

For discussion  
on 22 April 2014

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

**Reform of the current system to determine whether an offence is to  
be tried by judge and jury or by judge alone**

**Introduction**

At the meeting of the Legislative Council Panel on Administration of Justice and Legal Services (AJLS Panel) held on 23 July 2013, the Hon Dennis KWOK proposed to discuss the issue of “Reform of the current system to determine whether an offence is to be tried by judge and jury or by judge alone”. This paper sets out the relevant background and the latest developments regarding the issue.

**Background**

2. In Hong Kong, there are two modes of trial: by a judge or judicial officer alone, which takes place in the District Court and the Magistrates’ Courts respectively, or before a judge together with a jury, which only takes place in the Court of First Instance (CFI) of the High Court. For cases which may be tried either way, the prosecution determines the venue for trial with the aim of enabling the relevant court to deal most appropriately with the charge(s) involved and impose an adequate sentence to address the criminality involved in the conduct in question. As far as the District Court is concerned, it may try most of the serious offences, except for some (for example, murder, manslaughter and rape). The maximum term of imprisonment it can impose is seven years.

3. Under existing procedures, once a person has been charged with an indictable offence (i.e. other than a summary offence which may, save for some specific exceptions, only be tried before the Magistrates’ Court), he is brought before a magistrate, in accordance with the procedures prescribed by section 72(1) of the Magistrates Ordinance (Cap. 227) for committal proceedings. If the accused person is not subsequently

discharged, the case will be taken forward along one of the following routes: (1) the accused will be committed to the CFI for trial before a judge and a jury (or if the accused has entered a plea of guilty to the charge, for sentence by a judge sitting alone); (2) the prosecution makes an application to the magistrate under section 88 of Cap. 227 (which the magistrate is obliged to grant) to transfer the trial for hearing in the District Court before a judge sitting alone; or (3) the prosecution decides that the offence should be tried summarily by a magistrate in accordance with the provisions of Part V of the Cap. 227 and the prosecutor gives his consent in terms of section 94A<sup>1</sup> of the Ordinance.

4. Article 81 of the Basic Law provides, inter alia, that the judicial system previously practised in Hong Kong shall be maintained. Article 86 also provides that the principle of trial by jury previously practised in Hong Kong shall be maintained. In challenges brought by defendant by way of judicial review over prosecutorial decisions made as to the choice of venue by the prosecution, the courts have confirmed in the relevant judgments<sup>2</sup> that neither the Basic Law nor the Hong Kong Bill of Rights Ordinance (Cap. 383) confers on a defendant the right to choose a trial by jury (see more detailed discussion below).

### **Previous AJLS Panel Discussion**

5. The issue of whether there should be jury trials in the District Court was previously raised by the AJLS Panel in March 1997, and the Administration explained to the Panel the reasons for not extending the jury system to the District Court. The key question that called for consideration is whether the arrangement of leaving the choice of venue for trial solely with the prosecution might deny the defendant the right to trial by jury.

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<sup>1</sup> Under section 94A of Cap. 227, “[n]otwithstanding anything contained in section 91, 92 or 94, an indictable offence shall not be dealt with summarily, unless the consent of the prosecutor has been obtained.”

<sup>2</sup> The leading cases in this area are *Chiang Lily v Secretary for Justice* (HCAL 42/2008) and the subsequent appeals; the courts in these decisions confirmed the earlier decisions in *R v WONG King Chau & Others* [1964] DCLR 94 and *David Lam Shu-tsang & another v Attorney General* CACV42/1977.

6. Issues concerning the function of the prosecutions in determining the venue for trial and whether the jury system should be extended to the District Court were discussed at the AJLS Panel meeting on 28 June 2010. In the paper submitted by the Administration to the AJLS Panel for the discussion, the legal issues regarding the venue of trial as considered in a judicial review case (*Chiang Lily v Secretary for Justice* (HCAL 42/2008)) in 2009 were highlighted (paragraphs 18 and 21 of the AJLS Panel Paper at **Enclosure 1** are relevant). In gist, the court :

- (a) confirmed that under Hong Kong law, a defendant does not have an absolute right to trial by jury;
- (b) pointed out that electing the venue of trial is a function which properly should be vested in the prosecution; and
- (c) rejected any suggestion that a trial in the District Court was, by virtue of a being a non-jury trial, in any way less fair than a jury trial in the CFI.

7. In concluding the discussion, the then AJLS Panel Chairman requested DoJ to discuss with the two legal professional bodies the viability of giving defendants the right to elect a jury trial and report to the Panel on the progress of the discussion in due course.

### **Discussion with the Legal Professional Bodies and the new Prosecution Code**

8. Follow-up discussions between the Prosecutions Division (PD) and both branches of the legal profession have since taken place. Acknowledging that the focus should be on the more realistic issue of how the prosecution guidelines on the “Mode of Trial” might be revamped for more suitable cases to be tried before the CFI, PD carefully examined the possibility of strengthening the prosecution guidelines in respect of the selection of venue of trial.

9. The factors for deciding the venue of trial were consequentially expanded. The expanded factors are now set out in the Prosecution Code published in September 2013 (relevant extracts of the Prosecution Code (paras. 8.2 - 8.4) are at **Enclosure 2**). The following features of the paragraphs concerned are relevant for the present purpose :

(1) The latest guidelines are a substantial improvement over the section on “Mode of Trial” contained in para. 14 of the previous “Statement of Prosecution Policy and Practice” (relevant extracts at **Enclosure 3**). While certain of the factors for considering the mode of trial as set out in the previous guidelines continue to find their way to the current paras. 8.4 (a) to (c) and (h) to (i) of the latest guidelines given their merits, new factors (listed under paras. 8.4 (d) to (g)) are also added as a result of a serious attempt to encapsulate the various suggestions made to us by the legal profession painstakingly over our discussions. The two particularly relevant new considerations are –

*“f. whether or not the accused held a position of high public status, responsibility or trust;*

*g. whether or not issues arise for determination that require the application of community standards and/or values;”*

(2) The latest guidelines have taken into full account the common law position of trial by jury in the light of the development of local jurisprudence. As pointed out in para. 6 above, the legal issues regarding the venue of trial were considered by the courts and highlighted in the CFI judgment in the judicial review case of *Chiang Lily v Secretary for Justice* (HCAL 42/2008) as upheld on appeal, in which it was confirmed that a defendant does not have an absolute right to trial by jury in Hong Kong.

