

C018E

A BILL

To

Amend the Evidence Ordinance, the Criminal Procedure Ordinance and the Mutual Legal Assistance in Criminal Matters Ordinance.

Enacted by the Legislative Council.

1. Short title and commencement

(1) This Ordinance may be cited as the Evidence (Miscellaneous Amendments) Ordinance 2002.

(2) Part II shall come into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.

PART I

Competence and Compellability of Spouses in  
Criminal Proceedings  
Evidence Ordinance

2. Section added

The Evidence Ordinance (Cap. 8) is amended by adding---

"65A. Privilege against incrimination  
of self or spouse in criminal  
proceedings

The right of a person in criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty or for a forfeiture shall include a like right to refuse to answer any question or produce any document or thing if to do so would tend to expose the husband or wife of that person to any such proceedings."

Criminal Procedure Ordinance

3. Competence of person charged  
in criminal cases

Section 54(1) of the Criminal Procedure Ordinance (Cap. 221) is amended---

(a) by repealing everything before the proviso and substituting---

"(1) Every person charged with an offence, whether charged solely or jointly with any other person, shall be a competent witness for the defence at every stage of the proceedings:";

(b) in the proviso---

(i) in paragraph (b), by repealing ", or of the wife or husband as the case may be of the person so charged,";

- (ii) by repealing paragraphs (c) and (d);
- (iii) in paragraph (g), by repealing "every person" and substituting "a person charged and".

#### 4. Sections substituted

Section 57 is repealed and the following substituted---

"57. Competence and compellability of accused's spouse or former spouse

(1) The husband or wife of an accused shall be competent to give evidence on behalf of the accused or a co-accused and, subject to subsection (4), shall be competent to give evidence for the prosecution.

(2) Subject to subsection (4), the husband or wife of an accused shall be compellable to give evidence on behalf of the accused.

(3) Subject to subsection (4), the husband or wife of an accused shall be compellable to give evidence for the prosecution, and shall be compellable to give evidence on behalf of a co-accused, if the offence charged---

(a) involves an assault on, or an injury or threat of injury to, the husband or wife of the accused;

(b) involves causing the death of, an assault on, or an injury or threat of injury to, a child of the family who was at the material time under the age of 16 years;

(c) is a sexual offence alleged to have been committed in respect of a child of the family who was at the material time under the age of 16 years; or

(d) consists of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, an offence falling within paragraph (a),

(b) or (c).

(4) Where a person and the husband or wife of the person are jointly charged with an offence and are standing trial together for the offence, neither spouse shall at the trial be competent to give evidence for the prosecution under subsection (1), or be compellable to give evidence under subsection (2) or (3).

(5) Section 7 of the Evidence Ordinance (Cap. 8) (privilege of husband and wife) and section 8(2) of that Ordinance (evidence of access) shall not apply to the husband or wife of an accused, where the husband or wife is giving evidence for the prosecution, or on behalf of the accused or a co-accused, in circumstances in which he or she is compellable to do so under subsection (2) or (3), as the case may be.

(6) Section 65A of the Evidence Ordinance (Cap. 8) (privilege against incrimination of self or spouse in criminal proceedings) shall not apply to the husband or wife of an accused, where the husband or wife is giving evidence for the prosecution, or on behalf of a co-accused, in circumstances in which he or she is compellable to do so under subsection (3).

(7) Subject to subsection (8), a former husband or wife of an accused shall be competent and compellable to give evidence as if he or she had never been married to the accused.

(8) A former husband or wife of an accused shall not, as regards matters that occurred during his or her marriage to the accused, be compellable to give evidence for the prosecution, or on behalf of a co-accused, unless the former husband or wife would be so compellable under subsection (3) if he or she were still married to the accused.

(9) The failure to call the husband or wife of an accused to give evidence on behalf of the accused or a co-accused shall not be made the subject of any question or comment by the prosecution.

(10) In this section---

"accused" (被控人) means a person charged with an offence;

"child of the family" (家庭子女) means---

(a) a natural or adopted child of the accused or the husband or wife of the accused;  
or

(b) a person to whom the accused or the husband or wife of the accused stands in loco parentis;

"co-accused" (同案被控人), in relation to an accused, means a person standing trial together with the accused;

"sexual offence" (性罪行) means an offence under Part VI or XII of the Crimes Ordinance (Cap. 200).

