

LEGISLATIVE COUNCIL BRIEF

Evidence Ordinance
(Chapter 8)
Criminal Procedure Ordinance
(Chapter 221)
Mutual Legal Assistance in Criminal Matters Ordinance
(Chapter 525)

EVIDENCE (MISCELLANEOUS AMENDMENTS) BILL 2002

INTRODUCTION

At the meeting of the Executive Council on 14 May 2002, the Council ADVISED and the Chief Executive ORDERED that the Evidence (Miscellaneous Amendments) Bill 2002 should be introduced into the Legislative Council.

BACKGROUND AND ARGUMENT

(a) Competence and compellability of spouses

General background

2. At common law a person is not competent (i.e. may not lawfully be called to give evidence) to give evidence for or against his or her spouse except in very limited circumstances, such as where the spouse is accused of inflicting violence on that person. Various statutory provisions have extended the exception, for example, where the spouse is charged with certain sexual offences. A person is not, under the present law, compellable to give evidence against his or her spouse under any circumstances.

3. The present law can produce unjust and arbitrary results. For example, if a person witnessed his or her spouse killing somebody he or she would not be competent to testify against the spouse. In the absence of other evidence, no criminal proceedings could be brought and the killer would evade justice.

Further, even where competent to give evidence in favour of a spouse, a witness may refuse to do so and cannot be compelled to testify on behalf of his or her spouse.

Recommendations of the Law Reform Commission

4. In a report published in 1988 entitled “Competence and Compellability of Spouses in Criminal Proceedings”, the Law Reform Commission recommended that –

- (a) a spouse would be competent, if he or she consented, to give evidence for the prosecution in all criminal proceedings against his or her spouse;
- (b) a spouse could, in certain types of criminal proceedings, be compelled to give evidence for the prosecution against his or her spouse; and
- (c) a spouse could be compelled to give evidence for the defence of his or her spouse in all criminal proceedings.

The 1990 Bill

5. In order to implement the recommendations of the Law Reform Commission, the Criminal Procedure (Amendment) Bill 1990 (“the 1990 Bill”) was introduced into the Legislative Council. However, concern was expressed about the effect on family units if a wife could be compelled to testify against her husband. The Bill was defeated by a vote of 17 to 14 with nine abstentions.

Developments since 1990

6. The social welfare sector criticised the defeat of the 1990 Bill. It was said that the legislators had acted according to outdated values : family situations were not the same as they were many years ago, and women were no longer totally dependent upon their husbands to the point of having to tolerate abuse.

7. There is a rising trend of family violence, with the number of newly reported child abuse cases increasing from 409 in 1998 to 535 in 2001 and the number of newly reported battered spouse cases rising from 1,009 in 1998 to 2,433 in 2001. The respective statistics are set out in **Annex A**.

8. In 1996, a High Court judge wrote to the Attorney General following a case in which a defendant was convicted of murdering his mother in law. In the letter, the trial judge observed that it would have been easier to disprove the defendant's case had the defendant's wife – who provided valuable information in a witness statement – been competent to give evidence for the prosecution.

9. In 1999, a judge of the District Court referred to the “historical hangover” of the rule that spouses are neither competent nor compellable to give evidence against each other and recommended that the Department of Justice “look at this area of law with a view to legislative change”.

Current Views

10. A study of the law of several Australian jurisdictions, New Zealand, Canada and England shows that there has been a general tendency away from the special treatment of spouses under the rules of evidence in criminal proceedings. In some cases the court has been given a discretion to afford special treatment.

11. The interests of justice dictate that all available evidence should be capable of being introduced into court. Moreover, the accused should have the right to present all available evidence in his or her defence and the dictates of justice should prevail over the scruples of a spouse. Legislative change in this area of the law is required to protect the public interest, and to combat domestic violence and child abuse.

12. We therefore consider that a person should be competent to give evidence on behalf of his or her spouse and, except in one situation, should be competent to give evidence against his or her spouse. The exception is where the spouses are co-defendants.

13. However, we consider that spouses should not be made compellable to testify against each other, except where the offence charged –

- (a) involves an assault on the wife or husband of the accused or on a child of the family;
- (b) is a sexual offence alleged to have been committed in respect of a child of the family; and
- (c) consists of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, an offence

falling within paragraph (a) or (b) above.

14. To address the concerns of those who did not support the recommendations, the Administration proposes that a spouse of an accused should have the right to apply to the court to be excused from testifying against the accused. The court will have a discretion to excuse the spouse witness, taking into account such factors as the risk of harm to the spouse and to the relationship that might be caused by such testimony and the broader interests of justice.

