

**For discussion on
27 March 2017**

**Legislative Council Panel
on Administration of Justice and Legal Services**

**Enhancing protection of complainants in sexual offence cases and
mentally incapacitated persons during court proceedings**

Introduction

This paper seeks to report to Members on (a) the outcome of the consultation conducted by the Government on the proposed amendment to the Criminal Procedure Ordinance (Cap. 221) to give the court a discretion to permit complainants of certain sexual offences to give evidence by way of a live television link (the “**live television link proposal**”) and (b) measures adopted by the prosecutions for protecting mentally incapacitated persons (MIPs) in criminal proceedings.

Background

2. At the Administration of Justice and Legal Services (AJLS) Panel meeting on 18 October 2016, Dr Hon Elizabeth Quat urged the Panel to actively follow up with the Administration and the Judiciary Administrator on the implementation of measures for handling sexual offence cases and the provision of screens for complainants in sexual offence cases during court proceedings, following discussion of the subject at the earlier AJLS Panel meeting held on 27 June 2016. At the Panel meeting of October 2016, Hon Holden Chow also proposed to discuss the issue of measures for protecting MIPs during court proceedings.

Protection to complainants of sexual offences

Developments after the panel meeting of 27 June 2016

3. There has been public demand over the past few years for greater protection for victims of sexual offences. At the meeting of the Panel held on 27 June 2016, Members and represented interest groups involved in providing assistance to victims of sexual offences indicated support for a proposal made by Mr Eric Cheung, Principal Lecturer of the Department of

Law of The University of Hong Kong to introduce a bill to amend the Criminal Procedure Ordinance to give the court a discretion, on application or on its own motion, to permit complainants of certain sexual offences to give evidence by way of a live television link, so as to enhance the protection to these complainants when giving evidence in court¹, and called for its early introduction into the Legislative Council. The two legal professional bodies had no fundamental objection to the proposal.

4. Accordingly, the Department of Justice (DoJ) issued a consultation paper on the “live television link proposal” with a draft bill in October 2016². (A copy of the consultation paper issued is at **Annex A**.) As stated in the consultation paper, the proposal can effectively safeguard the rights of the complainants of sexual offences while at the same time :

- (a) does not unduly fetter the court’s discretion in the administration of criminal justice and can pass the tests of rationality and proportionality (consultation paper paragraph 8); and
- (b) does not affect the fundamental right of a defendant to a fair trial and is consistent with the principle of open justice

¹ This will involve adding a new provision to section 79B of the Criminal Procedure Ordinance, so that where a complainant within the meaning of section 156(8) of the Crimes Ordinance (Cap. 200) is to give evidence in proceedings in respect of a specified sexual offence within the meaning of section 117(1) of Cap. 200, the court may, on application or on its own motion, permit the complainant to give evidence by way of a live television link, subject to such conditions as the court considers appropriate in the circumstances. Under section 117(1) of Cap. 200, “specified sexual offence” means any of the following, namely, rape, non-consensual buggery, indecent assault, an attempt to commit any of those offences, aiding, abetting, counselling or procuring the commission or attempted commission of any of those offences, and incitement to commit any of those offences.

² Apart from posting the paper onto DoJ’s website, we also sent copies of the consultation paper to relevant entities, including –

- Mr Eric Cheung, Principal Lecturer of the Department of Law of The University of Hong Kong
- The Hon Dennis Kwok, Legislative Council Member of the Legal Constituency
- Hong Kong Bar Association
- The Law Society of Hong Kong
- Against Child Abuse
- Association Concerning Sexual Violence Against Women
- OIWA Limited
- Rainlily
- The Hong Kong Committee on Children’s Rights

(consultation paper paragraph 9).

5. On the actual operation of the proposed amendment, the consultation paper examined two issues in detail :

- (a) whether the applicability of the additional protection should only be confined to “specified sexual offences” under section 117(1) of the Crimes Ordinance, namely, rape, non-consensual buggery and indecent assault (consultation paper paragraphs 11 and 12); and
- (b) the correlation between additional protection proposed under the legislative amendment and other existing measures / arrangements (consultation paper paragraphs 13 to 16).

6. On the sexual offences to be covered (point 5(a) above), “specified sexual offences” as defined under section 117(1) of the Crimes Ordinance are relevant to the operation of section 156 of the Ordinance regarding the protection of anonymity of complainants of sexual offences³. This is to prevent any possible identification of the complainant who may be the victim of a “specified sexual offence”. It is the considered view of DoJ that the currently proposed legislative amendment and section 156 of the Crimes Ordinance serve a very similar purpose, and hence it is appropriate and logical for the proposed arrangement for the use of live television link in giving evidence to be applicable to the same class of complainants as that covered by section 156, i.e. complainants of “specified sexual offences”. As regards the complainants of other sexual offences, the court can continue to exercise its statutory and/or common law authority to order such other types of protection measures (see paragraphs 7 to 8 below) as are reasonable and proportionate to the case in question.

7. On the correlation between additional protection proposed under the legislative amendment and other related measures / arrangements (point 5(b) above), currently there are a number of statutory and administrative measures in place providing various types and degrees of protection to complainants and witnesses in sexual offence

³ Section 156 of the Crimes Ordinance provides that after an allegation is made that a specified sexual offence has been committed, no matter likely to lead members of the public to identify any person as the complainant in relation to that allegation shall either be published in Hong Kong in a written publication available to the public or be broadcast in Hong Kong except as authorized by the court’s direction given in pursuance of this section.

cases during court proceedings. The court will consider the circumstances of each case to determine whether it is appropriate for such measure(s) to be used. The guiding principle is to have regard to the interests of justice and the proper and fair administration of justice.

8. Our considered view is that these various statutory and administrative measures should be applied with flexibility having regard to the guiding principle. Even in cases where, under the current proposal, a complainant in a sexual offence is allowed to give evidence by way of a live television link, the use of such other measures may still be required. There is hence a practical need for these measures to continue to be made available, the application of which will continue to be subject to the judge's discretion under common law.

Outcome of the consultation exercise

9. Comments on the consultation paper were received from the following individuals and organisations :

- Mr Eric Cheung, Principal Lecturer of the Department of Law of The University of Hong Kong
- Mr I Grenville Cross, SBS, SC
- Ms Yu Lai-fan, Island District Council Member (and Ex-Vice Chairperson of OIWA Limited)
- Hong Kong Bar Association
- The Law Society of Hong Kong
- Association Concerning Sexual Violence Against Women
- Rainlily
- The Hong Kong Committee on Children's Rights
- VOICES : Victims' Rights Concern Group

10. Save for one respondent⁴, all other respondents supported the proposals set out in the consultation paper. Hence, DoJ will take forward the proposed amendment to the Criminal Procedure Ordinance by way of the Statute Law (Miscellaneous Provisions) Bill 2017, a paper on which is separately submitted for discussion at the meeting of this Panel on 27 March 2017.

