

資料文件

立法會 司法及法律事務委員會

《電視直播聯繫(在香港以外的證人)規則》擬稿 及 《高等法院規則(修訂)規則》擬稿

目的

本文件向委員簡述《電視直播聯繫(在香港以外的證人)規則》(“《電視直播聯繫規則》”)擬稿及《高等法院規則(修訂)規則》(“《高等法院修訂規則》”)擬稿(統稱為“規則擬稿”)(載於附件 A)。

背景

2. 《2003 年證據(雜項修訂)條例》(“《條例》”)在 2003 年 6 月 25 日獲立法會通過，並在 2003 年 7 月 4 日刊登憲報。《條例》的文本載於附件 B。

3. 《條例》第 1(2)條訂明，“本條例第 II 部自律政司司長以憲報公告指定的日期起實施。”

4. 《條例》第 II 部第 12 至 26 條涉及在刑事法律程序中藉電視直播聯繫方式提供證據。具體而言，《條例》第 II 部修訂《證據條例》(第 8 章)、《刑事訴訟程序條例》(第 221 章)、《刑事事宜相互法律協助條例》(第 525 章)、《刑事罪行條例》(第 200 章)、《裁判官條例》(第 227 章)及《刑事事宜相互法律協助規例》(第

525 章，附屬法例 A)的相關條文，以利便在刑事法律程序中使用電視直播聯繫。

5. 《條例》第 II 部第 20、21、22、25 及 26 條在 2006 年 3 月 3 日開始實施。這些條文主要關乎香港以外地方的有關當局根據《刑事事宜相互法律協助條例》就有關該地方的刑事事宜向香港提出錄取證供的請求。相關生效日期公告的副本載於**附件 C**。

6. 由於規則擬稿尚待敲定，《條例》第 II 部的其餘條文，即第 12 至 19、23 及 24 條(“**有待實施條文**”)仍未開始實施。《電視直播聯繫規則》及《高等法院修訂規則》分別由高等法院首席法官(“**首席法官**”) ¹ 及高等法院規則委員會 ² 訂立。

規則擬稿概要

《電視直播聯繫規則》

7. 目前，《刑事訴訟程序條例》沒有就為在香港進行的刑事法律程序的目的而以電視直播聯繫方式，向在香港以外的證人錄取證供，作出規定。新的第 IIIB 部藉《條例》第 17 條加入《刑事訴訟程序條例》。具體而言，新的第 IIIB 部中新的第 79I 條旨在賦權法院准許除被告人以外的人，可在香港以外地方藉電視直播聯繫方式，為在香港法院進行的刑事法律程序提供證據。《電視直播聯繫規則》擬稿列出根據《刑事訴訟程序條例》新的第 IIIB 部在香港以外地方藉電視直播聯繫方式提供證據的程序。

¹ 根據《刑事訴訟程序條例》新的第 79L 條(經《條例》第 17 條加入並經《2005 年成文法(雜項規定)條例》(2005 年第 10 號條例)第 19 條修訂)，《電視直播聯繫規則》須由首席法官訂立。

² 根據《高等法院條例》(第 4 章)第 54 條，《高等法院修訂規則》須由高等法院規則委員會訂立。

8. 具體而言，《電視直播聯繫規則》擬稿載有條文，訂明有關規則的生效日期、當中用詞的釋義、根據《刑事訴訟程序條例》第 79I 條提出申請及反對有關申請的程序、法庭裁定這類申請可採用的方式及法庭可施加的條件、在證人藉電視直播聯繫方式提供證據時可向該證人提出文件的方式，以及延展或縮短期限的申請程序。關於《電視直播聯繫規則》擬稿的詳細條文，請委員參閱附件 A。

《高等法院修訂規則》

9. 目前，香港法院沒有權限為香港以外的法院或審裁處（“**提出請求的法院**”）提供協助，為在提出請求的法院所進行法律程序的事宜，命令在香港透過電視直播聯繫方式訊問證人。當有待實施條文實施後（更具體而言，指《條例》第 12 至 16 條），原訟法庭便可提供上述協助。為此，《高等法院規則》（第 4A 章）第 70 號命令的條文³須予以修訂，以便訂定提供上述協助的程序。

10. 為達到預定目的，《高等法院修訂規則》提出多項建議，其中包括新的第 4(4)條規則，訂明藉電視直播聯繫方式向提出請求的法院提供證據的證人訊問的方式，以及新的第 7 條規則，訂明在香港藉電視直播聯繫方式訊問證人完結後，擬備、核證及傳送紀錄的方式。關於《高等法院修訂規則》擬稿的詳細條文，請委員參閱附件 A。

諮詢

11. 當局曾就規則擬稿諮詢香港大律師公會（“**大律師公會**”）和香港律師會（“**律師會**”）。大律師公會在日期為 2009 年 12 月 19 日的

³ 第 70 號命令列明“為外地法院取得證據等”的詳細規則。

---- 函件(副本載於**附件 D**)中確認，對規則擬稿沒有進一步的意見⁴。
律師會則在 2010 年 2 月 12 日以書面通知我們，對規則擬稿不表贊同。律師會 2010 年 2 月 12 日的函件副本，以及我們在 2010
---- 年 8 月 19 日致律師會的覆函副本，載於**附件 E**。

12. 為解決與律師會的分歧，我們繼續與律師會刑法及訴訟程序委員會(“**刑法及訴訟程序委員會**”)的代表舉行了會議和通訊。
律師會在 2011 年 3 月 31 日提交的意見書副本，以及我們在 2011
---- 年 6 月 24 日的覆函副本，載於**附件 F**。

13. 從我們在 2010 年 8 月 19 日的函件(載於**附件 E**)及 2011 年 6 月 24 日的函件(載於**附件 F**)可見，我們關注到律師會大部分建議均超越《條例》的權限(特別是新加入的《刑事訴訟程序條例》第 IIIB 部)或須由法院因應每宗案件的情況處理，這些建議因而不獲接納。然而，因應刑法及訴訟程序委員會代表在會議上提出的要求，我們在 2011 年 6 月 24 日致律師會的函件(載於**附件 F**)中表示，關於根據《電視直播聯繫規則》申請使用電視直播聯繫，我們同意延展就該項申請提出反對的期限。這一點現已反映在《電視直播聯繫規則》擬稿(載於**附件 A**)第 8(1)(b)條規則。

