

Criminal
LP 911/00/2C

BY FAX (21809928) AND BY POST

23 April 2002

Miss Selina Lau
Senior Government Counsel (Ag.)
Department of Justice
Legal Policy Division
1/F., High Block,
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66 Queensway, Hong Kong.

Dear Miss Lau,

Evidence (Miscellaneous Provisions) Bill - Examination of overseas witnesses via live TV link

Further to my letter to you dated 13 March 2002, I am pleased to advise that the Society's Criminal Law & Procedure Committee has considered the Consultation Paper on the above subject.

Members can appreciate that the proposed legislation, which would enable overseas witnesses to testify via TV link, has certain advantages. However, there are equally good reasons behind the present rule requiring witnesses to be physically present in court proceedings. In live proceedings, Judges and Juries are in a better position to observe the demeanour and assess the creditability of witnesses. The solemnity of the court proceedings will also assist in ensuring that a witness would take his oath seriously. There are also various concerns with the present proposals, e.g. how to ensure that overseas witnesses would take an oath seriously when in practice, it would be difficult to secure prosecution against those who have committed perjury abroad; and what are the cost implications of the proposed legislation. The Committee notes that the taking of evidence via live TV link is permitted in other overseas jurisdictions such as the UK, Canada, and various states in Australia. Members would wish to be provided with more information about the experience in these overseas jurisdictions in order that they can be in a better position to consider the present proposals.

Yours sincerely,

Christine W.S. Chu
Assistant Director of Practitioners Affairs

c.c.: Mrs. Percy Ma, Clerk to AJLS Panel

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13 December 2002

Miss Selina Lau
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Legal Policy Division
1/F., High Block,
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66 Queensway,
Hong Kong.

Dear Miss Lau,

Evidence (Miscellaneous Amendment) Bill 2002
Part II: Use of Live Television Link in Criminal Proceedings

Thank you for your letter dated 12 November 2002.

The Society's Criminal Law & Procedure Committee has considered Part II of the Evidence (Miscellaneous Amendments) Bill 2002 regarding the legislative proposal to empower a court to permit evidence to be given by way of live TV link from a place outside Hong Kong.

Whilst the Committee appreciates that the leave of court is required before evidence can be given in the proposed manner, it is concerned that the criteria laid down for the court to consider, one of which being "when the evidence cannot be more *conveniently* given in Hong Kong", are too loose.

The Committee does not think that the Administration has made out a case to substantiate the need for taking of evidence from abroad nor provided any information on the extent of difficulties they had encountered or any costs involved in getting witnesses to testify in local courts from abroad. The justice system should not be bending over to accommodate the "*convenience*" of the witness rather than the justice of the accused and admission of overseas evidence via live TV link should be the last resort.

The Committee will reiterate its previous concerns as stated in my previous letter dated 23 April 2002. If this mode of giving of evidence should be introduced, as a starting point, any applicant seeking to call overseas evidence through live TV link should have to substantiate the reasons as to why the particular witness "*could not*" but not "*could not more conveniently*" come to Hong Kong.

The Committee believes that information on the overseas experience will be particularly relevant for consideration of this piece of legislation but regret that none has been forthcoming despite our request. The Committee would reiterate its request for such information, in particular, the relevant legislation in other jurisdictions. It will be helpful to see what the courts in other jurisdictions, particularly in places with which Hong Kong has no extradition treaty, would need to consider when granting the kind of application in question.

Yours sincerely,

Christine W.S. Chu
Assistant Director of Practitioners Affairs

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BY FAX (21809928) AND BY POST

25 February 2003

Miss Selina Lau
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Legal Policy Division
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66 Queensway, Hong Kong.

Dear Miss Lau,

**EVIDENCE (MISCELLANEOUS AMENDMENT) BILL 2002
PART II: USE OF LIVE TELEVISION LINK IN CRIMINAL PROCEEDINGS**

Thank you for your letter dated 7 January 2003.

The Criminal Law & Procedure Committee has further reviewed the above legislative proposals but remains of the view that the Administration has not made out the case to substantiate the need to take video evidence from abroad in jurisdictions where all the safeguards of our well established courts are lacking.

You mentioned that the Administration was “*only introducing live television link as an alternative to the depositions evidence or to the complete absence of any evidence from the witness concerned*”. At present, a witness served with a Witness Summons to come to Hong Kong to give evidence cannot use the excuse of interruption to private or public duties as a just excuse to refuse to comply with the Witness Summons and attend Court in Hong Kong. The proposed use of the words “*could not more conveniently*” is play on words, it is another way of stating that a witness can rely upon “*inconvenience*” as an excuse for them not to attend Hong Kong to give evidence. This is a much lesser standard that which presently exists in the event a Witness Summons is served.

We also do not think that you have made clear as to how a witness abroad can be made subject to prosecution for perjury and be extradited if no extradition agreement has been signed between Hong Kong and the relevant jurisdiction. Even if an extradition agreement is in force, it is no easy task and could be costly and lengthy if the witness should fight against the extradition application vigorously at all costs.

The Committee's concern thus remain. There must be valid grounds to establish the need to use a video link. It should be the burden upon the party seeking to call a witness to give evidence by TV Link to show that their appearance in Hong Kong would cause unreasonable expense, have serious financial implications or there are serious medical or other valid reasons why they cannot come to Hong Kong. The full burden to establish these reasons should be borne by the party seeking an Order for video link evidence as should the costs implications. The Court should also be satisfied that facilities are available or can reasonably be made available.

The Committee's view remains that video link evidence should not be introduced. And if it is to be permitted at all, it should only be used as a rare exception and not as a general rule and only if the Court is persuaded on applications that it is in the interests of justice. Video link can never replace the atmosphere and personal contact in the Court room which allows the observation of body language such as what the witness does with their hands or body movement. In cases where video link is used all that is observed is a close up of the particular witnesses face. Further research needs to be conducted into the likely impact of video technology on individual participants and on the quality of justice that ultimately results before there is a rush to implement legislation.

Yours sincerely,

Christine W. S. Chu
Assistant Director of Practitioners Affairs