

For information
on 23 June 2008

LegCo Panel on Administration of Justice and Legal Services

**Information Paper on
Pre-trial Interviewing of Witnesses by Prosecutors**

Purpose

This paper addresses the issue of the pre-trial interviewing of witnesses by prosecutors, with particular reference to a monitoring exercise which the Director of Public Prosecutions (“DPP”) has recently appointed a working group to conduct within the Prosecutions Division of the Department of Justice.

2. In a letter to the Secretary for Justice dated 2 May 2008, the Chairman of the Panel asked for a briefing on :

- (i) the existing policy and practice on pre-trial interviewing of witnesses by prosecutors;
- (ii) the objectives of the monitoring scheme; and
- (iii) the experience of, and the schemes adopted in, other major common law jurisdictions.

Background

3. In Hong Kong, the present practice is for law enforcers to interview the witnesses involved in a criminal investigation, and to obtain written witness statements from them. Where legal advice is sought, the written statements, together with the other relevant documents, will be sent to the Prosecutions Division. Prosecutors, when assessing the strength of the case, will rely on these written statements, and on the assessments made by the law enforcers as to the credibility and reliability of witnesses.

4. In 2007, the overall conviction rates at the three levels of court in Hong Kong were as follows :

Magistrates Court	:	76.6%
District Court	:	90.5%
Court of First Instance	:	93.4%

5. In Canada, New South Wales, Australia, and Scotland, prosecutors interview the witnesses before trial, and the conduct of pre-trial witness interviews (“PTWI”) is standard practice in these jurisdictions. In England and Wales, following a consultation exercise and a pilot, a national roll-out of the PTWI scheme was implemented in April 2008.

6. In light of the developments in these common law jurisdictions, the DPP established a Working Group in 2007 to examine whether there is a need to introduce such a scheme in Hong Kong, and to examine related issues. The Working Group recommended to the DPP that before any decisions were taken, the situation in Hong Kong be monitored for a period of 9 months during which relevant statistics and information would be collected. That recommendation was accepted.

Canada

7. Pre-trial witness interviews by prosecutors, as part of the trial preparation process in all but the most routine cases, have long been part of the legal landscape throughout Canada. Almost all witnesses are interviewed and assessed for trial. In summary proceedings, such an interview usually takes place on the day of the trial. When the trial is on indictment, the interview usually takes place in advance of the trial date. In cases involving sexual offences or child witnesses, a number of interviews may take place.

8. The purpose of the exercise is to ensure that the prosecution is fully prepared in terms of the evidence that the witness can give to the court. Courts expect the prosecution to have seen the witnesses before the trials in order to avoid, so far as is possible, the collapse of cases due to unexpected evidence coming to light during the trials.

9. Pre-charge interviews, undertaken with the purpose of ascertaining whether or not criminal proceedings should be brought, are usually conducted where witness credibility is crucial, or where there is an issue over witness capacity.

New South Wales, Australia

10. The system in New South Wales is based on a strict separation of the powers of investigation and prosecution. While the DPP's office has no investigative role, prosecutors may ask the police to conduct further investigations and obtain further statements. After the case file has been received from the police, prosecutors in the DPP's office have the discretion to interview the witnesses at any time.

11. The purpose of the interview is to give the prosecutor an opportunity to form a view about the reliability of a witness's evidence, to establish a rapport with the witness, and to provide information to the witness about the prosecution process.

12. A contemporaneous note is made during the course of the interview. Audio-taping is permitted but is uncommon. Any relevant new evidence revealed during the interview will be disclosed to the defence.

13. Before prosecutors conduct such interviews, they are provided with the necessary training and issued with detailed guidelines. Allegations of coaching or contamination of evidence are rare.

Scotland

14. For historical reasons, the Procurator Fiscal is responsible both for investigating and conducting prosecutions, although, in practice, the police, in most cases, have *de facto* conduct of the investigation. In serious cases to be tried by a jury, the Fiscal has the power to "*precognosce*" (interview) prosecution and defence witnesses if he/she wishes to do so. The power is discretionary and is usually restricted to significant witnesses.

