

Court Protection for Sexual Offence Complainants

性罪行投訴人的法庭保障

Report by
**Association Concerning Sexual
Violence against Women**

關注婦女性暴力協會研究報告

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Research Coordinator: Lam Yee Ling Elene
Researchers: Ho Chun Wing Trevor
Fu Chi Yung
Ma Pik Kwan
Wai Yun Lam Vincent

Consultants: Linda Wong

Publisher: Association Concerning Sexual Violence against Women

Website: www.rainlily.org.hk

Tel: 852-23922569

Address: P.O.Box 74120 , Kowloon Central Post Office, Kowloon

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I. Introduction

This paper argues that the nature of sexual offence trials is distinct from that of other trials. However, it is submitted that our present law fails to respond adequately to this distinction, especially in the area of witness protection, thus exposing testifying sexual offence complainants to the risk of suffering from severe trauma. Moreover, the complainants' deserved dignity as citizens will be deprived of during the process of testifying as witnesses. As a result, the fundamental operation of our criminal justice and court system would be impeded. This paper is going to give recommendations to improve the two main current protective measures available to witnesses in Hong Kong, i.e. testifying behind a screen and through live television link, as well as to suggest a codification for the present proclaimed protection for witnesses stated in the Statement for Prosecution Policy and Practice.

II. Appreciating the distinctive nature of sexual offence trials

It is submitted that sexual offence trials have their own distinctive nature. The issue of consent is usually the most contended issue upon which the question of conviction or acquittal hinges. Consequently, the credibility of a complainant would be decisive and important to successful conviction. As such, the alleged victims' character is virtually on trial. The sexual nature of the evidence and the relationship between the defendant and the victim create further stress. Together with the hostile style of cross-examination taken by defense counsel, it is likely to affect the quality of evidence they give or even discourage them from attending the court, thereby hindering prosecution and the operation of criminal justice system.

Judges and magistrates have the inherent jurisdiction to control the process of the proceedings. However, they are reluctant to exercise the inherent jurisdiction to grant special protective measures such as testifying behind the screen.

III. Testifying behind a screen as a protective measure for sexual offences complainants

The use of screen is an effective measure for protecting witnesses. It protects complainants from suffering from second victimization in the court process, helps complainants give evidence of better quality thus facilitating prosecution work, and betters defendants' interest by enhancing the factual accuracy of evidence given by the witnesses.

Whilst we recognize the defendant have right to fair trial, right to public trial and cross-examination that, *prima facie*, operate against the use of screen in court, we submit that these are surmountable hurdles.

Regarding defendant's right to fair trial, we submit that the use of screen is conducive to this right since it improves the factual accuracy of evidence which is necessary for the reaching of a just verdict. It should also be noted that case law has recognized that the concept of fair trial has

evolved to embrace fairness to both the defendants and witnesses, so that it requires that defendant's interest should not be served exclusively at the expense of the witnesses¹. Hong Kong case law also recognizes that the realization of defendants' right needs to be balanced against the interest of the witnesses². Hence, defendant's enjoyment of the right is neither absolute nor hegemonic.

Regarding the right to public trial and cross-examination, we submit that the use of screen actually conforms to their underlying spirit of attaining factual accuracy. Its use also does not lead to the total denial of these rights, since defendant's legal representative is not necessarily shielded but can still cross-examine the witness with the full advantage of observing her demeanour. Equally, the use of screen does not prevent the verification of the identity of the witness, so the right to know the identity of the witness is preserved.

Hong Kong has been far behind other jurisdictions in giving recognition to witnesses' rights, as many common law jurisdictions have given statutory status to the use of screen, while it remains a matter of judge's discretion in Hong Kong. There exist no statutes or authoritative common law decisions that expound on when screen protection shall be granted.

The existing law in other common law jurisdictions in protecting victims can be divided into several main models: (1) creating a statutory presumption that the court must direct use of special measures to sexual offence complainants rebuttable only at the complainant's own will³, (2) making sexual offence complainants specifically entitled to special measures subject to the court's discretion to refuse⁴, and (3) providing considerations which the judge should visit when deciding whether to grant special measures⁵.

It is recommended that Hong Kong law should most preferably adopt the (1) model, or as a fallback position, the (2) model. The purpose is to give recognition to the distinctive nature of sexual offence trials and to respect victims' rights to obtain protection from court. This helps victims to avoid emotional stress during the application process.

As an alternative ground, it is argued that the law should provide for a list of considerations which the judge should visit when exercising his discretion on whether to grant screen protection, similar to model (3). This is to ensure legal certainty and prevent the exercising of discretion from being affected by personal bias.

IV. Testifying through live TV link as a protective measure to sexual offence complainants

¹ See *R v DJX* [1990] 91 Cr. App. R. 36.

² See *HKSAR v See Wah Lun* [2011] 2 HKLRD 957

³ These includes Victoria.

⁴ These jurisdictions include the UK, New South Wales and the Northern Territory.

⁵ Examples of this category include South Australia.

In Hong Kong, vulnerable witnesses falling within the categories of children, mentally incapacitated person and “witness in fear” are entitled to testifying through live television link, provided by s.79B of the Criminal Procedure Ordinance (Cap. 221) (“CPO”). A healthy adult sexual offence complainant could only fit into the “witness in fear” category.