(11) For the purposes of subsection (3), the age of a child of the family at the material time shall be deemed to be or to have been that which appears to the court to be or to have been his age at that time.

57A. Right to apply for exemption from  
obligation to give evidence

(1) Where the husband or wife of an accused is called to give evidence for the prosecution, or on behalf of a co-accused, in circumstances in which he or she is compellable to give evidence under section 57(3), the husband or wife may apply to the court for an exemption from the obligation to give evidence.

(2) Where an application for an exemption is made to a court under subsection (1) and the court is satisfied---

(a) that, if the husband or wife were to give evidence for the prosecution or on behalf of the co-accused, as the case may be, there would be a substantial risk of---

(i) serious harm being caused to the relationship between the husband or wife and the accused; or

(ii) serious emotional, psychological or economic consequences for the

husband or wife; and

(b) that, having regard to the nature and gravity of the offence charged and the importance at the trial of the evidence that the husband or wife is in a position to give, there is insufficient justification for exposing the husband or wife to that risk,

the court may exempt the husband or wife, wholly or in part, from the obligation to give evidence.

(3) Where a court is constituted by a judge and jury, an application for an exemption made under subsection (1) shall be heard and determined by the judge in the absence of the jury.

(4) The fact that the husband or wife of an accused has applied for, or been granted or refused, an exemption under this section shall not be made the subject of any question or comment by the prosecution.

(5) Where the husband or wife of an accused is called to give evidence for the prosecution, or on behalf of a 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 husband or wife is aware of his or her right to apply for an exemption under subsection (1).

(6) In this section, the terms "accused" (被控人) and "co-accused" (同案被控人) have the same meaning as in section 57."

## 5. Application

Section 58 is amended---

(a) by repealing "57" and substituting "57A";

(b) by repealing the full stop and substituting ", and in sections 54 to 57A, "court" (法庭) includes the District Court and a magistrate."

## 6. Evidence

(1) Section 83V(3) is amended by repealing everything after "is" and substituting "a competent but not a compellable witness."

(2) Section 83V is amended by adding---

"(6) Where the husband or wife of an appellant or respondent is required to be examined under subsection (1)(b) or (4), other than on behalf of the appellant or respondent concerned, the husband or wife may apply to the Court of Appeal for an exemption from the requirement to be so examined.

(7) Where the husband or wife of an appellant or respondent has the right to apply to the Court of Appeal for an exemption under subsection (6), the Court of Appeal must be satisfied that the husband or wife is aware of such a right.

(8) Where the husband or wife of an appellant or respondent applies to the Court of Appeal for an exemption under subsection (6), the Court of Appeal may exercise

the same powers that a court may exercise under section 57A(2), and that section shall apply with such modifications as the circumstances require.

(9) Section 7 of the Evidence Ordinance (Cap. 8) (privilege of husband and wife) and section 8(2) of that Ordinance (evidence of access) shall not apply to the husband or wife of an appellant or respondent, where the husband or wife is being examined under subsection (1)(b) or (4).

(10) Section 65A of the Evidence Ordinance (Cap. 8) (privilege against incrimination of self or spouse in criminal proceedings) shall not apply to the husband or wife of an appellant or respondent, where the husband or wife is being examined under subsection (1)(b) or (4), other than on behalf of the appellant or respondent concerned."

7. Schedule 2 repealed

Schedule 2 is repealed.

Consequential Amendments

Defamation Ordinance

8. Person charged may give evidence

Section 20 of the Defamation Ordinance (Cap. 21) is repealed.

Matrimonial Causes Ordinance

9. Evidence

Section 52(1) and (2) of the Matrimonial Causes Ordinance (Cap. 179) is repealed.

Theft Ordinance

10. Husband and wife

Section 31 of the Theft Ordinance (Cap. 210) is amended---

(a) in subsection (2), by repealing everything after "married" and substituting a full stop;

(b) by repealing subsection (3).