(3) Special emphasis is given in the latest guidelines regarding how the venue of trial is to be decided by the prosecution authority. The concluding passage of para. 8.4 of the latest guidelines makes it clear (to prosecutors, other parties in criminal proceedings, as well as the public at large) that after considering a number of stated factors –

*“... the prosecutor should select an available venue for trial that will enable the relevant court to deal most appropriately with the matter and impose an adequate sentence to address the criminality involved in the conduct. ...”* (emphasis added)

- (4) Insofar as the making of representations about an alleged offence and the desired venue for trial is concerned, this is what the defence and, less often, victims of crime do from time to time. Representations on such and other aspects to prosecutorial decision-making from any parties have not been ignored by our prosecutors. The current Code does not intend to and should not make any one feel inhibited from deciding to make such representations to the Department of Justice.

10. In discharging our duty to uphold the rule of law, the Department of Justice is always eager to ensure that criminal trials in Hong Kong are conducted in a fair and just manner. We believe that the current Prosecution Code has, in large measure and to the extent necessary and practicable, addressed the professed areas of concern from the legal profession. Our thinking above has been conveyed to the Bar Association following our latest meeting with its representatives held on 8 January 2014 who reduced their views on the new Prosecution Code subsequently in writing. This notwithstanding, we are keen to keep our dialogue with the legal profession open. In order to maintain its constructiveness, we will be more than happy to listen to ways in which the legal profession thinks how its views can be better and more particularly articulated in words to avoid the 2013 Prosecution Code being misread or permitted to give a different message.

Department of Justice  
April 2014

For Information

## LegCo Panel on Administration of Justice and Legal Services

### Trial in the District Court

#### Purpose

This paper addresses three inter-related issues, namely (i) conviction rates, (ii) the prosecution's right to elect venue of trial and (iii) mode of trial. The first issue concerns conviction rates for all criminal trial courts in Hong Kong but because these statistics can be broken down into conviction rates for each of the three criminal trial courts, they provide a contrast between a defendant's likely chance of conviction in a trial by a jury as opposed to his or her chance of conviction before a professional judicial officer sitting alone. The other two issues exclusively concern the trial of criminal offences in the District Court.

#### (i) Conviction Rates

2. In the *Yearly Review of the Prosecutions Division* for 2008, the conviction rates at various levels of court were compared to those for 2007 and were as follows:

Level of Court	2007	2008
Magistrates Court	76.6%	73.2%
District Court	90.5%	92.6%
Court of First Instance	93.4%	94.8%

3. In respect of these statistics two matters should be noted. First, the statistics used to calculate the conviction rates were defendant based and in relation to any substantive or alternative offence on which the defendant was

convicted. The figures however did not take into account acquittals of other charges if any. Secondly, the above conviction rates included defendants who were convicted on their own plea.

4. These conviction rates were thus arrived at by first adding up the number of defendants convicted on their own plea and the number of defendants who pleaded not guilty but were convicted after trial. The total number of defendants brought before the different levels of court (who pleaded guilty and pleaded not guilty) was then used as the base for calculating the resultant percentage.

5. For the purposes of calculating the conviction rates after trial, the Prosecutions Division discounted the number of defendants convicted on their own plea and then adopted the number of defendants who pleaded not guilty as the base figure for arriving at a percentage figure.

6. In order to better understand the above two methods for calculating the conviction rates, Members are invited to refer to the table at Annex A. The said table also includes the statistics for the year 2009.

Annex A

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attached

7. An alternative method of calculating conviction rates is to use as the base figure the total number of persons charged. Using this figure as a base figure enables calculations to be made which show the proportions of guilty pleas, convictions after trials, and acquittals that make up the total number of persons charged. When this method is employed, the figures for Hong Kong would be as follows:

	<b>District Court</b>	<b>Court of First Instance</b>
2006		
Overall conviction rates	91.8%	92.3%
Guilty pleas	65.5%	68.3%

	<b>District Court</b>	<b>Court of First Instance</b>
Convictions after trial	26.3%	24.0%
2007		
Overall conviction rates	90.5%	93.4%
Guilty pleas	69.5%	76.2%
Convictions after trial	21.0%	17.2%
2008		
Overall conviction rates	92.6%	94.8%
Guilty pleas	72.4%	75.0%
Conviction after trial	20.2%	19.8%

It is more accurate to describe these figures as a breakdown of the outcomes of prosecutions as a proportion of the overall number of persons charged, rather than as conviction rates. Taking the 2008 figures for the District Court, the breakdown only shows that 92.6% of all persons charged were convicted: that 72.4% of all persons charged pleaded guilty and that 20.2% of all persons charged were convicted after trial. Importantly, what these figures do not show is the rate of conviction for persons tried after pleading not guilty. The conviction rates after trial, which in 2008 were 73.3% and 79.3% for the District Court and Court of First Instance respectively, are a much more accurate assessment of the performance of the criminal justice system and the ability of the Department of Justice to identify appropriate cases for prosecution and to bring those cases to a successful conclusion.

8. It is noted that by a letter dated 7 June 2010 the Research and Library Services Division of the Legislative Council Secretariat provided the Department of Justice (“DoJ”) with a paper relating to conviction rates in other common law jurisdictions, namely England and Wales of the United Kingdom, Canada and Australia. A comparison was made between Hong Kong’s overall conviction rates in the District Court and the Court of First

Instance and those for similar court levels in the three selected common law jurisdictions.

9. However, such a comparison would seem to be inappropriate for a number of reasons. Firstly, according to the calculation method published by the three overseas jurisdictions in question, it is clear that they adopted a different basis from that of the Prosecutions Division in arriving at the conviction rates<sup>1</sup>. It appears as though these other jurisdictions have not used conviction rates as Hong Kong has done but has rather employed calculations which merely show the outcomes of prosecutions as a proportion of the overall number of persons charged. As mentioned above, in Hong Kong, the calculation of the conviction rate has been defendant based and in respect of any substantive or alternative offence on which the defendant has been convicted. The fact that the defendant has been acquitted of other charges has been discounted.

10. Secondly, there could be a variety of reasons for the difference in terms of conviction rates between Hong Kong and the three selected common law jurisdictions. It would therefore be imprudent to reach to any conclusions based solely on conviction statistics without knowing their full details and the basis of their calculation.

