

For information

Legislative Council Panel on Administration of Justice and Legal Services

Draft Live Television Link (Witnesses outside Hong Kong) Rules and Draft Rules of the High Court (Amendment) Rules

PURPOSE

----- This paper briefs Members on the draft Live Television Link (Witnesses outside Hong Kong) Rules (“**LTVL(WOHK)R**”) and the draft Rules of the High Court (Amendment) Rules (“**RHCR**”) (collectively as the “**Draft Rules**”), as attached at **Annex A**.

BACKGROUND

----- 2. The Evidence (Miscellaneous Amendments) Ordinance 2003 (the “**Ordinance**”) was passed by the Legislative Council on 25 June 2003, and gazetted on 4 July 2003. A copy of the Ordinance is at **Annex B**.

3. Section 1(2) of the Ordinance provides that “Part II shall come into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.”

4. Sections 12 to 26 in Part II of the Ordinance deal with the giving of evidence by way of a live television link in criminal proceedings. Specifically, Part II of the Ordinance amends the relevant sections of the Evidence Ordinance (Cap. 8), the Criminal Procedure Ordinance (Cap. 221), the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525), the Crimes Ordinance (Cap. 200), the Magistrates Ordinance (Cap. 227) and the Mutual Legal Assistance in Criminal Matters Regulation (Cap. 525 sub. leg. A) to facilitate the use of live television link in criminal proceedings.

5. Sections 20, 21, 22, 25 and 26 in Part II of the Ordinance, which principally relate to requests to Hong Kong made by an appropriate authority from a place outside Hong Kong for taking evidence for a criminal matter in

that place under the Mutual Legal Assistance in Criminal Matters Ordinance, came into operation on 3 March 2006. A copy of the relevant
----- commencement notice is at **Annex C**.

6. The remaining sections, namely, sections 12 to 19, 23 and 24 in Part II of the Ordinance (“**Pending Sections**”) have not yet come into operation, pending finalization of the Draft Rules. The LTVL(WOHK)R and RHCR are to be made by the Chief Judge of the High Court (“**CJHC**”)¹ and the Rules Committee of the High Court² respectively.

OUTLINE OF THE DRAFT RULES

LTVL(WOHK)R

7. At present, the Criminal Procedure Ordinance (“**CPO**”) does not provide for the taking of evidence from witnesses outside Hong Kong by a live television link for the purposes of criminal proceedings in Hong Kong. A new Part IIIB was inserted to the CPO by section 17 of the Ordinance. In particular, the new section 79I in this new Part IIIB seeks to empower the court to permit a person, other than the defendant, to give evidence in criminal proceedings in a Hong Kong court by way of a live television link from a place outside Hong Kong. The draft LTVL(WOHK)R set out the procedures in respect of the giving of evidence by way of a live television link under the new Part IIIB of the CPO.

8. Specifically, the draft LTVL(WOHK)R contains provisions providing for the commencement of the rules, interpretation of the terms therein, the procedures for making an application under section 79I of the CPO and an opposition to such an application, the manner in which the court may determine such an application and the conditions the court may impose, the way a document can be put to a witness who is giving evidence by way of a live television link, and the procedures for making an application for extension or abridgement of time. Members may refer to Annex A for the detailed provisions of the draft LTVL(WOHK)R.

¹ The LTVL(WOHK)R are to be made by the CJHC under the new section 79L of the CPO which was inserted by section 17 of the Ordinance and amended by section 19 of the Statute Law (Miscellaneous Provisions) Ordinance 2005 (Ord. No. 10 of 2005).

² The RHCR are to be made by the Rules Committee of the High Court under section 54 of the High Court Ordinance (Cap. 4).

RHCR

9. At present, there is no authority for the Hong Kong courts to give assistance to a court or tribunal outside Hong Kong (“**requesting court**”) by ordering examination of a witness via a live television link in Hong Kong for the purposes of legal proceedings in the requesting court. When the Pending Sections come into operation (more specifically, sections 12 to 16 of the Ordinance), the Court of First Instance will be able to give such assistance. In this connection, the provisions of Order 70 of the Rules of the High Court (Cap. 4A)³ need to be amended to provide for the procedures for giving such assistance.

10. To achieve the intended purpose, the RHCR proposes, among others, a new rule 4(4) to provide for the manner of taking examination of a witness who gives evidence by way of a live television link to the requesting court and a new rule 7 to provide for the drawing up, certification and transmission of minutes upon conclusion of an examination of a witness in Hong Kong by way of a live television link. Members may refer to Annex A for the detailed provisions of the draft RHCR.

CONSULTATION

11. The Hong Kong Bar Association (“**Bar**”) and the Law Society of Hong Kong (“**LS**”) were consulted on the Draft Rules. By a letter dated 19
----- December 2009, a copy of which is at **Annex D**, the Bar confirmed that it had no further comments on the Draft Rules⁴. As regards the LS, they informed us in writing on 12 February 2010 that they did not agree to the Draft Rules. A copy each of the letter from the LS of 12 February 2010, and our reply
----- letter to the LS of 19 August 2010 are at **Annex E**.

12. With a view to resolving the differences with the LS, we engaged in further meetings and correspondence with the representatives of the Criminal Law & Procedure Committee of the LS (“**CL&P Committee**”). A copy each
----- of the submission letter by the LS of 31 March 2011 and our reply of 24 June 2011 are at **Annex F**.

³ Order 70 sets out the detailed rules for “Obtaining Evidence For Foreign Courts, Etc.”

⁴ Subsequent to the Bar’s confirmation there has been certain further changes to the Draft Rules, notably the addition of rule 8(1)(b) to the LTVL(WOHK)R to provide for an extension of time to file an application under rule 4 in response to a request by the LS (see paragraph 13 below), and the other drafting and streamlining changes.

13. It can be seen from our letter of 19 August 2010 at Annex E and our letter of 24 June 2011 at Annex F that we are concerned that most of the LS' proposals would be *ultra vires* the Ordinance (notably, the newly added Part IIIB of the CPO) or should be dealt with by the courts on a case-by-case basis, and as such, they were not accepted. That said, in our letter to the LS dated 24 June 2011 at Annex F we did agree to an extension of time for opposing an application for the use of a live television link under the LTVL(WOHK)R, as is now reflected in rule 8(1)(b) of the draft LTVL(WOHK)R at Annex A, at the request of the representatives of the CL&P Committee at our meetings.

14. In our letter to the LS dated 24 June 2011 at Annex F, we notified the LS that “we will proceed to obtain final approval of the draft Rules shortly” and requested the LS to “revert to us within one month if the [CL&P] Committee has any further comments.” We proceeded to apply for final approval of the Draft Rules by the CJHC and the Rules Committee of the High Court on 29 October 2012.

15. On 28 January 2014, the Judiciary Administrator (“JA”) informed us that the CJHC had given approval for the draft LTVL(WOHK)R. JA further suggested that “DoJ consult the [AJLS] Panel before we invite CJHC and the High Court Rules Committee ... to make the respective rules”.

WAY FORWARD

16. Members are invited to note the contents of this paper. If Members so wish, the Department of Justice would be happy to brief the Panel and listen to views of Members on the Draft Rules. According to our current time table, we intend to invite the CJHC and the Rules Committee of the High Court to make the Draft Rules as soon as possible, and aim to table the Rules at the Legislative Council for negative vetting within 2014. Should any subcommittee be set up to scrutinize the Rules after their being tabled at the Legislative Council, we will also be pleased to discuss the legislative proposal with the subcommittee.

Department of Justice
June 2014

Live Television Link (Witnesses outside Hong Kong) Rules

Rule 1

1

Live Television Link (Witnesses outside Hong Kong) Rules

(Made by the Chief Judge of the High Court under section 79L of the Criminal Procedure Ordinance (Cap. 221))

1. Commencement

These Rules come into operation on the day on which section 17 of the Evidence (Miscellaneous Amendments) Ordinance 2003 (23 of 2003) comes into operation.

2. Interpretation

In these Rules—

court (法庭) includes the District Court and a magistrate;

live television link (電視直播聯繫) means a system in which 2 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;

officer of the court (法院人員) means—

- (a) in relation to proceedings in the High Court, the Registrar of the High Court;
- (b) in relation to proceedings in the District Court, the Registrar of the District Court; or
- (c) in relation to proceedings before a magistrate, the first clerk of the magistracy.

3. Making applications

- (1) An application under section 79I of the Ordinance for permission for a witness to give evidence by way of a live television link from a place outside Hong Kong must be made

Live Television Link (Witnesses outside Hong Kong) Rules

Rule 3

2

by giving a notice in the form specified by the Chief Judge to—

- (a) the officer of the court; and
- (b) all other parties to the proceedings.

- (2) If an application is made for a witness to give evidence for the purposes of a preliminary inquiry before a magistrate in respect of a charge, the application must be made within 42 days after the following date—

- (a) the date on which the defendant elects, or is deemed to have elected, under section 80C of the Magistrates Ordinance (Cap. 227) to have the charge heard at a preliminary inquiry; or
- (b) the date on which the defendant elects under section 77A(5) of the District Court Ordinance (Cap. 336) to have the charge heard at a preliminary inquiry.

- (3) If an application is made for a witness to give evidence for the purposes of a trial in the Court of First Instance in respect of a charge, the application must be made within 42 days after the following date—

- (a) if the charge has been heard at a preliminary inquiry before a magistrate, the date on which the defendant was committed for trial under section 85(2) of the Magistrates Ordinance (Cap. 227) in respect of the charge;
- (b) if the defendant does not elect, and is not deemed to have elected, to have the charge heard at a preliminary inquiry before a magistrate—
 - (i) the date on which the defendant is committed for trial under section 80C(4) of the Magistrates Ordinance (Cap. 227) in respect of the charge; or

- (ii) the date on which an order of transfer of proceedings to the Court of First Instance is made under section 77A of the District Court Ordinance (Cap. 336) in respect of the charge;
 - (c) if an indictment is preferred under section 24A(1)(b) of the Ordinance by the direction or with the consent of a judge in respect of the charge, the date on which the judge gives the direction or consent;
 - (d) if the proceedings against the defendant are transferred to the Court of First Instance pursuant to an order made under section 4 of the Complex Commercial Crimes Ordinance (Cap. 394), the date on which the order is made;
 - (e) if the defendant is committed for trial in the Court of First Instance pursuant to an order made under section 79F(5) of the Ordinance, the date on which the order is made.
- (4) If an application is made for a witness to give evidence for the purposes of a trial in the District Court in respect of a charge, the application must be made within 42 days after the following date—
- (a) if the proceedings against the defendant are transferred to the District Court pursuant to an order made under section 88 of the Magistrates Ordinance (Cap. 227), the date on which the order is made;
 - (b) if the proceedings against the defendant are transferred to the District Court pursuant to an order made under section 65F of the Ordinance, the date on which the order is made.
- (5) If an application is made for a witness to give evidence for the purposes of a trial before a magistrate in respect of a charge,

the application must be made within 42 days after the following date—

- (a) if the case is referred back to the magistrate by the Secretary for Justice under section 10 of the Ordinance, the date on which the Secretary for Justice refers the case back to the magistrate;
- (b) if the proceedings against the defendant are transferred before the magistrate pursuant to an order made under section 77A of the District Court Ordinance (Cap. 336), the date on which the order is made;
- (c) if the proceedings against the defendant are transferred before the magistrate pursuant to an order made under section 65F of the Ordinance, the date on which the order is made;
- (d) in any other case, the date on which the case is set down for trial before the magistrate.

