

JUDICIARY CONSULTATION ON REMOTE HEARING SUBMISSIONS

1. The Law Society is responding to the Consultation Paper of the Judiciary Administration on legislative proposals to enable remote hearing dated February 2021 (the “Consultation Paper”).

CIVIL PROCEEDINGS

2. We have in our previous submissions indicated support to the use of remote hearings for civil proceedings, with a caveat that the principle of open justice should remain intact.
3. On the issue of open justice, we note the Consultation Paper states the following

“Open Justice

18. Generally speaking, remote hearings will be broadcast in Judiciary premises such as open court rooms and other venues as specified by the Court and/or the Judiciary Administrator (“JA”) ...”

19. The Judiciary anticipates that there may be exceptional situations where the general public may be excluded from the court buildings or where remote hearing is not conducted in a court building. The requirement of open justice entails the need to make available the means by which the public may gain access to such proceedings conducted by way of remote hearing. The Judiciary proposes that under such exceptional circumstances, the Court may allow the public real time remote access to the hearing. The Chief Justice (“CJ”) and/or the JA may specify the necessary safeguards to prevent abuse of such real time remote access...”

4. While remote hearing by technological means for civil matters is welcomed and to be encouraged, it is equally important that administration of justice would not be disturbed by improper access or illegal recording of the proceedings. With real-time remote access to hearings as proposed,
 - (a) non-parties can view the hearing without attending court; and
 - (b) it will be impossible to detect whether the audience is recording the proceedings.

5. Under the current system, the public have to attend a venue (e.g. a courtroom) to view a hearing. Those requirements and safeguards should be simulated in the remote hearing system. In this regard, we echo what has been proposed in the Consultation Paper *plus* the following observations
 - (a) As a “default mode”, remote hearing can be viewed only from a courtroom, or a specified venue. Members of the public should attend that venue in person if they intend to watch the hearing on screen. There will be court clerks at this venue. By this, the Court can retain control/supervision of the proceedings and this should help prevent illegal recordings.
 - (b) In exceptional circumstances, where real time remote access is allowed, the Judiciary Administration should require the public to use an ID and password pre-set by the Judiciary Administration for remote access, and that the public needs to register for each hearing individually. Legal representatives can use another set of ID and passwords for remote access. To further deter any illegal recording, the user ID will be shown on a conspicuous part of the user’s screen. Any recording thereof would thereby display the identity of the party making such recording, illegally or otherwise.
 - (c) It is to be made clear that no authorization would ever be given for any recording by remote participants.
 - (d) Even with real time remote access, unless it is logistically not possible (e.g. for health reasons or otherwise), the Judiciary Administration should still try to offer a limited number of courtroom seats (on a first-come, first-served basis) for in-person attendance for a remote hearing. This is because not everyone has the technology to participate via the online remote system. In this regard, members of the

public must obtain prior approval and register for in-person attendance.

6. Remote hearing, where necessary and appropriate, has already taken place in all levels of civil courts, given it is permitted under the current law and the Judiciary's Guidance Notes. We therefore do not have any specific comments on the proposed legislative amendments.

MATRIMONIAL AND FAMILY PROCEEDINGS

7. We agree that remote hearings, where necessary and appropriate, could be used in the Family Court as an alternative mode of disposal.
8. Given matrimonial and family proceedings are usually not open to the public where this is required by legislation (e.g. in adoption proceedings) or by reason of their nature (e.g. matters relating to children and financial provisions in matrimonial proceedings), hearings are conducted in chambers (not open to public). Our observations are that:
 - (a) For any chambers hearings (not open to public) conducted remotely and involving litigants-in-person ("LIPs"), additional directions or safeguards should be provided for to ensure that no other participants or persons (e.g. family members or friends of the applicants) are allowed to attend, participate, observe or listen in any remote hearing, unless otherwise approved by the Court.
 - (b) To facilitate greater use of remote hearings in the Family Court and to ensure security and confidentiality are preserved, we suggest that rooms with video-conferencing facilities be made available for LIPs in court premises and the identities of the participants should be checked by the presiding Judge's clerk beforehand and/or staff from the Court Registry.
 - (c) Legal representatives would generally, on a without prejudice basis, communicate and/or negotiate amongst themselves outside the courtrooms before, in between or after the physical hearings, with a view to narrowing down the issues in dispute and/or reaching settlement. We consider it an important factor to be taken into account when making a remote hearing order for matrimonial and family proceedings

to provide for the opportunity and/or a channel of communication to allow for such dialogue.

