

Evidence (Miscellaneous Amendments) Bill 2002

Explanatory Notes for CSAs to be moved by the Administration

- (1) Clause 4, proposed section 57 of the Criminal Procedure Ordinance
- (a) The proposed section 57(3) provides that a spouse of an accused shall be compellable to give evidence for the prosecution and on behalf of a co-accused if the offence charged is one that is mentioned in subsection (3)(a) to (d). There is a potential ambiguity, at least arguably, that once the accused or co-accused is charged with a subsection (3)(a) to (d) offence, the spouse can be compellable to give evidence for any other offence that the accused or co-accused may be charged with, regardless whether that other offence is a subsection (3)(a) to (d) offence or not. The CSA seeks to clarify the position by providing that the spouse can only be compellable to give evidence in respect of a subsection (3)(a) to (d) offence. In the CSA, subsection (3)(a) to (d) offences have become specified offences, which are set out in subsection (3A). [clause 4(a)(i) and 4(a)(ii) of the CSA]
- (b) The CSA also extends the scope of specified offences to cover a child of family that was mentally incapacitated at the time of the offence or is mentally incapacitated at the time of the trial. This proposal is based on the suggestion of the Bills Committee (see proposed section 57(3A)(b) and (c) in the CSA). [clause 4 (a)(ii) of the CSA]
- (c) Regarding section 57(4), the present provision in the Bill provides that where a person and his/her spouse are jointly charged with an offence and are standing trial together, they should not be compellable to give evidence. However, as pointed out by the Bills Committee, this may give rise to an interpretation that spouses can still be compelled to give evidence if they are standing trial together for different offences. This is not consistent with a defendant's fundamental right to silence in a trial. Therefore, a CSA is proposed to clarify the situation. [clause 4(a)(iii) of the CSA]
- (d) The addition of a new proposed section 57(4A) in the CSA is to provide that a spouse will not be so protected by subsection (4) if he/she is no longer liable to be convicted in the same trial. [clause 4(a)(iv)]
- (2) Clause 4, proposed section 57A of the Criminal Procedure Ordinance
- This CSA is made to ensure that a spouse can make an application for

exemption at any time, including half-way through the examination. This CSA is made in response to a concern of Bills Committee, to which the Administration agrees.

(3) Clause 16, section 79I of the Criminal Procedure Ordinance

Members of the Bills Committee are of the opinion that the existing wording will render the permission be given too easily. One comment is that section 79I(2) gives an impression that once the requirements of section 79I(2) are satisfied, the court will have to grant the permission. The Administration's view is that section 79I(1) gives the court a general discretion even though the requirements under section 79I(2) are satisfied. In order to address to the concern of the Bills Committee, we agree to review the drafting. Besides, two more requirements are added to section 79I(2) to ensure that the granting of permission will be in the interests of justice and the witness will not be subject to any coercion.

(4) Clause 19(2)(b), new clause 19A, 20, 23 and 24

CSA is proposed to amend section 10(2) of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525). Under the existing provision in Cap. 525, where a magistrate is to take the evidence of a witness on a request from a place outside Hong Kong, he has to take the evidence on oath. The provision does not allow the magistrate to take an oath that does not amount to an oath under Hong Kong law even if the oath accords with the law of the requesting jurisdiction. However, occasions may arise when such power will become necessary. It is also noted that similar power (i.e. to take evidence otherwise than on oath) is available under the parallel arrangement under section 76 of the Evidence Ordinance. The Administration therefore proposes that clause 19(2) of the Bill is to be amended as shown in the draft CSA.

Consequentially, we also amend –

- (a) section 33 of Cap. 525 (regarding regulation-making power);
- (b) rule 5 of the Mutual Legal Assistance in Criminal Matters Regulation (Cap. 525 sub. leg. A) (in an "otherwise than on oath" case, to make it an offence for refusing to take an "oath" that accords with the law of the requesting jurisdiction but not with the law of Hong Kong);
- (c) Schedule 3 to Cap. 525A (to amend Form 3 that contains a form of “warrant for commitment of witness refusing to be sworn, give evidence or produce things”);

- (d) clause 20 of the Bill that amends section 32A of the Crimes Ordinance (to provide that a person who gives false unsworn statement under section 10 of Cap. 525 will commit an offence).

(5) New clause 22, section 118 of the Magistrates Ordinance (Cap. 227)

To provide a judge of the Court of First Instance hearing an appeal from the magistracy the like powers concerning competence and compellability of spouses and the use of live television link in criminal proceedings that the Court of Appeal would have had if the appeal had been an appeal to the Court of Appeal. The Administration proposes that section 118 of the Magistrates Ordinance be amended to achieve this purpose.