4. Parties may oppose applications

A party who is given a notice under rule 3(1) may, within 14 days after the date on which the notice is given, oppose the application concerned by—

- (a) notifying the officer of the court and all other parties to the proceedings in writing of the opposition; and
- (b) giving reasons for the opposition in the notice of opposition.

5. Determination

- (1) The court may determine an application under rule 3 without a hearing if the officer of the court is not notified of any opposition to the application under rule 4 in the period within which the opposition may be made.

- (2) If the court determines the application without a hearing, the officer of the court must notify all parties to the proceedings of the determination.
- (3) If the court grants the application without a hearing, the notification under subrule (2) must state—
 - (a) the country or territory in which the witness will give evidence;
 - (b) if known, the place from which the witness will give evidence;
 - (c) the name of the witness if—
 - (i) the witness is to give evidence for the prosecution (except where section 65DA(3) of the Ordinance applies); or
 - (ii) the witness is to give evidence for the defendant, and disclosure is required by section 65D or 65DA of the Ordinance or section 75A of the District Court Ordinance (Cap. 336); and
 - (d) the conditions, if any, imposed by the court under rule 6.
- (4) If the court decides to conduct a hearing in respect of the application (whether because an opposition is received or otherwise), the officer of the court must notify all parties to the proceedings of the time and place of the hearing.
- (5) The hearing must be conducted in open court unless the court, where it considers it necessary in the interests of justice, orders that all or part of the hearing is to be conducted in camera.

6. Court may impose conditions

- (1) If the court grants an application under rule 3, it may impose conditions on the permission given.

- (2) Without limiting subrule (1), the court may impose a condition that the witness is to give evidence in the presence of a person who is able and willing to answer under oath any question the court may put as to the circumstances in which the evidence is given, including any question about any person who is present when the evidence is given and any matter which may affect the giving of the evidence.

7. Putting documents to witnesses

- (1) If it is necessary to put a document to a witness when the witness is giving evidence by way of a live television link from a place outside Hong Kong, the court may—
 - (a) if the document is at the courtroom in Hong Kong, permit—
 - (i) the transmission by any means of a copy of the document to that place; and
 - (ii) the putting of the copy so transmitted to the witness; and
 - (b) if the document is at that place, permit—
 - (i) the putting of the document to the witness; and
 - (ii) the transmission by any means of a copy of the document to the courtroom in Hong Kong.
- (2) If a document or a copy of it is put to a witness in accordance with subrule (1), the transmitted copy of the document is, until the contrary is proved, to be presumed to be a true copy of the document and to be admitted in evidence without further proof.

8. Extension of time

- (1) The court may—

- (a) extend the period of 42 days specified in rule 3(2), (3), (4) or (5) on an application of a party to the proceedings, either before or after its expiry; or
 - (b) extend the period of 14 days specified in rule 4 on an application of a party who is given a notice under rule 3(1), either before or after its expiry.
- (2) The application must—
 - (a) be made in writing;
 - (b) specify the grounds on which it is based;
 - (c) in the case of an application under subrule (1)(b), be made within 28 days after the date on which the notice under rule 3(1) is given; and
 - (d) be given to—
 - (i) the officer of the court; and
 - (ii) all other parties to the proceedings.
- (3) The court may determine the application with or without a hearing.
- (4) If the court determines the application without a hearing, the officer of the court must notify all parties to the proceedings of the determination.
- (5) If the court decides to conduct a hearing in respect of the application, the officer of the court must notify all parties to the proceedings of the time and place of the hearing.
- (6) The hearing must be conducted in open court unless the court, where it considers it necessary in the interests of justice, orders that all or part of the hearing is to be conducted in camera.

9. Abridgement of time

The court may, on an application of a party to the proceedings, abridge the period of 42 days specified in rule 3(2), (3), (4) or (5), or the period of 14 days specified in rule 4, if it considers that it is fair and reasonable to do so in the circumstances of the case.

Chief Judge of the High Court

2014

Explanatory Note

These Rules set out the procedure respecting the giving of evidence to the court by way of a live television link from a place outside Hong Kong under Part IIIB of the Criminal Procedure Ordinance (Cap. 221).

Rules of the High Court (Amendment) Rules 2014

(Made by the Rules Committee of the High Court under section 54 of the High Court Ordinance (Cap. 4))

1. Commencement

These Rules come into operation on the day on which section 13 of the Evidence (Miscellaneous Amendments) Ordinance 2003 (23 of 2003) comes into operation.

2. Rules of the High Court amended

The Rules of the High Court (Cap. 4 sub. leg. A) are amended as set out in rules 3 to 8.

3. Order 70 heading amended (obtaining evidence for foreign courts, etc.)

Order 70, heading—

Repeal

“OBTAINING EVIDENCE FOR FOREIGN COURTS, ETC.”

Substitute

“Obtaining Evidence for Requesting Courts”.

4. Order 70, rule 3 amended (application by Law Officer (International Law) in certain cases)

(1) Order 70, rule 3(a)—

Repeal

“foreign court or tribunal”

Substitute

“requesting court”.

(2) Order 70, rule 3(b)—

Repeal

“a court or tribunal in the foreign country”

Substitute

“the requesting court”.

5. Order 70, rule 4 amended (person to take and manner of taking examination)

(1) Order 70, rule 4(2), after “any witness”—

Add

“(other than by way of a live television link by the requesting court)”.

(2) Order 70, rule 4(2)—

Repeal

“rules 5 to 10 and 11(1) to (3)”

Substitute

“rules 5, 6, 7, 8, 9, 10 and 11(1), (2) and (3)”.

(3) Order 70, rule 4(3), after “a witness”—

Add

“(other than by way of a live television link by the requesting court)”.

(4) Order 70, after rule 4(3)—

Add

“(4) If the examination of a witness is to be taken by way of a live television link by the requesting court, subject to any special directions contained in any order made under this Order for the examination, Order 39, rules 5, 6, 7, 8,

9, 10, 11(1), (2) and (3) and 14 apply with any necessary modifications.”.

6. Order 70, rule 5 amended (dealing with deposition)

- (1) Order 70, rule 5, after “any witness”—

Add

“(other than by way of a live television link by the requesting court)”.

- (2) Order 70, rule 5(b)—

Repeal

everything after “transmission to the”

Substitute

“requesting court.”.

7. Order 70, rule 6 amended (claim to privilege)

- (1) Order 70, rule 6(1), after “witness”—

Add

“(other than a witness who is giving evidence to the requesting court by way of a live television link)”.

- (2) Order 70, rule 6(3)(c)—

Repeal

“foreign court or tribunal”

Substitute

“requesting court”.

- (3) Order 70, rule 6(3)(d)—

Repeal

“foreign court or tribunal”

Substitute

“requesting court”.

- (4) Order 70, rule 6(3)(d)—

Repeal

“that court or tribunal”

Substitute

“the requesting court”.

- (5) Order 70, rule 6(3)(d)—

Repeal

“court or tribunal’s”

Substitute

“requesting court’s”.

8. Order 70, rule 7 added

Order 70, after rule 6—

Add

“7. Examination of witness by way of live television link (O. 70, r. 7)

- (1) If an order made under this Order is for the examination of a witness by way of a live television link by the requesting court, the person before whom the examination is taken must be present at the place where the witness is present during the examination and must on the conclusion of the examination—

- (a) draw up minutes indicating—

- (i) unless otherwise directed by the order, the identity of the witness;
- (ii) the date on which, and the time at which, the evidence is taken;

- (iii) the place where the evidence is taken; and
 - (iv) whether or not an oath or affirmation has been administered to the witness;
- (b) certify that the minutes were drawn up by the person; and
- (c) cause the minutes so certified to be sent to the Registrar.
- (2) The Registrar must, after receiving the minutes sent under paragraph (1)(c), cause the minutes to be sent—
 - (a) if the request was sent to the Registrar by the Chief Secretary for Administration, to the Chief Secretary for Administration; or
 - (b) if the request was sent to the Registrar by some other person in accordance with a Civil Procedure Convention, to that other person.”.

Made this day of 2014.

Explanatory Note

These Rules amend Order 70 of the Rules of the High Court (Cap. 4 sub. leg. A) to provide for the procedure respecting the taking of evidence by way of a live television link by a court or tribunal exercising jurisdiction in a country or territory outside Hong Kong. These Rules also amend references to “foreign court or tribunal” and other similar references to “requesting court” to achieve consistency with Part VIII of the Evidence Ordinance (Cap. 8).

EVIDENCE (MISCELLANEOUS AMENDMENTS)
ORDINANCE

Ord. No. 23 of 2003

A881

EVIDENCE (MISCELLANEOUS AMENDMENTS) ORDINANCE 2003

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EVIDENCE (MISCELLANEOUS AMENDMENTS)
ORDINANCE

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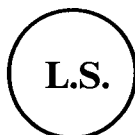
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HONG KONG SPECIAL ADMINISTRATIVE REGION

ORDINANCE No. 23 OF 2003



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”.

L. S. NO. 2 TO GAZETTE NO. 1/2006

L.N. 7 of 2006

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L.N. 7 of 2006

**EVIDENCE (MISCELLANEOUS AMENDMENTS)
ORDINANCE 2003 (COMMENCEMENT) NOTICE 2006**

Under section 1(2) of the Evidence (Miscellaneous Amendments) Ordinance 2003 (23 of 2003), I appoint 3 March 2006 as the day on which sections 20, 21, 22, 25 and 26 of the Ordinance shall come into operation.

WONG Yan Lung
Secretary for Justice

3 January 2006

Peter Duncan S.C.

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Annex D

Department of Justice,
Legal Policy Division,
1/F., High Block,
Queensway Government Offices,
66 Queensway,
Hong Kong.

