

**REMOTE HEARING: DRAFT COURTS
(REMOTE HEARING) BILL, PRACTICE DIRECTIONS
AND OPERATIONAL GUIDELINES**

SUBMISSIONS

1. The Law Society has in April 2019 and March 2021 made submissions on the Judiciary's Information Technology Strategy Plan, as well as the proposals on legislative amendments to enable remote hearings. We are pleased to see progress, in particular that a draft bill on remote hearings has now been produced by the Judiciary Administration. The draft bill, together with the draft Practice Directions and Operational Guidelines, are set out in a Consultation Paper by the Judiciary Administration "*Remote Hearing: Draft Courts (Remote Hearing) Bill, Practice Directions and Operational Guidelines*" (the "Consultation Paper") issued in June 2022 for views.
2. We have studied the Consultation Paper, the draft Courts (Remote Hearing) Bill (the "draft Bill"), Practice Directions and Operational Guidelines. Our responses are set out below.

CRIMINAL PROCEEDINGS

3. For the **Consultation Paper**, we have the following comments.
 - 3.1. It is a cardinal principle in criminal law that if one is accused of a crime, one should be entitled to a fair trial, meaning that, among other things, one should be able to take part in the criminal process, and for himself to be confronted with the accusations and the evidence thereon. Being physically present in the trial *per se* is important.

- 3.2. We note the general principle and policy put forward in the Consultation Paper that unless the Court directs otherwise, the *default mode* for hearings for criminal matters remains and should remain to be physical hearings (see § 2.1 of the Consultation Paper). In response, we agree that remote hearings should not be for *criminal trials*. For criminal trials, the Court, the parties and/or their legal representatives, and the other relevant parties, such as witnesses, should be physically present in the proceedings conducted in the courtroom.
- 3.3. We also agree that remote hearings are generally inappropriate for a *defendant's first appearance before a Magistrate*. The first appearance of an accused before a magistrate should be a physical presence, for the reasons set out in the Consultation Paper (§2.5. ditto).
- 3.4. In addition, we concur with the view that whilst remote hearings may be adopted, a defendant should be physically present in court at the time of his *plea, verdict and sentence* unless the Judges and Judicial Officers ("JJO") direct otherwise, having considered the relevant factors (§ 2.5, ditto).
- 3.5. The possible advantages of remote hearings in a criminal process are noted. Remote hearings in our view could be used in criminal matters (apart from trials) if the Court is satisfied that justice can be served via a remote hearing, after weighing those factors now proposed in the draft Bill (clause 8 thereof). That said, even if physical presence of the accused in certain stages of the criminal process can be excused (e.g. bail applications), the accused should still be able to witness those proceedings himself, *if he chooses to do so*. The above is fundamental, as the accused should be given a choice to see the accusations made, and the evidence for and against himself in those proceedings, in order that he could choose to respond and/or put forward his account or defence.
- 3.6. Live *audio* links (meaning by telephone) are not appropriate for criminal proceedings. For live *video* links, that could be *allowed for bail applications* (§2.7 ditto). For these applications, if physical presence is to be dispensed with, the defendant should still be entitled to have a virtual presence if

he so chooses, and we repeat our views in paragraph 3.5 above. If required (e.g. if the defendant needs to converse with his legal representatives in the course of a remote hearing), the Court can stand down the matter in order that the legal representatives can take short instructions.

