauge and learn from the experience in the United Kingdom and in other places so as to be in a better position to look at these matters further.

8. And “joint enterprise”. Hong Kong can really claim ownership of this particular topic. When I tried to entice Professor David Ormerod to our Conference, I wrote to him as follows “*(w)ith Hong Kong being at least partly responsible for "the wrong turn" to start with, I have suspected that we may be able to tempt you to come here and tidy up some "Jogee loose ends*". “*Jogee loose ends*” is the title of an very insightful article that David co-authored after the case *Jogee*. And I am happy that I was successful, so here we are we have David here. I am not going to recite all these very interesting debates on the intricacies of *Jogee*. And in fact I may not be even qualified to do that. It will be safer for me to take this tangential yet

very important point. In fact last year when we were faced with the appeal *Chan Kam Shing* and after the CFA had certified the point, we had to quickly form a policy decision as to what to do. I had a numbers of conferences in house and also with fiat counsel. Should we embrace *Jogee,* just to tidy up some loose ends, or should we fight it? Should we consider our Hong Kong position, all the turns and so on, and to continue with our path after the *Chan Wing Shiu* turn? We decided to fight it, and the rest is history.

9. The interesting thing is that Article 8 of our Basic Law mandates Hong Kong to retain its long-held common law tradition. I am glad to say this tradition has never been more vibrant in Hong Kong. *Jogee* is one of those cases decided by the Court of Final Appeal which, quoting what the Secretary of Justice said in a speech he made during his earlier visit to Australia, that "*have made a mark in the development of common law both within the Hong Kong SAR and in other common law jurisdictions*"[3]. And my point is supported by Professor Ormerod. In fact, he acknowledged his failing in not having looked at our CFA cases more. David, our CFA and our common law traditions are going nowhere, and you have plenty of time to right your wrong.

10. Then "sentencing". *Ngo Van Nam* literally overhauled the once thought to be long-established sentencing practice of affording a full 1/3 discount to court-door pleas. The effects of the case are profound, as you can see from the statistics we have presented in the reference paper. We see

[3] Speech by the Hon Rimsky Yuen, SC, Secretary for Justice of the HKSAR at the Luncheon Event of the Law Society of New South Wales on 9 August 2016 on ' "The One Country, Two Systems" Policy and the Development of Common Law Jurisprudence in the Hong Kong SAR', para 28. The full speech is accessible at: http://www.doj.gov.hk/eng/public/pdf/2016/sj20160809e2.pdf.

lesser changes of pleas, we see lesser waste of judicial and other public resources, and we see much shorter listing time. From a utilitarian perspective, the case achieves what we aim to achieve. But as has been discussed in the reference paper, the implementation of the practice is still in an early stage. It will no doubt take a further while before we can see exactly how the judgment is going to develop and evolve and how the judgment sinks in.

11. So, there we are. We have had very interesting discussions on four evolving topics on our criminal legal system. To quote again Lord Bingham in his book "The Rule of Law", *"fairness is a constantly evolving concept, not frozen at any moment of time"* and *"(t)his is most obviously true of criminal trials"*[4]. In fact, that underlies the value of our Criminal Law Conference, in that we can all take time off, sit back a bit in a neutral forum, Judges sharing their views and we voicing out some of the grievances we have had, and looking forward to how best to handle some of the points which affect everybody in Hong Kong, either concretely or potentially.

12. On this note, I declare the conference close. Once again, a big thank-you to the Bar Association, the Law Society, and definitely our guests. Last of course not least, I express my gratitude to our staff. They have spent quite a lot of time preparing everything. And this back drop, I thought it was absolutely stunning and beautiful. And I am tempted to grasp one of these to be hanged on my wall at home. And Apollonia, Lenny thank you very much. And on a personal note, time files and this is my third Criminal

[4] See Tom Bingham, *The Rule of Law* (Allen Lane 2010), pages 90 to 91.

Law Conference already, and I have had enjoyed every one of them. Thank you for the assistance, and thank you for the privilege.

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