

LEISLATIVE COUNCIL BRIEF

EVIDENCE (AMENDMENT) BILL 1999

INTRODUCTION

At the meeting of the Executive Council on 15 June 1999, the Council ADVISED and the Chief Executive ORDERED that the Evidence (Amendment) Bill, at Annex A, should be introduced into the Legislative Council. The Bill is intended to abrogate the corroboration rules in sexual offences.

BACKGROUND AND ARGUMENT

Corroboration rules in respect of sexual offences

2. Corroboration is evidence which confirms the accuracy of other evidence in a material particular. In criminal cases, it must confirm or tend to confirm the guilt of the accused.

3. In certain categories of case, the judge is required specifically, as a matter of practice, to warn the jury of the dangers of convicting on the uncorroborated evidence of a single witness, and to explain what can (and what cannot) amount to corroborative evidence. These “corroboration rules” originally applied to evidence given by accomplices, children and victims of sexual offences. The application of the rules in respect of the evidence of an accomplice and of a child witness were abolished in Hong Kong in 1994 and 1995 respectively. The sole remaining category of case in which the rules still apply in Hong Kong is therefore in respect of sexual offences.

4. In addition to a general requirement in sexual offence cases that a warning must be given by the trial judge to the jury regarding corroboration, there are seven specific sexual offences under the Crimes Ordinance (Cap. 200) in respect of which prosecution evidence must be corroborated. These include procuring a person by threats or intimidation to do an unlawful sexual act, and procuring a person to become a prostitute. These are statutory requirements. In the absence of such corroborative evidence, the accused cannot properly be convicted of the offence alleged, even if the judge or jury is convinced of the accused’s

guilt.

Criticism of the Corroboration Rules

5. A “full” direction by the judge to a jury in cases where the corroboration rules apply has two main parts: acquainting the jury with the dangers of convicting on the uncorroborated evidence of the type of witness in question (the warning) and the explanation, where there is potentially corroborative evidence, of what can, and cannot corroborate.

6. The Law Commission in England observed that the warning was defective in that there was “no justification for automatically applying the same rules to evidence of all witnesses who fall within one of the categories to which the rules apply.”. The inflexibility of the rules meant that a direction was required “whatever the trial judge’s assessment of the reliability of the evidence or the assistance that the jury need to be given in assessing it”.

7. The warning was also criticised for its complexity. The rules as to what could and could not count as corroboration were difficult and complex and they were “the cause of many actual or alleged errors and of many appeals.”

8. The corroboration rules were abrogated in England in 1994 by section 32(1) of the Criminal Justice and Public Order Act 1994. The corroboration rules applying to sexual offences have also been abolished in New Zealand and some Australian states.

9. The Administration proposed the abolition of the corroboration rules in relation to sexual offences in 1996 by way of the Evidence (Amendment) Bill 1996, which also included provisions relating to mutual legal assistance in criminal matters. The Administration ultimately did not seek resumption of the Second Reading of the 1996 Bill because the matters relating to mutual legal assistance had been dealt with in the Mutual Legal Assistance in Criminal Matters Ordinance (Ord. No. 87 of 1998), and the proposal to abolish the corroboration rules was not pursued.

10. Since then, however, the proposal to abolish the corroboration rules has been given new impetus by an observation of the Court of Appeal in HKSAR v. Kwok Wai-chau (Cr. App. 502/97) on 5 June 1998 that –

“ We wish to add before leaving this matter that we are unable to understand why the requirement for corroboration of the evidence of a complainant in a sexual case has not been done away with in Hong Kong.

It was abrogated in 1994 in the United Kingdom. That this has not been done in Hong Kong is, in our view, inexplicable.”

11. It is proposed that both the common law practice of applying corroboration rules in sexual offence cases and the statutory requirements for corroborative evidence be abrogated.

The Bar Association’s view

12. When the abolition of the corroboration rules was first put forward in 1996, the Bar Association supported the abolition of the requirement for corroborative evidence but counter proposed that the Judge should be required to give a clear warning to the jury of the dangers of convicting on the complainant’s evidence alone, although they may do so if they are sure that the complainant is telling the truth.

13. The Bar Association proposed following an Australian formula (recommended by the Law Reform Commission of Australia but not adopted by any of the Australian states). That formula requires the judge to give a different type of warning, “unless there are good reasons for not doing so.”.

14. The Bar Association submitted that judicial experience has shown that certain general directions and warnings are necessary in every case and particular types of warnings are necessary in particular types of cases. Further accumulated judicial experience tends to crystallise into established rules of judicial practice, accepted rules of law and statutory provisions. The corroboration rules evolved from such judicial experience and should not be abandoned. The *raison d’être* of the rule is to avoid the danger of an innocent man being convicted.

