

EVIDENCE (MISCELLANEOUS AMENDMENTS) ORDINANCE 2003

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HONG KONG SPECIAL ADMINISTRATIVE REGION

ORDINANCE NO. 23 OF 2003

L.S.

TUNG Chee-hwa
Chief Executive
3 July 2003

An Ordinance to amend the Evidence Ordinance, the Criminal Procedure Ordinance and the Mutual Legal Assistance in Criminal Matters Ordinance.

[4 July 2003]

Enacted by the Legislative Council.

1. Short title and commencement

(1) This Ordinance may be cited as the Evidence (Miscellaneous Amendments) Ordinance 2003.

(2) Part II shall come into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.

PART I

**COMPETENCE AND COMPELLABILITY OF SPOUSES IN
CRIMINAL PROCEEDINGS**

Evidence Ordinance

2. Section added

The Evidence Ordinance (Cap. 8) is amended by adding—

**“65A. Privilege against incrimination
of self or spouse in criminal
proceedings**

The right of a person in criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty or for a forfeiture shall include a like right to refuse to answer any

question or produce any document or thing if to do so would tend to expose the husband or wife of that person to any such proceedings.”.

Criminal Procedure Ordinance

3. Competence of person charged in criminal cases

Section 54(1) of the Criminal Procedure Ordinance (Cap. 221) is amended—

(a) by repealing everything before the proviso and substituting—

“(1) Every person charged with an offence, whether charged solely or jointly with any other person, shall be a competent witness for the defence at every stage of the proceedings:”;

(b) in the proviso—

(i) in paragraph (b), by repealing “, or of the wife or husband as the case may be of the person so charged,”;

(ii) by repealing paragraphs (c) and (d);

(iii) in paragraph (g), by repealing “every person” and substituting “a person charged and”.

4. Sections substituted

Section 57 is repealed and the following substituted—

“57. Competence and compellability of accused’s spouse or former spouse

(1) The husband or wife of an accused shall be competent to give evidence on behalf of the accused or a co-accused and, subject to subsection (5), shall be competent to give evidence for the prosecution.

(2) Subject to subsection (5), the husband or wife of an accused shall be compellable to give evidence on behalf of the accused.

(3) Subject to subsection (5), the husband or wife of an accused shall be compellable—

(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.

- (4) 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).

(5) Subject to subsection (6), where an accused and the husband or wife of the accused are standing trial together, neither spouse shall at the trial be competent to give evidence for the prosecution under subsection (1), or be compellable to give evidence under subsection (2) or (3).

(6) Subsection (5) 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).

(7) Section 7 of the Evidence Ordinance (Cap. 8) (privilege of husband and wife) and section 8(2) of that Ordinance (evidence of access) shall not apply to the husband or wife of an accused, where the husband or wife is giving evidence for the prosecution, or on behalf of the accused or a co-accused, in circumstances in which he or she is compellable to do so under subsection (2) or (3), as the case may be.

(8) Section 65A of the Evidence Ordinance (Cap. 8) (privilege against incrimination of self or spouse in criminal proceedings) shall not apply to the husband or wife of an accused, where the husband or wife is giving evidence for the prosecution, or on behalf of a co-accused, in circumstances in which he or she is compellable to do so under subsection (3).

(9) Subject to subsection (10), a former husband or wife of an accused shall be competent and compellable to give evidence as if he or she had never been married to the accused.

(10) A former husband or wife of an accused shall not, as regards matters that occurred during his or her marriage to the accused, be compellable to give evidence for the prosecution, or on behalf of a co-accused, unless the former husband or wife would be so compellable under subsection (3) if he or she were still married to the accused.

(11) The failure to call the husband or wife of an accused to give evidence on behalf of the accused or a co-accused shall not be made the subject of any question or comment by the prosecution.

(12) In this section—

“accused” (被控人) means a person charged with an offence;

“child of the family” (家庭子女) means—

(a) a natural or adopted child of the accused or the husband or wife of the accused; or

(b) a person to whom the accused or the husband or wife of the accused stands in loco parentis;

“co-accused” (同案被控人), in relation to an accused, means a person standing trial together with the accused;

“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;

“sexual offence” (性罪行) means an offence under Part VI or XII of the Crimes Ordinance (Cap. 200).

(13) For the purposes of subsection (3), the age of a child of the family at the material time shall be deemed to be or to have been that which appears to the court to be or to have been his age at that time.