PART II

Use of Live Television Link in Criminal Proceedings

Evidence Ordinance

11. Interpretation

Section 74 of the Evidence Ordinance (Cap. 8) is amended by adding---

""live television link" (電視直播聯繫) means a system in which two places are equipped with, and linked by, audio visual facilities that enable persons at one place to see and hear persons at the other place, and vice versa, at the same time;".

12. Power of a court in Hong Kong to

give effect to an application

for assistance

(1) Section 76(2)(a) is amended by repealing ", either orally or in writing" and substituting "by any means, including by way of a live television link".

(2) Section 76(3) is amended by repealing "testimony (either orally or in writing)" and substituting "evidence".

### 13. Privilege of witnesses

(1) Section 77(1)(b) is amended by repealing "subsection (2)" and substituting "subsections (2) and (2A)".

(2) Section 77(2) is amended by repealing "Subsection" and substituting "Where a person is giving evidence by any means other than by way of a live television link, subsection".

(3) Section 77 is amended by adding---

"(2A) Where a person is giving evidence by way of a live television link, subsection (1)(b) shall not apply unless---

(a) the claim of the person in question to be exempt from giving the evidence is supported or conceded as mentioned in subsection (2); or

(b) the requesting court, on the matter being referred to it by way of a live television link, upholds the claim."

### 14. Power of Hong Kong court to assist

in obtaining evidence for criminal

proceedings in an overseas court

Section 77B(1)(b) is repealed and the following substituted---

"(b) an order under section 76 shall not make provision for any matter other than a matter referred to in section 76(2)(a) or (b)."

### 15. Issue of letter of request to obtain

evidence in criminal proceedings

(1) Section 77E(2)(a) is amended by adding "by any means (including by way of a live television link)" after "witness".

(2) Section 77E is amended by adding---

"(6A) In subsection (2), "live television link" (電視直播聯繫) has the same meaning as in Part VIII."

## Criminal Procedure Ordinance

### 16. Part added

The Criminal Procedure Ordinance (Cap. 221) is amended by adding---

"PART IIIB

Taking Evidence from Witnesses Outside Hong Kong

by Live Television Link

79H. Interpretation

In this Part, unless the context otherwise requires---

"court" (法庭) includes the District Court and a magistrate;

"live television link" (電視直播聯繫) means a system in which two places are equipped with, and linked by, audio visual facilities that enable persons at one place to see and hear persons at the other place, and vice versa, at the same time.

79I. Court may take evidence by live television link from person outside Hong Kong

(1) A court may, on the application of a party to any criminal proceedings, permit a person, other than a person who is a defendant in the proceedings concerned, to give evidence to the court by way of a live television link from a place outside Hong Kong, subject to such conditions as the court considers appropriate in the circumstances.

(2) A court shall not give permission under subsection (1) unless it is satisfied that---

- (a) the person concerned is outside Hong Kong;
- (b) the evidence cannot more conveniently be given in Hong Kong; and
- (c) a live television link is available or can reasonably be made available.

79J. Place from which person gives evidence to be deemed part of courtroom

(1) Where a person is giving evidence in proceedings by way of a live television link pursuant to permission given under section 79I, the place from which the person is giving evidence shall, for all purposes in connection with the proceedings concerned, be deemed to be part of the courtroom in Hong Kong in which the proceedings concerned are taking place.

(2) Without prejudice to the generality of subsection (1), that subsection has effect for the purposes of the laws in force in Hong Kong relating to evidence, procedure, contempt of court and perjury.

79K. Administration of oaths and affirmations

An oath to be sworn or affirmation to be made by a person who is to give evidence by way of a live television link under this Part may be administered---

- (a) by way of a live television link, as nearly as practicable in the same way as oaths or affirmations are administered in a court in Hong Kong; or
- (b) by a person authorized by the court, acting at the direction of and on behalf of the court, at the place where the person is to give evidence.

79L. Chief Justice to make rules or give directions

The Chief Justice may make rules or give directions respecting the giving of evidence by way of a live television link under this Part."

## 17. Evidence

Section 83V is amended by adding---

"(11) Where a child is required to be examined before the Court of Appeal under subsection (1)(b) in proceedings in respect of an offence specified in section 79B(2), the Court of Appeal may exercise the same powers that a court may exercise under section 79B(2).

