

**For discussion  
on 20 March 2002**

**LegCo Panel on Administration of Justice and Legal Services  
The giving of evidence by overseas witnesses via live TV link**

**Introduction**

The Administration proposes to amend the law to provide for the giving of evidence by overseas witnesses in criminal proceedings via live TV link.

**Background**

2. Overseas witnesses may, while willing to give evidence, be unable or reluctant to come to Hong Kong to testify for various reasons. It would be expensive and time-consuming for the court and all parties to travel to the country where a witness resides. Where the witness is unable or reluctant to come to Hong Kong to testify, the only present alternative is to take his evidence by way of a letter of request issued by the Hong Kong court or by a request made by the Secretary for Justice under mutual legal assistance procedures. This involves the delay of questioning the witness in the presence of an authority in the requested jurisdiction and presenting his evidence in written form in Hong Kong. Nor can such evidence be tested in cross-examination unless counsel travels to the overseas place to conduct the cross-examination or arranges for a representative in that place to cross-examine the witness on his behalf. Allowing an overseas witness to give evidence from abroad via live TV link to a Hong Kong court would significantly reduce inconvenience to the witness and the travel costs associated with bringing him to Hong Kong to testify. It would also enable the court to facilitate cross-examination and observe the demeanour of the witness.

3. The taking of evidence via live TV link is permitted in –
- (a) the UK (section 32 of the Criminal Justice Act 1988)
  - (b) Canada (Part II of Chapter C-5 of Canada Evidence Act)

- (c) New South Wales, Australia (Evidence (Audio and Audio Visual Links) Act 1998)
- (d) Victoria, Australia (section 3 of the Evidence (Audio Visual and Audio Linking) Act 1997)
- (e) Western Australia (Evidence Act 1906)
- (f) Commonwealth, Australia (Mutual Assistance in Criminal Matters Act 1987)

4. The Law Society and the Bar Association were consulted in 1998 and both supported the proposal in principle. The proposal was postponed due to a resources problem which has now been resolved. A technology courtroom, which will be equipped with overseas TV link facilities, is being installed in the High Court and is expected to be in full operation by September 2002. We are of the view that this matter be reactivated. We are in the process of consulting the Law Society, Bar Association and the law faculties of the University of Hong Kong and City University on the current proposals.

### **The proposal**

#### **General principles**

5. Under the proposal, the court in Hong Kong will be empowered, upon application, to grant approval to a party to criminal proceedings to adduce evidence of an overseas witness via live TV link and to hear the evidence on the hearing date. The practical arrangements for the evidence to be given, and for the obtaining of the approval of the overseas authority concerned, will be separate from the role of the court in giving the approval.

6. A bilateral treaty between Hong Kong and the overseas jurisdiction concerned is not needed for a party to make arrangement for his witness to give evidence via live TV link. However, if such a treaty exists, its terms must be respected. The court will require the party concerned to satisfy it that the taking of evidence of an overseas witness via live TV link does not infringe the domestic law of the overseas jurisdiction concerned and that the consent of the central authority of the overseas jurisdiction has been obtained.

7. The admissibility of overseas evidence (oral, documentary and real) adduced via live TV link will be determined by the Hong Kong court as if such evidence is physically adduced in a Hong Kong court. Witnesses giving evidence via live TV link will enjoy the same protection which they would have if they were giving evidence in a Hong Kong court.

8. The party may decide whether he wants to make the required arrangements using the mutual legal assistance channel or by private arrangement without the assistance of any overseas authority.

9. Regarding the mutual legal assistance channel, the Administration proposes to amend the *Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)* and the *Evidence Ordinance (Cap.8)* respectively to empower the Secretary for Justice and the Court of First Instance to make a request to an overseas authority or court to assist in the taking of the evidence of an overseas witness via live TV link.

10. It is also considered that witnesses in Hong Kong should be permitted to give evidence via live TV link to an overseas court upon the request of other jurisdictions. Hong Kong courts would be in a stronger position to obtain live TV link evidence if we are prepared to reciprocate.

11. Legislation is required to provide for the procedure regarding the use of the live TV link system for the purpose of taking evidence of an overseas witnesses in criminal proceedings, the admissibility of evidence so adduced, and the power of the Court of First Instance and the Secretary for Justice to request assistance from or provide assistance to an overseas jurisdiction to take evidence via live TV link.

### **Legislative proposal**

12. Details of the proposed legislation are at **Annex A**. This may be varied in the light of the responses received during the consultation exercise.

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**Detailed proposal**

(For the sake of easy reference, in this paper, witnesses giving live TV link evidence under private arrangement will be referred to as “non-MLA witnesses” and witnesses giving live TV link evidence under formal arrangements between governments will be referred to as “MLA witnesses”.)