57A. Right to apply for exemption from obligation to give evidence

(1) Where the husband or wife of an accused is called to give evidence for the prosecution, or on behalf of a co-accused, in circumstances in which he or she is compellable to give evidence under section 57(3), the husband or wife may at any time apply to the court for an exemption from the obligation to give evidence.

(2) Where an application for an exemption is made to a court under subsection (1) and the court is satisfied—

(a) that, if the husband or wife were to give evidence for the prosecution or on behalf of the co-accused, as the case may be, there would be a substantial risk of—

(i) serious harm being caused to the relationship between the husband or wife and the accused; or

- (ii) serious emotional, psychological or economic consequences for the husband or wife; and
- (b) that, having regard to the nature and gravity of the offence charged and the importance at the trial of the evidence that the husband or wife is in a position to give, there is insufficient justification for exposing the husband or wife to that risk,

the court may exempt the husband or wife, wholly or in part, from the obligation to give evidence.

(3) Where a court is constituted by a judge and jury, an application for an exemption made under subsection (1) shall be heard and determined by the judge in the absence of the jury.

(4) The fact that the husband or wife of an accused has applied for, or been granted or refused, an exemption under this section shall not be made the subject of any question or comment by the prosecution.

(5) Where the husband or wife of an accused is called to give evidence for the prosecution, or on behalf of a co-accused, in circumstances in which he or she is compellable to give evidence under section 57(3), the court must be satisfied that the husband or wife is aware of his or her right to apply for an exemption under subsection (1).

(6) In this section, the terms “accused” (被控人) and “co-accused” (同案被控人) have the same meaning as in section 57.”.

5. Application

Section 58 is amended—

- (a) by repealing “57” and substituting “57A”;
- (b) by repealing the full stop and substituting “, and in sections 54 to 57A, “court” (法庭) includes the District Court and a magistrate.”.

6. Evidence

(1) Section 83V(3) is amended by repealing everything after “is” and substituting “a competent but not a compellable witness.”.

(2) Section 83V is amended by adding—

“(6) Where the husband or wife of an appellant or respondent is required to be examined under subsection (1)(b) or (4), other than on behalf of the appellant or respondent concerned, the husband or wife may apply to the Court of Appeal for an exemption from the requirement to be so examined.

(7) Where the husband or wife of an appellant or respondent has the right to apply to the Court of Appeal for an exemption under subsection (6), the Court of Appeal must be satisfied that the husband or wife is aware of such a right.

(8) Where the husband or wife of an appellant or respondent applies to the Court of Appeal for an exemption under subsection (6), the Court of Appeal may exercise the same powers that a court may exercise under section 57A(2), and that section shall apply with such modifications as the circumstances require.

(9) Section 7 of the Evidence Ordinance (Cap. 8) (privilege of husband and wife) and section 8(2) of that Ordinance (evidence of access) shall not apply to the husband or wife of an appellant or respondent, where the husband or wife is being examined under subsection (1)(b) or (4).

(10) Section 65A of the Evidence Ordinance (Cap. 8) (privilege against incrimination of self or spouse in criminal proceedings) shall not apply to the husband or wife of an appellant or respondent, where the husband or wife is being examined under subsection (1)(b) or (4), other than on behalf of the appellant or respondent concerned.”.

7. Schedule 2 repealed

Schedule 2 is repealed.

Consequential Amendments

Defamation Ordinance

8. Person charged may give evidence

Section 20 of the Defamation Ordinance (Cap. 21) is repealed.

Matrimonial Causes Ordinance

9. Evidence

Section 52(1) and (2) of the Matrimonial Causes Ordinance (Cap. 179) is repealed.

Theft Ordinance

10. Husband and wife

Section 31 of the Theft Ordinance (Cap. 210) is amended—

- (a) in subsection (2), by repealing everything after “married” and substituting a full stop;
- (b) by repealing subsection (3).

Magistrates Ordinance

11. 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)”.

PART II

USE OF LIVE TELEVISION LINK IN CRIMINAL PROCEEDINGS

Evidence Ordinance

12. Interpretation

Section 74 of the Evidence Ordinance (Cap. 8) is amended by adding—
““live television link” (電視直播聯繫) means 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;”.

13. Power of a court in Hong Kong to give effect to an application for assistance

(1) Section 76(2)(a) is amended by repealing “, either orally or in writing” and substituting “by any means, including by way of a live television link”.

(2) Section 76(3) is amended by repealing “testimony (either orally or in writing)” and substituting “evidence”.