(b) Evidence from overseas via live television link

General background

15. Overseas witnesses who are willing to give evidence in a criminal case in Hong Kong may be put to expense and inconvenience in travelling here. They may decide not to do so. In such a situation, the only present alternative is to take the evidence by way of a letter of request issued under mutual legal assistance procedures. This involves questioning the witness in the presence of an authority in the requested jurisdiction and presenting his evidence in written form in Hong Kong. Furthermore, such evidence cannot be tested in cross-examination unless counsel travels to conduct the cross-examination overseas or arranges for a representative in that place to cross-examine the witness on his behalf.

16. Allowing an overseas witness to give evidence from abroad via live television 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 to observe the demeanour of the witness.

The proposals

17. It is proposed that a Hong Kong court be empowered, upon application, to allow a party to criminal proceedings to adduce the evidence of a witness overseas via live television link. The terms of any bilateral treaty (if one exists) between Hong Kong and the overseas jurisdiction concerned regarding the taking of evidence by live television link would need to be respected.

18. The admissibility of overseas evidence (oral, documentary and real) adduced via live television link will be determined by the Hong Kong court as if such evidence were physically adduced in a Hong Kong court.

The role of mutual legal assistance

19. Under the existing law, a party may wish to obtain overseas evidence under arrangements for mutual legal assistance between Hong Kong and an overseas jurisdiction. It is proposed that it should be possible for such assistance to include the provision of evidence via live television link. In order to do so, it is necessary to ensure that the Secretary for Justice and the Court of First Instance can make a request to an overseas authority or court to assist in the taking of the evidence of witnesses overseas via live television link.

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

THE BILL

21. This Bill comprises two Parts –

Part I – Competence and Compellability of Spouses in Criminal Proceedings

Part II – Use of live television link in criminal proceedings

(a) Competence and compellability of spouses

22. Part I of the Bill amends the law of evidence to give effect to the proposals described in paragraphs 12, 13 and 14 above.

23. The main provisions are in clause 4, and are the following new sections of the Criminal Procedure Ordinance –

- (a) section 57(1) renders a wife or husband of an accused competent to testify on behalf of her or his accused spouse or a co-accused and, subject to subsection (4), on behalf of the prosecution;
- (b) section 57(2) renders a wife or husband compellable to testify on behalf of her or his accused spouse except in the situation provided in subsection (4);
- (c) section 57(3) sets out, subject to subsection (4), the limited circumstances in which a wife or husband will be compellable to testify for the prosecution or on behalf of a co-accused;

- (d) section 57(4) ensures that, despite changes affecting the competence and compellability of spouses, where both spouses are jointly charged with an offence, neither spouse will lose the rights of an accused person in a criminal proceeding;
- (e) section 57A gives the court a discretion to exempt a spouse witness who is compellable to testify for the prosecution or on behalf of a co-accused;
- (f) section 57A(2) requires the court, in the exercise of the discretion to exempt the spouse “wholly or in part”, to consider, among other things, the risk of harm to the spouse and the marital relationship if no exemption were granted. Even if there is such a risk, the court may refuse to grant the exemption if exposure to the risk is justified by the nature and gravity of the offence and the importance of the spouse’s evidence.

(b) Evidence from overseas via live television link

24. Part II of the Bill provides for the taking of evidence from witnesses overseas via live television link. The main provisions are –

- (a) clauses 11 to 14 amend Part VIII of the Evidence Ordinance to make it clear that the Court of First Instance may assist a court or tribunal in a country or territory outside Hong Kong in obtaining evidence for civil and criminal proceedings by ordering the examination of a witness in Hong Kong via live television link;
- (b) clause 15 amends Part VIIIA of the Evidence Ordinance to make it clear that the Court of First Instance may request a court or tribunal in a place outside Hong Kong to assist in obtaining evidence by the examination of a witness in that place via live television link for the purposes of criminal proceedings in Hong Kong;
- (c) clause 16 amends the Criminal Procedure Ordinance to empower the Court of First Instance, District Court and magistrates, upon the application of a party to any criminal proceedings, to permit a witness outside Hong Kong to give evidence to the court via live television link;

- (d) clause 17 amends section 83V of the Criminal Procedure Ordinance to empower the Court of Appeal to take evidence via live television link from vulnerable witnesses and witnesses outside Hong Kong;
- (e) clause 18 amends section 9 of the Mutual Legal Assistance in Criminal Matters Ordinance to empower the Secretary for Justice to request an overseas authority to assist in the obtaining of evidence via live television link for the purposes of a criminal matter in Hong Kong;
- (f) clause 19 amends section 10 of the Mutual Legal Assistance in Criminal Matters Ordinance to empower the Secretary for Justice to assist an overseas authority in the obtaining of evidence in Hong Kong via live television link for the purposes of a criminal matter in that place.

LEGISLATIVE TIMETABLE

25. The legislative timetable will be –

Publication in Gazette	17 May 2002
First Reading and commencement Of Second Reading debate	29 May 2002
Resumption of Second Reading debate, Committee Stage and Third Reading	to be notified

BASIC LAW IMPLICATIONS

26. The Department of Justice advises that the Bill does not conflict with those provisions of the Basic Law carrying no human rights implications.