14. 我們在 2011 年 6 月 24 日致律師會的函件(載於**附件 F**)中，告知律師會“我們快將着手就規則擬稿取得最終批准”，並要求律師會“在一個月內把[刑法及訴訟程序]委員會的任何其他意見通知我們。”我們其後在 2012 年 10 月 29 日向首席法官及高等法院規則委員會申請最終批准規則擬稿。

⁴ 在大律師公會作出確認後，當局對規則擬稿再作出若干修訂，特別是應律師會的要求(見下文第 13 段)，在《電視直播聯繫規則》中加入第 8(1)(b)條規則，就延展根據第 4 條規則提交申請的期限作出規定，以及其他在草擬和精簡方面的修訂。

15. 2014 年 1 月 28 日，司法機構政務長通知我們高等法院首席法官批准《電視直播聯繫規則》擬稿。司法機構政務長進一步建議“律政司在我們請首席法官及高等法院規則委員會……訂立相關規則前，先諮詢[司法及法律]事務委員會”。

未來路向

16. 本文件供委員備悉。如委員認為有需要，我們樂意向事務委員會簡介規則擬稿，並聽取委員的意見。按照我們現時的時間表，我們計劃盡快請首席法官及高等法院規則委員會訂立規則擬稿，以期在 2014 年內把規則提交立法會根據先訂立後審議程序進行審議。如在提交規則後，立法會成立小組委員會審議有關規則，我們也十分樂意與小組委員會討論有關的立法建議。

律政司

2014 年 6 月

《電視直播聯繫(在香港以外的證人)規則》

第 1 條

1

《電視直播聯繫(在香港以外的證人)規則》

(由高等法院首席法官根據《刑事訴訟程序條例》(第 221 章)第 79L 條訂立)

1. 生效日期

本規則自《2003 年證據(雜項修訂)條例》(2003 年第 23 號)第 17 條的實施日期起實施。

2. 釋義

在本規則中 —

法庭 (court) 包括區域法院及裁判官；

法院人員 (officer of the court) —

- (a) 就於高等法院進行的法律程序而言，指高等法院的司法常務官；
- (b) 就於區域法院進行的法律程序而言，指區域法院的司法常務官；或
- (c) 就於裁判官席前進行的法律程序而言，指裁判法院的書記長；

電視直播聯繫 (live television link) 指符合以下說明的系統：在該系統中，有兩個地方裝設有讓分處該兩個地方的人能夠同時互相看見和聽見對方的視聽設施，並以該等設施相聯繫。

3. 提出申請

- (1) 根據本條例第 79I 條提出的、要求准許證人在香港以外地方藉電視直播聯繫方式提供證據的申請，須藉向以下人士發出採用高等法院首席法官指明的格式的通知提出 —

- (a) 有關的法院人員；及

《電視直播聯繫(在香港以外的證人)規則》

第 3 條

2

- (b) 有關的法律程序的其他各方。

- (2) 如提出有關申請的目的，是讓證人為在裁判官席前就某控罪進行的初級偵訊提供證據，該申請須於以下日期之後 42 日內提出 —

- (a) 被告人根據《裁判官條例》(第 227 章)第 80C 條選擇或被當作根據該條選擇就該控罪作初級偵訊的聆訊的日期；或
- (b) 被告人根據《區域法院條例》(第 336 章)第 77A(5)條選擇就該控罪作初級偵訊的聆訊的日期。

- (3) 如提出有關申請的目的，是讓證人為在原訟法庭就某控罪進行的審訊提供證據，該申請須於以下日期之後 42 日內提出 —

- (a) (如就該控罪已在裁判官席前作初級偵訊的聆訊)根據《裁判官條例》(第 227 章)第 85(2)條就該控罪將被告人交付審訊的日期；

- (b) 如被告人沒有選擇就該控罪在裁判官席前作初級偵訊的聆訊，亦沒有被當作如此選擇 —

- (i) 根據《裁判官條例》(第 227 章)第 80C(4)條就該控罪將被告人交付審訊的日期；或

- (ii) 根據《區域法院條例》(第 336 章)第 77A 條就該控罪作出移交令將法律程序移交原訟法庭的日期；

- (c) (如該控罪的公訴書，是根據本條例第 24A(1)(b)條按某法官的指示或經其同意而提出的)該法官給予該指示或同意的日期；

- (d) (如針對被告人的法律程序，是依據一項根據《複雜商業罪行條例》(第 394 章)第 4 條發出的命令而移交原訟法庭的)發出該命令的日期；

- (c) (如被告人是依據一項根據本條例第 79F(5)條作出的命令而交付原訟法庭審訊的)作出該命令的日期。
- (4) 如提出有關申請的目的，是讓證人為在區域法院就某控罪進行的審訊提供證據，該申請須於以下日期之後 42 日內提出 —
 - (a) (如針對被告人的法律程序，是依據一項根據《裁判官條例》(第 227 章)第 88 條作出的命令而移交區域法院的)作出該命令的日期；
 - (b) (如針對被告人的法律程序，是依據一項根據本條例第 65F 條作出的命令而移交區域法院的)作出該命令的日期。
- (5) 如提出有關申請的目的，是讓證人為在裁判官席前就某控罪進行的審訊提供證據，該申請須於以下日期之後 42 日內提出 —
 - (a) (如律政司司長根據本條例第 10 條將案件發回裁判官)律政司司長將案件發回裁判官的日期；
 - (b) (如針對被告人的法律程序，是依據一項根據《區域法院條例》(第 336 章)第 77A 條作出的命令而移交裁判官席前的)作出該命令的日期；
 - (c) (如針對被告人的法律程序，是依據一項根據本條例第 65F 條作出的命令而移交裁判官席前的)作出該命令的日期；
 - (d) (如屬任何其他情況)有關案件被編定在裁判官席前進行審訊的日期。