1. For the purpose of discussion, the proposal can be conveniently divided to cover four situations, namely —

- (a) Hong Kong court and non-MLA overseas witnesses;
- (b) Hong Kong court and MLA overseas witnesses;
- (c) overseas court and non-MLA Hong Kong witnesses; and
- (d) overseas court and MLA Hong Kong witnesses.

***Hong Kong court and non-MLA overseas witnesses***

2. The Hong Kong court would, upon application, have the discretion to grant leave for evidence to be taken via live TV link. The court would not on its own motion arrange for a witness to give evidence via live TV link (this is the same position as in New South Wales and the UK). As in most criminal proceedings, it is a matter for the party concerned to secure the attendance of his witness.

3. An overseas witness need not give evidence in a courtroom setting. This would provide greater flexibility to the parties concerned. This is the position in the UK and Australia. It would be a requirement that a Hong Kong court will not permit the examination of an overseas witness via live TV link unless the court is satisfied that no injustice will be caused. A further safeguard can also be provided by empowering the court to specify that, as a condition of the grant of leave, the witness should give evidence in the presence of a specified person who can attest to the court as to the circumstances in which the evidence is given.

4. An application for leave by any party for evidence to be given via live TV link would be made to the Registrar of the High Court, the Registrar of the District Court or the First Clerk of the magistracy (depending on where the proceedings are to take place) by way of a notice within 28 days after the date of –

- (a) the committal for trial of the defendant; or
- (b) the consent to the preferment of a bill of indictment in relation to the case; or

- (c) the order of transfer under section 88 of the *Magistrates Ordinance* (Cap. 227); or
- (d) the setting down of the case for trial before a magistrate.

The notice must also be sent to all other parties to the proceedings who may object to the application within 14 days of receiving the notice. The court may then decide the application without a hearing. If the court decides to hold a hearing, it must notify all parties concerned of the time and place of the hearing. The 28-day period of application may be extended by an application in writing, specifying the grounds for the extension, sent to the Registrar or First Clerk.

5. The court should not grant leave unless it is satisfied that –
- the person who is to give the evidence is not the accused;
  - the person is not in Hong Kong;
  - the evidence cannot more conveniently be given in the court in Hong Kong;
  - facilities are available;
  - the overseas location where the evidence is to be given is properly and adequately equipped with the necessary facilities;
  - the provision of evidence by an overseas witness in this manner is not in contravention of the law of the place where the witness is to give evidence;
  - no injustice would be caused and all other parties have been given an opportunity to object.

The court may grant leave subject to conditions and may give directions as to how the evidence is to be taken, the setting of the place where the witness is giving evidence, and the person who will attest as to the circumstances in which evidence is given. The court, as a matter of international comity, would also require the applicant to obtain the consent of the relevant overseas authority of the jurisdiction concerned in respect of the taking of evidence via live TV link in that jurisdiction, or to satisfy the court that the overseas authority does not object to the taking of evidence in that jurisdiction via live TV link.

6. The court will not interfere with the manner in which the arrangement to take evidence is made. The applicant will be responsible for obtaining the necessary clearance from the overseas authority and making all necessary arrangements to facilitate his witness to give evidence to the Hong Kong court via live TV link.

7. Regarding the hearing, the following will apply–

- (i) The live TV link system must enable the court to see the witness clearly and allow the court to see the whole room if the court so wishes.
- (ii) The place where an overseas witness is giving evidence would, for the purposes of the criminal proceedings, be deemed to be a part of the courtroom. Hong Kong law relating to evidence, procedure, contempt of court and perjury would apply since the witness would be giving evidence in Hong Kong criminal proceedings and a Hong Kong court cannot apply overseas law. Further, for a non-MLA witness, the Hong Kong court, though remote, is the only court that is supervising the witness and in charge of the proceedings. When submitting to the jurisdiction of the Hong Kong court voluntarily, the witness should consider the consequences and any civil and criminal liabilities that may arise under the law of the place in which the evidence is being given. This is the position in the UK, New South Wales, Victoria and Western Australia.
- (iii) An oath or affirmation would be administered by the court in Hong Kong or by a person authorized by the Hong Kong court at the place where the evidence is to be given.

8. The *Criminal Procedure Ordinance (Cap.221)* (“CPO”) would be amended to give effect to the above. The Chief Justice will be empowered to make a new set of rules under the CPO to provide for the details of the procedure including the production and handling of real or documentary evidence.

9. The *Evidence Ordinance (Cap. 8)* would also be amended to provide that real or documentary evidence produced in accordance with the procedure under the CPO (or rules made under the CPO) during the process, which may not be transmitted to the court simultaneously, shall be admitted in evidence as if it were produced in the courtroom during the process.

### ***Hong Kong court and MLA overseas witnesses***

10. No distinction will be made between MLA and non-MLA witnesses regarding the procedures for obtaining the leave of the court for the use of the live TV link system to examine an overseas witness and for the conduct of the hearing. Therefore, paragraphs 2 to 7 above will also apply to MLA witnesses.