CRIMINAL PROCEEDINGS

9. Insofar as criminal proceedings are concerned, our understanding of the Judiciary's proposal is as follows.
- (a) *“the default mode of [criminal] hearing remains that the Court, the parties or their legal representatives, and the other relevant parties, such as witnesses, shall be physically present in the proceedings conducted in the courtroom, unless the Court directs otherwise. The Court will direct remote hearing only if it is fair and just to do so, and it is a case management decision...”* (§ 5, the Consultation Paper).
 - (b) The above 'default mode' could be departed from when, upon applications by the parties, or on the Court's own motion, the Court directs the use of remote hearing. The Court has the discretion to do so (§ 5).
 - (c) *“Whilst physical hearing remains the default mode of hearing and the Court may only order remote hearing if it considers fair and just to do so, the Judiciary observes that there are limitations, in terms of principle and practice, in adopting remote hearing in all criminal proceedings. In some cases and specific stages of the proceedings, physical present of the defendant in court is of actual significance and remote hearing will be only ordered in exceptional circumstances as directed by the Court”* (§ 7).
 - (d) Under the proposal, not all criminal matters are amenable to remote hearings (§§ 8 and 9). For those which are amenable to remote hearing, the Court may consider a list of factors set out in §16 *plus* an additional list of factors set out in § 17 – the § 17 factors are mandatory and must be considered by the Court for remote hearings.
 - (e) There are other proposals ancillary to the above, including those on live audio links (§ 10), witnesses (§ 13), advocates (§ 14), judges (§ 15), real time access (§§ 19 – 20), appeals (§24 – 25) and penalties (§22).

10. The above, which was written for both civil practices and criminal practices, has not made it sufficiently clear that remote hearings are *not* to be arranged for criminal proceedings¹, unless for those exceptional circumstances *which should be extremely rare*.
11. We stress that the status quo (or the 'default mode', using the above terminology) for criminal hearings should remain, for the following reasons.
 - (a) Fundamentally, a defendant's right to be tried in person in an open court is an important component of the right to a fair trial. This is enshrined in Article 14 of the International Covenant on Civil and Political Rights. A defendant should have the constitutional right to be present at his or her criminal trial, the right to confront witnesses, and the ability to communicate privately with his or her legal representatives.
 - (b) If a defendant is to attend only a remote hearing via video link, he or she can only see a fragmented view of the court process. On the other hand, he or she would not be able to effectively interact with legal representatives, the judge, the jury, the witness, the interpreters and the co-defendants. That potentially affects the defendant's ability to fully participate in his or her proceedings, a key component to procedural justice.
 - (c) Without a legal representative in the same room to guide him or her, a defendant could have difficulty to understand what is happening in his or her own criminal trial. The effects of isolation by reason of not being able to be present in the same room with legal representatives can be even more significant on vulnerable defendants.
 - (d) Seeing the parties only through video link also makes it harder for the judges to gauge the demeanor of a witness and for example to spot when the Prosecution or the Defendant (or their witness) is struggling upon cross-examination. The problem could be especially serious with technology not working properly throughout the hearing.

