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**Paper for the House Committee meeting on 13 June 2003**

**Report of the Bills Committee on  
Evidence (Miscellaneous Amendments) Bill 2002**

**PURPOSE**

1. This paper reports on the deliberations of the Bills Committee on Evidence (Miscellaneous Amendments) Bill 2002.

**THE BILL**

2. The Bill comprises two Parts -
- (a) Part I seeks to implement the recommendations of the Law Reform Commission (LRC) in its "Report on Competence and Compellability of Spouses in Criminal Proceedings" (1988); and
  - (b) Part II seeks to provide for the giving of evidence by way of a live television link in criminal proceedings.

**THE BILLS COMMITTEE**

3. At the House Committee meeting on 31 May 2002, members agreed to form a Bills Committee to scrutinize the Bill. A membership list of the Bills Committee is in **Appendix I**.
4. Under the chairmanship of Hon Margaret NG, the Bills Committee has held six meetings with the Administration. The Bills Committee has considered the views of the Law Society of Hong Kong and the Hong Kong Bar Association on the Bill. On 14 March 2003, members of the Bills Committee also attended a demonstration session at the new Technology Court which is equipped with facilities for video conferencing for witness testimony.
5. The deliberations of the Bills Committee on the Bill are set out below.

## **PART I OF THE BILL - COMPETENCE AND COMPELLABILITY IN CRIMINAL PROCEEDINGS (clauses 2-10 of the Bill)**

### **Background**

6. 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.

7. In its report published in 1988 entitled "Competence and Compellability of Spouses in Criminal Proceedings", LRC 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.

8. Following the recommendations of LRC, the Administration introduced the Criminal Procedure (Amendment) Bill 1990 (the 1990 Bill) into the Legislative Council in 1990. Concerns about the harmful effect of the proposed legislative changes on family units were raised. The 1990 Bill was defeated by a vote of 17 to 14, with nine abstentions.

9. The Administration considers that the situation has changed since 1990. Apart from a rising trend of family violence such as battered spouse and child cases, a study of the law in several Australian jurisdictions, New Zealand, Canada and England also shows that there has been a general tendency away from the special treatment of spouses under the rules of evidence in criminal proceedings. The Administration has therefore re-introduced the recommendations of LRC in Part I of the Bill.

10. The main provisions of Part I of the Bill are in clause 4 which amends the Criminal Procedure Ordinance (Cap. 221) (CPO) by replacing the existing section 57 with two new sections, namely sections 57 and 57A.

**Competence and compellability of accused's spouse or former spouse (proposed section 57 of CPO) (clause 4 of the Bill)**

Proposed section 57(3)

11. Under the proposed section 57(3), the spouse of an accused shall be compellable to give evidence for the prosecution and 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 11 (a), (b) or (c).

*Age of "child of the family" and mentally incapacitated persons*

12. Members have enquired why the age of "a child of the family" under the proposed section 57(3) should be set at the age of under 16 years.

13. The Administration has advised that the age of "a child of the family" in the Bill follows the recommendation of LRC. 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 noted that LRC had considered and followed the relevant provisions in the Police and Criminal Evidence Act 1984 of the United Kingdom (UK) which was based on the recommendations of the UK Criminal Law Review Committee. In proposing compelling the spouse of an accused to testify against the accused for offences of violence or sexual nature towards children under the age of 16 belonging to the same household as the accused, the UK Criminal Law Review Committee held the view that such cases would be harder to prove in court especially if the child was unable to give evidence. It is therefore considered that a child of the family under the age of 16 years may have difficulty in giving evidence in court, especially when he or she is required to testify against a close family member.

14. Hon Cyd HO has suggested that the proposed section 57(3) should also apply to a person who was over the age of 16 years but not in a position to give evidence, e.g. mentally incapacitated persons.

15. After consideration, the Administration has agreed that mentally incapacitated persons should be covered by the proposed section 57(3) but considers that they should be limited to a child of the family as defined in the Bill. The Administration has agreed to move CSAs to extend the scope of the compellable offences under the proposed section 57(3) to also cover a child of the family who is mentally incapacitated, regardless of his or her age, rather than all mentally incapacitated persons. The CSAs will also provide a definition for "mentally incapacity person" in the Bill.

