

For Information

LegCo Panel on Administration of Justice and Legal Services

Pre-trial Interviewing of Witnesses by Prosecutors

Purpose

This paper briefs Members on the responses received during the consultation exercise on the proposed scheme of pre-trial interviewing of witnesses (“PTWI”)and the way forward.

Background

2. In May 2007, a Working Group was set up in the Department of Justice to examine the existing arrangements in respect of a PTWI scheme by prosecutors and to consider whether it was necessary and desirable to introduce a scheme in Hong Kong that would allow prosecutors, in selected cases, to interview before trial non-expert key witnesses who were to be called by the prosecution.

3. The primary benefit which a PTWI scheme would provide is an opportunity for prosecutors to assess the reliability and credibility of certain witnesses without whose evidence a prosecution would not be able to proceed. This opportunity would enable weak cases to be weeded out at an early stage thereby ensuring a fairer criminal justice process.

4. The existing policy and practice on pre-trial interviewing of witnesses by prosecutors, the objectives of a PTWI scheme and the practices in other jurisdictions were set out in papers submitted to this Panel in March 2008 and 23 June 2008.

The Report of the Working Group

5. In November 2007, the Working Group completed its first report into this issue and recommended that a monitoring exercise be conducted in order to gauge the views of prosecutors and counsel prosecuting on fiat as to the desirability of conducting pre-trial interviewing of witnesses. The monitoring period ran for nine months from 1 April to 31 December 2008.

6. At the end of the monitoring period, the Working Group completed a second report dated 20 January 2009. In this report it summarised the results of the monitoring exercise and noted that a total of 41 prosecutors had responded and that the majority of them were of the view that pre-trial interviewing of witnesses would not be useful. The main reasons given for the majority reaching this view were as follows:

- (i) A pre-trial interview may be used by the witness as an opportunity to rehearse his/her evidence or to make his/her evidence better to fit his/her own purpose, which may include the illicit purpose of making a false case against the accused. To maintain a high standard of criminal justice, prosecutors should have confidence in the law enforcement officers in assessing the evidence and in carrying out the necessary investigations to verify the veracity of a witness's assertions.
- (ii) A PTWI scheme would not be necessary if, before trial, sufficient elaboration or clarification had already been given in the form of an additional witness statement.
- (iii) A pre-trial interview would not be of use if the witness had not already disclosed the full facts and circumstances to the Police.
- (iv) A pre-trial interview would not be of use if the witness had come to court determined to be selective in the evidence he/she was going to give.

7. However because there were divided opinions amongst prosecuting counsel, the Working Group recommended that a consultation exercise be conducted so that the opinions of the legal profession, the law enforcement agencies, and other relevant concern groups could be obtained. This recommendation was accepted and the consultation period ran for six months from 20 March to 30 September 2009.

8. At the conclusion of the Consultation Exercise, ten responses were received from the following bodies:

- (i) The Law Society of Hong Kong
- (ii) The Hong Kong Bar Association
- (iii) The Legal Aid Department
- (iv) The Hong Kong Police Force
- (v) The Customs and Excise Department
- (vi) The Independent Commission Against Corruption

- (vii) The Social Welfare Department
- (viii) The Harmony House
- (ix) The Association Concerning Sexual Violence against Women
- (x) The End Child Sexual Abuse Foundation.

9. Other than the two concern groups listed in (viii) and (ix), all the others were not in support of introducing a PTWI scheme in Hong Kong. The reasons given for not favouring the introduction of a PTWI scheme included the following:

- (a) The prosecutors' feedback during the monitoring exercise did not support such a scheme.
- (b) The high conviction rate in Hong Kong renders one of the main objectives of a PTWI scheme irrelevant.
- (c) The reliability and credibility of witnesses might be difficult to discern in the pre-trial interview.
- (d) If necessary, the law enforcement agencies could assist by video-taping the statement-taking process for viewing and assessment by prosecutors.
- (e) The PTWI might give rise to allegations of coaching, contamination of evidence, and helping witnesses to rehearse their evidence.
- (f) The PTWI, if not conducted properly, might result in the witnesses' refusals to testify at trial.
- (g) The PTWI might have significant costs implications in terms of manpower, facilities, and disclosure requirements.

