

Submission of the Hong Kong Bar Association

Pre-Trial Witness Interviews by Prosecutors

1. The Department of Justice has formed an internal Working Group to consider whether, under certain circumstances, prosecutors could and/or should conduct pre-trial interviews with prospective prosecution witnesses ("PTWI"). A consultation paper has been prepared and views on the following issues have been sought from the Bar:
 - (i) Whether the Bar thinks there is a need to introduce the PTWI scheme in Hong Kong and why;
 - (ii) The areas that would cause the Bar concern if a PTWI were to be conducted;
 - (iii) What safeguards could be introduced to help address such concerns;
 - (iv) What the Bar thinks the purpose of a PTWI should be;
 - (v) At what stage of the proceedings should a PTWI be held;
 - (vi) Whether the use of PTWI should be only limited to certain categories of offences or witnesses;
 - (vii) In what form should the contents of a PTWI be recorded;
 - (viii) Whether the prosecutor who conducts a PTWI should be different from the prosecutor who conducts the trial; and
 - (ix) What role would the relevant law enforcers etc. have, if any, at a PTWI.

2. The members of the Bar's Special Committee on Criminal Law and Procedure (the "Committee") have studied the consultation paper and discussed the consultation paper. The followings represent the considered views of the Committee in relation to the above issues.

3. The Committee has taken note of the results of a survey conducted by the Department of Justice with prosecutors in cases resulting in acquittals on whether, in their opinions, it would have been beneficial for a prosecutor to have interviewed the witnesses prior to trial. A significant majority of those surveyed came to the view that it would NOT be beneficial.
4. Whilst the Committee whole-heartedly agrees with the principle that weak cases should be weeded out as early as possible to ensure that a suspect would not have to go through the ordeal of a criminal trial, it appears from the survey that a PTWI would unlikely be an effective means to achieve this laudable aim. It is further noted that a great majority of criminal cases resulted in convictions. Thus, given the facts that only a minority of cases would result in acquittals and that in only a small proportion of those acquittals were a PTWI deemed to be beneficial, the Committee does not see any pressing need to implement the PTWI scheme (Issue (i) above).
5. This is not to say that the Committee does not recognize that the PTWI scheme has its advantages, but there are significant risks in implementing such a scheme. The Committee is concerned with the risk of witness coaching and contamination of witnesses' evidence. In particular, there is a clear risk that during a PTWI, issues originally not canvassed in the witness' earlier statements may be raised by the interviewing prosecutor, and this may (i) allow the Prosecution a chance to test whether it could obtain evidence outside the ambits of the witness' original statements, and (ii) alert the witness on potential areas on which he/she may be challenged. This would obviously result in unfairness to the Defendant (Issue (ii) above).
6. To address these concerns, if a PTWI scheme were to be implemented, it will be essential that strict guidelines must be issued to prosecutors and there has

to be set up an effective way to monitor that such guidelines are strictly followed. Moreover, a time limit should be imposed whereby a PTWI should only be permitted to take place at a time well ahead of the commencement of trial. This is to ensure that the Defence would have sufficient time to request and digest disclosable materials arising out of a PTWI (Issue (iii) above).

7. The Committee believes that the only permissible purpose for conducting a PTWI is to weed out weak cases. It cannot be a proper purpose for conducting a PTWI if the aim were to build rapport between the prosecutor and the witness. The Committee does not see any need for prosecutors to explain court process to the prospective witnesses (Issue (iv) above).
8. It is noted in the consultation paper that a PTWI may achieve the purpose of assisting the prosecutor to understand complex evidence. The Committee is deeply concerned with the suggestion of using a PTWI to help a prosecutor to understand the case he is to conduct. In any such situation, the prosecutor would effectively be tutored by a lay witness, who may have an interest in the outcome of the case. If this were allowed to happen, the role of a prosecutor as a minister of justice would be seriously eroded (Issue (iv) above).
9. The Committee believes that if a PTWI were to be conducted, it should be conducted by advising counsel at a very early stage of the proceedings. This would achieve the laudable purpose of avoiding a likely-to-be-acquitted suspect from the ordeal of waiting and preparing for his trial. Moreover, as the Department of Justice plays the important role as a gate-keeper to weed out unmeritorious cases, it would be most appropriate for advising counsel to

conduct a PTWI when he/she was considering whether to press ahead with a prosecution (Issue (v) above).

10. As expressed above, the Committee has concerns over the building of rapport between the actual prosecuting counsel and a witness, and thus, it would be safer if any PTWI would be conducted by someone other than trial counsel. Hence, if a PTWI had to be conducted, the most appropriate candidate to carry this out would be advising counsel from the Department of Justice (Issue (v) above).

11. As to whether there is a need to limit the PTWI scheme to a certain category of offences, the Committee does not see a need to impose any such restrictions. If a PTWI could weed out an unmeritorious prosecution, there is no reason why only those suspected of a certain class of offences could benefit from such a scheme (Issue (vi) above).

12. The Committee believes that if a PTWI were to be conducted, it is of fundamental importance that the interview must be properly recorded, so that the Defence could have access to the contents of the interview. In a trial, the Defence is entitled to cross-examine the witness on (i) any perceived inconsistency between his/her testimony and any previous statement made by him/her and (ii) any perceived inconsistency between statements made on different previous occasions. It is thus necessary to fully record the PTWI and to disclose all such records to the Defence in a timely fashion (Issue (vii) above).

13. The Committee recommends that were a PTWI to be conducted, it should be videotaped and all the procedures in relation to the arrangement of such an interview should be fully documented and subject to disclosure. To facilitate

the use of the videotaped interviews during the trial, it is recommended that a transcript should be made of the contents of any such interview. The Committee notes that videotaping of interviews is commonplace in Hong Kong, and it does have the advantage to allow all parties the equal chance to observe the witness' demeanor (Issue (vii) above).

14. As stated above, the Committee believes it would be improper for a PTWI to be held for the purpose of rapport building between prosecuting counsel and the witness. Indeed, the Committee sees a need to avoid any such rapport building. It is therefore necessary to prevent as far as possible any PTWI from being conducted by trial prosecuting counsel. It is recognized that there may be certain exceptional situations whereby if a PTWI were to be conducted by trial counsel, an unnecessary and unmeritorious trial could be weeded out. It is only in those very exceptional circumstances that trial prosecuting counsel should be allowed to conduct PTWI (Issue (viii)).

15. The Committee believes that there should only be a very small and passive role to be played by law enforcement officers in the PTWI scheme. It is envisaged that, apart from the handling of the logistical aspects of such an interview, the law enforcement officers should not have any role in such a scheme (Issue (ix)).

16. In conclusion, the Committee does not see a pressing need to implement the proposed PTWI scheme. While it recognizes that such a scheme may well in certain circumstances fulfill its laudable aim of weeding out unnecessary and unmeritorious prosecutions, it could also potentially lead to abuses.

Hong Kong Bar Association

Dated: 16 October 2009