*Reference to "material time"*

16. Members have asked whether the reference to "material time" in the proposed section 57(3)(b) and 57(3)(c) refers to the time of the offence or the time of the trial, and asked the Administration to consider reflecting this clearly in the Bill. The Administration confirms that it is the policy intention 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 . . .".

17. Members consider that greater protection should be provided to a child of the family who is mentally incapacitated at the time of trial (but was not so at the time of offence). After consideration, the Administration has agreed to introduce a CSA to amend the proposed section 57(3) to cover a child of the family who at the time when the evidence is given is a mentally incapacitated person.

*Proposed section 57(3)*

18. The Bills Committee has expressed concern that once an accused or co-accused is charged with an offence specified under the proposed section 57(3), the spouse may be compelled to give evidence for any other offence that the accused or co-accused may be charged with, regardless of whether that other offence is an offence under section 57(3).

19. After consideration, the Administration has agreed to introduce Committee Stage amendments (CSAs) to make it clear that the spouse will not be compelled to give evidence for the prosecution or on behalf of a co-accused in respect of a non-compellable offence in cases where the accused or a co-accused is charged with both compellable and non-compellable offences. The CSAs provide that the spouse may be compellable -

- (a) to give evidence for the prosecution only in respect of a specified offence with which the accused or a co-accused is charged; and
- (b) to give evidence on behalf of a co-accused only in respect of a specified offence with which the co-accused is charged.

"Specified offences" are those compellable offences under the proposed section 57(3) in the Bill (paragraph 11 above refers), and are now set out in the new proposed section 57(3A) in the CSAs.

*New proposed section 57(3A) in the CSAs*

20. Some members have expressed reservations about the formulation of the new proposed sections 57(3A)(a) and 57(3A)(b) in the CSAs. For example, proposed section 57(3A)(a) provides that an offence is a specified offence if "it involves an assault on, or an injury or threat of injury to, the husband or wife of the accused..." Members have pointed out that the word "involves" 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.

21. The Administration has explained that the use of the word follows the recommendation of LRC. By using the word "involves", 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 will be covered. For example, 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) in the CSAs 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.

Proposed section 57(4)

22. The proposed section 57(4) provides that where a person and his/her spouse are jointly charged with an offence and are standing trial together, they should not be compellable to give evidence.

23. Members have pointed out that the wording of the proposed section 57(4) may give rise to an interpretation that spouses can still be compelled to give evidence if they are standing trial together for different offences.

24. The Administration has explained that the rationale of the proposal section 57(4) is that the spouse, being an accused person himself or herself, should not be deprived of the usual protection accorded to an accused person simply because he or she is the spouse of the accused. The Administration has agreed to move a CSA to make it clear that where an accused and his/her spouse are standing trial together, neither spouse shall at the trial be competent to give evidence for the prosecution, or be compellable to give evidence for the prosecution or on behalf of a co-accused. The Administration will also add a new provision to provide that subsection (4) shall not apply to either spouse who is no longer liable to be convicted of any offence in the trial (whether as a result of pleading guilty or for any other reason) (new proposed section 57(4)(4A)).

Proposed section 57(7) and (8)

25. The Bills Committee has requested the Administration to explain how compellability would apply to a person in the following scenarios -

- (a) the person was the spouse of the accused at the time of the alleged offence but had since divorced the accused; and
- (b) 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.

26. The Administration has explained that 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 as if he or she were still married to the accused.

27. The Administration has pointed out that the provisions of the Bill will apply to 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.

**Right to apply to exemption from obligation to give evidence (proposed section 57A of CPO) (clause 4 of the Bill)**

28. The proposed 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 proposed section 57(3).

Threshold for granting exemption by court

29. Under the proposed section 57A, the court will have a discretion to excuse the spouse witness from testifying against the accused, 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. The Administration has advised that this provision was not in the 1990 Bill (paragraph 8 above refers) and would address the concerns of those who did not support the recommendation of LRC concerning compellability on the ground that it would impact adversely on the institution of marriage.

30. In response to Hon Audrey EU's request for clarification, the Administration has explained that there is no restriction on when and how many times the spouse could apply for exemption. To clarify the policy intent that a spouse can make an

application for exemption at any time, including half-way through the examination, the Administration has proposed to add "at any time" after "may" in the proposed section 57A(1) by way of a CSA.