- 3.7. On the operation of remote hearings (§ 3.7 ditto) where applicable to a criminal matter, we agree to the following
 - 3.7.1. a JJO conducting a remote hearing is deemed to have satisfied the requirement under any rule of law to sit in the court physically. The JJO is also deemed to have all the powers he would have as if the remote hearing were a physical hearing;
 - 3.7.2. a participant who is directed by the court to attend a remote hearing is deemed to be present at the place of hearing at the proceedings, and to have complied with any relevant requirements for appearing in the proceeding physically. The law in force in Hong Kong relating to evidence, procedure, contempt of court and perjury applies to a participant who attends a remote hearing at a place outside Hong Kong. However, no remote hearing should be made available for a fugitive, or else that would frustrate the efforts of law enforcement agencies in tracking and bringing the fugitive back to the jurisdiction of HKSAR.
- 3.8. We note the proposal in the Consultation Paper that the making of a remote hearing order in criminal matters (where applicable) is a *case management decision* of the Court, and the Court's existing case management powers shall apply (§3.3, ditto). We have no objection to this proposal, but we have grave reservations as to how remote hearings could be arranged or ordered for criminal trials.
- 3.9. Upon a material change in circumstances of a criminal case and if the Court is satisfied that it is in the interests of justice to *vary or revoke the order*, the Court may, on its own motion or on application by any party to a proceeding, vary or revoke a remote hearing order (§3.4, ditto). This is sensible, as an

order for remote hearing could and should be varied as circumstances change; an order given at one stage in a criminal matter might not encompass subsequent developments.

- 3.10. We have no comments on the other proposals on the making of oath or affirmation or signing of documents (for criminal matters) for the purpose of remote hearings (§ 3.7 ditto).
 - 3.11. We agree that for criminal proceedings, those reporting restrictions concerning certain proceedings e.g. bail and committal proceedings are to be applicable for remote hearings (§3.12, ditto).
 - 3.12. We have no comments on the proposed offences for the recording and publishing of remote hearings, physical hearings, and broadcast of such hearings, and the penalties proposed therefor (§ 3.13 – 3.22, ditto).
 - 3.13. We note the proposal to amend the Criminal Procedure Ordinance (Cap. 221) and the Hong Kong Court of Final Appeal Ordinance (Cap. 484) such that the attendance of a defendant is to be dispensed with where the appeal is on grounds involving question(s) of law alone, on an application for leave to appeal or any proceedings preliminary or incidental to an appeal, unless the Court gives him leave to be present (§ 3.23, ditto). We have no strong objection to dispense with the physical presence of the defendant, but we ask that allowance should be given to the defendant to be present virtually, if he/she so wishes. See paragraphs 3.1 and 3.5 above. If the Judiciary Administration have views different from the above, it would assist the deliberation if there can be an elaboration on the rationale as to why a defendant is not *entitled* to be present in that proceeding (if the defendant so requests), even if the presence is only a virtual one.
4. As for the **Draft Bill** itself, we have the following observations and comments.

4.1. **Clause 2 – Interpretation**

Apart from reference to “solicitor” or “barrister”, we propose that “trainee solicitor”, “paralegal” and “solicitor-advocates” be added to the definition of “*legal representative* (法律代表)”.

4.2. **Clause 33 - Section 83U substituted**

The Judiciary Administration proposes that section 83U of the Criminal Procedure Ordinance (Cap 221) be repealed and be substituted by the following (emphasis supplied by us):

“83U. Right of defendant to be present

(1) Subject to subsection (2), a defendant is entitled to be present at the hearing of an appeal.

(2) Unless with the leave of the Court of Appeal, a defendant is not entitled to be present—

(a) at the hearing of an application for leave to appeal;

(b) at the hearing of an appeal which is made on the ground of question of law alone; or

(c) in any proceedings preliminary or incidental to an appeal.

(3) The Court of Appeal may exercise its power to pass sentence on a person although that person is for any reason not present.”

In response to the above proposed section 83U(2)(c), we ask that for bail applications pending appeal, the defendant should be allowed to be present but his/her presence needs only to be virtual. A defendant should be entitled to participate in his/her own proceedings. This is significant for the reasons we set out in the above (see paragraphs 3.1 and 3.13). We ask section 83U(2)(c) be further amended.

4.3. **Clause 36 - Section 36 substituted**

The above applies *mutatis mutandis* to a similar amendment proposed by the Judiciary Administration to the Hong Kong Court of Final Appeal Ordinance (Cap. 484). The proposed amendments appear in Clause 36 of the Bill (see below, emphasis supplied by us):

“36. Right of defendant to be present

- (1) Subject to subsection (2), a defendant is entitled to be present at the hearing of an appeal.*
- (2) Unless with the leave of the Court, a defendant is not entitled to be present—*
 - (a) at the hearing of an application for leave to appeal;*
 - (b) at the hearing of an appeal which is made on the ground of question of law alone; or*
 - (c) in any proceedings preliminary or incidental to an appeal.”.*

Same as Clause 33 in the above, we ask that section 36(2)(c) of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) be further amended to accommodate bail applications pending appeal.

