關注婦女性暴力協會

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

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Court Protection for Sexual Offence Complainants

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1. Introduction

It is argued in this paper that the sexual offences trials have a distinctive nature that is different to other kinds of offences, and sexual offence complainants are distinct from other kinds of witnesses. On that basis, it is further argued that our present court system fails to respond to this distinctive nature, the result of which is the exposure of sexual offence complainants as witnesses to trauma which will have the following effects: (i) the impediment of the function of our criminal justice and court system, and (ii) the deprivation of the sexual offence complainants of dignity which they are entitled to as citizens. All these offend the underlying spirit and goal of our criminal justice system.

This paper proposes three things: (i) the presumption for entitlement to the use of screen for sexual offence complainants; (ii) the presumption for entitlement to the use of live television link for sexual offence complainants; and (iii) the codification of the more comprehensive protective measures for sexual offence victims in the Statement for Prosecution Policy and Practice.

2. The distinctive nature of sexual offences

2.1 The role of consent

The role of consent in sexual offences makes the trials of this kind of offences different from most other criminal proceedings. Unlike most other non-sexual offences, in cases of sexual offences, whether the defendant will be convicted often hinges on the question whether the behaviour (namely, sexual intercourse) is performed in the absence of consent. This is a question most often turning on the credibility of the complainant[1]. Research findings have shown that this gives sexual offence trials a distinctive dynamic, and virtually have the effect of putting the character of the victim on trial[2]. Victims face excessive stress because this creates the feeling that they have to prove their innocence[3].

2.2 The sexual nature of the offences

It has been suggested by studies that within our cultural context, the act which constitutes sexual offence is ascribed a sexual nature which adds complexity to the offence itself and to the complainants[4].

An abundance of research has shown that a victim of sexual offence is likely to respond differently to, for example, a victim of other kinds of offences, such as a property offence or a

[1] This is also observed by New South Wales Law Reform Commission in their Report 101 "*Questioning of complainants by unrepresented accused in sexual offence trials*" (2003) at para 2.6-2.7.
[2] See New South Wales Sexual Assault Committee, "*Sexual Assault PhoneIn Report*" (1993) at para 39.
[3] See, for example, Parliament of NSW, Legislative Council, Standing Committee on Social Issues, "*Sexual violence, the hidden crime: inquiry into the incidence of sexual offences in NSW: part 1*" (Report 6, 1993) at para 1.1.9
[4] See, for example, *ibid* at para 1.1.1-1.1.2.

non-sexual assault[5]. Complainants of sexual offences usually suffered from emotional trauma that is incomparable to other kinds of offences. This ranges from shame, guilt, embarrassment, confusion, feeling dirty and used. Feelings of self-blame and self-recrimination are particularly common among sexual violence victims[6]. The New South Wales Legislative Council Standing Committee on Social Issues wrote, "The sexual violence victim is often confronted with a range of additional feelings resulting from the social stigma and physical invasiveness of the incident."

Whilst sexual offence victim may recover from physical harm, the psychological harm they suffer could be grave, is ongoing, and may well last forever. The New South Wales Sexual Assault Committee found that 97% of complainants of sexual assaults who participated in a PhoneIn in 1992 reported ongoing emotional harm as a result of the assault[7]. Others reported that physical harm, ongoing problems in their interpersonal relationships, disruption to their normal daily life, disruption to their education or employment and financial harm[8]. Research has powerfully illustrated that "sexual assault is not just another form of physical assault. It is an assault on a person's body, senses, emotions and whole self"[9].

2.3 The intimate nature of evidence given

The intimate nature of evidence imposes a burden upon a testifying complainant. To take the offence of rape in Hong Kong as an example, it requires the prosecution to establish the elements of vaginal penetration and penetration by penis. It should be noted that the presumption of innocence requires that the burden of proof is on the prosecution. The criminal standard of proof requires the prosecution to prove each and every element "beyond reasonable doubt", namely, with certainty. Hence, it almost makes it inevitable that the prosecution requires the complainant witness to recount to excruciating details the process of the alleged victimization for the purpose of establishing his case. It is supported by recent studies that sexual offence complaints experience confusion and helplessness during the process[10]. This distress is aggravated where the complainant is a woman who is from cultural backgrounds in which such matters are not conventionally discussed among men[11].

In a study where barristers, judges and magistrates were interviewed on the topic of court experience of rape complainants, almost all respondents agreed that rape complainants go through a significantly different experience as witnesses than victims of other forms of personal violence[12]. From the perspectives of the legal professionals interviewed, the intimate character of

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[5] See New South Wales Law Reform Commission, Report 101 "*Questioning of complainants by unrepresented accused in sexual offence trials*" (2003), at para 2.3.

[6] See Parliament of NSW, Legislative Council, Standing Committee on Social Issues (Report 6, 1993), "*Sexual violence, the hidden crime: inquiry into the incidence of sexual offences in NSW: part 1*" at para 1.1.1-1.1.2.

[7] See New South Wales Sexual Assault Committee, "*Sexual Assault PhoneIn Report*" (1993).

[8] See *supra*, fn 7, at paras 23-25.

[9] See *supra*, fn 7, at para 25.

[10] See Hung, Suet-lin (2011) "*A Study on Help Seeking Experiences of Sexual Violence in Hong Kong: Community Response and Second Victimization*". See also New South Wales Sexual Assault Committee, "*Sexual Assault PhoneIn Report*" (1993) at para 39.

[11] Australian Law Reform Commission (1994, Report 69, Part II), "*Equality before the law: justice for women*" at para 7.28.

[12] M Heenan and H McKelvie (1996 Rape Law Reform Evaluation Project, Report 2, Victorian Attorney General's Department, Legislation and Policy, Department of Justice, 1996), "*The Crimes (Rape) Act 1991: an evaluation*

the evidence rape complainants give in front of strangers make the complainant's experience of the trial process different from other kinds of trials.

2.4 More lengthy and hostile cross examination

Because of the important role of consent for conviction under this offence and the resultant focus on the complainant's credibility, defense counsel usually adopts the tactic of attacking rape complainants on their motives for lying. Hence testifying complainants are subject to more "savage" or "thorough" treatment than other kinds of witnesses. On that account, cross examination is usually more lengthy and hostile[13].

The rape shield law, although designed to protect testifying complainants from aggressive and intrusive questions about private sexual life, is not usually effective in preventing aggressive questioning, since a number of exceptions are allowed, and a Hong Kong study reveal that the prosecution often does not contend where such questions are raised against witnesses[14]. Hence court experience is made a significantly more intrusive, dignity-stripping, private life-offending and hence highly traumatic for sexual offence complainants.

2.5 The relationship between the complainant and the defendant

It is not uncommon that the commission of sexual offences involves the exercise of power by one person over another[15], and this power relationship extends to the moment of trials, thus giving rise to trauma experienced by the less powerful. To take Hong Kong as an example, case law's recognition of this power relationship is shown in the creation of an irrebuttable presumption that sexual intercourse procured by physical coercion constitutes rape[16].

It is submitted that the power relationship between the alleged perpetrator and victim in sexual offences is distinct from that in other offences, such as theft, where such power relationship contributing to the commission of the offence is absent. This power relationship is found to be creating severe trauma in the complainant when they faced the defendant again in the court. Research findings have shown that a vast majority of complainants identify seeing the accused as one of the worst features of having to attend the court[17]. Physical proximity to and pre-existing acquaintance with the accused can be very distressing, especially where the courtroom itself is small[18]. Complainants have commented that "we should not have to face the accused in court"[19].

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report" at 244.

[13] See New South Wales Law Reform Commission, Report 101 "*Questioning of complainants by unrepresented accused in sexual offence trials*" (2003) at para 2.2. Please see also Hung, Suet-lin (2011) "*A Study on Help Seeking Experiences of Sexual Violence in Hong Kong: Community Response and Second Victimization*".

[14] See Hung, Suet-lin (2011) "*A Study on Help Seeking Experiences of Sexual Violence in Hong Kong: Community Response and Second Victimization*".

[15] The notion that sexual offences distinctively involved the exercise of power by one person over another is expressed, for example, in Westmead Sexual Assault Service, "*Submission*" at 1.

[16] *R v Olugboja* [1982] QB 320

[17] See, for example, Hung, Suet-lin (2011) "*A Study on Help Seeking Experiences of Sexual Violence in Hong Kong: Community Response and Second Victimization*".

[18] See NSW Attorney General's Department Regional Violence Against Women Specialist Unit (Southern region), "*Submission*".

Besides, unlike some other kinds of offences, research findings have shown that the complainant and the defendant usually know each other prior to the alleged commission of the offence. This is said to be complicating the emotional responses of the complainants when testifying. Research has found that this gives rise to repeat victimization[20]. This is because the complainant has to bear "the additional burden of having been betrayed by someone once trusted"[21]. This problem is aggravated where the unrepresented accused cross examines the complainant in person[22].

[19] See NSW Bureau of Crime Statistics and Research (1996, General Report Series), "*The criminal justice response to sexual assault victims*" at 44.
[20] See *ibid* at iii.
[21] See Parliament of NSW, Legislative Council, Standing Committee on Social Issues (1993, Report 6), "*Sexual violence, the hidden crime: inquiry into the incidence of sexual offences in NSW: part 1*" at para 1.1.7.
[22] See New South Wales Law Reform Commission, Report 101 "*Questioning of complainants by unrepresented accused in sexual offence trials*" (2003) at para 2.10-2.11.

3. The importance of responding to the distinctive nature of sexual offence trials

Protecting witnesses from in-court emotional trauma is not merely a matter of making witnesses feel better. It is submitted that adequate protection has bearing on the achievement of values of our criminal justice and court system below—

3.1 Essential to the function of the criminal justice system

It should be noted that the operation of the criminal justice system depends on prosecution of offenders. Prosecution should effectively be made to convict the guilty and acquit the innocent. This, however, is not free goods, and further relies on the attainment of the following—

(1) Witnesses such as the complainants are willing and able to be compelled to testify for the prosecution; and
(2) The complainant witnesses compelled to testify are capable of giving evidence that is of competent quality, so that their evidence is reliable and have probative value for reaching a verdict.

It should be noted that the establishment of prosecution's case in sexual crimes such as rape predominantly depends on the testimony of the complainants. However, on the account of the distinctive nature of sexual offences, their victims usually face emotional trauma when giving evidence in court, which prevents them from giving oral evidence that is of competent quality[23]. This gravely compromised the prosecution's case, and contributing to failure of the prosecution which may otherwise have succeeded. In many cases the trauma resulted in incapability to testify, and witnesses had to withdraw from court. This led to abortion of prosecution that otherwise upon the evidence available to the prosecution may have succeeded[24].

3.2 Protecting victims' rights and dignity

It is also submitted that protection of witness's interest is part of the fundamental value underlying our criminal justice system, which not only protect the interest of the defendants, but *all* citizens, from the oppression or harm by the instruments of the state. It is submitted that whilst the present court system gives recognition to the personal liberties and dignity of the defendants as citizens, this is done at the expense of the interest of other civilian participators such as the testifying complainant witnesses.

If one accepts the above, a question may well be cast upon a state of law, which, while professing that both the defendants and the complainants are citizens entitling to freedom from oppression by reason of the constitutional relationship between the state and the citizens,

[23] See, e.g., Jim Parsons & Tiffany Bergin (2010), "*The Impact of Criminal Justice Involvement on Victims' Mental Health*", 23 J. of Traumatic Stress 182, 183-184; see also Mary P. Koss (2000), "*Blame, Shame, and Community: Justice Responses to Violence Against Women*", American Psychologist 3, 6 (Nov. 2000).