The Administration’s view

15. In view of the criticisms made of the existing corroboration rules, most recently by the Court of Appeal, the Administration considers that there is a sound case for pursuing the abolition of the rules.

16. The Administration is of the view that the Bar Association’s concerns (namely, minimising the possibility of an innocent person being convicted) can be, and are already, met by the current law, even with the proposed abolition of the corroboration rule in sexual offence cases.

17. It is stressed that the abolition of the rules in Hong Kong would not prevent a judge from giving a warning about the reliability of the evidence of any witness in proceedings for a sexual offence if, on the particular facts of the case, he considered this necessary. The fundamental principle is that the trial judge has an overriding duty to ensure a fair trial for the accused, with a corresponding obligation to put the defence case fairly and adequately to the jury. The abolition of the rules would put victims (who are often the only available witness to the alleged criminal act) in sexual offence cases on a par with witnesses in any other case.

18. The Court of Appeal can and will correct the position where the judge has misdirected the jury (or failed to give a direction where one was required) concerning the credibility of a witness. This control applies as much in sexual offence cases as in any other kind of case.

19. Moreover, the form of warning proposed by the Bar Association would create new uncertainties or difficulties of its own. For example, there would almost certainly be many appeals over the question whether the judge had “good reasons” for not giving the warning.

THE BILL

20. Clause 2 of the Bill adds a new section 4B to the Evidence Ordinance to provide for the abolition of the rule requiring a corroboration warning to be given in respect of sexual offences, both in the case of a judge sitting with a jury, and in the case of a judge (including a magistrate) sitting alone. Clause 3 of the Bill repeals the requirement of corroboration in respect of certain specific sexual offences under the Crimes Ordinance.

PUBLIC CONSULTATION

21. A total of 40 organizations, including the Bar Association, the Law Society, and a number of non-governmental organizations were consulted. Responses from 23 organizations have been received. 20 indicated support, one (the Law Society) reserved its position, and 2 (the Bar Association and the Legal Aid Department) indicated opposition.

BASIC LAW IMPLICATIONS

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

HUMAN RIGHTS IMPLICATIONS

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

BINDING EFFECT OF THE LEGISLATION

24. The provisions of the Bill do not affect the current binding effect of the Ordinance to which the Bill relates.

FINANCIAL AND STAFFING IMPLICATIONS

25. There are no financial or staffing implications arising from the Bill.

LEGISLATIVE TIMETABLE

26. Subject to Members' approval of the introduction of the Bill into the Legislative Council, the legislative timetable will be:

Publication in the Gazette	25 June 1999
First Reading and Commencement Of Second Reading Debate	7 July 1999
Resumption of Second Reading debate, Committee stage and Third Reading	to be notified

PUBLICITY

27. A press release will be issued. A spokesman will be available to answer press enquiries which might arise from the proposal to abolish the corroboration rules.

ENQUIRIES

28. Any enquiry about this Brief can be directed to -

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ANNEX

Annex A - Evidence (Amendment) Bill 1999

A BILL

To

Amend the Evidence Ordinance.

Enacted by the Legislative Council.

1. Short title

This Ordinance may be cited as the Evidence (Amendment) Ordinance 1999.

2. Section added

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

"4B. Abolition of corroboration rule in respect of sexual offences

(1) Any requirement whereby at a trial by and before a judge and jury it is obligatory for the judge to give the jury a warning about convicting the accused of an offence under Part VI or XII of the Crimes Ordinance (Cap. 200) on the uncorroborated evidence of a person merely because that person is the person in respect of whom that offence is alleged to have been committed is hereby abrogated.

(2) Any requirement that is applicable at a trial by a judge or magistrate and corresponds to the requirement mentioned in subsection (1) is hereby abrogated.

(3) This section shall not apply to -

(a) any trial; or

(b) any committal proceedings within the meaning of section 71A of the Magistrates Ordinance (Cap. 227),

that commenced before the commencement of this section."

Consequential Amendments

Crimes Ordinance

3. Sections repealed

Sections 119(2), 120(3), 121(2), 130(2), 131(2), 132(2) and 133(3) of the Crimes Ordinance (Cap. 200) are repealed.

Explanatory Memorandum

The object of this Bill is to -

- (a) amend the Evidence Ordinance (Cap. 8) to remove the requirement that a jury must be given a warning about the danger of convicting an accused charged with any sexual offence (including incest) on the uncorroborated evidence of the person in respect of whom that offence is alleged to have been committed (clause 2); and
- (b) consequentially repeal certain provisions of the Crimes Ordinance (Cap. 200) which, in the case of a sexual offence, prohibit the conviction of the accused on the uncorroborated evidence of one witness only (clause 3).