

**Bills Committee on
Evidence (Miscellaneous Amendments) Bill 2002**

**Response by the Administration to issues raised by
Members at the meeting on 10 April 2003
on Part II of the Bill**

This paper is a response to the issues raised at the Bills Committee meeting on 10 April 2003, namely :

(8) & (9) Section 79I of the Criminal Procedure Ordinance

Members expressed concern that the criteria for the court to be satisfied under section 79I are too loose and the court should only give permission in exceptional circumstances. There are no criteria in the English legislation, and the criteria in the Bill are similar to those found in the Australian legislation. However, the court is given a discretion and can be expected to exercise it in a common sense fashion. Crime is transnational and it is now more frequently the case that a witness for a trial in Hong Kong was never in Hong Kong at the material time, does not want to travel to Hong Kong, and cannot be compelled to do so. On the other hand, he may be willing to give evidence in the other jurisdiction by TV link. These are not “exceptional circumstances” and are increasingly common. It would frustrate the prosecution of crime in Hong Kong if the threshold were set so high that these kinds of witnesses would be excluded. It would also be unfair to the defendant if evidence that may otherwise be made available by TV link cannot be obtained.

On the point that TV link should still be the exception rather than the norm, the Administration proposes to add the following criteria of which the court must be satisfied before giving permission under the proposed section 79I(1) -

- (a) proper safeguards are or can be put in place to ensure that the witness will not be subject to any coercion and that these can be checked by the Hong Kong court at any time during the giving of evidence; and

- (b) the granting of permission would be in the interests of justice.

The policy intent is not to allow TV link to be made available regardless of the circumstances or to make it too difficult to obtain. The proposed section 79I(1) gives the court a general discretion to decide whether to grant the permission or not. To address the concern of the Bills Committee, the Administration will review the drafting of the provisions to reflect the policy intent in clearer language. CSAs will be submitted for members' consideration in due course.

(10) *Overseas experiences*

A copy of the relevant UK Crown Court Rules is enclosed at **Annex** for members' information.

Department of Justice
April 2003

The proceedings must be by way of trial on indictment, appeal to the criminal division of the Court of Appeal or the hearing of a reference under section 9 of the *Criminal Appeal Act* 1995.

For the text of section 32A(7) (see subs. (6), *ante*), which defines "child", see *post*, § 8-61.

For rules of court made under this section, see rules 23A and 23B of the *Crown Court Rules* 1982, *post*, and rules 9A and 9B of the *Criminal Appeal Rules* 1968, *ante*, §§ 7-219, 7-220.

Rule 23 of the *Magistrates' Courts (Children and Young Persons) Rules* 1992 (S.I. 1992 No. 2071) makes like provision in relation to magistrates' courts. The only differences are such as are necessary to take account of the different courts to which the rules apply.

The *Criminal Justice Act* 1988 (*Application to Service Courts*) (*Evidence through Television Links*) Order 1993 (S.I. 1993 No. 244) applies section 32(1), (2) (a) to (c) and (3) of the 1988 Act to proceedings before service courts subject to specified modifications.

As to the prohibition on cross-examination of a child witness by an accused in person, who is charged with an offence to which section 32(2) applies, see section 34A of the 1988 Act, *post*, § 8-115.

Arson is an offence involving a "threat of injury" within section 32(1) (a): *R. v. Lee* [1996] Crim.L.R. 412, CA.

The offence of child abduction, contrary to section 2 of the *Child Abduction Act* 1984 (*post*, § 19-313) is an offence "which involves an assault on, or injury or a threat of injury to, a person" within section 32(2) (a): *R. v. McAndrew-Bingham* [1999] 2 Cr.App.R. 293, CA.

As to the proper approach to this section, see *R. (DPP) v. Redbridge Youth Court; R. (L.) v. Bicester Youth Court* [2001] Crim.L.R. 473 DC, *post*, § 8-64a.

Crown Court Rules 1982, rr. 23A, 23B

Evidence through television link where witness is a child or is to be cross-examined after admission of a video recording:

23A:—(1) Any party may apply for leave under section 32(1) (b) of the *Criminal Justice Act* 1988 for evidence to be given through a live television link where— §-58

(a) the offence charged is one to which section 32(2) applies; and

(b) the evidence is to be given by a witness who is either—

(i) in the case of an offence falling within section 32(2) (a) or (b), under the age of 14; or

(ii) in the case of an offence falling within section 32(2) (c); under the age of 17; or

(iii) a person who is to be cross-examined following the admission under section 32A of that Act of a video recording of testimony from him;

and references in this rule to an offence include references to attempting or conspiring to commit, or aiding, abetting, counselling, procuring or inciting the commission of, that offence.