4.4. Clause 34 - Section 122 amended (power to exclude public from criminal courts)

The Judiciary Administration proposes to amend section 122(1) and (2) of the Criminal Procedure Ordinance Cap 221 in the following.

“Section 122(1) and (2)—

Repeal

“or public order or security”

Substitute

“, public order, security, public health or emergency”.”

With the proposed amendments, in a summary, the JJO could in the interests of justice or public order, security, public health or emergency, exclude public from criminal courts.

We surmise that the reference to “public health or emergency” in the proposed amendments is to address those situations such as COVID - pandemic that force the Judiciary to close off its courts. A confirmation of the above understanding is helpful.

5. On the draft **Practice Direction** for Remote Hearing in Criminal Proceedings we have the following comments:

5.1. Paragraph 12

“12. The application and responses may be lodged electronically.”

We ask that the electronic transmission as alluded to in the above includes fax transmission.

5.2. Paragraph 23 (emphasis supplied by us)

“23. The defendant will be directed to a designated consultation room which is equipped with appropriate confidential communication facilities for unrecorded private communications between defendants in custody and legal representatives. The consultation room is to be booked in advance through the relevant correctional service institutions. Counsel are expected to familiarize themselves with the communication facilities so that they will be able to communicate in private with the defendant smoothly, and show or view documents or reports to and from the defendants.”

The above draft paragraph poses logistics challenges to the arrangement of remote hearings. Under the proposal, if a party could not book and secure a consultation room first, he would not be able to fix the remote hearing dates. On the other hand, if he is to fix the remote hearing dates first, he could be in difficulty if he subsequently cannot book a consultation room. In our view it should facilitate the arrangement if a consultation room is to be made available, as of right, on the day of remote hearings through coordinated efforts between the correctional service institutions and the Judiciary Administration themselves. We therefore propose that, instead of asking a consultation room to be *booked in advance*, the *consultation room should be made available on the day of the remote hearings*.

6. On the draft **Operational Guidelines** for Remote Hearings, we note paragraph 5 thereof states that (emphasis supplied by us)

“It shall be the duty of the parties to ensure that the remote hearing facilities and equipment proposed to be used at the remote location will be compatible with the current technical specifications of the remote hearing facilities of the Judiciary for establishing the link.”

The abovementioned duty includes the duty of law firms to source, procure, install and maintain the requisite software for remote hearings that are compatible with those in use by the Judiciary Administration. We note the experience of use of remote hearings in civil litigation. For criminal litigation, we assume that the same or similar remote hearing facilities to those now used in civil litigation are to be procured. On this assumption, we suggest that there should be the additional consideration for criminal matters in the following viz.

- 6.1. apart from compatibility with the system of the Judiciary, the facilities procured by the party should be compatible also with those of the Correctional Services Department,
 - 6.2. there should be an assured level of security and that certain security features might need to be built-in (e.g. use of a one-time-password for each log-in), and
 - 6.3. notwithstanding any additional features, and generally, the costs of procuring and installing the remote hearing facilities should not be prohibitively high.
7. As a matter of prudence, the Judiciary Administration may wish to arrange regular reviews of the Practice Directions and the Operational Guidelines after the enactment of the legislation. This assists the Judiciary Administration to canvass comments and feedbacks on the regime.

CIVIL PROCEEDINGS

8. We received views from our members (including personal injuries practitioners) that use of remote hearings for interlocutory hearings and checklist reviews are saving travelling and waiting time and also costs.