Attn: Mr. Christopher Ng
Senior Government Counsel

Your Ref: LP 911/00/2C XV

BY HAND

19th December 2009

Dear Mr. Ng,

**Re: Taking of Evidence by Way of a Live Television Link
Rules of the High Court (Amendment) Rules
Live Television Link (Witnesses Outside Hong Kong) Rules**

I have to report that the enclosures with your letter of 3rd November last were considered by the Bar's Special Committee on Criminal Law and Procedure at its meeting on 17th inst.

The Bar has no further comments on the proposals.

Thank you for providing us with the opportunity to comment.

Yours sincerely,

Peter Duncan

c.c. Ms. Rani Romani
Hong Kong Bar Association



THE

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12 February 2010

Mr. Christopher Ng,
Senior Government Counsel,
Department of Justice,
Legal Policy Division,
1/F., High Block,
Queensway Government Offices,
66 Queensway,
Hong Kong.

Dear Mr. Ng,

**Taking of Evidence by Way of a Live Television Link
Rules of the High Court (Amendment) Rules ("RHCR")
Live Television Link (Witnesses Outside Hong Kong) Rules
("LTVL(WOHK)R")**

Further to our letter dated 31 December 2009, we are pleased to attach the submissions of the Law Society's Criminal Law & Procedure Committee on the above draft Rules for your consideration.

Yours sincerely,

Christine W. S. Chu
Assistant Director of Practitioners Affairs

Encls.

P.55

I: No.127507



THE
LAW SOCIETY
OF HONG KONG
香港律師會

**The Law Society's Submissions on
Part II of the Evidence (Miscellaneous Amendments) Ordinance 2003 –
(a) draft Rules of the High Court (Amendment) Rules; and
(b) draft Live Television Link (Witnesses Outside Hong Kong) Rules**

Introduction

The Law Society has been invited to comment on the 11th draft of the Rules of the High Court (Amendment) Rules (“RHCR”) and the 7th draft of the Live Television Link (Witnesses Outside Hong Kong) Rules (“LTVL (WOHK) R”) in respect of the use of live television link (“VL”) in criminal proceedings for the giving of evidence by overseas witness.

The Evidence (Miscellaneous Amendments) Ordinance 2003 was passed by the LegCo on 25 June 2003. The Ordinance has come into operation, save Part II of the Ordinance (which amends the Criminal Procedure Ordinance (“CPO”)) which relates to the issue of permitting an overseas witness to give evidence to the court via VL.

According to the new section 79L of CPO, (which has been passed by LegCo but not yet Gazetted), the Chief Justice may make rules or give directions in respect of the giving of evidence by way of a VL. The section mandates that the rules shall be tabled to LegCo for negative vetting before they come into operation.

The Department of Justice (“DoJ”) lastly consulted the Law Society on the draft RHCR and draft LTVL (WOHK) R on 21 November 2006. The Law Society’s Criminal Law & Procedure Committee (“the Committee”) expressed its concerns in a letter dated 22 January 2007 to the DOJ, regarding the legislation itself and put forward concerns for their consideration in the next draft of the rules.

The Administration has redrafted the proposed rules on a number of occasions without consulting The Law Society before presenting the latest draft of the Rules to the Law Society recently for comments. The Administration advised that the latest Rules have been approved in principle by the Chief Judge and the Rules Committee of the High Court.

The present drafts reflect only changes in drafting style from the draft rules submitted to The Law Society for consideration in 2006.

The latest 11th draft of the LTVL (WOHK) R deals with the following:-

1. the Schedule set forth the prescribed form of the notice of application for permission to use of live television link is deleted;
2. new provisions are added requiring that the hearing of the application and determination of the use of VL must be conducted in open court unless the court, where it considers it necessary in the interests of justices, orders that all or part of the hearing is to be conducted in chambers or in camera; and
3. Rule 9 on recording the giving of evidence is deleted.

Outstanding Issues of concern

The following remains the fundamental concerns of the Committee that the latest draft rules do not address or resolve:

1. The option of having an authorised person from Hong Kong to be present at the venue where the evidence is given by the overseas witness to ensure there will be no undue influence upon the witnesses from behind the scenes

2. ***Practical problems***
Cost Implications
Funding

There has been no information from the Administration of how the proposal may be funded. It will be an enormous burden on public funds.

Sending of Authorized Personnel

The sending of personnel to another country will be just as expensive as bringing the witness to Hong Kong.

Time Delays
Longer Proceedings

Voire Dire proceedings may take place before the court will grant leave. There may be long delays if there is opposition. This will lead to an increase of time and legal costs not a reduction of it.

Time Difference

It may mean that the court will not be able to sit in "normal" hours. This will cause further delay.

3. ***Problems in the Courtroom***
Quality of evidence

Transmission of images or sound will be disrupted. The downtime will cause delays and prolongs the hearing. This in turn will increase the costs of litigation.

Scope of Vision

The court will be unable to see who is actually in the room with the witness. The court would be innocent to whether the witness was coerced or threatened by others. More cameras may resolve this problem but it will increase the costs significantly.

Documents

The witness may be cross examined on certain documents. Courts will need to be equipped. It will increase the costs significantly. The witness maybe shown the document on the screen but it may not be clear enough for the witness to peruse. An advance copy of the bundle may be sent to the witness. However this will be preparing the witness and the element of surprise is completely lost.

Recall of Witnesses

Where a witness gives evidence by VL, such recalls may be impossible. The cost of finding and preparing the VL procedure will increase the costs of litigation.

All the above factors will contribute to an increase of costs not a decrease to both the prosecution and the defence.

4. *Legal Issues*

Place of Testimony

It is a paramount concern as often the solemnity of the location reminds the witness of the serious nature of any criminal proceeding thus placing a greater burden on the witness to convey the truth.

Enforcement of contempt or perjury

The witness may be extradited. However, this will substantially increase the costs rather than diminish them, especially if the witness wishes to fight the extradition order.

The argument that the witness be subjected to prosecution if they ever come to Hong Kong is unsustainable. They may not want to come to Hong Kong due to possible exposure to criminal sanctions in the first place. It is unlikely the witness will come to Hong Kong voluntarily.

5. *Human Rights Compliance Issues*

5.2.2 Bill of Rights Ordinance: (Cap. 383) - Article 11 – The Right to Cross-Examine

It will be against the Bill of Rights Ordinance to have the witness against the accused to testify via VL link. The ability to cross examine is severely restricted. It is understandable where a Vulnerable Witness is involved, the community's interest to protect the Vulnerable Witness means rights under the Bill of Rights may not be fully afforded.

However, where an argument of convenience is presented to justify a restriction on a statutorily affirmed right, it is simply an unacceptable infringement on the accused's rights.

The Common Law Right of Confrontation

The common law has preserved the accused's right to confrontation. This right is of such significance, it is part of the Constitution of the United States under the Sixth Amendment.

The United States Court of Appeals held that testimony at trial of witnesses by two way video teleconference from Australia violated the D resent accused.

6. Whether the proposed use of a VL to overseas witnesses will be either more cost effective or more convenient and practicable than present methods of obtaining evidence from an overseas witness.

Basic Issues

1. Evidence given through a VL must be treated as an extension of the HK trial and will be governed by HK procedures and rules, for example over the admissibility and weight of the evidence.
2. Witnesses giving evidence through a VL must only do so in a normal court in the overseas jurisdiction: no hotels or other informal arrangements. The place from which evidence is given should be as similar as possible to a courtroom for a Court of First Instance trial.
3. The VL arrangements must be such that persons in the courtroom in Hong Kong can see the whole of the room where the evidence is given at the same time as viewing the witness who is giving evidence. Split or multi-screen technology or more than one camera and/or camera angle can address these issues.
4. The system must cater to the putting of exhibits to the witness. Zoom-in technology could be considered with non-documentary exhibits. Scanning documentary exhibits and E-mailing them to the room where the witness is giving evidence and while the witness is giving evidence might be appropriate with documentary exhibits. The E-mail equipment must be in the courtroom in Hong Kong so that all concerned can see the scanning and E-mailing. Similarly the equipment in the place where the witness is must enable all concerned to see the arrival and printing out of the documentary evidence. Scanning

documentation and sending it by E-mail attachments is steadily replacing the faxing of documentation.

5. A witness (whether prosecution or defence) will only be allowed to give evidence through a VL with leave of a substantive Court of First Instance judge or, where the case proceeds in the District Court, of the Chief District Court Judge or, if he/she is not in HK, the acting Chief District Court Judge; or in the Magistracy with the leave of the Chief Magistrate or, as the case may be, the Acting Chief Magistrate.
6. The application for leave will be heard in chambers and there shall be no reporting of the application. Restrictions on reporting are necessary to protect the integrity of the trial.
7. The application for leave shall be made on notice within 42 days of the committal of the defendant to the CFI or within 42 days of the transfer of the case to the District Court or 42 days of the Not Guilty plea for Magistracy cases. The statements of intended Prosecution Witnesses should have been disclosed to the defence before the date of the application and a better assessment can then be made whether the particular witness is needed for the trial, particularly in relation to cross examination, why the witness will not come and what if any alternatives have been considered by the prosecution. The evidence proposed to be given through the VL will then be looked at the context of the prosecution case overall.
8. Leave for evidence to be given through a VL shall not be given unless the judicial officer hearing the application is satisfied that the evidence of the witness is admissible, that it is in the interests of justice for that evidence to be admitted into the trial, that the witness will not voluntarily return to Hong Kong to give evidence or, where the witness could be brought to Hong Kong to give evidence, that the costs incurred in bringing the witness to Hong Kong are disproportionate. The VL procedure must not be allowed to become a convenient way of avoiding the witness attending the trial in Hong Kong.
9. The burden of satisfying the judicial officer hearing the application of the conditions in 8 shall be upon the party making the application.
10. Provision should be made for an appeal against the decision on an application for evidence to be given through a VL. That appeal should be heard by a single judge of the Court of Appeal.
11. In a Court of First Instance trial, the judge must direct the jury when the evidence through a VL is about to be considered (similar to the way a judge warns the jury where a witness is testifying under an immunity or was previously a defendant who has pleaded guilty and is now a prosecution witness) that the fact that the evidence is being given through a VL is a matter to be taken into account when considering the weight to be given to the evidence. The direction must be repeated in the summing up and be amplified to direct the attention of the jury to relevant issues arising during the giving of evidence: c.f. identification evidence directions.

12. Where evidence is given through a VL in a Court of First Instance trial, the jury shall not be allowed to view the evidence again whilst considering its verdict.
13. The costs of and incidental to a witness giving evidence by VL shall be dealt with at the trial (in accordance with the Costs in Criminal Proceedings Ordinance)
14. The courtroom where the witness gives evidence must be an open court.
15. The oath or affirmation will be administered by the trial judge in the same way as if the witness was giving evidence orally in Hong Kong.

