

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

**Provision of Screens for Complainants in Sexual Offence Cases
During Court Proceedings**

PURPOSE

The purpose of this paper is to set out the Judiciary's position in regard to the proposal to provide screens for complainants in sexual offence cases during court proceedings.

BACKGROUND

2. Following the visit by the Panel on Administration of Justice and Legal Services of the Legislative Council ("the Panel") to the Judiciary on 3 December 2013, the Clerk to the Panel wrote to the Judiciary on 27 May 2014, proposing that the Judiciary should shield complainants in sexual offence cases behind screens during court proceedings upon applications from the prosecution, on the grounds that this will encourage complainants to pursue their cases in court and to give a full and candid account of the acts complained of in court. It has also been stated that the use of such a screen would not undermine the right of the accused to a fair trial, as the accused and/or their lawyers can observe and cross-examine the evidence testified by the complainants. As we understand it, this proposal would in effect mean that screens should be provided automatically as a matter of course upon the application of the prosecution to screen off complainants in sexual offence cases when they testify in court.

CURRENT ARRANGEMENTS

3. Whilst there is currently no legislative provision specifically governing the use of screens for witnesses in sexual offence proceedings, the use of screens in criminal proceedings is governed by common law. Whether a screen should be deployed during court proceedings is a matter subject to judicial discretion.

4. Under the existing arrangements, the prosecution would apply to the court before trial for special measures to be adopted to address the specific needs of the complainants testifying in court (see The Statement on the Treatment of Victims and Witnesses issued by the Department of Justice (“DoJ”) in 2009 at **Annex A**). Such measures may include placing a screen around the complainant in a sexual offence case during related proceedings so that :

- (a) the complainant will not be able to see the accused; and/or
- (b) the public and the press will not be able to view the complainant.

5. The court would consider the prosecution’s application carefully having regard to the circumstances of the case and the needs of the complainants and would take into account the views of the defendant before deciding whether to adopt any special measure. The discretion is exercised as part of the court’s common law duty to endeavour to see that justice is done and is seen to be done in the case.

6. The table below shows the number of applications received from the prosecution for the use of screen for sexual offence cases at different court levels from 1 June 2013¹ to 31 December 2014, including those that have been granted or refused:

| | High Court | District Court | Magistrates’ Courts |
|---|-------------------|-----------------------|----------------------------|
| Number of sexual offence cases ² heard | 35 | 48 | 490 |
| Number of applications | 6 | 7 | 13 |
| Number granted | 6 | 7 | 10 |
| Number refused | 0 | 0 | 3 |

¹ The Judiciary has recorded the figures since June 2013, when the screens started to be provided by the Judiciary instead of by the prosecution.

² Sexual offence cases refer to offences relating to (i) rape; (ii) incest; (iii) buggery; (iv) gross indecency; (v) indecent assault; (vi) indecent conduct; (vii) unlawful sexual act; (viii) unlawful sexual intercourse; (ix) procuring another person under the age of 16 for making pornography; (x) keeping/managing vice establishment; and (xi) controlling/living on earnings of prostitution.

It may be noted from the above figures that the majority of the applications for the use of screen were approved by the court. While some were refused, it only but manifests the importance and necessity of allowing judicial discretion as each case needs to be considered on its own merits.

7. As regards other measures which are available for adoption by the court during court proceedings where protection of the complainants in sexual offence cases is required, Members may refer to the Judiciary's earlier paper on Protection of Victims or Witnesses of Sexual Offence Cases During Court Proceedings (LC Paper No. CB(4)679/12-13(05)).

RELEVANT CONSIDERATIONS

8. Having consulted DoJ, the Judiciary considers the following factors would be relevant in examining whether a screen should be automatically provided for complainants in sexual offence cases upon the application by the prosecution.

Right to a Fair Trial

9. The right to a fair and public hearing is guaranteed by Article 10 of the Hong Kong Bill of Rights ("HKBOR"), implementing Article 14.1 of the International Covenant on Civil and Political Rights ("ICCPR"):

"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, ...everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. ..." (underline added)

Article 11(1) & (2)(e) of the HKBOR further state that:

"(1) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to the law.

- (2) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality ...
 - (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ...”

Restriction on the Right to a Fair Trial

10. Any restriction on the right to a fair trial must meet the requirements in Article 39 of the Basic Law:

“The provisions of the [ICCPR] ... as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.” (underline added)

The Role of the Judge

11. In a criminal trial, the common law has recognized the right of an accused to be presumed innocent unless and until proved guilty, the right of an accused to confront his accuser, the right to have a trial conducted in public and indeed the right to (and be seen to) have a fair trial. These rights are reinforced by human rights provisions and the law that has subsequently been developed around them. In addition to the rights of the accused, there is the public interest in having open justice and the opportunity to observe judicial proceedings. It goes without saying that the Judiciary itself does have a pertinent interest in ensuring public hearings as far as possible since transparency and access to court play a critical role in maintaining public confidence in the administration of the criminal justice process and the independence of the Judiciary.

12. Hence, when deciding on the use of a screen, a trial judge is performing his role of balancing the rights and interests of the accused, the

prosecution, the complainant and the community at large. In exercising such judicial discretion, it is of the utmost importance that the judge applies his/her independent mind to the issues and has an essentially unfettered freedom to act when determining where the interests of justice lie.

13. The above is demonstrated in a recent case HKSAR v SHAMSUL HOQUE (HCCC 379/2013) whereby the Court of First Instance of the High Court has granted an application made by the prosecution for the complainant in a sexual offence case to give evidence behind a screen so that she is shielded from view by members of the public gallery. In exercising his discretion, the presiding judge has taken the following into account:

- “(1) The right to confront accuser is engaged when a witness is screened from the defendant but is not engaged when a witness is screened from the public. Even in such circumstances when it is engaged, it is generally viewed that any prejudicial effect is cured by an appropriate direction to the jury. In a case where a witness is screened from the public, there is no undue prejudice to the defendant.
- (2) The principle of open justice is engaged when a witness is screened from the public. There is a limited restriction to the public nature of the proceedings and the courts will have to balance that limited restriction against the rights of a witness, taking into consideration the nature of the evidence to be given by the witness and the effect it will have on him or her in giving such evidence, and that this is necessary in order to achieve the due administration of justice.
- (3) A fair trial involves fairness to the defendant, the witnesses and the public. The rights of victims and witnesses are recognized and are an important consideration in the criminal trial process. It is part of the court’s function to regulate its proceedings and to employ appropriate measures to ensure that a witness’s ability to give effective evidence is not affected and this will serve the public

interest to encourage generally witnesses to come forward to testify in criminal trials.