31. The Bills Committee has noted that the major concern of the Law Society of Hong Kong about Part I of the Bill is that the criteria for the court to grant exemption for a spouse of an accused to give evidence for the prosecution, or on behalf of a co-accused, are too strict. The Law Society has pointed out that under proposed section 57A(2), the court may grant exemption only if it is satisfied that there would be "serious harm being caused to the relationship between the husband or wife and the accused", or "serious emotional, psychological or economic consequences for the husband or wife". The Law Society also fails to see how the court may, in practice, exempt the spouse wholly or in part from the obligation to give evidence.

32. The Administration has explained that the threshold adopted in proposed section 57A(2) is the possibility of a "substantial risk" of serious harm or consequences, rather than actual harm. The Administration has also quoted the case of *Tresesinski v Daire* in South Australia to illustrate the circumstances under which the court had exempt the spouse of an accused, in part, from the obligation to give evidence.

#### Additional ground for granting exemption

33. Hon Audrey EU has requested the Administration to consider whether the spouse of an accused should be allowed to apply for exemption from giving evidence in respect of a compellable offence, on the ground that the evidence is related to a jointly charged but not compellable offence. She has also enquired whether this issue had been considered by LRC, and about the practices in overseas common law jurisdictions.

34. According to the Administration, the issue raised had not been discussed by LRC in its report. The issue raised is not a ground for granting exemption from giving evidence in those Australian states, e.g. South Australia, where an exemption arrangement is provided under their legislation. As regards England, the U.K. Police and Criminal Evidence Act 1984 has no exemption provisions. The Administration does not consider that the issue raised should form a separate ground for granting an exemption under the proposed section 57A. The Administration has pointed out that in cases where the evidence to be given by a spouse in respect of a compellable offence may relate to a jointly charged but not compellable offence, the court may consider whether an exemption should be granted by applying the same considerations as set out in the proposed section 57A(2), i.e. whether there is substantial risk of serious harm to the relationship between the spouse and the accused, whether there is serious emotional, psychological or economic consequences for the spouse and whether there is sufficient justification for exposing the spouse to that risk.

### **General compellability for the prosecution or on behalf of a co-accused**

35. As a spouse of an accused may apply to the court for exemption from obligation to give evidence under proposed section 57A, Hon TSANG Yok-shing has requested the Administration to consider whether a spouse of an accused should be compellable in all cases to testify for the prosecution or on behalf of a co-accused, instead of being compellable only in respect of the specified offences set out in the Bill. Some members have reservation about further extending the scope of compellability of the spouse of an accused to testify for the prosecution or on behalf of a co-accused.

36. The Administration has pointed out that LRC had considered and declined to recommend a general rule of compellability for the prosecution. LRC's view is that a spouse of an accused should be compellable to testify against the accused where the family itself was threatened by the accused because of violence against the spouse or a child or sexual molestation of a child. LRC recommends that compellability for the prosecution or on behalf of a co-accused is only necessary in certain exceptional circumstances.

37. The Administration considers that the question of 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. It is considered 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.

## **PART II OF THE BILL - GIVING OF EVIDENCE BY WAY OF A TELEVISION LINK (clauses 11 - 21 of the Bill)**

### **Background**

38. The Administration has advised the Bills Committee that 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 the 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 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.



39. 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.

40. The Administration has 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. 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.

41. Under clause 11 of the Bill, "live television link" is defined to mean 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.

### **Overseas practice**

42. The Administration has advised that the taking of evidence via live television link is permitted in UK, Canada, and various states in Australia. The Administration has provided a comparison of the proposal in the Bill with the arrangements adopted by these other overseas jurisdictions, in terms of actual operation and statutory provisions, for the reference of the Bills Committee.

### **Use of live television link in civil and criminal proceedings**

43. The Bills Committee has requested the Administration to explain whether the same arrangements in respect of the giving of evidence by way of live television link would apply to both civil and criminal proceedings.

#### Civil proceedings

44. The Administration has explained that live television link can be used for the taking of evidence from a witness outside Hong Kong in civil proceedings in Hong Kong. The basis for the admission of overseas evidence obtained via live television link is set out in Order 38, rule 3 of the Rules of High Court and section 47 of the Evidence Ordinance.

45. The Administration has further explained that the reason that live television link can be used as an option in civil proceedings for the taking of evidence is that the evidence is itself admissible. There are no specific statutory rules adopted for this purpose. The permission is granted as a matter of the general discretion of the court. The Administration considers that since the option of live television link

already exists in the civil regime and the existing arrangement works, it may not be desirable to change the law in respect of the use of live television link in civil proceedings. Therefore, Part II of the Bill does not apply to civil proceedings.

