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Panel on Administration of Justice and Legal Services

Meeting on 27 June 2016

Background brief on measures for handling sexual offence cases and provision of screens for complainants in sexual offence cases during court proceedings

Purpose

This paper provides background information on measures for handling sexual offence cases and provision of screens for complainants in sexual offence cases during court proceedings and provides an account of the past discussions of the Panel on Administration of Justice and Legal Services ("the Panel") on these measures and related issues.

Background

Measures adopted by the Hong Kong Police Force ("the Police") in protecting victims during investigation of sexual violence cases

2. The Police have put in place various measures to protect the victim when they investigate sexual violence cases. The measures include:

- (a) Upon receiving a sexual violence report, interview the victim as soon as practicable in private by a police officer of the same sex trained in dealing with sexual violence victims. The victim may be accompanied by a relative or friend;
- (b) Adopting the "one-stop" service model to speed up the process of investigation, thus reducing stress to the victim. In line with the multi-agency and cross-sectoral approach, sexual violence victims

receive 24-hour quality support service by referral to relevant governments and non-governmental organisations. Designated social workers will be responsible for coordinating various departments or units to provide support service to the victims with the aim to reducing their harm;

- (c) If the victims of sexual violence are children under 17 years old, or Mentally Incapacitated Persons, their statements are video recorded in "Vulnerable Witness Interview Suites". The video recording may, with the leave of the court, be presented as evidence in court;
- (d) Providing training on various sex violence related issues (such as, handling domestic sex violence incidents, handling victims' psychology and conflict management) to frontline police officers at various stages of their career. Ad-hoc seminars will also be organised for them to enhance their professional sensitivities and update their knowledge with the latest changes in laws and procedures; and
- (e) Reviewing the procedures for dealing with sex violence cases contained in the *Force Procedures Manual and Criminal Investigation Manual* regularly to identify areas for improvement.

Measures adopted by Prosecutions Division of the Department of Justice ("DoJ") in handling victims in sexual offence cases

3. DoJ and its prosecutors committed to providing the highest level of service and support to victims and witnesses. The measures taken by prosecutors to protect the privacy and address the psychological impact of victims and witnesses in sexual offence cases include the following:

- (a) **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. To help the witnesses, prosecutors will, to the extent that this is practicable and/or necessary:-
 - (i) seek to expedite the processing of cases, particularly those involving children and other vulnerable witnesses. If a case concerns a vulnerable witness, the prosecutor is under a duty to remind the court that the Practice Direction PD9.5 'Evidence by way of live television link or video recorded

testimony' requires it to be given priority for listing purposes;

- (ii) ask the court to set a date for trial which is as convenient as possible to witnesses;
 - (iii) ask the police to arrange a visit to court for children or mentally incapacitated witnesses before trial;
 - (iv) ask the court to allow the use of screens to shield the witnesses from the accused while testifying in court;
 - (v) apply to the court the use of two-way closed circuit television to enable witnesses to give evidence outside the courtroom through a televised link to the courtroom;
 - (vi) apply to the court for an order, if necessary, that the identity of witness(es) other than that of the victim of a sexual offence himself/herself (which is already protected under section 156 of the Crimes Ordinance, Cap. 200) shall remain anonymous;
 - (vii) apply to the court for a gag order;
 - (viii) ask the court for closed court hearings.
- (b) **At trial**, prosecutors will:-
- (i) seek to keep the waiting times for witnesses to a minimum;
 - (ii) take steps to ensure that personal particulars of victims and witnesses, such as addresses, telephone numbers and email addresses, are not necessarily disclosed in open court;
 - (iii) object to defence questioning which is abusive or unjustifiably intrusive or aggressive;
 - (iv) ask the court, when appropriate, to release a witness who has testified, or is no longer required.
- (c) **Upon conviction/At sentencing stage**, when the victim has been harmed or has lost property, prosecutors will:-

- (i) ensure the court is aware of the consequences of the offence, and if appropriate, ask the court to obtain the latest medical or other relevant reports on the victims;
 - (ii) furnish the court with updated factual information as to the impact of the harm caused to the victim;
 - (iii) make an application, in an appropriate case, for a compensation order and/or restitution order.
- (d) If the case reaches the **appeal stage**, counsel appearing for the prosecution will continue to take measures to ensure that the anonymity of the victim is protected and not mentioned either in open court or in the any judgment to be delivered or handed down by the court.