(2) An application under paragraph (1) shall be made by giving notice in writing, which shall be in the form prescribed in Schedule 5 or a form to the like effect.

(3) An application under paragraph (1) shall be made within 28 days after the date of the committal of the defendant, or of the consent to the preferment of a bill of indictment in relation to the case, or of the service of notice of transfer under section 53 of the *Criminal Justice Act* 1991, or of the service of copies of the documents containing the evidence on which the charge or charges are based under paragraph 1 of Schedule 3 to the *Crime and Disorder Act* 1998, or of the service of Notice of Appeal from a decision of a youth court or magistrates' court, as the case may be.

(4) The notice under paragraph (2) shall be sent to the appropriate officer of the Crown Court and at the same time a copy thereof shall be sent by the applicant to every other party to the proceedings.

(5) A party who receives a copy of a notice under paragraph (2) and who wishes to oppose the application shall within 14 days notify the applicant and the appropriate officer of the Crown Court, in writing, of his opposition, giving the reasons therefor.

(6) An application under paragraph (1) shall be determined by a judge of the Crown Court without a hearing, unless the judge otherwise directs, and the appropriate officer of the Crown Court shall notify the parties of the time and place of any such hearing.

(7) The appropriate officer of the Crown Court shall notify all the parties and any person who is to accompany the witness (if known) of the decision of the Crown Court in relation to an application under paragraph (1). Where leave is granted, the notification shall state—

(a) where the witness is to give evidence on behalf of the prosecutor, the name of the witness, and, if known, the name, occupation and relationship (if any) to the witness of any person who is to accompany the witness, and

(b) the location of the Crown Court at which the trial should take place.

(8) The period specified in paragraph (3) may be extended, either before or after it expires, on an application made in writing, specifying the grounds of the application and sent to the appropriate officer of the Crown Court, and a copy of the application shall be sent by the applicant to every other party to the proceedings. The appropriate officer of the Crown Court shall notify all the parties of the decision of the Crown Court.

(9) An application for extension of time under paragraph (8) shall be determined by a judge of the Crown Court without a hearing unless the judge otherwise directs.

(10) A witness giving evidence through a television link pursuant to leave granted under paragraph (7) shall be accompanied by a person acceptable to a judge of the Crown Court and, unless the judge otherwise directs, by no other person.

[Rule 23A was inserted by the *Crown Court (Amendment No. 5) Rules 1988* (S.I. 1988 No. 2160). The original rule 23A was substituted by the current version by virtue of the *Crown Court (Amendment) Rules 1992* (S.I. 1992 No. 1847). It is printed as amended by the *Crown Court (Amendment No. 3) Rules 2000* (S.I. 2000 No. 3362).]

Evidence through television link where witness is outside United Kingdom

8-59

23B.—(1) Any party may apply for leave under section 32(1) of the *Criminal Justice Act 1988* for evidence to be given through a live television link by a witness who is outside the United Kingdom.

(2) An application under paragraph (1), and any matter relating thereto which, by virtue of the following provisions of this rule, falls to be determined by the Crown Court, may be dealt with in chambers by any Judge of the Crown Court.

(3) An application under paragraph (1) shall be made by giving notice in writing, which shall be in the form prescribed in Schedule 6 or a form to the like effect.

(4) An application under paragraph (1) shall be made within 28 days after the date of the committal of the defendant or, as the case may be, of the giving of a notice of transfer under section 4(1)(c) of the *Criminal Justice Act 1987*, or of the service of copies of the documents containing the evidence on which the charge or charges are based under paragraph 1 of Schedule 3 to the *Crime and Disorder Act 1998*, or of the preferal of a bill of indictment in relation to the case.

(5) The period of 28 days in paragraph (4) may be extended by the Crown Court either before or after it expires, on an application made in writing, specifying the grounds of the application. The appropriate officer of the Crown Court shall notify all the parties of the decision of the Crown Court.