- (4) A complainant in a sexual offence will more than likely be giving evidence that is embarrassing and sensitive. That alone justifies allowing the complainant to give evidence screened from the public in order to achieve the due administration of justice. An appropriate direction to the jury can be given that they do not read anything adverse to the defendant by the use of the screen.”

It is then concluded that “a defendant’s right to a fair trial is not jeopardized or prejudiced by addressing the reasonable concerns and anxieties of a witness in a case concerning a sexual offence”. It is also worth noting that while the judgment in question largely deals with the situation where a witness was screened from the public, it has also touched on the scenario where the screening of the witness from the defendant is involved. On the latter, the judgment has cited cases which cover both the granting and the refusal of applications for use of a screen to shield the witness from the defendant. A copy of the said judgment is at **Annex B** for Members’ easy reference.

The Proposal to Provide Automatically Screens for Complainants in Sexual Offences upon Application

14. As mentioned in the preceding paragraphs, the provision of screens for witnesses in sexual offence cases is governed by common law. At the common law, the court would exercise its judicial discretion on a case-by-case basis. As advised by DoJ, the proposal that screens be provided automatically to shield the complainant from the accused appears to be a departure from the common law position as it now stands for Hong Kong.

15. As the above-mentioned proposal would necessarily restrict the right of the accused to a fair trial, it is imperative that it needs legislative backing in order that the “prescribed by law” requirement under Article 39 of the Basic Law (as mentioned in paragraph 10 above) can be met. In other words, if the court chooses to provide screens on an automatic basis for complainants in sexual offence cases upon application without statutory

backing, this could be perceived to be in breach of the principles set out in paragraphs 9 and 10 above.

Overseas Experiences

16. The arrangements for witnesses in other major common law jurisdictions are mostly provided in statute law, such as the United Kingdom, Canada and most of the different states of Australia. In New Zealand, a judge must make a discretionary judgment on a case-by-case basis in accordance with criteria set out in the statute while Tasmania in Australia relies on common law in this respect. A summary is at **Annex C**.

THE JUDICIARY'S POSITION

17. The Judiciary has considered the following options:

- (a) whether the law should be changed to provide for automatic provision of screens for complainants in sexual offence cases upon application;
- (b) whether, within the existing framework, the current procedures could be improved for considering applications for use of screens for complainants in sexual offence cases; and
- (c) whether, within the existing framework, certain guidelines should be developed to set out in greater details the factors that should be taken into account when the court considers applications for use of screens for complainants in sexual offence cases.

Option (a)

18. Regarding the proposal of automatic provision of screens for complainants in sexual offence cases upon application, this cannot be implemented without legislation. This would also apply to another suggestion of the Panel of amending the definition of “witness in fear” under Section 79B of the Criminal Procedure Ordinance, Cap. 221 to include complainants in sexual offences so that the use of live television

link can be made available to them on a mandatory basis³. In this connection, the Judiciary has been advised by DoJ that if screens are to be automatically provided to complainants upon application by way of legislation, it is necessary for consideration to be given to providing judges with a residual power to disallow the use of screen if the complainant does not wish to give evidence behind a screen, the accused would otherwise be unfairly prejudiced, or the use of a screen would interfere with the due administration of justice. Otherwise, a blanket application without any judicial discretion would run the risk of the measure failing the proportionality test.

19. As this option essentially involves legislation, the Judiciary takes the view that this cannot be determined by the Judiciary alone. Legislation may have the effect of removing completely the exercise of judicial discretion now existing under the current common law arrangement. Given that the matter affects human rights and public interest, extensive consultation and in-depth deliberation by the public may be needed before a decision is reached on whether such a measure would be justified. In this regard, it is considered appropriate that the matter should be referred to the Administration for further consideration.

Option (b)

20. So long as the present position still stands, the court will continue to exercise judicial discretion in determining whether screen should be provided for witnesses in sexual offence cases during court proceedings.

21. From the figures set out in paragraph 6 above, it appears that the numbers of applications for screens are on the low side. Given that the application for use of screen is at present initiated by the prosecution, the Judiciary considers that the procedure can be improved by amending Practice Direction - 9.3 "Criminal Proceedings in the Court of First Instance" and Practice Direction - 9.4 "Criminal Proceedings in the District Court" to require, as a matter of standing procedure, the counsel to advise

³ Under the current arrangement, a complainant in sexual offence case can, upon application by the prosecution, seek the use of live television link for giving evidence as a "witness in fear". This position is clearly set out in the Judiciary's paper LC Paper No. CB(4)679/12-13(05) and DoJ's letter dated 25.2.2014 to the Panel. Past records show that all such applications had been granted during the period of January 2010 to September 2013.

the presiding judge of the following during the Pre-trial Review of every sexual offence case:

- (a) whether the complainant has requested a screen; and
- (b) whether the prosecution considers it appropriate to make such an application.

22. With the above change, the consideration of the need for screen will become a standing procedure in every sexual offence case that will be brought forward to court. The same could be applied to the Magistrates' Courts. The introduction of this measure will ensure that consideration has been given by the complainant and the prosecution to the use of a screen in each and every sexual offence case.

Option (c)

23. The Judiciary has considered the feasibility of developing guidelines by setting out in detail the factors that should be taken into account when the court considers the use of screens for complainants in sexual offence cases. As the circumstances of each case are different, it would not be possible to list all the factors exhaustively. To do so in a non-comprehensive manner would only affect adversely the unfettered exercise of judicial discretion and therefore this option is not favoured.

24. In any event, the case in the High Court quoted in paragraph 13 above would serve as a precedent for cases in other courts with similar circumstances.

CONCLUSION

25. Having considered the above, the Judiciary considers that option (b) should be adopted. Option (a) should be referred to the Administration for further examination while option (c) should be rejected.

26. Members are requested to note the contents of this paper.

Judiciary Administration
January 2015

Department of Justice
Hong Kong

**The
Statement on the
Treatment of
Victims and Witnesses**

2009

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FOREWORD

The Statement on the Treatment of Victims and Witnesses ('*The Statement*') is a practical document which incorporates latest thinking and encourages best practice. It is also aspirational, and reflects the vision of those who prosecute criminal cases. *The Statement* sets benchmarks for prosecutors, and explains to the public how prosecutors consider that victims and witnesses should be treated.