11. The DoJ's concerns were conveyed to the Research and Library Services Division and are reflected in the latest version of the research paper.

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<sup>1</sup> For England and Wales, the conviction rates were case based. The percentages for guilty pleas and convictions after trial were calculated using the total number of cases dealt with by way of (i) judge ordered acquittals (including bind overs), (ii) warrants etc.(iii) judge directed acquittals (iv) acquittals after trial (v) guilty pleas and (vi) convictions after trial as the base figure.

In the case of Canada, the conviction rates were file based. The percentage for guilty pleas included the number of files where there were guilty plea for other or lesser offence. Likewise, the percentage for convictions after trial included the number of files where there were convictions of other or lesser offence.

In relation to Australia, while the conviction rates were defendant based, the base figure used to calculate percentages for guilty pleas and convictions after trial included defendants whose charges had been withdrawn by prosecution, defendants who were deceased, unfit to plead, transferred to other courts and other non-adjudicated finalisations.

12. Although it would be imprudent to rush to any conclusion in respect of the DoJ's statistics, it can be said of them that in so far as they allow of any conclusion they suggest that the mode of trial has little impact on a defendant's chance of acquittal. The DoJ is of the view that there is nothing in its conviction statistics that should be a cause of any concern.

**(ii) Venue of Trial**

13. At the AJLS Panel Meeting held on 13 January 2009, Members noted the concerns raised by the Chairman of the Hong Kong Bar Association in his speech delivered at the Ceremonial Opening of the Legal Year 2009 that many commercial fraud cases, including the substantial and complex ones, were heard before the District Court rather than in the Court of First Instance before a jury. Members shared a concern that the current practice of allowing the choice of the venue of trial to rest solely with the prosecution may deny a defendant the right to jury trial.

14. The law in Hong Kong is that every indictable offence commences its progress through the magistrates' court as a committal proceeding until such time as the prosecutor brings that committal proceeding to an end, either by electing the offence to be tried summarily in the magistracy or before a judge alone in the District Court. If the prosecution wish the offence to be tried in the Court of First Instance, then it so informs the court and the defendant may then elect to have a preliminary enquiry in the magistrates' court or to be committed for trial in the Court of First Instance on the basis of the committal papers served on him. The effect of the prosecution electing District Court as the venue of trial is that the defendant will be tried by a District Court Judge and not by a jury.

15. The right of the prosecution to determine the venue of trial was considered in a judicial review of the prosecution's decision to elect District

Court, as opposed to the Court of First Instance, as the venue of trial in respect of two separate cases of conspiracy to defraud. This application for judicial review was heard before Wright J (*Chiang Lily v Secretary for Justice* HCAL 42/2008 and HCAL 107/2008 at Annex B). On 2 February 2009, in response to this Panel's request, the DoJ provided information on the factors to which the prosecution would have regard in selecting the venue for trial (LC Paper No. CB(2)756/08-09(01). In its response, DoJ also advised that although there were no plans to review the current practice, the question of whether any review was necessary or desirable would be examined in the light of the outcome of the judicial review proceedings.

Annex B

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16. On 9 February 2009, Wright J delivered his judgment in the first of the two judicial reviews. He pointed out that there does not exist in Hong Kong any absolute right to a jury trial nor any mechanism by which a person to be tried for an indictable offence may elect to be so tried. The decision as to whether an indictable offence is tried in the Court of First Instance by a judge and jury or in the District Court by a judge alone is the prerogative of the Secretary for Justice ("SJ"). Wright J found that the reasons furnished by the SJ for his decision to transfer the proceedings to the District Court were sufficient on the factual situation of each case. In respect of the second judicial review, he ruled in June 2009 that the provision in the Magistrates Ordinance which allowed the prosecution to elect venue of trial (section 88) was not unconstitutional as a usurpation of judicial power.

17. In September 2009, the Court of Appeal upheld the decision of Wright J (see *Chiang Lily v Secretary for Justice* CACV 55 & 151/2009 at Annex C). The applicant then applied for leave to appeal to the Court of Final Appeal.

Annex C

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18. The application for leave to appeal was heard by the Appeal Committee of the Court of Final Appeal in March 2010 (see *Chiang Lily v*

Annex D

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*Secretary for Justice* FAMC 64 & 65/2009 at Annex D). In dismissing applications to certify various points of law and for leave to appeal, the Appeal Committee confirmed that there is no right to trial by jury in Hong Kong. The Appeal Committee determined that the contention that section 88 of the Magistrates Ordinance, Cap. 227 is unconstitutional on the basis that it allocates a judicial function to the SJ was not reasonably arguable. In giving the judgment of the Appeal Committee, Chief Justice Li stated that:

15. ... Choice of the venue for a prosecution is clearly a matter covered by Article 63 of the Basic Law which gives control of prosecutions to the Secretary for Justice without any external interference. Wright J's conclusion was plainly correct.

16. This becomes obvious once one considers the context and basis of any decision regarding venue. As to context, if selection of venue were a judicial function, the magistrate would have to hear submissions and take evidence bearing on that choice, looking in some detail at the alleged offence and the circumstances of the accused, turning the mere decision as to venue into a mini-trial. That cannot be the proper function of the magistrate.

17. Moreover, the basis of making the selection shows that the function is not judicial. In the Statement of Prosecution Policy and Practice (2009), guidance as to choice of venue is given as follows:

“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.” (para. 14.1)

18. These are plainly matters that may properly guide the prosecutor but which it would be highly undesirable for a magistrate to explore before the trial. It would obviously be most inappropriate for there to be a debate as to likely sentence or antecedents or aggravating factors before the magistrate regarding a person fully entitled to the presumption of innocence. The present systems avoids this by properly treating the question of venue as a prosecutorial choice with the transfer following on a mandatory basis.

It is significant that by these comments Chief Justice Li is not just saying that the function of electing venue for trial is one that by operation of law belongs to the prosecution by virtue of Article 63. Importantly he is also saying that because of the factors involved in the decision-making process of electing venue, it is a function which properly should be vested in the prosecution. In view of the strength of these comments the DoJ is of the view that no change to the current process of determining venue of trial is warranted.

