

## **Hong Kong Bar Association**

### **Comment on Consultation on the Draft Court (Remote Hearing) Bill**

1. Pursuant to the invitation of 16 June 2022 by the Judiciary Administrator, the Bar Council has tasked a team of members comprising both civil and criminal practitioners and of various seniority to offer their comments on the Courts (Remote Hearing) Bill (the “Draft Bill”), the 2 sets of Practice Direction for civil and criminal proceedings respectively (the “Draft PDs”) and the Operational Guidelines: Guidance Note on the Preparation and Conduct of Remote Hearing (the “Draft Guidelines”).
2. Members of the team also attended the briefing session on 19 July 2022 remotely.
3. Comments given by the members of the team are consolidated and summarised below.

#### I – General Views

4. In general, the use and expansion of the use of remote hearing is welcomed. The flexibility brought about by remote hearing is capable of facilitating access to justice and ensuring open justice. This is of benefit to both the legal professions and the public at large.
5. The Draft Bill, Draft PDs and Draft Guidelines are necessary in ensuring proper and transparent administration of remote hearings, and therefore vital to achieving the objectives of facilitating access to justice and ensuring open justice.
6. With the above objectives and the overall interest to justice in mind, as well as technical considerations, the following specific comments are offered.

## II – Specific Comments

7. **Public real time remote access to remote hearing** - paragraphs 29 and 32 of the civil and criminal Draft PDs respectively; paragraphs 41-42 and Appendix 6 of the Draft Guideline:-
- (a) The prescribed framework, in particular Appendix 6 of the Draft Guideline, shows that such remote access to remote hearings by members of the public is subject to permission by the Court;
  - (b) The need for such a permission is also reflected in paragraph 3.11 of the Consultation Document: “...*people who wish to observe the proceedings will be required to make an application to the Court in advance. Once approved by the Court...*”;
  - (c) At the briefing session on 19 July 2022, when asked about the criteria for such an approval by the Court, it was explained that the framework is not meant to be a complicated vetting mechanism but rather to cater for the need to know the identity of the person(s) remotely accessing the remote hearing for enforcement purposes;
  - (d) To avoid misunderstanding and any impression of restricting remote access to remote hearings (where no concerns of capacity or public health or order would arise) by the general public, while at the same time ensuring the need to know the identity of person(s) remotely accessing the remote hearing for enforcement purposes, the following modifications to the currently proposed framework are suggested :-
    - (i) Any reference or wording indicating a requirement of Court approval or permission be removed;

- (ii) Any member of the public may request in writing for information necessary to enable remote access in writing and such information must be provided, provided that personal identification information is provided, otherwise written reasons must be provided for not providing such information by the Court and such reasons must be published or otherwise made publicly available.

8. Further, the form of notification of the remote hearing warrants consideration :-

- (a) At the moment under paragraphs 29 and 32 of the civil and criminal Draft PDs respectively it is only provided that “[g]enerally, the application needs to be submitted no less than 3 days before the hearing. If the notification of the remote hearing is given less than 3 days before the hearing, the application should be submitted as early as possible before the hearing...”;
- (b) There is no indication as to what “*notification*” is envisaged therein;
- (c) If it was to mean by way of the Daily Cause List, which usually becomes available near 5pm the day before, then the time for members of the public to request for remote access information and also the time for the judge’s clerk to deal with such requests (see para.41 of Guidance Note) would be extremely limited;
- (d) Hence, it is suggested that other forms of “*notification*” more timely than the Daily Cause List should be looked into, e.g. additional and immediate notice in a dedicated notice board on the Judiciary website once directions for public real time remote access are given.

9. **Offences** – Part 5 and Part 7 Division 2 under the Draft Bill :-

- (a) As criminal offences are to be created for recording and/or publishing hearings or broadcasts, as well as modifying existing offence for making

and/or publishing record made in a court building (the current s.7 of SOO), it will be of vital importance to clearly set out, as much as practicable, the bounds of all the elements of these offences;

- (b) Of those elements, “*without lawful authority or reasonable excuse*” may require further elaboration;
- (c) Firstly, as to “*without lawful authority*”, the following details may require further consideration and clarification :-
  - (i) Who or which body(-ies) would have the power to grant such a “*lawful authority*”?
  - (ii) How is anyone to obtain such a “*lawful authority*”, e.g. the mechanism of any relevant application?
  - (iii) What would be the considerations/criteria for determining whether such a “*lawful authority*” should be granted?
- (d) Stemming from the above, in the interest of open justice specifically, whether the participants to the hearing/broadcast would be informed of any person or body(-ies) have been granted such a “*lawful authority*” to record and/or publish the relevant hearing/broadcast;
- (e) Secondly, as to “*reasonable excuse*”, the following details may require further consideration and clarification :-
  - (i) As the offences would have been committed by only recording, i.e. without publishing, the ambit of “*reasonable excuse*” may differ in offences for only recording versus for only publishing, especially given the differences in severity of penalty for each type of offence;
  - (ii) A non-exhaustive and for illustration only examples of “*reasonable excuses*” for each permutation will be welcomed;

(f) Thirdly, as to the prosecution deadline for the offences to be created, the meaning of “*discovered by the prosecutor*” may require further consideration and clarification :-

(i) Who is to come within the definition of “*prosecutor*” – e.g. which level of officer in the prosecution division?

(ii) What is the precise definition of “*discovered*”, given that the “*prosecutor*” would presumably not be the person responsible for the investigation of any offences?

10. **Use of electronic communication devices** – paragraph 26 of the Draft Guideline :-

(a) Paragraph 26 prescribes that electronic communication device be switched off during remote hearings, which goes beyond the current restriction in physical hearing of allowing use of text based electronic communication devices;

(b) The use of text based electronic communication devices may well be more important during remote hearings, e.g. when the instructing solicitors access the remote hearing from a different physical location than the counsel and therefore unable to communicate directly;

(c) It is suggested that, instead of a blanket ban of electronic communication devices, the same permission for use of text based electronic communication devices be replicated, unless such use actually cause interference with the hearing or transmission.

11. The HKBA thanks the Judiciary for the opportunity to give our comments on the drafts.

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8 September 2022