Justice is the expectation of victims and witnesses, and also their right. No system of criminal justice can succeed without their full support and co-operation, and they must have faith in the system. In addition to guiding prosecutors in their dealings with others, *The Statement* makes victims and witnesses aware of their rights and of the standards of service they may expect throughout criminal proceedings.

The Statement promotes transparency in a vital area of criminal justice, and constitutes a pact between prosecutors and those who are victims of crime or witnesses to crime. It places victims and witnesses at the heart of the decision-making process, and at each stage of the trial process. *The Statement* will promote community confidence in the criminal justice system.

I. Grenville Cross, SC
Director of Public Prosecutions
1 September 2009

1. THE VISION OF THE DEPARTMENT OF JUSTICE

Prosecutors committed to a fair deal

- 1.1 The Department of Justice ('the Department') and its prosecutors are committed to providing the highest levels of service and support to victims and witnesses. Justice is their expectation, as well as their right. Those involved in the criminal process require the best possible deal.
- 1.2 Victims and witnesses are essential to the success of the criminal justice system. They must have faith in that which is on offer to them. Those who commit offences can only be prosecuted if victims and witnesses are willing to make reports and to testify. They need to know they will be treated throughout with respect and understanding.
- 1.3 The Department is committed to liaising with others to protect and advance the interests of victims and witnesses.
- 1.4 The proper care and treatment of victims and witnesses is at the forefront of prosecution policy and strategy. Prosecutors are committed to upholding the principles and practices contained in :
 - (a) *The Statement of Prosecution Policy and Practice;*

- (b) *The Victims of Crime Charter;*
- (c) *The Policy for Prosecuting Cases involving Domestic Violence.*

1.5 *The Statement on the Treatment of Victims and Witnesses* ('*The Statement*') indicates how the Department considers victims and witnesses should be treated, and the means by which prosecutors will safeguard their interests.

2. STATEMENT OF POLICY

The role of the Department of Justice

2.1 The Department acts independently on behalf of the community. Decisions on cases are based on the strength of the evidence followed by an assessment of the public interest. This process is governed by *The Statement of Prosecution Policy and Practice*. The Department does not act directly on behalf of individual victims or represent them in criminal proceedings, because it has to take decisions reflecting the overall public interest rather than the particular interests of any one person. Modern prosecution policy nonetheless requires that full weight be given to the position of victims and witnesses in the decision-making process.

The decision to prosecute

- 2.2 The more serious the case, the more likely is it that a prosecution will be required in the public interest. *The Statement of Prosecution Policy and Practice* provides that the gravity of the offence is affected by the extent of the harm or loss suffered by the victim, and the significance of the harm or loss may be relative to the circumstances of the victim in question. The effect of the offence upon the victim must be assessed as it is a vital factor for the prosecutor to consider. The views of the victim will be given such weight as is appropriate in all the circumstances when making a charging decision.
- 2.3 In determining whether to discontinue a prosecution or to accept an adjusted plea to a lesser charge, the prosecutor should, if practicable, ascertain the views of the victim. While the views are not determinative of the issue, they will assist the prosecutor in reaching an informed decision.
- 2.4 Where a decision not to prosecute is taken, a letter, if appropriate, will be sent to the victim by a prosecutor to explain the basis of that decision.
- 2.5 The Department is committed to according priority to concerns arising from criminal cases. Victims or witnesses who raise any concern with the Department about prosecutorial decisions will be given adequate and prompt responses. In appropriate circumstances, a face-

to-face meeting between the prosecutor and the victim will be arranged. If the victim reveals any material evidence not previously known to the prosecutor or the law enforcement agency, a referral to the relevant law enforcement agency for further investigation may be considered.

Information about victims and witnesses

- 2.6 When the police submit a file to the Department, it may contain information about victims and witnesses. Such information is important as it enables the prosecutor to see the offence in its full context. It may, for example, reveal aggravating or mitigating considerations. Prosecutors must examine, assess and act upon the information supplied.

Compensation and Restitution

- 2.7 Victims often wish to claim compensation and/or restitution for the harm or loss caused to them by the crime. If so, the police should include details of the claim to be made and/or the details of the pecuniary loss suffered by the victim. If this is not done, and the case is accepted by the Department for prosecution, the prosecutor will ask the police to provide details or to explain why they are not required. In cases where there is

a claim for compensation and/or restitution, the prosecutor will tell the court. The court may then impose a compensation order and/or a restitution order in an appropriate case. Whilst a compensation order is essentially concerned with the power of a court to order the offender to pay money to victims for personal injury, loss of or damage to property, or both such injury and loss or damage, a restitution order is an order for the return of property.

Safety of victims and witnesses

2.8 Victims and witnesses have the right to protection where this is required before, during and after criminal proceedings. Such persons may place themselves and their families in jeopardy by agreeing to give evidence. Although prosecutors do not participate in witness protection programmes, they have a responsibility, in an appropriate case, to advise the relevant agency as to the need for and the importance of particular witnesses in the conduct of a prosecution. If appropriate, steps should be taken to ensure that those responsible have done all that is necessary to protect victims and witnesses.

Victims and witnesses at court

- 2.9 Victims of crime have a legitimate interest in the cases in which they are involved. Prosecutors will seek to assist victims and witnesses at court by providing appropriate guidance and useful information. Victims and witnesses are kept abreast of developments and are consulted and advised where necessary.

3. STANDARDS OF SERVICE

- 3.1 Victims and witnesses deserve consideration and understanding throughout criminal proceedings. The taking of practical steps to improve the service to victims and witnesses is just as important as responding sympathetically to their concerns. The Department is committed to liaison with others in the criminal justice system to protect the interests of victims and witnesses.
- 3.2 Victims and witnesses are entitled to have their rights to privacy and confidentiality respected.
- 3.3 Victims and witnesses deserve consistent standards of care and treatment.