10. The two concern groups were generally in support of a PTWI scheme, but emphasized that it should not be used generally and cautioned that repeated interviews might cause severe emotional distress to witnesses. A summary of the views, comments and recommendations of the ten bodies that responded is annexed.

Annex 11. In view of the responses it received, the Working Group concluded that there was no pressing need to introduce PTWI in Hong Kong. In recommending against the introduction of a PTWI scheme, the Working Group took into account the following:

- (a) a vast majority of prosecutors who responded during the Monitoring Exercise were of the view that a PTWI would not have been beneficial for making an early assessment of the witness' evidence and identifying potential problems;
- (b) most of the respondents in the Consultation Exercise were against the introduction of the PTWI scheme in Hong Kong;
- (c) PTWI might open-up new grounds for the prosecution evidence to be challenged;
- (d) there might be adverse impact on the witnesses, especially those vulnerable witnesses; and
- (e) it seems questionable whether the PTWI scheme is indeed a cost-effective means to achieve its aims.

Conclusion

12. A PTWI scheme would require additional funding and the training of counsel if it were to operate effectively. The deployment of resources to it could only be justified if there existed a clear need for it either in terms of remedying an existing problem or of providing significant benefits to the criminal justice process. The overwhelming views expressed by those consulted was that there was an absence of any real or pressing need for the scheme and that if introduced it would only provide limited, if any, benefits, to improving the fairness of the criminal justice process. It was not seen as likely to be effective in achieving the goals for which it was to be created. Furthermore it was clear that there are some genuinely held concerns that a PTWI scheme could lead to problems of coaching of witnesses and contamination of evidence.

13. Taking into account all these matters and balancing the likely benefits to flow from such a scheme against the problems it might cause, it was concluded that there is insufficient justification at the present time to warrant the introduction of a PTWI scheme.

ANNEX

SUMMARY OF RESPONSES TO THE PTWI CONSULTATION PAPER

A. Professional Bodies

(1) Law Society of Hong Kong (Criminal Law and Procedure Committee)

In support of PTWI?	Comments	Recommendations
No	<ol style="list-style-type: none">(1) The Committee does not think there is a need to implement the PTWI scheme in Hong Kong.(2) The Department of Justice's own survey of prosecutors' views does not justify a need for the PTWI scheme.(3) The high conviction rate in Hong Kong makes the main objective of the PTWI irrelevant.(4) In assessing the reliability and credibility of potential witnesses, prosecutors can be assisted by law enforcement agencies.(5) The Committee has real concerns about the possibility of witness coaching and contamination of evidence.	<p>Any PTWI scheme in Hong Kong should provide for: -</p> <ol style="list-style-type: none">(1) the attendance of defence solicitors at the PTWI;(2) video-recording of the PTWI, copies of which to be supplied to the Defence; and(3) a Code of Practice for interviewers.

(2) Hong Kong Bar Association (Special Committee on Criminal Law and Procedure)

In support of PTWI?	Comments	Recommendations
No	<ol style="list-style-type: none">(1) The Committee does not see a pressing need to implement the PTWI scheme.(2) It appears from the Department of Justice's survey that PTWI would unlikely be an effective means to achieve the laudable objective of weeding out weak cases.(3) There are significant risks in implementing the scheme, including the risk of witness coaching and contamination of witnesses' evidence.	<ol style="list-style-type: none">(1) If the PTWI scheme were to be implemented, it would be essential that strict guidelines be issued to prosecutors. There must be an effective way to ensure that those guidelines are strictly followed.(2) A PTWI should be undertaken by the advising counsel, as opposed to the trial advocate, and it should take place well before the

	(4) The Committee is deeply concerned with the suggestion of using a PTWI to help a prosecutor to understand the case he is to conduct.	<p>commencement of trial.</p> <p>(3) Any PTWI should be properly recorded. All procedures in relation to the arrangement of such an interview must be fully documented and disclosed.</p> <p>(4) The Committee does not see a need to limit the scheme to certain categories of offences.</p>
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B. Law Enforcement Agencies