There are inadequacies in the existing law in Hong Kong concerning testifying through live TV link. First, sexual offence complainants are not automatically entitled to using live TV link by reason of their status as a sexual offences victim. They are required to satisfy the “witness in fear” requirement⁶, which gives them the following hardships. Secondly, under Hong Kong case law a witness only qualifies as “witness in fear” in limited and severe circumstances⁷. Thirdly, the judicial attitude is that the granting of live TV link is only in rare and exceptional circumstances⁸. Fourthly, the statutory guidance as to the determination of a “witness in fear” is inadequate.

It is proposed that, first, sexual offence complainants shall be specifically entitled to testifying through live TV link in the statute, similar to the law in the United Kingdom⁹, New South Wales¹⁰, Northern Territory¹¹, Victoria¹², etc. Amongst which the Victorian model of creating a presumption that the court must direct use of live TV link rebuttable only by the complainant’s own will free of the court’s discretion¹³ shall be most preferable and protective to be adopted in Hong Kong. This is to do away the “witness in fear” requirement. Secondly, even if such requirement cannot be done away, there shall be comprehensive factors listed in the CPO to guide judges to determine whether a person is a “witness in fear”, similar to those listed in s.17(2) of Youth Justice and Criminal Evidence Act 1999, such as nature of the offence, the witness’ religious, employment, ethnic background, etc., to confer more legal certainty. Thirdly, an alternative fall back option would be to widely construct the reasonable grounds to find a witness as a “witness in fear” in the case law with reference to the UK legislation¹⁴.

The need for advocating more protection for sexual offences complainants when testifying in court is due to the distinctive nature of sexual offences which makes the trial process particularly burdensome and intimidating for the victims, the court’s duty to ensure the witness give evidence

⁶ s.79B(1), Criminal Procedure Ordinance.

⁷ The Hong Kong courts tend to find reasonable grounds based on severe circumstances of the case, such as gang rape (*HKSAR v Chan Ka Chun* [2000] HKEC 25); and more vulnerable witness, such as age, suffering from post-traumatic stress disorder (*HKSAR v Leung Kam Ting* [2009] 3 HKLRD 476), triad member acting as a police informer (*HKSAR v See Wah Lun* [2011] 2 HKLRD 957), or the witness being an accomplice and has been under a witness protection scheme (*R v Wong Kwai Nam*[1996] HKLY 362).

⁸ See *HKSAR v See Wah Lun* [2011] 2 HKLRD 957 para. 29.

⁹ S. 17(4) Youth Justice and Criminal Evidence Act 1999.

¹⁰ s.294B(3)(a) of Criminal Procedure Act 1986 No. 209

¹¹ S. 21A(2) Northern Territory Evidence Act.

¹² S. 363 The Criminal Procedure Act 2009

¹³ *Ibid.*

¹⁴ s.17(2) of the Youth Justice and Criminal Evidence Act 1999.

without fear or danger¹⁵, and the notion that a witness as well as the defendant shall be entitled to the right to fair trial¹⁶. Moreover, the defendant's right to a fair trial shall not be the sole consideration to justify the rare and exceptional use of live TV link, instead, since the defendant's right to a fair trial shall be balanced with the need for witness protection, live TV link should be used in a wider range of circumstances¹⁷. Moreover, if the use of live TV link is denied, a live trial will only reduce, rather than enhance, factual accuracy of the evidence given by a witness where the witness is emotionally unstable.

It is suggested that making sexual offence complainants specifically entitled to special measures would serve as a statutory recognition of the distinctive nature of sexual offences. It is proposed that the most preferable form of statutory protection would be a presumption that the court must direct special measures, similar to the Victoria¹⁸ legislation. This is because mere entitlement of special measures at the discretion of the court might in reality face the threat of bias from judges or magistrates when exercising their discretion to refuse use.

V. Proposed codification of special measures in the Statement for Prosecution Policy and Practice

The only special court protection measure in the CPO applicable to healthy adult victims of sexual crimes is to give evidence through live television link (s.79B). We submit that this measure alone is neither comprehensive nor giving effective protection to the victims. It is proposed that more special measures listed under section 22.5 of the Statement of Prosecution Policy and Practice, such as screen, video-recorded evidence, arrangement of support persons, etc., shall be codified into the CPO for assisting vulnerable witnesses to give evidence in court. Incorporating these measures into the CPO as statutory law enhances the measures' legal status, certainty and enforceability. On that account, vulnerable witnesses' rights to a fair trial are better protected.

VI. Conclusion

It is our stance that better recognition of the distinctive nature of sexual offence trials and victims' plight by our law will have the effect of facilitating the prosecution of harmful crimes while respecting the dignity and protecting the well-being of vulnerable crime victims. All of these are the fundamental values of our criminal justice system. It is submitted in this paper that many other common law jurisdictions have achieved this recognition by statutory reforms, but Hong Kong up to the present is still yet to catch up. This paper has given recommendations on how Hong Kong should reform its law to take care of the issues, to the effect that the court shall be more willing to grant to sexual offence complainants special protective measures such as screen

¹⁵ See n6.

¹⁶ *R v DJX* [1990] 91 Cr. App. R. 36.

¹⁷ See n2.

¹⁸ See n12.

and live television link. Besides, it is suggested the special protective measures for witnesses stated in the Statement for Prosecution Policy and Practice should be codified.

Research Coordinator
Lam Yee Ling Elene

Researchers:
Ho Chun Wing
Fu Chi Yung
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Wai Yun Lam