4. 法律程序的各方可反對申請

獲發第 3(1)條所指的通知的一方可在該通知發出日期之後 14 日內，藉以下方式反對有關申請 —

- (a) 以書面將反對通知有關的法院人員及有關的法律程序的其他各方；及
- (b) 在反對通知內，述明反對理由。

5. 裁定

- (1) 如在第 3 條所指的申請提出後，沒有人在可就該申請提出反對的限期內，根據第 4 條將該項反對通知有關的法院人員，則法庭可不經聆訊而就該申請作出裁定。
- (2) 如法庭不經聆訊而就上述申請作出裁定，有關的法院人員須將裁定通知法律程序的各方。
- (3) 如法庭不經聆訊而批准上述申請，第(2)款所指的通知 —
 - (a) 須述明證人在提供證據時將會身處的國家或地區；
 - (b) (如知道的話)須述明證人在提供證據時將會身處的地方；
 - (c) 在以下情況下，須述明證人的姓名 —
 - (i) 證人是為控方提供證據(除在本條例第 65DA(3)條適用的情況外)；或
 - (ii) 證人是為被告人提供證據，而本條例第 65D 或 65DA 條或《區域法院條例》(第 336 章)第 75A 條規定作出有關披露；及
 - (d) 須述明法庭根據第 6 條施加的條件(如有的話)。
- (4) 如法庭決定就上述申請進行聆訊(不論因接獲反對或其他原因)，有關的法院人員須將聆訊的時間地點通知法律程序的各方。
- (5) 上述聆訊須公開進行，但法庭如認為基於司法公正的理由而有必要，則可命令聆訊完全或局部以非公開形式進行。

6. 法庭可施加條件

- (1) 法庭如批准第 3 條所指的申請，可就給予的准許施加條件。
- (2) 在不局限第(1)款的原則下，法庭可施加條件，規定證人須在符合以下說明的人在場的情況下，提供證據：能夠並願意在經宣誓的情況下，回答法庭就提供該證據的環境而提出的問題，包括關於在該證人提供該證據時在場的任何人的問題，以及可影響該證據的提供的任何事情的問題。

7. 向證人提出文件

- (1) 如在證人從香港以外地方藉電視直播聯繫方式提供證據時，需向該證人提出某份文件 —
 - (a) 如該文件是在香港的法庭之中，法庭可准許 —
 - (i) 藉任何方法，將該文件的副本傳送至該地方；及
 - (ii) 將如此傳送的副本向該證人提出；及
 - (b) 如該文件是在該地方，法庭可准許 —
 - (i) 將該文件向該證人提出；及
 - (ii) 藉任何方法，將該文件的副本傳送至在香港的法庭。
- (2) 如有任何文件或其副本按照第(1)款向證人提出，在相反證明成立之前，該文件的經傳送副本須推定為該文件的真實副本，並須獲接納為證據，而無需再加證明。

8. 延展期限

- (1) 法庭可 —
 - (a) 應法律程序的一方提出的申請，在第 3(2)、(3)、(4)或(5)條指明的 42 日限期屆滿之前或之後，延展該限期；或

- (b) 應獲發第 3(1)條所指的通知的一方提出的申請，在第 4 條指明的 14 日限期屆滿之前或之後，延展該限期。
- (2) 上述申請須 —
 - (a) 以書面方式提出；
 - (b) 指明該申請所據的理由；
 - (c) (如屬第(1)(b)款所指的申請)在第 3(1)條所指的通知發出日期之後 28 日內提出；及
 - (d) 發給 —
 - (i) 有關的法院人員；及
 - (ii) 有關的法律程序的其他各方。
- (3) 法庭可經聆訊而就上述申請作出裁定，亦可不經聆訊而作出裁定。
- (4) 如法庭不經聆訊而就上述申請作出裁定，有關的法院人員須將裁定通知法律程序的各方。
- (5) 如法庭決定就上述申請進行聆訊，有關的法院人員須將聆訊的時間地點通知法律程序的各方。
- (6) 上述聆訊須公開進行，但法庭如認為基於司法公正的理由而有必要，則可命令聆訊完全或局部以非公開形式進行。

9. 縮短期限

法庭如認為在某個案的情況下，縮短第 3(2)、(3)、(4)或(5)條指明的 42 日限期或第 4 條指明的 14 日限期屬公平合理，可應法律程序的一方提出的申請，縮短該限期。

高等法院首席法官

2014 年 月 日

註釋

根據《刑事訴訟程序條例》(第 221 章)第 IIIB 部，證人可在香港以外地方藉電視直播聯繫方式向法庭提供證據。本規則列出有關程序。

《2014 年高等法院規則(修訂)規則》

(由高等法院規則委員會根據《高等法院條例》(第 4 章)第 54 條訂立)

1. 生效日期

本規則自《2003 年證據(雜項修訂)條例》(2003 年第 23 號)第 13 條開始實施的日期起實施。

2. 修訂《高等法院規則》

《高等法院規則》(第 4 章, 附屬法例 A)現予修訂, 修訂方式列於第 3 至 8 條。

3. 修訂第 70 號命令標題(為外地法院取得證據等)

第 70 號命令, 標題 —

廢除

“為外地法院取得證據等”

代以

“為提出請求的法院取得證據”。

4. 修訂第 70 號命令第 3 條規則(在某些情況下由國際法律專員提出申請)

(1) 第 70 號命令, 第 3(a)條規則 —

廢除

“外地法院或審裁機構”

代以

“提出請求的法院”。

(2) 第 70 號命令, 第 3(b)條規則 —

廢除

“在外國的法院或審裁機構”

代以

“提出請求的法院”。

5. 修訂第 70 號命令第 4 條規則(進行訊問的人及訊問的方式)

(1) 第 70 號命令, 第 4(2)條規則, 在“訊問證人”之後 —
加入

“(由提出請求的法院藉電視直播聯繫方式進行者除外)”。

(2) 第 70 號命令, 第 4(2)條規則 —

廢除

“第 5 至 10 條及第 11(1)至(3)”