Possible Problems

1. Problems could possibly arise on an application for a defence witness to give evidence through a VL. The evidence of the witness will have been disclosed to the prosecution on the hearing of the application. What, if any, use can the prosecution make of that evidence if leave is refused or, if leave is given, the witness subsequently refuses to give evidence through the VL? Question of costs on refusal of witness (whether prosecution or defence) to give evidence through a VL after the arrangements have been made?
2. Simply getting an order for evidence to be given through a VL may not be enough as it will not address the witness who has, for example, given a witness statement and then left HK and refuses to give evidence even through a VL. Should these issues be addressed? How can they be addressed?

Implementation

1. Reciprocal agreements are to be preferred. Such agreements make for certainty, can contain built in protections and can take account of, and address, conditions in the overseas jurisdiction.
2. Reciprocal agreements can define the logistical and practical support to be provided by the overseas jurisdiction and issues of funding and cost involved in setting up and running the scheme.

Conclusion

The Committee is not persuaded that the provisions would effect a costs saving.

It is concerned and that the common law right to cross examine may be adversely affected by the proposed rules and that the VL provisions will be seen as a convenient way of avoiding bringing witnesses to testify in Hong Kong.

The minimum required is:

1. that the giving of evidence via VL be permitted only when the court is satisfied that the applicant party has used their best endeavours to bring the witness to Hong Kong court, *and it is in the interests of justice for the evidence to be received via a VL.*
2. that the giving of evidence via live television link be permitted only where it is conducted at a court room in the jurisdiction where the evidence is given.

**The Law Society of Hong Kong
Criminal Law & Procedure Committee
12 February 2010**

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19 August 2010

Ms Christine Chu
Assistant Director of Practitioners Affairs
The Law Society of Hong Kong
3/F, Wing On House,
71 Des Voeux Road Central
Hong Kong

via Mr T Y Lee, SASG(GLP)(Ag) *1918.*

Dear Ms Chu,

**Taking of Evidence by Way of a Live Television Link
Rules of the High Court (Amendment) Rules ("RHCR")
Live Television Link (Witnesses Outside Hong Kong) Rules
("LTVL(WOHK)R")**

Thank you for your letter of 12 February 2010.

We attach a table incorporating our comments on the issues raised in your letter for your consideration. In view of the numerous issues raised by the Law Society, we would be happy to meet with representatives of the Law Society's Criminal Law and Procedure Committee, preferably in mid October 2010, to further discuss the subject.

We shall be grateful if you could contact the undersigned at 2867 4903 to confirm whether or not you can attend the meeting, and if so to make a mutually convenient appointment for the meeting.

Yours sincerely,


(Christopher Ng)
Senior Government Counsel

Date: 19 August 2010

Outstanding Issues of Concern

Item	Law Society's Comments	Remarks
1	<p>The option of having an authorised person from Hong Kong to be present at the venue where the evidence is given by the overseas witness to ensure there will be no undue influence upon the witnesses from behind the scenes.</p>	<p>Rule 7(2) of the LTVL(WOHK)R has already empowered the court to impose a condition that the witness is to give evidence in the presence of a person who is able and willing to answer under oath any question the court may put as to the circumstances in which the evidence is given, including any question about any person who is present when the evidence is given and any matter which may affect the giving of the evidence.</p> <p>The policy intent behind section 79I is to confer the court with the <i>general discretion</i> to grant permission for giving evidence by a live TV link except for certain specific circumstances. Those specific circumstances were carefully scrutinised at the BC meetings before their adoption in section 79I(2). They include (which should address the Law Society's concern on "undue influence"):</p> <p>"(d) measures to ensure that the person will be giving evidence without coercion cannot</p>

Item	Law Society's Comments	Remarks
		<p>reasonably be taken; or (e) it is not in the interests of justice to do so"</p> <p>The option currently proposed by the Law Society is more restrictive than those in section 79I(2) above. It would reduce court's flexibility on granting permission based on interests of justice and would re-open discussions on this point after its conclusion at the BC meetings. We do not therefore consider it appropriate to impose this additional requirement.</p>
2.	Practical problems	
2(1)	<p><u>Cost Implications</u> <u>Funding</u></p> <p>There has been no information from the Administration of how the proposal may be funded. It will be an enormous burden on public funds.</p>	<p>The public funds to be incurred by the installation and maintenance of live TV link facilities would be compensated by the saving in costs resulted from obviating the need to send a team of counsel and relevant parties to the country where a witness resides to obtain evidence.</p>
2(2)	<p><u>Sending of Authorized Personnel</u></p> <p>The sending of personnel to another country will be just as expensive as bringing the witness to Hong Kong.</p>	<p>As we explained at the BC meetings, overseas witnesses might, while willing to give evidence, be unable or reluctant to come to Hong Kong to testify for various reasons, and it would be</p>

Item	Law Society's Comments	Remarks
		<p>expensive and time-consuming for the court and all parties to travel to the country where a witness resides to obtain evidence.¹ By allowing an overseas witness to give evidence from abroad via live TV 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.²</p> <p>In response to Law Society's letter of 13 December 2002, we explained that the costs involved in getting a witness to testify in a local court from abroad varied from case to case and, generally speaking, they would include airfares and hotel charges. We also explained that, if a witness is giving evidence via live TV link, the costs would probably be the rental of the relevant facilities.³</p> <p>Besides, it will not always be necessary to send personnel overseas, although the Hong Kong court may impose such a condition under rule 7(2) of the LTVL (WOHK)R.</p>

¹ BC report to HC, LC Paper CB(2)(2416/02-03, at paragraph 38

² Ibid, at paragraph 39

³ DoJ's letter to the Law Society dated 7 January 2003

Item	Law Society's Comments	Remarks
2(3)	<p><u>Time Delays</u> <i>Longer Proceedings</i></p> <p>Voire Dire proceedings may take place before the court will grant leave. There may be long delays if there is opposition. This will lead to an increase of time and legal costs not a reduction of it.</p>	<p>Voire Dire proceedings may take place even for proceedings not involving a witness giving evidence by a live TV link. Hence, this point is not directly relevant to whether we should allow witnesses to give evidence via a live TV link under the LTVL(WOHK)R.</p>
2(4)	<p><i>Time Difference</i></p> <p>It may mean that the court will not be able to sit in "normal" hours. This will cause further delay.</p>	<p>It is useful to note that the court shall not grant permission for a person to give evidence by live TV link if evidence can "more conveniently be given in Hong Kong"⁴. Furthermore, it may be possible to deal with the problem by way of the court's discretion under section 79I(1). For example, the court could make it a condition of granting permission that the applicant arrange for the live TV link evidence to be given at a time convenient to the court.</p> <p>If we do not allow, or impose overly onerous conditions, for giving evidence by live TV link, an overseas witness may in the end not give evidence at court. This poses a much greater danger to the administration of justice than any inconvenience</p>

⁴ section 79I(2)(b) of the Ordinance

Item	Law Society's Comments	Remarks
		(which as mentioned can be resolved) in scheduling a suitable time for the evidence be given via live TV link. Delay is not an issue if the alternative is that the witness may not even give evidence.
3.	Problems in the Courtroom	
3(1)	<i>Quality of evidence</i> Transmission of images or sound will be disrupted. The downtime will cause delays and prolongs the hearing. This in turn will increase the costs of litigation.	<p>In our previous response to the Law Society's letter of 13 December 2002 on a similar point, we explained in our letter of 7 January 2003 that "The Committee has previously expressed its concern that the TV Link may not enable the court to see the witness as clearly as where the witness is physically in the courtroom. I suggest that this is a technical issue and suggest that, if necessary, we may try to arrange a visit to the facilities in the High Court when the facilities are available (subject to the consent of the Judiciary)".</p> <p>We do not consider we should re-open a similar issue after the BC has considered the issue and the Ordinance was enacted into law.</p>
3(2)	<i>Scope of Vision</i>	Please refer to remarks on Item 1 above.

Item	Law Society's Comments	Remarks
	<p>The court will be unable to see who is actually in the room with the witness. The court would be innocent to whether the witness was coerced or threatened by others. More cameras may resolve this problem but it will increase the costs significantly.</p>	
3(3)	<p><i>Documents</i></p> <p>The witness may be cross examined on certain documents. Courts will need to be equipped. It will increase the costs significantly. The witness maybe shown the document on the screen but it may not be clear enough for the witness to peruse. An advance copy of the bundle may be sent to the witness. However this will be preparing the witness and the element of surprise is completely lost.</p>	<p>Please refer to Item 2 (1) above on costs.</p> <p>Regarding the concern that the witness may be shown the document on the screen which may not be clear enough, please note that the proposed rule 8 of the draft LTL(WOHK) Rules has already provided for the transmission of documents to the witness by any means (e.g. if so permitted by court, by scanning a document exhibit and emailing it to a witness as suggested by the Law Society in item 6(4) below).</p> <p>Please refer to Section 79I(2)(e) on concerns over "preparing the witness" for giving evidence by sending him documents in advance of his examination, namely the court shall not give permission under section 79I(1) if it is not in the interests of justice to do so.</p>

Item	Law Society's Comments	Remarks
3(4)	<p><i>Recall of Witnesses</i></p> <p>Where a witness gives evidence by VL, such recalls may be impossible. The cost of finding and preparing the VL procedure will increase the costs of litigation.</p>	<p>Under section 79J of the Criminal Procedure Ordinance (CPO), a witness giving evidence in the overseas location will enjoy the same privilege and will be subject to the same rules of procedures as a witness physically giving evidence in a Hong Kong courtroom.⁵ Hence, a judge will have the same power to recall a witness who gives evidence by a live TV link like any other witnesses who give evidence in person at court. In this connection, it should be noted that the judge has a discretionary power to recall, or allow recall of, witnesses as the exigencies of justice require.⁶</p> <p>Please refer to Item 2 (1) above on costs.</p>
4.	Legal Issues	
4(1)	<p><i>Place of Testimony</i></p> <p>It is a paramount concern as often the solemnity of the location reminds the witness of the serious nature of any criminal proceeding thus placing a greater burden on the witness to convey the truth.</p>	<p>On a similar point raised by the Law Society's letter of 25 February 2003, we have explained that "It is accepted that a video link can never replace the atmosphere and personal contact in the courtroom and that a close up of the face of a witness may not be sufficient. However, on a pure</p>

⁵ paragraph 12 of LC Paper CB(2)1446/02-03(02)