[24] See, for example, New South Wales Law Reform Commission, Report 128 "Family Violence – A National Legal Response" (2010) at para 27.3.

defendants should however be particularly favoured to an extent that complainant witnesses' interest is disproportionately compromised. This is especially so where such witnesses is vulnerable due to the fact that they are victims of the defendant's behaviour. It should also be noted that the defendants are given recourse to appeal mechanisms when injustice has been done to them whilst the witnesses are not.

4. Existing court protections for sexual offences complainants

4.1 Sources of protection

Protection for sexual violence victims can be found in both statutory provisions and non-statutory prosecution policies and guidelines in Hong Kong.

Statutory protection is mainly provided by:

i. Part IIIA of the Criminal Procedure Ordinance, Cap. 221,
ii. Special Procedures for Vulnerable Witnesses, and
iii. Part XII of the Crimes Ordinance, Cap 200, Sexual and Related Offences.

The Department of Justice published:

i. *The Statement of Prosecution Policy and Practice – Code for Prosecutors*,
ii. *District Court Advisory*,
iii. *The Victims of Crime Charter*, as well as
iv. *The Statement on the Treatment of Victims and Witnesses*,

despite their non-statutory status, also play an important role in providing guidelines for protecting sexual violence victims.

4.2 Measures for protecting victims or witnesses during trial

Various measures are provided by the aforementioned legislation and policies to offer protection for victims or witnesses during trial.

4.2.1 Live television link

Witnesses may give evidence by live television link[25]. The court may, on application or on its own motion, permit the "vulnerable witness" (i.e. witness in fear[26], child and mentally incapacitated person)[27] to give evidence or be examined by way of a live television link.

4.2.2 Video recording

Witnesses may give evidence by video recording[28]. Vulnerable witnesses, with the leave of court, may give evidence by video recording. Where a video recording is given in evidence, any statement made by the child or mentally incapacitated person which is disclosed by the recording shall be treated as if given by that witness in direct oral testimony. However, it should be noted

[25] Criminal Procedure Ordinance, Cap. 221, s.79B: Evidence by live television link

[26] "Witness in fear" is defined under Criminal Procedure Ordinance s.79B(1) as a witness whom the court hearing the evidence is satisfied, on reasonable grounds, is apprehensive as to the safety of himself or any member of his family if he gives evidence.

[27] The provisions allowing these three categories of vulnerable witnesses to give evidence by live television link are separately set out in Criminal Procedure Ordinance s.79B(2), (3) and (4)

[28] Criminal Procedure Ordinance, Cap. 221, s.79C: Video-recorded evidence

that, different from giving evidence by live television link, this protection is only available to child and mentally incapacitated person[29], but not for "witness in fear".

4.2.3 Closed court proceedings

Criminal proceedings may be held in a closed court[30]. If it appears to a court that it is necessary so to do in the interests of justice or public order or security, the court may order that the whole of the proceedings before it in respect of any offence or, having regard to the reason for making such an order, any appropriate part of such proceedings shall take place in a closed court[31].

4.2.4 Anonymity of the complainant

Identity of the complainant may be kept from the public. Section 156 of Crimes Ordinance, Cap. 200, provides that after an allegation is made that a specified sexual offence has been committed no matter likely to lead members of the public to identify any person as the complainant in relation to that allegation shall either be published in Hong Kong in a written publication available to the public or be broadcast in Hong Kong except as authorized by a direction given in pursuance of this section.[32]

4.2.5 Rape shield protection

Apart from the above procedural protections for the complainants, there is also substantive protection for them during the trial of the accused. The most commonly known protection is the rape shield protection, which is contained in section 154 of Crimes Ordinance[33]. In a charge for a rape offence or indecent assault to which the trial in question relates, except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience of a complainant with a person other than that defendant.[34]

Additional protections are also provided by non-statutory guidelines and policies.

4.2.6 Gag order

For example, the District Court Advisory provides that in cases involving vulnerable witness of serious sexual offences and victims of blackmail whose identities needed to be protected, additional measures would be undertaken in order to give those victims confidence to testify, such as applying for a gag order and for the use of screen to prevent victims from being seen by the public during their testimonies. To reveal the identities of such victims to the public might understandably generate extreme fear, distress and embarrassment in their mind.

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[29] s.79C(2), (3), *ibid.*
[30] s.123(1), *ibid.*
[31] *Ibid.*
[32] Crimes Ordinance, Cap.200, s.156: Anonymity of complainants
[33] s.154: Restrictions on evidence at trials for rape etc, *ibid.*
[34] *Ibid.*

4.2.7 Other special measures provided by *The Statement of Prosecution Policy and Practice – Code for Prosecutors*

Also, section 22 of *The Statement of Prosecution Policy and Practice – Code for Prosecutors* also requires prosecutors, upon application, to assist vulnerable witnesses to give evidence in court with appropriate measures. Such measures may include:

i. evidence by live television link,
ii. evidence by video recorded evidence,
iii. priority listing,
iv. no postponement of trial,
v. avoidance of delay,
vi. arrangement of support persons,
vii. removal of gowns and wigs,
viii. and appropriate security for witnesses in fear,

there will also be cases where the interests of justice require a screen to be made available to shield a witness from the accused or the public, or for the public gallery to be cleared.

4.3 Rights of victims

Apart from the above specific measures provided for sexual offence victims, victims also possess a wide range of rights. These rights are recognized in the Victims of Crime Charter and Statements issued by the Department of Justice.

4.3.1 *Victims of Crime Charter*

The *Victims of Crime Charter* provides for a comprehensive account of victims' rights. For instances, victims have a right to information about the progress of investigation and prosecution[35]. If a decision is made not to prosecute, victims shall be told of that decision. Where prosecution is proceeding, victims shall be told about the steps which follow in the prosecution process, the progress of the investigation, the role of victims as witnesses in the prosecution of the offence, the date and place of the hearing of the proceedings, and the final disposal of the case, including the outcome of any appeal. Victims shall have the right to ask to be notified of the offender's pending release, or escape, from penal custody.

Victims also have a right to proper facilities at court[36]. Victims who have to give evidence in court shall not be made to feel intimidated by the experience. There shall be clear signposting in every court premises, and a clearly marked reception or information point. There shall be adequate accommodation and facilities for victims and other witnesses while they are waiting at the court premises.

[35] Victims of Crime Charter, Rights and Duties of a victim, 5.The victim's right to information - investigation and prosecution
[36] 6.The victim's right to proper facilities at court, *ibid.*

Other rights provided for victims under the Victims of Crime Charter include the victim's right to be heard[37], right to seek protection[38], right to privacy and confidentiality[39], right to support and after-care[40] and right to seek compensation[41], etc.

4.3.2 *Statement of Prosecution Policy and Practice – Code for Prosecutors*

The Statement of Prosecution Policy and Practice – Code for Prosecutors also recognized a series of victims' rights. Specifically, section 22.4 provides that the prosecutor must respect the rights of the victim. These include the rights to be treated with courtesy and respect; be kept informed of the progress of cases; have their views considered by prosecutors and investigators; be provided with proper facilities at court; have their circumstances and views brought to the attention of the court whenever appropriate; and respect for privacy and confidentiality.[42] Section 22.6 also provides that if a case concerns a vulnerable witness, the prosecutor is under a duty to remind the court that the Practice Direction requires it to be given priority for listing purposes, whilst section 22.7 provides that the prosecutor should take steps to ascertain if the victim wishes to claim compensation and/or restitution for the harm or loss that has been sustained.

4.3.3 *Statement on the Treatment of Victims and Witnesses*

The rights of sexual offence victims are reiterated in *The Statement on the Treatment of Victims and Witnesses*. Prosecutors have a responsibility, in an appropriate case, to advise the relevant agency as to the need for and the importance of particular witnesses in the conduct of a prosecution. If appropriate, steps should be taken to ensure that those responsible have done all that is necessary to protect victims and witnesses[43]. Prosecutors are also requested to seek to assist victims and witnesses at court by providing appropriate guidance and useful information.[44] Prior to trial, prosecutors will also need to consider whether witness protection is required and determine, if practicable, whether what is being/is to be provided is adequate.[45] Several guidelines are provided for prosecutors: to seek early identification of cases where protection might be necessary; to consult, if appropriate, with the case officer as to the nature of the protection required and its duration; to monitor, if appropriate, the situation of the witness subject to protection; to inform the court during the accused's application for bail of any risk of interference with witnesses and any need for witness protection; to notify the witnesses as soon as possible of any special bail conditions which may affect them or their families should the accused be released on bail by the court, etc.[46]

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[37] 7.The victim's right to be heard, *ibid.*
[38] 8.The victim's right to seek protection, *ibid.*
[39] 9.The victim's right to privacy and confidentiality, *ibid.*
[40] 11.The victim's right to support and after-care, *ibid.*
[41] 12.The victim's right to seek compensation, *ibid.*
[42] *The Statement of Prosecution Policy and Practice – Code for Prosecutors* section 22.4
[43] s.2.8, *ibid.*
[44] s.2.9, *ibid.*
[45] s.3.4, *ibid.*
[46] *Ibid.*

5. Testifying behind a screen as a protective measure to sexual offences complainants

5.1 The role of screen for the protection of sexual violence victims

It is supported by judicial opinions and research findings that the use of screen helps complainants to calm down at the court venue, and creates a mental state that is conducive to the giving of oral testimony of better quality[47]. In England, the court has increasingly recognized the effect of court process on the emotion of the complainants. The use of screen has been approved by the Court of Appeal in *R v Foster*[48] and by the European Commission of Human Rights in *X v United Kingdom*[49].

5.2 The framework of law governing the granting of screen in Hong Kong

In Hong Kong, statutes do not provide for special procedures or alternative arrangements in court that caters specifically to the distinctive nature of sexual offence trials. As such, the present law treats these complainants in a manner that is not different to other kinds of non-vulnerable adult witnesses, in the way that they need to go through the same procedures to apply for special measures via the prosecution. They also need to discharge the burden of persuading the court that their personal circumstances qualify for special measures. For example, in order to persuade the court to allow them to testify via live television link, an adult witness would need to satisfy the court that he/she is within the category of "witnesses in fear" [50]. The fact that the complainant is an alleged sexual violence victim does not put him/her at any advantage for the purpose of passing the test. It should be noted that since the court adopts a rare and exceptional approach in allowing this measure[51], sexual offence complainants face big difficulties in seeking assistance from it.

It should be noted that, whilst the granting of special measure in the form of live television link is provided for in the Criminal Procedure Ordinance, there is no statute which stipulates or provides for the ordering of the use of screen. As such, the judge or magistrate, in exercise of their inherent jurisdiction, decides on discretion as to whether it shall order the use of screen. There is no authoritative case law at present which offers appropriate guidance to judges regarding ordering the use of screen.

5.3 The unsatisfactory aspects of the present state of law

[47] See, for example, *R v West* [1992] 1 Qd R 227 at 231 (WilliamsJ); *R v Sparkes* (Tasmania, Supreme Court, No 47 of 1996; A58/1996, UnderwoodJ, 1 October 1996, unreported); *R v DJX*(1990) 91 Cr App R 36 at 40. For academic studies, please see also Hung, Suet-lin (2011) "*A Study on Help Seeking Experiences of Sexual Violence in Hong Kong: Community Response and Second Victimization*"; Association Concerning Sexual Violence against Women (2010) "*反擊*", Issue 30, July, 2010.