### Criminal proceedings

46. The above rationale for civil cases cannot apply to criminal proceedings as the rules of evidence for criminal and civil proceedings are very different. The hearsay rule under section 47 of the Evidence Ordinance does not apply to criminal proceedings nor does the court have the general power under rule 3, Order 38 of the Rules of the High Court. Therefore, for criminal proceedings, there is a need to make specific provisions to enable such evidence to be admissible.

47. Given the differences of the evidentiary rules, it is inappropriate for criminal cases to follow the law that applies to civil cases. The Administration therefore considers it more appropriate to enact a new set of procedures and criteria for criminal proceedings. Each application will be considered by the court on its own merits for the purposes of conducting a fair and effective trial.

### **Number of cases**

48. The Bills Committee has requested the Administration to provide the number of cases (both civil and criminal) in the past three years where a party had requested to obtain the evidence of an overseas witness.

49. The Administration has advised that it does not keep a comprehensive record of the number of cases where a party had requested to obtain the evidence of an overseas witness. As far as it is aware, the figures are as follows:

#### (a) Criminal cases

Year	Number of requests made by the prosecution	Number of prosecution witnesses actually came to Hong Kong
2000	78	78
2001	60	56
2002	53	50

#### (b) Civil cases

During the past 3 years, there were at least 10 witnesses outside Hong Kong coming to Hong Kong to give evidence in cases where the HKSAR Government was a party. Live television link was not used in those cases.

## **Criteria for the court to give permission (clause 16 of the Bill)**

### Proposed section 79I of CPO

50. Proposed section 79I(1) of CPO provides that a court may, on application of a party to any criminal proceedings, permit a person other than 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. Proposed section 79I(2) provides that the 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 give in Hong Kong; and
- (c) a live television link is available or can reasonably be made available.

### The criterion that "the person concerned is outside Hong Kong" (proposed section 79I(2)(a))

51. Some members have suggested that this criteria should be revised to "the person concerned is not ordinarily resident in Hong Kong".

52. In the Administration's view, it is unnecessary to provide that the overseas witness must be ordinarily resident outside Hong Kong. The term "ordinarily resident" is not without ambiguity. Unless the court is satisfied that the overseas witness will not come or return to Hong Kong within a practical timeframe, it is unlikely to grant permission for taking of evidence from an overseas location by live television link.

### The criterion that "the evidence cannot be more conveniently be given in Hong Kong." (proposed section 79I(2)(b))

53. Some members consider that it would be difficult for the court to determine whether the evidence of the witness can "more" conveniently be given in Hong Kong. They are of the view the court should not give permission unless it is satisfied that the particular witness "could not", and not "could not more conveniently", come to Hong Kong. The Bills Committee has requested the Administration to make reference to similar legislative provisions in other jurisdictions, and consider deleting the word "more" in this criterion.

54. The Administration has explained that the term "more conveniently" in proposed section 79I(2)(b) is adopted from the New South Wales legislation. In the view of the Administration, removal of the word "more" would seem to lower the threshold. For example, giving evidence in Hong Kong may be inconvenient but giving evidence via live television link is even more inconvenient. In removing the word "more", the party seeking to call a witness to give evidence by television link will only have to show that the evidence cannot conveniently be given in Hong Kong. Although the effect will apply equally to both the prosecution and the

defence, video link evidence should only be used as an exception rather than as a general rule and it is not deemed appropriate to remove the word "more".

#### General views

55. Members share the main concern of the Hong Kong Bar Association that the threshold for the court to be satisfied under the proposed section 79I is too low. They are of the view that the legislation should contain an explicit requirement for the judge to consider the interests of justice. They consider that permission by the court for the use of live television link should be the exception rather than the norm. The Bills Committee has requested the Administration to consider including other factors which the court must be satisfied, such as the interests of justice, the interests of the defendant, the importance of the evidence to the case, and circumstances of the case.

56. Hon James TO has expressed serious concern about the rights of overseas witnesses giving evidence via live television link, and how to ensure that they would not be giving evidence under coercion.