(12) Where a mentally incapacitated person is required to be examined before the Court of Appeal under subsection (1)(b) in proceedings in respect of an offence specified in section 79B(3), the Court of Appeal may exercise the same powers that a court may exercise under section 79B(3).

(13) Where a witness in fear is required to be examined before the Court of Appeal under subsection (1)(b) in proceedings in respect of any offence, the Court of Appeal may exercise the same powers that a court may exercise under section 79B(4).

(14) Where a person outside Hong Kong is required to be examined before the Court of Appeal under subsection (1)(b) in proceedings in respect of any offence, the Court of Appeal may exercise the same powers that a court may exercise under section 79I.

(15) Section 79B(5) shall apply in relation to the exercise of the powers referred to in subsection (11), (12) or (13) as it applies in relation to the exercise of the powers under section 79B.

(16) Sections 79J and 79K shall apply in relation to the exercise of the powers referred to in subsection (14) as they apply in relation to the exercise of the powers under section 79I.

(17) In subsections (11) to (13)---

"child" (兒童) means a person---

(a) who, in the case of an offence specified in section 79B(2)(a), is under 17 years of age; or

(b) who, in the case of an offence specified in section 79B(2)(b) or (c), is under 14 years of age;

"mentally incapacitated person" (精神上無行為能力的人) means a person who is mentally disordered or mentally handicapped within the meaning of section 2 of the Mental Health Ordinance (Cap. 136);

"witness in fear" (在恐懼中的證人) means a witness in respect of whom the Court of Appeal is satisfied, on reasonable grounds, is apprehensive as to the safety of himself or any member of his family if he gives evidence."

Mutual Legal Assistance in Criminal Matters Ordinance

18. Requests by Hong Kong for taking  
of evidence, etc.

(1) Section 9(1) of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) is amended---

(a) by repealing "or" at the end of paragraph (a);

(b) by adding---

"(aa) evidence to be taken by way of a live television link from a person at the place; or".

(2) Section 9 is amended by adding---

"(3) In subsection (1), "live television link" (電視直播聯繫) means a system in which two places are equipped with, and linked by, audio visual facilities that enable persons at one place to see and hear persons at the other place, and vice versa, at the same time."

19. Requests to Hong Kong for taking of evidence, etc.

(1) Section 10(1) is repealed and the following substituted---

"(1) Where a request is made by an appropriate authority of a place outside Hong Kong that---

(a) evidence be taken in Hong Kong;

(b) evidence be taken by way of a live television link from a person in Hong Kong; or

(c) a thing (including a thing belonging to a class of things) in Hong Kong be produced,

for the purposes of a criminal matter in the place, the Secretary for Justice may authorize in writing---

(i) where paragraph (a) applies, the taking of evidence and the transmission of the evidence to that place;

(ii) where paragraph (b) applies, the taking of evidence by way of a live television link from the person concerned; or

(iii) where paragraph (c) applies, the production of the thing and, subject to subsection (14), the transmission of the thing to that place."

(2) Section 10(2) is amended---

(a) by adding "授權錄取證供或交出物件" after "第 (1) 款";

(b) in paragraph (a)---

(i) by adding "under subsection (1)(i)" after "taking of evidence";

(ii) by repealing "or" at the end of subparagraph (ii);

(c) by adding---

"(aa) in the case of the taking of evidence under subsection (1)(ii), a magistrate shall be present during the taking of the evidence and the magistrate shall---

(i) identify the witness;  
(ii) upon the conclusion of the taking of the evidence, draw up minutes indicating the date on which the evidence is taken, the place where the evidence is taken, and whether or not an oath or affirmation has been administered to the witness;  
(iii) certify that the minutes were drawn up by the magistrate; and  
(iv) cause the minutes so certified to be sent to the Secretary for Justice;  
or";

(d) in paragraph (b)---

(i) by adding "under subsection (1)(iii)" after "production of a thing";

(ii) by adding "certify that the thing was produced to the magistrate and shall" after "shall".

