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Miss Flora Tai
Clerk to Panel on Administration of
Justice and Legal Services
Legislative Council Secretariat
3/F Citibank Tower
3 Garden Road
Hong Kong

By Fax & By Post
Fax : 2509 9055

Dear Miss Tai,

Panel on Administration of Justice and Legal Services
Mode of Trial

Your letter of 15 January 2009 refers.

The factors to which the prosecution has regard in its selection of the venue for trial are summarised in Chapter 14 of *The Statement of Prosecution Policy and Practice* (2009). Entitled 'The Mode of Trial', Chapter 14 states :

14. The Mode of Trial

14.1 *For most offences which are triable in the Magistrates Court, the maximum sentence upon conviction is 2 years' imprisonment. In the District Court, the maximum sentence upon conviction is 7 years' imprisonment. In the Court of First Instance, the maximum sentence upon conviction is that prescribed by law, including, for some offences, life imprisonment. In the selection of venue, the sentence which is likely to be imposed upon an accused after trial is an important factor for the prosecutor to examine. The prosecutor will also wish to consider the general circumstances of the case, the gravity of what is alleged, the antecedents of the accused and any aggravating factors.*

Matters such as the length of trial or the possibility of a guilty plea are not usually relevant.

- 14.2 *Although it is the prerogative of the prosecution to select the venue for trial, 'the venue selected should be appropriate' (HKSAR v Tai Chi-wah and Another CACC 497 of 2006). In HKSAR v Kwok Chi-kwai and Another CACC 12 of 2005, the Court of Appeal observed :*

"These applicants for leave to appeal against conviction were tried in the High Court, a choice of venue that surprises us given that it was a complicated conspiracy to defraud in respect of which there was never a prospect of a sentence exceeding the maximum term that District Court judges are entitled to impose."

- 14.3 *In the selection of venue, the prosecutor should have regard to those offences which must in law be tried in the Magistrates Court, as they are purely summary, and to those which must be tried on indictment, such as murder and rape, and to those which are triable either way. Purely summary offences may be tried together with indictable offences in the District Court, but not in the Court of First Instance.*
- 14.4 *In deciding whether a case should be tried in the Court of First Instance or the District Court, the prosecutor is entitled to consider the possibility of an enhanced sentence being imposed upon conviction in accordance with section 27 of the Organized and Serious Crimes Ordinance, Chapter 455. An enhanced sentence may be appropriate if the offence is an organized crime, but also in other circumstances, as where significant harm has been caused or where the offence is prevalent. The Magistrates Court lacks the jurisdiction to enhance a sentence in this way.*

The decision of the prosecution to seek trials in the District Court rather than in the Court of First Instance in two separate cases of conspiracy to defraud is currently subject to applications for judicial review, and these are to be determined by Mr. Justice Wright in the Court of First Instance from 2 to 4 February 2009.

Although there are no plans to review the current practice, the question of whether any review is necessary or desirable will be examined in light of the outcome of the forthcoming judicial review proceedings.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Elizabeth Tai', with a long horizontal flourish extending to the right.

(Elizabeth Tai)
Administrative Assistant
to Secretary for Justice