代以

“第 5、6、7、8、9、10 及 11(1)、(2)及(3)”。

(3) 第 70 號命令, 第 4(3)條規則, 在“訊問證人”之後 —
加入

“(由提出請求的法院藉電視直播聯繫方式進行者除外)”。

(4) 第 70 號命令, 在第 4(3)條規則之後 —

加入

“(4) 如訊問證人是由提出請求的法院藉電視直播聯繫方式進行的, 則除根據本命令就該訊問作出的任何命令所載的特別指示另有規定外, 第 39 號命令第 5、6、7、8、9、10、11(1)、(2)及(3)及 14 條規則在經必要的變通後適用。”。

6. 修訂第 70 號命令第 5 條規則(書面供詞的處理)

- (1) 第 70 號命令，第 5 條規則 —

廢除

在“訊問證人”之後而在“必須”之前的所有字句

代以

“(由提出請求的法院藉電視直播聯繫方式進行者除外)命令另有指示，否則如訊問是在某訊問員席前進行的，則該訊問員”。

- (2) 第 70 號命令，第 5(b)條規則 —

廢除

在“給”之後的所有字句

代以

“提出請求的法院。”。

7. 修訂第 70 號命令第 6 條規則(要求獲得特權)

- (1) 第 70 號命令，第 6(1)條規則，在“證人”之後 —

加入

“(藉電視直播聯繫方式向提出請求的法院提供證據的證人除外)”。

- (2) 第 70 號命令，第 6(3)(c)條規則 —

廢除

“有關的外地法院或審裁機構”

代以

“提出請求的法院”。

- (3) 第 70 號命令，第 6(3)(d)條規則 —

廢除

“有關的外地法院或審裁機構”

代以

“提出請求的法院”。

- (4) 第 70 號命令，第 6(3)(d)條規則 —

廢除

“送交該法院或審裁機構”

代以

“送交提出請求的法院”。

- (5) 第 70 號命令，第 6(3)(d)條規則 —

廢除

“該法院或審裁機構的裁定”

代以

“提出請求的法院的裁定”。

8. 加入第 70 號命令第 7 條規則

第 70 號命令，在第 6 條規則之後 —

加入

“7. 藉電視直播聯繫方式訊問證人(第 70 號命令第 7 條規則)

- (1) 如根據本命令作出的命令飭令由提出請求的法院藉電視直播聯繫方式訊問證人，而該訊問是在某人席前進行的，則該人須身處該證人出席該訊問的地方，並須在該訊問完結後 —

- (a) 擬備顯示以下資料的紀錄 —

- (i) (除非該命令另有指示)該證人的身分；

- (ii) 錄取有關證據的日期時間；
 - (iii) 錄取有關證據的地方；及
 - (iv) 曾否為該證人監督；
 - (b) 核證該紀錄是由該人擬備的；及
 - (c) 安排將如此核證的紀錄送交司法常務官。
- (2) 司法常務官在接獲根據第(1)(c)款送交的紀錄後 —
- (a) (如有關的請求書，是由政務司司長送交司法常務官的)須安排將該紀錄送交政務司司長；或
 - (b) (如有關的請求書，是由其他人按照一份民事訴訟程序公約送交司法常務官的)須安排將該紀錄送交該其他人。”。

於 2014 年 月 日訂立。

註釋

本規則修訂《高等法院規則》(第 4 章, 附屬法例 A)第 70 號命令, 以就由在香港以外國家或地區行使司法管轄權的法院或審裁機構藉電視直播聯繫方式錄取證據的程序訂定條文。本規則亦將對“外地法院或審裁機構”的提述及其他類似的提述修訂為“提出請求的法院”, 使之與《證據條例》(第 8 章)第 VIII 部的用語相符。

A880 2003 年第 23 號條例

《證據(雜項修訂)條例》

《2003 年證據(雜項修訂)條例》

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香港特別行政區

2003 年第 23 號條例



行政長官
董建華
2003 年 7 月 3 日

本條例旨在修訂《證據條例》、《刑事訴訟程序條例》及《刑事事宜相互法律協助條例》。

[2003 年 7 月 4 日]

由立法會制定。

1. 簡稱及生效日期

- (1) 本條例可引稱為《2003 年證據(雜項修訂)條例》。
- (2) 本條例第 II 部自律政司司長以憲報公告指定的日期起實施。

第 I 部

刑事法律程序中配偶的作證資格及可否予以強迫作證

《證據條例》

2. 加入條文

《證據條例》(第 8 章) 現予修訂，加入——

“65A. 刑事法律程序中免導致自己
或配偶入罪的特權

在刑事法律程序中，某人如回答任何問題或交出任何文件或物件則會傾向於使該人就某項罪行或就追討罰款或就沒收措施而被人向他提出法律程序，因而享有的拒絕回答該問題或拒絕交出該文件或物件的權利，包括如回答任何問題或交

出任何文件或物件則會傾向於使該人的丈夫或妻子被人向他提出任何該等法律程序，因而享有的拒絕回答該問題或拒絕交出該文件或物件的相同權利。”。

《刑事訴訟程序條例》

3. 刑事案件中被控告的人的作證資格

《刑事訴訟程序條例》(第 221 章) 第 54(1) 條現予修訂——

(a) 廢除在但書之前的所有字句而代以——

“(1) 每一名被控告 (不論是單獨被控告或是與任何其他一人一同被控告) 某罪行的人，均有資格在法律程序的每一階段作辯方的證人：”；

(b) 在但書中——

(i) 在 (b) 段中，廢除“，或被如此控告的人的妻子或丈夫 (視屬何情況而定) 沒有提供證據一事，”；

(ii) 廢除 (c) 及 (d) 段；

(iii) 在 (g) 段中，廢除“每一名”而代以“被控告並”。

4. 取代條文

第 57 條現予廢除，代以——

“57. 被控人的配偶或前配偶的作證資格 及可否予以強迫作證

(1) 被控人的丈夫或妻子有資格為被控人或同案被控人提供證據，而除第 (5) 款另有規定外，亦有資格為控方提供證據。

(2) 除第 (5) 款另有規定外，被控人的丈夫或妻子可予強迫為被控人提供證據。

(3) 除第 (5) 款另有規定外——

(a) 僅就被控人或同案被控人被控告的指明罪行而言，被控人的丈夫或妻子可予強迫為控方提供證據；或

(b) 僅就同案被控人被控告的指明罪行而言，被控人的丈夫或妻子可予強迫為同案被控人提供證據。

(4) 任何罪行如符合以下說明，即就第(3)款而言屬指明罪行——

- (a) 涉及襲擊、傷害或恐嚇傷害被控人的丈夫或妻子；
- (b) 涉及襲擊、傷害或恐嚇傷害家庭子女或導致家庭子女死亡，而該名子女——
 - (i) 在關鍵時間不足 16 歲或屬精神上無行為能力的人；或
 - (ii) 在有關證據被提供的時間屬精神上無行為能力的人；
- (c) 屬指稱就家庭子女而犯的性罪行，而該名子女——
 - (i) 在關鍵時間不足 16 歲或屬精神上無行為能力的人；或
 - (ii) 在有關證據被提供的時間屬精神上無行為能力的人；或
- (d) 由企圖、串謀、協助、教唆、慫恿、促致或煽惑犯(a)、(b)或(c)段所指的罪行所構成。