(3) Section 10(3) is amended---

(a) by repealing "or" at the end of paragraph (b);

(b) by repealing the full stop at the end of paragraph (c) and substituting "; or";

(c) by adding---

"(d) in the case of the taking of evidence under subsection (1)(ii)---

(i) the criminal matter outside Hong Kong to which the proceeding relates is a prosecution;

(ii) the appropriate authority of the place concerned requests that the proceeding be held in camera; and

(iii) the proceedings in the place concerned in which the evidence is to be received will be held in camera.".

(4) Section 10 is amended by adding---

"(15) In this section, "live television link" (電視直播聯繫) means a system in which two places are equipped with, and linked by, audio visual facilities that enable persons at one place to see and hear persons at the other place, and vice versa, at the same time.".

Consequential Amendments

Crimes Ordinance

20. False unsworn statement under

section 76 of Evidence

Ordinance

Section 32A of the Crimes Ordinance (Cap. 200) is amended by repealing "any testimony (either orally or in writing)" and substituting "evidence".

Magistrates Ordinance

21. Taking of evidence at hearing

Section 81 of the Magistrates Ordinance (Cap. 227) is amended by adding---

"(4) Where the evidence of a witness is taken by way of a live television link under Part IIIB of the Criminal Procedure Ordinance (Cap. 221)---

(a) the requirement in subsection (2) that the deposition or evidence of the witness shall be signed by the witness in the presence of the accused shall be deemed to have been complied with if, in the presence of the accused, the witness confirms on oath the accuracy of the deposition or evidence by way of a live television link; and  
(b) where subsection (3) applies, paragraph (b) of that subsection shall be deemed to have been complied with if, after the writing concerned is made available to the accused or his counsel, and in the presence of the accused, the witness confirms on oath the accuracy of the writing concerned by way of a live television link.

(5) In subsection (4), "live television link" (電視直播聯繫) has the meaning assigned to it by section 79H of the Criminal Procedure Ordinance (Cap. 221).".  
Explanatory Memorandum

This Bill comprises two parts. Part I of the Bill seeks to implement the recommendations made by the Law Reform Commission in a report published in 1988 entitled the "Report on Competence and Compellability of Spouses in Criminal Proceedings". Part II of the Bill provides for amendments to legislation to allow the giving of evidence by way of a live television link in criminal proceedings.

#### PART I

2. Clause 2 amends the Evidence Ordinance (Cap. 8) ("the EO") by adding a new section 65A to extend the privilege against self-incrimination in criminal proceedings to include incrimination of a spouse.

3. Clause 4 amends the Criminal Procedure Ordinance (Cap. 221) ("the CPO") by replacing the existing section 57 with two new sections, namely, sections 57 and 57A. The new section 57 provides---

(a) that the spouse of an accused shall be competent to give evidence on behalf of the accused or a co-accused and, except where both spouses are tried together for the same offence, shall be competent to give evidence for the prosecution (the new section 57(1) and (4));

(b) that, except where both spouses are tried together for the same offence, the spouse of an accused shall be compellable to give evidence on behalf of the accused (the new section 57(2) and (4));

(c) that, except where both spouses are tried together for the same offence, the spouse of an accused shall be compellable to give evidence for the prosecution, and shall be compellable to give evidence on behalf of a co-accused, in respect of an offence where the spouse or a child of the family is the victim (the new section 57(3) and (4));

(d) that the privilege against revealing marital communications contained in section 7 of the EO and the privilege against giving evidence of marital intercourse contained in section 8(2) of the EO shall not be available to the spouse of an accused, where the spouse is giving evidence for the prosecution, or on behalf of the accused or a co-accused, in circumstances in which he or she is compellable to do so under the new section 57(2) or (3), as the case may be (the new section 57(5));

(e) that the privilege against incrimination of a spouse contained in the new section 65A of the EO (clause 2) shall not be available to the spouse of an accused, where the spouse is giving evidence for the prosecution, or on behalf of a co-accused, in circumstances in which he or she is compellable to do so under the new section 57(3) (the new section 57(6));

(f) that a former spouse of an accused shall be competent and compellable to give evidence as if he or she had never been married to the accused, except that, as regards matters that occurred during his or her marriage to the accused, the former spouse shall not be compellable to give evidence for the prosecution, or on behalf of a co-accused, unless the former spouse would be so compellable under the new section 57(3) if he or she were still married to the accused (the new section 57(7) and (8)); and

(g) that the failure to call the spouse of an accused to give evidence on behalf of the accused or a co-accused shall not be made the subject of any question or comment by the prosecution (the new section 57(9)).