[48] [1995] *Criminal Law Review* 333

[49] (1993) 15 ECHR 113

[50] See s79B(4), *Criminal Procedure Ordinance* (Cap. 221)

[51] See *HKSAR v See Wah Lun* [2011] HKEC 866 English Judgment.

It is submitted that this state of the law is not satisfactory. This state of law gives rise to four problems. Firstly, the inherent jurisdiction to order the use of screen of the court unfettered by statutory or common law standards can render the granting of screen susceptible to the influence of any biased preference or hunch of the magistrate or judge concerned. According to the Association Concerning Sexual Violence Against Women[52], judges and magistrates in the past have given wide range of reasons for the granting or refusals of screen. These reasons are varying and are not intended to form a consistent system of rules[53]. There has been no certain or consistent standard to follow in the exercise of discretion. This may leave the matter to the whim of the individual judge or magistrate.

Secondly, the present law fails to achieve legal certainty in procedures in criminal trials. Legal certainty protects the expectation of the participators of the legal system. Knowing and being sure that their rights and interest will be respected by the system in certain circumstances, they are capable of planning their affairs accordingly. Legal certainty achieved by clearly stipulated law guards against abuses of power. It is well recognized that legal certainty is an underlying value of our common law system, and has been accepted as one of the very prerequisites for a good legal system[54]. However, since the law is absent and the prospects of being granted screen protection are uncertain, citizens are incapable to predict when and to what extent their related interest as witnesses would be protected in court trial. According to research[55], uncertainty and the process of waiting for results of application are huge sources of anxiety for victims of sexual offences. This causes confusion and fear in sexual offence complainants, giving rise to trauma, and having the effect of disabling them from testifying in court.

Thirdly, the present law as such being not friendly to witness's interest, gravely compromises the effective operation of the prosecution function of our criminal justice system. The purpose of the criminal law is to allow people to go about their daily life without harms to their persons and property. It is in the interest of everyone that serious crimes should be investigated and effectively prosecuted. Witness participation is important for the investigation and the prosecution of crimes. Giving proper care to witnesses encourages the report of crimes. On the other hand, confusion and fear aroused by uncertainty of protective measures discourage complainants from participating in prosecution. According to a survey conducted by one Hong Kong non-governmental organization, a vast majority of female victims of sexual assault did not report the incident to the police[56].

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[52] See Association Concerning Sexual Violence against Women (2012) "*反擊*", Issue 34, January, 2012 at p.1.

[53] For example, some magistrates have refused applications because they were of the view that the sexual violence victims, being adults, were not vulnerable like children and hence were not entitled to screen protection as children might well have been. In some other failure of applications cases, judges or magistrates refused applications because they were of the view that the granting of the screen would potentially form a ground for appeal which overthrew their ruling. Some cases seem to recognize that screen protection can be granted even to people who are not emotionally vulnerable. For example, there were cases where judges thought that screen protection should be granted since the judges were of the view that the persons were celebrities whose anonymity should be preserved for the protection of reputation.

[54] See, for example, Maxeiner, James R. (2008) "*Some realism about legal certainty in globalization of the rule of law*", Houston Journal of International law; The legal philosopher Gustav Radbruch regarded legal certainty, together with justice and policy, as the fundamental pillars of law.

[55] See, for example, Hung, Suet-lin (2011) "*A Study on Help Seeking Experiences of Sexual Violence in Hong Kong: Community Response and Second Victimization*".

[56] According to a survey conducted by the Association for the Advancement of Feminism (2005), 90% of the female

Fourthly, it is argued that the present procedural rules governing the use of screen discretion tend to discourage judges from treating these applications seriously. It should be noted that the issue of applications for the use of screen is raised by the prosecution before or during the trial. A prosecutor has minimal interest in arguing with the judge about the granting of the measure. Judges may also give only simple reasons with a few sentences in refusing the application. Besides, although the use of screen may be important to the interest of the witness, it should also be noted that in such failure of application situations even no appeal mechanism is open to complainants whose application is denied. Simply stated, their applications are at the mercy of the prosecution and the judge concerned, and the rights to proper facilities as mentioned in the Victims' Charter is precarious at best[57].

5.4 Different principles that operate against the granting of screen

It is submitted that the use of screens is not something that is dispensible or can be trifled with by our judicial professionals. Whilst we accept the fundamentality of defendant's right which has been developed into one of the proudest traditions of our common law system, it is our submission that these rights are not irreconcilable with a need to balance with the interest of other participators of the system such as the witnesses. This section serves to illustrate this position.

5.4.1 Defendant's right to fair trial

It has been a long-established principle in common law that the accused's right to a fair trial is absolute, and cannot be compromised or restricted. Failure to observe this would lead to a judicial decision being quashed[58]. Common law- recognized elements of fair trial may encompass the accused's right to public trial, the right to cross examine witnesses against him, the right to know the identity of the witnesses against him, etc.

However, it should be noted that the common law does not offer a rigid model of fair trial to the operation of the court system, which is to be judged on a case by case basis[59]. The common law vests the trial judge with the inherent power to control proceedings to ensure that fair trial is achieved. This power includes the power to make alternative arrangements for a witness to give evidence[60]. In exercising its discretion, the court will assess whether such an arrangement advances the course of justice[61].

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sexual assault victims interviewed did not report their incident of victimization to the police.

[57] Victims of Crime Charter, Rights and Duties of a victim, 6.The victim's right to proper facilities at court.

[58] The right to fair trial in common law finds its origin in the *Magna Carta* (1215). In the UK it was recognized in the 1689 Bill of Rights. In Hong Kong the most pertinent authority today is Article 86 and 87 of the *Hong Kong Basic Law* and Article 10, s8 of the *Hong Kong Bill of Rights Ordinance*.

[59] See NSW Law Reform Commission (2003, Report 101) "*Questioning of complainants by unrepresented accused in sexual offence trials*" at paras 6.23-6.24.

[60] See, for example, *R v Smellie* (1919) 14 Cr App R 128; *R v DJX* (1990) 91 Cr App R 36 at 41 (Hutchison LCJ).

[61] See, as an example in other common law jurisdictions, *Park v Citibank Savings Ltd* (1993) 31 NSWLR 219 at 225 (Powell J).

The requirement of fair trial requires that evidence is given accurately at court for the determination of the accused's case. This may not be possible where the complainant is so traumatized by the court experience that he or she is incapable of giving accurate or clear evidence. The requirement of fair trial therefore requires that complainant's emotion is well taken care of by the court so that they may give oral testimony competently. In circumstances where the complainant's apprehension of giving evidence in front of the alleged attacker compromises the reliability of the evidence, special or alternative arrangements such as screen protection are tenable instrument that reduces this apprehension. This role of screen to the common law has been recognized by the UK House of Lords. In *R v DJX*[62], a screen was placed to obscure the complainants of a sexual assault case from seeing or being seen by the accused. Lord Hutchison, the Chief Justice, applauded the use of the screen as "a perfectly proper, and indeed a laudable attempt to see that this was a fair trial: fair to all, the defendants, the Crown and indeed the witnesses". Hutchison LCJ continued, "The learned judge has the duty on this and on all other occasions of endeavouring to see that justice is done. Those are high sounding words. What it really means is, he has got to see that the system operates fairly… In the circumstances the necessity of trying to ensure that these children would be able to give evidence outweighed any possible prejudice to the defendants by the erection of the screen"[63]. After balancing the interest of justice in allowing the infant witness to be able to give evidence with the possible prejudice to the defendant, screen protection was considered to be a measure that is conducive to a fair trial and was granted.

Besides, it should also be noted that modern common law jurisprudence points to a triangulation of the interest of the defendant, witnesses, and the community at large. This is expressed by Lord Hutchison the Chief Justice in *R v DJX*, where he stated, "[the learned judge] has got to see that the system operates fairly… fairly not only to the defendants but also to the prosecution and also to the witnesses. Sometimes he has to make decisions as to where the balance of fairness lies…"[64] Fairness to witnesses is increasingly accepted as a condition for a fair trial also in other common law jurisdictions. The issue has been discussed in *R v TA*[65], a New South Wales case. In that case, Spigelman CJ stated, in sexual assault matters, it is appropriate for the court to consider the effect of cross-examination and the trial experience upon a complainant when deciding whether s 41 of the Evidence Act 1995 [66] should be invoked. Spigelman CJ acknowledged that the difficulties encountered by complainants in sexual assault cases in the criminal justice system had been a focus of concern for several decades. Judges play an important role in protecting complainants from unnecessary, inappropriate and irrelevant questioning by or on behalf of an accused. That role is perfectly consistent with the requirements of a fair trial, which requirements do not involve treating the criminal justice system as if it were a forensic game in which every accused is entitled to some kind of sporting chance[67]

The above aside, it is also submitted that the criminal justice system expresses the relationship between the state and the citizens, being operated for the state's prosecution of any commission

[62] (1990) 91 Cr App R 36 at 41, per Hutchison LCJ
[63] See *ibid*, at 40.
[64] *Ibid*.
[65] (2003) 57 NSWLR 444
[66] S41 of the *Evidence Act* 1995 provides for when the court has the power and duty to disallow a question put to a witness in cross-examination, or to inform the witness that it need not be answered: see s41(1).
[67] *Supra*, fn 65, at 446.

of criminal offences by civilians. If the accused have a right against the arbitrary sanction and oppression by the system of the state in the form of an unfair trial, it is hard to argue why other civilian participants in the same system should not be entitled to the same.

5.4.2 Right to Public Trial

It is provided by Article 14 of the *International Covenant on Civil and Political Rights* (*ICCPR*) that everyone is entitled to a fair and public hearing. The Covenant applies to Hong Kong pursuant to Article 39 of the *Basic Law*. The right has its origin in the *Raleigh's case*[68], and has been recognized as an important tool for preventing abuse of the court system by the state for the purpose of oppressing citizens. It is said by Lord Steyn that "the glare of contemporaneous publicity ensures that trials are properly conducted"[69]. Jeremy Bentham, the utilitarian jurist, also spoke about the values of the right, "Publicity is the very soul of justice. It is the keenest spirit to exertion and the surest of all guards against improbity." R. Friedman expressed that openness of procedure ensures amongst other benefits that, "the witness's testimony is not the product of torturer of milder forms of coercion and intimidation" [70].

The spirit of this right is to ensure that evidence obtained from witness is factually accurate, and is not distorted by illegitimate means of extraction such as torture. This notion is shared by Ian Dennis, in which he accepts that factual accuracy is a fundamental condition of the legitimacy of a criminal verdict, and publicity helps achieve this spirit by serving as procedural tool for maximizing the factual accuracy of adjudication. Dennis said that a defendant's interest in publicity as a means of potentially increasing the factual accuracy of adjudication can provide a foundation for this right.

If we accept that the fundamental spirit of this right is for the achievement of the factual accuracy of evidence, a query could be raised as to whether this right could be legitimately curtailed where insisting on it would in certain situations have the inevitable effect of compromising the factual accuracy of evidence. In the case of defendant of sexual violence offence being on trial, insisting on the public trial requirement that testifying complainants must physically confront the defendant has the effect of creating an excessive burden to an extent that would seriously affect complainant's ability to give evidence with quality.