### **(iii) Mode of Trial**

19. This issue concerns the question of whether criminal trials in the District Court should be before a professional judge sitting alone, the current position, or whether, like trials in the Court of First Instance, they should be before a jury. This issue of whether there should be jury trials in the District Court was last raised by this Panel in March 1997. An Information Paper on the issue was presented to Panel Members by the then Attorney General's Chambers on 16 June 1997 (Annex E). The 1997 Paper compared the jury system in Hong Kong with that in the United Kingdom, explained the reasons for not extending the jury system to the District Court and the Administration's opinion that such extension would require a lengthy, detailed and in-depth study, which would entail a consideration of the criminal justice system of other jurisdictions besides the United Kingdom.

Annex E

attached

20. Article 81 of the Basic Law provides, *inter alia*, that the judicial system previously practised in Hong Kong shall be maintained. Article 86 also provides that the principle of trial by jury previously practised in Hong Kong shall be maintained. Neither the Basic Law nor the Hong Kong Bill of Rights Ordinance confers on a defendant the right to choose trial by jury.

21. In its judgment refusing Ms Chiang leave to appeal, the Appeal Committee of the Court of Final Appeal also rejected any suggestion that a

trial in the District Court was, by virtue of being a non-jury trial, in any way less fair than a trial in the Court of First Instance. At paragraph 9 of its judgment it said:

As is rightly accepted by the applicant, it is clear that there is no right to trial by jury in Hong Kong. Although the applicant's strong preference is for a jury trial, she has not suggested that she cannot have a fair trial in the District Court before a judge sitting alone. Indeed, such a suggestion cannot be responsibly made by any person facing trial in the District Court.

22. If there is no issue of fairness of trial involved then it is difficult to identify any benefit that jury trial would confer on a defendant that he would not obtain from a judge alone trial. The conviction statistics would suggest that the perception of a forensic tactical benefit that might increase the defendant's chance of an acquittal is illusory. Nor can any support be found in the statistics for the contention that jury trial would allow for more defendants to be tried in their native language. It is clear from the statistics that while the number of criminal cases tried in Chinese in the District Court has shown a steady increase in recent years, the number of those in the Court of First Instance has shown no comparable increase. Since 2007, while there has been an increased pool of Chinese-speaking jurors, this has not led to any significant increase in jury trials in Chinese in the Court of First Instance. This would suggest that the introduction of jury system in the District Court would not necessarily lead to an increased use of Chinese in that Court. The language of trial does not appear to be influenced by the mode of trial.

<b>Level of Court</b>	<b>Number of trials heard in Chinese</b>		
	<b>2007</b>	<b>2008</b>	<b>2009</b>
Court of First Instance	24.7%	23.8%	26.1%
District Court	31.9%	47.8%	55.5%

23. A significant benefit that a judge alone trial confers on a defendant is that he receives from the court reasons for why he is being convicted.

A jury trial only allows a defendant to know how the judge summed up to the jury and does not provide him with any insight into the reasoning behind the jury's verdict. The availability to a defendant of the District Judge's Reasons for Verdict is a considerable advantage to a convicted defendant in both understanding why he is convicted and formulating grounds of appeal against his conviction.

24. Considerations which militate against introducing the jury system to the District Court are the significant increase in demand for eligible jurors to service such trials and the resource implications involved in providing the required facilities.

*Increased Demand for Jurors*

25. The following are statistics obtained from the Judiciary regarding jury trials conducted in the Court of First Instance since 2007.

<b>Year</b>	<b>No. of cases tried by jury</b>	<b>No. of jurors empanelled</b>	<b>No. of summonses issued for potential jurors to attend for selection</b>
2007	77	541	18,172
2008	69	487	17,078
2009 (up to October)	73	515	14,260

26. On the other hand, the number of criminal trials conducted in the District Court for the same period are as follows:

<b>Year</b>	<b>No. of trials</b>
2007	647
2008	588
2009 (up to October)	612

27. From the above statistics and in particular the large number of criminal cases tried in the District Court, the introduction of the jury system in the District Court would mean that the number of members of the public required to serve as jurors would significantly increase.

*Other Resource Implications*

28. Although the Administration would never allow financial considerations to prejudice the fairness of a defendant's trial, it nevertheless cannot, where that fairness is not at risk, ignore the overall resource implications involved in introducing jury trials in the District Court. Introducing such trials in the District Court would have significant resource implications; for example it would be necessary to construct jury benches inside the courtrooms, a jury assembly room, separate access and facilities for jurors, jury deliberation rooms and overnight accommodation.

29. Other ongoing expenses, such as payment of allowances to those who serve as jurors and the costs of administrative staff to ensure effective running of the jury system in the District Court, have to be taken into account in assessing the viability for introducing the system. One should also bear in mind that there is an indirect cost to the community at large. Jurors, whether self-employed or not, are required to be absent from their normal work duties and may adversely affect their productivity and efficiency.

*Conclusion*

30. Having carefully reviewed the 1997 Paper and having taken into account all the circumstances, the Administration's position remains the same and it has no current plan to introduce the jury system to the District Court.

Prosecutions Division  
Department of Justice  
June 2010

**Information Paper for LegCo Panel on  
Administration of Justice and Legal Services**

**Jury System in Hong Kong**

**Introduction**

1. At a meeting on 10 March 1997, the LegCo Panel on the Administration of Justice and Legal Services asked for an information paper on the jury system in Hong Kong setting out the following:
  - a) a comparison of the jury system in Hong Kong with that of the United Kingdom and the reasons for the differences;
  - b) the reasons for not extending the jury system to the District Court and the Administration's opinion as to whether the extension of the jury system to the District Court should be made an ultimate goal; and
  - c) the AG's existing power in determining the venue for trial.

**I. The Hong Kong and UK Jury System Compared**

<u>Items</u>	<u>UK</u>	<u>Hong Kong</u>	<u>Reasons for the difference</u>
<b>1. Historical Background</b>	The jury system was introduced in England after 1066. The system was transformed during the Middle Ages in England from a group of neighbours who decided according to their personal knowledge of the case to neutral deciders who must decide solely on the basis of what is presented to them during the judicial proceedings. The relevant legislation is the Juries Act 1974.	The jury system was first introduced into Hong Kong in 1845, and is at present governed by the Jury Ordinance (Cap 3). Section 37 of the Jury Ordinance provides that where that ordinance is silent, the law in force in England applies (except with regard to juries for coroners inquests).	Historical.