Other comments

11. Support to the proposals set out in the consultation paper aside, some respondents also shared their observations on measures to enhance protection to complainants of sexual offence cases and MIPs as witnesses in court proceedings. In respect of complainants of sexual offence cases, the following suggestions are noted :

- (a) The Judiciary should enhance the provision of screens and special passageway.
- (b) The Judiciary should keep record of the deployment of various protective measures.
- (c) The Judiciary as well as law enforcement agencies (LEAs) should provide training to court personnel (法庭人員) (including judges and frontline police officers) on a continuous basis so as to reduce the possible secondary victimisation to complainants of sexual offence cases.
- (d) Members of the public observing court hearings should not be allowed to see the complainants from the live television link broadcast.
- (e) The Judiciary should consider providing training to social workers or other staff handling sexual offences cases so as to enable them to become persons acceptable to the court who could accompany a witness giving evidence through a live

⁴ The response concerned is from Ms Yu Lai-fan. She is of the view that there is already sufficient flexibility to give the court the discretion to permit complainants of certain sexual offences to give evidence by way of a live television link. Further legislative amendments are thus not necessary. In this regard, having revisited the legal position of the matter, we confirm that while the court is currently empowered to permit specific categories of persons to give evidence by way of a live television link (see section 79B of the Criminal Procedure Ordinance), complainants in sexual offence cases can be so permitted only if they fall under any of those categories of persons (see paragraphs 2 and 3 of the consultation paper at Annex A). Hence, legislative amendment (as currently proposed) is essential to achieving the aim of providing the court necessary additional discretion to permit complainants of specified sexual offences to give evidence by way of a live television link.

television link (i.e. “**support persons**”), thus enhancing the support for complainants of sexual offence cases in court proceedings.

- (f) The giving of evidence by way of a live television link as well as the provision of screen and special passageway should be allowed automatically.

12. In respect of points 11(a), (b), (c) and (d) above, the responses of the Judiciary are set out in a separate document submitted by the Judiciary for discussion at the same meeting of this Panel on 27 March 2017.

13. As for the Police, continuous training has been provided to frontline officers (point 11(c) refers). Given the great importance that the Police have attached to the professional handling of sexual offence cases with particular focus on reducing any possible secondary victimisation of sexual offence cases, police officers are reminded of the importance of ensuring quality protection and necessary support to all victims. To equip frontline officers with the skills and knowledge to handle sexual violence cases professionally, relevant topics including “Sexual Violence”, “Victim’s Charter”, “Psychological Skills in Handling Victims”, “Empathetic Listening”, “Conflict Management” and “Understanding Aggression, Violence and Handling Techniques” are covered in the Foundation Training Courses, various Development and Promotion Courses as well as Criminal Investigation Courses. In addition, guest speakers from relevant non-government organisations are also invited to deliver training to frontline officers on a regular basis. Besides, relevant training materials are made available for the quick and easy reference of frontline officers via the Police’s Intranet.

14. On the training of support persons (point 11(e) refers), such training has been provided primarily by the Social Welfare Department (SWD)⁵, which mainly focuses on how to provide emotional and physical

⁵ For child witnesses, Po Leung Kuk (PLK) Tsui Lam Centre provides support persons for court attendance. PLK Tsui Lam Centre provides one-day training to them prior to them being deployed. Speakers from PLK, SWD and the Police are invited.

For adult MIP witnesses, SWD deploys family aid workers as support persons, and they receive one-day in-house training. Again, a speaker from the Police is invited. Representatives from MIP parents’ associations are also invited to assist in such training.

support to witnesses, as well as the court procedure generally. From DoJ's point of view, SWD has the suitable resources, neutrality, experience and expertise (from, for example, social workers and psychologists) in training the support persons, and we consider that it would serve the witnesses' best interests and the proper administration of justice for the current arrangement to continue.

15. On the proposal that the giving of evidence by way of a live television link as well as the provision of screen and special passageway should be allowed automatically for complainants of sexual offence cases (point 11(f) refers), the Government's stance is that it is not supported, for the reasons set out previously in our paper submitted to the AJLS Panel for discussion at the meeting on 27 June 2016 (paragraphs 8 and 9 are relevant). In gist, the proposal has the effects of fettering the trial judge's discretion, and depriving the complainants of their choice. The giving of evidence by way of a live television link as well as the provision of screen will also bear upon the fundamental principle of open justice. Even though the proposal has the well-intended aim of protecting complainants in sexual offence cases, the automatic application of the measures concerned may make their validity susceptible to challenge under the Basic Law, having regard to the rationality and proportionality of the measures concerned to the aims sought to be addressed thereby.

16. As opposed to a proposal which seeks to allow complainants of sexual offences to give evidence by way of a live television link automatically, the current legislative proposal rationally and proportionally confers upon the court a discretion, on application or on its own motion, to permit complainants of certain sexual offences to give evidence by way of a live television link. Similarly, the provision of screens in the court room or special passageways for entering / leaving the court building / court room for victims of sexual violence in criminal proceedings is currently governed by common law and is a matter left to a judge's judicial discretion. As such, it is up to the court to consider the propriety of allowing the use of live television link, screens and/or

The Multi-purpose Crisis Intervention and Support Centre (CEASE Crisis Centre), operated by the Tung Wah Group of Hospitals, provides support persons to adult vulnerable witnesses, mostly for sexual violence related cases. These support persons will be provided one-day training by SWD, similar to that provided for family aid workers for cases involving adult MIP witnesses mentioned above.

special passageway, having regard to the facts of each case, the needs of the complainant and the views of the defendant, thus ensuring that each and every case can be considered by the court on its own merit, and that the protection to be accorded to each sexual offence complainant is reasonable and proportionate to the case in question. The court's discretion in the administration of criminal justice should be preserved. As stated above, the guiding principle is to have regard to the interests of justice, and the proper and fair administration of justice.

Protection to MIPs in court proceedings

17. Previously in 2013, DoJ submitted a paper to the AJLS Panel setting out measures adopted by the Prosecutions Division of DoJ in handling victims in sexual offence cases, many of which are also applicable to MIP witnesses. A copy of the paper is attached at **Annex B** for Members' ease of reference. Moreover, further back in 1995, special procedures were introduced by the Judiciary by way of Practice Direction 9.5 (copy of current version at **Annex C**) which is applicable to vulnerable witnesses who apply for leave to call evidence in accordance with the provisions of the Live Television Link and Video Recorded Evidence Rules (Cap. 221J) made under section 79D of the Criminal Procedure Ordinance⁶.