⁶ section 8-211, Archibold, Hong Kong 2010

Item	Law Society's Comments	Remarks
		technical consideration, video link evidence is not novel in Hong Kong. Vulnerable witnesses have already been giving evidence via live TV link under Part IIIA of the Criminal Procedure Ordinance. In any event, when the court makes a decision as to whether an application for the use of live TV link should be granted, it would most probably also take into account the difference between a witness physically inside the courtroom and a witness appearing through a video link."
4(2)	<p><i>Enforcement of contempt or perjury</i></p> <p>The witness may be extradited. However, this will substantially increase the costs rather than diminish them, especially if the witness wishes to fight the extradition order.</p> <p>The argument that the witness be subjected to prosecution if they ever come to Hong Kong is unsustainable. They may not want to come to Hong Kong due to possible exposure to criminal sanctions in the first place. It is unlikely the witness will come to Hong Kong voluntarily.</p>	<p>On a similar point raised by the Law Society's letter of 25 February 2003, we have explained that "It is admittedly more difficult to prosecute a witness for the offence of perjury if he is outside Hong Kong and it would be impossible or costly to extradite the person to Hong Kong. However, the same problems would arise even if a witness comes to Hong Kong to give evidence and perjured himself. The jurisdiction of Hong Kong courts to prosecute him for perjury can be equally lost if the witness leaves Hong Kong subsequently".</p>
5.	Human Rights Compliance Issues	
5(1)	<i>5.2.2 Bill of Rights Ordinance (Cap. 383) – Article 11 – The</i>	We do not agree that it is against the Hong Kong

Item	Law Society's Comments	Remarks
	<p><i>Right to Cross-Examine</i></p> <p>It will be against the Bill of Rights Ordinance to have the witness against the accused to testify via VL link. The ability to cross examine is severely restricted. It is understandable where a Vulnerable Witness is involved, the community's interest to protect the Vulnerable Witness means rights under the Bill of Rights may not be fully afforded.</p> <p>However, where an argument of convenience is presented to justify a restriction on a statutorily affirmed right, it is simply an unacceptable infringement on the accused's rights.</p>	<p>Bills of Rights Ordinance ('HKBOR') to have the overseas witness to testify against the accused via live TV link.</p> <p>Article 10 of the HKBOR guarantees equality before the courts and the right to fair and public hearing. Article 11(2)(e) of the HKBOR provides – "(2) [i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality – (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;". Articles 10 and 11(2)(e) of the HKBOR correspond to Articles 14.1 and 14.3(e) of the International Covenant on Civil and Political Rights ('ICCPR') respectively, which are entrenched in Article 39 of the Basic Law. The UN Human Rights Committee ('HRC') considers that Article 14.1 guarantees in general terms the right to equality before courts and tribunals, equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination. (See paragraphs 7 and 8 of General Comment No. 32 dated 23</p>

Item	Law Society's Comments	Remarks
		<p>August 2007 issued by the HRC.) Article 14.3(e) of the ICCPR guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution. The accused does not have an unlimited right to obtain the attendance of any witness requested by them or their counsel, but only a right to have witnesses admitted that are relevant for the defence, and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings. Within these limits, and subject to the limitations on the use of statements, confessions and other evidence obtained in violation of Article 7 of the ICCPR (which provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."), it is primarily for the domestic legislatures of States parties to determine the admissibility of evidence and how their courts assess it. (See paragraph 39 of General Comment No. 32 dated 23 August 2007 issued by the HRC.) Nowak considers that the right to call, obtain the attendance of and</p>

Item	Law Society's Comments	Remarks
		<p>examine witnesses under the same conditions as the prosecutor is an essential element of 'equality of arms' and thus of a fair trial. Of principal importance here is that the parties are treated equally with respect to the introduction of evidence by way of interrogation of witnesses. (See Manfred Nowak, U.N. Covenant on Civil and Political Rights CCPR Commentary, 2nd revised edition, N.P. Engel, Publisher, at pp. 341-342.) Under the Strasbourg jurisprudence, the right of the accused to examine, or have examined, witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him is guaranteed by Article 6(3)(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR').</p> <p>In R(D) v Camberwell Green Youth Court [2005] 1 WLR 393, the House of Lords considered a line of case authorities in the United States and in Strasbourg respectively and held that the use of live TV links for child witnesses did not give rise to a risk of injustice and was compatible with the accused's right to a fair trial under Article 6(3)(d) of the ECHR. Their Lordships noted that since all</p>

Item	Law Society's Comments	Remarks
		<p>the evidence was produced in the presence of the defendant, who could see and hear the witnesses against him, and who had every opportunity to challenge and question the witnesses against him at the trial itself there was no violation of the defendant's right to a fair trial; and that the Convention did not guarantee the accused a right to a face-to-face confrontation with witnesses in the same court room as the witness giving evidence. The House of Lords held that Parliament was entitled to modify or adapt the domestic legal system to meet modern conditions provided the adaptations complied with Article 6 of the ECHR.</p> <p>In the light of the above, we are of the view that the arrangement to have the prosecution witness to testify via live TV link does not impair the ability of the accused to cross examine the witness and is unlikely to violate the accused's right to a fair trial guaranteed by Article 10 of the HKBOR or the accused's right to examine the witness guaranteed by Article 11(2)(e) of the HKBOR.</p>
5(2)	<i>The Common Law Right of Confrontation</i>	Please see Item 5(1) above.

Item	Law Society's Comments	Remarks
	<p>The common law has preserved the accused's right to confrontation. This right is of such significance, it is part of the Constitution of the United States under the Sixth Amendment.</p> <p>The United States Court of Appeals held that testimony at trial of witnesses by two way video teleconference from Australia violated the D resent[sic] accused.</p>	<p>It is unclear as to the case authority being referred to here. We note that in the case of <i>United States v Yates</i> 438 F 3d 1307, the United States Court of Appeals held that the defendants' right under the Confrontation Clause of the Sixth Amendment to the United States Constitution to confront accusatory witnesses might be satisfied, in absence of physical, face-to-face confrontation at trial, (i) only where denial of such confrontation is necessary to further an important public policy, and (ii) only where reliability of testimony is otherwise assured. The court held, by a majority, that on the facts of that case there was a violation of the Sixth Amendment to the United States Constitution on the ground that allowing the government to present testimony of witnesses at the defendants' trial by means of two-way video teleconference was not necessary to further any important public policy given the availability of the alternative means of a deposition in criminal case pursuant to Rule 15 (Fed. R. Crim. P. 15(a) (2002)). The case of <i>United States v Yates</i> is not binding on the Hong Kong courts. However, we are of the view that even if that case is applicable to the proposed arrangement for live TV link, there is unlikely to be a violation of the accused's right</p>

Item	Law Society's Comments	Remarks
		<p>on the ground that the requirements in (i) and (ii) above are satisfied.</p> <p>In respect of (i) at present, where evidence in a criminal case in Hong Kong is needed from a witness who is outside Hong Kong, that witness will generally have to travel here to give evidence. However, a witness may be deterred from coming here by the expense and inconvenience involved. In such a situation, the only present alternative is to take his evidence by way of a request issued by the Court of First Instance or 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. The disadvantage of this procedure is that such evidence cannot be tested in cross-examination unless counsel travels to the jurisdiction to conduct the cross-examination. Furthermore, the Hong Kong court is unable to observe the demeanour of the witness. By allowing an overseas witness to give evidence from abroad via live television link to a Hong Kong court, it would significantly reduce inconvenience to the witness and the travel costs associated with</p>

Item	Law Society's Comments	Remarks
		<p>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 foregoing summarises the important policy reasons for allowing an overseas witness to give evidence from abroad via live television link to a Hong Kong court.</p> <p>In respect of (ii), whilst whether a witness is reliable is a matter for the judge / jury, the defendant / accused can cross-examine the witness. Furthermore, under s.79J, CPO, the witness giving evidence will be subject to the same rule of procedures as a witness physically giving evidence in a Hong Kong court room.</p>

Basic Issue

Item	Law Society's Comments	Remarks
6	Whether the proposed use of a VL to overseas witnesses will be either more cost effective or more convenient and practicable than present methods of obtaining evidence from an overseas witness.	
(1)	Evidence given through a VL must be treated as an extension of the HK trial and will be governed by HK procedures and rules, for example over the admissibility and weight of the evidence.	Under s 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 procedures as a witness physically giving evidence in a Hong Kong courtroom. ⁷
(2)	Witnesses giving evidence through a VL must only do so in a normal court in the overseas jurisdiction: no hotels or other informal arrangements. The place from which evidence is given should be as similar as possible to a courtroom for a Court of First Instance trial.	In response to the request by the BC on 14 March 2003 on whether the meaning of "the place from which the person is giving evidence" in s 79J of CPO should be more clearly specified, we have explained as follows: (a) The emphasis is on 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

⁷ paragraph 12 of LC Paper CB(2)1446/02-03(02)

Item	Law Society's Comments	Remarks
		<p>transmission and production/transmission of documents. This could be possible from a variety of locations, for example, an overseas courtroom, conference room of a corporation, an audio-visual studio, a correctional institution, a hospital ward or even a private residence. 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 TV 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.”; and</p> <p>(b) “the “place” from which overseas evidence may be given is also not specifically defined in the UK and Australian legislation.”⁸</p> <p>In addition, in response to a request by the</p>

⁸ paragraphs 20 and 21 of LC Paper CB(2)1698/02-03(02)

Item	Law Society's Comments	Remarks
		<p>BC on 25 April 2003 for "a provision that the place outside Hong Kong from which a person was to give evidence via live television should have the same "sanctity" as a courtroom in Hong Kong", we have explained that:</p> <p>"the prerequisites for the place outside Hong Kong from which the person is to give evidence must remain flexible. 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 proposed section 79I(2) sets out criteria which 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."</p>

Item	Law Society's Comments	Remarks
		Furthermore, not all overseas courtrooms will be equipped with the technical capabilities to transmit live video evidence, and other places (such as hotel room or a conference room or indeed any other location that is so equipped) may need to be used. It is undesirable to set out the criteria for choosing a particular location in specific terms.
(3)	The VL arrangements must be such that persons in the courtroom in Hong Kong can see the whole of the room where the evidence is given at the same time as viewing the witness who is giving evidence. Split or multi-screen technology or more than one camera and/or camera angle can address these issues.	Please refer to the remarks in points 3(1) and 6(2)(a) above.
(4)	The system must cater to the putting of exhibits to the witness. Zoom-in technology could be considered with non-documentary exhibits. Scanning documentary exhibits and E-mailing them to the room where the witness is giving evidence and while the witness is giving evidence might be appropriate with documentary exhibits. The E-mail equipment must be in the courtroom in Hong Kong so that all concerned can see the scanning and E-mailing. Similarly the equipment in the place where the witness is must enable all concerned to see the arrival and printing out of the	<p>Rule 8 of the LTVL(WOHK)R empowers the court to grant permission for the transmission by any means of a copy of document to the witness outside Hong Kong and the putting of the copy so transmitted to the witness.</p> <p>In addition, under Rule 7 of the LTVL(WOHK)R, the court may impose conditions for granting an application for permission for a witness to give evidence by way of a live television link from a</p>

