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Panel on Administration of Justice and Legal Services

Meeting on 22 June 2015

Background brief on reform of the current system to determine whether an offence is to be tried by judge and jury or by judge alone

Purpose

This paper provides background information on the current system to determine whether an offence is to be tried by judge and jury or by judge alone and an account of past discussions of the Panel on Administration of Justice and Legal Services ("the Panel") on the subject.

Background

Venue of trial

2. In Hong Kong, there are two modes of trial: by a judge or judicial officer alone, which takes place in the District Court ("DC") 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 DC 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 DC 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 of the Ordinance.

4. Article 81 of the Basic Law ("BL") provides, inter alia, that the judicial system previously practised in Hong Kong shall be maintained. BL86 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[1] that neither BL nor the Hong Kong Bill of Rights Ordinance (Cap. 383) confers on a defendant the right to choose a trial by jury.

Review of venue to trial

5. The issue of whether there should be jury trials in the DC was previously raised by the Panel in March 1997, and the Administration explained to the Panel the reasons for not extending the jury system to the DC. 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.

6. Issues concerning the function of the prosecutions in determining the venue for trial and whether the jury system should be extended to the DC were discussed at the Panel meeting on 28 June 2010. In the paper submitted by the Administration to the Panel for the discussion (LC Paper No. CB(2)1889/09-10(06)), 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. In gist, the court:

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1 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 *DavidLam Shu-tsang & another v Attorney General* CACV42/1977.

(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 DC 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 Panel Chairman requested the Department of Justice ("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.

8. Follow-up discussions between the Prosecutions Division ("PD") of DoJ and both branches of the legal profession have since taken place. According to DoJ, both sides acknowledged 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. To this end, the factors for deciding the venue of trial were consequentially expanded which were set out in paragraphs 8.2 to 8.4 of the the Prosecution Code published in September 2013. 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;"

Special emphasis is also given in the latest guidelines regarding how the venue of trial is to be decided by the prosecution authority. The concluding passage of paragraph 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 <u>most appropriately</u> with the matter and impose an adequate sentence to address the criminality involved in the conduct. …" (*emphasis added*)

9. Relevant extracts of the Prosecution Code (paragraphs 8.2 - 8.4) are in **Appendix I**.

Recent discussion

10. At the meeting of the Panel held on 22 April 2014 to discuss the latest development regarding 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", the Hong Kong Bar Association ("the Bar Association") considered that as the subject under discussion was a matter of substance and not a matter of procedure, it was necessary for the Panel to re-visit the subject so that the relevant parties could provide a detailed paper for members' further consideration. Issues such as the meaning of "trial by jury", the decisions of the courts and views of other jurists on the subject, the dialogue between the Bar Association and the Director of Public Prosecutions ("DPP") and the latest developments in international law regarding the matter in the last four years should be explored by the Panel.

11. The Bar Association pointed out that the paper from DoJ (LC Paper No. CB(4)569/13-14(04)) had presented the view of PD only. Over the last four years, despite some of the discussions of the Bar Association with DPP had been taken up and reflected in the new PC, there were still a lot of inadequacies in the current system to determine whether an offence is to be tried by judge and jury or by judge alone and these were made known to DPP in January 2014 after the publication of the new PC. The following deficiencies in the new PC were highlighted:

(a) there was no indication of the importance of jury trials in the new PC which should provide guidance to the public as well as junior prosecutors who were relatively inexperienced about the selection of trial venues and jury trials;

(b) paragraph 8.4 (a) to (i) of the new PC were mere statements which did not provide any guidance, indications or examples on how each should be applied and this might lead to arbitrariness and a lack of consistency in PD's decision-making on the venue for trial. A prosecutor making reference to the new PC would not be able to see how each factor should be weighed in favour of either a jury trial or a DC trial;

(c) the handling of cases which involved allegations of dishonesty were not specifically addressed in the new PC; and

(d) there was no mention of the issue of representations from defendants in the new PC.

12. DoJ responded that DPP had discussed and exchanged views in writing with the Bar Association in early 2014 on its concerns over the matter.