9. As we have indicated in our previous submissions, we support the continual use of remote hearings in civil proceedings, with a caveat that the principle of open justice should continue to be upheld.
10. The draft Bill, Practice Directions and Operational Guidelines to be applied to civil proceedings are welcomed. These provide additional guidance on how remote hearing are to be handled.
11. While the draft Bill, Practice Directions and Operational Guidelines are helpful in addressing the needs of today, the Judiciary Administration should take full notice of the continual and rapid technological advancements. It is important that the regime could be technologically updated from time to time.
12. As for the draft Bill itself, for civil proceedings, we have the following observations:
 - 12.1. Clause 8 “Factors to be considered” of the Bill – we suggest the scope of clause 8(o) could slightly be expanded as follows, in order to provide for more flexibility:

“whether there is any public order, security, public health, or emergency concern or other circumstances which makes it undesirable or impracticable for the parties to attend the proceeding in person;” (our proposed addition underlined).
 - 12.2. For witnesses who are to give evidence remotely, the draft Bill seems to be silent on what measures are to be put in place to ensure that the process is conducted properly and fairly, and that the witnesses are not influenced. In this regard, we note Section D3 of the Operational Guidelines sets out some guidance, but it is not entirely clear as to status of the Guidelines - e.g. what are the consequences of non-compliance thereof.

COMPETITION LAW PROCEEDINGS

13. The proposal on remote hearings raises a difficult question in respect of competition law proceedings. The difficulty arises from the nature of competition proceedings. There have been suggestions that

proceedings in which a financial penalty is sought (as in the case of competition law proceedings) constitute a criminal charge, thereby attract various Hong Kong Bill of Rights protections. There has been, however, and continues to be, heavy debate about whether such proceedings then attract traditional criminal procedural safeguards, including prohibition of hearsay, the right to silence, etc.

14. The judgments on liability in the first two cases to come before the Competition Tribunal do not provide conclusive views on the above issue. In *Competition Commission v W Hing Construction Co Ltd* [2020] HKCT1, the Competition Tribunal stated:

“Whilst, for the purposes of Art 11 of the Bill of Rights, the Commission has accepted that these proceedings involve the determination of a criminal charge, and this Tribunal has concluded that the applicable standard of proof is proof beyond reasonable doubt, it does not follow that, for all purposes and in all contexts, contravention of the conduct rules is to be regarded as a criminal offence or that these proceedings are to be regarded as a criminal trial and sentencing”.

15. In a subsequent case, *Competition Commission v T.H. Lee Book Co Ltd* [2020] HKCT12, the issue arose again in the context of a dispute about whether there should be an advance disclosure of the defendant’s evidence by way of simultaneous exchange of witness statements in advance of trial. The defendants relied on Art 11 of the Hong Kong Bill of Rights to try to resist this order, invoking the right of silence and privilege against self-incrimination. The Competition Tribunal rejected this, following its earlier decision.

16. It is worthy to note that the Undersecretary for Commerce and Economic Development noted as far back as 2008 that the decision in *Koon Wing Yee v Insider Dealing Tribunal and Another* [2008] 3 HKLRD 372, necessitated appropriate criminal safeguards to be in place not just at the adjudication stage but also “during the investigation ... of such infringements so as to meet the requirements of the Hong Kong Bill of Rights.”¹

¹ See News Archives, “Speech by U.S.CED at 5th Annual Conference of Asian Competition Forum”, Information Services Department of the Government of the Hong Kong Special Administrative Region (7 December 2009), available at <https://www.info.gov.hk/gia/general/200912/07/P200912070145.htm>

17. The Competition Commission's position however appears to be that civil procedure rules apply. The position has not been made clear.
18. The above is likely to be heavily contested in future cases, but raises an important question in this consultation for the Judiciary Administration.