(1) Hong Kong Police Force

In support of PTWI?	Comments	Recommendations
No	<p>(1) There is at present no imminent need for PTWI.</p> <p>(2) Serious consideration should be given to whether PTWI could generate benefits in excess of costs.</p> <p>(3) The reliability and credibility of witnesses might be difficult to discern in PTWI.</p> <p>(4) There are concerns that PTWI might be 'hijacked' by the Defence as a means to discredit the impartiality of the Prosecution.</p>	<p>(1) Training and rules-in-use should be put in place to reduce administrative costs and enhance coordination.</p> <p>(2) PTWI should be limited to cases often facing witness credibility problems such as triad cases, sexual offences involving vulnerable witnesses, cases in which counter allegations are common, and cases relying primarily on the evidence of a single witness.</p> <p>(3) A contemporaneous written record should suffice.</p>

(2) Customs and Excise Department

In support of PTWI?	Comments	Recommendations
No	<p>(1) The Customs do not see an imminent need to introduce PTWI in Hong Kong.</p> <p>(2) As most Customs cases involve no civilian witnesses who are victims of crime, PTWI would unlikely 'offer any real or additional benefit to the prosecutor'.</p> <p>(3) The introduction of PTWI will</p>	<p>(1) Since the investigating officers and officers-in-charge do not seem to have any role during the PTWI, their presence seems unnecessary.</p> <p>(2) Where an overseas witness is involved, PTWI should not be arranged unless the witness is himself the victim of crime and</p>

	<p>inevitably require significant resources on the part of the Prosecution as well as the law enforcement agencies. The benefit of introducing the scheme in Hong Kong is 'questionable'.</p> <p>(4) PTWI should preferably be limited to civilian witnesses only. It is not recommended for expert witnesses.</p>	<p>there are no other means to assess the witness's credibility and reliability.</p> <p>(3) PTWI should be held after conclusion of criminal investigation and before the case is due for its first hearing.</p> <p>(4) In terms of accuracy and convenience, an audio-recording of PTWI is the best option.</p>
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(3) Independent Commission Against Corruption

In support of PTWI?	Comments	Recommendations
No	<p>(1) Given the procedures currently in place, the ICAC doubts whether there is a need for PTWI.</p> <p>(2) There is great concern about the legal obligations of disclosing unused materials coming into existence through the operation of the scheme.</p> <p>(3) The ICAC often needs to use accomplices as prosecution witnesses. Where such accomplice witnesses are made candidates for PTWI, the scheme may create more problems than it solves. There is a real likelihood that the scheme would "open new grounds for challenges to be made that the witnesses' evidence was rehearsed or the witnesses were coached or their evidence was otherwise contaminated."</p>	<p>The issue of the implementation of the scheme should be further addressed and deliberated, taking into account the unique circumstances in Hong Kong.</p>

C. Concern Groups

(1) Harmony House Limited (和諧之家)

In support of PTWI?	Comments	Recommendations
Yes	<p>(1) The organization is generally in support of PTWI.</p> <p>(2) In a consultation session with 12 of the organization's clients who were battered women of domestic violence, most of</p>	<p>It is important to have emotional support from social workers or someone whom the interviewees trust to accompany them during the PTWI.</p>

	<p>them responded positively to the idea of having the PTWI scheme so as to ensure that adequate evidence is gathered before prosecution, especially for sexual assault cases.</p>	
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(2) **Association Concerning Sexual Violence against Women**
 (關注婦女性暴力協會)

In support of PTWI?	Comments	Recommendations
Yes	<p>In view of the necessity to enhance the Prosecution's understanding and handling of cases, the Association is generally positive towards the proposition that prosecutors should be allowed pre-trial access to witnesses.</p>	<ol style="list-style-type: none"> (1) As repeated interviews by different professionals would result in severe emotional distress to victims, PTWI should be conducted by a single prosecutor. (2) Professional cooperation and exchange with the prosecutors may be necessary as the understanding of victims' psychology would assist prosecutors in conducting the PTWI and interpreting the information obtained. (3) To minimize the impact of PTWI on victims, interviews should only be arranged if, after the plea of the Defendant, the prosecution requires clarification of a complainant's evidence. (4) It is essential that the interviewees be allowed to be accompanied by relevant professionals, such as social workers. (5) In cases where a decision not to prosecute is made after a PTWI is conducted, the Prosecution should provide an explanation to the complainant.

(3) **End Child Sexual Abuse Foundation** (護苗基金)

In support of PTWI?	Comments	Recommendations
No	The Foundation is of the view that child and teenage victims of sexual abuse should not be interviewed or asked to answer the same questions repeatedly if video-recorded evidence is available.	Recommendations on 'briefing' or 'interviewing' of victims before Court hearings were made. They are, however, not directly related to the PTWI scheme.