Witness protection

3.4 Prior to trial, prosecutors will consider whether witness protection is required and determine, if practicable, whether what is being/is to be provided is adequate. Prosecutors will :

- seek early identification of cases where protection might be necessary;
- consult, if appropriate, with the case officer as to the nature of the protection required and its duration;
- liaise, where necessary, with those responsible for the security and attendance of witnesses;
- monitor, if appropriate, the situation of the witness subject to protection;
- inform the court during the accused's application for bail of any risk of interference with witnesses and any need for witness protection;
- notify the witnesses as soon as possible of any special bail conditions which may affect them or their families should the accused be released on bail by the court;

- take such steps as may be practicable to ensure that the manner in which the protected witness is treated conforms to the procedures contained in the Witness Protection Ordinance;
- apply to the court, if appropriate, for closed court hearings or for an order of non-disclosure of the identities of the victim or certain witnesses.

Before trial

3.5 Before trial, prosecutors will consider whether the attendance of a witness is strictly necessary, and ensure that only the witnesses necessary to prove the charge are called to testify in court. They recognise that the witnesses who are required to attend court often feel worried and concerned at what to expect. To help the witnesses, prosecutors will, to the extent that this is practicable and/or necessary :

- seek to expedite the processing of cases, particularly those involving children and other vulnerable witnesses;
- ask the court to set a date for trial which is as convenient as possible to witnesses;

- ask the police to give witnesses as much notice as possible when the date for trial is fixed;
- ask the police to ensure that the witness is informed of the procedures at court;
- ask the police to arrange a visit to court for children or mentally incapacitated witnesses before trial;
- encourage the provision of proper facilities at court for the reception of witnesses;
- ask the police to arrange assistance for the young, the elderly and the disabled to get to court;
- address the specific needs of witnesses and, where justified, make appropriate applications to the court for special measures, which include :
 - (a) use of screens to shield witnesses from the accused while testifying in court;
 - (b) use of two-way closed circuit television to enable witnesses to give evidence outside the courtroom through a televised link to the courtroom;

- (c) admission of video-recorded interviews as evidence-in-chief of witnesses who are children or mentally incapacitated persons;
 - (d) removal of wigs and gowns by judges and advocates during trial;
 - (e) for sexual offences, an order that the witness' identity remains anonymous;
 - (f) closed court hearings;
- ask the court to arrange an appropriate interpretation service.

At trial

3.6 Once the trial has started, prosecutors will :

- try to ensure that witnesses are made aware of arrangements at court, and the availability of facilities, such as witness waiting rooms, and canteens;
- seek to keep waiting times for witnesses to a minimum;

- inform the court of any difficulty a witness might face so that the situation of the witness may be accommodated;
- introduce themselves to witnesses, if practicable, and explain their role;
- take steps to ensure that personal particulars of victims and witnesses, such as the addresses and telephone numbers, are not unnecessarily disclosed in open court;
- seek to ensure that witnesses do not come into contact with those accused of crime while in the court precincts;
- keep witnesses informed of the progress of cases, and of developments, such as delays or adjournments, or changes of plea;
- inform the court of any available information about the likely effect on victims or witnesses of a delay where the defence seeks to postpone the trial;
- object to defence questioning which is abusive or unjustifiably intrusive or aggressive;
- ask the court, when appropriate, to release a witness who has testified, or is no longer required;

- explain the results of cases, whenever possible, to victims.

At sentencing

3.7 When the victim has been harmed or has lost property, prosecutors will :

- ensure that the court is aware of the consequences of the offence;
- inform the court of any known financial loss which has resulted from the crime;
- remind the court of its power to award compensation and/or to order restitution in appropriate cases;
- make an application, in an appropriate case, for a compensation order and/or a restitution order;
- do all they can to ensure that the court is supplied with sufficient information to enable it to make a compensation order and/or a restitution order.

3.8 Upon conviction of sexual offenders, prosecutors will :

- bring to the attention of the court the victim's background where appropriate;

- furnish the court with updated factual information as to the impact of the harm caused to the victim.

3.9 In cases involving violence or sexual offences, where the victim suffered physical or psychological injuries as a result of the crime, prosecutors will furnish the court with the latest medical or other relevant reports.

Defence mitigation

3.10 When defence mitigation contains misstatements of fact or unjust criticism of the victim or witness, prosecutors will :

- tell the court that the mitigation is not accepted by the prosecution;
- explain why the mitigation is challenged;
- invite the court to receive evidence on the issues raised by the defence.

Witness expenses

3.11 To ensure that witnesses are reimbursed properly and quickly, prosecutors will :

- ascertain whether the witness wishes to claim expenses;
- if appropriate, apply to the court for an order for witness expenses after the witness has testified;
- if appropriate, apply to the court for an order for witness expenses for witnesses who have attended the court but were not called to testify.

Appeals to the High Court

3.12 Victims are not usually required to attend court when the defendant appeals against conviction or sentence. To ensure that victims are kept in touch with the progress of appeals, prosecutors will :

- advise the police of the progress of the appeal so that victims and their relatives are kept updated;
- introduce themselves, if victims or their relatives choose to attend the hearing, and explain the nature of the proceedings and the issues involved;
- take steps to ensure that police advise victims and relatives as soon as practicable of the outcome of appeals in which they have an interest.

Reviews of sentence to the Court of Appeal

3.13 Victims and their relatives may have a close interest in reviews of sentence initiated by the Department. Prosecutors will :

- ensure, if appropriate, that the police advise victims and relatives if there is to be a review, and when it will be heard;
- introduce themselves, whenever possible, to victims and relatives who attend the hearing and explain the nature of the proceedings and the issues involved;
- take steps to ensure that the police advise victims and relatives as soon as practicable of the outcome of reviews in which they have an interest.

Cases involving fatalities and serious harm

3.14 The Department recognises that cases which involve the death of the victim or which cause serious harm or trauma to the victim will invariably cause great anguish to relatives and friends. Prosecutors will :

- ensure that such cases are advised on and conducted by a person of appropriate experience;

- be prepared to meet relatives of the victim, if appropriate, to discuss in general terms the basis on which a decision has been taken;
- ask the court to pay special attention to the listing of these cases when this is necessary.

After cases are over

3.15 Once criminal proceedings have concluded, prosecutors will :

- take steps to ensure that property belonging to the witness which was held for court purposes is returned as soon as practicable to its owner;
- liaise with the police if victims or witnesses continue to require the services of the Witness Protection Programme;
- if appropriate, consider the interests of victims who remain in need of medical or after-care services;
- respect the right the victim may have to be notified of an offender's pending release, or escape, from lawful custody.