Although the right to public trial has been known in the common law as a right that defendant enjoys during his trial, human rights instruments such as the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (*ICCPR*) have recognized that the right is by no means absolute, and could be curtailed for the achievement of certain aims that the instruments themselves regard as legitimate. The *ICCPR*, of which Hong Kong has become a state party since 1976, has provided for the exclusion of the press and public from the trial on various grounds in Article 14(1), including (1) reasons of morals, (2) public order (ordre public) or national security in a democratic society, and (3) when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the

[68] 2 How. St. Tr. 1, 15-16, 24 (1603)
[69] See *S (A Child) (Identification: Restrictions on Publication), Re* [2004] 4 All E.R. 683 at 696, per Lord Steyn.
[70] See Richard Friedman, "*'Face to Face': Rediscovering the right to confront prosecution witnesses*" (2004) 8 E. & P. 1, 15.

court in special circumstances where publicity would prejudice the interests of justice. After the Handover, this article continues to apply to Hong Kong pursuant to Article 39 of the *Basic Law*. This means that the right to public trial should not be treated as a ground that has the effect of leading to the absolute foreclosure of any inquiry as to whether a screen is a legitimate means to be used in the court, especially where the interest of the private lives of the witnesses (who, although not strictly a party to a proceeding, are participants in the court procedures) are arguably concerned. Many common law jurisdictions have also recognized that the granting of screen as special measures or alternative arrangement for the protection of vulnerable witnesses can be a legitimate form of curtailment of the right to public trial[71], at least where it is required for enhancing the quality of evidence. The Youth Justice and Criminal Evidence Act 1999 of UK, for example, codified screen as among the range of special measures that could be chosen at the discretion of the court where it is satisfied that the defendant is a "vulnerable witness"[72].

5.4.3 Right to confront the accusers physically

Another dimension of the right to fair trial that has been recognized by the common law world is the right to confront the accusers physically. The purpose of this right, according to Ian Dennis, is for the testing of "the witness's sincerity by seeing whether the witness is prepared to make the accusation to the defendant's face rather than behind his back in private"[73]. This, however, is derived from the United States jurisprudence expressed in the authoritative ruling in *Coy v Iowa*[74]. Another purpose mentioned by Ian Dennis, is to "give effect to a principle of respect for the defendant's dignity and autonomy by symbolically placing him on a footing of equality with the witness"[75], so as to "emphasize his entitlement to play a full role in the adjudicative process rather than being dealt with as an object for the application of the criminal law". However, this right is absent in English Law[76]:

In Hong Kong, the right to see and confront the witnesses against the defendant has been discussed in *HKSAR v See Wah Lun and others*[77]. Whilst accepting that the in the context of the *Basic Law* and *Bill of Rights* of Hong Kong, Hong Kong needs not follow the European Convention of Human Rights in refusing the right to the defendant, it has nevertheless been accepted that the extent to which this right is realized is subject to curtailment if after balancing the interest of the accused and the significant public interest of witness giving evidence without

[71] Examples include the UK, New South Wales, Victoria, South Australia.
[72] S23(1), *Youth Justice and Criminal Evidence Act* 1999
[73] See Ian Dennis, "*The right to confront witnesses: meanings, myths and human rights*" (2010) Crim L.R. 255 at 263.
[74] 487 U.S. 1012 (1988)
[75] Ian Dennis arguably derived this from a number of articles, including T. Massaro, "*The Dignity Value of Face-to-Face Confrontations*" (1988) 40 Florida L.R. 863; E. Scallen, "*Constitutional Dimensions of Hearsay Reform: Toward a Three Dimensional Confrontation Clause*" (1992) 76 Minn. L.R. 623.
[76] Statements in the House of Lords indicated that art.6 in the *European Convention on Human Rights* (ECHR) provides no right of physical confrontation of a witness, and the Strasbourg jurisprudence provides no support for the same: See *Camberwell Green Youth Court* [2005] UKHL 4; [2005] 1 All E.R. 999; Also see Emmerson, Ashworth and Macdonald, *Human Rights and Criminal Justice*, 2007 fn.409, paras 14-161et seq.; *Lee Kun* [1916] 1 K.B. 337; *Jones (Anthony William)* [2002] UKHL 5; [2003] 1 A.C. 1.
[77] CACC 370/2009

occasioning danger to themselves or members of the community the court the court is of the view that it is appropriate to grant such an order[78].

5.4.4 The Right to Cross Examination

In Hong Kong, Article 14(3) of the *ICCPR* provides for the right to cross examine a witness against the defendant[79].

Right to cross examination is a feature of the adversarial process, designed to expose deficiencies in a witness' testimony[80]. It is expressed by Ian Dennis that the purpose of a right to cross examine witnesses against the defendant is to help to avoid a miscarriage of justice in the form of wrongful conviction by bringing out material favourable to the defendant which has been previously suppressed, exposing lies and mistakes in the adverse testimony, discrediting the witness completely or in an important respect[81]. The factual accuracy of evidence is also the object that this right aims at achieving[82]. The right is also intended to acknowledge the defendant's autonomy and dignity by allowing his voice to be heard to the maximum extent[83].

But in many common law jurisdictions, the right to cross examine witnesses has been recognized as non-absolute. For example, in UK, this right is subject to limitation where the witnesses are the complainants of sexual offences and certain categories of child witness[84]. Where the quality of the witness's evidence is likely to be diminished if the cross-examination is conducted by the defendant in person, the court has the power to prohibit a defendant from cross-examining in person any other witness[85]. The statutes and the common law have imposed prohibition against the asking of sexual history of complainants in rape cases, and the bad character and previous convictions of victims and witnesses generally. According to Ian Dennis, modern legislation aiming at protecting witnesses from unjustified distress and humiliation has cut back on the freedom defendants enjoyed at common law to attack the credibility of witnesses by questions and evidence of these types[86].

It is submitted that even the use of screen does not necessarily prevent a defendant's legal representative from cross-examining witnesses. A screen has the logistical advantage that its physical position may be adjusted to enable the witness to be visible by any participant or any group of participants of the trial or the public. The UK law requires that the use of screen must not prevent the witness from being able to see, or being seen by the judge or justices (or both)

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[78] See para 29, *ibid*.
[79] "In the determination of a criminal charge against him, everyone shall be entitled to a minimum guarantee… (d) Right to examine witnesses against him and to obtain the attendance and examination of witnesses on his behalf …"
[80] Such notion could be seen, for example, in Australian Government and Australian Law Reform Commission, "*Uniform Evidence Report*" at p. 141, 5.70
[81] See *supra*, fn 73 at 266.
[82] *Ibid*.
[83] *Ibid*.
[84] See s34 (concerning adult complainants) and s35 (concerning child witnesses) in *Youth Justice and Criminal Evidence Act 1999* (UK).
[85] See s36, *ibid*.
[86] See *supra,* fn 73 at 267.

and the jury (if there is one)[87], and legal representatives acting in the proceedings[88]. This model for its use does not prevent the defense counsel from cross-examining a witness or prevent the judge or jury from beholding the response of the witness, with the full advantage of observing the witness's demeanour, whilst at the same time removing visual contact between the witness and the defendant.

5.4.5 Right to know the identity of the accuser

The right to know the identity of the accuser is important for effective cross-examination, since cross-examination as to credibility may become much more difficult if the defendant cannot investigate the witness's background and reputation[89]. In *Smith v Illinois*[90], it was opined by the Supreme Court of US: "The witness's name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself."

However, it should be noted that the use of screen does not in conflict with the right of the defendant to know the identity of the witness.

5.5 Application of screen in other jurisdictions

In many common law jurisdictions, modern evidence jurisprudence has evolved to cope with the recognition of the complainants' plight. For example, statutes are enacted in these jurisdictions to stipulate the circumstances which warrant special measures or alternative arrangements being granted for sexual offence complainants testifying in court. In some jurisdictions, adult sexual offence victim are entitled to statutory rights of using special measures, including a wide range of protection such as the use of screen, closed-circuit television or video-recorded testimony. Other jurisdictions have legislated to provide for the use of screen, thus giving a statutory recognition to the use of screen as a legitimate means to enhance the quality of evidence.

Unlike the situation in Hong Kong, where the granting of screen remains a matter of discretion for the magistrate or the judge concerned, these jurisdictions have provided for it in their statutes. This section offers an overview of the law of these jurisdictions regarding the granting of screen protection for sexual offence complainants, which may serve as reference for Hong Kong if Hong Kong needs to revise its legislation.

Amongst these jurisdictions, the Australian province of Victoria, the United Kingdom, New South Wales and Northern Territory (5.5.1 – 5.5.4) provide more protection by specifically

[87] See s23(2)(a), *Youth Justice and Criminal Evidence Act 1999* (UK)
[88] See s23(2)(b), *ibid*.
[89] See *Alford v United States* (1931) 282 U.S. 687; Lord Diplock, *Report of the Commission to Consider Legal Procedures to deal with Terrorist Activities in Northern Ireland* (Diplock Report) (HMSO, 1972), Cmnd.5185, para.20
[90] (1967) 390 U.S. 129 at 131

entitling adult sexual offence complainants to a special witness/ vulnerable witness status in the statute, which means the complainants are entitled to a statutory *right* to the enjoyment of special measures. For Western Australia, South Australia, Queensland and Canada (5.5.5 – 5.5.8), adult sexual offence complainants are not specifically entitled to a special witness status under statutory law.

5.5.1 Victoria

The Victoria Criminal Procedure Act 2009 No. 7 recognizes the special status of complainants of a sexual offence by giving them the legal status of a "protected witness"[91].

The court is given a power to direct that alternative arrangements be made for the giving of evidence by these witnesses. These arrangements include the use of closed-circuit television, the use of screens, allowing support persons chosen by the witness to be his/her company when giving evidence, etc.[92]

Where the witness is a complainant relating to a charge of a sexual offence, the court must direct the arrangement of closed-circuit television facilities for him/her to give evidence, unless he/she makes the informed choice that he/she does not wish to use it[93]. Where the witness does not wish to give evidence out of the courtroom (thus relinquishing the right to use closed-circuit television facilities) and applies for giving evidence in the courtroom, the court must direct that he/she testifies with the use of screens, unless he/she makes the informed choice that he/she does not wish to use it[94]. It should also be noted that where sexual offence complainants are to give evidence either in or out of the courtroom, the judge or magistrate must direct presence of a support person at his/her choice[95].

The Victorian law gives fullest protection to sexual offence complainants since it creates a statutory presumption that these witnesses must testify through closed circuit television or behind the screen at their choice. The enjoyment of these measures is neither a matter at nor subject to the discretion of the judge.

It should also be noted that the legislation recognizes with certainty a wide range of special arrangements for protected witnesses. These include permitting only those specified by the court to present while the witness is giving evidence[96], requiring legal practitioners not to robe[97], requiring legal practitioners to be seated while examining or cross-examining witnesses[98].

[91] See s359, *Criminal Procedure Act 2009* (Victoria).
[92] See s360, *ibid*.
[93] See s363, *ibid*.
[94] See s364, *ibid*.
[95] See s365, *ibid*.
[96] See s360(d), *ibid*.
[97] See s360(e), *ibid*.
[98] See s360(f), *ibid*.