The new section 57A gives the spouse of an accused the right to apply to the court for exemption from giving evidence for the prosecution, or on behalf of a co-accused, where the spouse is compellable to give evidence under the new section 57(3).

4. Clauses 3 and 6(1) amend sections 54(1) and 83V(3) respectively of the CPO, and clause 7 repeals Schedule 2 of the CPO, as a consequence of the new section 57 of the CPO (clause 4).

5. Clause 5 amends section 58 of the CPO as a consequence of the new section 57A of the CPO (clause 4), and to make it clear that in sections 54 to 56 of the CPO, as well as in the new sections 57 and 57A of the CPO (clause 4), "court" (法庭) includes the District Court and a magistrate.

6. Clause 6(2) amends section 83V of the CPO to provide that on an appeal---

(a) the spouse of an appellant or respondent, who is required to be examined, other than on behalf of the appellant or respondent concerned, before the Court of Appeal under section 83V(1)(b) or before a person appointed by the Court of Appeal under section 83V(4), shall have the right to apply to the Court of Appeal for exemption from the requirement to be so examined;

(b) the privilege against revealing marital communications contained in section 7

of the EO and the privilege against giving evidence of marital intercourse contained in section 8(2) of the EO shall not be available to the spouse of an appellant or respondent, where the spouse is being examined before the Court of Appeal under section 83V(1)(b) or before a person appointed by the Court of Appeal under section 83V(4); and

(c) the privilege against incrimination of a spouse contained in the new section 65A of the EO (clause 2) shall not be available to the spouse of an appellant or respondent, where the spouse is being examined, other than on behalf of the appellant or respondent concerned, before the Court of Appeal under section 83V(1)(b) or before a person appointed by the Court of Appeal under section 83V(4).

7. Clauses 8, 9 and 10 make consequential amendments to section 20 of the Defamation Ordinance (Cap. 21), section 52 of the Matrimonial Causes Ordinance (Cap. 179) and section 31 of the Theft Ordinance (Cap. 210), respectively.

## PART II

8. Clauses 11 to 14 amend Part VIII of the EO to make it clear that, at the request of a court or tribunal exercising jurisdiction in a country or territory outside Hong Kong, the Court of First Instance has power, subject to the provisions of that Part, to make an order requiring the examination of a person by any means, including by way of a live television link, for the purposes of civil or criminal proceedings in that country or territory.

9. Clause 15 amends Part VIIIA of the EO to make it clear that the Court of First Instance may request a court or tribunal exercising jurisdiction in a place outside Hong Kong to assist in obtaining evidence by the examination of a person by any means, including by way of a live television link, for the purposes of criminal proceedings in Hong Kong.

10. Clause 16 amends the CPO by adding a new Part IIIB to empower a court, upon the application of a party to any criminal proceedings, to permit a person (other than a person who is a defendant in the proceedings concerned) to give evidence to the court by way of a live television link from a place outside Hong Kong, subject to such conditions as the court considers appropriate in the circumstances. In the new Part IIIB, "court" (法庭) includes the District Court and a magistrate.

11. Clause 17 amends section 83V of the CPO to empower the Court of Appeal to exercise the powers exercisable by a court in relation to the taking of evidence by way of a live television link from vulnerable witnesses and witnesses outside Hong Kong.

12. Clause 18 amends section 9 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) ("the MLAO") to empower the Secretary for Justice to request an appropriate authority of a place outside Hong Kong to arrange for evidence to be taken by way of a live television link from a person at that place, for the purposes

of a criminal matter in Hong Kong.

13. Clause 19 amends section 10 of the MLO to empower the Secretary for Justice, at the request of an appropriate authority of a place outside Hong Kong, to authorize the taking of evidence by way of a live television link from a person in Hong Kong, for the purposes of a criminal matter in that place.

14. Clauses 20 and 21 make consequential amendments to section 32A of the Crimes Ordinance (Cap. 200) and section 81 of the Magistrates Ordinance (Cap. 227), respectively.