15. The purpose of precognition is primarily to ascertain from the witness all relevant evidence which he/she may give in the case, whether what has been recorded in the police statements(s) is accurate and comprehensive, and to allow the witness to expand upon his/her evidence if there has been an omission in the account given to the police. The very widespread use of precognition by the Procurator Fiscal is partly attributable to the limited contents and the quality of police statements.

16. The precognition is confidential and is not automatically disclosed to the defence, although the Procurator Fiscal has the discretion to disclose if he/she believes it appropriate to do so.

England and Wales

17. In 2003, a consultation exercise on PTWI was conducted at the direction of the Attorney General of England and Wales. In response to the consultation, the Criminal Bar Association, and some other organizations, expressed some concerns. The principal concern was based on the potential risk of coaching or otherwise tainting the witness's evidence.

18. On 20 December 2004, the Attorney General published a report following the consultation, and the report concluded that prosecutors should be permitted to speak to witnesses about matters of evidence. The report also concluded that the purposes of the interview would be three-fold. Firstly, it would allow the prosecutor to assess the reliability of, or to clarify, a witness's evidence; secondly, to assist the prosecutor in understanding complex evidence; and, thirdly, to explain the criminal process and procedures to the witness.

19. In answer to the risk of witness coaching or contamination of a witness's evidence, the Attorney General reported that none of the jurisdictions/institutions studied (Scotland, the Army Legal Service (UK), Northern Ireland, New South Wales and British Columbia) ruled out PTWI on the ground of coaching, and that the fear was more apparent than real as there was no basis to suggest that prosecutors would be more likely than law enforcers to coach the witness. The Attorney General concluded that proper training, and the adoption of a code of practice, would sufficiently address the concern.

20. The Crown Prosecution Service then consulted the Bar. In consequence, an amendment was made to the Bar's Written Standards for the Conduct of Professional Work to the effect that prosecution counsel might, if instructed to do so, interview potential witnesses for the purposes of, and in accordance with, the practice set out in the Code for Pre-Trial Witness Interviews.

21. As a result, a pilot scheme to allow prosecutors to interview witnesses was implemented between January 2006 and February 2007 in four areas in the north of England. During this period, 47 interviews were conducted in those areas. The pilot was independently assessed, and was

considered a success. The evaluation was positive about the benefits that PTWI could bring, in particular, by improving the quality of prosecutorial decision-making both by strengthening cases that proceed to trial, and by the timely rejection of evidentially weak cases. Moreover, in a feature article published in the Law Society's Gazette in March 2008, it was reported that the legal profession was now in general support of the PTWI scheme.

22. Following this successful pilot, a national roll-out of the scheme was implemented in April 2008. PTWI are now conducted across England and Wales by designated Crown Prosecutors in accordance with the Code of Practice signed by the DPP in February 2008. The Code stipulates the rules that are to be observed in relation to PTWI, and matters concerning recording and disclosure.

Hong Kong – the Monitoring Scheme

23. The monitoring scheme covers trials in the Court of First Instance and the District Court, as well as vulnerable witness/ICAC cases tried in the Magistrates' Court. The 9-month period runs from 1 April to 31 December 2008.

24. During the monitoring period, no change is made to the existing practice concerning the conduct of interviews by law enforcers. The only change is the revision made to the prosecutors' case report form which now requires prosecutors, in a case where the defendant is acquitted, to assess whether it would have been beneficial for a prosecutor to have interviewed the witness prior to trial in order to make an assessment of the witness's evidence, thereby weeding out weak cases at an early stage.

Conclusion

25. Depending on the results of the monitoring scheme, the Working Group may or may not recommend that the practice in England and Wales, and the other common law jurisdictions, be followed in Hong Kong. If it is considered beneficial to put in place the PTWI scheme, and if the recommendation is accepted by the DPP and the Secretary for Justice, there will, as in England and Wales, be full discussion with the legal sector and other concerned bodies, before a decision is made on the way forward.

26. It is to be emphasized that those jurisdictions which have adopted the PTWI have done so with a view to advancing the interests of justice. If weak cases are weeded out at an early stage, this is seen as

providing an additional safeguard to suspects who might otherwise have to stand trial. No decision has yet been made as to whether or not to introduce the PTWI scheme in Hong Kong, and the current practice whereby law enforcers interview witnesses and record their statements continues to be followed.

Prosecutions Division
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