4. CONCLUSION

Transparency and assistance creating confidence

- 4.1 The publication of *The Statement* is designed to demonstrate the commitment of the Department to the proper care and treatment of victims and witnesses. *The Statement* provides a practical guide for prosecutors. The operation of *The Statement* is subject to periodic review by the Department.
- 4.2 The criminal justice system depends on victims and witnesses to achieve its ends. Reporting offences to the police and giving evidence at court can be a difficult experience. *The Statement* puts the interests of victims and witnesses at the centre of the approach to prosecuting, and recognises their importance in making justice work. The Department is committed to doing all it can to assist victims and witnesses and to enhance their confidence in the legal system.

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CRIMINAL CASE NO 379 OF 2013**

BETWEEN

HKSAR

v

SHAMSUL HOQUE

Before: Hon Zervos J in Chambers

Date of Hearing: 6 June 2014

Date of Ruling: 13 June 2014

Date of Reasons for Ruling: 17 June 2014

REASONS FOR RULING

Introduction

1. The defendant in this case stands accused by the complainant of having raped her and is about to go on trial before a jury in the Court of First Instance. The complainant has previously been granted an anonymity order pursuant to s 156 of the Crimes Ordinance, Cap 200, and is to be referred to as “X”.

2. An application has been made by the prosecution for the complainant to enter and leave the courtroom without going through the public gallery and to give her evidence behind a screen so that she is shielded from view by members of the public gallery. The defendant

A opposes the application for the screen on the basis that it will be prejudicial
B to him.

C *Prosecution application for a screen*

D 3. The prosecution submit that the complainant suffers from
E emotional distress and post-traumatic stress disorder, and is worried and
F feels under great pressure about giving her testimony in front of members of
G the public. It is submitted that the complainant's evidence is embarrassing
H and sensitive and by testifying before the eyes of the public this could add
I considerable stress to her, and intimidate her, and inhibit her as she recounts
J intimate details in court. The prosecution submit that the proposed
K arrangements will not cause any prejudice to the defendant, and in any event,
L any concerns can be allayed by a direction from the judge to the jury that the
M screen has been put up to spare the witness of having to recount intimate
N details while members of the public watch on and that they should not hold
O that against the defendant in any way.

P *Cases on screens*

Q 4. It is worthwhile examining the trilogy of cases that are
R commonly referred to when addressing, or more particularly when opposing,
S the use of a screen by a witness when giving evidence. The cases go back
T some 20 years and were concerned with initially a child, and later an adult,
U giving evidence behind a screen that separated him or her from the
V defendant. These cases must be understood in light of the fact that they
dealt with a situation where the defendant could not see the witness who
gave evidence against him. They therefore engaged the issue of the right

A of an accused to confront his accuser.¹ This does not apply when the
B screen is used to shield the witness from the public and not the accused.

C 5. The first case is *R v X, Y and Z* (1990) 91 Cr App R 36 where
D the English Court of Appeal were concerned with a complaint that the use of
E a screen with a child witness would act in a prejudicial way to the
F defendants in the trial. It was suggested that the jury might have been
G readily influenced and unfairly prejudiced against the defendants by seeing
H the screen there, and that the jury might think that there was a suggestion
I that the persons in the dock had already in some way intimidated the child
J who was going to give evidence. The Court rejected the complaint by
K acknowledging that a fair trial meant fair to all: the defendant, the
L prosecution and the witnesses. In that case, the three defendants were
M charged with serious sexual offences against a number of young boys and
N girls. The Court observed from experience that in such cases children were
O shown to be reluctant to give evidence, and that cases in the past had
P collapsed because the children were unwilling or, unable to speak as to the
Q facts about which they were expected to speak. At trial, a screen was
R erected in court so as to prevent the child witnesses from seeing or being
S seen from the dock. It was on this basis that the Court considered the issue
and rejected there was prejudice to the defendants. The Court stated:

“ The learned judge has the duty on this and on all other occasions
of endeavouring to see that justice is done. Those are high
P sounding words. What it really means is, he has got to see that
Q the system operates fairly: fairly not only to the defendants but
R also to the prosecution and also to the witnesses. Sometimes he
S has to make decisions as to where the balance of fairness lies. He
came to the conclusion that in these circumstances the necessity of
trying to ensure that these children would be able to give evidence
outweighed any possible prejudice to the defendants by the
erection of the screen.

T ¹ See the discussion of the common law principle in the judgment of Lord Bingham of Cornhill in *R v*
U *Davis* [2008] HRLR 35.
V

A The Court agrees with him in that view. We do not think, even
B without the warning which the learned judge did give to the jury,
C that any sensible jury could have been prejudiced against any
D defendant by the existence of this barrier between the witnesses
E and the dock. But at the outset of the trial the judge said this:

‘ Do not allow the mere presence of the screen in any way to
D prejudice you against any of the defendants. The purpose
E of the provision of those screens is in an endeavour to
F prevent children from being intimidated by their
G surroundings. I think you can understand yourselves,
H those of you who have young children, to have to come in
I front of a court of this sort is bound to be a matter which is
J somewhat frightening perhaps and certainly not an
K experience they enjoy. Do not hold that fact against any
L of the defendants. You will decide the case on the
M evidence, that is to say that which is said before you and
N the documents which are placed before you.’

H ...

I We take the view that we do not need authority to confirm us in the
J view that what the learned judge here did in his discretion was a
K perfectly proper, and indeed a laudable attempt to see that this was
L a fair trial: fair to all, the defendants, the Crown and indeed the
M witnesses.’²

K 6. The second case is *R v Cooper and Schaub* [1994] Crim
L LR 531, where the English Court of Appeal at that time observed that the
M use of screens had been confined to child witnesses but there had been
N occasions when such protection had been afforded to adult witnesses. This
O case is commonly relied on to oppose an application for the use of a screen
P but it needs to be read in light of subsequent decisions. The Court stated
Q that the use of a screen was prejudicial to the defendant even where an
R appropriate direction was given and went on to emphasise that the decision
S for the use of a screen for a witness was within the discretion of the judge
T but should only be used in the most exceptional cases where an adult was
U giving evidence. Given the reliance placed on this decision, I set out the
V relevant part of the judgment of the court given by Farquharson LJ where he
states:

² At pp 40-41.