11. This exercise would provide the option of live TV link as a means of taking evidence in MLA matters. It is not intended to expand the existing MLA regime or to confer on anybody a right that he does not currently possess. The arrangement will follow the existing practice regarding the obtaining of evidence

under the *Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)* (“*MLACMO*”) and Part VIIIA of the *Evidence Ordinance*.

12. After leave has been obtained from the Hong Kong court in accordance with the procedure mentioned in paragraph 5 above, if it is considered that assistance from an overseas authority is needed or the overseas authority insists that a formal request be made, the Secretary for Justice may make such request to the relevant overseas authority under the *MLACMO*. The *MLACMO* would be amended for this purpose.

13. Alternatively, a request may also be made by the Court of Instance to a foreign court or tribunal under Part VIIIA of the *Evidence Ordinance*. The *Evidence Ordinance* will be amended accordingly.

14. We consider that Hong Kong law on evidence, procedure, contempt of court and perjury should apply, as the witness would be giving evidence in Hong Kong criminal proceedings, but that the requested jurisdiction may also give the witness fundamental rights and immunities which the Hong Kong court will need to respect. An oath would be administered by the requested jurisdiction with the assistance of their judicial authorities. Since a foreign authority is involved, the execution of the request would be subject to the law of the requested jurisdiction over which the Secretary for Justice or the Court of First Instance would have no control. They would forward special requests, if any, for the consideration of the requested jurisdiction.

15. The *Evidence Ordinance* would be amended to provide that any witness testimony and thing produced during the process would be admissible as if it is physically adduced in the Hong Kong courtroom concerned.

#### ***Overseas court and non-MLA Hong Kong witnesses***

16. A foreign court has no criminal jurisdiction in Hong Kong but, provided that the way in which evidence is taken does not contravene any law in force in Hong Kong, there is no law to prohibit the taking of evidence from Hong Kong. It is up to the foreign court concerned to decide whether it wants to take evidence from a person in Hong Kong via live TV link and for the person to decide whether he wants to be a witness. The Hong Kong government would not provide any assistance to a foreign court nor would it give the witness any special protection. Although the Hong Kong authorities would expect to be notified of a proposal to take evidence in criminal proceedings as a matter of international comity, we consider that it is unnecessary to legislate for an otherwise lawful activity.

17. There may be questions as to whether an overseas lawyer will be practising law in Hong Kong. We are of the view that if the live TV link room were to be a part of the overseas court then a lawyer who examined the witness via the link would be practising law in the overseas court, not in Hong Kong.

*Overseas court and MLA Hong Kong witnesses*

18. To facilitate reciprocity with other jurisdictions, we propose to extend the scope of the existing law to enable Hong Kong to assist an overseas authority in respect of giving evidence via live TV link. The *MLACMO* and the *Mutual Legal Assistance in Criminal Matters Regulation, Cap. 525 sub. leg.* will be amended to empower the Secretary for Justice to act upon a request from an overseas authority for the examination of a witness in Hong Kong via live TV link.

19. The proposal includes the following –

- (a) To empower the Secretary for Justice to authorize evidence to be taken via live TV link, and sending things produced during the examination process to the requesting authority.
- (b) Where the Secretary for Justice authorizes the taking of evidence and sending things produced during the process, the proceedings would be conducted before a magistrate.
- (c) The magistrate would take the oath of the witness and be responsible for the identification of the witness appearing before him, the drawing up of minutes indicating the date and place of the hearing, taking things received during the process and sending them to the Secretary for Justice. The Secretary for Justice would be responsible for sending the things to the requesting jurisdiction.
- (d) Since an open court setting may not be appropriate in the case of a link-up where the court is sitting in another jurisdiction and the court may wish to conduct proceedings in camera, a magistrate would have the power to conduct the hearing in camera if the requesting jurisdiction so requests or if the magistrate sees fit.
- (e) The person giving evidence would be entitled to be accompanied by a legal representative. There may be issues involving the application of Hong Kong law such as a magistrate's power to order a person to attend before the court.
- (f) Without changing the position under the existing section 10(6)-(14) of the *MLACMO*, the law of the requesting jurisdiction would apply unless it is otherwise agreed by the requesting court, the magistrate and the witness, in which case the law of Hong Kong will apply.

20. Part VIII of the *Evidence Ordinance* will also be amended to enable the Court of First Instance to act upon a request from an overseas jurisdiction in so far as it relates to criminal proceedings. The purpose of the proposed amendment would be –

- (a) to empower the court to make an order regarding the examination of witnesses by a requesting court via live TV link; and
- (b) regarding the privilege of a witness under the existing section 77(2) of the *Evidence Ordinance*, to provide that if examination is given via live TV link, the person would also be exempt from giving the evidence if his claim for exemption is upheld by the requesting court which is communicated to the court sitting in Hong Kong via the live TV link.

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