18. As DoJ has emphasised in different contexts, it treats most seriously the rights and interests of MIPs. In October 2016, having taken note of the views of interested individuals and organisations in relation to DoJ's withdrawal of prosecution against the defendant in a sexual offence case at a residential care home for persons with disabilities (with the victim being an MIP), DoJ decided to examine the procedures in handling prosecutions involving MIPs to see if there might be room for further improvement, so that we could safeguard their rights even better. Separately, in the context of the consultation exercise regarding the "live television link proposal" reported above (see chapeau of paragraph 11), some respondents also provided their observations on measures to enhance protection to MIPs as witnesses in court proceedings. These issues are also covered in our review.

⁶ Including (a) live television link (under section 79B of the Criminal Procedure Ordinance) where the witness is a child or mentally incapacitated or in fear, or (b) video recorded testimony (under section 79C of the Criminal Procedure Ordinance) in the case of witnesses who are either children or mentally incapacitated persons.

19. Having examined our existing measures, we are of the view that they can provide appropriate protection to MIPs in the context of criminal judicial proceedings. This notwithstanding, we consider that there is room for further enhancing such protection and for this, the Prosecutions Division has introduced the following measures :

- (a) Regular in-house training courses/seminars on handling of vulnerable witnesses (including MIPs in court proceedings) provided to prosecutors of the Prosecutions Division should be enhanced.⁷
- (b) Legal circulars are prepared and circulated to all counsel, court prosecutors and counsel on fiat to remind them of the law, practice and procedure, the proper treatment of vulnerable witnesses and other relevant considerations in the prosecution of these cases.
- (c) A policy coordinator for vulnerable witnesses cases has been designated to coordinate the advice, prosecution and subsequent handling of these cases. The policy coordinator maintains regular liaison/meetings with the Judiciary, the Police and SWD to ensure that these cases are handled with the necessary competence, professionalism and sensitivity. To enhance the effectiveness of the policy coordinator in this role, he/she will also maintain regular liaison with non-governmental organizations including MIP concern groups so that the views and concerns of MIPs and their families can be better understood and addressed, and that the interests of MIPs are appropriately safeguarded.

20. We have also carefully considered the observations made by some respondents to consultation paper on the “live television link”

⁷ Under the Continuing Legal Education Programme provided to prosecutors, a training module on handling domestic violence cases and sex offences involving vulnerable witnesses was conducted on 23 September and 7 October 2016 which covered the topics of “Understanding the characteristics and nature of mentally handicapped minor witnesses” and “Procedures for handling vulnerable witnesses”, with professional officers of relevant departments as speakers. In addition, ad hoc seminars will also be provided on a regular basis. For example, on 29 November 2016, a sharing talk on “Prosecution of vulnerable witnesses cases” was held and attended by about 120 government counsel; and on 10 February 2017, a forensic pathologist from the Department of Health spoke to counsel of the Prosecutions Division on “Medical-legal aspects of sexual offences” with a special reference to forensic examination of MIP witnesses in sexual offence cases.

proposal on measures to enhance protection to MIPs as witnesses in court proceedings, including :

- (a) Allowing disabled persons (「殘疾人士」) to be automatically eligible to give evidence via live television link and/or the use of screen when giving evidence in court (without the need for the court to exercise discretion to allow for such arrangement), and also providing a clearer definition in the law for “disabled persons”.
- (b) DoJ to prompt for more rapid reforms in relation to the proposal of accepting hearsay evidence as set out in the report of the Law Reform Commission (LRC) on “Hearsay in Criminal Proceedings” as announced in November 2009.
- (c) DoJ to restore and strengthen its Vulnerable Witnesses Team.
- (d) DoJ to take progressive steps in protecting witnesses, with reference to the new arrangements in England for children and MIPs to give video-recorded evidence and be cross-examined in “pre-trial evidence sessions” (which allow pre-decided, toned-down questions), and to remove the requirement for such witnesses to attend the actual hearing.

21. On point 20(a), it is relevant to note that taking into account the assistance that they require in the process, the use of live television link as special procedures in giving evidence is applicable to “vulnerable witnesses” (currently covering children, MIP and witness-in-fear, and will cover complainants in specified sexual offences after the implementation of the “live television link proposal”), while the measures of screens and special passageway are mainly used to protect the identity and privacy of victims of sexual offence cases and witnesses in fear generally. There are clear definitions of the terms “children”, “mentally incapacitated persons” and “witnesses in fear” under sections 79A and 79B of the Criminal Procedure Ordinance.

22. The above-mentioned measures (as appropriate) can be applied to disabled persons if they are also “vulnerable witnesses” or victims of sexual offence cases generally. However, taking into account the principle of rationality and proportionality, the status as a disabled person by itself does not necessarily call for the application of these special procedures (automatically or otherwise). Following from this, there is also no practical need to provide a special definition for “disabled persons” in the Criminal Procedure Ordinance.

23. In respect of the law reform relating to “hearsay evidence” (point 20(b) refers), DoJ will consult the legal professional bodies, the Judiciary and other interested parties on a working draft bill to implement the LRC’s recommendations made in its report on Hearsay in Criminal Proceedings. One of the recommendations is to give the court a discretion to admit “hearsay evidence” of a declarant who is unfit to be a witness because of his physical or mental condition (so that the admission of hearsay evidence becomes “necessary”), on the additional condition that the court is satisfied with the “reliability” of the evidence. A separate paper to brief Members on the working draft bill is also submitted for discussion at the same meeting of this Panel on 27 March 2017.

24. On whether the Vulnerable Witnesses Team of DoJ should be restored (point 20(c) refers), it should be noted that the Team was set up in the 1990’s with the aim of having in place a team of counsel who were familiar with the law and practice in relation to the treatment of vulnerable witnesses, taking into account the implementation of the amendment to the Criminal Procedure Ordinance and the introduction of the Special Procedures for Vulnerable Witnesses by the Judiciary in 1995. The actual handling of vulnerable witnesses cases evolved over the years, with an increasing number of DoJ counsel generally having accumulated valuable experience in handling cases involving vulnerable witnesses. For better coordination and handling of these cases, our current arrangement is that a counsel at directorate rank is assigned as the policy coordinator of the subject, who will deploy suitable counsel to handle cases involving vulnerable witnesses and related matters (see paragraph 19(c) above).

25. Although the need for the Team had fallen away, it did not mean that DoJ placed less importance to the handling of cases involving vulnerable witnesses. In fact, DoJ had strengthened training for its counsel in respect of handling cases involving vulnerable witnesses and will continue with its efforts in this regard⁸.

26. We have also examined the new English practice as mentioned in point 20(d), which according to our understanding is running as a pilot scheme. When considering the same, we need to consider three aspects :

⁸ See footnote 7 above.