¹ We acknowledge that certain criminal proceedings (or part of the proceedings) are already permissible under the current arrangement for video-links such as the giving and taking of evidence in sexual or violent offences, or from vulnerable persons, as directed by the Court

- (e) Advocates would have similar difficulties with remote hearings, as they could be deprived of the interactions with the judges, the witnesses, the jury (in the case of a jury trial), the interpreters (if any), the prosecution and the co-defendants (and their legal teams). These interactions (verbal and non-verbal) would be frustrated, and advocates could feel that appearing remotely diminishes their ability to advocate.
- (f) On the part of the solicitors, with a remote hearing, they would not be able to take instructions timely or instantly from the defendants in the course of trials. There have been instances in civil proceedings when communications via WhatsApps or texts between a party and his solicitor have been allowed by the Court but this can hardly be a satisfactory arrangement in criminal proceedings, especially on important issues such as a change of plea which is normally secured in writing and signed by the defendant. It is after all essential that legal representatives should have meaningful access to their clients in private during the hearings.
- (g) There are procedural and logistics issues with remote hearings, and these are not canvassed in the Consultation Paper. For example, how could exhibits be passed around at a remote hearing? What are the arrangements with interpreters? Is remote interpretation to be allowed, and if so, are there any protocols?
- (h) The proposals pose challenges to the disciplinary functions of the two legal professional bodies. In situations where the advocates or solicitors conducting a remote criminal hearing are found to be in breach of the relevant code of conducts, and they are outside the jurisdictions, queries could arise as to whether and if so how they are to be subject to the relevant disciplinary proceedings or court sanctions (where appropriate) - assuming there could be jurisdictions on the part of the relevant disciplinary boards and/or the courts.
- (i) With remote hearings, the public might command less respect and dignity to the criminal courts since, as a matter of perception or otherwise, the trial process is to take place in a virtual space, absent the formality of a court sittings and attire with solemnity. On the other hand, by not being able to have a more tangible connection with their legal representatives, defendants might feel they are

not to be represented or be treated fairly. There could also be technical hitches which could cause the trial process to lose, or be seen to lose, its formality². The above could undermine the public's confidence in the criminal justice system in Hong Kong.

12. In setting out the above, we are approaching remote hearings as a mode of hearing through live audio-visual link on a real-time basis. If remote hearings are to take place only through live audio link (i.e. telephone hearing, and that is averred to in the Consultation Paper (§ 4)), the problems identified in the above for criminal hearings could be compounded.
13. We therefore say that remote hearing is unsuitable for criminal trials. If, the proposals for remote hearing are in any event to be proceeded with for criminal matters, we have the following additional comments:
 - (a) It would help if the Judiciary could first identify the types of hearings which the Judiciary considers suitable for remote hearings.
 - (b) For the list of factors that the Court must consider when making a remote hearing in criminal proceedings (§ 17), there ought to be included the need of a consent by the Defendant for that particular hearing.
 - (c) The importance of confidentiality is paramount in remote hearings. It is essential that a defendant must be able to consult his or her legal representatives, in strict confidence, before and during the course of the hearing.
 - (d) As a corollary to the above, the technology and resources available to the Correctional Services Department (“CSD”) should be reviewed before the implementation of any remote hearings. For example, if a defendant is in custody for a remote hearing, CSD must ensure that they have suitably designed and equipped facilities in place that could keep the communications between the defendant and his or her legal representatives secure and confidential. In this regards, we will look forward to a participation in the discussion between the Judiciary and CSD.

² E.g. see the news article “*Lawyer tells judge ‘I’m not a cat’ in viral video as he struggles with filter during Zoom court hearing*” SCMP of 10 Feb 2021

- (e) The Chief Justice should have sufficiently wide powers to make rules for remote hearings criminal matters. That affords flexibility to cater for situations which could not be envisaged for remote hearings for criminal matters.
14. We take note of a proposal to enable one or more members of the panel of judges to participate in a remote hearing from a location outside Hong Kong (§ 15). Without more information on, for example, the qualifications and the jurisdictions of the judges hearing a criminal matter remotely, we express reservations with this proposal.
15. As for the penalty (§§ 21 – 23)³, we consider that the penalty proposed for unauthorized transmission of remote hearings is not sufficient at all. This offence is serious, for the reasons set out in the Consultation Paper; moreover and fundamentally, it poses serious risks to and it interferes with the due administration of justice. It undermines the public's confidence in the Judiciary when, among others, the Judiciary could be seen to have lost control over its proceedings⁴.
16. Accordingly, the penalty for unauthorised instantaneous transmission, recording, uploading, and publication etc. of remote hearings should be increased substantially, and that *should attract penalty heavier* than the same offence for physical hearings. A heavier sentence is relevant and apposite because, with the current technical capabilities of mobile phones and the internet, unauthorized transmission, photographs and recording can be sent almost instantaneously to a large number of unidentified and unconnected parties, without knowledge or control. Furthermore, it is much easier to commit the offence with remote hearings as there is not any physical setting for the hearing. It is on the other hand more difficult to investigate and to catch the offender. A higher deterrent is warranted.
17. We consider that in respect of an offending company, the officers involved should themselves be criminally liable. That would deter