5.5.2 The United Kingdom

The law in the United Kingdom provides that a complainant in respect of a sexual offence is to be treated as a "vulnerable witness", who is eligible to assistance by special measures unless he/she does not wish to be so eligible[99]. But the question whether and which specific special measure(s) the complainant will be granted remain a matter to be decided by the court[100]. In the determination of these questions, the law provides that the court shall consider whether granting special measures will improve the quality of evidence[101], and that the measure or combination of measures granted shall maximize so far as practicable the quality of evidence given by the witness[102]. Hence, the witness is only entitled to a "special status" that must attract the consideration of granting special measures, but is not entitled to an absolute right to special measures or to choose specifically which special measure that is going to be used in court.

5.5.3 New South Wales

New South Wales Law Reform Commission recognized there are at least 3 factors that make sexual offence trials particularly distressing for sexual offence complainants: the nature of the crime; the role of consent with its focus on the credibility of the complainant; and the likelihood that the complainant and the accused knew each other before the alleged assault[103].

The NSWLRC found that the treatment of such matters in cross-examination is a particular concern, with complainants likely to be cross-examined for a longer period of time than victims of other types of assaults. Complainants have appealed for greater control of cross-examination to make the process less stressful[104]:

New South Wales has special criminal procedural rules in its legislation which is tailor-made for the distinctive nature of sexual offences trials. The New South Wales Criminal Procedure Act 1989 No. 209 has a carved-out section which contains provisions that deal specifically with the giving of evidence by complainants in sexual offence trials[105].

The New South Wales law gives powerful protection for sexual offence complainants testifying in court. Its Criminal Procedure Act 1989 No. 209 provides that complainants of prescribed sexual offences are entitled to (1) giving evidence via closed-circuit television facilities, or (2) giving evidence by use of alternative arrangements such as (a) the use of screen or (b) planned

[99] See s17(4), *Youth Justice and Criminal Evidence Act 1999* (UK).
[100] See s19(2), *ibid*.
[101] See s19(3)(a), *ibid*.
[102] See s19(3)(b)(i), *ibid*.
[103] See New South Wales Law Reform Commission, Report 101 "*Questioning of Complainants by unrepresented Accused in Sexual Offence Trials*" (2003) from paras 2.1 to 2.11.
[104] See New South Wales Law Reform Commission, Report 101 "*Questioning of Complainants by unrepresented Accused in Sexual Offence Trials*" (2003) at para 2.2.
[105] See Part 5 of the *New South Wales Criminal Procedure Act 1989 No. 209*, from s290-s306L.

seating arrangements[106]. Complainants are also entitled to choosing support persons when giving evidence[107].

It should be noted that New South Wales' law did not rule out the inherent jurisdiction of the judge or the magistrate to control the proceedings outright. The aforementioned entitlement to alternative measures is subject to an order of refusal from the court in the interest of justice[108].

5.5.4 Northern Territory

The Northern Territory law also recognizes the special status of alleged sexual violence victims. It provides that alleged victims of a sexual offence are "vulnerable witnesses"[109] who are entitled to giving evidence by use of special arrangements at their choice, such as the use of the closed-circuit television facilities[110] and screens, partition or one-way glass[111], the company of another as support person[112] and closed court proceedings[113].

Like the position in New South Wales, the judge or magistrate is given the power to refuse special arrangements. He/she may do so where he/she is of the view that (1) it is not in the interests of justice for the witness's evidence to be given using that arrangement[114]; or (2) the urgency of the proceeding makes the use of that arrangement inappropriate[115]. A laudable aspect of this area of law of the Northern Territory is that it extends the spirit of legal certainty to the delineation of what amounts or does not amount to being "in the interests of justice" to use the arrangements[116]. This guides the exercise of discretion by judge or magistrate in refusing special arrangements. Besides, one consideration concerning whether to refuse the arrangements is the need to minimize harm that is caused to the vulnerable witness[117]. This has symbolic significance since it reflects a commitment to the mandate of the law to take care of the need and interest of victims of crimes.

It should also be noted that the Northern Territory law is that after application for special arrangements is made and pending determination of the application, the witness applying for the arrangements is to be treated as if he/she is a vulnerable witness[118]. This mitigates anxiety faced by witness awaiting decision.

5.5.5 Western Australia

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[106] See s294B(3) of the *New South Wales Criminal Procedure Act 1989 No. 209*.
[107] See s294C(1), *ibid*.
[108] See s294B(6), *ibid*.
[109] See s21A(1), *Evidence Act* (Northern Territory).
[110] See s21A(2)(a), *ibid*.
[111] See s21A(2)(b), *ibid*.
[112] See s21A(2)(c), *ibid*.
[113] See s21A(2)(d), *ibid*.
[114] See s21A(2A)(a), *ibid*.
[115] See s21A(2A)(b), *ibid*.
[116] See s21A(2B), *ibid*.
[117] See s21A(2B)(a), *ibid*.
[118] See s21A(6), *ibid*.

A judge or a magistrate has the power to make an order to grant a special witness status on the application by the prosecutor on the victim's behalf[119]. However, a sexual offence complainant is not automatically recognized as a special witness, and is not automatically entitled to the special measures.

The law provides for grounds which guide the exercise of power to grant a special witness status or the use of special measures: (1) where by reason of physical disability or mental impairment, the witness is unlikely to be able to give evidence, or to give evidence satisfactorily; or where (2) the witness is (a) likely to suffer severe emotional trauma by reason of age, cultural background, relationship to any party to the proceeding, the nature of the subject matter of the evidence, or any other factor that the court considers relevant; or where (b) the witness is so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily by reason of age, cultural background, relationship to any party to the proceeding, the nature of the subject matter of the evidence, or any other factor that the court considers relevant[120]. A healthy sexual offence complainant is not automatically regarded as a special witness. He/she has to satisfy the aforementioned requirements (2)(a) or (b) before the court may make an order of declaring him/her as a special witness or directing special arrangements such as video links or screens.

Nonetheless the law recognizes the special status of victims of *serious* sexual offence. There is a presumption of special witness status for serious sexual offence victims which obligates the judge or magistrate to grant such status to this group of witnesses on application. This is so unless the witness relinquishes his/her right to be treated as so, or the judge or magistrate is not satisfied that the witness be so[121].

Special witness may apply for (1) a support person approved by the court; (2) a communicator while he/she is giving evidence; (3) giving evidence via video link or for a screen arrangement as described in S106N[122].

5.5.6 South Australia

The South Australian law does not automatically treat an adult complainant of sexual offence with mental disabilities as a "vulnerable witness". Such complainants have to satisfy the court that they meet the one of the conditions provided for in s4 of Evidence Act 1929 in order to obtain the status granted by the court. These conditions include (1) that the complainant is an alleged victim of a serious offence against the person[123], (2) the circumstances of the witness or the circumstances of the case would make the witness be specially disadvantaged if not treated as vulnerable witnesses[124], *inter alias*. The court also retains the discretion to order the specific kind of special measure(s) to any vulnerable witnesses.

[119] See s106R(3)(a), *Evidence Act 1906* (Western Australia).
[120] See s106R(3), *ibid*.
[121] See s106R(3a), *ibid*.
[122] See s106R(4), *ibid*.
[123] See s4, *Evidence Act 1929* (South Australia)
[124] *Ibid*.

Nevertheless, South Australia law has codified special measures which the judge or magistrate may grant to "vulnerable witnesses"[125].

The judge or magistrate may also on his/her own initiative and at his/her discretion orders that special measures be granted to protect witness from embarrassment or distress, or to protect witness from being intimidated by the atmosphere of the courtroom or for any other proper reason[126].

5.5.7 Queensland

Queensland's law does not confer any special status upon alleged victims of sexual offences. Nevertheless, it provides for criteria for determination when a witness will be classified as a "special witness". Alleged victims of sexual offences will have to satisfy the court that, *inter alias*, he/she is likely to suffer from emotional trauma[127], or to be so intimidated as to be disadvantaged as a witness, if he/she is required to give evidence in accordance to the usual rules and practice of the court[128].

Complainants of sexual assaults are not presumed to be special witness under the current law. The use of screen is not listed as special measures, but complainants of sexual assaults are qualified as protected witness under section 21M of the Evidence Act 1977. Special procedures are provided in regards to cross-examination

5.5.8 Canada

The Canadian law does not specifically legislate for healthy adult sexual offence complainants. It provides that a judge or justice shall grant the use of screens for (1) witness under 18 or (2) who may have difficulty in communicating evidence due to physical or mental disability[129]. Adult sexual offence complainants might be granted the use of screen if a judge or justice is of the opinion that keeping the complainant from seeing the accused is necessary "to obtain a full and candid account of the acts complained of from the complainant"[130]. The judge shall take into account the age of the witness, whether the witness has a mental or physical disability, the nature of the offence, the nature of any relationship between the witness and the accused, and any other circumstance that the judge or justice considers relevant[131].

5.6 Recommendation to legal reform

It is submitted that the present law regarding the ordering of the use of screen leaves too much room for the exercise of discretion by judges or magistrates. To recap, studies have shown that magistrates and judges are often influenced by patriarchal norms which make them insensitive to the emotional distress and need of sexual offence complainants. Discretion makes room for these

[125] See s13A(2), *ibid*.
[126] See s13(1)(a), *ibid*.
[127] S21A(b)(ii), *Queensland Evidence Act 1977*
[128] S21A(b)(iii), *ibid*.
[129] S486.2(1), *Criminal Code*, RSC 1985, c C-46 (Canada)
[130] S486.2(2), *ibid*.
[131] See ss486.2(3) and 486.1(3), *ibid*.

hunches to intervene, leading to the result that complainants are not adequately protected whilst they ought to be. Complainants are required to give evidence in distress. The quality of the evidence they give is also compromised

It is submitted that a statutory presumption for entitlement to the use of screen in favour of sexual offence complainants (resembling the model in Victoria) should be created. This model gives the strongest protection by creating a presumption to use of screen rebuttable only at the complainant's will. The purpose of this proposal is four-folded. First, it removes rooms for influence of bias in the exercise of discretion by magistrates and judges. This has special meaning in the context of Hong Kong where patriarchal norms may still exercise some influence even among our senior judicial members in a predominantly Chinese society. Secondly, such a presumption amounts to instituting a *right* to the use of screen to sexual offence complainants. This creates a reciprocal *obligation* of the court to order its use. As such complainants' enjoyment is no longer precarious, and will no longer form any ground for appeal. The third purpose is to create legal certainty in the granting of orders regarding protective measures. Research has found that distress to complainants is reduced where they know that protective measures for giving evidence will be available as a matter of course[132]. The fourth purpose is sociological. It is that our law, by incorporation in statutes, is able to exercise its expressive function to give recognition to the distinctive nature of sexual offence trials and special circumstances faced by alleged victims of sexual violence which are distinct to those of other kinds of complainants.

As an alternative position, perhaps pending to the ultimate achievement of the above submission, It is submitted that a statutory entitlement to special measures in favour of sexual offence complainants subject to the judge's discretion of refusal (resembling the model in the United Kingdom, New South Wales, Northern Territory) should be created. More precisely, the Northern Territory position is the most preferable, where sexual offence complainants being "special witness" or "protected witness" are entitled to a list of special measures, but the judge or magistrate shall only exercise principled discretion to refuse. This position of law gives recognition to the distinctive nature of sexual offence trials and the special circumstances faced by sexual offence complainants, but allow judges and magistrates to retain discretion.

Our further fallback position is to ask for a list of considerations which the judge should visit when exercising his discretion on whether to order the use of screen to any witness who applies for its use. This is to ensure legal certainty and prevent the exercising of discretion from being affected by personal hunches.