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- (1) The giving by the courts of pre-trial directions on manner of cross-examination : It is the view of DoJ that it will be within the inherent jurisdiction of a High Court judge to do so; similar directions are indeed envisaged in for example paragraph 9 of Practice Direction 9.5 (see Annex C) and can be sought from the court in appropriate cases.
 - (2) Pre-trial and pre-arraignment cross-examination : Such procedures may in fact be available under specific circumstances (e.g. section 79E of the Criminal Procedure Ordinance⁹), and the prosecutions will consider to apply for the adoption of such procedures in appropriate cases. But it should also be noted that the procedures are applicable to both a MIP defendant as well as a witness.
 - (3) Video-recorded evidence-in-chief and the cross examination be placed before the jury as suggested, “without needing the witnesses to attend” the court to give evidence : Such a proposal is not generally permitted under the existing law (except perhaps when permitted under (2) above), given a

⁹ According to section 79E of the Criminal Procedure Ordinance :

“(b) Where a mentally incapacitated person is to give evidence in proceedings in respect of an offence that is triable-

(a) on indictment; or

(b) either summarily or on indictment,
and in respect of such proceedings-

(i) for good reason it is unavoidable that a trial cannot be heard without delay; or

(ii) exposure to a full trial would endanger the physical or mental health of the mentally incapacitated person,

a party to the proceedings may apply for leave for a deposition in writing to be taken from the mentally incapacitated person, including a mentally incapacitated person who is a defendant where such a defendant and his counsel so request, by a magistrate.

.....
(5) Where leave has been granted, a magistrate may take the deposition at any time before the trial of the offence commences.

.....
(7) A deposition taken in accordance with this section is admissible as evidence without further proof at the trial of the offence to which the deposition relates.

(8) Except with leave of the court, a witness in respect of whom a deposition has been taken under this section shall not be examined or cross-examined in any subsequent hearing on any matter which in the court's opinion has been dealt with in the deposition.

(9) In taking a deposition the magistrate may, on application or on his own motion, allow testimony to be given by way of a live television link, subject to such conditions as the magistrate considers appropriate in the circumstances.”

defendant's right to a fair trial¹⁰. A substantive law reform will be necessary to implement this proposal, as it will involve quite an overhaul of the existing statutory regime. On the other hand, as explained above (see paragraph 23), it is the current plan of the Government to implement the LRC's recommendations made in its report on Hearsay in Criminal Proceedings which, if it can be implemented, will be helpful in avoiding the situation where prosecution cannot proceed / continue to proceed as a result of an MIP not being able to appear in court to give evidence. Hence, we consider it desirable to quickly pursue the reform of the hearsay law and observe its effect in addressing the current problems involving MIPs as witnesses in court proceedings before considering whether there is any further practical need for us to introduce the English pilot measure into Hong Kong.

Department of Justice
March 2017

¹⁰ See in particular Article 14(3)(e) of the International Covenant on Civil and Political Rights (which has been applied to Hong Kong by the Hong Kong Bill of Rights Ordinance (Cap. 383)), that a defendant in criminal proceedings has the right to, inter alia, "*examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him*".

Consultation Paper:

**Proposed amendment to the
Criminal Procedure Ordinance (Cap. 221)
to give the court a discretion to permit
complainants of certain sexual offences to
give evidence by way of a live television link**

Department of Justice
October 2016

The Department of Justice invites comments on the matters raised in this Consultation Paper by 18 November 2016. All correspondence (marked “Proposed amendment to the Criminal Procedure Ordinance”) should be addressed to:

Address: Department of Justice, 5/F, High Block, Queensway Government Offices, 66 Queensway, Hong Kong

Telephone: 2867 4492

Fax: 2877 0171

E-mail: mariawong@doj.gov.hk

It may be helpful for the Department of Justice, either in discussion with others or in any subsequent documents, to be able to refer to comments submitted in response to this Consultation Paper. Any request to treat all or any part of a response in confidence will be fully respected. However, it will be assumed that the response is not intended to be confidential if no such express request is made.

Anyone who responds to this Consultation Paper may be acknowledged by name in subsequent document(s) or report(s). If an acknowledgement is not desired, please expressly say so in your response.

The information, statistics and figures contained in this Consultation Paper are, unless otherwise specified, accurate up to 1 September 2016.

Introduction

This consultation paper proposes that the Criminal Procedure Ordinance (Cap. 221) and the Live Television Link and Video Recorded Evidence Rules (Cap. 221 sub. leg. J) be amended to give the court a discretion, on application or on its own motion, to permit complainants of certain sexual offences to give evidence (or to be examined on any appeal)¹ by way of a live television link, so as to enhance the protection to such complainants during court proceedings.

Background

2. Currently, under section 79B of Cap. 221, the court² may, on its own motion or upon application, permit a person falling within any of the following three categories to give evidence by way of a live television link :

- (a) a child (other than a defendant) giving evidence in proceedings in respect of an offence of sexual abuse or cruelty, or of an offence (other than one triable summarily only) which involves an assault on, or injury or a threat of injury to, a person; or
- (b) a mentally incapacitated person (including a defendant) giving evidence in proceedings in respect of an offence that is triable otherwise than summarily only; or
- (c) a “witness in fear” giving evidence in proceedings in respect of any offence.

3. A “witness in fear” is defined in section 79B(1) (by application of section 7(1) of the Interpretation and General Clauses Ordinance (Cap. 1)) to mean a witness whom the court hearing the evidence is satisfied, on reasonable grounds, is apprehensive as to the safety of himself/herself or any member of his/her family if he/she gives evidence.³ While it is possible that a complainant of sexual offences can be a “witness in fear”, and hence be covered by the existing section 79B, it is not necessarily so. A complainant or witness of a sexual offence, though not “in fear” as statutorily defined, ought nonetheless to be treated with understanding, fairness and dignity. The court should have the requisite powers in appropriate cases to protect such witnesses from the embarrassment of being exposed to public sight, any indignity of treatment, and the anxiety arising from the need to physically face the

¹ Though the exercise of this power under section 83V of Cap. 221 is rarely seen or reported, it should be extended to cover the amended section 79B for the sake of consistency and completeness. In the rest of this paper, the references to “giving evidence” include being examined on any appeal.

² “Court” is defined in section 79A of Cap. 221 to include the District Court and a magistrate.

³ Although the English text of section 79B(1) refers to “himself” and “his”, section 7(1) of Cap. 1 applies so that a female witness is also covered by the definition.

assailants during the trial.