<u>Items</u>	<u>UK</u>	<u>Hong Kong</u>	<u>Reasons for the difference</u>
<b>2. The role of the jury</b>	(Please refer to the column on HK.)	<p>In Hong Kong, as in UK, the jury plays an important role in the criminal justice system:</p> <ul style="list-style-type: none"><li>a) First, in a trial with a jury, the jury decides the facts and it is on those facts which it then determines the guilt or innocence of the defendant. The jury is to arrive at its verdict by considering whether it is satisfied that the prosecution has proved its case solely on the evidence presented at the trial and in accordance with the direction of the judge as to the law.</li><li>b) Secondly, the jury adds certainty to the law, since it gives a general verdict. The jury merely states that the accused is either guilty or not guilty, and gives no reasons. The decision is not open to dispute.</li><li>c) Trial by jury reflects the principle of being judged by one's peers.</li></ul>	No material difference.

<u>Items</u>	<u>UK</u>	<u>Hong Kong</u>	<u>Reasons for the difference</u>
<p><b>3. Availability of Jury Trial in Criminal Proceedings</b></p>	<p>In UK, magistrates deals with the vast majority of criminal cases and they have exclusive jurisdiction over summary offences. Jury trial is not available for offences designated as summary offences. For offences triable either way ie on indictment or summarily, an accused may, in most cases, opt for summary trial (ie without a jury) or trial on indictment (ie with a jury). The court may impose trial on indictment, but may not insist on summary trial if the defendant objects. Jury trial is heard in the Crown Court. The Royal Commission on Criminal Justice (1993) has recommended restricting somewhat an accused's right to trial by jury, by</p>	<p>Most criminal cases are heard by magistrates or in the District Court. A permanent magistrate may impose a maximum of three years of consecutive sentences. A District Judge has jurisdiction to sentence a person to imprisonment for up to 7 years. Jury trial is not available for offences designated as summary offences. It is available in the High Court, which hears the most serious types of offences such as murder and manslaughter. A full list of such offences is set out in Part III of the Second Schedule to the Magistrates Ordinance (Cap 227) (see Annex).</p>	<p>The distinction between summary offences and indictable offences for the purpose of trial before magistrates and the High Court in Hong Kong and UK is similar. The reason for the introduction of the District Court in Hong Kong and the absence of jury trial in that court are set out in Part II of this paper.</p>

<u>Items</u>	<u>UK</u>	<u>Hong Kong</u>	<u>Reasons for the difference</u>
	removing his or her existing right to insist that the case, where it is triable either way, should be heard in the Crown Court before a jury.		

<u>Items</u>	<u>UK</u>	<u>Hong Kong</u>	<u>Reasons for the difference</u>
<p><b>4. Qualification for Jury Service</b></p>	<p>In UK, to qualify for selection as a juror, a person must be:</p> <ul style="list-style-type: none"> <li>a) aged between 18 and 70;</li> <li>b) registered as a parliamentary or local government elector; and</li> <li>c) have been ordinarily resident in the United Kingdom for any period of at least five years since the age of 13.</li> </ul> <p>In addition, a person must not fall into the categories of people disqualified or ineligible by Schedule 1 of the Juries Act 1974.</p> <p>The people disqualified are those who:</p> <ul style="list-style-type: none"> <li>a) at any time have been sentenced in UK to life imprisonment</li> </ul>	<p>In Hong Kong, a person is qualified and liable for jury service if he satisfies the criteria laid down in Section 4 of the Jury Ordinance, ie he or she is:</p> <ul style="list-style-type: none"> <li>a) between the ages of 21 and 65 years;</li> <li>b) of sound mind, and not afflicted with deafness, blindness, or other such infirmity;</li> <li>c) a good and sufficient person;</li> <li>d) resident within Hong Kong; and</li> <li>e) has a knowledge of the English language sufficient to enable him or her to understand the evidence of witness, the address of counsel and the Judge's summing up.</li> </ul> <p>Some specific mandatory exemptions are set out in section 5 of the Jury Ordinance, and include :</p> <ul style="list-style-type: none"> <li>a) ExCo, LegCo, Urban Council and Regional Council members;</li> <li>b) Justices of the Peace;</li> <li>c) Public officers, such as judges, Government legal officers, immigration</li> </ul>	<p>In both UK and Hong Kong, the objectives of disqualification and ineligibility are:</p> <p>firstly, to exclude from participation people who are or have been intimately concerned with the administration of justice; and</p> <p>secondly, to exclude from participation those who are demonstrably incompetent.</p> <p>There is at least an implicit assumption that a basic level of intellectual ability is necessary for a person to be able to be involved in the performance by the jury of its various functions.</p> <p>While the major difference</p>

<u>Items</u>	<u>UK</u>	<u>Hong Kong</u>	<u>Reasons for the difference</u>
	<p>or youth custody, or to be detained during Her Majesty's pleasure;</p> <p>b) at any time in the last ten years have in UK served any part of a sentence of imprisonment, youth custody or detention, or had imposed a suspended sentence of imprisonment or order for detention or a community service order;</p> <p>c) at any time in the last five years has been placed on probation in the UK: or</p> <p>d) are on bail in criminal proceedings.</p> <p>The people who are ineligible for jury service fall into four categories:</p> <p>a) the judiciary;</p> <p>b) others</p>	<p>officers;</p> <p>d) consuls;</p> <p>e) barristers and solicitors in actual practice and their clerks;</p> <p>f) registered doctors and dentists; and</p> <p>g) daily newspaper editors, chemists, clergymen, and pilots.</p>	<p>between Hong Kong and UK appears to lie in the mandatory English language requirement in Hong Kong, the UK court is empowered under Section 10 of the Juries Act to discharge the summons (for service as juror) where, on account of the insufficient understanding of English of the person attending in pursuance of the summons, he or she does not have the capacity to act effectively as a juror. The crucial issue remains whether the person serving as juror has an adequate understanding of the proceedings in question.</p> <p>The Jury</p>

