

Measures for Protecting Mentally Incapacitated Persons during Court Proceedings

Comments from the Civil Society Law Reform Committee

Introduction

1. The Civil Society Law Reform Committee (the “**Committee**”) refers to the Administration's paper on “Enhancing protection of complainants in sexual offence cases and mentally incapacitated persons during court proceedings” dated March 2017 and a letter from the Judiciary to the Panel of Administration of Justice and Legal Services on “Measures for Handling Sexual Offence Cases and the Provision of Screens for Witnesses in Sexual Offence Cases during Court Proceedings” dated 20 March 2017.
2. The Committee is an advocacy group comprising of Legislative Councillors, lawyers, academics, clinical psychologists and workers from organisations providing services to sexual violence victims. Its set-up was prompted by “The incident of the Bridge of Rehabilitation Residential Home (康橋之家事件)” in late 2016, in which the inability of a mentally incapacitated victim to give evidence in court has forced the Department of Justice (“**DOJ**”) to withdraw prosecution against the defendant of an unlawful sexual intercourse case. The Committee has produced a report which aims to provide insights into the challenges faced by vulnerable persons, including mentally incapacitated persons, in their pursuit of justice and make recommendations to protect their legal rights enshrined in international, the Basic Law and the Bills of Rights (link to the full report: <https://goo.gl/gyqfkj>) (the “**Report**”).
3. The Committee appreciates the Administration’s effort in setting out the recent development in matters related to protecting complainants of sexual offence cases and mentally incapacitated persons during court proceedings. The Committee generally welcomes the measures to be introduced, including: (1) the proposed amendments to section 79B of the Criminal Procedure Ordinance (Cap.221) to widen the definition of “witness in fear” so that complainants of a specified sexual offence will be able to give evidence by way of a live television link with the court’s permission; (2) the DOJ’s pledges to conduct regular in-house training/seminars on handling of vulnerable witnesses; (3) the DOJ’s proposal to introduce a policy coordinator for vulnerable witnesses; (4) the Judiciary’s proposal to amend certain Practice Directions so that consideration of the need for passageways will become a standing procedure in every sexual

offence in court; and (5) the Administration's pledge to initiate legal reform on hearsay evidence rules in criminal proceedings soon.

4. However, the Committee wishes to draw the attention of the Panel of Administration of Justice and Legal Services to the following two recommendations from the Report:

Application of the "Support Person" in Court Proceedings

5. It is reported that relatives or social workers are often "disallowed" from being acting as a support person for a vulnerable witness at trial. This is common, despite the existing Practice Direction 9.5 of the Judiciary does not specify that such a support person is to be a stranger to the witness, as well as Guidelines from the Social Welfare Department (the "SWD") direct workers to utilise persons from the witness's network before turning to the Witness Support Programme. The Committee therefore urges the SWD, the Police and the DOJ to explain the discrepancy between actual practice and outlined procedure; and to take necessary measures to ensure that the Practice Direction and Guidelines are being observed.
6. According to Paragraph 7 of PD9.5, "where the witness is a child or is mentally handicapped, a 'support person' may be present with the permission of the court" when a witness is giving evidence pursuant to sections 79B and 79C of the CPO. The support person cannot be a witness in the case, or been directly involved in the investigation of the case. In the case of a mentally handicapped witness, the support person should be one who has some understanding and expertise in relation to the nature of handicap.
7. In both the cases of child abuse and cases involving persons with mental disability, the support person should be sought from the witness's natural network, such as relatives, social workers and teachers, as long as they fulfilled the above requirement and is approved by the judge. The witness may apply for the Witness Support Programme when a support person from the natural network is not available.
8. A Witness Support Programme was launched by the SWD in collaboration with Hong Kong Police Force in 1996 to provide trained volunteers or staff to serve the role of support person when needed. The procedures are listed in Procedural Guide for Handling Child Abuse Cases and Procedural Guide for Social Workers on

the Handling of Mentally Incapacitated Adults Arising from the New Provisions in the Criminal Procedure (Amendment) Ordinance 1995 (the “**1995 Guidelines**”) for child abuse cases and MIP respectively.