4. In this regard, we are given to understand that Mr Eric Cheung, Principal Lecturer of the Department of Law of The University of Hong Kong, has prepared a draft Bill to add a new provision to section 79B of Cap. 221, so that where a complainant within the meaning of section 156(8) of the Crimes Ordinance (Cap. 200)⁴ is to give evidence in proceedings in respect of a specified sexual offence within the meaning of section 117(1) of Cap. 200⁵, the court may, on application or on its own motion, permit the complainant to give evidence by way of a live television link, subject to such conditions as the court considers appropriate in the circumstances. (A copy of the Bill, incorporating finetuning by the Department of Justice (DoJ) plus necessary supplementary / consequential amendments⁶, is attached at **Annex A**.) The effect of the proposed Bill is to confer on the court a discretion to permit complainants of sexual offences who are outside the three current categories to give evidence by way of live television link, so that the protection to such individuals when giving evidence in court can be enhanced. The proposed supplementary / consequential amendments are ancillary in nature. They are necessary to ensure overall consistency and that the proposed Bill will integrate seamlessly with the existing legislation.

5. At the meeting of the Administration of Justice and Legal Services (AJLS) Panel of the Legislative Council (LegCo) held on 27 June 2016, the draft Bill of Mr Cheung was discussed. A number of LegCo members speaking at the meeting supported the Bill.

6. It is the view of the Government that the proposed legislative measure mentioned above can broadly achieve the aim of offering additional protection to complainants in sexual offence cases, and at the same time is likely to be able to pass the tests of rationality and proportionality, does not affect the fundamental right of a defendant to a fair trial, is consistent with the principle of open justice, and does not unduly fetter the court's discretion in the administration of criminal justice. DoJ

⁴ Under section 156(8) of Cap. 200, complainant, in relation to an allegation of a specified sexual offence, means the person against whom the offence is alleged to have been committed.

⁵ Under section 117(1) of Cap. 200, specified sexual offence means any of the following, namely, rape, non-consensual buggery, indecent assault, an attempt to commit any of those offences, aiding, abetting, counselling or procuring the commission or attempted commission of any of those offences, and incitement to commit any of those offences.

⁶ A consequential amendment will be made to section 83V(13) of Cap. 221 so that the existing power of the Court of Appeal to examine a witness in accordance with section 79(B) of Cap. 221 will be extended to cover a complainant of a specified sexual offence. Similarly, rule 3 of the Live Television Link and Video Recorded Evidence Rules (Cap. 221J) which concerns the procedure of an application made under section 79B, will need to be amended accordingly to cover such a complainant.

undertook to give further consideration to the legislative proposal and, if considered to be viable and desirable, to consult the stakeholders with a view to taking forward the necessary legislative amendments.

Assessment of the legislative proposal by DoJ

7. In considering any measure to provide additional protection to complainants in sexual offence cases, we need to ensure that such measure :

- (a) can effectively safeguard the rights of the complainants of such offences;
- (b) can pass the tests of rationality and proportionality;
- (c) does not affect the fundamental right of a defendant to a fair trial;
- (d) is consistent with the principle of open justice;
- (e) can integrate suitably with the existing protective measures; and
- (f) does not unduly fetter the court's discretion in the administration of criminal justice.

8. As opposed to a proposal which seeks to allow complainants of sexual offences to give evidence by way of a live television link automatically, the current legislative proposal only confers upon the court a discretion, on application or on its own motion, to permit complainants of certain sexual offences to give evidence by way of a live television link. It is up to the court to consider the propriety of allowing the use of live television link, having regard to the facts of each case, the needs of the complainant and the views of the defendant. Moreover, it is specifically provided in the proposed amendment that the court may impose such conditions as it considers appropriate in the circumstances. In totality, it helps ensure that each and every case can be considered by the court on its own merit, and that the protection to be accorded to each sexual offence complainant is reasonable and proportionate to the case in question. And with the ultimate arrangement (including conditions as considered appropriate in the circumstances) to be left to be decided by the judge in each case, the court's discretion in the administration of criminal justice can be preserved.

9. Any proposal that would have an effect of debarring the defendant and his counsel from seeing the witness's response, etc. would engage the fundamental right of a defendant to a fair trial and the principle of open justice. The use of live television link in giving evidence by a complainant of sexual offences only keeps the defendant from the witness's sight. This arrangement, on its own, will not prevent the defendant and the defendant's counsel from seeing the witness's response. As regards whether the witness should be further protected from public sight when giving evidence via a live television link, the current proposal enables the court to decide on the most appropriate arrangement (e.g. by imposing appropriate conditions) after having regard to the views and needs of the complainant on the one hand and

the principle of open justice on the other hand. The defendant will also have an opportunity to ventilate his or her views and objection, if any, regarding the application. Hence, the proposal, whilst engaging the fundamental right of a defendant to a fair trial and the principle of open justice, does not infringe either of them.

10. On the basis of the above, the Government considers it appropriate to take forward the proposed legislative amendments. In this regard, two operational aspects of the amendments have also been considered :

- (a) whether the applicability of the additional protection should only be confined to the specified types of sexual offences under section 117(1) of Cap. 200, namely, rape, non-consensual buggery and indecent assault, as proposed in Mr Eric Cheung's draft Bill; and
- (b) the correlation between additional protection proposed under the legislative amendment and other existing measures / arrangements.

Sexual offences to be covered

11. As set out in footnote 5 above, "specified sexual offence" is defined under section 117(1) of Cap. 200 to cover rape, non-consensual buggery, indecent assault, an attempt to commit any of those offences, aiding, abetting, counselling or procuring the commission or attempted commission of any of those offences, and incitement to commit any of those offences. This definition of "specified sexual offence" is relevant to the operation of section 156 of Cap. 200 regarding the protection of anonymity of complainants of sexual offences. Section 156 of Cap. 200 provides that after an allegation is made that a specified sexual offence has been committed, no matter likely to lead members of the public to identify any person as the complainant in relation to that allegation shall be published in Hong Kong in a written publication available to the public or be broadcast in Hong Kong except as authorized by the court's direction made under this section. This is to prevent any possible identification of the complainant who may be the victim of a specified sexual offence.

12. We consider that both the currently proposed legislative amendment and section 156 of Cap. 200 serve a very similar purpose – i.e. to protect complainants of sexual offences from the stress and embarrassment arising from the trial in court, and to remove the consequential discouragement for them to testify in court to bring the offenders to justice. On this basis, it is also appropriate and logical for the proposed arrangement for the use of live television link in giving evidence to be applicable to the same class of complainants as that covered by section 156 of Cap. 200, i.e. complainants of specified sexual offences. As regards the complainants of other sexual offences, the court can continue to exercise its statutory and/or common law authority to order such other types of protection measures (see paragraphs 13 to 16 below) as are reasonable and proportionate to the case in question.