5.7 Conclusion

It has been support by modern studies on court procedures that sexual offence trial possesses distinctive nature that distinguishes it from trials of other kinds of offences. This paper takes the view that the court in Hong Kong fails to respond adequately to this distinctive nature of sexual offences, resulting in excessive emotional trauma and harm suffered by testifying complainants during the court procedures. This not only causes re-victimization in sexual offence victims, but

[132] See New South Wales Law Reform Commission, Report 101 "*Questioning of complainants by unrepresented accused in sexual offence trials*" (2003), at para 6.21.

also compromises the operation of the criminal justice system, since the emotional trauma suffered by complainants affects the quality of evidence given, and even discourages complainants from testifying in court, thus impeding the work of prosecution.

This paper argues that screen has the effect of protecting testifying complainants from being exposed to this emotional trauma, and hence preserving the quality of evidence given by testifying witnesses. The stance of the writer is that this important role of screen should not be overlooked by the court, and should be considered in administration of justice in court.

At the same time, we acknowledge that the granting of screen protection *prima facie* operates against some common law principles on criminal procedures and the right of the defendants. We argue that these hurdles can be overcome. It is also submitted that the court's mandate to uphold a fair trial shall require the court to consider the fairness both to the defendant and to the complainant.

Finally, we offer an overview of the law of other common law jurisdictions and give recommendations for the betterment of law. It is submitted that the other common law jurisdictions are more progressive than Hong Kong in giving recognition to the distinctive nature of sexual offences trials, and have reformed their law regarding the granting of special procedures accordingly to accommodate this nature.

6. Testifying through live television link as a protective measure for sexual offences complainants

Testifying in court by live television link is the only statutory special protective procedure which a healthy adult sexual violence victim could be eligible to under Part IIIA of Criminal Procedure Ordinance (Cap. 221) ("CPO"). Sexual violence victims are faced with multiple hurdles when applying for testifying in court by live television link due to inadequacies of the existing law in Hong Kong. First, sexual offence complainants are not specifically entitled to use of live television link by reason of their special status as a sexual offences victim, and have to satisfy the "witness in fear" requirement provided by s.79B(1) CPO in order to be so eligible. Secondly, in Hong Kong case law, the reasonable grounds for finding a witness as a "witness in fear" are only limited to severe circumstances which fail to respond to the reality. Thirdly, the judicial attitude is also towards rare and exceptional use of live television link. Fourthly, there is inadequate statutory guidance as to the determination of a "witness in fear".

6.1 Justifications of testifying through live television link

Sexual violence victims are usually the witness, in most of the cases the only witness of the crime and have to testify in court. In sexual offences trials the issue of consent and credibility of the witness are essential to the ruling, leading to long, hostile and embarrassing cross-examinations. Therefore, in many jurisdictions, sexual offence complainants are entitled to protective measures like testifying behind a screen or through live television link to prevent them from emotional harm and second victimization. By the use of live television link, the victim can give evidence in a room separate from the court room and avoid being in the same space with the defendant abuser, so that his/her emotions would be less affected, enhancing the quality of the testimony.

The intention of giving such protection to the witness is explained in *R v Wong Kwai Nam* [1997] HKLY 362 per HH Judge Pang (in the judgment extract quoted below, Pang J is referring to a "witness in fear" defined at s.79B(1)),

> *"The intention of the new provisions under s.79B was to allow a witness who was in reasonable fear to give evidence via a televised link in a safe and protected environment. The legislation recognised the fact that the proximity of the defendant might itself be such a threat or interference that the witness would not be able to give his evidence freely and without any perceived pressure."*

6.2 Eligibility for testifying by live television link

In order to be eligible to testifying by live television link, the witness, if not a child or a mentally incapacitated person[133], has to satisfy the "witness in fear" requirement prescribed in s.79B(1) CPO. According to the provision, "witness in fear" means "a witness whom the court hearing the

[133] CPO provides for the giving of evidence through a live television link from a child at s.79B(2) and a mentally incapacitated person at s.79B(3).

evidence is satisfied, on reasonable grounds, is apprehensive as to the safety of himself or any member of his family if he gives evidence".

Regarding the determination of "witness in fear", in *HKSAR v See Wah Lun* [2011] 2 HKLRD 957 para.29, Cheung JA summarized 3 principles:

> *"(5) An adult witness can still be a witness in fear. In deciding whether he is a witness in fear, the court is to have regard to the circumstances of the case and the nature and circumstances of the witness. Factors such as the witness being an accomplice and has been under a witness protection scheme may be taken into account.*
>
> *(6) A witness in fear may not be in any actual danger and that his fear may only be that of meeting the assailant face-to-face.*
>
> *(7) The critical issue in determining whether a witness can be characterised as a "witness in fear" is the state of mind of the witness. It is not necessary that their fears be objectively justified or that those fears are directly attributed to conduct on the part of the accused."*

In summary, in order to determine whether a witness is a "witness in fear", the critical test used by the court is a subjective test, that is, whether it is the state of mind of the witness that he/she is apprehensive as to the safety of himself/herself or any member of his family if he/she gives evidence in court (point (7)). The apprehension need not be limited to the safety of himself or any member of his family, but can also be about meeting the assailant face-to-face (point (6)). The apprehension need not be objective. At the same time, the court is to have regard to the objective circumstances of the case and the nature and circumstances of the witness. Factors such as the witness being an accomplice and has been under a witness protection scheme may be taken into account in consideration of determination of a "witness in fear" (point (5)).

It should be noted that although the court employs a subjective test to access the witness' state of mind, objective elements also come into play. The statutory provision s.79B(1) provides that *the court has to satisfy on reasonable grounds* the witness is apprehensive as to the safety of himself or any member of his family. In this way the reasonable grounds element introduces objectivity into the determination of "witness in fear". This means the subjective state of mind of the witness is enough to establish apprehension, but only if the court is satisfied that such apprehension is found on objectively reasonable grounds could a witness be determined as a "witness in fear".

Since Criminal Procedure Ordinance (Cap. 221) does not prescribe factors or criteria which help the court determine if there are reasonable grounds, one has to look at the case law to seek guidance. Looking at the Hong Kong case law, it is contended that the circumstances to find reasonable grounds of apprehension are too limited to protect vulnerable witnesses. In *HKSAR v See Wah Lun* [2011] 2 HKLRD 957 para.29, Cheung JA mentioned at paragraph 29 in point (5) that in deciding whether he is a "witness in fear", the court is to have regard to the circumstances of the case and the nature and circumstances of the witness. 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 young 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).

The statutory requirement of "witness in fear" and the limited construction of reasonable grounds to find apprehension diminish the victim's chance for eligibility for the use of live television link. First, the requirement of "witness in fear" limits the use of live television link only to (1) circumstances which the complainant witness would be apprehensive to the safety of himself/herself or his/her family if he/she gives evidence in court; or (2) he/she would be fearful to meet the assailant face-to-face. Such requirement would diminish the strength of justification to grant the use of live television link when the defendant abuser is an acquaintance of the complainant. This would be an ignorance to the fact that in severe sexual offence cases like rape, the abuser is usually an acquaintance, and the threat and emotional trauma posed to the victim when meeting the abuser again in the court room could be as traumatizing as when the abuser is a stranger. Secondly, a complainant only qualifies as a "witness in fear" in one of the two circumstances mentioned above, which is very incomprehensive, ignoring the wider range of circumstances such as that the complainant might feel intimidated not because of actual danger or having to face his assailant, but because of the stressful and embarrassing cross-examination process.

Thirdly, the limited construction of reasonable grounds to find apprehension confines use of live television link to only severe circumstances or very vulnerable witness. This ignores the fact that sexual offences exist in many forms in reality, and each case has its particularity, those circumstances which are less severe in the eyes of the law such as indecent assault could be as emotionally devastating to the complainant as "severer" circumstances such as rape. Also, a teenager as well as a mature adult at the time of the crime could feel equally helpless and devastated when their body integrity has been infringed, regardless of their age. More importantly, the limited principles established by our case law on determination of "witness in fear" and the lack of comprehensive guidance in the statute failed to take into consideration factors pointing to a vulnerable witness in a wider context, such as the complainant witness' religious, employment, ethnic background, etc.

It is argued that the current law on the determination of eligibility for "witness in fear" fails to recognize the distinctive nature of sexual offences and ignores the needs of the victims. It is proposed that legal reforms shall be in place to improve the situation, which will be discussed in the later part of this paper.

6.3 Justifications of rare and exceptional use of live television link

Use of live television link has been rare and exceptional in Hong Kong. Regarding the balancing interests between the defendant and the witness on the granting of live television link, in *HKSAR v See Wah Lun* [2011] 2 HKLRD 957 para.29, Cheung JA summarized 4 principles which are quoted below:

"(1) An accused is entitled to the fundamental right of a fair trial. The accused is also entitled to confront his accuser and see him in the eye. It is not necessary to decide whether the right to a fair trial includes the right to confront and look the accuser in the eye. It appears that the common law right of a face-to-face confrontation is not guaranteed by the European Convention on Human Rights (see R (D) v Camberwell Green Youth Court [2005] 1 WLR 393). This view may probably be explained by the fact that, apart from England, many European countries do not have the requirement of seeing the witness in court. In the context of the Basic Law and Bill of Rights in Hong Kong, such a rationale may not necessarily be applicable. In any event, even under common law, the right to confront and see the witness can be curtailed. As Lord Coleridge J stated in R v Smellie (George) (1920) 14 Cr App R 128 , 130:
If the judge considers that the presence of the prisoner will intimidate a witness there is nothing to prevent him from securing the ends of justice by removing the former from the presence of the latter.

(2) These rights, however, are now subject to statutory intervention by allowing a witness in fear to give evidence by way of live television link.

(3) It is rare and exceptional to adopt the live television link approach. The court must consider the interests of the accused.

(4) At the same time the court must balance the interests of the accused and the significant public interest of witnesses giving evidence without occasioning danger to themselves or to members of the community. The fact that an accused may suffer some forensic disadvantage does not mean such an order should be refused."

In summary, the court's position is that different interests shall be balanced on the two sides of the scale, on one side the defendants' fundamental right to a fair trial and right to confrontation, and on the other, the need to enable a "witness in fear" to testify in a way without danger to themselves or their family (points (1)-(4)). The court justifies the rare and exceptional use of live television link by considering the interests of the accused (point (3)). The tilt of the balance to the defendant's side might be because the defendant's right to a fair trial and right to confrontation are traditionally recognized common law rights, which originates from common law and criminal justice values such as presumption of innocence. The reason for greater protection to the defendant in the criminal court lies in that criminal offences are severe accusations which would deprive the defendant of his liberty, so the proof of guilt must be careful and compelling beyond reasonable doubt.

However, the practice of rendering rare and exceptional use of special measures shall be reviewed in light of that the common law courts are beginning to accept that the right to a fair trial includes the defendant as well s the witness' right to a fair trial[134]. In fact, while special measures like live television link or screen could pacify the witness and enhance the quality of the testimony, it enables better quest of truth on court and would eventually lead to a fairer trial to both the defendant and the witness. The rare and exceptional use of special measures in Hong

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

Kong shall also be viewed in the light of the trend of statutory reform in other jurisdictions (as discussed below at 6.5).