9. The Guidelines suggests that a support person is available from the witnesses’ natural network. This is consistent with the Committee’s view that a person whom the witness has known previously and trusted could provide better emotional support than a stranger assigned by the Witness Support Program, and therefore a better support person. Meeting a stranger and having only this person to accompany the witness to testify in the AV witness room is likely to create additional stress to the witness, which in turn increases the likelihood of withdrawal from the legal procedure. Thus, the Witness Support Program should only serve as a backup when no one from the witness’ natural network can serve the support person role.

Introducing the Use of a Testimonial Intermediary to Court Proceedings

10. ‘Intermediaries’ or ‘testimonial intermediaries’ are communication specialists who can assist a witness both in understanding the questions asked and in communicating the witness’s answers. The Committee believes that having an intermediary for vulnerable witnesses can prevent miscommunication and secondary victimisation of the vulnerable witness when testifying at trial. In the Committee’s view, a capacity-based approach is recommended for determining a person’s need for an intermediary.
11. ‘Intermediaries’ or ‘testimonial intermediaries’ are communication specialists who can assist a witness both in understanding the questions asked and in communicating the answers. The use of intermediaries was introduced as early as late 1980s to early 1990s in South Africa, and is now adopted in England and Wales, Ireland, Australia and Israel and others. Taiwan is the latest jurisdiction to introduce the use of intermediaries, with its new provisions coming into effect on January 2017.
12. For example, in England and Wales, the ‘intermediary provision’ special measure for vulnerable witnesses, both defence and prosecution, is found in s.29 of the Youth Justice and Criminal Evidence Act 1999 (“**YJCEA**”). The purpose of the intermediary is to ensure that questions put to a witness and the witness’s responses. Registered Intermediaries have been facilitating communication with vulnerable witnesses in the English and Welsh since the Witness Intermediary

Scheme (the “**Scheme**”) was first introduced as a pilot project. In 2008, the Scheme was implemented nationwide and is now available through all police forces and Crown Prosecution Service offices nationwide.

13. Intermediaries are registered professionals and have to participate in continuing professional development programmes. Intermediaries are also subject to a Code of Practice, Code of Ethics and Principles of Practice; all of which can be found in the Registered Intermediary Procedural Guidance Manual produced by the Ministry of Justice.
14. To be eligible to be assisted by an intermediary, the witness must fall within the definition set out at Section 16 of the YJCEA. They must be under the age of 17, suffering from a mental disorder (within the meaning of the Mental Health Act 1983), a “significant impairment of intelligence and social functioning”; or a physical disability or disorder, such that the quality of their evidence is likely to be diminished due to the mental/physical disability or disorder.
15. Intermediaries are tasked with communicating questions to the witness and their answers. The intermediary is to explain the questions and/or answers “so far as necessary to enable them to be understood by the witness or the person in question.” (s. 29(2) of the YJCEA) They may translate the questions put to the witness and the witness’ answers while explaining the questions or responses where necessary. Judges can instruct the witness to alert the intermediary when a question in cross-examination is not understood. Intermediaries can also intervene of their own accord and flag non-comprehension of questions.
16. Like other jurisdictions that use intermediaries, where the testimony is not being conducted in the courtroom, the testimony of the witness must be visible and audible to the judge(s), jury and legal representative(s) and they must also be able to communicate with the intermediary. This example in England and Wales shows that the use of intermediaries is compatible with the traditions and rules of criminal justice in common law jurisdictions in principle.
17. The Committee understands that the introduction of intermediaries at court proceedings require amendments to the certain legal provisions and must be done without prejudicing a defendant’s right to a fair trial. The Committee is however of the view that the use of intermediaries is one of most commonly implemented statutory measures for prosecution and defence witnesses to

prevent miscommunication and secondary victimisation in courtroom, especially during cross-examination. When introducing intermediaries to court proceedings, relevant considerations will be given to the role of intermediaries, the power of an intermediary and the required qualifications of the intermediaries. The Committee strongly believes adoption of this measure will greatly enhance the protection of vulnerable witnesses in Hong Kong.

18. The Committee urges the Administration to explore the plausibility of implementing this measure as soon as possible in Hong Kong, including conducting a consultation exercise and/or introducing pilot schemes.

Conclusion

19. The Committee is of the view that the abovementioned recommendations from the Report should be considered by the Administration with priority, in addition to the measures currently undertaken by the Administration in further enhancing the legal rights and access of justice of vulnerable persons.

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The Civil Society Law Reform Committee