(5) 除第(6)款另有規定外，凡被控人與其丈夫或妻子一同受審，則任何一方配偶均沒有資格根據第(1)款為控方提供證據，亦不得根據第(2)或(3)款而屬可予強迫提供證據。

(6) 如任何一方配偶已不再可在有關審訊中被裁定犯任何罪行(不論是因認罪或因任何其他原因)，則第(5)款不適用於該配偶。

(7) 凡被控人的丈夫或妻子在根據第(2)或(3)款(視屬何情況而定)屬可予強迫為控方或被控人或同案被控人提供證據的情況下如此提供證據，則《證據條例》(第8章)第7條(丈夫及妻子的特權)及該條例第8(2)條(交合的證據)不適用於該名丈夫或妻子。

(8) 凡被控人的丈夫或妻子在根據第(3)款屬可予強迫為控方或同案被控人提供證據的情況下如此提供證據，則《證據條例》(第8章)第65A條(刑事法律程序中免導致自己或配偶入罪的特權)不適用於該名丈夫或妻子。

(9) 除第(10)款另有規定外，被控人的前夫或前妻有資格並可予強迫提供證據，猶如他或她從未與被控人結婚一樣。

(10) 被控人的前夫或前妻不可予以強迫就於其與被控人的婚姻期間發生的事宜為控方或同案被控人提供證據，但如該名前夫或前妻假若仍然與被控人有婚姻關係即會根據第(3)款屬可予強迫如此提供證據的話，則屬例外。

(11) 控方不得就被控人的丈夫或妻子沒有被傳召為被控人或同案被控人提供證據一事，提出任何問題或作出任何評論。

(12) 在本條中——

“同案被控人”(co-accused) 就被控人而言，指與被控人一同受審的人；

“性罪行”(sexual offence) 指《刑事罪行條例》(第 200 章) 第 VI 或 XII 部所訂的罪行；

“家庭子女”(child of the family) 指——

(a) 被控人的親生或領養子女，或被控人的丈夫或妻子的親生或領養子女；或

(b) 由被控人或被控人的丈夫或妻子代替其父母的地位的人；

“被控人”(accused) 指被控以某罪行的人；

“精神上無行為能力的人”(mentally incapacitated person) 指《精神健康條例》(第 136 章) 第 2(1) 條所指的患有精神紊亂的人或該條所指的屬弱智的人。

(13) 就第(3)款而言，法庭如覺得某名家庭子女在關鍵時間的年齡為某年齡，則該年齡須當作是或曾經是該名家庭子女當時的年齡。

57A. 申請豁免提供證據責任的權利

(1) 凡被控人的丈夫或妻子在根據第 57(3) 條屬可予強迫提供證據的情況下，被傳召為控方或同案被控人提供證據，則該名丈夫或妻子可在任何時間向法庭申請豁免，使他或她無須負上提供證據的責任。

(2) 凡被控人的丈夫或妻子根據第(1)款向法庭申請豁免，而法庭——

(a) 信納如該名丈夫或妻子為控方或同案被控人(視屬何情況而定)提供證據，即有相當程度的——

(i) 對該名丈夫或妻子與被控人的關係造成嚴重損害的風險；或

(ii) 對該名丈夫或妻子造成嚴重的情緒、心理或經濟方面的後果的風險；及

(b) 在顧及被控告的罪行的性質及嚴重性，以及該名丈夫或妻子所能夠提供的證據在審訊中的重要性之後，信納並沒有足夠理由讓該名丈夫或妻子承受該風險，

則法庭可豁免該名丈夫或妻子，使他或她無須負上提供證據的完全或部分責任。

(3) 凡法庭是由法官及陪審團組成的，根據第(1)款提出的豁免申請須在陪審團不在場的情況下由法官聆訊和裁定。

(4) 控方不得就被控人的丈夫或妻子曾根據本條申請豁免、獲得豁免或遭拒絕批予豁免的事實，提出任何問題或作出任何評論。

(5) 凡被控人的丈夫或妻子在根據第 57(3) 條屬可予強迫提供證據的情況下，被傳召為控方或同案被控人提供證據，則法庭必須信納該名丈夫或妻子已知悉其根據第(1)款申請豁免的權利。

(6) 在本條中，“被控人”(accused)及“同案被控人”(co-accused)兩詞語的涵義與第 57 條中該等詞語的涵義相同。”。

5. 適用範圍

第 58 條現予修訂——

(a) 廢除兩度出現的“57”而代以“57A”；

(b) 廢除句號而代以“，而在第 54 至 57A 條中，“法庭”(court)包括區域法院及裁判官。”。

6. 證據

(1) 第 83V(3) 條現予修訂，廢除在“人)”之後的所有字句而代以句號。

(2) 第 83V 條現予修訂，加入——

“(6) 凡上訴人或答辯人的丈夫或妻子根據第(1)(b)或(4)款須接受訊問(為有關的上訴人或答辯人提供證據除外)，該名丈夫或妻子可向上訴法庭申請豁免，使他或她無須如此接受訊問。

(7) 凡上訴人或答辯人的丈夫或妻子具有根據第(6)款向上訴法庭申請豁免的權利，則上訴法庭必須信納該名丈夫或妻子已知悉該權利。

(8) 凡上訴人或答辯人的丈夫或妻子根據第(6)款向上訴法庭申請豁免，則上訴法庭可行使法庭根據第 57A(2) 條可行使的相同權力，而該條經作出視乎情況所需的變通後適用。