Correlation between additional protection proposed under the legislative amendment and other related measures/ arrangements

13. Currently, there are a number of statutory and administrative measures in place providing various types and degree of protection to complainants and witnesses in sexual offence cases during court proceedings. (Details are set out in the AJLS Panel Paper on “Protection of Victims of Sexual Offence Cases During Court Proceedings” (LC Paper No. CB(4)679/12-13(05)) issued by the Judiciary Administration in May 2013 and discussed at the AJLS Panel meeting on 28 May 2013. See extracts of relevant information at **Annex B.**) As set out in the said AJLS Panel paper, the court will consider the circumstances of each case to determine whether it is appropriate for such measure(s) to be used. Generally speaking, the measure(s) will be used where it is satisfied that they are required for the administration of justice and fair adjudication.

14. In respect of the statutory measures, while they all have the effect of providing privacy and protection to complainants of sexual offence cases during court proceedings to various extents, each of them targets different groups and/or situations with different effects. The currently proposed measure of giving the court a discretion to permit complainants of certain sexual offences to give evidence by way of a live television link will complement (but not affect the operation of) these other existing statutory measures.

15. As regards the administrative measures, while some of them are general in nature (e.g. banning of shooting and recording in court, special arrangements in respect of daily cause list, special arrangements for cases involving children), others are more commonly used in sexual offence cases (e.g. provision of screens in the court room or special passageways for entering / leaving the court building / court room). The deployment of these measures is left to a judge’s discretion under the common law. There is a question as to whether these statutory and administrative measures should continue to be provided, if the court is indeed given the discretion to permit complainants of certain sexual offences to give evidence by way of a live television link.

16. Our considered view, having regard to overseas practices as well as our operational need, is that these various statutory and administrative measures seek to address different circumstances. Even in cases where, under the current proposal, a complainant in a sexual offence is allowed to give evidence by way of a live television link, the use of screen may still be required. One example is when there is a need not to disclose to the public the true identity of the complainant. On the other hand, the provision of special passageway serves a different (but complementary) purpose of shielding the complainant from public sight when entering / leaving the court building / court room. There is hence a practical need

for these measures to continue to be made available⁷, the usage of which will continue to be subject to the judge's discretion under the common law.

Way forward

17. If the proposed legislative amendment is agreeable to relevant stakeholders, we will further take forward the legislative process with a view to introducing the amendments as soon as possible (hopefully within 2017).

Consultation

18. As noted above, DoJ wishes to consult all relevant stakeholders on the proposals set out above. DoJ therefore invites views from the relevant stakeholders, and would be grateful if such views can be sent to DoJ as stated at the beginning of this consultation paper.

Department of Justice
October 2016

⁷ In respect of the provision of screen, after consultation with stakeholders, the Judiciary has earlier promulgated amended / new Practice Directions, as a result of which the consideration of the need for screens as shields has become a standing procedure in every sexual offence case that is brought before the court starting from 1 August 2016. It would be highly useful for this enhanced practice to continue to be in force with the continued provision of screen as a measure of protection of complainant of sexual offences.

Criminal Procedure (Amendment) Bill 2016

Clause 1

A BILL

To

Amend the Criminal Procedure Ordinance to give the court a discretion to permit a complainant of certain sexual offences to give evidence (or be examined) in the proceedings by way of a live television link; and to provide for related matters.

Enacted by the Legislative Council.

Part 1

Preliminary

Criminal Procedure (Amendment) Bill 2016

Clause 1

1. **Short title**

This Ordinance may be cited as the Criminal Procedure (Amendment) Ordinance 2016.

2. **Enactments amended**

The enactments specified in Parts 2 and 3 are amended as set out in those Parts.

Part 2

Amendments to Criminal Procedure Ordinance (Cap. 221)

3. **Section 79B amended (evidence by live television link)**

- (1) Section 79B(1), Chinese text, definition of 在恐懼中的證人—

Repeal the full stop

Substitute a semicolon.

- (2) Section 79B(1)—

Add in alphabetical order

Criminal Procedure (Amendment) Bill 2016

Clause 4

“*complainant* (申訴人) has the meaning given by section 156(8) of the Crimes Ordinance (Cap. 200);

specified sexual offence (指明性罪行) has the meaning given by section 117(1) of the Crimes Ordinance (Cap. 200);”.

(3) After section 79B(4)—

Add

“(4A) If a complainant is to give evidence in proceedings in respect of a specified sexual offence, the court may, on application or on its own motion, permit the complainant to give evidence by way of a live television link, subject to any conditions the court considers appropriate in the circumstances.”.

4. Section 83V amended (evidence)

(1) After section 83V(13)—

Add

Criminal Procedure (Amendment) Bill 2016

Clause 4

“(13A) If a complainant is required to be examined before the Court of Appeal under subsection (1)(b) in proceedings in respect of a specified sexual offence, the Court of Appeal may exercise the same powers that a court may exercise under section 79B(4A).”.

(2) Section 83V(15)—

Repeal

“(12) or (13)”

Substitute

“(12), (13) or (13A)”.

(3) After section 83V(17)—

Add

“(18) In subsection (13A)—

complainant (申訴人) has the meaning given by section 79B(1);

specified sexual offence (指明性罪行) has the meaning given by section 79B(1).”.

Part 3

Amendment to Live Television Link and Video Recorded Evidence Rules (Cap. 221 sub. leg. J)

Criminal Procedure (Amendment) Bill 2016

Clause 5

- 5. Rule 3 amended (evidence through live television link where witness is a vulnerable witness or is to be cross-examined after admission of a video recording)**

Rule 3(1)(a)—

Repeal

“(3) or (4)”

Substitute

“(3), (4) or (4A)”.

Explanatory Memorandum
Paragraph 1

Explanatory Memorandum

The object of this Bill is to amend the Criminal Procedure Ordinance (Cap. 221) to give the court a discretion to permit a complainant of certain sexual offences to give evidence (or be examined) in the proceedings by way of a live television link, in order to enhance the protection to the complainant (clauses 3 and 4).

2. The Bill also consequentially amends the Live Television Link and Video Recorded Evidence Rules (Cap. 221 sub. leg. J) (clause 5).

**Measures to Protect Victims or Witnesses of Sexual Offence Cases
during Court Proceedings**

(Information extracted from AJLS Panel Paper
LC Paper No. CB(4)679/12-13(05) on “Protection of
Victims or Witnesses of Sexual Offence Cases During Court Proceedings”
issued by the Judiciary Administration in May 2013)

(A) Statutory Measures

(a) Anonymity of Complainants

Section 156 of the Crimes Ordinance, Cap. 200 provides that after an allegation is made that a specified sexual offence has been committed, no matter, which will likely lead members of the public to identify any person as the complainant in relation to that allegation, shall be published in Hong Kong in a written publication available to the public or be broadcast in Hong Kong, unless the court directs otherwise. This is to prevent the identification of the complainant who may be the victim or witness.