(6) The notice under paragraph (3) or any application under paragraph (5) shall be sent to the appropriate officer of the Crown Court and at the same time a copy thereof shall be sent by the applicant to every other party to the proceedings.

(7) A party who receives a copy of a notice under paragraph (3) shall, within 28 days of the notice, notify the applicant and the appropriate officer of the Crown Court, in writing—

(a) whether or not he opposes the application, giving his reasons for any such opposition, and

(b) whether or not he wishes to be represented at any hearing of the application.

(8) After the expiry of the period referred to in paragraph (7), the Crown Court shall determine whether an application under paragraph (1) is to be dealt with—

(a) without a hearing, or

(b) at a hearing at which the applicant and such other party or parties as the court may direct may be represented,

and the appropriate officer of the Crown Court shall notify the applicant and, where necessary, the other party or parties, of the time and place of any such hearing.

(9) The appropriate officer of the Crown Court shall notify all the parties of the decision of the Crown Court in relation to an application under paragraph (1) and, where leave is granted, the notification shall state—

- (a) the country in which the witness will give evidence,
- (b) if known, the place where the witness will give evidence,
- (c) where the witness is to give evidence on behalf of the prosecutor, or where disclosure is required by section 11 of the *Criminal Justice Act 1967* (alibi) or by rules under section 81 of the *Police and Criminal Evidence Act 1984* (expert evidence), the name of the witness,
- (d) the location of the Crown Court at which the trial should take place, and
- (e) any conditions specified by the Crown Court in accordance with paragraph (10).

(10) The Crown Court dealing with an application under paragraph (1) may specify that as a condition of the grant of leave the witness should give the evidence in the presence of a specified person who is able and willing to answer under oath or affirmation any questions the trial judge may put as to the circumstances in which the evidence is given, including questions about any persons who are present when the evidence is given and any matters which may affect the giving of the evidence.

[Rule 23B was inserted by the *Crown Court (Amendment) Rules 1990* (S.I. 1990 No. 2157). It is printed as amended by S.I. 2000 No. 3362 (*ante*, 8-58).]

(3) Video recordings of testimony from child witnesses

Criminal Justice Act 1988, s.32A

Video recordings of testimony from child witnesses

32A.—(1) This section applies in relation to the following proceedings, namely—

- (a) trials on indictment for any offence to which section 32(2) above applies;
- (b) appeals to the criminal division of the Court of Appeal and hearings of references under section 9 of the *Criminal Appeal Act 1995* in respect of any such offence; and
- (c) proceedings in youth courts for any such offence, appeals to the Crown Court arising out of such proceedings and hearings of references under section 11 of the *Criminal Appeal Act 1995*.

(2) In any such proceedings a video recording of an interview which—

- (a) is conducted between an adult and a child who is not the accused or one of the accused "the child witness"; and
- (b) relates to any matter in issue in the proceedings,

may, with the leave of the court, be given in evidence in so far as it is not excluded by the court under subsection (3) below.

(3) Where a video recording is tendered in evidence under this section, the court shall (subject to the exercise of any power of the court to exclude evidence which is otherwise admissible) give leave under subsection (2) above unless—

- (a) it appears that the child witness will not be available for cross-examination;
- (b) any rules of court requiring disclosure of the circumstances in which the recording was made have not been complied with to the satisfaction of the court; or
- (c) the court is of the opinion, having regard to all the circumstances of the case, that in the interests of justice the recording ought not to be admitted;

and where the court gives such leave it may, if it is of the opinion that in the interests of justice any part of the recording ought not to be admitted, direct that that part shall be excluded.

(4) In considering whether any part of a recording ought to be excluded under subsection (3) above, the court shall consider whether any prejudice to the accused, or one of the accused, which might result from the admission of that part is outweighed by the desirability of showing the whole, or substantially the whole, of the recorded interview.

(5) Where a video recording is admitted under this section—

- (a) the child witness shall be called by the party who tendered it in evidence;
- (b) that witness shall not be examined in chief on any matter which, in the opinion of the court, has been dealt with adequately in his recorded testimony.

(6) Where a video recording is given in evidence under this section, any statement made by the child witness which is disclosed by the recording shall be treated as if given by that witness in direct oral testimony; and accordingly—

- (a) any such statement shall be admissible evidence of any fact of which such testimony from him would be admissible;

8-60

8-61