(9) 凡上訴人或答辯人的丈夫或妻子根據第(1)(b)或(4)款接受訊問，則《證據條例》(第 8 章)第 7 條(丈夫及妻子的特權)及該條例第 8(2)條(交合的證據)不適用於該名丈夫或妻子。

(10) 凡上訴人或答辯人的丈夫或妻子根據第(1)(b)或(4)款接受訊問(為有關的上訴人或答辯人提供證據除外)，則《證據條例》(第 8 章)(刑事法律程序中免導致自己或配偶入罪的特權)第 65A 條不適用於該名丈夫或妻子。”。

7. 廢除附表 2

附表 2 現予廢除。

相應修訂

《誹謗條例》

8. 被控人可作證

《誹謗條例》(第 21 章)第 20 條現予廢除。

《婚姻訴訟條例》

9. 證據

《婚姻訴訟條例》(第 179 章)第 52(1)及(2)條現予廢除。

《盜竊罪條例》

10. 丈夫及妻子

《盜竊罪條例》(第 210 章) 第 31 條現予修訂——

- (a) 在第 (2) 款中，廢除在“一樣”之後的所有字句而代以句號；
- (b) 廢除第 (3) 款。

《裁判官條例》

11. 聆訊上訴的程序

《裁判官條例》(第 227 章) 第 118(1)(b) 條現予修訂，廢除“(a)、(b) 及 (c) 段”而代以“第 (1) 及 (6) 至 (10) 款”。

第 II 部

在刑事法律程序中使用電視直播聯繫

《證據條例》

12. 釋義

《證據條例》(第 8 章) 第 74 條現予修訂，加入——

““電視直播聯繫”(live television link) 指一個系統，在該系統中，有兩個地方裝設有讓分處該兩個地方的人能夠同時看見和聽見對方的視聽設施，並以該等設施相聯繫；”。

13. 香港法院實現協助
申請的權力

(1) 第 76(2)(a) 條現予修訂，廢除“口頭或書面方式”而代以“任何方式(包括藉電視直播聯繫方式)”。

(2) 第 76(3) 條現予修訂，廢除“(以口述或書面方式) 作出證供”而代以“提供證據”。

14. 證人特權

- (1) 第 77(1)(b) 條現予修訂，在“款”之前加入“及 (2A)”。
- (2) 第 77(2) 條現予修訂，在“除”之前加入“凡任何人正以任何方式(藉電視直播聯繫方式除外)提供證據，則”。
- (3) 第 77 條現予修訂，加入——
 - “(2A) 凡任何人藉電視直播聯繫方式提供證據，則除非——
 - (a) 所涉及的人就豁免提供證據所作的索請是如第 (2) 款所述般獲支持或接受；或
 - (b) 提出請求的法院就獲藉電視直播聯繫方式提交的事宜支持該索請，否則第 (1)(b) 款不適用。”。

15. 香港法院協助為海外法院的刑事法律程序 取得證據的權力

- 第 77B(1)(b) 條現予廢除，代以——
 - “(b) 除第 76(2)(a) 或 (b) 條所提述的事宜外，根據第 76 條作出的命令不得就任何其他事宜作出規定。”。

16. 為取得刑事法律程序中的證據而發出請求書

- (1) 第 77E(2)(a) 條現予修訂，在“須藉”之後加入“以任何方式(包括藉電視直播聯繫方式)”。
- (2) 第 77E 條現予修訂，加入——
 - “(6A) 在第 (2) 款中，“電視直播聯繫”(live television link) 的涵義與第 VIII 部中該詞的涵義相同。”。

《刑事訴訟程序條例》

17. 加入第 IIIB 部

- 《刑事訴訟程序條例》(第 221 章) 現予修訂，加入——

“第 IIIB 部

藉電視直播聯繫錄取在香港以外的證人的證據

79H. 釋義

在本部中，除文意另有所指外——

“法庭”(court)包括區域法院及裁判官；

“電視直播聯繫”(live television link)指一個系統，在該系統中，有兩個地方裝設有讓分處該兩個地方的人能夠同時看見和聽見對方的視聽設施，並以該等設施相聯繫。

**79I. 法庭可藉電視直播聯繫錄取在香港
以外的人的證據**

(1) 除第(2)款另有規定外，法庭可應任何刑事法律程序的一方的申請，准許某人(有關法律程序中的被告人除外)在法庭認為在有關情況下屬恰當的條件規限下，在香港以外地方藉電視直播聯繫方式向法庭提供證據。

(2) 如有以下情況，法庭不得根據第(1)款給予准許——

- (a) 有關的人在香港；
- (b) 有關證據能夠在更方便的情況下在香港提供；
- (c) 沒有可供使用的電視直播聯繫，亦不能在合理情況下安排電視直播聯繫以供使用；
- (d) 不能在合理情況下採取措施以確保該人在不受脅迫的情況下提供證據；或
- (e) 給予該准許並不利於司法公正。

**79J. 某人提供證據所在的地方
當作為法庭的一部分**

(1) 凡某人依據按第 79I 條給予的准許藉電視直播聯繫方式在法律程序中提供證據，該人提供證據所在的地方就與該等法律程序相關的所有目的而言，須當作為進行該等法律程序的香港法庭的一部分。

(2) 在不損害第 (1) 款的一般性的原則下，該款就在香港有效的關於證據、程序、藐視法庭罪及宣誓下作假證供的法律而言具有效力。

79K. 進行宗教式及非宗教式宣誓

根據本部藉電視直播聯繫方式提供證據的人如作出宗教式或非宗教式宣誓，可——

- (a) 藉電視直播聯繫方式，並以在切實可行的範圍內盡量與在香港法庭內監誓的方式接近的同樣方式；或
- (b) 在該人提供證據所在的地方，由獲法庭授權的人按法庭的指示代表法庭，