A “ The provision of such screens had become more frequent during
B the past few years. Generally speaking the point was to protect
the witness from any form of eye contact or sense of presence of
the person charged.

C Such cases had, generally, been confined to children giving
evidence but screens had been used with adults.

D Undoubtedly a judge had a discretion whether he would allow
such a protective unit to be put in place. It was his duty to ensure
E that justice was done. If that could not be achieved without the
witness having some form of protection, it was appropriate for the
F judge to make the necessary order, see *R v X Y and Z* ((1989) 91 Cr
App R 36).

G While one could see the risk that might arise where children were
concerned, they might be inhibited or overawed in court, such
protection was not obvious where a witness concerned was adult.

H There could be little doubt that the use of screens was prejudicial
to the accused person, even where a jury was properly warned not
I to make any assumptions adverse to that person about the presence
or use of the screen. The very fact that screens were being
employed suggested to a jury that there was need for the witness to
J be protected in some way from any contact, even only visual
contact, with that person. He was to some extent at a disadvantage
K in as much as such protection was, at any rate, considered to be
desirable.

L Accordingly, in their Lordships’ judgment it should only be in
most exceptional cases that such apparatus should be used when an
adult was giving evidence. By no means every case of rape or
M prosecution for sexual offences should involve the use of screens.

N The present case involved a woman aged 21 having to give
evidence of an exceptionally unpleasant kind, involving multiple
O rape. The judge gave the jury the necessary warning. The
decision was undoubtedly very much in the judge’s discretion and
it was impossible to say that the discretion was exercised
unlawfully or in a way which could not reasonably be supported.”

P 7. The third case is *R v Foster* [1995] Crim LR 333, where at trial
Q a screen was used to separate the witness from the defendant. The English
R Court of Appeal explained that the comments in *Cooper and Schaub* were
not intended to depart from the test in *X, Y and Z*, namely that is was the
S judge’s duty to endeavour to see that justice was done. The Court held that
T a warning to the jury not to read anything adverse to the defendant into the
U fact that the witness was giving evidence from behind a screen resulted in no
V

A real danger of prejudice to the defendant. In the commentary to the case, it
B was clear that the underlying concern of the courts was the impact this
C would have on the right of confrontation, and the case of *R v Taylor and*
D *Crabb* [1995] Crim LR 253 was referred to where the prosecution sought a
E witness to give evidence anonymously. In that case, the Court agreed that
F “the fundamental right of a defendant to see and know the identity of his
G accusers” should only be denied in rare and exceptional circumstances but
H went on to point out that the matter was pre-eminently one for the discretion
I of the judge. It was noted that the Court in the present case saw little
J strength in the argument that screens were *per se* prejudicial to the defendant
K because the jury may draw the inference that the witness requires protection
L from him. It was also noted that as the use of screens became more
M common and people got used to them, the Court considered that the jury
N would eventually be no more inclined to draw an inference from a screen
O around the witness than from the fact that the defendant appears in the dock.

8. There is another case that is worth mentioning and that is *R v*
L *Paul T*, Action No 2000/1263/Y1, 13 November 2000, unreported, which
M also involved a screen being placed between the complainant when giving
N evidence and the defendant. The Court held in those circumstances that an
O appropriate warning by the judge was sufficient to avoid any unwarranted
P prejudice to the defendant. The Court explained:

“ 16. The warning that he promised to give and that he did give
Q was this. The screens were simply there to allay the anxiety of a
R witness who was giving delicate evidence, and it was not unusual
S for screens to be used and that their use must not be held against
T the defendant. In our judgment, that was an entirely satisfactory
U warning for the jury to be given.

17. In the experience of this Court in recent years there has been
S no reason to doubt the efficacy of such warning. It is the
T evidence upon which juries focus in trials of this nature and not the
U trappings of the courtroom. Of course the court must be alive to
V the dangers of prejudice, but an astute jury will recognise that the

presence of a screen is entirely consistent with the innocence of a defendant. There is no reason to believe that this jury was distracted from the real nature of its task, which was to weigh up the evidence before deciding whether it was sure of the prosecution's case. We have concluded that there is no reason to doubt the safety of these convictions...."

9. As is apparent from the brief analysis of these cases, they are concerned with a situation where the witness is screened from the defendant and therefore engage the right of the accused to face his accuser. That is not the situation here. The witness is to be screened from the public. It does, however, raise the principle of open justice which I will address, but before I do, I will set out the arguments advanced by the defendant in opposing this application.

Defence opposition to a screen

10. Mr Trevor Beel, for the defendant, argues that it is not suggested that the complainant is a vulnerable witness, and within the provisions of Part IIIA of the Criminal Procedure Ordinance, Cap 221, and therefore she is not entitled to the treatment that she seeks. He argues that where a person is outside these provisions, the prosecution should establish a proper basis for seeking to depart from the normal procedures under which a witness testifies before a jury. He contends that once a proper foundation has been laid for the application by supporting medical evidence, it is then for the defence to raise the issue of prejudice, whereupon the Court in deciding the application is to strike an appropriate balance to ensure a fair trial. He further contends that the offence of rape does not per se give rise to the complainant having a special status as a witness other than the anonymity protection under ss 156 and 157 of the Crimes Ordinance.

11. I have no hesitation in rejecting these arguments. They are not only misconceived but also ill-founded and without support in the

A modern context. These arguments fail, in that they presuppose there is a
B prejudice to the defendant, and misunderstand the concept of a fair trial.
C As I have pointed out, the cases relied on in opposing this and previous
D applications, deal with a screen between the witness giving evidence and the
E defendant. This is not the case here. It is a request to put up a screen
F between the witness giving evidence and members of the public. In such
G circumstances, there is no prejudice to the defendant, and as far as I am
H concerned, none can be shown. To take this reasoning to its logical
I extension, it would mean that a defendant in the dock, and even legal
J terminology, the court procedures and the courtroom setting, would be
K prejudicial against the defendant. To speak of prejudice in isolation like
L this, is really to exaggerate its effect, if any. Put in the context of the
M criminal trial process where the defendant is presumed innocent, the
N prosecution have the burden to prove its case beyond reasonable doubt, the
O defendant does not have to prove his innocence, and the jury are reminded to
P arrive at their verdict only on the evidence presented to them during the trial,
Q there is no prejudice against the defendant as claimed.

