

**Bills Committee on
Evidence (Miscellaneous Amendments) Bill 2002**

**Response by the Administration to issues raised by
Members at the meeting on 10 April 2003
on Part I of the Bill**

This paper is a response to the issues raised at the Bills Committee meeting on 10 April 2003, namely :

(1) *Proposed section 57 of the Criminal Procedure Ordinance*

(1) *explain how compellability would apply to a person in the following scenarios :*

- (i) *the person was the spouse of the accused at the time of the alleged offence but had since divorced the accused; and*
- (ii) *the person was not the spouse of the accused at the time of the alleged offence but had since become the spouse of the accused.*

The proposed sections 57(7) and 57(8) cater for the person who was the spouse of the accused at the time of the alleged offence but had since divorced the accused. The effect of these provisions is that a former spouse of the accused is competent and compellable to give evidence as if he or she had never been married to the accused. However, regarding matters that occurred during the marriage between the former spouse and the accused, the former spouse is not compellable to give evidence for the prosecution or on behalf of a co-accused, unless the former spouse would be so compellable in respect of a specified offence if he or she were still married to the accused.

A person who was not the spouse of the accused at the time of the alleged offence but had since become the spouse of the accused is covered by the proposed rules in Part I of the Bill.

(2) ***Reconsider the drafting of the proposed new section 57(3A)(a) and 57(3A)(b)***

The proposed sections 57(3A)(a) and 57(3A)(b) in the draft CSA use the word "involves". Members pointed out that the term could widen the scope of the compellable offences in the Bill. It would cover cases in which assault etc is not an element of the offence charged but the facts of the case involve an assault etc. The use of the term follows the recommendation of the Law Reform Commission. It appears from paragraphs 14.13 to 14.16 of the LRC Report that, when the LRC recommended that the U.K. Police and Criminal Evidence Act 1984 be followed, it had two specific types of offences in mind, i.e. offences of violence against the spouse or a child of the family under 16 and sexual offences against a child of the family under 16. In paragraph 14.13, the LRC states that "We consider that there is a need for an exception to the rule of non-compellability where the family itself is threatened by the spouse. Where a spouse is accused of inflicting physical violence upon or sexually molesting members of his own family, any law which shields spouses from giving evidence in court ceases to protect the family unit and instead makes it easier for its members to be abused." It is considered that by using the term "involves", the LRC intended to cover situations in which an offence is committed against the spouse or a child of the family by the accused by subjecting them to assault, injury or threat of injury. It may be wider than involving assault etc as an element of the offence.

For example, a person commits robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force (section 10 of the Theft Ordinance, Cap. 210). Assuming that a husband committed a robbery against his wife and, when committing the offence, he put his wife under a threat of injury. If the husband is charged with robbery against his wife, this example is arguably covered by the proposed section 57(3A)(a) because it "involves" a threat of injury to the wife of the accused. This example may show that while the offence of robbery does not have assault, injury or threat of injury as one of its elements, it would be covered if the facts

of the case involved a threat by the husband of injury to his wife. It is considered that the intention behind the proposed sections 57(3A)(a) and 57(3A)(b) should also cover cases in which assault etc is not an element of the offence charged but the facts of the case involve an assault etc.

- (3) ***"Material time" in proposed new sections 57(3A)(b) and 57(3A)(c)***
and
 (5) ***the child of the family who at the material time was above the age of 16 years but became a mentally incapacitated person afterwards***

Members raised the issue whether the reference to "material time" in the proposed sections 57(3A)(b) and 57(3A)(c) was to the time of the offence or the time of the trial and asked the Administration to consider reflecting this clearly. The Administration confirms that "material time" refers to the time of the offence, as evidenced by the use of the past tense "was under the age of 16 years . . . ". It also reflects the policy intention.

It seems that, in respect of the reference to the age of the child of the family in these proposed provisions, it is not necessary to refer to the time of the trial because the condition that the child was under the age of 16 years at the time of the offence would cover cases in which the child was under the age of 16 years at the time of the trial.