ADMISSION PROCEEDINGS

19. We have taken the opportunity to study the possible use of remote hearings for solicitor admission under the draft Bill. At the moment, a trainee solicitor could have his admission (after completion of the trainee contract and the fulfillment of other requisite requirements as provided by the relevant legislation) only by physical hearings. These admission hearings are fixed in the same manner as other court matters, i.e. a date is to be obtained from the Court's diary (after filing of a Notice of Motion under Order 8, Rules of the High Court). The hearings are held in open court. All applicants are properly robed when attending the hearing. At the scheduled hearing, a judge is to preside over the hearing and make orders.
20. Among other things, an applicant would have to wait for his admission hearing.
21. As the matter now stands, it seems that if physical hearings could be dispensed with and be replaced by remote hearings for the purpose of admissions, the waiting time should be improved and/or the process could be expedited. Furthermore, there would be more flexibility in the deployment of judicial resources, and some resources could be saved.
22. Although the Bill is not designed or drafted primarily for admission hearings, the Bill (in its current draft) in our view should apply to these hearings (irrespective of whether the applicants are located within or outside Hong Kong²). As the principal objective of the Bill is not for admission hearings, there are issues to be resolved before an applicant could invoke the ordinance to be enacted and seek a remote hearing for admission pursuant to an application (as a party under Clause 5 of the Bill).

² See Clause 12 of the Bill

23. As provided for under Rule 6 of Admission and Registration Rules, Cap 159B, an applicant would need to subscribe an oath as prescribed. Moreover, when the applicant is to read out the oath in open court, the applicant would have to sign the Roll Book. Rule 6 above is silent on the signing of the Roll Book, including whether it could be signed before or after the admission hearing³. If the hearing is to take place remotely, one would need to consider how one is to sign the Roll Book for admission purpose. This is not provided for in the Bill; in practice, as we understand, the Roll Book is not in a loose-leaf format, and the signing page or the Roll Book itself could not be delivered to a particular applicant for signing and return. On the other hand, the draft Bill also would not help those who are overseas and who thereby cannot attend the court to sign it on the occasion⁴.
24. Clause 20 of the Bill states that the Court may request a participant to a remote hearing to “sign or write on the document” and “return the document as directed by the court”, and when it is done, it shall be “deemed” to have satisfied the relevant requirement. A pertinent question for the Judiciary Administration is therefore how the Court is to envisage the signing of a Roll Book under Clause 20 of the Bill to be carried out. An explanation and elaboration of the above would be helpful.
25. There could be other issues to be deliberated with respect to intended admissions by remote hearings (pursuant to an application under Clause 5 of the Bill) and we welcome further discussion with the Judiciary Administration.

CONCLUSION

26. In conclusion,

26.1. for criminal proceedings, subject to the comments and caveats set out in this submission, and except for trials and those matters set out in paragraphs 3.3 and 3.4 above, in

³ However, see the judgment in *So Chin Wang v The Law Society of Hong Kong* [2021] HKCFI 617 (paragraph 15)

⁴ We note from desk researches that in certain jurisdictions such as Australia, there is an absentee admission procedure which allows eligible applicants to, among other things, sign the roll by way of a supplemental roll sheet provided to the applicant.

general, we support the proposed application of remote hearings to criminal process;

- 26.2. we are in support of the continual use of remote hearings for civil proceedings. Our further comments for these proceedings are set in the above paragraphs;
 - 26.3. we have pointed out the difficulties with the proposal if and when applied to competition proceedings; and
 - 26.4. we consider that if the regime could better accommodate admission hearings, that would benefit not only the legal profession but also the Judiciary itself, and for that, thorough consideration of those issues we have highlighted in this submission would assist.
27. We would not comment on litigants in person or the public's access to remote hearings (e.g. see Sections G and I of the Draft Practice Direction for Remote Hearings in Criminal Proceedings). Obviously, some may have concerns if there are proceedings they feel excluded from. We believe the Judiciary Administration will have considered how to deal with these issues.
28. By way of a passing remark, the Judiciary Administration may wish to consider to broadcast live the delivery by the Court of Appeal and the Court of Final Appeal of those judgments which are of significant public interest. This has already been allowed in countries such as the UK. We reckon that this proposal is not within the scope of the current consultation, but in our views, this proposal should be considered by the Judiciary Administration in tandem with the plan(s) for procurement of and expansion of court technology (such as facilities for streaming). Broadcasting live the delivery of those judgments enhances the understanding by the public of the judicial process. That improves transparency and boosts confidence in our judicial system.

**The Law Society of Hong Kong
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