<u>Items</u>	<u>UK</u>	<u>Hong Kong</u>	<u>Reasons for the difference</u>
	<p>concerned with the administration of justice, including barristers (and their clerks), solicitors and trainees, the staff of the Crown Prosecution Service, authorised advocates or litigators, court staff, prison officers and prison custody officers, police officers and forensic scientists;</p> <p>c) the clergy; and</p> <p>d) mentally disordered persons.</p>		<p>(Amendment) Bill 1997 was introduced into LegCo in early 1997. It proposes to replace the existing language requirement with a new one ie "the person has a sufficient knowledge of the language in which the proceedings are to be conducted to be able to understand the proceedings". It is hoped that the Bill will be enacted before the end of the current legislative session.</p>
<p><b>5. Number of Jurors</b></p>	<p>In UK, the number is twelve.</p>	<p>Section 3 of the Jury Ordinance requires that all juries (criminal or civil) consist of 7 members, unless the court or the judge, before the trial is to be heard, specifically orders a jury of nine.</p>	<p>The number of jurors for each trial is slightly smaller than that of UK, because of the limited availability of qualified jurors in Hong Kong.</p>

<u>Items</u>	<u>UK</u>	<u>Hong Kong</u>	<u>Reasons for the difference</u>
<p><b>6. Selection of the Jury</b></p>	<p>In UK, the people selected for jury service receive a summons requiring them to attend at the Crown Court at a specified time. Accompanying the summons are a form, which is intended to identify those ineligible or disqualified, and a set of notes, which explains the procedure of jury and the functions of the juror. A failure to attend the Crown Court can result in a fine, as can unfitness for service through drink or drugs after attendance. Those summoned for service constitute the jury panel and the jury for an individual case will be selected from this panel. The panel may be divided into parts relating to different days or sittings. The</p>	<p>In Hong Kong, the procedure for the selection or formation of the jury panel is set out in sections 13 and 17 of the Jury Ordinance:</p> <p>a) The first step is that a registrar (of the Supreme Court) will compile a list of common jurors out of all those persons qualified in Hong Kong. Each time it is necessary to summon a jury, the registrar will select, at random or by ballot, such number of jurors as a judge shall direct to form a panel (usually about 60).</p> <p>b) The second step is that the registrar shall then issue a summons to each such person chosen, requiring him or her to appear on the day specified in the summons. The summons shall be served by post or personal service at least four clear days before the commencement of the sittings.</p> <p>c) As soon as convenient, the</p>	<p>There is no material difference between the selection procedure between UK and Hong Kong. The special power of the Court on composition of jury and exemption of woman juror by reason of the nature of evidence are peculiar to Hong Kong. This gives the court somewhat greater discretion in the composition of jurors.</p>

<u>Items</u>	<u>UK</u>	<u>Hong Kong</u>	<u>Reasons for the difference</u>
	<p>jury list contains the names, addresses and dates for attendance of the panel. The parties to the case and their lawyers are entitled to inspect the list before or during the trial. Such information may assist counsel in deciding whether to challenge any of the jurors for cause.</p>	<p>registrar must cause a list to be made of the names and addresses of those persons summoned. Defence counsel may have access to that list in order to give some advance consideration as to which jurors should be challenged.</p> <p>d) Empanelling the jury involves the selection from the panel, by ballot and after challenges, of those seven or nine persons who will be the jury that tries any particular case.</p> <p>A judge is empowered under section 20 of the Jury Ordinance, on the application of any party or at his or her own instance, to order that the jury be composed entirely of men or of women. Moreover, on the application of a woman juror, the judge may exempt her from service by reason of the nature of the evidence.</p>	

<u>Items</u>	<u>UK</u>	<u>Hong Kong</u>	<u>Reasons for the difference</u>
<p><b>7. Balloting, challenges and swearing in</b></p>	<p>In UK, the jury for a particular case is selected from the jury panel by ballot in open court. The clerk of the court has the names of all members of the panel. The names are put on cards, the cards are shuffled and the clerk reads out the names from the pile of cards. Hence, a random selection is achieved from a randomly-selected panel.</p> <p>On entering the jury box to be sworn, each juror may be challenged by the prosecution or the defence. Unlike in Hong Kong, the defence has only the right to challenge for cause. The prosecution has the right to challenge for cause or to require a juror to stand by (ie the Crown, without giving reasons, can ask a juror to stand</p>	<p>In Hong Kong, some 20 members of the panel, who are called the 'jury in waiting', are brought into court, usually immediately after the plea is taken. The registrar has had the names of each person printed on a separate card and placed into a ballot box and the registrar, or the clerk of the court, will draw names until a jury is obtained. If there are insufficient jurors, in theory, the judge may command the bailiff to collect a number of persons, apparently qualified, from the vicinity of the court, and if their names are on the jury roll, they can be immediately sworn in and may serve as jurors. In practice, this rarely needs to be done. Those called will then proceed to enter the jury boxes and, at this stage, the registrar or clerk will tell the accused that the names of the jurors who are to try him are to be called. If he objects to any of them, he must do so before they are sworn. All challenges occur before the jurors take a</p>	<p>There is no material difference in the balloting procedure between UK and Hong Kong. As for challenges, in Hong Kong, the defence has the right to challenge without cause for up to five jurors. This right to peremptory challenges was abolished by the Criminal Justice Act 1988 in UK. Both defence counsel and prosecution can only challenge for cause. The right to peremptory challenge was first introduced in Hong Kong in 1971. It entitles the defendant to object to as many as five prospective jurors without having to give any reasons.</p>

<u>Items</u>	<u>UK</u>	<u>Hong Kong</u>	<u>Reasons for the difference</u>
	aside until the jury panel is exhausted).	seat in the jury box and are sworn in. The prosecution has the right to challenge any juror "for cause" (ie for good reasons, such as not being qualified, unable to be objective, or reasonably suspected of bias or interest or prejudice) and to require a juror to stand by. The defence has the right to challenge up to five jurors without cause and any juror for cause.	This change to the Juries Ordinance was intended to bring Hong Kong law more in line with English law in this aspect of procedure in criminal trials. However, when the UK 1988 Act abolished peremptory challenges, Hong Kong did not follow suit. This gives the defendant slightly greater protection in the composition of the jury. It will not, however, interfere with the principle of random selection of jurors because the defendant cannot select jurors, he can only remove them.