In respect of the reference to the mental incapacity of the child of the family, the Administration agrees with the point made by a Member that there is no logical connection between the mental incapacity of a child of the family at the time of offence and at the time of trial. In order to provide greater protection to a child of the family who is mentally incapacitated at the time of trial (but was not so at the time of offence), it would be necessary to cover the time of trial as well.

- (4) ***Rationale for limiting the age of the child to under 16 years in the case of death of the child***

The LRC was of the view that the question whether there should be a general rule of compellability involves a balancing of interests. On the

one hand there is the interest of society in upholding the institution of marriage and in recognising the privacy of the marital relationship, and, on the other hand, there are the interests of society in prosecuting and convicting offenders. On balancing these interests, the LRC was of the view that the interests of the community and the existing social fabric of Hong Kong would be best served by not making spouses compellable to testify against each other, save in exceptional cases such as where a spouse is accused of inflicting physical violence upon or sexually molesting *members of his own family*, namely a child of the family or a child under the age of 16 in respect of whom either spouse was acting in loco parentis.

The LRC did not deliberate on why the age of a child of the family should be set at the age of under 16 years in its report. However it is apparent that the LRC considered and followed this aspect of the provisions in the Police and Criminal Evidence Act 1984 of the United Kingdom. The United Kingdom Act was based on the recommendations of the United Kingdom Criminal Law Review Committee set out in its 11th Report on Evidence (General) (HMSO, Cmnd 4991).

From the recommendations, it seems that in order to restrict the scope of compellability, the scope of the offences should be limited to those against children who were also members of the same household as the accused. It was felt that the basic reason for enacting compellability in such cases was to try to secure the availability of some evidence where otherwise there might be none, and that some cases, for example, of cruelty to children too young to testify, might otherwise go unpunished. This would be most likely to occur in cases where the child was a member of the same household as the accused.

In relation to the reference to “causing the death of”, the LRC felt that it is necessary to make it absolutely clear that killing would be included (c.f. not added to the category of cases where the spouse is compellable in the UK Act). Without such phrase, a spouse may be compellable to testify against a spouse when the accused spouse injures a child, but not when he kills it.

(6) *"Mentally disordered person" and "mentally handicapped person"*

There is no case directly on the meaning of and/or deciding whether a person is “mentally disordered” or “mentally handicapped”. The reason might be that there would always be available expert opinion/evidence from doctors, psychiatrists or clinical psychologists on this aspect and there would seldom be challenges from the defence.

Under the Mental Health Ordinance (Cap. 136), “Mentally disordered person” means a person suffering from mental disorder : s.2(1). “Mental disorder” means mental illness; a state of arrested or incomplete development of mind which amounts to a significant impairment of intelligence and social functioning which is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned; psychopathic disorder; or any other disorder or disability of mind which does not amount to mental handicap, and “mentally disordered” is to be construed accordingly. It would seem therefore that a person who is mentally retarded may well fall within such definition.

“Mental handicap” means sub-average general intellectual functioning with deficiencies in adaptive behaviour, and “mentally handicapped” is to be construed accordingly. “Sub-average general intellectual functioning” means an IQ of 70 or below according to the Wechsler Intelligence Scales for Children or an equivalent scale in a standardised intelligence test. “IQ” means intelligence quotient : s. 2(1) of Cap. 136 (**Annex**).

In the case of R v. Man Ming Hing [1993] 2 HKC 522, the appellant pleaded guilty to “unlawful sexual intercourse with a defective (i.e. mentally incapacitated person)” under section 125(1) of the Crimes Ordinance (Cap. 200) and appealed against sentence. The Court of Appeal had considered the evidence of a doctor as to the mental state of the victim. The victim was mentally retarded, was able to recall the incident in question, but was mentally not fit to consent to sexual intercourse.

(7) ***Proposed new section 57(4A) of the Criminal Procedure Ordinance***

A Member raised the issue whether the wording of the proposed section 57(4A) may give rise to an ambiguity which appears to relate to the words “no longer liable to be convicted of any offence in the trial”. The Administration has considered this point carefully and has concluded that the wording is not ambiguous. If a defendant pleads guilty to the charge(s) against him, the judge will enter the conviction(s) of the defendant immediately after the plea although the judge may defer sentencing to a later stage (e.g. the defendant may be called to give evidence against his co-accused in the trial and the judge may then choose to consider the sentence after the defendant has given evidence). Such defendant is "no longer liable to be convicted of any offence in the trial".