為該人監誓。

79L. 終審法院首席法官訂立規則 或作出指示

終審法院首席法官可就根據本部藉電視直播聯繫方式提供證據訂立規則或作出指示。”。

18. 證據

第 83V 條現予修訂，加入——

“(11) 凡一名兒童在就第 79B(2) 條所指明的罪行進行的法律程序中，須根據第 (1)(b) 款在上訴法庭席前接受訊問，則上訴法庭可行使法庭根據第 79B(2) 條可行使的相同權力。

(12) 凡一名精神上無行為能力的人在就第 79B(3) 條所指明的罪行進行的法律程序中，須根據第 (1)(b) 款在上訴法庭席前接受訊問，則上訴法庭可行使法庭根據第 79B(3) 條可行使的相同權力。

(13) 凡一名在恐懼中的證人在就任何罪行進行的法律程序中，須根據第 (1)(b) 款在上訴法庭席前接受訊問，則上訴法庭可行使法庭根據第 79B(4) 條可行使的相同權力。

(14) 凡一名在香港以外的人在就任何罪行進行的法律程序中，須根據第 (1)(b) 款在上訴法庭席前接受訊問，則上訴法庭可行使法庭根據第 79I 條可行使的相同權力。

(15) 第 79B(5) 條就第 (11)、(12) 或 (13) 款所提述的權力的行使適用，一如其就根據第 79B 條行使權力適用一樣。

(16) 第 79J 及 79K 條就第 (14) 款所提述的權力的行使適用，一如其就根據第 79I 條行使權力適用一樣。

(17) 在第 (11) 至 (13) 款中——

“在恐懼中的證人”(witness in fear) 指任何證人，而上訴法庭基於合理理由信納該證人如提供證據他即會對其本身或其家庭成員的安全感到憂慮；

“兒童”(child)——

(a) 就第 79B(2)(a) 條所指明的罪行的個案而言，指不足 17 歲的人；或

(b) 就第 79B(2)(b) 或 (c) 條所指明的罪行的個案而言，指不足 14 歲的人；

“精神上無行為能力的人”(mentally incapacitated person) 指《精神健康條例》(第 136 章) 第 2 條所指的患有精神紊亂或屬弱智的人。”。

《刑事事宜相互法律協助條例》

19. 由香港提出的錄取證供等的請求

(1) 《刑事事宜相互法律協助條例》(第 525 章) 第 9(1) 條現予修訂——

(a) 在 (a) 段中，廢除末處的“或”；

(b) 加入——

“(aa) 安排藉電視直播聯繫方式向在該地方的人錄取證供；或”。

(2) 第 9 條現予修訂，加入——

“(3) 在第 (1) 款中，“電視直播聯繫”(live television link) 指一個系統，在該系統中，有兩個地方裝設有讓分處該兩個地方的人能夠同時看見和聽見對方的視聽設施，並以該等設施相聯繫。”。

20. 向香港提出的錄取證供等的請求

(1) 第 10(1) 條現予廢除，代以——

“(1) 凡香港以外某地方的有關當局請求為該地方的刑事事宜的目的而——

- (a) 在香港錄取證供；
- (b) 藉電視直播聯繫方式向在香港的人錄取證供；或
- (c) 交出在香港的某物件(包括屬某類別物件的某物件)，

則律政司司長可以書面——

- (i) (凡(a)段適用)授權錄取證供及將該證供轉傳至該地方；
- (ii) (凡(b)段適用)授權藉電視直播聯繫方式向有關的人錄取證供；或
- (iii) (凡(c)段適用)授權交出該物件，及在符合第(14)款的規定下授權將該物件轉傳至該地方。”。

(2) 第 10(2) 條現予修訂——

(a) 在“第(1)款”之後加入“授權錄取證供或交出物件”；

(b) 在(a)段中——

- (i) 在“授權”之前加入“如屬根據第(1)(i)款”；
- (ii) 廢除“的每名證人就該事宜作證而錄取”而代以“就該事宜作證的每名證人錄取經宣誓或不”；
- (iii) 在第(ii)節中，廢除末處的“或”；

(c) 加入——

“(aa) 如屬根據第(1)(ii)款授權錄取證供，在錄取證供時裁判官須在場，而且該裁判官須——

- (i) 確定證人的身分；
- (ii) 在錄取證供完結後擬備紀錄，註明錄取該證供的日期及地點，以及曾否為證人監誓；
- (iii) 核證該等紀錄是由該裁判官擬備的；及
- (iv) 安排將如此核證的紀錄送交律政司司長；或”；

(d) 在(b)段中——

- (i) 在“授權”之前加入“如屬根據第(1)(iii)款”；
- (ii) 在“須”之後加入“核證該物件是向該裁判官交出的，並須”。

(3) 第 10 條現予修訂，加入——

“(2A) 裁判官只可在有關的香港以外地方的有關當局如此要求時，根據第(2)(a)款向證人錄取不經宣誓而作出的證供。”。

(4) 第 10(3) 條現予修訂——

(a) 在 (b) 段中，廢除末處的“或”；

(b) 在 (c) 段中，廢除句號而代以“；或”；

(c) 加入——

“(d) 就根據第(1)(ii)款錄取證供而言——

(i) 該法律程序所關乎的在香港以外的刑事事宜是一項檢控；

(ii) 有關地方的有關當局請求以非公開形式進行該法律程序；

及

(iii) 收取該證供所在的有關地方的法律程序將以非公開形式進行。”。

(5) 第 10 條現予修訂，加入——

“(15) 在本條中，“電視直播聯繫”(live television link)指一個系統，在該系統中，有兩個地方裝設有讓分處該兩個地方的人能夠同時看見和聽見對方的視聽設施，並以該等設施相聯繫。”。

21. 規例

第 33(i) 條現予修訂，廢除“在宣誓下”而代以“經宣誓或不經宣誓而作出”。

相應修訂

《刑事罪行條例》

22. 根據某些條例作出而屬虛假的不經宣誓的陳述

《刑事罪行條例》(第 200 章) 第 32A 條現予修訂，廢除在首次出現的“如”之後而在“時”之前的所有字句而代以“任何人依據《刑事事宜相互法律協助條例》(第 525 章) 第 10 條不經宣誓而作出證供，或根據《證據條例》(第 8 章) 第 76 條或經由《證據條例》(第 8 章) 第 77B 條引伸適用的該第 76 條所作出的命令的規定不經宣誓而作出證供，則該人如在如此作出證供”。