M 12. The general protection under s 156 of the Crimes Ordinance
N offered to a complainant by providing anonymity during the trial process is
O significant. Its enactment is in recognition by the legislature that a
P complainant in a sexual offence needs to be specially treated given the
Q nature of the alleged crime and the matters likely to be raised in the course
R of a trial. In addition, the court has the common law power, and the duty to
S regulate its proceedings, and in particular the manner in which witnesses
T might give their evidence, when it is necessary to meet the requirements of
U justice in a particular case. In *Hampson v HM Advocate* [2003] SLT 94, it
V was explained that in normal circumstances a witness gives evidence in
public from the witness box, makes known his or her identity, sees and is

A seen by the accused, is subject to cross examination by or on behalf of the
B accused, and has no assistance in the expression of his or her evidence. It
C was also recognised that there are witnesses who would be placed at an
D unfair disadvantage by the normal procedure, and on that account are
E regarded as vulnerable and in need of special measures to protect them and
F the courts under the common law may authorise exceptions from the normal
G procedure. It was held in that case that the enactment of legislation to
H further cater for certain categories of witnesses by authorising special
I measures for the taking and giving of evidence did not limit the continuing
J common law power. The fact that Part IIIA of the Criminal Procedure
K Ordinance, Cap 221, authorised the taking of evidence of vulnerable
L witnesses in special circumstances, does not deprive the court of the power
M to deal with persons outside these provisions under the common law.

J *Fair trial*

K 13. During the course of a criminal trial there will be occasions
L when a balance will need to be struck between competing or conflicting
M interests whilst ensuring at all times that the defendant receives a fair trial.
N In the context of a permanent stay of criminal proceedings on the ground of
O an abuse of process, in *HKSAR v Lee Ming Tee & Another* (2001) 4
P HKCFAR 133, Ribeiro PJ, with whom the other members of the Court of
Q Final Appeal agreed, had this to say about the concept of a fair trial:

P “... it is only in very unusual circumstances that a court can
Q properly be satisfied that a fair trial is ‘impossible’. The
R ‘fairness’ achievable is judged in practical and not absolute terms.
S As Brennan J pointed out in *Jago v District Court of New South
T Wales* (1989) 168 CLR 23 at p 49:

S ‘If it be said that judicial measures cannot always secure
T perfect justice to an accused, we should ask whether the
U ideal of perfect justice has not sounded in rhetoric rather
V than in law and whether the legal right of an accused, truly
stated, is a right to a trial as fair as the courts can make it.
Were it otherwise, trials would be prevented and

convictions would be set aside when circumstances outside judicial control impair absolute fairness.’

More importantly, the court’s primary endeavour is to ensure that a fair trial takes place, employing the law’s available resources, and not to abort it on the ground that fairness cannot be attained, save as a last resort.”³

14. In *AG’s Reference (No. 3 of 1999)* [2001] 1 All ER 577, Lord Steyn famously stated that:

“The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of all that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.”⁴

15. It must not be overlooked that victims have rights too. Under the Victims of Crime Charter (2007) in paragraph 6 it provides that: “Victims who have to give evidence in court shall not be made to feel intimidated by the experience.” See also The Statement on the Treatment of Victims and Witnesses (2009) at paragraph 3.5 and The Prosecution Code (2013) at Chapter 14 which provides, amongst other things:

“ 14.2 Victims of crime and vulnerable witnesses (because of age or psychological or physical condition) have special interest in the proceedings and special needs, which may affect their ability to give effective evidence if left unattended.

14.3 There is a public interest in facilitating the reporting of crime and in its effective prosecution. This may be promoted by treating such persons with respect and understanding and supporting them through the criminal justice process.”

16. In ensuring a fair trial is received by a defendant, the court is also required to ensure that fairness extends to other interests, including that of a witness. There will be occasions where the court will be required to

³ At p 150 D – G.

⁴ At p 584 g – j.

A strike a balance between, on the one hand, the rights of the defendant, and, A
B on the other, the rights of the witness. B

C 17. It is in the public interest that the courts, within acceptable C
D norms, attend to the requirements of a witness so that their ability to give D
E evidence properly and fully is not affected. E

F *Open justice* F

G 18. In *Scott v Scott* [1913] AC 417, the House of Lords affirmed G
H the general rule of the common law that justice must be administered in H
I public, although a court by reason of its inherent jurisdiction to control its I
J own procedure, may direct exceptions to that rule. To allow an exception J
K it must be shown that it was necessary in order that the due administration of K
L justice be achieved. This was succinctly stated by Lord Diplock in L
M *Attorney-General v Leveller Magazine* [1979] AC 440 at 449H: M
N
O
P

“ As a general rule the English system of administering justice does
L require that it be done in public: *Scott v Scott* [1913] AC 417. If L
M the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or M
N idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of N
O open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, O
P all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle P
Q requires that nothing should be done to discourage this. Q

R However, since the purpose of the general rule is to serve the ends R
S of justice it may be necessary to depart from it where the nature or S
T circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or T
U render impracticable the administration of justice or would damage U
V some other public interest for whose protection Parliament has made some statutory derogation from the rule. Apart from V
statutory exceptions, however, where a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified

A to the extent and to no more than the extent that the court
B reasonable believes it to be necessary in order to serve the ends of
justice.”

C 19. I do not see the principle of open justice being offended to any
D measurable degree by a witness, in the circumstances of a case of this type,
E giving evidence behind a screen so that she cannot be seen from the public
F gallery. The public cannot see her and she cannot see the public. But in
G every other respect, the proceedings are in open court. This is a limited
H restriction on the public nature of the hearing and one that appropriately
involves balancing a desire to ensure open justice, on the one hand, and the
addressing the reasonable concerns and anxieties of a witness, on the other.⁵

I 20. In a more recent case, the English Court of Appeal in *Sodiq*
J *Adejo, David Nyamupfukudza v R* [2013] EWCA Crim 41 rejected the
K argument that screens erected to prevent members of the public gallery
L seeing the witness raised the possibility that the jury would feel sympathy
M for the witness or animosity towards the defendants. The Court did not
N accept that the erection of screens in the public gallery were capable of
O causing undue prejudice to the appellant. A view with which
P I wholeheartedly agree.