Item	Law Society's Comments	Remarks
	documentary evidence. Scanning documentation and sending it by E-mail attachments is steadily replacing the faxing of documentation.	<p>place outside Hong Kong and under section 79I(2)(e) of the Ordinance the court shall not give permission under 79I(1) if "it is not in the interests of justice to do so".</p> <p>It is not appropriate to insert the further specific conditions as suggested by the Law Society under this item. To do so, it would undermine the court's discretion and flexibility to impose the most relevant conditions, if any, under Rule 7 of the LTVL(WOHK)R according to the individual circumstances and facilities available in a particular case. We are also not aware of any such requirements in the UK, Australia, or Singapore.</p> <p>That said, there is no restriction in the LTVL(WOHK)R itself to prohibit e-mailing of a scanned copy document for transmission to the overseas witness in the manner as described by the Law Society.</p>
(5)	A witness (whether prosecution or defence) will only be allowed to give evidence through a VL with leave of a substantive Court of First Instance judge or, where the case proceeds in the District Court, of the Chief District Court Judge or, if he/she is not in HK, the acting Chief District	The trial judge who may not necessarily be the Chief District Court Judge / Chief Magistrate should be in a better position to assess the application. Therefore, we suggest no restriction should be added.

Item	Law Society's Comments	Remarks
	Court Judge; or in the Magistracy with the leave of the Chief Magistrate or, as the case may be, the Acting Chief Magistrate.	
(6)	The application for leave will be heard in chambers and there shall be no reporting of the application. Restrictions on reporting are necessary to protect the integrity of the trial.	The Law Society's proposal is contrary to the open justice policy. In addition, there is currently no statutory restriction on the report of hearings of applications relating to the use of a live TV link. Hence, Rule 6(5) of the LTVL(WOHK)R should be retained as drawn.
(7)	The application for leave shall be made on notice within 42 days of the committal of the defendant to the CFI or within 42 days of the transfer of the case to the District Court or 42 days of the Not Guilty plea for Magistracy cases. The statements of intended Prosecution Witnesses should have been disclosed to the defence before the date of the application and a better assessment can then be made whether the particular witness is needed for the trial, particularly in relation to cross examination, why the witness will not come and what if any alternatives have been considered by the prosecution. The evidence proposed to be given through the VL will then be looked at the context of the prosecution case overall.	<ol style="list-style-type: none"> 1) The proposal for the application be made within 42 days of the committal of the defendant to the Court of First Instance is covered by Rule 3(3)(a)(i) and Rule 3(3)(b) of the LTVL(WOHK)R. 2) The proposal for the application be made within 42 days of the transfer of the case to the District Court is covered by Rule 3(4) of the LTVL(WOHK)R. 3) The proposal for the application be made within 42 days of the Not Guilty plea for Magistracy cases is covered by Rule 3(5)(d),

Item	Law Society's Comments	Remarks
		<p>assuming the case will be set down for trial following a not guilty plea.</p> <p>Whether there should be a list of factors that the court must satisfy before granting permission for giving evidence via a live TV link in criminal proceedings were discussed in detail at the BC meetings. As mentioned in the BC meetings, the Administration does not propose to specify such a list on the basis that the factors relevant for the court's decision would vary from case to case. Instead, it is submitted that requirement that the court shall not grant the permission if "it is not in the interests of justice to do so" in section 79I is wide enough to encompass the interests of the defendant, the importance of the evidence and other circumstances of the case.</p> <p>For the above reasons, it is not appropriate to impose the specific requirements presently proposed by the Law Society.</p>
(8)	Leave for evidence to be given through a VL shall not be given unless the judicial officer hearing the application is satisfied that the evidence of the witness is admissible, that it is in the interests of justice for that evidence to be admitted	As explained in our letter to the Law Society dated 17 May 2002, "This Bill does not purport to remove the requirement for witnesses to be physically present in the courtroom. In our

Item	Law Society's Comments	Remarks
	<p>into the trial, that the witness will not voluntarily return to Hong Kong to give evidence or, where the witness could be brought to Hong Kong to give evidence, that the costs incurred in bringing the witness to Hong Kong are disproportionate. The VL procedure must not be allowed to become a convenient way of avoiding the witness attending the trial in Hong Kong.</p>	<p>proposal, the live TV link option is only available with the leave of the court. It is not envisaged that a witness whose presence in the courtroom can more conveniently be arranged will be allowed by the court to give evidence via live TV link in a place outside Hong Kong. The purpose of the Bill is to enable the court to obtain evidence of a witness who[se] presence in the courtroom cannot be arranged without inconvenience or cannot be arranged at all"⁹. In addition, we also explained in our letter to the Law Society of 11 March 2003 that "It is our proposal that the permission for the use of live TV link will only be granted at the discretion of the court...The court, when deciding on an application, will take into account all factors such as those mentioned in your letter."¹⁰ Furthermore, we explained previously that "The Administration does not propose to specify a list of factors of which the court must be satisfied. Such a list cannot be exhaustive for the reason that the factors to be considered will vary from case to case. It is submitted that "in the interests of justice" is wide enough to encompass the interests</p>

⁹ 2nd paragraph thereof

¹⁰ 4th paragraph thereof

Item	Law Society's Comments	Remarks
		of the defendant, the importance of the evidence and other circumstances of the case". ¹¹
(9)	The burden of satisfying the judicial officer hearing the application of the conditions in (8) above shall be upon the party making the application.	Given the fact that the court may permit a person to give evidence to the court by way of a live TV link upon the application of a party to any criminal proceedings, and that the court may not give permission if any of the conditions in section 79I(2) arises, the applicant would, subject to our comments on Item 6(8) above, naturally have the relevant burden for the application.
(10)	Provision should be made for an appeal against the decision on an application for evidence to be given through a VL. That appeal should be heard by a single judge of the Court of Appeal.	The mechanism of judicial review is available. It is not necessary for every ruling of the judge, particularly an interlocutory order, be a subject of appeal.
(11)	In a Court of First Instance trial, the judge must direct the jury when the evidence through a VL is about to be considered (similar to the way a judge warns the jury where a witness is testifying under an immunity or was previously a defendant who has pleaded guilty and is now a prosecution witness) that the fact that the evidence is being given through a VL is a matter to be taken into account when considering the weight	The fact that a witness gives evidence via VL would not affect the witness's credibility, unlike the 2 examples given by the Law Society. With respect, we therefore see no justification for such proposal.

¹¹ paragraph 5 of LC Paper CB(2)1698/02-03(02)

Item	Law Society's Comments	Remarks
	to be given to the evidence. The direction must be repeated in the summing up and be amplified to direct the attention of the jury to relevant issues arising during the giving of evidence: c.f. identification evidence directions.	
(12)	Where evidence is given through a VL in a Court of First Instance trial, the jury shall not be allowed to view the evidence again whilst considering its verdict.	As mentioned in our letter of 21 November 2006 to the Law Society, the Bar Association had previously expressed its view that the LTVL(WOHK)R could be improved by making it explicit that evidence might be taken by live video link and recorded and that it was not necessary for the evidence be given live before the jury. We noted that the Judiciary and the Law Society disagreed with the Bar Association's view. In the circumstances, as you are aware, we have already removed Rule 9 (which provides that the court may direct that a video recording be made of the evidence given under Part IIIB of the Ordinance) from the current draft of the LTVL(WOHK)R.
(13)	The costs of and incidental to a witness giving evidence by VL shall be dealt with at the trial (in accordance with the Costs in Criminal Proceedings Ordinance)	The costs of VL is reasonably covered by s.15(a) of the Costs in Criminal Cases Ordinance (Cap. 492).
(14)	The courtroom where the witness gives evidence must be an open court.	S 79I of CPO provides that the court may permit a person to give evidence to the court by way of a

Item	Law Society's Comments	Remarks
		<p>live TV link from a place outside Hong Kong, subject to such conditions as the court considers appropriate in the circumstances. It is submitted that whether the witness shall give his evidence via a live TV link in open court or not should be decided by the court according to s 79I(1) and it is not appropriate to restrict this in the LTVL(WOHK)R (which is only a subsidiary legislation to the Ordinance itself).</p> <p>Furthermore, given a live TV link is simply a medium for providing evidence, it should not change the nature of a trial. That should not dictate whether a trial should be heard in open or close court. We are also not aware of such requirements in any of the UK, Australia, or Singapore.</p>

Item	Law Society's Comments	Remarks
(15)	<p>The oath or affirmation will be administered by the trial judge in the same way as if the witness was giving evidence orally in Hong Kong.</p>	<p>The latest proposal by the Law Society is not consistent with and more restrictive than s 79K of CPO. Thus, it is not appropriate to impose it in the LTVL(WOHK)R.</p> <p>Furthermore, given the place where the witness gives evidence is deemed to be part of the courtroom in Hong Kong, the laws in force in Hong Kong relating to evidence and procedure will apply (s 79J of CPO). As such, an oath or affirmation can be administered by the trial judge in Hong Kong under the laws of Hong Kong.</p>

Possible Problems

Item	Law Society's Comments	Remarks
1	Problems could possibly arise on an application for a defence witness to give evidence through a VL. The evidence of the witness will have been disclosed to the prosecution on the hearing of the application. What, if any, use can the prosecution make of that evidence if leave is refused or, if leave is given, the witness subsequently refuses to give evidence through the VL? Question of costs on refusal of witness (whether prosecution or defence) to give evidence through a VL after the arrangements have been made?	If leave is refused or if leave is given and the witness subsequently refuses to give evidence via VL, there is no evidence from this witness at all. The Prosecution cannot rely on the untested evidence given from the bench and use it against the defence. Parties should secure attendance of their own witnesses. If the applying party fails to secure attendance of his witness, the Court may order costs against the applying party under s.17 of the Costs in Criminal Cases Ordinance (Cap. 492).
2	Simply getting an order for evidence to be given through a VL may not be enough as it will not address the witness who has, for example, given a witness statement and then left HK and refuses to give evidence even through a VL. Should these issues be addressed? How can they be addressed?	As in most criminal proceedings, it is a matter for the party concerned to secure the attendance of his witness. ¹² VL is not intended to address these issues.