《裁判官條例》

23. 在聆訊中對證供的錄取

《裁判官條例》(第 227 章) 第 81 條現予修訂，加入——

“(4) 凡根據《刑事訴訟程序條例》(第 221 章) 第 IIIB 部藉電視直播聯繫方式向證人錄取證供——

(a) 而該證人藉電視直播聯繫方式在被控人面前宣誓並確認其供詞或證供屬準確，則第 (2) 款中要求該證人在被控人面前簽署該供詞或證供的規定須當作已獲遵從；及

(b) 而第 (3) 款適用，如被控人或其代表律師獲提供有關的文字紀錄後，該證人藉電視直播聯繫方式在被控人面前宣誓並確認有關的文字紀錄屬準確，則該款的 (b) 段須當作已獲遵從。

(5) 在第 (4) 款中，“電視直播聯繫”(live television link) 具有《刑事訴訟程序條例》(第 221 章) 第 79H 條給予該詞的涵義。”。

24. 聆訊上訴的程序

經本條例第 11 條修訂的第 118(1)(b) 條現予修訂，廢除“(10)”而代以“(17)”。

《刑事事宜相互法律協助規例》

25. 證人沒有回答問題等

《刑事事宜相互法律協助規例》(第 525 章，附屬法例 A) 第 5 條現予修訂——

(a) 在 (a) 段中，廢除在逗號之後的所有字句而代以“或拒絕按照作出有關請求的有關當局所在的香港以外地方的法律而採取任何具有類似效力的步驟；”；

(b) 加入——

“(aa) 無合法或合理辯解而在該裁判官要求他回答問題時拒絕回答；或”；

(c) 在第 (i) 段中，在“誓”之後加入“、採取該步驟”。

26. 修訂附表

附表現予修訂，在表格 3 中——

- (a) 廢除“時拒絕作出上述宣誓 * / 已宣誓”而代以“(或按照有關的香港以外地方的法律採取任何具有類似效力的步驟) 時拒絕如此行事 * /”；
- (b) 在“* / 回答”之前加入“或按照有關的香港以外地方的法律採取該步驟”。

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**《2006 年〈2003 年證據 (雜項修訂) 條例〉
(生效日期) 公告》**

現根據《2003 年證據 (雜項修訂) 條例》(2003 年第 23 號) 第 1(2) 條，指定 2006 年 3 月 3 日為該條例第 20、21、22、25 及 26 條開始實施的日期。

律政司司長
黃仁龍

2006 年 1 月 3 日

Peter Duncan S.C.

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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.

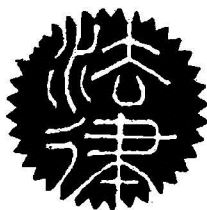
The Bar has no further comments on the proposals.

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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BY FAX (21809928) AND BY POST

12 February 2010

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Mr. Christopher Ng,
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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")**

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.35

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) *19/8.*

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	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.	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. 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"): "(d) measures to ensure that the person will be giving evidence without coercion cannot

Item	Law Society's Comments	Remarks
		reasonably be taken; or (e) it is not in the interests of justice to do so" 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.
2.	Practical problems	
2(1)	<u>Cost Implications</u> <u>Funding</u> There has been no information from the Administration of how the proposal may be funded. It will be an enormous burden on public funds.	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.
2(2)	<u>Sending of Authorized Personnel</u> The sending of personnel to another country will be just as expensive as bringing the witness to Hong Kong.	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

Item	Law Society's Comments	Remarks
		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 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 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.

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)	<u>Time Delays</u> <i>Longer Proceedings</i> 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.	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.
2(4)	<u>Time Difference</u> It may mean that the court will not be able to sit in "normal" hours. This will cause further delay.	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. 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

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.	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)". 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.
3(2)	<i>Scope of Vision</i>	Please refer to remarks on Item 1 above.

Item	Law Society's Comments	Remarks
	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.	
3(3)	<i>Documents</i> 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.	Please refer to Item 2 (1) above on costs. 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). 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.

Item	Law Society's Comments	Remarks
3(4)	<i>Recall of Witnesses</i> 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.	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 Please refer to Item 2 (1) above on costs.
4.	Legal Issues	
4(1)	<i>Place of Testimony</i> 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.	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

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)	<i>Enforcement of contempt or perjury</i> 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.	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".
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
	<i>Right to Cross-Examine</i> 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.	Bills of Rights Ordinance ('HKBOR') to have the overseas witness to testify against the accused via live TV link. 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

Item	Law Society's Comments	Remarks
		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

Item	Law Society's Comments	Remarks
		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'). In R(D) v Camberwell Green Youth Court [2005]1WLR 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

Item	Law Society's Comments	Remarks
		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. 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.
5(2)	<i>The Common Law Right of Confrontation</i>	Please see Item 5(1) above.

Item	Law Society's Comments	Remarks
	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[sic] accused.	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

Item	Law Society's Comments	Remarks
		on the ground that the requirements in (i) and (ii) above are satisfied. 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

Item	Law Society's Comments	Remarks
		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. 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.

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
		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 (b) “the “place” from which overseas evidence may be given is also not specifically defined in the UK and Australian legislation.”⁸ In addition, in response to a request by the

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

Item	Law Society's Comments	Remarks
		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: "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."

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	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. 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

Item	Law Society's Comments	Remarks
	documentary evidence. Scanning documentation and sending it by E-mail attachments is steadily replacing the faxing of documentation.	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". 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. 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.
(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.	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
		assuming the case will be set down for trial following a not guilty plea. 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. For the above reasons, it is not appropriate to impose the specific requirements presently proposed by the Law Society.
(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
	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.	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

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
		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). 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.

Item	Law Society's Comments	Remarks
(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.	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. 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.

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)

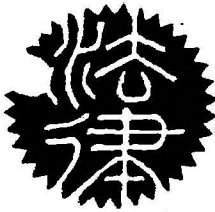
Implementation

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.	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. 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.
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	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, <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.	Please refer to Item 1 on page 1 of this Table above. Please refer to Item 6(2) above.



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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
3/F, Wing On House,
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 case².

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**