Q *Entitlement to a screen*

R 21. The notion that the use of a screen between a witness and
S members of the public is prejudicial to a defendant is without foundation
T and should be soundly rejected. It is now commonplace for courts to
employ a range of protective measures for witnesses, including the use of a
screen to shield a witness from view when giving evidence, and this would
be perfectly understandable in a case where a witness has to give evidence
that could be embarrassing and sensitive for her. In the modern context,

U ⁵ See *Re Ministry of Defence's Application* [1994] NILR 279.
V

A juries would not read anything adverse to the defendant into the fact that the
B witness is giving evidence with the use of a screen. If the circumstances
C arise where a witness is to give embarrassing and sensitive evidence in a
D sexual offence case, and it has been requested that she gives her evidence
E screened from the public, there is in my view no basis to refuse such a
F request. In any event, an appropriate direction to the jury will allay any
concerns from the defendant. Victims are part of the criminal process and
fairness to them is of equal importance for a fair trial.

G 22. For the avoidance of any doubt, I do not see any need in a
H sexual offence case for a complainant to support an application by obtaining
I and producing medical evidence. A similar view was taken by the New
J Zealand Court of Appeal in *R v Mussa* [2010] NZCA 123 where they
K rejected the requirement for expert evidence from a social worker or a
L psychologist to support an application for the complainant in a rape case to
M give her evidence screened from the defendant. The Court said “We are
N loath to require Judges to undertake an extensive process involving expert
O evidence in every case of this kind.”⁶ It is enough for a complainant to
P express his or her concerns about giving evidence which should be readily
accepted by the courts given that allegations of sexual violence or abuse
raise embarrassing and sensitive matters for a complainant, and if a
complainant wishes to give his or her evidence screened from the public, she
or he should be allowed to do so.

Q *Conclusion*

R 23. Let me summarise the issues and my views in relation to them.

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U ⁶ At para49.
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(1) The right to confront your accuser is engaged when a witness is screened from the defendant but is not engaged when a witness is screened from the public. Even in such circumstances when it is engaged, it is generally viewed that any prejudicial effect is cured by an appropriate direction to the jury. In a case where a witness is screened from the public there is no undue prejudice to the defendant.

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(2) The principle of open justice is engaged when a witness is screened from the public. There is a limited restriction to the public nature of the proceedings and the courts will have to balance that limited restriction against the rights of a witness, taking into consideration the nature of the evidence to be given by the witness and the effect it will have on him or her in giving such evidence, and that this is necessary in order to achieve the due administration of justice.

(3) A fair trial involves fairness to the defendant, the witnesses and the public. The rights of victims and witnesses are recognised and are an important consideration in the criminal trial process. It is part of the court's function to regulate its proceedings and to employ appropriate measures to ensure that a witness's ability to give effective evidence is not affected and this will serve the public interest to encourage generally witnesses to come forward to testify in criminal trials.

(4) A complainant in a sexual offence will more than likely be giving evidence that is embarrassing and sensitive. That alone justifies allowing the complainant to give evidence screened from the public in order to achieve the due administration of

A justice. An appropriate direction to the jury can be given that
B they do not read anything adverse to the defendant by the use of
C the screen.

D 24. It is quite apparent from the foregoing that a defendant's right
E to a fair trial is not jeopardized or prejudiced by addressing the reasonable
F concerns and anxieties of a witness in a case concerning a sexual offence.
G It is imperative that witnesses come forward and give evidence, and feel
H assured that appropriate measures will be put in place to lessen the trauma
and the anxiety in giving evidence in such cases. The criminal justice
system is equipped to ensure that there is fairness to all.

I 25. For the reasons I have given, I grant the application by the
J prosecution.

K *Proposed direction*

L 26. I propose to give a direction to the jury at the time the
M complainant gives her evidence in the following terms and to repeat them in
my summing up to the jury.

N "Please do not read anything adverse to the defendant into the fact
O that the witness is giving evidence with the use of a screen. The
P purpose of the screen is to shield the witness from public view to
Q give evidence about matters that are embarrassing to her. Please
R be reminded, you are to decide the case on the evidence before
S you."

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27. I invite submissions from counsel as to the proposed terms of the direction and when it should be given.

(Kevin Zervos)
Judge of the Court of First Instance
High Court

Mr John Marray, counsel on fiat for the prosecution
Mr Trevor Beel, counsel for the defendant

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Overseas Experiences on Provision of Screens for Witnesses of Sexual Offence Cases

United Kingdom

The complainant in respect of a sexual offence would be automatically eligible for assistance by virtue of s.17(4) of the Youth Justice and Criminal Evidence Act 1999 unless the complainant chooses to opt out.

The court would then, on application of a party or on its own motion, determine what special measures or measures are appropriate for the eligible witness and make a special measure direction in accordance with s.19.

The use of screening as a special measure is provided for in s.23.

New Zealand

In New Zealand, no witnesses would be automatically entitled to testify in an alternative way and the judge must make a discretionary judgment on a case-by-case basis in accordance with the criteria set out in s.103 of their Evidence Act 2006.

Screening a witness from the accused or other specified person would be possible under s.105.

Canada

Under s.486.2(2) of the Criminal Code, a discretionary order may be made for the use of testimonial aid (e.g. witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused) in relation to any adult witness if it is necessary to obtain a full and candid account of the acts complained of.

Australia

In New South Wales, under the Criminal Procedure Act 1986, a complainant giving evidence for a prescribed sexual offence is entitled to (but may choose not) to give that evidence by alternative arrangements made to restrict contact (including visual contact) between the complainant and the accused, including the use of screens or planned seating arrangements. It appears that the court has no discretion to disallow the complainant's entitlement to use a screen.

In Victoria, a complainant in a sexual offence is a protected witness under the Criminal Procedure Act 2009 and entitled to an array of protective measures. If evidence is to be given in the courtroom by a complainant in a sexual offence, the court must direct that a screen be used to remove the accused from the direct line of vision of the complainant unless the complainant opts out.

In Queensland, s.21(A) of the Evidence Act 1977 provides that a witness who, in the court's opinion, would be likely to suffer severe emotional trauma or would be likely to be so intimidated as to be disadvantaged as a witness may be declared a "special witness". Among other measures, the court may order that the accused be obscured from the view of the special witness.

In Tasmania, the use of screens is governed by common law. The Tasmania Supreme Court held in *R v Sparkes* that the imposition of a screen between the complainant witness and the accused so that they cannot see each other was permissible and no prejudice was caused to the accused.

(Source: Department of Justice)