Measures adopted in protecting victims or witnesses of sexual offence cases during court proceedings

4. There are various measures that are available to ensure the victims or witnesses of sexual offence cases have the necessary privacy and protection during the court proceedings. Generally speaking, the measure(s) will be used where it is satisfied that they are required for the administration of justice and fair adjudication.

(A) *Statutory measures*

(a) *Anonymity of complaints*

5. Section 156 of Cap. 200 provides protection to prevent the identification of the complainant of sexual offence cases who may be the victim or witness.

(b) *Power of exclusion and closed court*

6. The prosecution would apply on behalf of a victim or witness to a criminal court for excluding the public from the proceedings and/or for the proceedings to be held in camera under the following legislative provisions:

- (i) Section 122 of the Criminal Procedure Ordinance, Cap. 221 provides a judge or a magistrate with the power to order the exclusion from the court in which he sits of members of the public where proper administration of justice so requires; and

- (ii) Under section 123(1) of Cap. 221, the court may order the whole of proceedings before it in respect of any offence or any appropriate part of such proceedings to be taken place in a closed court having regard to the reason for making such an order.

(c) *Non-disclosure of identity of victims or witnesses*

7. Pursuant to section 123(2) of Cap. 221, the court may order that no question shall be put to any specified witness in the proceedings before it if the answer thereto would lead, or tend to lead, to disclosure of the name and address of the victim or any witness in the proceedings.

(d) *Prohibition on taking photographs, etc. in court*

8. Under section 7 of the Summary Offences Ordinance, Cap. 228, no one shall be allowed to take or attempt to take any photograph, portrait or sketch of any person in court.

(e) *Special Measures for child victims or witnesses*

9. If the victim of a sexual offence case is a child under 17 or 18 years of age (as the case may be), the court may make special arrangements for them as a vulnerable witness under Cap. 221. In accordance with section 79C of Cap. 221, the court may allow the video recording that has been made of an interview between the child and a police officer or a social worker/ a clinical psychologist who is employed by the Government be admitted and used as evidence in the proceedings. In accordance with section 79B of Cap. 221, the court may also permit the child to give evidence or examined by way of a live television link. In accordance with section 79E of Cap. 221, where a child is to give evidence in proceedings and in respect of such proceedings, a party to the proceedings may apply for leave for a deposition in writing to be taken from the child by a magistrate.

(B) *Administrative Measures*

10. In addition to the above statutory measures, the following administrative measures can also be resorted to by the court in protecting the victims or witnesses of sexual offence cases:

- (a) Banning of shooting and recording in the court;
- (b) Provision of screen when a victim or witness gives evidence in courtroom. The court, upon the application of the prosecution,

may arrange for a screen to be placed around the victim or witness so that the public or the press will not be able to view or identify the victim or witness during the related proceedings (the current arrangement and the proposal with regard to the provision of screens for complainants in sexual offence cases during court proceedings are set out in more details in paragraph 11-24 below);

- (c) Provision of special passage for the victim or witness to enter/leave the court building upon the application of the prosecution, where the circumstance warrants;
- (d) Making special arrangement in respect of daily cause list to prevent identification of the victim or witness;
- (e) Making special arrangement for child victims or witnesses. For instance, cases involving child victims or witnesses will be given priority for listing purpose and that postponement would be avoided as far as possible on the day of trial in order to avoid child victims or witnesses being burdened with additional stress.

Provision of screens for complainants in sexual offence cases during court proceedings

Current arrangement

11. 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. At common law, the court would exercise its judicial discretion on a case-by-case basis.