14. Privilege of witnesses

(1) Section 77(1)(b) is amended by repealing “subsection (2)” and substituting “subsections (2) and (2A)”.

(2) Section 77(2) is amended by repealing “Subsection” and substituting “Where a person is giving evidence by any means other than by way of a live television link, subsection”.

(3) Section 77 is amended by adding—

“(2A) Where a person is giving evidence by way of a live television link, subsection (1)(b) shall not apply unless—

- (a) the claim of the person in question to be exempt from giving the evidence is supported or conceded as mentioned in subsection (2); or
- (b) the requesting court, on the matter being referred to it by way of a live television link, upholds the claim.”.

15. Power of Hong Kong court to assist in obtaining evidence for criminal proceedings in an overseas court

Section 77B(1)(b) is repealed and the following substituted—

“(b) an order under section 76 shall not make provision for any matter other than a matter referred to in section 76(2)(a) or (b).”.

16. Issue of letter of request to obtain evidence in criminal proceedings

(1) Section 77E(2)(a) is amended by adding “by any means (including by way of a live television link)” after “witness”.

(2) Section 77E is amended by adding—

“(6A) In subsection (2), “live television link” (電視直播聯繫) has the same meaning as in Part VIII.”.

Criminal Procedure Ordinance

17. Part added

The Criminal Procedure Ordinance (Cap. 221) is amended by adding—

“PART IIIB

TAKING EVIDENCE FROM WITNESSES OUTSIDE HONG KONG
BY LIVE TELEVISION LINK

79H. Interpretation

In this Part, unless the context otherwise requires—
“court” (法庭) includes the District Court and a magistrate;
“live television link” (電視直播聯繫) means 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.

79I. Court may take evidence by live television link from person outside Hong Kong

(1) Subject to subsection (2), a court may, on the application of a party to any criminal proceedings, permit a person, other than a person who is 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, subject to such conditions as the court considers appropriate in the circumstances.

- (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.

79J. Place from which person gives evidence to be deemed part of courtroom

(1) Where a person is giving evidence in proceedings by way of a live television link pursuant to permission given under section 79I, 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.

(2) Without prejudice to the generality of subsection (1), that subsection has effect for the purposes of the laws in force in Hong Kong relating to evidence, procedure, contempt of court and perjury.

79K. Administration of oaths and affirmations

An oath to be sworn or affirmation to be made by a person who is to give evidence by way of a live television link under this Part may be administered—

- (a) by way of a live television link, as nearly as practicable in the same way as oaths or affirmations are administered in a court in Hong Kong; or
- (b) by a person authorized by the court, acting at the direction of and on behalf of the court, at the place where the person is to give evidence.

79L. Chief Justice to make rules or give directions

The Chief Justice may make rules or give directions respecting the giving of evidence by way of a live television link under this Part.”.

18. Evidence

Section 83V is amended by adding—

“(11) Where a child is required to be examined before the Court of Appeal under subsection (1)(b) in proceedings in respect of an offence specified in section 79B(2), the Court of Appeal may exercise the same powers that a court may exercise under section 79B(2).

(12) Where a mentally incapacitated person is required to be examined before the Court of Appeal under subsection (1)(b) in proceedings in respect of an offence specified in section 79B(3), the Court of Appeal may exercise the same powers that a court may exercise under section 79B(3).

(13) Where a witness in fear is required to be examined before the Court of Appeal under subsection (1)(b) in proceedings in respect of any offence, the Court of Appeal may exercise the same powers that a court may exercise under section 79B(4).

(14) Where a person outside Hong Kong is required to be examined before the Court of Appeal under subsection (1)(b) in proceedings in respect of any offence, the Court of Appeal may exercise the same powers that a court may exercise under section 79I.

(15) Section 79B(5) shall apply in relation to the exercise of the powers referred to in subsection (11), (12) or (13) as it applies in relation to the exercise of the powers under section 79B.

(16) Sections 79J and 79K shall apply in relation to the exercise of the powers referred to in subsection (14) as they apply in relation to the exercise of the powers under section 79I.

(17) In subsections (11) to (13)—
“child” (兒童) means a person—

(a) who, in the case of an offence specified in section 79B(2)(a), is under 17 years of age; or

(b) who, in the case of an offence specified in section 79B(2)(b) or (c), is under 14 years of age;

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

“witness in fear” (在恐懼中的證人) means a witness in respect of whom the Court of Appeal is satisfied, on reasonable grounds, is apprehensive as to the safety of himself or any member of his family if he gives evidence.”.