Department of Justice
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Chapter:	136	Title:	MENTAL HEALTH ORDINANCE	Gazette Number:	L.N. 29 of 1999
Section:	2	Heading:	Interpretation	Version Date:	01/02/1999

- (1) In this Ordinance, unless the context otherwise requires-
- "approved social worker" (認可社會工作者) means a social worker approved for the purposes of this Ordinance by the Director of Social Welfare; (Added 46 of 1988 s. 2. Amended 81 of 1997 s. 3)
- "certified patient" (實證病人) means a person who is detained in a mental hospital in accordance with the provisions of section 36;
- "chairman" (主席) means chairman of the tribunal; (Added 46 of 1988 s. 2)
- "Correctional Services Department Psychiatric Centre" (懲教署精神病治療中心) means the Correctional Services Department Psychiatric Centre set apart as a prison under section 4 of the Prisons Ordinance (Cap 234); (Added 37 of 1973 s. 2)
- "Court" (原訟法庭) means the Court of First Instance and any judge of the Court of First Instance; (Replaced 25 of 1998 s. 2)
- "Director of Social Welfare" (社會福利署署長) includes an assistant director of social welfare;
- "guardian" (監護人)-
- (a) in relation to a person under the age of 16 years to whom section 30 applies, means any other person having charge of that first-mentioned person or the Director of Social Welfare;
 - (b) in relation to a person under the age of 18 years other than a person to whom paragraph (a) applies, means any other person having charge of that first-mentioned person;
 - (c) in relation to a person subject to a guardianship order under Part IIIA, means the Director of Social Welfare, or such other person as may be specified in the order, as the case may be; or
 - (d) under Part IVB, means the person so appointed under that Part in respect of a mentally incapacitated person who has attained the age of 18 years; (Replaced 81 of 1997 s. 3)
- "hospital order" (入院令) means an order made in accordance with the provisions of section 45, 49, 54 or 54A or an order having the effect that a person shall be treated as if he were liable to be detained by an order under any of those sections; (Amended 37 of 1973 s. 2; 46 of 1988 s. 2)
- "IQ" (智商) means intelligence quotient; (Added 81 of 1997 s. 3)
- "medical officer" (公職醫生) means a registered medical practitioner in the full time employment of Government or the Hospital Authority within the meaning of the Hospital Authority Ordinance (Cap 113); (Amended 68 of 1990 s. 24)
- "medical superintendent" (院長) means the medical superintendent or an assistant medical superintendent of a mental hospital appointed in accordance with the provisions of section 4;
- "mental disorder" (精神紊亂) means-
- (a) mental illness;
 - (b) a state of arrested or incomplete development of mind which amounts to a significant impairment of intelligence and social functioning which is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned;