6.4 Are the reasons for rare and exceptional use of live television link justified?

The use of live television link is often faced with two major oppositions: the defendant's right to confrontation and the value of a live trial. In the following this paper would evaluate whether the oppositions are justified.

6.4.1 Right to confrontation

For live television link, it is true that the defendant can still see the witness victim when he/she is testifying, but the major difference between live television link testimony and a live trial is that the witness is out of the courtroom. This brings us to the question of whether the accused has the right to confront his accuser directly face-to-face, that is, physical confrontation (the defendant seeing the witness directly face-to-face in the same space). An accused's right to face his or her accuser predates to *Magna Carta*. In the US the "Confrontation clause" is prescribed in the Sixth Amendment of the US Constitution. In the leading judgment of the US Supreme Court decision *Maryland v Craig*[135], it is held that the "Confrontation Clause" meant direct face-to-face confrontation. Therefore although live television link testimony is permissible, it is not preferable. The dissenting judge Justice Antonin Scalia even went further to say that live television link testimony always contravened a defendant's right to a fair trial.

In contrast, the common law right of a face-to-face confrontation is not guaranteed by the European Convention on Human Rights (see *R (D) v Camberwell Green Youth Court* [2005] 1 WLR 393). In the English law, the House of Lords ruled that in common law there exists no right to physical confrontation: *Lee Kun* [1916] 1 K.B. 337, *Jones (Anthony William)* [2002] UKHL 5, *Camberwell Green Youth Court* [2005] UKHL 4, so that the defendant is not entitled to a common law right to physically see and confront the witness.

In Hong Kong, *HKSAR v See Wah Lun*[136] recognized the witness defendant's right to confrontation and right to fair trial shall be balanced with the need to ensure that the witness give evidence without fear of safety of self and his/her family, and the common law right of confrontation could be curtailed when the presence of the prisoner will intimidate a witness[137]. The judge found that there would only be curtailment in rare and exceptional circumstances due to the defendant's interests[138]. Thus the judicial attitude is more tilted to the defendant's favour. It is contended that where the court in *HKSAR v See Wah Lun* recognized that the determination

[135] 497 U.S. 836 (1990)
[136] [2011] 2 HKLRD 957 at para 29
[137] As Lord Coleridge J stated in *R v Smellie (George)* (1920) 14 Cr App R 128 , 130: If the judge considers that the presence of the prisoner will intimidate a witness there is nothing to prevent him from securing the ends of justice by removing the former from the presence of the latter.
[138] *HKSAR v See Wah Lun* [2011] 2 HKLRD 957 para.29

is a balance of rights, it is strange why the court on the other hand justify the rare and exceptional use solely by the defendant's rights. It is no more than a simple assertion, which is also in conflict with the balance of rights.

6.4.2 The value of a live trial

Many academics relate a live trial process with the ability to seek truth in the testimony[139]. Peter Auslander put forth that criminal trial procedure is rooted in an unexamined belief that live confrontation somehow gives rise to truth-telling[140]. Ellis Magner, an Australian legal academic specializing in Evidence Law, also advocated that effective cross-examination is the key to a fair trial, and spontaneity of a witness' immediate response is considered a more reliable indicator of the truth[141]. The two major relations of live trial with truth-finding is first, positive intimidation by cross-examination and secondly, demeanor assessment. This paper argues that they could hardly justify the rare and exceptional use of live television link.

6.4.2.1 Positive intimidation

It is suggested that some degree of intimidation conferred by cross-examination in court will have a positive effect on reliability and function as a safeguard of truth-telling[142]. Cross-examination is specifically designed to challenge and discomfort a witness, and in this way it serves as a primary means of evidence-testing in the mechanism of the adversarial trial[143]. With the use of live television link, positive intimidation might be weakened by the lost of physical proximity and direct face-to-face confrontation between the legal representative (defence lawyer or prosecutor) and the witness.

However, it should be noted that through live television link, the legal representative and the witness can still see and interact with each other through the television screen, it is hard to see how this could impede the legal representation from cross-examination and challenging the witness' testimony. In the time of technological advancement, the loss of physical proximity would not weaken the positive intimidation provided that the image is transferred smoothly and clearly.

6.4.2.2 Demeanor assessment

Demeanor assessment is where the jury assesses the credibility of a witness through his/her appearance and manner as well as the content of the testimony. Research findings revealed that jurors found the credibility of a witness reduced through using CCTV (live television link) testimony as compared with that of a live trialbecause testifying by live television link might

[139] Leader, K. (2010). Closed-Circuit Television Testimony: Liveness and Truth-telling. *Law Text Culture*, Vol. 14(1), 312-336.
[140] *Ibid.*
[141] *Ibid.*
[142] *Ibid.*
[143] *Ibid.*

make demeanor assessment for the jury more difficult and lessen the power of the witness' testimony[144]. On the other hand, the use of special protective measures is alleged to give a false impression to the jury that the witness is very vulnerable and thus prejudices and presumes guilt to the defendant, contrary to his right to be presumed innocent[145].

However, it is not clear from any available study whether witness or jurors believe confrontation does make witness more truthful, or whether they are simply more likely to be believed because the jury thinks confrontation makes witnesses more truthful. Therefore it is contended that this is only a circular belief. The duty is on the judiciary to eliminate the bias conferred to the jury that live television link testimony is less truthful by proper jury directions. Also, the Supreme Court of Canada in *R. v. Levogiannis*, [1993] 4 S.C.R. 475 rejected that the use of special measures would presume guilt to the defendant as long as the jury is properly directed. Moreover, demeanor assessment is highly controversial, with legal practitioners, scholars and judges arguing that it is obsolete. For instance, Underwood argues that, 'the idea that it is possible to sift the accurate oral account from the inaccurate oral account from the demeanor of the witness has long been discredited'[146]. Since demeanor assessment is a process prone to subjective bias, it is doubtful whether the jury can really assess whether the witness is telling the truth simply through their demeanor in the court room. Even so, there is no way why demeanor assessment could be impeded as long as the jury can observe the witness through the television screen.

6.5 Comparison with other jurisdictions

6.5.1 Inherent jurisdiction

Generally, a court has the inherent power to control its proceedings, including the power to arrange alternative arrangements for a witness to give evidence. Such power is established in many common law jurisdictions by various case laws. For the United Kingdom, the inherent jurisdiction is recognized by *R. (on the application of S) v Waltham Forest Youth Court*[147]. It established that the court has the discretion to apply special measures to protect the witness in order to achieve a fair trial. The discretionary power enables the court to grant special measures to witnesses based on flexible grounds. Based on the inherent jurisdiction, the court can still decide a witness eligible for reasons other than listed in the statute[148] because the inherent power predates the Youth Justice and Criminal Evidence Act and is untouched by it[149].

In the English case of *R v Smellie (George)*[150], the decision to order the accused to sit on the stairs going out of the dock, obscuring him from the complainant's sight while she gave evidence was affirmed on appeal in the interests of justice where the judge considers that the presence of the accused would intimidate the witness. In *R v West*[151], the Supreme Court of Queensland

[144] *Ibid.*
[145] *Ibid.*
[146] Underwood, C. J. (2006). 'The Trial Process: Does One Size Fit All?'. *Journal of Judicial Administration,* 15/3
[147] *R. (on the application of S) v Waltham Forest Youth Court* [2004] 2 Cr App R 21
[148] S.17 Youth Justice and Criminal Evidence Act 1999
[149] The Crown Prosecution Office. *Special Measures*. Retrieved July 6, 2012, from http://www.cps.gov.uk/legal/s_to_u/special_measures/
[150] *R v Smellie* (1919) 14 Cr App R 128
[151] *R v West* [1992] 1 Qd R 227 at 230 (Thomas J)

affirmed the power at common law to direct that an accused be obscured from the view of a witness. In *R v Ngo*[152], the New South Wales Supreme Court confirmed that special arrangements can be made to ensure that the accused cannot see the witnesses or vice versa. In that case, the court ordered that the television be visible to the jury but not to the accused to prevent the accused from identifying the witness[153]. The New South Wales court also has inherent jurisdiction to exercise such discretion if such arrangement advances the course of justice[154]. In Hong Kong, the court is also empowered with the inherent jurisdiction to control its proceedings.

Of course, such inherent jurisdiction is subjected to the inherent jurisdiction of the court to make such steps as necessary to ensure that a defendant has a fair trial[155].

6.5.2 Statute

In some jurisdictions, the statute recognizes sexual offence complainants' special witness status with specific entitlement to protective measures. This in effect gives more protection and more lenient treatment to sexual offence complainants because to be eligible to special measures they do not have to satisfy prerequisites similar to the "witness in fear" requirement in Hong Kong. The relevant provisions are mentioned below:

6.5.2.1 The United Kingdom

S.17(4) of Youth Justice and Criminal Evidence Act 1999 provides that complainants of sexual offences are eligible for special measures (including live television link) unless the witness does not wish to be so eligible. Once it is satisfied the witness is so eligible, s.19(2) retains the court with discretion to determine whether and which special measure is to be granted.

> *s.17(4) Where the complainant in respect of a sexual offence is a witness in proceedings relating to that offence (or to that offence and any other offences), the witness is eligible for assistance in relation to those proceedings by virtue of this subsection unless the witness has informed the court of the witness' wish not to be so eligible by virtue of this subsection.*
>
> *s.19(2)Where the court determines that the witness is eligible for assistance by virtue of section 16 or 17, the court must then—*
>
> *(a) determine whether any of the special measures available in relation to the witness (or any combination of them) would, in its opinion, be likely to improve the quality of evidence given by the witness; and*

[152] *R v Ngo* [2001] NSWSC 339 at para 20 (Dunford J)
[153] Law Reform Commission New South Wales. *Report 101 (2003) Questioning of complainants by unrepresented accused in sexual offence trials*. Retrieved July 6, 2012, from http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r101chp6
[154] *Park v Citibank Savings Ltd* [1993] 31 NSWLR 219
[155] *R(P) v West London Youth Court* [2006] 1 WLR 1219

(b)if so—

(i) determine which of those measures (or combination of them) would, in its opinion, be likely to maximise so far as practicable the quality of such evidence; and

(ii) give a direction under this section providing for the measure or measures so determined to apply to evidence given by the witness.

6.5.2.2 Victoria

S.363 of The Criminal Procedure Act 2009 provides that the court must grant the use of CCTV to a complainant who relates wholly or partly to a sexual offence unless the complainant does not wish to. This in effect provides fullest protection by creating a statutory presumption of use of CCTV which could only be rebuttable at the complainant's own will, free of any intervention from the court's discretion.

s.363. If the witness is a complainant in a criminal proceeding that relates (wholly or partly) to a charge for a sexual offence, the court must direct that an arrangement referred to in section 360(a) [156] *be made unless-*

(a) the prosecution applies for the complainant to give evidence in the courtroom; and

(b) the court is satisfied that the complainant-

(i) is aware of the right of the complainant to give evidence in another place by closed-circuit television or other facilities; and

(ii) is able and wishes to give evidence in the courtroom.

6.5.2.4 New South Wales

S.294B(3)(a) of Criminal Procedure Act 1986 No. 209 provides that a sexual offence complainant is entitled to testifying by means of CCTV, subject to the court's refusal prescribed by s.294B(6).

s.294B (3) A complainant who gives evidence to which this section applies is entitled (but may choose not):

(a) to give that evidence from a place other than the courtroom by means of closed-circuit television facilities or other technology that enables communication between that place and the courtroom,

[156] Section 360(a) provides for the use of CCTV.

s.294B (5) Despite subsection (3) (a), a complainant must not give evidence as referred to in that paragraph if a court, on its own initiative or on application by a party to the proceeding, orders that such means not be used.

s.294B (6) A court may make an order under subsection (5) only if it is satisfied that there are special reasons, in the interests of justice, for the complainant's evidence not to be given by such means.