12. 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. Such measures may include placing a screen around the complainant in a sexual offence case during related proceedings so that the complainant will not be able to see the accused and/or the public and the press will not be able to view the complainant.

13. Whether a screen should be deployed during court proceedings is a matter subject to judicial discretion. The discretion is exercised as part of the court's common law duty to endeavor to see that justice is done and is seen to be done in the case.

14. In the past, such screen was generally provided by the prosecution.

Nonetheless, in view of the recurrence of such requests and the need for consistency, arrangements have been made for their procurement to be centrally co-ordinated and provided by the Judiciary since June 2013. At present, screens are available in High Court, the District Court and the seven Magistrates' Courts.

The proposal to provide screens automatically for complainants in sexual offence upon the application of the prosecution

15. Following the visit to the Judiciary on 3 December 2013, the Panel proposed to the Judiciary that complainants in sexual offence cases should be shielded behind during court proceedings upon applications from the prosecution. The Judiciary took that this proposal in effect mean that such screens should be automatically provided as a matter of course upon the application of the prosecution.

16. Having consulted DoJ, the Judiciary considered that the following factors would be relevant in examining the proposal of whether a screen should be automatically provided for complainants in sexual offence cases upon the application by the prosecution ("the Proposal"):

- (a) The right to a fair and public hearing is guaranteed by Article 10 of the Hong Kong Bill of Rights;
- (b) Any restriction on the right to fair trial must meet the requirements in Article 39 of Basic Law: "... The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless prescribed by Law..."
- (c) The role of a trial judge in balancing the rights and interests of the accused, the prosecution, the complainant and the community at large when deciding on the use of a screen.

17. As advised by DoJ, the Proposal appears to be a departure from the common law position as it now stands in Hong Kong. As the 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 can be met. In other words, if the court chooses to provide screen on an automatic basis for complainant in sexual offence cases upon application without statutory backing would be perceived to be in breach of the principles set out under Article 10 of the Hong Kong Bill of Rights and Article 39 of Basic Law.

Options considered by the Judiciary

18. In examining the Proposal, 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 the prosecution's applications;
- (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)

19. The proposal 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 Cap. 221 to include complainants in sexual offence so that the use of live television link can be made available to them on a mandatory basis.

20. As this option essentially involves legislation, the Judiciary takes the view that this cannot be determined by the Judiciary alone and that consultation and in-depth deliberation by the public may be needed.

Option (b)

21. The Judiciary considers that the procedures for processing the application for the use of screen (initiated by the prosecution) 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 standing procedure, the counsel to advise the presiding judge on whether the complainant has requested a screen and whether the prosecution considers it appropriate to make such an application.

22. The introduction of the measure under this option 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 considers that as the circumstances of each case are different and thus 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. In any event, the judgment of the High Court Case HKSAR V SHAMSUL HOQUE (HCCC379/2013) would serve as a precedent for cases in other courts with similar circumstances.

Way forward proposed by the Judiciary

24. 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.

Discussions of the Panel

25. At its meeting held on 28 May 2013, the Panel discussed the handling of sexual offence cases. The Hong Kong Committee on Children's Rights, Against Child Abuse, Association Concerning Sexual Violence Against Women, Rainlily, OIWA Limited and Hong Kong Bar Association ("the Bar Association") also attended the meeting to give views on the subject. Written submissions had been received from four of the above deputations as well as Dr Monit CHEUNG of Graduate College of Social Work of the University of Houston and Association for Concern for Legal Rights of Victims of Domestic Violence. At the Panel meeting held on 26 January 2015, the Panel discussed the provision of screens for complainants in sexual offence cases during court proceedings. Major deliberations are set out in the ensuing paragraphs.