(b) Power of Exclusion & Closed Court

Normally, the prosecution would apply on behalf of a victim or witness to a criminal court for excluding the public from the proceedings and/or for the proceedings to be held in camera under the following legislative provisions:

- (i) Section 122 of the Criminal Procedure Ordinance, Cap. 221, provides a judge or a magistrate with the power to order the exclusion from the court in which he sits of members of the public where the proper administration of justice so requires; and
- (ii) Under section 123(1) of Cap. 221, subject to the provisions of the Hong Kong Bill of Rights Ordinance, Cap. 383, if it appears to a court that it is necessary so to do in the interests of justice or public order or security, the court may order that the whole of proceedings before it in respect of any offence or, having regard to the reason for making such an order, any appropriate part of such proceedings shall take place in a closed court.

(c) Non-disclosure of Identity of Victims or Witnesses

Pursuant to section 123(2) of Cap. 221, the court may order that no question shall be put to any specified witness in the proceedings before it if the answer thereto would lead, or tend to lead, to disclosure of the name and address of any witness in the proceedings. The witness includes the

victim of a sexual offence case.

(d) Prohibition on Taking Photographs, etc in Court

Under section 7 of the Summary Offences Ordinance, Cap. 228, no one shall be allowed to take or attempt to take any photograph, portrait or sketch of any person in court. This serves the same purpose of protecting the identity of a victim or witness.

(e) Special Measures for Child Victims or Witnesses

If the victim of a sexual offence case is a child under 17 or 18 years of age (as the case may be) ¹, the court may make special arrangements for them as a vulnerable witness under Cap. 221 as follows:

(i) Video Recorded Evidence

In accordance with section 79C of Cap. 221, the court may allow the video recording that has been made of an interview between the child and a police officer or a social worker/a clinical psychologist who is employed by the Government be admitted and used as evidence in the proceedings. In the circumstances, the court may decide that the child need not be examined in chief.

(ii) Evidence by Live Television Link

In accordance with section 79B of Cap. 221, where a child is required to give evidence, or be examined on video recorded evidence given, the court may, on application or on its own motion, permit the child to give evidence or be examined by way of a live television link.

Practice Direction – 9.5 entitled “Evidence by Way of Live Television Link or Video Recorded Testimony” sets out clearly the related arrangements for live television link and video recorded testimony. During the proceedings where live television link is made use of, the judge will ensure that no intimidating practices are adopted in the course of questioning; and no inappropriate language is used having regard to the age and mental capacity of the child. Where a defendant is not represented and wishes to ask questions of the child, the judge in his/her discretion may permit:

¹ According to section 79A of Cap. 221, “child” means a person who in the case of an offence of sexual abuse -

- (i) is under 17 years of age; or
- (ii) for the purposes of section 79C, if the person was under that age when a video recording to which section 79C applies was made in respect of him, is under 18 years of age.

- (1) the picture to be switched off on the monitor in the CCTV witness room allowing only the defendant's voice to be heard by the child; or
- (2) the question to be channelled through another person (including the judge),

if he/she feels that the impact of cross-examination will be too inhibiting or threatening to allow the child to answer freely.

(iii) Depositions

In accordance with section 79E of Cap. 221, where a child is to give evidence in proceedings and in respect of such proceedings:

- (1) for good reason it is unavoidable that a trial cannot be heard without delay; or
- (2) exposure to a full trial would endanger the physical or mental health of the child,

a party to the proceedings may apply for leave for a deposition in writing to be taken from the child by a magistrate. Where leave has been granted, a magistrate may take the deposition at any time before the trial of the offence commences. A deposition taken as such would be admissible as evidence without further proof at the trial of the offence to which the deposition relates. Moreover, except with leave of court, the child in respect of whom a deposition has been taken shall not be examined or cross-examined in any subsequent hearing on any matter which in the court's opinion has been dealt with in the deposition.

(B) Administrative Measures

In addition to the above statutory measures, there are other administrative measures which can be resorted to by the court in protecting the victims or witnesses of sexual offence cases. These are set out below.

(a) Banning of Shooting and Recording in Court

No shooting or recording is allowed in court. This prevents the disclosure of the identity of the victims or witnesses.

(b) Provision of Screen

When a victim or witness gives evidence in courtroom, the court, upon the application of the prosecution, may arrange for a screen to be placed around the victim or witness so that the public or the press will not be able to view or identify the victim or witness during the related proceedings.

In the past, such screen was generally provided by the prosecution. Nonetheless, in view of the recurrence of such requests and the need for

consistency, arrangements have been made for their procurement to be centrally co-ordinated and provided by the Judiciary. At present, screens are available in the High Court, the District Court and the seven Magistrates' Courts.

(c) Provision of Special Passage

Where circumstances warrant, the court may order that special arrangement would be made for the victim or witness to enter/leave the court building through special passageways. Such order is generally made upon the application of the prosecution.

(d) Special Arrangement in respect of Daily Cause List

Daily cause list placed at the reception counter or the Judiciary website for dissemination to the public will only display the initials of a defendant's name if full disclosure may lead to identification of the victim or witness.

(e) Special Arrangements for Child Victims or Witnesses

Cases involving child victims or witnesses will be given priority for listing purposes.

On the day of trial, in order to avoid child victims or witnesses being burdened with additional stress, postponement, except in very exceptional circumstances, would be avoided as far as possible. All preliminary issues that may otherwise delay the start of the trial would be dealt with in advance or, alternatively, notified to the parties concerned and to the court, at least seven days before the commencement of trial so that arrangements can be made to obviate the child victims or witnesses from coming to court on days or at times when it is unlikely that they will be needed.

* * * * *

For information**Legislative Council Panel on
Administration of Justice and Legal Services****Existing measures by Prosecutions Division of Department of Justice
in handling victims in sexual offence cases**

In response to the request for information from a Panel Member which was referred to the Department of Justice, among others, by the Panel Secretariat, this paper provides the relevant information on the part of the Department.

2. The Department of Justice and its prosecutors are committed to providing the highest levels of service and support to victims and witnesses. Victims and witnesses are essential to the success of the criminal justice system. They need to know they will be treated throughout with respect, understanding and sensitivity. The taking of practical steps to improve the service to victims and witnesses is just as important as responding sympathetically to their concerns. The Department of Justice is committed to liaising with others in the criminal justice system to protect the interests of victims and witnesses.

3. The proper care and treatment of victims and witnesses is at the forefront of prosecution policy and strategy. All cases involving sexual offences are handled by experienced prosecutors specialised in conducting cases involving in the area.

