

Measures for Handling Sexual Offences Cases
Protective Measures For Victims of Sexual Violence in the Courtroom
Draft Criminal Procedure Ordinance (Amendment) Bill 2016

Introduction

1. Our criminal justice system depends heavily on the cooperation of victims of crime in achieving effective prosecution. Their willingness to report crime and to give evidence in court is essential to initiate and maintain a due prosecution process. It has long been recognized by courts that our long-cherished concept of a fair trial covers not only fairness to the accused, but also to the prosecution and the witnesses. For example, in *R v DJX* (1990) 91 Cr App R 36, Lord Lane CJ of the English Court of Appeal explained: “[the learned judge] has got to see that the system operates fairly... fairly not only to the defendants but also to the prosecution and also to the witnesses. Sometimes he has to make decisions as to where the balance of fairness lies...”. Cheung JA of our Court of Appeal also said at para 29(4) in *HKSAR v See Wah Lun* [2011] 2 HKLRD 957: “...the Court must balance the interests of the accused and the significant public interest of witnesses giving evidence without occasioning danger to themselves or to members of the community.”

2. Sexual violence is one of the most severe and invasive forms of impairment to one’s bodily integrity and the taboo on it has not been fully broken in our society. Apart from physical harm, victims often suffer from psychological trauma and are confronted with social stigma. If they are to give evidence at a court trial, they would need to relive the traumatic experience and recount the excruciating and embarrassing details of the assault, in front of the curious public. They would need to stand against hostile and demeaning cross-examinations. They are subjected to further trauma in the judicial process. Indeed, sexual offences are strikingly underreported. RainLily, a sexual violence crisis centre established in Hong Kong, found that 87%¹ of the victims of sexual violence were deterred from reporting the incident to the police, because of the feeling of shame and embarrassment, and also the fear of being blamed or doubted by others².

¹ The statistics are compiled from RainLily’s Hotline Service Database from April 2011 to March 2013.

² The Hong Kong Women’s Coalition on Equal Opportunities conducted a Survey on Women’s Experience of Violence in Hong Kong in 2013, which revealed that victims refused to report incidents of sexual violence due to feeling of shame and embarrassment (51.5%), fear of making

3. It is regrettable that against such background, victims of sexual offences are further deterred from testifying in court because our related legislation is outdated.

Main Problem in Hong Kong

4. The main problem of the Hong Kong laws is that sexual crimes victims are NOT recognized as a special category of victims who may be granted the necessary protective procedures to facilitate their giving evidence at trial without unnecessary fear or trauma.
5. As stated by Zervos J in *HKSAR v Shamsul Hoque* ([2014] 6 HKC 395, HCCC 379/2013, 17 June 2014, at para 23(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.”

6. The position in Hong Kong may be contrasted with that in other common law jurisdictions. For example, in England and Wales and some states in Australia (e.g. Victoria, New South Wales), by virtue of the witness’s status as a complainant in a sexual offence, he/she is statutorily entitled to a range of comprehensive special procedures in court proceedings. The level of availability and diversity of protection are both higher than that in Hong Kong.
7. In England and Wales, a range of special measures are available under the Youth Justice and Criminal Evidence Act 1999 by virtue of the witness’s status as a complainant in a sexual offence³. They include screening the complainant from the accused⁴, evidence by live link⁵, evidence given in private⁶ (but the accused, legal representatives and press representatives, etc., are not excluded from the proceedings), removal of wigs and gowns⁷, video recorded evidence in chief⁸, and

the incident big (34.6%) and fear of being blamed or doubted by others (31.6%).

³ Youth Justice and Criminal Evidence Act 1999, section 17(4).

⁴ *Ibid*, section 23.

⁵ *Ibid*, section 24.

⁶ *Ibid*, section 25.

⁷ *Ibid*, section 26.

video recorded cross-examination or re-examination⁹.