26. With respect to the disclosure of victims' previous sexual experience in the cross examination of witnesses, the Bar Association noted that restrictions could be placed in the criminal justice process to avoid unjustifiably intrusive or aggressive questions. Nonetheless, the Bar Association pointed out that the right to a fair trial should never be impaired by these restrictions, albeit the rights of young children, the rights of liberty and security of a person were to be respected. The Bar Association added that there was room for improvement during the pre-trial review. Specifically, the Prosecutions Division could proactively seek to apply for the provision of screen to shield the victim at trial, and other necessary provisions for the purpose of protecting the privacy of the victim.

27. A member questioned why the victims would not be provided with screen at trial unconditionally, without the need for making an application with the judge. Another member was of a strong view that the provision of screen to shield victims of sexual offence cases at trial should be made a standard provision.

28. DoJ responded that in terms of the application procedure, the Police was responsible for gathering the necessary information for reference of the Prosecutions Division and the Prosecutions Division was responsible for preparing the application to be submitted to the judge before the trial. According to the law, the decision as to whether a screen should be provided for a particular witness in a case rested with the judge.

29. To ascertain how often victims of sexual offence cases were provided with screen at trial, a member asked about the number of applications for the provision of screen at trial in the past five years, and the number of applications being approved. [The response from DoJ on 25 February 2014 was issued to members vide LC Paper No. CB\(4\)435/13-14\(01\).](#) The information on the number of applications received from the prosecution for the use of screens for sexual offence cases at different court levels from 1 June 2013 to 31 December 2014, including those that had been granted/ refused was available at paragraph 6 of [the Judiciary Administration's paper \(LC paper No. CB\(4\)367/14-15\(05\)\)](#).

30. A member asked whether consideration could be given to arranging video recording when taking statement of the victims of sexual offence cases.

31. The Police responded that for victims under 17 years old or mentally incapacitated persons, their statement were video recorded for presentation in court and that only under special circumstances, the Police or the relevant professionals would have to seek further information from the victims when some crucial information was missing from the previous statement taken of them.

32. The member disagreed that a victim of sexual offence cases had to render proofs of being a vulnerable witness. He urged the DoJ to review the relevant provisions in the law. He enquired whether consideration could be given to adopting a checklist for the Prosecutions Division to ensure that particular questions were deliberately asked during the pre-trial review of the cases. Another member shared similar view and urged the Prosecutions Division to take a more proactive approach when reviewing the needs of victims of sexual offence cases before the trial, having regard to the procedural

fairness and quality of the victims' testimony.

33. Noting members' concern over the protection of victims of sexual offence cases, the Police agreed to take a more proactive approach in considering and preparing for the application for the provision of screen at trial for such victims.

34. A few members expressed concern about the "one-stop" service model and the Police was requested to submit further information about its operation. [The response from the Security Bureau on 11 July 2013 was issued to members vide LC Paper No. CB\(4\)896/12-13\(01\).](#)

35. At the Panel meeting on 26 January 2015, the Judiciary briefed members on the current arrangements of the provision of screens for complainants in sexual offence cases during court proceedings and the Judiciary's position on the three options, option (a)-(c), as set out in paragraph 18 above.

36. The Bar Association was in favour of option (b). The Bar Association considered that the adoption of option (b) should not undermine the unfettered exercise of judicial discretion. First, it had long been the practice in Hong Kong courts to provide some protection to not just victims of sexual offence cases but of other types of cases such as blackmail cases. Second, under Part IIIA of Cap. 221, vulnerable witnesses had been allowed to give evidence by way of a live television link in criminal proceedings for over 20 years. The Bar Association supplemented that many other common law jurisdictions, such as Canada, New Zealand and Australia, had the long tradition of providing protection to victims of sexual offences, including the use of a screen to shield the victim to prevent him/her from facing the defendant during court proceedings.

37. A few members expressed dissatisfaction that no progress had been made in providing screen automatically for victims of sexual offences during court proceedings. A member also considered that despite the adoption of option (b), option (a) should still be pursued. Another member shared the view that option (b) should be adopted first, whilst option (a) should continue to be pursued. In its written submission, the Association Concerning Sexual Violence Against Women also considered that prior to adopting option (a), option (b) should first be adopted.