D. **Government Departments**

(1) **Legal Aid Department**

In support of PTWI?	Comments	Recommendations
No	<p>(1) According to the views collected from prosecutors in the 9-month monitoring exercise, only a small percentage of prosecutors considered that PTWI would have been beneficial. The Legal Aid Department therefore considers that 'the need to introduce PTWI is yet to be demonstrated'.</p> <p>(2) If PTWI is aimed solely at identifying the evidential weakness of a case with a view to determining whether to initiate or discontinue a prosecution, it would be an improvement to the present system. There are, however, concerns regarding other uses of PTWI, particularly to clarify or expand details on incomplete, questionable or contradictory evidence disclosed in the witness statements.</p> <p>(3) There are also concerns about potential risks of coaching or contaminating witnesses' evidence.</p> <p>(4) The Legal Aid Department is concerned that there will be consequential increase in defence preparation time in reviewing the PTWI materials. There will also be an inevitable increase in costs as the relevant transcripts (and possibly translations) have to be prepared.</p> <p>(5) The use of PTWI should be limited to cases where there is an identifiable and</p>	<p>(1) Apart from PTWI, other means for assessing credibility should be considered. For example, where the Police are of the opinion that a witness may be unreliable at trial, the Police should video-record the taking of the statement.</p> <p>(2) Proper training is necessary for those conducting PTWI. It is also necessary to have a strict code of conduct relating to PTWI.</p> <p>(3) Risks of witness coaching and contamination of evidence could be reduced by video-recording the PTWI.</p> <p>(4) There should be timely disclosure of PTWI materials, including written notes of prosecutors as well as audio or video recordings and transcripts of PTWI.</p> <p>(5) The prosecutor who conducts the PTWI should not be permitted to prosecute the case if it goes to trial.</p>

	justifiable need for the reliability of a witness to be assessed before trial.	
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(2) **Social Welfare Department**

In support of PTWI?	Comments	Recommendations
No	<p>(1) There seems to be no imminent need to introduce the PTWI scheme in Hong Kong without obtaining strong evidence to justify its effectiveness as well as soliciting wider support from the social welfare sector and the public. A pilot scheme may be introduced first to assess the applicability and effectiveness of PTWIs in Hong Kong.</p> <p>(2) Apart from witness coaching and contamination of witnesses' evidence, PTWI may result in adverse consequences, such as witnesses' refusal to testify in the trial.</p> <p>(3) Given the experience of the 9-month monitoring exercise, the concerns of the witnesses and legal practitioners should be fully explored.</p> <p>(4) It would be preferable for a PTWI to take place before the prosecutor reaches a decision to proceed with the prosecution and after the point at which the prosecutor considers that he has sufficient information and evidence for an interview to be of value.</p>	<p>(1) If PTWI is to be introduced, comprehensive training, a code of practice and guidelines for interviewers should be provided. PTWI should be carefully and tactfully conducted to avoid any contamination of witnesses' evidence.</p> <p>(2) If a PTWI is considered necessary, it should be arranged as soon as possible and the number of interviews should be kept to a minimum to avoid undue stress for the witness.</p> <p>(3) Clear message and adequate information on the purposes of PTWI should be given to witnesses.</p> <p>(4) Should PTWI be introduced in Hong Kong, it would be more appropriate to adopt it for all categories of offences and witnesses for the sake of fairness, although prosecutors may have the discretion to conduct interviews based on individual cases.</p> <p>(5) The taking of a written note for a PTWI is considered proper and appropriate. The use of video and audio recording may help defend accusations of coaching and contamination of the witnesses' evidence. However, the idea of using audio and video recording may be threatening for vulnerable witnesses. If audio or video recording is required, consent from the interviewee should be sought.</p>

		(6) From the perspective of witnesses, particularly vulnerable witnesses, it is more desirable for the prosecutor conducting the trial to conduct the PTWI.
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Remarks

- (1) By way of an email to the then DPP dated 19th October 2009, the Judiciary replied that *'it would not be appropriate for the Judiciary to provide general comments on the possible changes that might be adopted by prosecutors in Hong Kong in relation to their contact with non-expert witness prior to trial'*.
- (2) The Law Reform Commission has verbally informed the Department that they have no comments to the Consultation Paper.