6.5.2.3 Northern Territory

S.21A(2) of Northern Territory Evidence Act provides that a sexual offence complainant is treated as a vulnerable witness and be entitled to use alternative measures (including live television link) to give evidence in court, subject to the court's refusal prescribed by s.21A(2A).

s.21A(2) Subject to subsection (2A) and section 21B, a vulnerable witness is entitled to give evidence using one or more of the following arrangements as chosen by the witness:

(a) that the evidence of the vulnerable witness be given at a place outside the courtroom and transmitted to the courtroom by means of closed circuit television where that facility is available;

s.21A (2A) The Court may make an order that the vulnerable witness is not to give evidence using an arrangement under subsection (2) if satisfied that:

(a) it is not in the interests of justice for the witness's evidence to be given using that arrangement; or

(b) the urgency of the proceeding makes the use of that arrangement inappropriate.

6.7 Recommendations to legal reform

It should be noted that the practical situation is that despite the statute provisions, use of live television link might be still rarely granted, because mere entitlement to use (as in the United Kingdom, New South Wales, Northern Territory) is still subject to the court's discretion, e.g. where the court under certain circumstances does not satisfy it is in the interest of justice to grant the special measure, and such discretion is eventually influenced by the judge's personal bias. In New South Wales, despite the above statutorily entitlement, successful application of CCTV is still low[157]. The complainant's right would easily be compromised unless the statute explicitly establishes a rebuttable presumption of use of special measures free of the court's discretion (such as that in Victoria). That means the sexual offence complainant starts out with the special

[157] See n146.

measure for sure, unless the complainant does not wish to exercise the use and rebut the presumption.

This paper recommends that the rebuttable presumption approach enforced in Victoria shall be adopted in Hong Kong for the best protection to sexual offence complainants. Even if the rebuttable presumption approach cannot be endorsed in Hong Kong, it is hoped that the statute could recognize sexual offence complainants' special witness status with specific entitlement to protective measures (as in the United Kingdom, New South Wales, Northern Territory). If this suggestion is adopted, with such approach of creating specific entitlement of special measures to sexual offence complainants, it is in effect doing way the "witness in fear" requirement prescribed by s.79B CPO.

If this suggestion is not accepted, this paper recommends that Hong Kong shall review the definition of "witness in fear", to codify in the CPO a more comprehensive range of factors to be considered by the court for the determination of whether "witness in fear" is satisfied, in order to allow use of live television link in more circumstances. The purpose is to remedy the limited circumstances which live television link could be granted and the narrow "witness in fear" definition as discussed in 6.2. The statutory provision of the United Kingdom is a good example for reference:

For witnesses applying for special measures other than age or mental incapacity, the statute Youth Justice and Criminal Evidence Act 1999 prescribed the aforementioned provision specific to sexual violence complainants (s. 17(4)). For witnesses otherwise eligible, s. 17(2) listed a number of factors which the court must take into account when considering whether a witness is intimidated and hence eligible for the special measures. The factors include the nature and alleged circumstances of the offence, the age of the witness; and, if considered relevant, the social, cultural, ethnic origin, domestic and employment circumstances, religious beliefs or political opinions of the witness; and any behavior of the accused or related persons towards the witness.

It is hoped that by creating a statutory provision equivalent or similar provision to s.17(2) Youth Justice and Criminal Evidence Act 1999 of the UK, it would remedy the limited circumstances established by the Hong Kong case law which live television link would be granted (as illustrated above by the cases *HKSAR v See Wah Lun* [2011] 2 HKLRD 957, *HKSAR v Leung Kam Ting* [2009] 3 HKLRD 476, *HKSAR v Chan Ka Chun* [2000] HKEC 25, *R v Wong Kwai Nam*[1996] HKLY 362).

The least preferable option would be to expand the construction of "witness in fear" by case laws. This would be less preferable because review could only be done when such case comes to the court, and such decision might not bind higher courts.

6.7 Conclusion

The use of live television link is important for testifying in court because it enables the witness to give evidence in a less emotionally affected way to allow better quality of the evidence. Yet the courts in many case laws often justify the rare and exceptional use of live television link by the

rights of the defendant, such as right to confrontation, right to fair trial, etc. However, it should be noted that in the light of the reform trend of many common law jurisdictions, while the United Kingdom, New South Wales, Northern Territory, Victoria, etc. have legislated provisions to grant sexual violence complainants specific statutory entitlements to use special measures like live television link, the previous practice of rare and exceptional use shall be reviewed to go in line with the statutory reform to enable use in more circumstances. Moreover, while the court recognized that the determination of granting of live television link rests on a balance between rights of the defendant and need of the witness [158], this also suggests its use in more circumstances.

Apart from the right to confrontation, the value of a live trial is often a justification for refusing the use of testifying by live television link. It is suggested that the intimidation by direct face-to-face confrontation can result in more truthfulness in the testimony; and the jury could better assess the demeanor of the witness by a live trial. However, there is no existing report verifying the belief that a face-to-face testimony is more reliable and truthful than that given by live television link. Therefore, whether this ground can be a solid justification for direct face-to-face testimony is doubtful. Instead, it shall be the court's duty to eliminate the subjective bias towards live television link testimony if such measure is necessary.

In Hong Kong, sexual violence complainants are only eligible to use of live television link in very limited and severe circumstances like gang rape, or that the victim is suffering from psychological trauma, due to the narrow construction of "witness in fear". This surely does not confer enough protection for sexual violence complainants. It is proposed that Hong Kong shall: (1) do away the "witness in fear" requirement regarding the grant of live television link for sexual offence complainants, and legislate specific entitlement to use of live television link for sexual violence complainants, just like the United Kingdom, New South Wales, Northern Territory, Victoria, etc, with the Victorian model of rebuttable presumption of use of live television link as the most preferable approach; (2) another option is to legislate more comprehensive range of factors in determination of "witness in fear", similar to s.17(2) Youth Justice and Criminal Evidence Act 1999, or less preferably, (3) expand the construction of "witness in fear" in case laws.

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

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

7.1 Background

The Statement of Prosecution Policy and Practice[159] ("the Statement") was released in Hong Kong in 2008 by the Department of Justice ("DOJ"). The statement offers guidelines on prosecution process and policy, and on prosecutorial ethics and responsibility. With the statement, the standards, policies and practices of the public prosecutors are reasonably defined, so that prosecutors at all levels may properly discharge of their functions. It was prepared with respect to contributing the openness and transparency, which the common law dealings shall uphold in the community. Mr. Grenville Cross, the Director of Public Prosecutions of the DOJ, once called the statement "a modern code which emphasizes our common law traditions"[160], it should have been "a significant criminal justice initiative" made.

Section 22.5 of the statement concerns with the special protections granted to vulnerable witnesses. It provides that:

> *"The prosecutor must safeguard the position of vulnerable witnesses, namely, a child, a mentally incapacitated person or a witness in fear, as defined in the Criminal Procedure Ordinance, Chapter 221. Applications should be made to assist vulnerable witnesses to give evidence in court. Such measures may include evidence by live television link, video recorded evidence, priority listing, no postponement of trial, avoidance of delay, arrangement of support persons, removal of gowns and wigs, and appropriate security for witnesses in fear. There will also be cases where the interests of justice require a screen to be made available to shield a witness from the accused or the public, or for the public gallery to be cleared."*

Sections 22.5 prescribes a wide range of special measures to vulnerable witnesses. In contrast, the Criminal Procedure Ordinance ("CPO") only prescribes one special measure available to healthy adult sexual offence complainants, which is testifying through live television link[161], provided that the complainant satisfies the "witness in fear" requirement[162]. The CPO is clearly inadequate to respond to the need of the sexual offence victims. This paper argues that while the Statement provides a practical guide to the prosecutors, it is also important to codify the special measures prescribed in section 22.5 such as granting of screen and arrangement of support persons, etc. into the CPO to confer higher legal status, legal certainty, and enforceability to these measures.

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[159] The Department of Justice. (2008). *The Statement of Prosecution Policy and Practice - Code for Prosecution*. Retrieved July 10, 2012, from http://www.doj.gov.hk/eng/public/pubsoppaptoc.htm

[160] HKSAR Government Press Release. (2008). *Statement of Prosecution Policy and Practice released* . Retrieved July 10, 2012, from http://www.info.gov.hk/gia/general/200812/23/P200812230154.htm

[161] s.79B, Criminal Procedure Ordinance (Cap. 221)

[162] s.79B(1), *ibid.*

7.2 Differences between the CPO and the Statement and their significance

While it is recognized that the Statement, as a practical guide to the prosecutors, is an important reference which directs them to apply for special measures to assist sexual offence complainants, it is advocated that the special measures prescribed in section 22.5 of the Statement shall also be codified into the CPO to provide for a statutory reference for such application. Codification in the CPO confers legal significance over prescription in the Statement, as illustrated as follows:

The CPO enjoys a higher legal status and legal certainty than the Statement. The formal aspect of legal certainty intertwines with the concept of predictability. It concerns of whether the legislation is clear, coherent, stable and transparent, and protects citizens against adverse side effects of legal instruments. In this respect, the CPO is a primary legislation that was formally introduced and passed by the Legislative Council. The Statement exists in the form of guidelines as published by the DOJ. The Statement was not enacted nor approved by the legislative branch of the government.

A statutory backup is important because it provides the legal ground for possible judicial challenge wherever injustice occurs. For example, under section 79B, IIIA of the Criminal Procedures Ordinance, the court may permit giving of evidence by live television link to child, mentally incapacitated person and "witness in fear". The plaintiff may judicially challenge on constitutional grounds, making reference to article 87 of HK basic law, concerning the right to fair trial. Arguably, the right of fair trial shall not only apply to defendants. It should also be expanded to cover the witnesses who give testimony in court. It was agreed by the Lord Chief Justice in the case of *R v DJX* 91 Cr. App. R. 36 that fairness of trial depends on the three parties of defendants, prosecution as well as witnesses. Therefore, this adds strength to the basis for legal remedy.

As so, the nature of the CPO and the Statement are of significant differences from legal perspective. The Statement sincerely serves as a set of guidelines and has restricted legal binding power. Protective measures for vulnerable witnesses shall not be merely listed as in this set of "guidelines". They should be offered more concrete support. Eventually it arrives at the deduction of more special court protections to vulnerable witnesses ought to be included in the CPO.

7.3 Recommendations to legal reform

The only special court protection measure currently covered in the CPO, applicable to adult and mentally capacitated victims of sexual crimes, is the provision of evidence through live television link. This is neither comprehensive nor effective in enforcement. It is proposed that more special court protection measures promised to vulnerable witnesses for assisting to give evidence in court, e.g. screen, video-recorded evidence, priority listing as under section 22.5 of the Statement of Prosecution Policy and Practice, to be covered in the section 79, Part IIIA of the Criminal Procedures Ordinance. Incorporating these measures into the CPO (as statutory law) may enhance, as a whole, the measures' legal status, certainty and enforceability. In this way, the victims of sexual crimes are statutorily entitled to these court measures.

8. Conclusion

It is submitted 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 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.