57. The Administration has explained that the policy intent is not to allow live television link to be made available regardless of the circumstances or to make it too difficult to obtain. The proposed section 79I(1) gives the court a general discretion to decide whether an application for evidence to be given via live television link should be granted. It is expected that the court will only exercise its discretion in a manner that is in the interests of justice and not prejudicial to the defendant's right to a fair trial.

58. The Administration has further explained that under the proposed section 79J of CPO, the place from which a witness outside Hong Kong is giving evidence will be deemed to be part of the courtroom in Hong Kong. A witness giving evidence in the overseas location will enjoy the same privilege and will be subject to the same rules of procedure as a witness physically giving evidence in a Hong Kong 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 Hong Kong court cannot apply overseas law.

59. To address members' concerns, the Administration has proposed to add two additional criteria which the court must be satisfied before giving permission, and to revise the formulation of the proposed section 79I(2), as follows -

- "(2) The court shall not give permission under subsection (1) if -
- (a) the person concerned is in Hong Kong;
  - (b) the evidence can more conveniently be given in Hong Kong;
  - (c) a live television link is not available and cannot reasonably be made available;

- (d) measures to ensure that the person will be giving evidence without coercion cannot be reasonably be taken; and
- (e) it is not in the interests of justice to do so."

The Administration considers that "in the interests of justice" is wide enough to encompass the other factors proposed by members such as the interests of the defendant, the importance of the evidence and other circumstances of the case.

60. The Bills Committee notes that under Rule 23B(10) of the UK Crown Court Rules, the court may specify that, as a condition of the grant of leave, the witness should give the evidence in the presence of a specified person who is able and willing to answer under oath or affirmation any questions the trial judge may put as to the circumstances in which the evidence is given, including questions about any persons who are present when the evidence is given and any matters which may affect the giving of the evidence. The Bills Committee has requested the Administration to introduce a provision similar to Rule 23B(10) as an additional criteria in the proposed section 79I(2). The Administration has agreed that a similar provision will be included in the rules to be made by the Chief Justice under the new section 79L of CPO.

#### **Place from which person gives evidence (clause 16 of the Bill)**

61. Proposed section 79J of CPO provides that where a person is giving evidence in proceedings by way of a live television link, 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.

62. Members have requested the Administration to consider whether the meaning of "the place from which the person is giving evidence" should be more clearly specified. They consider that the place should have the same "sanctity" as a courtroom in Hong Kong.

63. While the Administration agrees that the place should have the "sanctity" of a courtroom, the prerequisites for the place outside Hong Kong from which the person is to give evidence must remain flexible. A main consideration is the technical ability to link up the overseas location with the Hong Kong courts in a way that permits clear and uninterrupted two-way audio and visual transmission and production/transmission of documents. Considering that a courtroom may not always be available, other proper venues such as hotel conference facilities or arbitration centre facilities may be used, depending in each case on the practice of the requested jurisdiction, the needs and requirements of the witness, and the technological capabilities of any given room to transmit live television link evidence. The address of the location and the reason for choosing that location would be disclosed in the application for permission to provide evidence from overseas by way of live television link. The court and parties concerned will have ample

opportunities to consider whether such location is proper and should be deemed to be part of the Hong Kong court for giving evidence from overseas. The "place" from which overseas evidence may be given is also not specifically defined in the UK and Australian legislation.

64. The Administration has further explained that the criteria for the court to give permission are set out in the revised proposed section 79(I)2 (paragraph 59 above refers). These include requirements that the place must have a live television link available, and that measures can be taken to ensure that the witness is not subject to coercion. The "interests of justice" criterion will also give the court a basis to refuse an application, if it is not satisfied that the proposed place for the taking of evidence is appropriate. For these reasons, the Administration does not consider it necessary for the "place" from which overseas evidence may be given to be specifically defined in the Bill. However, details of the attributes that the "place" will have to possess may be set out in the rules that are to be made by the Chief Justice under section 79L of CPO.

#### **Rules to be made by the Chief Justice under the proposed section 79L of the CPO (clause 16 of the Bill)**

65. The Bills Committee has noted that the Chief Justice may make rules or give directions respecting the giving of evidence by way of a live television link. The rules are subject to negative vetting of the Legislative Council and will come into operation on the day when Part II of the Evidence (Miscellaneous Amendments) Ordinance 2002 comes into operation.