³ The Judiciary is proposing that the penalty should be a fine not exceeding level 5 (currently at \$50,000) or imprisonment up to six months – see § 23 of the Consultation Paper.

⁴ A women in the UK who live streamed her partner's Crown court trial on Facebook after videoing from the public gallery received (suspended) custodial sentence. See the Law Society Gazette of 187 Feb 2021:<https://www.lawgazette.co.uk/news/suspended-sentence-for-woman-who-live-streamed-video-of-boyfriends-trial/5107470.article>

offenders from evading criminal liability by use of a “2-dollar company” or any sham establishments.

18. By way of passing remarks, we suggest the Judiciary to revisit Practice Direction 35 on “*Use of Mobile Phones and other Devices in Courtrooms for Court Proceedings Involving Jury*” (issued in June 2018). In our views, the provisions in the above Practice Direction need to be updated and beefed up. For instance, in the Practice Direction, it is said that

“Non-compliance with [Practice Direction 35] may result in the offender being:

- (a) held in contempt of court punishable by a fine or imprisonment; or*
- (b) prosecuted under section 7 of the Summary Offences Ordinance (Cap 228).”*

In the Consultation Paper, it is already said that “*In future, the taking of photographs, and portrait/sketch during court proceedings will only be caught under the Remote Hearing Bill, but not the Summary Offences Ordinance.*” (§ 22, emphasis supplied). In any event, the problem of clandestine video-recording and photo-taking in courtrooms should be revisited, in the light of the concerns expressed in jury trials and the subsequent discussion⁵.

TECHNOLOGY

19. On the technology for remote hearings, our preliminary observations are that
- (a) the electronic signatures to be used in oaths under the proposals should be consistent with those provided for under the Electronic Transactions Ordinance (Cap. 553) and/or be in conformity with similar provisions;
 - (b) the technology should be user-friendly; and
 - (c) practitioners should not need to incur expenses to procure a new set of hardware and/or software before they could participate in remote hearings.

⁵ See the written reply by the Secretary for Justice to a LegCo question on video-recording in court rooms, of 6 June 2018:
<https://www.info.gov.hk/gia/general/201806/06/P2018060600464p.htm>

CONCLUSION

20. In conclusion, while we applaud the efforts of the Judiciary Administration to keep the justice system running during the COVID-19 pandemic and to advance Court technology in times, for criminal matters, the Judiciary Administration should carefully assess the impact of holding virtual hearings and that the new technologies and processes are to comply with the constitutional rights of defendants. For one thing, it is critically important that confidentiality in the communications between parties and their legal representatives in remote hearings must be preserved.
21. Insofar as criminal matters are concerned, it must be made clear that remote hearings are allowed only under exceptionally rare circumstances, for the reasons we set out in this submission.
22. As for civil matters (including matrimonial matters), we welcome more use of remote hearings where relevant and appropriate, and that the Judiciary Administration should continue to expedite and facilitate remote hearings. As for the legislation now proposed for remote hearings for civil matters, given that, seemingly, the existing legislation and Practice Directions have already provided for remote hearings, we are not convinced that a new set of legislation for civil matters is required. However, if such legislation (for civil matters) is for some reasons needed, we urge that the legislative process be expedited as soon as possible.

The Law Society of Hong Kong
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