8. In Victoria, Australia, under the Criminal Procedure Act 2009, alternative procedures are applicable¹⁰ to criminal proceedings related to a sexual offence. If the witness is a complainant in a sexual offence, the court must direct use of close-circuit television¹¹, use of screen¹², or presence of support person¹³, unless the complainant does not so wish.
9. In New South Wales, Australia, a complainant in a sexual offence is entitled to alternative arrangements¹⁴ under the Criminal Procedure Act 1986. These include giving evidence by closed-circuit television¹⁵, use of screens¹⁶, planned seating arrangements¹⁷, and presence of support persons¹⁸.
10. The two most helpful protective measures which many sexual violence victims need are (1) the use of screen inside the courtroom with special passage for coming into and leaving the courtroom and (2) the giving of evidence at trial by live television link (CCTV). As regards (1), I understand that there has been good progress recently and the judiciary has already prepared a draft Practice Direction on this. However, even though (2) is a well-established procedure to assist vulnerable witnesses without compromising the right to a fair trial by the defendants, unfortunately it is not available to many sexual violence victims.
11. At present, the Criminal Procedure Ordinance (cap 221) only allows the court a power to permit the giving of evidence by live television link¹⁹ in respect of three categories of vulnerable witnesses, namely, (i) child²⁰, (ii) mentally incapacitated

⁸ *Ibid*, section 27.

⁹ *Ibid*, section 28.

¹⁰ Criminal Procedure Act 2009, section 359.

¹¹ *Ibid*, section 363.

¹² *Ibid*, section 364.

¹³ *Ibid*, section 365.

¹⁴ Criminal Procedure Act 1986, section 294B.

¹⁵ *Ibid*, section 294B(3)(a).

¹⁶ *Ibid*, section 294B(3)(b)(i).

¹⁷ *Ibid*, section 294B(3)(b)(ii).

¹⁸ *Ibid*, section 294C.

¹⁹ Criminal Procedure Ordinance, Cap.221, section 79B.

²⁰ *Ibid*, section 79A.

person²¹ and (iii) witness in fear²². Complainants of sexual offence do not normally fall under any of these three existing categories of vulnerable witnesses. In the case of an adult complainant of sexual offence with normal mental capacity, the court will not have any discretion to permit him/her to give evidence by live television link provided in section 79B unless he/she is able to satisfy the court that he/she is a “*witness in fear*”.

12. A witness in fear is defined by section 79B(1) as “*a witness whom the court hearing the evidence is satisfied, on reasonable grounds, is apprehensive as to the safety of himself or any member of his family if he gives evidence.*” However, complainants in sexual offences may not necessarily be “*in fear of safety*”.

13. In many cases these complainants need special protection in giving evidence because they fear not about their safety, but about the fact that they may be seen by the public or media while going into and outside the court as well as the distress and trauma when meeting their assailants face-to-face during the trial or inside or within the vicinity of the court. Such a legitimate fear cannot be satisfactorily addressed by the use of screen (because the screen is to block the public inside the courtroom but not the defendant) or special passage (because the settings of many existing court buildings may render the arrangement of special passage ineffective in preventing the complainants from being seen by the public or media while going into and outside the court).

Proposed Stopgap Measure Pending Comprehensive Law Reform.

14. Ideally we should have a comprehensive law reform review for a holistic approach for enhancing protection for the sexual offence victims, and this should be done without undue delay. However, realistically it will take a long time for a comprehensive law reform review and the enactment of comprehensive legislative amendments. As justice delayed to these sexual crime victims is justice denied, in the interim, I believe a stopgap measure which can be easily and uncontroversially introduced should be implemented as soon as possible. At the request of RainLily, I have prepared a draft Criminal Procedure Ordinance (Amendment) Bill 2016 (see attached) in this connection.

15. What the draft Bill seeks to do is, by way of a simple legislative amendment to the

²¹ *Ibid.*

²² Criminal Procedure Ordinance, Cap.221, section 79B(1).

Criminal Procedure Ordinance (Cap. 221), to give the court a power and discretion to permit a complainant to give evidence by way of a live television link in proceedings in respect of a specified sexual offence within the meaning of section 117(1) of the Crimes Ordinance (Cap 200), in order to enhance protection to such a complainant when testifying in court.

Main Attraction of the Stopgap Measure

16. The main attraction of this proposed stopgap measure is that it can be done by a simple legislative amendment and is built upon well-established mechanism with judicial control:

(1) Section 79B of the Criminal Procedure Ordinance (which allows the court a discretion, either on application or on its own motion, to permit vulnerable witnesses to give evidence by way of a live television link) has been operating satisfactorily since its introduction in 1995 and has been held not to have contravened the defendant's right to a fair trial²³.