38. The Judiciary responded that as the adoption of option (a) required legislation and that the decision on whether or not to introduce a legislative proposal to effect rested on the Administration. The Judiciary supplemented that the work of revising Practice Direction - 9.3 and Practice Direction 9.4

was being expedited for the early adoption of option (b).

39. A member suggested that it should be made clear in the revised Practice Direction 9.3 and Practice Direction 9.4 that the counsel should apprise complainants in sexual offence cases that they could request for the provision of a screen during court proceedings and the presiding judge should also ask the counsel to provide the reason(s) why the prosecution did not consider it appropriate to make an application for use of screen during court proceedings.

40. As regards option (c) to provide guidelines on the factors that the presiding judge should take into account when considering applications for use of screens for complainants in sexual offence cases, a member could not agree totally that the adoption of such option would affect adversely the unfettered exercise of judicial discretion as these guidelines would only serve as a checklist and similar guidelines were used in other court applications such as bail.

41. A member suggested to invite the Association Concerning Sexual Violence Against Women and other women's group and stakeholders to give views on provision of screens for complainants in sexual offence cases during court proceedings at a future meeting of the Panel.

42. DoJ responded that they had and would continue to discuss with the women's group on ways to improve the existing procedures for applying for the use of screens during court proceedings.

Latest position

43. With regard to the provision of screens for complainants in sexual offence cases during court proceedings, the Judiciary advised the Panel on 4 November 2015 that the following draft amended or new Practice Directions had recently been issued to the relevant parties for consultation:

- (a) Criminal Proceedings in the Court of First Instance;
- (b) Criminal Proceedings in the District Court; and
- (c) Use of Screens in Sexual Offence Cases in Magistrates' Courts.

44. The Judiciary also advised that comments on the above were expected to arrive by end December 2015. Having considered the comments, the Judiciary would consider promulgating the Practice Directions in the 2nd quarter of

2016.

45. At the Panel meeting on 22 December 2014, members agreed to discuss the following measures for handling sexual offence cases:

- (a) extending the definition of the term "witness in fear" under Cap. 221 to allow a witness falling within the expanded definition to give evidence in court under the provision of a screen or by live television link, and enter/leave the court building through special passageways;
- (b) revising section 154(1) of Cap. 200 to stipulate the criteria for granting of leave by the judge; and
- (c) enhancing training for the legal sector and the Police on the handling of sexual offence cases.

46. The Department of Justice will brief the Panel on the measures for handling sexual offence cases and the Judiciary Administration will brief the Panel on the new and amended Practice Directions relating to the provision of screens for complainants in sexual offence cases during court proceedings at the meeting scheduled for 27 June 2016.

Relevant papers

47. A list of relevant papers is in the **Appendix**.

Council Business Division 4
Legislative Council Secretariat
21 June 2016

Measures for handling sexual offence cases and provision of screens for complainants in sexual offence cases during court proceedings

List of relevant papers

Meeting	Date	Paper
Panel on Administration of Justice and Legal Services	28 May 2013 (Agenda item IV)	<u>Agenda</u> <u>Minutes of meeting</u>
	11 July 2013	<u>Response from Security Bureau on handling of sexual offence cases</u>
	25 February 2014	<u>Response from DoJ on handling of sexual offence cases</u>
	28 November 2014	<u>Letter from Dr Hon Elizabeth QUAT dated 28 November 2014 requesting to discuss the measures for handling sexual offence cases (Chinese version only)</u>
	22 December 2014 (Agenda item II)	<u>Minutes of meeting</u>
	26 January 2015 (Agenda item IV)	<u>Agenda</u> <u>Submission from the Association Concerning Sexual Violence Against Women for agenda item IV on "Provision of screens for complainants in sexual offence cases during court proceedings" (Chinese version only)</u> <u>Minutes of meeting</u>