<u>Items</u>	<u>UK</u>	<u>Hong Kong</u>	<u>Reasons for the difference</u>
<p><b>8. Excusal, discretionary deferral and discharge</b></p>	<p>In UK, any member of a jury panel may be excused service on the basis of previous service, or on showing entitlement to be excused, or, at the discretion of the appropriate officer, for good reason.</p> <p>The judicial power to discharge the jury or individual jurors once the trial has begun is closely related to the challenge for cause. A judge's decision to discharge a jury or juror is unchallengeable, whereas if the judge decides not to discharge, that decision may be challenged on appeal against conviction by the accused on the basis that the conviction is to be regarded as unsafe and unsatisfactory because there was no discharge. If doubt arises about the capacity of a juror because of</p>	<p>In Hong Kong, under sections 25 and 37 of the Jury Ordinance, there is considerable scope for the discretionary exclusion of persons:</p> <ul style="list-style-type: none"> <li>a) who have a personal interest, concern in, or knowledge of the parties; or</li> <li>b) where jury service would result in them suffering hardship.</li> </ul> <p>The judge may discharge a juror who is subsequently found to be unqualified, but the inclusion of such a person in a jury cannot be a ground of appeal if such inclusion is discovered after the verdict has been entered.</p>	<p>There are no material differences between the arrangement in UK and Hong Kong.</p>

<u>Items</u>	<u>UK</u>	<u>Hong Kong</u>	<u>Reasons for the difference</u>
	physical disability or insufficient understanding of English, that person may be discharged It may also be appropriate to accommodate a juror by exercising the discharge power, for example, on the death of a spouse.		

<u>Items</u>	<u>UK</u>	<u>Hong Kong</u>	<u>Reasons for the difference</u>
<p><b>9. Majority Verdict</b></p>	<p>In UK, the requirement that the verdict be unanimous, which had stood since the thirteenth century, was abandoned by the Criminal Justice Act 1967, which introduced the majority verdict. The governing provision is now the Juries Act 1974, s.17: “(1) ... the verdict of a jury in proceedings in the Crown Court or the High Court need not be unanimous if - a) in a case where there are not less than eleven jurors, ten of them agree on a verdict; and b) in a case where there are ten jurors, nine of them agree on a verdict.</p>	<p>In Hong Kong, in all criminal proceedings, where a jury consists of seven persons, its decision must be reached by a majority of not less than five (even if the number of jurors has been reduced to six by death or proper discharge). If the jury is reduced to five, the verdict must still be five and must be unanimous. Where nine-person juries have been sworn in, then the majority shall be of not less than seven (unless properly reduced to eight, in which case the majority can be six, or if properly reduced to six or seven, then the majority may not be less than five). If the jury is properly reduced to five, the verdict must be unanimous. It is possible that the jury may be unable to agree to unanimous or even a majority verdict. Then, if it sufficiently appears to the court that this is the case, the judge must discharge the jury, cause a new jury to be empanelled and order that case be tried as if it was for the first time.</p>	<p>There are no material differences between the arrangement in UK and Hong Kong. The differences are due to the different number of jurors required by the UK and Hong Kong jury system respectively.</p>

## II Non-Extension of the Jury Trial to District Court

2. A Bill to set up the District Court as an intermediate court, with limited civil and criminal jurisdiction, between the Magistracy and the Supreme Court was introduced into the Legislative Council in 1952. It was prompted by the increase in volume of litigation, both civil and criminal, such that these cases could not be adequately and expeditiously dealt with by the judges and magistrates at that time. The Attorney General, when moving the Bill, explained why there would be no trial by jury in the District Court as follows:

“In the District Court, the maximum sentence of imprisonment, whether for one or more offence, which may be imposed on conviction is limited to five years, and there are further limitations on penalties set forth in [the Bill]. Moreover, provision is made for appeals in criminal cases to go to the Full Court, and the trial judge is required ... to place on record a short statement of the reasons for his verdict. It is considered that these provisions are an adequate safeguard against miscarriages of justice. To provide for trial by jury in the District Court would place a grave additional burden on an already over-worked jury list, and to provide for a right to elect to be tried by jury would be to introduce something which is not at present available to an accused person, and might very well defeat one of the main objects of the Bill.”

3. From the above, the reasons for not introducing jury trial into the District Court appears to be twofold:
  - a) firstly, adequate safeguards against miscarriage of justice were provided in the Bill;
  - b) secondly, and more importantly, there were not sufficient eligible persons to serve as jurors in the District Court.
4. A careful examination of these factors will be required if the question of extending jury trial into the District Court is considered. At this stage, it is possible to highlight some of the factors that should be taken into consideration:
  - a) whether there will be adequate persons to serve as jurors;
  - b) cost;
  - c) the implication for the length of trial and the workload of the District Court.
5. Given that the introduction of juries in the District Court would be a significant development, the issue could not be considered in isolation. Other related issues that would call for consideration would include:

- a) whether jury trial should be available in respect of all types of offences tried in the District Court or whether the summary jurisdiction of the District Court should be retained in part;
  - b) whether the sentencing power of a District Judge should be amended and whether a District Judge should be given the power to remit a case to the High Court for sentencing;
  - c) whether a particular level of experience should be required for District Judges presiding over a jury trial;
  - d) whether the accused should have the right to elect the mode of trial ie jury or non-jury trial;
  - e) whether committal proceedings should be available if there were jury trials in the District Court; and
  - f) whether solicitors should have a right of audience if there were jury trials in the District Court.
6. In view of these many important issues, the question whether there should be jury trials in the District Court would require a lengthy, detailed and in-depth study. This study would entail a consideration of the criminal justice system of other jurisdictions besides the UK.

### III AG's Power to Determine Venue for Trial

7. The Attorney General has the power to institute criminal proceedings for any offence:
  - a) under Section 12(a) of the Magistrates Ordinance (Cap 227), he is entrusted with the "duty and discretion" to conduct the prosecution of all offences tried before a magistrate;
  - b) under Section 14 of the Criminal Procedure Ordinance (Cap 221), he has the discretion to initiate prosecutions "if he sees fit" in the High Court;
  - c) under Section 75 of the District Court Ordinance, he may prefer charges against an accused for offences which are the subject matters of proceedings transferred from the Magistrates Court or the High Court.
  
8. Moreover, the Attorney General may apply to court for an order for transfer of the following proceedings:
  - a) from the Magistrates Court to the District Court (under Section 88 of the Magistrates Ordinance);
  - b) from the District Court to the High Court or to the Magistrates Court (under Section 77A of the District Court Ordinance);
  - c) from the High Court to the Magistrates Court or the District Court (under Section 65F of the Criminal Procedure Ordinance).
  