HUMAN RIGHTS IMPLICATIONS

27. The Department of Justice advises that the Bill is consistent with the human rights provisions of the Basic Law.

BINDING EFFECT

28. The provisions of the Bill do not affect the current binding effect of the Ordinances to which the Bill relates.

FINANCIAL AND STAFFING IMPLICATIONS

29. Separately, a technology court equipped with facilities such as multimedia presentation, electronic data storage and retrieval and overseas live television link is being installed in the High Court. It is expected to be operational by September 2002. The project, which entails a non-recurrent expenditure of 9 million and an annual recurrent expenditure of \$1 million, is an initiative of the Judiciary to enhance the operational efficiency of court proceedings. There are no other financial or staffing implications arising from the Bill.

SUSTAINABILITY IMPLICATIONS

30. The proposals in the Bill do not have quantifiable sustainability implications.

PUBLIC CONSULTATION

31. In July 2000, the Administration circulated a consultation paper on the proposed implementation of the recommendations of the Law Reform Commission to the legal professional bodies, women's groups, social welfare organisations and other interested NGOs. Most consultees, including the Hong Kong Bar Association, supported the recommendations. Four organizations, namely the Law Society of Hong Kong, JUSTICE, the Society for the Rehabilitation of Offenders, Hong Kong and the Heung Yee Kuk, expressed concern that a spouse could, in certain types of criminal proceedings, be compelled to give evidence for the prosecution against his or her spouse.

32. The Administration briefed the LegCo Panel on Administration of Justice and Legal Services (AJLS Panel) on the recommendations of the Law Reform Commission, the result of the public consultation and the proposed legislative amendments. The AJLS Panel generally supports the proposed amendments. The Hong Kong Bar Association, which was represented at the AJLS Panel meetings, expressed support which represents a change of their stance from ten years ago when the matter was last considered by them.

33. The Administration considers that concerns about the "sanctity of marriage" are addressed by the proposed new section 57A of the Criminal Procedure Ordinance giving the court a discretion to exempt a spouse who is compellable to testify for the prosecution similar to the equivalent provisions in Victoria and South Australia.

34. In March 2002, the Administration circulated a consultation paper on the detailed proposals for enabling evidence to be taken from witnesses overseas via live television link to the Judiciary, the Law Society of Hong Kong, the Hong Kong Bar Association, and the law faculties of the University of Hong Kong and City University. The Law Faculty of the University of Hong Kong and the Judiciary have replied to the paper and they supported the proposals.

PUBLICITY

35. The Bill will be published in the gazette on 17 May 2002. A spokesman will be available to answer media and public enquiries.

Department of Justice May 2002

Subject Officers :	Mr Stephen Kai-yi Wong	Deputy Solicitor General
	Mr John Reading	Deputy Director of Public Prosecutions
	Mr Wayne Walsh	Deputy Principal Government Counsel
	Ms Betty Choi	Senior Government Counsel
	Mr Llewellyn Mui	Senior Government Counsel
	Mr Peter Kam	Senior Government Counsel
	Miss Selina Lau	Senior Government Counsel

Annex A

I. Number of child abuse cases newly reported to the Child Protection Registry

No. of Newly Reported Child Abuse Cases Classified by Types of Abuse

(source: Child Protection Registry [CPR]. The CPR was computerized in 1994 and figures before the year 1995 is not available)

Year Type of abuse \	1995	1996	1997	1998	1999	2000	2001
Physical abuse	135	120	181	193	286	265	306
Gross neglect	7	22	18	17	15	30	29
Sexual abuse	53	125	146	162	210	150	152
Psychological abuse	12	10	6	11	11	16	17
Multiple abuse	17	34	30	26	53	39	31
Total	224	311	381	409	575	500	535

II. Number of battered spouse cases newly reported to the Central Information System on Battered Spouse Cases

No. of battered spouse cases known to SWD*

Year	90/91	91/92	92/93	93/94	94/95	95/96	96/97
No. of cases	209	209	164	214	220	255	384

No. of newly reported cases on battered persons by types of battering registered to the Central Information System on Battered Spouse Cases*

Year Type of abuse \	1998	1999	2000	2001
Physical abuse	709	1358	1880	2067
Sexual abuse	5	1	10	10
Psychological abuse	59	67	61	51
Multiple abuse	236	253	370	305
Total	1009	1679	2321	2433

* The figures from the year 90/91 to 96/97 referred to the new battered spouse cases known to **SWD only** and there was no classification on the types of abuse of the figures. With the setting up of the Central Information System on Battered Spouse Cases in April 1997, statistics on the **newly reported battered spouse cases** are collected from various concerned departments and NGOs handling battered spouse cases which include SWD, NGOs, Hospital Authority, Hong Kong Police Force, Legal Aid Department and Housing Department.