

律政司
法律政策科

香港金鐘道 66 號
金鐘道政府合署高座 1 樓

圖文傳真：852-2180 9928



DEPARTMENT OF JUSTICE
Legal Policy Division

1/F., High Block
Queensway Government Offices
66 Queensway, Hong Kong

Fax: 852-2180 9928

本司檔號 Our Ref.: LP 911/00/2C VI
來函檔號 Your Ref.:
電話號碼 Tel. No.: 2867 4900

The Law Society of Hong Kong
3/F Wing On House
71 Des Voeux Road
Central
Hong Kong
(Attn : Ms. Christine W.S. Chu)

7 January 2003

via Mr Michael Scott, SASG/GLP

Dear Ms. Chu,

Evidence (Miscellaneous Amendments) Bill 2002
Part II : Use of Live Television Link in Criminal Proceedings

Thank you for your letter of 13 December 2002.

As the Committee knows, the taking of evidence from witnesses overseas in criminal proceedings is not something new. Under the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525), the Secretary for Justice can request an overseas jurisdiction to assist in the obtaining of evidence from a witness abroad. The requested jurisdiction will take the evidence and transmit the same to Hong Kong in the form of a written deposition. The written deposition will be produced in the court as evidence under section 9 of Cap. 525. Similar arrangement can also be found in Part VIIIA of the Evidence Ordinance (Cap. 8). The Bill does not intend to change the existing requirement for the physical presence of a witness in a Hong Kong court. It is not our policy intent that the court will grant an application when a witness can be brought to give evidence in Hong Kong. We are only introducing live television link as an alternative to the depositions evidence or to the complete absence of any evidence from the witness concerned. This option will be available to both the prosecution and the defence.

A witness may be unable to come to Hong Kong for various reasons. If a witness does not come to Hong Kong, the court will be deprived of his evidence. It is our view that it is not in the interest of justice that a court cannot hear relevant evidence when trying a case. The present solution is to make a request to an overseas court to assist in the obtaining of the witness's evidence in the form of a written deposition. On average, we make 10 requests under Cap. 525 per year.

However, the existing option of obtaining evidence in the form of a written deposition is not satisfactory. The judge and jury cannot observe the demeanor of the witness at all. The Committee has previously expressed its concern that the TV link may not enable the court to see the witness as clearly as where the witness is physically in the courtroom. I suggest that this is a technical issue and suggest that, if necessary, we may try to arrange for a visit to the facilities in the High Court when the facilities are available (subject to the consent of the Judiciary).

You ask about the costs involved in getting a witness to testify in a local court from abroad. The amount varies from case to case. Generally speaking, I envisage that costs will include airfares and hotel. If a witness is giving evidence via live TV link, the costs will probably be the rental for the relevant facilities.

Your other concern is that the live TV link will be less effective in ensuring that a witness will tell the truth. The function of the judge or jury as a tribunal of fact is to decide whether he will trust the testimony of a witness. The court can always refuse to accept the evidence of a witness if it thinks that the witness is not telling the truth. It is our proposal that a witness will still be subject to prosecution for perjury and may be extradited if an extradition agreement is in force.

I also note the Committee's concern over the criteria for the court to grant a leave to use live TV link. We consider that to restrict the ground to "*could not*" rather than "*could not more conveniently*" will be too strict. It is, theoretically speaking, almost impossible to have a "*could not*" situation. However, if the Committee considers that "*could not more conveniently*" is too loose, I will be glad to hear any other alternatives.

In response to the Committee's request to be provided with relevant legislation in other jurisdictions, I enclose for the Committee's consideration the following:

- Evidence (Audio and Audio Visual Links) Act 1998 (New South Wales, Australia)
- Evidence (Audio Visual and Audio Linking) Act 1997 (Victoria, Australia)
- Criminal Justice Act 1988 s. 32 (UK)
- Mutual Assistance in Criminal Matters Act 1987 (Commonwealth, Australia)

I also note your request for information regarding the law of those jurisdictions with which Hong Kong has no extradition treaty. I assume that you are requesting information on how other jurisdictions deal with applications for leave to hear live TV link evidence of a witness in a place where no extradition treaty is in place. For this purpose, I enclose for your consideration the following cases:

- *The Queen v. Kyu Hyuk Kim, Supreme Court of Victoria (Criminal), No. 1422 of 1997, (17 February 1999)*

The court was prepared to deal with the unenforceability of the offence of perjury by way of a warning to the jury.

- *R v. Dix, Alberta Queen's Bench, 1 May 1998*

When considering the difficulties in ensuring that a witness would answer the questions properly or be cooperative, the court was of the view that the difficulties could be met during the course of the evidence and, in the extreme case, the evidence could be considered of no weight or the procedure could be discontinued.

I hope the above will help the Committee to consider this matter. If you need any information or explanation, please do not hesitate to let me know.

Yours sincerely,

(Miss Selina Lau)
Government Counsel
Legal Policy Division

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