66. At the request of Hon James TO, the Administration has provided a copy of the draft Live Television Link (Witnesses Outside Hong Kong) Rules for members' reference. Although the option of live television link is available at all levels of court, the Rules will only deal with those hearings that are within the scope of Part IIIB of the CPO, i.e. those before magistrates, the District Court and the Court of First Instance. The Rules -

- (a) set out the requirements for making an application for leave for a person to give evidence to the court by way of a live television link from a place outside Hong Kong;
- (b) provide the time limit for making the application;
- (c) provide for the making of opposition to the application;
- (d) enable the court to determine an application with or without a hearing and impose a duty on the officer of the court to notify the applicant of the determination of the court if the application is determined without a hearing;
- (e) provide that the court may impose conditions on the grant of leave;

- (f) deal with document that may need to be put to a witness during the course of examination; and
- (g) enable the making of a video recording of the evidence concerned in the absence of the jury.

**Requests by and to Hong Kong for taking of evidence, etc. (clauses 18 -19 of the Bill)**

67. The Administration has explained that under the existing law, a party may obtain overseas evidence under arrangements for mutual legal assistance between Hong Kong and an overseas jurisdiction. The Administration has proposed that such assistance should include the giving of evidence via live television link. Clause 18 amends section 9 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) 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.

68. The Administration also considers 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. Clause 19 amends section 10 of Cap. 525 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.

69. The Administration has advised the Bills Committee that under the existing provision of Cap. 525, where a magistrate is to take the evidence of a witness on a request from a place outside Hong Kong, he has to take the evidence on oath. The provision does not allow the magistrate to take an oath that does not amount to an oath under Hong Kong law even if the oath accords with the law of the requesting jurisdiction. However, occasions may arise when such power will become necessary. A similar power, i.e. to take evidence otherwise than on oath, is available under the parallel arrangement under section 76 of the Evidence Ordinance. The Administration has therefore proposed to amend clause 19(2) of the Bill (i.e. section 10(2) of Cap. 525) to that effect. The Administration will also propose a number of consequential amendments to Cap. 525 and its Regulation, and the Crimes Ordinance.

70. In addition, the Administration will also add new clauses 10A and 22 to amend section 118 of the Magistrates Ordinance (Cap. 227). The purpose of the new clause is to provide a judge of the Court of First Instance hearing an appeal from the magistracy the like powers concerning competence and compellability of spouses and the use of live television link in criminal proceedings that the Court of Appeal would have had if the appeal had been an appeal to the Court of Appeal.

### **Committee Stage amendments (CSAs)**

71. Apart from the CSAs mentioned in this report, the Administration will also propose other minor amendments. A full set of the CSAs to be proposed by the Administration is in **Appendix II**.

### **Recommendation**

72. The Bills Committee recommends that, subject to the CSAs to be moved by the Administration, the Second Reading debate on the Bill be resumed at the Council meeting on 25 June 2003.

### **Advice sought**

73. Members are invited to note the recommendation of the Bills Committee.

Council Business Division 2  
Legislative Council Secretariat  
12 June 2003



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

**Membership list**

**Chairman** Hon Margaret NG

**Members** Hon Cyd HO Sau-lan  
Hon James TO Kun-sun  
Hon CHAN Yuen-han, JP  
Hon Andrew WONG Wang-fat, JP  
Hon Jasper TSANG Yok-sing, GBS, JP  
Hon Miriam LAU Kin-yee, JP  
Hon Audrey EU Yuet-mee, SC, JP

(Total : 8 Members)

**Clerk** Mrs Percy MA

**Legal Adviser** Miss Kitty CHENG

**Date** 14 February 2003

EVIDENCE (MISCELLANEOUS AMENDMENTS) BILL 2002

COMMITTEE STAGE

Amendments to be moved by the Secretary for Justice

Clause

Amendment Proposed

4

(a) In the proposed section 57 -

(i) in subsection (3), by deleting everything after "compellable" where it first appears and substituting -

" -

(a) to give evidence for the prosecution but only in respect of any specified offence with which the accused or a co-accused is charged; or

(b) to give evidence on behalf of a co-accused but only in respect of any specified offence with which the co-accused is charged." ;