(2) It has also long been recognized by our legislature that complainants in some specified sexual offences should be treated as a special category of victims who deserve anonymity protection: section 156 of the Crimes Ordinance prohibits publication of any matter likely to lead members of the public to identify a complainant in respect of a specified sexual offence within the meaning of section 117(1), namely, "*rape, non-consensual buggery, indecent assault, an attempt to commit any of those offences, aiding, abetting, counselling or procuring the commission or attempted commission of any of those offences, and incitement to commit any of those offences*".

(3) What the draft Bill seeks to achieve as a stopgap measure is to expand the definition of vulnerable witnesses under section 79B to cover those sexual crime complainants who have long been recognized under section 156 of the Crimes Ordinance as a special category of complainants who deserve special legislative protection against publicity.

(4) It does not mean that all such sexual crime complainants can automatically be allowed to give evidence by way of a live television link in all cases. Judicial control is still available to balance any legitimate conflicting interests of the

²³ See e.g. *HKSAR v See Wah Lun* [2011] 2 HKLRD 957

defendants. What the draft Bill seeks to do is just to recognize these sexual crime victims as a special category of complainants deserving special protection and confer a discretionary jurisdiction on the court to permit them to give evidence by way of a live television link under a well-established procedure.

(5) Under the draft Bill, the position of these sexual crime complainants will basically be the same as that of the existing category of “*witness in fear*” under section 79B. They may be permitted to give evidence by way of a live television link but not by way of Video Recorded Interview (the latter being available only to a vulnerable witness who is either a child or mentally incapacitated person under section 79C).

17. The feedback I have received from my earlier discussions with representatives from the Bar Association, the Law Society, the Department of Justice as well as legislators from different political parties is on the whole positive and encouraging. I would therefore very much hope that the proposed stopgap measure can be introduced and implemented in the near future.

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Appendix

Criminal Procedure Ordinance (Amendment) Bill 2016

A BILL

To

Amend the Criminal Procedure Ordinance to give the court a discretion to permit a complainant to give evidence by way of a live television link in proceedings in respect of a specified sexual offence within the meaning of section 117(1) of the Crimes Ordinance (Cap 200); and to provide for related matters.

Enacted by the Legislative Council.

1. Short title

This Ordinance may be cited as the Criminal Procedure (Amendment) Ordinance 2016.

2. Criminal Procedure Ordinance amended

The Criminal Procedure Ordinance (Cap 221) is amended as set out in section 3.

3. Section 79B amended (evidence by live television link)

After section 79B(3)—

Add

“(3A). Where a complainant within the meaning of section 156(8) of the Crimes Ordinance (Cap 200) is to give evidence in proceedings in respect of a specified sexual offence within the meaning of section 117(1) of the Crimes Ordinance (Cap 200), the court may, on application or on its own motion, permit the complainant to give evidence by way of a live television link, subject to such conditions as the court considers appropriate in the circumstances.”.

Explanatory Memorandum

The main object of this Bill is to amend the Criminal Procedure Ordinance (Cap 221) to give the court a discretion to permit a complainant to give evidence by way of a live television link in proceedings in respect of a specified sexual offence within the meaning of section 117(1) of the Crimes Ordinance (Cap 200), in order to enhance the protection to such a complainant in the court.

本條例草案

旨在

修訂《刑事訴訟程序條例》，訂明在《刑事罪行條例》(第 200 章)第 117(1)條所指的指明性罪行的法律程序中，法庭可以有酌情權准許申訴人藉電視直播聯繫方式提供證據；以及就相關事宜訂定條文。

由立法會制定。

1. 簡稱

本條例可引稱為《2016 年刑事訴訟程序(修訂)條例》。

2. 修訂《刑事訴訟程序條例》

《刑事訴訟程序條例》(第 221 章)現予修訂，修訂方式列於第 3 條。

3. 修訂第 79B 條 (藉電視直播聯繫提供的證據)
在第 79B(3)條之後—

加入

“(3A). 凡一名《刑事罪行條例》(第 200 章)第 156(8)條所指的申訴人將在《刑事罪行條例》(第 200 章)第 117(1)條所指的指明性罪行的法律程序中提供證據，法庭可應申請或主動准許該申訴人藉電視直播聯繫方式提供證據，並可施加法庭認為在有關情況下屬恰當的條件規限。”。

摘要說明

本條例草案的主要目的，是修訂《刑事訴訟程序條例》（第 221 章），訂明在《刑事罪行條例》（第 200 章）第 117(1)條所指的指明性罪行的法律程序中，法庭可以有酌情權准許申訴人藉電視直播聯繫方式提供證據，從而加強法庭對申訴人的保護。