4. All prosecutors are committed to upholding the principles and practices contained in:

- (a) The Statement of Prosecution Policy and Practice;
- (b) The Victims of Crime Charter;
- (c) The Statement on the Treatment of Victims and Witnesses;
- (d) The Policy for Prosecuting Cases involving Domestic Violence;
- (e) Periodic Legal Circulars on procedures and treatment of victims of crime and witness.

5. Victims and witnesses are entitled to have their rights to privacy and confidentially respected at all stages of the criminal justice process.

6. The means by which prosecutors will protect the privacy and address the psychological impact on victims and witnesses in sexual offence cases include the following :

- (a) **Before trial**, prosecutors will consider whether the attendance of a witness is strictly necessary, and ensure that only the witnesses necessary to prove the charge are called to testify in court. To help the witnesses, prosecutors will, to the extent that this is practicable and/or necessary:-
 - (i) seek to expedite the processing of cases, particularly those involving children and other vulnerable witnesses. If a case concerns a vulnerable witness, the prosecutor is under a duty to remind the court that the Practice Direction PD9.5 'Evidence by way of live television link or video recorded testimony' requires it to be given priority for listing purposes;
 - (ii) ask the court to set a date for trial which is as convenient as possible to witnesses;
 - (iii) ask the police to arrange a visit to court for children or mentally incapacitated witnesses before trial;
 - (iv) ask the court to allow the use of screens to shield the witnesses from the accused while testifying in court;
 - (v) apply to the court the use of two-way closed circuit television to enable witnesses to give evidence outside the courtroom through a televised link to the courtroom;
 - (vi) apply to the court for an order, if necessary, that the identity of witness(es) other than that of the victim of a sexual offence himself/herself (which is already protected under section 156 of the Crimes Ordinance, Cap. 200) shall remain anonymous;
 - (vii) apply to the court for a gag order;
 - (viii) ask the court for closed court hearings.

- (b) **At trial**, prosecutors will:-
- (i) seek to keep the waiting times for witnesses to a minimum;
 - (ii) take steps to ensure that personal particulars of victims and witnesses, such as addresses, telephone numbers and email addresses, are not necessarily disclosed in open court;
 - (iii) object to defence questioning which is abusive or unjustifiably intrusive or aggressive;
 - (iv) ask the court, when appropriate, to release a witness who has testified, or is no longer required.
- (c) **Upon conviction/At sentencing stage**, when the victim has been harmed or has lost property, prosecutors will:-
- (i) ensure the court is aware of the consequences of the offence, and if appropriate, ask the court to obtain the latest medical or other relevant reports on the victims;
 - (ii) furnish the court with updated factual information as to the impact of the harm caused to the victim;
 - (iii) make an application, in an appropriate case, for a compensation order and/or restitution order.
- (d) If the case reaches **the appeal stage**, counsel appearing for the prosecution will continue to take measures to ensure that the anonymity of the victim is protected and not mentioned either in open court or in the any judgment to be delivered or handed down by the court.

PRACTICE DIRECTION – 9.5

**EVIDENCE BY WAY OF LIVE TELEVISION LINK
OR VIDEO RECORDED TESTIMONY**

1. These procedures cover applications for leave to call evidence by way of—

- (a) live television link (under s.79B) where the witness is a child or mentally handicapped or in fear; or
- (b) video recorded testimony (under s.79C) in the case of witnesses who are either children or mentally handicapped;

and in accordance with the provisions of the Live Television Link and Video Recorded Evidence Rules made under s.79D.

2. Cases involving vulnerable witnesses should be given priority for listing purposes.

3. Hearings to determine applications under s.79B(2), (3) and (4) will take place while the court is sitting in chambers.

4. Where the court grants leave to admit a video recording under s.79C but directs that a part of the recording is to be excluded, the party applying to have the recording admitted is responsible for the editing of the video tape in accordance with the court's directions. The edited copy together with the amended transcript pages should then be supplied to the appropriate officer of the court and to all parties in the proceedings in advance of the trial.

5. On the day of trial, in order to avoid additional stress being suffered by any vulnerable witness, there should be no postponement except in the most exceptional circumstances. All preliminary issues that might otherwise delay the start of the trial should have been dealt with in advance or, alternatively, notified to the parties concerned and to the court, at least seven days before the commencement of trial so that arrangements can be made to obviate vulnerable witnesses coming to court on days or at times when it is unlikely that they will be needed.

6. Whenever a witness as defined in para.1(a) above gives evidence, a court usher will be present to—

- (a) operate the audio-visual facilities (AV) in the witness room;
- (b) explain to the witness what to do and where to sit;
- (c) ensure there is no improper communication between the witness and the supporting person (if any); and
- (d) supervise in a general way so that the witness is properly looked after.

7. Where the witness is a child or is mentally handicapped, a “support person” may also be present with the permission of the court. That person should not be a witness in the case and should not have been directly involved in the investigation of the case. In the case of a mentally handicapped witness, the “support person” should be someone with some understanding and expertise related to the nature of the handicap. In all cases, the judge must warn the “support person” not to prompt or seek to influence the witness in any way. (See also: R v Chan Wai [1994] 2 HKCLR 75).

8. There should normally be no need for any person other than the witness and the court usher to be inside the AV witness room in a case where the witness is in fear.

9. The judge will ensure that—

- (a) no intimidating practices are adopted in the course of questioning;
- (b) no inappropriate language is used having regard to the age and mental capacity of the witness; and
- (c) that breaks are offered or given to a witness at regular intervals, if appropriate.

10. Where a defendant is not represented and wishes to ask questions of any vulnerable witness, the judge in his discretion may permit—

- (a) the picture to be switched off on the monitor in the AV witness room allowing only the defendant's voice to be heard by the witness; or
- (b) the questions to be channelled through another person (including the judge),

if the judge feels that the impact of cross-examination will be too inhibiting or threatening to allow the witness to answer freely.

11. The judge will decide whether gowns and/or wigs should be removed while a child or handicapped person gives evidence.

12. Where a witness who is in fear is to give evidence, it will be the responsibility of the police to arrange for the security of the witness at court and, if special arrangements are to be made which encroach upon the normal working arrangements at court, the appropriate officer of the court must be given advance notice of what it is proposed so that a course of action can be agreed.

13. Where it is believed that the safety and security of the court is itself in jeopardy as a result of the presence of a witness in fear, it will be the responsibility of the police to ensure that no risks are taken.

14. Where special arrangements are made, as shown in paras.(12) and (13) above, the officer of the court will be responsible for keeping the judge informed of the situation.

15. This Practice Direction supersedes the previous Practice Direction 9.5.

Dated this 27 day of August 2015

(Andrew Cheung)
Chief Judge of High Court