¹² paragraph 2, Annex A of Background Brief by the Legislative Council Secretariat, CB(2)1167/02-03(1)

Implementation

Item	Law Society's Comments	Remarks
1	Reciprocal agreements are to be preferred. Such agreements make for certainty, can contain built in protections and can take account of, and address, conditions in the overseas jurisdiction.	<p>Indeed, the subject of the use of live TV link in criminal proceedings has arisen in Hong Kong's negotiations with foreign jurisdictions on agreements of mutual legal assistance. To this end, ss 20, 21, 22, 25 and 26 of Part II of the Evidence (Miscellaneous Amendments) Ordinance 2003 (which primarily amended the Mutual Legal Assistance in Criminal Matters Ordinance (Cap 525) and the Mutual Legal Assistance in Criminal Matters Regulation)) have already come into effect on 3 March 2006.</p> <p>The draft rules are important in that LTVL(WOHK)R will facilitate applications be made to Hong Kong courts to take live TV link evidence outside of Hong Kong, while the RHCR will facilitate court to court requests for evidence be given by way of a live TV link under the Evidence Ordinance.</p>
2	Reciprocal agreements can define the logistical and practical support to be provided by the overseas jurisdiction and issues of funding and cost involved in setting up and running the	Existing agreements for mutual legal assistance which specifically cater for live TV evidence do so only on a general basis. The detail will be dealt

Item	Law Society's Comments	Remarks
	scheme.	with on a case-by-case basis and in our view it would be impractical to define such detail in reciprocal agreements. Most jurisdictions (including Hong Kong) already have established facilities to support live TV evidence and the costs involved will usually be the cost of the satellite link-up. This cost is normally borne by the requesting party.

Conclusion

Item	Law Society's Comments	Remarks
1	The Committee is not persuaded that the provisions would effect a costs saving.	-
2	It is concerned and [sic] that the common law right to cross examine may be adversely affected by the proposed rules and that the VL provisions will be seen as a convenient way of avoiding bringing witnesses to testify in Hong Kong.	Please refer to Item 5 above.
3	<p>The minimum required is:</p> <ol style="list-style-type: none">1. that the giving of evidence via VL be permitted only when the court is satisfied that the applicant party has used their best endeavours to bring the witness to Hong Kong court, <i>and it is in the interests of justice for the evidence to be received via a VL.</i>2. that the giving of evidence via live television link be permitted only where it is conducted at a court room in the jurisdiction where the evidence is given.	<p>Please refer to Item 1 on page 1 of this Table above.</p> <p>Please refer to Item 6(2) above.</p>



THE

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BY FAX (21809928) AND BY POST

31 March 2011

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Mr. Christopher Ng,
Senior Government Counsel,
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66 Queensway, Hong Kong.

Dear Mr. Ng,

**Taking of Evidence by Way of a Live Television Link
Rules of the High Court (Amendment) Rules ("RHCR")
Live Television Link (Witnesses Outside Hong Kong) Rules
("LTVL(WOHK)R")**

We refer to the recent joint meeting between representatives of your Department and members of our Criminal Law & Procedure Committee on the above subject and understand the Administration would like to convene a further joint meeting to discuss the Committee's concerns. We are pleased to advise that representatives of our Criminal Law & Procedure Committee can make the suggested date of 20 April at 3:30 p.m.

To facilitate discussion, we attach the written submissions of the Committee on the subject for consideration by the Department of Justice.

Yours sincerely,

Christine W. S. Chu
Assistant Director of Practitioners Affairs

Encls.

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SUBMISSIONS OF THE LAW SOCIETY'S CRIMINAL LAW & PROCEDURE COMMITTEE ON PROPOSED LEGISLATION ON LIVE TELEVISION (WITNESS OUTSIDE HONG KONG)

1. Criteria for Admissibility of Evidence via Live Television Link ("LTL")

- 1.1 The criteria for admissibility of evidence from a witness outside of Hong Kong via a live television link to a Hong Kong court must have a higher threshold more than reducing inconvenience to the witness and/or avoiding travel costs.
- 1.2 Evidence via live television link should only be allowed in the interests of justice where the evidence of the witness is admissible and its absence from the trial would seriously harm the case of the party seeking to introduce the evidence via a live television link: a test of necessity or last resort.
- 1.3 In considering necessity or last resort, the evidence of the witness must be viewed in the context of the overall case of the party seeking to introduce the evidence via an LTL.
- 1.4 Even where the necessity test is satisfied, evidence via a live television link should only be allowed where it is shown to the satisfaction of the court that the witness is:
 - outside Hong Kong and it is not reasonably practicable for him or her to return to Hong Kong to give evidence;
 - outside Hong Kong and is unfit to return to Hong Kong to give evidence because of age or physical condition; or
 - genuinely apprehensive as to the safety of himself/herself or any member of his/her family if he/she returns to Hong Kong to give evidence and such apprehension cannot reasonably be addressed through existing witness protection procedures.
- 1.5 The following should not be reasons for the evidence to be given via LTL:
 - simple unwillingness on the part of the witness to return to Hong Kong
 - simply avoiding the costs of bringing the witness to Hong Kong to give evidence

2. Duty of the Applicant

- 2.1 Leave should not be given where the circumstances said to justify the witness giving evidence via an LTL have been brought about by the act or neglect of the party seeking the introduction of the evidence via an LTL, or by someone acting on that party's behalf.
- 2.2 The burden of proving the need for the evidence to be given via an LTL is on the party applying to use an LTL. In the case of the prosecution, the standard of proof is beyond reasonable doubt. In the case of the defence, the standard of proof is on the balance of probabilities.
- 2.3 The party applying for evidence to be given via an LTL must make full disclosure to the court and to the other party of all communications with the witness outside of Hong Kong and of attempts made to secure the return of the witness to Hong Kong to give evidence.

- 2.4 The party applying for evidence to be given via an LTL must show good reason why the evidence should not be obtained through existing mutual legal assistance procedures with counsel for the parties travelling to the jurisdiction where the witness is to conduct the examination and cross examination of the witness.
- 2.5 Where the witness has made a statement in Hong Kong but has subsequently left Hong Kong, the party applying for the evidence to be given via an LTL must show good reason:
- in the case of a witness who has made a statement in Hong Kong and has subsequently left Hong Kong, where the trial proceeds in the Court of First Instance, why the evidence of the witness could not have been obtained in Hong Kong under s. 80 of the Evidence Ordinance Cap. 8;
 - where the case proceeds in the Magistracy, why the evidence of the witness who has left Hong Kong could not have been obtained by starting the trial, the witnesses being examined and cross examined, and the trial adjourned to a later date.

3. Place of Testimony

- 3.1 When issuing an application for leave to give evidence via an LTL, the party applying for leave shall provide the court and other party with all relevant information on where and how it is proposed that the evidence should be taken.
- 3.2 Ideally, the evidence should be given in a courtroom in the jurisdiction where the witness is and under the supervision of authorised court staff.
- 3.3 Where the evidence will not be given in a courtroom under the supervision of authorised court staff, the party applying for leave should meet the costs of a representative of the other party attending at the place where the evidence is given or the retention of an independent person in the jurisdiction where the evidence is given to observe; where necessary and/or appropriate, he must draw attention to any alleged irregularities in the giving of that evidence so that this can be addressed by the trial judge in Hong Kong.
- 3.4 In considering an application to give evidence through an LTL, wherever the evidence will be given, the party applying for leave must demonstrate to the satisfaction of the court to which the application is made that the proposed LTL will be adequate to ensure that persons in the courtroom in Hong Kong can see the witness, the room where the evidence is given, persons present in that room and any exhibits shown to the witness.

4. Appeal

- 4.1 A party aggrieved by an order granting or refusing leave for evidence to be given via an LTL should have a right to appeal that order within 7 days of the grant or refusal of leave.
- 4.2 Appeals from orders made in the magistracy should go to a single judge of the Court of First Instance.

4.3 Appeals from orders made in the Court of First Instance or in the District Court should go to the Court of Appeal.

5. Enforcement of Contempt or Perjury

5.1 There are concerns on enforcement of the Offence of Contempt or Perjury committed by overseas witness giving evidence via LTL: it is unclear where such offence will have been committed: in the place where the lie was given or in HK where the lie was received?

5.2 There are practical difficulties of bringing the witness who told lies back to Hong Kong where the evidence was given in a jurisdiction with which HK has no extradition treaty. The LTL scheme should be limited to jurisdictions with which HK has an extradition treaty.

March 2011

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24 June 2011

Ms Christine W S Chu
Assistant Director of Practitioners Affairs
The Law Society of Hong Kong
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71 Des Voeux Road Central,
Hong Kong

via Ms Adeline Wan, SASG/GLP

Handwritten signature and date: 24/6

Dear Ms Chu,

**Taking of Evidence by way of a Live Television Link
Rules of the High Court (Amendment) Rules ("RHCR")
Live Television Link (Witnesses Outside Hong Kong) Rules
("LTVL(WOHK)R") (collectively as the "Rules")**

We refer to our two meetings with the representatives of your Criminal Law & Procedure Committee ("the Committee") on 25 January 2011 and 6 May 2011 respectively ("the Meetings") and your letter dated 31 March 2011.

Please find enclosed our written reply to the Submissions of the Committee attached to your letter of 31 March 2011. In our written reply, we have also dealt with the concerns raised by the representatives of the Committee at the Meetings.

As regards the issue of extension of time to oppose an application

for the use of a live television link raised by the representatives of the Committee at the Meetings, after due consideration of the views of the Committee, and in order to strike a balance between the interests of the parties concerned and to avoid unnecessary delay in the administration of justice, we would propose to provide for an extension on a similar basis as in rule 4 of the draft LTVL(WOHK)R but subject to the condition that an application for extension must be made within 28 days after the notice of application has been given to the opponent.

As we will proceed to obtain final approval of the draft Rules shortly, we should be grateful if you would revert to us within one month if the Committee has any further comments to make.

Yours sincerely,



(Miss Sally Yam)
Senior Government Counsel
Legal Policy Division

Reply to the Submissions of the Law Society's Criminal Law & Procedure Committee on Proposed Legislation on Live Television (Witnesses Outside Hong Kong) of March 2011 ("the Submissions")

1. Criteria for Admissibility of Evidence via Live Television Link ("LTL")¹

1.1: The newly added Part IIIB of the Criminal Procedure Ordinance (Cap. 221) ("CPO") and the draft Live Television Link (Witnesses Outside Hong Kong) Rules ("LTVL(WOHK)R") prepared under this part are concerned with taking evidence from witnesses outside Hong Kong via an LTL rather than the admissibility of the evidence so taken. The admissibility of a piece of evidence is to be determined by the trial judge or magistrate at the trial rather than by the court to which such an application is made.