In particular, DPP assured that PD would continue to take into account defendants' representations with regard to the trial venue albeit this was not provided for in the new PC. Regarding the contention that the new PC was largely a duplicate of the previous Statement of Prosecution Policy and Practice, DoJ pointed out that four new factors (listed under paragraphs 8.4(d) to (g)) were added as a result of a serious attempt to encapsulate the various suggestions made by the legal profession over the discussions. For example, paragraph 8.4(g) had addressed the Bar Association's concern regarding the matter of dishonesty as it was stated that "the prosecution should have regard to whether or not issues arise for determination that require the application of community standards and/or values", and honesty was a community value. Regarding whether defendants who were professionals or holding positions of high public status should be tried in CFI, DPP was of the view that the public or social status of the defendant should not be a factor in its own right for deciding the venue for trial.

13. On the Bar Association's suggestion of setting out in the PC the clear meaning of trial by jury and its importance in the common law system, DoJ responded that the matter of whether there existed a common law right for a trial by jury was in any event overtaken by the introduction of a Bill in 1952 to set up the DC, which had completely changed the legal system and trial mechanisms of Hong Kong. Neither the BL nor the Bill of Rights Ordinance (Cap. 383) currently in force in Hong Kong conferred on a defendant the right to select trial by jury. The judgments made by the courts in the case of *Chiang Lily v Secretary for Justice* had also confirmed that there was no right or entitlement for a trial by jury. Hence, DPP expressed reservation on the Bar Association's suggestion of including in the new PC the principles underlying the jury systems in other common law jurisdictions as they were no longer applicable to Hong Kong.

14. A member opined that fair trial was the guiding principle of the administration of justice and legal services. He referred to one of the main reasons of the Administration for not introducing jury trial into the DC in 1952 when only English was used in courts, viz, there were not sufficient eligible persons to serve as jurors in the DC. With the increased use of Chinese as an official language in courts after 1997 and the enhanced education level of the general public, the extension of jury trials to the DC could be explored. The member also opined that it did not appear to him that there was any impediment under BL81 and 86 to introduce jury trials into the DC.

15. Another member was of the view that the circumstances under which the principle of trial by jury previously practised in Hong Kong might have changed. For example, the number of jurors had already increased from some 20,000 in 1977 to more than 600,000 in 2014. The supply now could meet the

increase in demand for eligible jurors to service trials in the DC if necessary. She cited the judgment of a Court of Final Appeal case involving BL86 as follows:

> "The article in question, Article 86, speaks of the principle of trial by jury being maintained as previously practised in Hong Kong. But of course "as it was previously practised in Hong Kong" was according to specific factual circumstances then and those circumstances have changed. "As previously practised", of course, goes to something more fundamental than the exigencies of any particular situation in history; for example, how many jurors there were in 1977 as opposed to how many jurors there are now."

16. Members were of the view that the fact that BL86 provided that the principle of trial by jury previously practised in Hong Kong should be maintained should not be understood as impeding any improvements to be made to the system previously practised. DoJ was urged to draw reference from different countries/jurisdictions, in particular those under the common law system, to assess the pros and cons of having the jury system, and to adopt a more open attitude in studying the matter and improving the jury system.

17. In closing, members agreed that the Panel should further discuss the issue when the parties concerned had prepared detailed submissions.

Latest position

18. The Panel will 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" at its meeting scheduled for 22 June 2015.

Relevant papers

19. A list of relevant papers is in **Appendix II**.

Council Business Division 4
Legislative Council Secretariat
16 June 2015

Appendix I

Relevant Extracts of the Current Prosecution Code published in September 2013

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8. Charging Practice and Procedure

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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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Appendix II

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

List of relevant papers

Committee	Date of meeting	Paper
Panel on Administration of Justice and Legal Services	28.6.2010 (Agenda item V)	Agenda Minutes of meeting [LC Paper No. CB(2)2188/09-10] http://www.legco.gov.hk/yr09-10/english/panels/ajls/minutes/aj20100628.pdf Administration's paper on "Trial in the District Court" [LC Paper No. CB(2)1889/09-10(06)] http://www.legco.gov.hk/yr09-10/english/panels/ajls/papers/aj0628cb2-1889-6-e.pdf
	22.4.2014 (Agenda item IV)	Agenda Minutes of meeting [LC Papper No, CB(4)843/13-14] http://www.legco.gov.hk/yr13-14/english/panels/ajls/minutes/aj20140422.pdf Administration's paper on "Reform of the current system to determine whether an offence is to be tried by judge and jury or by judge alone" [LC Paper No. CB(4)569/13-14(04)] http://www.legco.gov.hk/yr13-14/english/panels/ajls/papers/aj0422cb4-569-4-e.pdf

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