9. In any application for transfer by the Attorney General under section 88 of the Magistrates Ordinance, the magistrate is required to make an order for transfer. Where an application is made under Section 77A of the District Court Ordinance or Section 65F of the Criminal Procedure Ordinance, the judge may make an order for transfer where it is in the interests of justice to do so.
  
10. In the Attorney General's Chambers' Prosecution Policy - Guidance For Crown Counsel (1993) (pages 9-10), guidelines for the decision by Crown Counsel as to the mode of trial is set out as follows:

"Where a case is considered too serious for trial in the Magistrates Court Crown Counsel should consider carefully whether the trial can properly take place in the District Court rather than the High Court bearing in mind that the maximum sentence that can be passed in the District Court is 7 years imprisonment. If Crown Counsel considers that the sentence to be passed in the event of conviction after trial is likely to be less than seven years he should transfer the case to the District Court for trial. Where it is known that the defendant will plead guilty the case should be transferred for hearing in the District Court where it is thought the starting point for sentence is unlikely to exceed 7 years."

“Whilst the attraction of an expeditious disposal should never be the sole reason for summary trial, Crown Counsel is entitled to have regard to the fact that trial in the Magistrates Court is almost certain to be speedier as well as less expensive. Other considerations such as the length of trial or the possibility of a plea of guilty by the defendant are also relevant.”

Legal Department  
June 1997

## CAP. 227 Magistrates

## PART III

[s. 88]

1. Any offence which is punishable with death.
2. Any offence which is punishable with imprisonment for life except an offence against section 37C, 37D, 37O or 37P of the Immigration Ordinance (Cap. 115), an offence against section 53 or 123 of the Crimes Ordinance (Cap. 200), an offence against Part VIII of the Crimes Ordinance (Cap. 200), an offence against section 4 or 6 of the Dangerous Drugs Ordinance (Cap. 134), an offence against section 10 or 12 of the Theft Ordinance (Cap. 210), section 17, 28 or 29 of the Offences against the Person Ordinance (Cap. 212) or section 16, 17 or 18 of the Firearms and Ammunition Ordinance (Cap. 238). *(Replaced 49 of 1965 s. 21. Amended L.N. 165 of 1967; 41 of 1968 s. 59; 21 of 1970 s. 35; 48 of 1972 s. 4; 25 of 1978 s. 6; 59 of 1980 s. 2; 68 of 1981 s. 56; 59 of 1984 s. 7; 52 of 1992 s. 11)*
3. Any offence against section 21 or 22 of the Crimes Ordinance (Cap. 200).
4. Misprision of treason.
5. Any offence against the Queen's title, prerogative, person or government.
6. Blasphemy and offences against religion.
7. Composing, printing or publishing blasphemous, seditious or defamatory libels.
8. Genocide and any conspiracy or incitement to commit genocide. *(Added 52 of 1969 s. 4)  
(Part III added 2 of 1953 s. 4)  
(Second Schedule replaced 24 of 1949 Schedule)*

## 第 III 部

〔第 88 條〕

1. 任何可處死刑的罪行。
2. 任何可處終身監禁的罪行，但以下罪行除外——  
違反《人民入境條例》(第 115 章)第 37C、37D、37O 或 37P 條的罪行，違反《刑事罪行條例》(第 200 章)第 53 或 123 條的罪行，違反《刑事罪行條例》(第 200 章)第 VIII 部的罪行，違反《危險藥物條例》(第 134 章)第 4 或 6 條的罪行，違反《監竊罪條例》(第 210 章)第 10 或 12 條的罪行，違反《侵害人身罪條例》(第 212 章)第 17、28 或 29 條的罪行，或違反《火器及彈藥條例》(第 238 章)第 16、17 或 18 條的罪行。*(由 1965 年第 49 號第 21 條代替。由 1967 年第 165 號法律公告修訂；由 1968 年第 41 號第 59 條修訂；由 1970 年第 21 號第 35 條修訂；由 1972 年第 48 號第 4 條修訂；由 1978 年第 25 號第 6 條修訂；由 1980 年第 59 號第 2 條修訂；由 1981 年第 68 號第 56 條修訂；由 1984 年第 59 號第 7 條修訂；由 1992 年第 52 號第 11 條修訂)*
3. 違反《刑事罪行條例》(第 200 章)第 21 或 22 條的任何罪行。
4. 隱匿叛逆。
5. 對女皇陛下的稱號、特權、人身或政府所犯的任何罪行。
6. 褻瀆神明及宗教罪行。
7. 撰寫、印刷或出版褻瀆神明、煽動性或誹謗名譽的永久形式誹謗。
8. 危害種族罪及任何串謀或煽惑犯危害種族罪。*(由 1969 年第 52 號第 4 條增補)  
(第 III 部由 1953 年第 2 號第 4 條增補)  
(附表 2 由 1949 年第 24 號附表代替)*

**Relevant Extracts of the Current Prosecution Code  
published in September 2013**

\* \* \* \* \*

*8. Charging Practice and Procedure*

\* \* \* \* \*

*Venue for Trial*

8.2 Some offences must be tried in the Magistrates' Court, some must be tried on indictment in the District Court or the Court of First Instance and some may be tried either way. Purely summary offences may be tried with indictable offences, but not in the Court of First Instance.

8.3 Article 86 of the *Basic Law* provides: "*The principle of trial by jury previously practised in Hong Kong shall be maintained.*"

8.4 When deciding the venue for trial, a prosecutor should have regard to:

- (a) the maximum penalties available for offences dealt with in the Magistrates' Court (2 years' imprisonment in most cases), the District Court (7 years' imprisonment) and the Court of First Instance (the prescribed maximum penalty);
- (b) the general circumstances of the case;
- (c) the gravity of the allegations;
- (d) issues likely to be in dispute;
- (e) the public importance of the proceedings;
- (f) whether or not the accused held a position of high public status, responsibility or trust;
- (g) whether or not issues arise for determination that require the application of community standards and/or values;
- (h) any aggravating and mitigating factors;
- (i) the accused's antecedents.

After considering the above, the prosecutor should select an available venue for trial that will enable the relevant court to deal most appropriately with the matter and impose an adequate sentence to address the criminality involved in the conduct. A prosecutor should take into account the possibility of an enhanced sentence for an organized crime offence.

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**Relevant Extracts of the Previous  
Statement of Prosecution Policy and Practice published in 2009  
[no longer in force]**

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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.

\* \* \* \* \*