1.2 and 1.3: The new s. 79I(2)(e) of the CPO already provides that the court should not give permission to give evidence via an LTL if "it is not in the interests of justice to do so". The criteria for limiting the court's discretion to grant the permission under s. 79I(2) of the CPO were duly discussed and considered by the Bills Committee of the then Evidence (Miscellaneous Amendments) Bill 2002. Therefore, it would not be appropriate to superimpose a necessity or last resort test to further limit the court's discretion in the proposed subsidiary legislation of the Evidence (Miscellaneous Amendments) Ordinance 2003 ("Ordinance"). Moreover, such a proposal would be *ultra vires* the Ordinance.

1.4: We take the view that the conditions set out in para. 1.4 of the Submissions may be taken into account by the court in considering whether permission should be given under s. 79I of the CPO in certain cases. However, they should not be specified as the necessary conditions for granting the permission. Besides, such a proposal would be *ultra vires* the Ordinance. We have explained previously that 'The Administration does not propose to specify a list of factors of which the court must be satisfied. Such a list cannot be exhaustive for the reason that the factors to be considered will vary from case to case. It is

¹ Cf Item 6(8) of the Law Society's previous comments set out in the table attached to our letter to the Law Society dated 19 August 2010.

considered that the phrase “in the interests of justice” is wide enough to encompass the interests of the defendant, the importance of the evidence and other circumstances of the case’².

1.5: We would reiterate that the criterion of “in the interests of justice” under s. 79I(2)(e) of the CPO would be sufficient and it would not be appropriate to superimpose the proposed additional restrictions on the court’s discretion to grant permission in the proposed subsidiary legislation. Moreover, such a proposal would be *ultra vires* the Ordinance.

2. Duty of the Applicant

2.1: Under s. 79I(2)(e) of the CPO, if the court considers that it is not in the interests of justice to give permission for a witness to give evidence via an LTL, then the court should not give such permission. Depending on the facts of the particular case concerned, this might include where “the circumstances said to justify the witness giving evidence via an LTL have been brought about by the act or neglect of the party seeking the introduction of the evidence via an LTL, or by someone acting on that party’s behalf” as mentioned in the Submissions. However, since the circumstances of each case might be different, it would not be appropriate to restrict the court’s discretion rigidly in the proposed subsidiary legislation. Moreover, such a proposal would be *ultra vires* the Ordinance.

2.2: Rule 3(1) of the LTVL(WOHK)R provides that an application under s. 79I of the CPO must be made by giving a notice in the form specified by the Chief Judge to (a) the officer of the court; and (b) all other parties to the proceedings. As explained at our meeting with the Law Society on 6 May 2011, the court would likely adopt an approach similar to that in the use of LTL for taking evidence from vulnerable witnesses under s. 79B of the CPO. The applicant would be required to set out the grounds for application in the notice. If there is a hearing in respect of the application, the applicant would be required to establish the grounds at the hearing. If any evidence is required, the application can be adequately supported by affirmation evidence and as such the

² Para. 5 of LC Paper CB(2)1698/02-03(02).

question of standard of proof should not arise.

2.3: This point is again concerned with a practical aspect of an application under s. 79I of the CPO. In deciding whether it is in the interests of justice to give permission under this section, the court might take into account various factors such as whether the applicant has made "full disclosure to the court and to the other party of all communications with the witness outside of Hong Kong and of attempts made to secure the return of the witness to Hong Kong to give evidence". However, there is no legal basis for requiring the applicant to make such full disclosure in any particular case.

2.4: It is not a prerequisite to an application under s. 79I of the CPO that the applicant must attempt or must have attempted to obtain the evidence through the existing mutual legal assistance procedures (which would involve counsel for all the parties concerned travelling to the jurisdiction where the witness is to conduct examination and cross examination of the witness). Therefore, there is no legal basis for requiring the applicant to show good reason why the evidence should not be obtained through the existing mutual legal assistance procedures. The purpose of putting in place the LTL scheme is to supplement the existing mutual legal assistance procedures and to provide an additional procedure which is more timely and cost-effective than travelling to the foreign jurisdiction to take the evidence. It would defeat the purpose of the Ordinance if parties were first required to exhaust all efforts to travel abroad to take the evidence before an application could be made. Moreover, as explained in the meeting of 6 May 2011, a witness could not be compelled to come to Hong Kong to testify. If a witness would not come to Hong Kong to testify for whatever reason, then there should be some other means, e.g. a live television link, in place for him to give evidence in another place. The question was how to strike the right balance. S. 79I(2) of the CPO would be sufficient to protect the integrity of the process. Any specific request about the use of a live television link could be raised at the application stage.

2.5: S. 80 of the Evidence Ordinance (Cap. 8) is concerned with the magistrate's duty to take down in the minute of proceedings any material statement or observation made, and any evidence given, by the

accused at the trial of an indictable offence. This section does not seem to be relevant to the subject of taking evidence from a witness via an LTL. We believe that the section number referred to in this point should be s. 70 of Cap. 8, which is concerned with the admissibility of the deposition of a person dead, etc. Attempts to obtain evidence from a witness pursuant to s. 70 of Cap. 8 or in any other way prior to the witness leaving Hong Kong are not prerequisites to an application under s. 79I of the CPO. Therefore, there is no legal basis for requiring the applicant to show good reason why the evidence of the witness could not have been obtained in Hong Kong pursuant to s. 70 of Cap. 8 or in any other way.

3. Place of Testimony

3.1: The country or jurisdiction and the place from which the witness will give evidence via an LTL would normally be disclosed in an application for the use of an LTL. However, in some circumstances, the place may not be known until after the application has been granted.

3.2: This point had been raised previously by the Law Society³ and was raised again by the representatives of the Law Society at the meeting on 25 January 2011. We would reiterate our response set out in Item 6(2) of the table attached to our letter to the Law Society dated 19 August 2010 and what we stated in this respect at the meeting on 25 January 2011.

It should be noted that Part IIIB of the CPO does not contain any provision restricting the venue for giving evidence via an LTL so long as it is outside Hong Kong. Under this part, the court may permit an overseas witness to give evidence anywhere outside Hong Kong via an LTL provided that the requirements under s. 79I(2) of the CPO are satisfied. The court has a wide discretion to consider an application for evidence to be given via an LTL and may impose such conditions as it considers appropriate in the circumstances. To restrict the venue of giving evidence via an LTL in the proposed subsidiary legislation would fetter the discretion conferred on the court by the Ordinance.

³ Item 6(2) of the Law Society's previous comments set out in the table attached to our letter to the Law Society dated 19 August 2010.

3.3: Part IIIB of the CPO does not contain any provision concerning costs. In this circumstance, the award of any costs of “a representative of the other party attending at the place where the evidence is given” or “the retention of an independent person in the jurisdiction where the evidence is given to observe” should be governed by the Costs in Criminal Cases Ordinance (Cap. 492). See also Item 6(13) of the table attached to our letter to the Law Society dated 19 August 2010.

Rule 7(2) of the LTVL(WOHK)R provides that “without limiting subrule (1), the court may impose a condition that the witness is to give evidence in the presence of a person who is able and willing to answer under oath any question the court may put as to the circumstances in which the evidence is given, including any question about any person who is present when the evidence is given and any matter which may affect the giving of the evidence”. If such a condition is imposed, the person present at the place where evidence is given by the witness via an LTL may be asked whether there are any irregularities in the giving of the evidence.

3.4: This point is concerned with the technical aspects of the use of an LTL and can be dealt with by the court at the hearing of an application under s. 79I of the CPO.

4. Appeal

4.1 – 4.3: This point had been raised previously by the Law Society⁴ and was raised again by the representatives of the Law Society at the meetings on 25 January 2011 and 6 May 2011. At the meeting on 25 January 2011, we explained that:

- (a) Generally speaking, there is no right of appeal against an interlocutory order for criminal proceedings in Hong Kong for fear that such appeals may cause undue delay to criminal proceedings;
- (b) There is no right of appeal against a court’s decision regarding an application for giving evidence via an LTL by a vulnerable witness under s.

⁴ Item 6(10) of the Law Society’s previous comments set out in the table attached to our letter to the Law Society dated 19 August 2010.

79B of the CPO, and it is difficult to justify why such right should be provided for in the present exercise;

(c) A convicted party who is not satisfied with the decision regarding an application for giving evidence via an LTL is entitled to challenge the decision as a ground of appeal against the conviction;

(d) More importantly, the Ordinance does not provide for a right of appeal against such a decision. In other words, it would be *ultra vires* the Ordinance to provide for such a right in the proposed subsidiary legislation.

In view of the above, and after due consideration of the Submissions, we have decided not to provide for a right of appeal in the proposed subsidiary legislation.

5. Enforcement of Contempt or Perjury

5.1: S. 79J of the CPO provides that:

“(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.”

Thus, based on s. 79J of the CPO, if a witness commits an offence of contempt of court or perjury while giving evidence at a place outside Hong Kong via an LTL, he would be regarded as committing the offence in the courtroom in Hong Kong.

5.2: This point was raised by the representatives of the Law Society at the meetings on 25 January 2011 and 6 May 2011. Apart from what we stated in Item 4(2) of the table attached to our letter to the Law Society dated 19 August 2010, we would like to add that:

(a) At present, an overseas witness might come to Hong Kong to give evidence in person at our courts even if there is no arrangement for

surrender of fugitive offenders between his home country and Hong Kong on perjury charges. As such, we do not consider it appropriate to limit the application as suggested by the Law Society;

(b) The risk of an overseas witness perjuring himself via an LTL can be minimized by proper cross examination of the witness. In this respect, if there are justified concerns that the equipment for giving evidence via an LTL might not be sufficient for counsel to conduct a proper cross examination, such concerns could be brought to the attention of the court at the hearing of the application;

(c) As we mentioned at the meeting on 25 January 2011, we would like to focus on the issue of giving evidence via an LTL *per se* rather than on whether we can effectively press charges against an overseas witness who has perjured himself when giving evidence via an LTL. In this respect, if the court is of the view that a witness has not been truthful when giving evidence via an LTL, the court can simply reject the evidence. If it is only found out later that the witness has perjured himself, then the convicted person can rely on this as a ground of appeal against his conviction; and

(d) More importantly, the Ordinance does not limit the application as suggested by the Law Society, and it would be *ultra vires* the Ordinance to impose such limitation in the proposed subsidiary legislation.

After further due consideration, we have arrived at the conclusion that it is not appropriate to limit the application as suggested by the Law Society.

**General Legal Policy Unit
Legal Policy Division
June 2011**