- (c) psychopathic disorder; or
 - (d) any other disorder or disability of mind which does not amount to mental handicap,
- and "mentally disordered" (精神紊亂) shall be construed accordingly; (Replaced 81 of 1997 s. 3)
- "mental handicap" (弱智) means sub-average general intellectual functioning with deficiencies in adaptive behaviour, and "mentally handicapped" shall be construed accordingly; (Added 81 of 1997 s. 3)
- "mental hospital" (精神病院) means any place declared to be a mental hospital in accordance with the provisions of section 3;
- "mental hospital visitor" (精神病院視察人員) means a person appointed to be a mental hospital visitor in accordance with the provisions of section 5 while he is so appointed;
- "mental incapacity" (精神上無行為能力) means-
- (a) mental disorder; or
 - (b) mental handicap,
- and "mentally incapacitated" (精神上無行為能力) shall be construed accordingly; (Added 81 of 1997 s. 3)
- "mentally disordered person" (精神紊亂的人) means a person suffering from mental disorder; (Added 81 of 1997 s. 3)
- "mentally handicapped person" (弱智人士) means a person who is or appears to be mentally handicapped; (Added 81 of 1997 s. 3)
- "mentally incapacitated person" (精神上無行為能力的人) means-
- (a) for the purposes of Part II, a person who is incapable, by reason of mental incapacity, of managing and administering his property and affairs; or
 - (b) for all other purposes, a patient or a mentally handicapped person, as the case may be; (Added 81 of 1997 s. 3)
- "patient" (病人) means a person suffering or appearing to be suffering from mental disorder; (Replaced 46 of 1988 s. 2)
- "patient under observation" (接受觀察病人) means a person who is detained in a mental hospital in accordance with the provisions of section 31 or 32;
- "prescribed form" (訂明表格) means a form provided by regulations; (Amended 46 of 1988 s. 2)
- "psychopathic disorder" (精神病理障礙) means a persistent disorder or disability of personality (whether or not including significant impairment of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the person concerned; (Added 46 of 1988 s. 2. Amended 81 of 1997 s. 3)
- "registered dentist" (註冊牙醫) has the same meaning as in the Dentists Registration Ordinance (Cap 156); (Added 81 of 1997 s. 3)
- "registered medical practitioner" (註冊醫生) means a person who is registered or who is deemed to be registered in accordance with the provisions of the Medical Registration Ordinance (Cap 161);
- "Registrar" (司法常務官) means the Registrar of the High Court; (Amended 25 of 1998 s. 2)
- "regulations" (規例) means regulations made under section 72; (Added 46 of 1988 s. 2)
- "relative" (親屬), in relation to a mentally incapacitated person, means any of the following persons being, in the case of persons referred to in paragraphs (b) to (i) of this definition, persons who have attained the age of 18 years-
- (a) spouse or reputed spouse;
 - (b) child or child's spouse;
 - (c) parent or parent-in-law;
 - (d) sibling or sibling's spouse;
 - (e) grandparent or grandparent-in-law;

- (f) grandchild or grandchild's spouse;
- (g) uncle or aunt;
- (h) nephew or niece or spouse of nephew or niece;
- (i) cousin or cousin's spouse;
- (j) any person with whom the mentally incapacitated person resides or has resided;
(Replaced 81 of 1997 s. 3)

"sub-average general intellectual functioning" (低於平均的一般智能) means an IQ of 70 or below according to the Wechsler Intelligence Scales for Children or an equivalent scale in a standardized intelligence test; (Added 81 of 1997 s. 3)

"transfer order" (轉移令) means an order issued in accordance with the provisions of section 52 or 53;

"tribunal" (審裁處) means the Mental Health Review Tribunal established under section 59A;
(Replaced 46 of 1988 s. 2)

"Voluntary patient" (自願入院病人) means a person who has been admitted into and is in a mental hospital in accordance with the provisions of section 30.

(2) Of the medical certificates given for the purposes of section 7(5) or the opinions given for the purposes of sections 36 and 59M, at least one shall be given by a practitioner approved for the purposes of this section by the Hospital Authority within the meaning of the Hospital Authority Ordinance (Cap 113) as having special experience in the diagnosis or treatment of mental disorder or having special experience in the assessment or determination of mental handicap, as the case may be. (Added 46 of 1988 s. 2. Amended L.N. 76 of 1989; 68 of 1990 s. 24; 81 of 1997 s. 3)

(3) In deducing relationships for the purposes of this section, any relationship of the half-blood shall be treated as a relationship of the whole blood, an illegitimate person shall be treated as the legitimate child of his mother, and an adopted child as a child of the adopting parent. (Added 46 of 1988 s. 2)

(4) Any function vested in the Director of Social Welfare or any power conferred on him by or under this Ordinance may be exercised on his behalf by any public officer authorized in that behalf by the Director of Social Welfare. (Added 46 of 1988 s. 2. Amended 81 of 1997 s. 3)

(5) Nothing in subsection (1) shall be construed as implying that a person may be dealt with under this Ordinance as suffering from mental disorder, or from any form of mental disorder described in that subsection, by reason only of promiscuity or other immoral conduct, sexual deviancy or dependence on alcohol or drugs. (Added 46 of 1988 s. 2)

(6) For the purposes of this Ordinance, any reference to "medical superintendent" may be construed to include a reference to any alternative title (such as "hospital chief executive") as may be used from time to time by the Hospital Authority. (Added 81 of 1997 s. 3)