(ii) by adding -

"(3A) An offence is a specified offence for the purposes of subsection (3) if -

- (a) it involves an assault on, or an injury or threat of injury to, the husband or wife of the accused;
- (b) it involves causing the death of, an assault on, or an injury or threat of injury to, a child of the family who -
  - (i) at the material time was under the age of 16 years or was a mentally incapacitated person; or
  - (ii) at the time when the evidence is given is a mentally incapacitated person;
- (c) it is a sexual offence alleged to have been committed in respect of a child of the family who -
  - (i) at the material time was under

the age of 16  
years or was a  
mentally  
incapacitated  
person; or

(ii) at the time when  
the evidence is  
given is a  
mentally  
incapacitated  
person; or

(d) it 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).";

(iii) in subsection (4), by deleting everything  
before "neither" and substituting -

"(4) Subject to subsection (4A),  
where an accused and the husband or wife  
of the accused are standing trial  
together,";

(iv) by adding -

"(4A) Subsection (4) shall not apply  
to either spouse who is no longer liable

to be convicted of any offence in the trial (whether as a result of pleading guilty or for any other reason).";

(v) in subsection (10) -

(A) in the definition of "被控人", by deleting the full stop at the end and substituting a semicolon;

(B) by adding -

" "mentally incapacitated person" (精神上無行為能力的人) means a mentally disordered person within the meaning of section 2(1) of the Mental Health Ordinance (Cap. 136) or a mentally handicapped person within the meaning of that section;".

(b) In the proposed section 57A(1), by adding "at any time" after "may".

New By adding immediately after clause 10 -

**"Magistrates Ordinance**

**10A. Procedure on hearing appeal**

Section 118(1)(b) of the Magistrates Ordinance (Cap. 227) is amended by repealing "paragraphs (a), (b) and (c)" and substituting "subsections (1) and (6) to (10)".

12 In the heading, by deleting everything after "院" and substituting "實現協助申請的權力".

16 In the proposed section 79I -

(a) in subsection (1), by deleting "A" and substituting "Subject to subsection (2), a";

(b) by deleting subsection (2) and substituting -

"(2) The court shall not give permission under subsection (1) if -

(a) the person concerned is in Hong Kong;

(b) the evidence can more conveniently be given in Hong Kong;

(c) a live television link is not available and cannot reasonably be made available;

(d) measures to ensure that the person will be giving evidence without coercion cannot reasonably be taken; or

(e) it is not in the interests of justice to do so."

19 (a) In subclause (2)(b), by adding -

"(ia) by adding "or otherwise than on oath" after "oath";".

(b) By adding -

"(2A) Section 10 is amended by adding -

"(2A) A magistrate may only take the evidence of a witness under subsection (2)(a) otherwise than on oath where this is asked for by the appropriate authority of the place outside Hong Kong."."

New By adding before the heading "**Consequential Amendments**" -

**"19A. Regulations**

Section 33(i) is amended by adding "or otherwise than on oath" after "oath".

20 By deleting the clause and substituting -

**"20. False unsworn statement under certain Ordinances**

Section 32A of the Crimes Ordinance (Cap. 200) is amended by repealing everything after "giving" and before "makes" and substituting "evidence otherwise than on oath pursuant to section 10 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525), or where required to do so by an order under section 76 of the Evidence Ordinance (Cap. 8) or that section 76 as extended by section 77B of the Evidence Ordinance (Cap. 8),".

New By adding -

**"22. Procedure on hearing appeal**

Section 118(1)(b), as amended by section 10A of this Ordinance, is amended by repealing "(10)" and substituting "(17)".

**Mutual Legal Assistance in Criminal  
Matters Regulation**

**23. Failure of witness to answer  
questions, etc.**

Section 5 of the Mutual Legal Assistance in Criminal Matters Regulation (Cap. 525 sub. leg. A) is amended -

(a) in paragraph (a), by repealing everything after "witness" and substituting "or refuses to take any other step to similar effect in accordance with the law of the place outside Hong Kong the appropriate authority of which has made the request concerned;" ;

(b) by adding -

"(aa) without lawful or reasonable excuse, refuses to answer a question when required to do so by the



magistrate; or";

- (c) in paragraph (i), by adding ", to take the step" after "sworn".

**24. Schedule amended**

The Schedule is amended, in Form 3 -

- (a) by repealing everything after "by me to" where it first appears and before "refuses to" and substituting "be sworn (or affirmed) as a witness (or to take any other step to similar effect in accordance with the law of the place outside Hong Kong concerned) now refuses so to do\*/(or being a witness)";
- (b) by adding "or take the step in accordance with the law of the place outside Hong Kong concerned" before "\*/answer".