

Evidence (Miscellaneous Amendments) Bill 2002

**Response by the Administration to the letter from
Assistant Legal Advisor of Legislative Council
on Part I of the Bill**

This paper is a response to the issues raised in the letter dated 30 April 2003 from the Assistant Legal Advisor of Legislative Council.

(1) **New Section 57**

The term "co-accused" is defined in section 57(10) as "in relation to an accused, means a person standing trial together with the accused". Please clarify whether such definition includes an accused person who is jointly charged with another person for an offence but for some reasons these 2 accused persons are tried separately.

The definition of "co-accused" under the proposed section 57(10) refers to a person standing trial together with the accused. The definition does not include an accused person who is jointly charged with another person for an offence but for some reasons these 2 accused persons are tried separately.

(2) **New Section 57A**

Under section 57A(5), where the spouse of an accused is called to give evidence for the prosecution, or on behalf of co-accused, in circumstances in which he or she is compellable to give evidence under section 57(3), the court must be satisfied that the spouse is aware of his or her right to apply for an exemption under section 57A(1).

Please explain, in terms of criminal procedure, that who has the duty to advise the spouse of his or her right to apply for exemption and what is the standard of proof in this respect. Would the Administration make provisions for the procedure in the Criminal Procedure Rules or any other subsidiary legislation?

Under the proposed section 57A(5), the judge or magistrate hearing the case "must be satisfied that [the spouse] is aware of his or her right", i.e. the judge or magistrate will have the duty to advise the spouse of his or her right to apply for exemption under section 57A(1). Since the trial judge or magistrate is charged with the duty to advise the spouse of his or her right to apply for exemption, there is nothing to be proved by the prosecution or defence. The matter concerning 'standard of proof' does not arise.

This issue was considered in the case of *Trezesinski v Daire* (1986) 21 A Crim R 247 by Prior J when applying a similar provision under section 21(5) of the Evidence Act 1929 (South Australia) :

"By subs (5), the presiding judicial officer is required to satisfy himself that the prospective witness is aware of his right to apply for an exemption under this section. The magistrate speaks of the wife's rights being explained to her. I assume that this was done by him. I agree with the view expressed by Cox J in *Morgan* (unreported, 22 October 1984) that this is not something to be left to counsel. It is a responsibility staying with the presiding judicial officer. It is not one for any counsel, whether that counsel be counsel for one of the parties to the proceedings or otherwise." (at p.249 of the judgment)

On the question of whether the right of a person who falls within the scope of the section should be explained to him by the judge personally, Prior J apparently agreed with the views of Cox J in the case of *Morgan* in that "at least as a general rule, it is better if the trial judge makes the necessary explanation and inquiries under subs (5) of section 21 for himself, and satisfies himself from the prospective witness' own answers that the witness understands the questions that necessarily arise under section 21 where a close relative is called to give evidence against a person charged with an offence". On the basis of the case of *Trezesinski v Daire*, it is considered that the proposed section 57A(5) is sufficiently clear and it is not necessary to make subsidiary legislation for this purpose.

(3) **Section 52 of the Matrimonial Causes Ordinance (Cap. 179)**

One of the consequential amendments sought to be made is to repeal section 52(1) and section 52(2) of the Matrimonial Causes Ordinance. Section 52(1) and section 52(2) of the Matrimonial Causes Ordinance provide as follows:-

“(1) The evidence of a husband or wife shall be admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period; but a husband or wife shall not be compellable in criminal proceedings to give evidence of the matters aforesaid.

(2) The parties to any proceedings instituted in consequence of adultery and the husbands and wives of the parties shall be competent to give evidence in the proceedings.”

Please explain the effect of the proposed consequential amendment on:-

- (i) the admissibility of the evidence of a husband or wife in any proceedings (civil or criminal) in relation to the question of whether or not marital intercourse took place between them during any period; and**

The admissibility of the evidence of a husband or wife in any proceedings in relation to the question of whether or not marital intercourse took place between them during any period will, after the consequential amendment on section 52 of the Matrimonial Causes Ordinance, continue to be provided for under section 8(1) of the Evidence Ordinance (Cap 8) which is not affected by the amendments under the Bill.

Section 8(1) of Cap. 8 provides –

“Notwithstanding any rule of law, the evidence of a husband or wife shall be admissible in any proceedings to prove that marital intercourse did or did not take place between them at any period.”

- (ii) the question of competence in any proceedings (e.g. in civil or matrimonial proceedings) instituted in consequence of adultery.**

The question of competence of the parties to any proceedings (e.g. in civil or matrimonial proceedings) instituted in consequence of adultery and that of the spouses of the parties will, after the consequential amendment on section 52 of the Matrimonial Causes Ordinance, continue to be provided for under section 5 of the Evidence Ordinance.

Section 5 of Cap. 8 provides –

“In all proceedings before the court, the parties and the husbands and wives of the parties thereto, and the persons in whose behalf any proceedings may be brought, or instituted, or opposed, or defended, and the husbands and wives of such persons shall, except as hereinafter excepted, be competent and compellable to give evidence, either viva voce or by deposition, according to the practice of the court, on behalf of either or any of the parties to the proceedings.”