

Submissions by The Law Society's Criminal Law & Procedure Committee on the Consultation Paper on Pre-trial Witness Interviews by Prosecutors

The Law Society's Criminal Law & Procedure Committee has reviewed the desirability of introducing the Pre-Trial Witnessing Interview ("PTWI") scheme in Hong Kong and has the following observations:

1. The Committee noted there are pros and cons of the PTWI. The Department of Justice's Consultation Paper draws reference to the practices in other common law jurisdictions. However, the Committee does not think Hong Kong should just slavishly follow the overseas jurisdictions. The decision on whether to introduce the scheme really boils down to, at the end of the day, a balancing exercise between the potential benefits that a PTWI scheme would bring and its associated risks and limitations.
2. **The Committee does not think there is a need to implement the PTWI scheme in the Hong Kong context** for the following reasons:
 - (a) the Department of Justice's own survey of the prosecutors' views during the 9-month monitoring period does not justify a need for the PTWI scheme. The majority views obtained, i.e. that it would not have been beneficial for the prosecutors to have interviewed the witnesses in question prior to trial, indeed point to an opposite direction;
 - (b) the main objective of the PTWI scheme is to enable the prosecutor to have a first-hand opportunity to assess the credibility and reliability of witnesses so that weak cases can be weeded out at an early stage. However, this does not seem to be relevant in Hong Kong, considering the high conviction rates here, with 92.6% in the District Court and 94.8% in the Court of First Instance in year 2008, as compared with 40% of the Crown Court in England in 2007;
 - (c) to the extent that prosecutors in Hong Kong already have the written statements taken by trained law enforcement officers (this is again evidenced by the high conviction rates), the PTWI seems to serve little additional purpose. Prosecutors and counsel on fiat have been refraining from interviewing prosecution witness on 2 basic principles, namely: before laying a charge against a defendant, it is the duty of the

advising Counsel to scrutinize the quality of the prosecution evidence, and that naturally includes the statements taken from potential prosecution witnesses. If deficiencies are found in those statements, the present procedure allow for the taking of further statements by the law enforcement agency to clarify and supplement the previous statements. Therefore, by the time the prosecution makes a decision to lay a charge, such decision should have been made on the basis of not only the evidence in hand, but also having considered the quality of such evidence, including witnesses who will be called upon to give evidence in Court on the material particulars of the charge; and

- (d) concerns regarding the reliability and credibility of potential witnesses can largely be met if law enforcement officers in charge of cases state in covering memos to advising prosecuting counsel their assessment of the likely credibility of potential witness. This would engender a culture of taking responsibility for the preparation of a case on those investigating rather than encourage a culture of passing responsibility up the line.
3. The Committee does have real concerns about significant risks with PTWI giving rise to the possibility of witness coaching and contamination of evidence; or a reminder for witnesses to “fill in the gap”, etc.
4. Any PTWI scheme in Hong Kong should provide that:-
- (a) defence solicitors be given a right to be present at the PTWI. In this regard, similar provisions to those at ID parades could be made whereby defence solicitors can observe the whole process of the interview, if needs be through one way mirrored glass;
 - (b) the PTWI should be video-recorded with the defence being provided with a copy of the video tape; and
 - (c) Codes of Practice should be put into place to ensure that inadvertent contamination of witnesses by prosecutors does not take place.

**The Law Society of Hong Kong
Criminal Law & Procedure Committee
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