Mutual Legal Assistance in Criminal Matters Ordinance

19. Requests by Hong Kong for taking of evidence, etc.

(1) Section 9(1) of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) is amended—

(a) by repealing “or” at the end of paragraph (a);

(b) by adding—

“(aa) evidence to be taken by way of a live television link from a person at the place; or”.

(2) Section 9 is amended by adding—

“(3) In subsection (1), “live television link” (電視直播聯繫) means 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.”.

20. Requests to Hong Kong for taking of evidence, etc.

(1) Section 10(1) is repealed and the following substituted—

“(1) Where a request is made by an appropriate authority of a place outside Hong Kong that—

- (a) evidence be taken in Hong Kong;
- (b) evidence be taken by way of a live television link from a person in Hong Kong; or
- (c) a thing (including a thing belonging to a class of things) in Hong Kong be produced,

for the purposes of a criminal matter in the place, the Secretary for Justice may authorize in writing—

- (i) where paragraph (a) applies, the taking of evidence and the transmission of the evidence to that place;
- (ii) where paragraph (b) applies, the taking of evidence by way of a live television link from the person concerned; or
- (iii) where paragraph (c) applies, the production of the thing and, subject to subsection (14), the transmission of the thing to that place.”.

(2) Section 10(2) is amended—

(a) by adding “授權錄取證供或交出物件” after “第 (1) 款”;

(b) in paragraph (a)—

- (i) by adding “under subsection (1)(i)” after “taking of evidence”;
- (ii) by adding “or otherwise than on oath” after “oath”;
- (iii) by repealing “or” at the end of subparagraph (ii);

(c) by adding—

“(aa) in the case of the taking of evidence under subsection (1)(ii), a magistrate shall be present during the taking of the evidence and the magistrate shall—

- (i) identify the witness;
- (ii) upon the conclusion of the taking of the evidence, draw up minutes indicating the date on which the evidence is taken, the place where the evidence is taken, and whether or not an oath or affirmation has been administered to the witness;
- (iii) certify that the minutes were drawn up by the magistrate; and
- (iv) cause the minutes so certified to be sent to the Secretary for Justice; or”;

(d) in paragraph (b)—

- (i) by adding “under subsection (1)(iii)” after “production of a thing”;
- (ii) by adding “certify that the thing was produced to the magistrate and shall” after “shall”.

(3) 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.”.

(4) Section 10(3) is amended—

(a) by repealing “or” at the end of paragraph (b);

(b) by repealing the full stop at the end of paragraph (c) and substituting “; or”;

(c) by adding—

“(d) in the case of the taking of evidence under subsection (1)(ii)—

(i) the criminal matter outside Hong Kong to which the proceeding relates is a prosecution;

(ii) the appropriate authority of the place concerned requests that the proceeding be held in camera; and

(iii) the proceedings in the place concerned in which the evidence is to be received will be held in camera.”.

(5) Section 10 is amended by adding—

“(15) In this section, “live television link” (電視直播聯繫) means 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.”.

21. Regulations

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

Consequential Amendments

Crimes Ordinance

22. 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),”.

Magistrates Ordinance

23. Taking of evidence at hearing

Section 81 of the Magistrates Ordinance (Cap. 227) is amended by adding—

“(4) Where the evidence of a witness is taken by way of a live television link under Part IIIB of the Criminal Procedure Ordinance (Cap. 221)—

(a) the requirement in subsection (2) that the deposition or evidence of the witness shall be signed by the witness in the presence of the accused shall be deemed to have been complied with if, in the presence of the accused, the witness confirms on oath the accuracy of the deposition or evidence by way of a live television link; and

(b) where subsection (3) applies, paragraph (b) of that subsection shall be deemed to have been complied with if, after the writing concerned is made available to the accused or his counsel, and in the presence of the accused, the witness confirms on oath the accuracy of the writing concerned by way of a live television link.

(5) In subsection (4), “live television link” (電視直播聯繫) has the meaning assigned to it by section 79H of the Criminal Procedure Ordinance (Cap. 221).”

24. Procedure on hearing appeal

Section 118(1)(b), as amended by section 11 of this Ordinance, is amended by repealing “(10)” and substituting “(17)”.

Mutual Legal Assistance in Criminal Matters Regulation

25. 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”.

26. 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”.