# 立法會
# *Legislative Council*

LC Paper No. CB(2)2532/99-00
(These minutes have been
seen by the Administration
and cleared with the Chairman)

Ref : CB2/BC/32/98

**Bills Committee on Evidence (Amendment) Bill 1999**

**Minutes of the third meeting**
**held on Friday, 19 May 2000 at 4:00 pm**
**in Conference Room A of the Legislative Council Building**

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| **Members Present** | : | Hon Albert HO Chun-yan (Chairman)<br>Hon Cyd HO Sau-lan<br>Hon CHAN Yuen-han<br>Hon Jasper TSANG Yok-sing, JP<br>Hon Ambrose LAU Hon-chuen, JP |
| **Members Absent** | : | Hon Margaret NG<br>Hon Christine LOH<br>Hon CHOY So-yuk |
| **Member Attending** | : | Hon Martin LEE Chu-ming, SC, JP |
| **Public Officers Attending** | : | Mr Stephen WONG<br>Deputy Solicitor General<br><br>Mr Darryl SAW, SC<br>Deputy Director of Public Prosecutions<br><br>Mr Michael SCOTT<br>Senior Assistant Solicitor General<br><br>Mr Geoffrey FOX<br>Senior Assistant Law Draftsman |

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| | | Ms Carmen CHU<br>Senior Government Counsel |
| | | Miss Agnes CHEUNG<br>Senior Government Counsel |
| **Deputations by Invitation** | : | Hong Kong Bar Association |
| | | Mr Alan HOO, SC |
| | | Mr Graham HARRIS |
| | | Mr Stephen LEE |
| | | Association Concerning Sexual Violence Against Women |
| | | Dr Andy CHIU |
| | | Ms Yonnie HO |
| | | Hong Kong Council of Social Service |
| | | Mr Cliff CHOI Kim-wah<br>Secretary, Committee on Women Service |
| | | Miss Vera LAM<br>Member, Committee on Women Service |
| | | Equal Opportunities Commission |
| | | Ms Alexandra PAPADOPOULOS<br>Legal Adviser |
| | | Dr Priscilla CHUNG<br>Director (Gender) |
| **Clerk in Attendance** | : | Ms Doris CHAN<br>Chief Assistant Secretary (2) 4 |
| **Staff in Attendance** | : | Miss Connie FUNG<br>Assistant Legal Adviser 3 |

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Ms Joanne MAK
Senior Assistant Secretary (2) 4

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**I. Meeting with deputations and the Administration**
[LC Paper Nos. CB(2)1689/99-00(01)-(03), CB(2)1701/99-00(01), CB(2)1784/99-00(01), CB(2)1851/99-00(01) and CB(2)2046/99-00(01)]

The Chairman welcomed the representatives of the Hong Kong Bar Association (the Bar), the Association Concerning Sexual Violence Against Women, the Hong Kong Council of Social Service (HKCSS) and the Equal Opportunities Commission (EOC) to the meeting and invited them to present their views.

2. Mr Alan HOO of the Bar referred to the Administration's paper compiled in response to the Bar's submission, and made the following points -

(a) It was incorrect for the Administration to describe the position of the Bar as one basically in support for a set of evidential rules which were discriminatory against women. The Administration had distorted the Bar's submission.

(b) The comments made by Salmon L.J. in *Henry and Manning* (1969) 53 Cr. App. R 150, "that in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone", were made by the judge in respect of that case only. It should be noted that Salmon L.J. did not mean that it was dangerous to convict based on the evidence of women in general but of the woman in that case.

(c) The Bar's position was that the corroboration rules had nothing to do with the sex of the complainant.

3. Mr HOO pointed out that the corroboration rules were extremely simple rules. It had also been an established common law practice that the jury should be warned of the danger of convicting without corroborated evidence in all sexual offences, irrespective of the *sex* or *age* of the complainant. He pointed out that as most sexual offences took place in private and very often it was not a situation which was susceptible to independent observation, there was normally no eye witness. He also invited members' attention to the fact that a sexual offence complaint was easy to make but difficult to refute. In view of the special nature of sexual offences, and the fact that a sexual offence was a very serious allegation, the Bar was of the view that the corroboration rules should not be abrogated in respect of sexual offences. He said that the rules had nothing to do with gender discrimination since the victims in sexual offences could also be male.

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4. Mr HOO further quoted from the case of *HKSAR v Lee Kam Wing* [1999] to illustrate the judicial attitude towards the corroboration rules. In this case, it was a non-jury trial and the judge did not indicate in the reasons for verdict that he had reminded himself or was mindful of the corroboration warning. Mr HOO quoted that in this case the Counsel for the prosecution reiterated that the main reason for exercising caution before convicting an accused of a sexual offence upon the uncorroborated evidence of the complainant was that allegations of such nature were usually easy to make but difficult to refute. Moreover, in many cases the evidence of the victims of sexual offences was susceptible to fabrication. Hence, in the case of a jury trial, the judge should warn the jury of the danger of convicting without corroborative evidence and if it was a trial without a jury, the judge should warn himself of the danger.

5. Mr HOO pointed out that the other argument of the Administration was relating to the form and the content of the corroboration warning, which was criticized to be inflexible and complex. It was also criticized to produce anomalies and was unable to protect the accused. Mr HOO considered that even if these arguments were sustainable, they justified only improvement to be made to the corroboration rules rather than abolition.

6. Mr HOO referred to an appeal case in England (*John Joseph O'Reilly*), and quoted that there was not any particular form of words or incantation to be used in the warning given to the jury. What was required was that "there should be a solemn warning given to the jury, in terms which a jury can understand, to safeguard the accused."

7. Mr HOO then referred to another appeal case in England (*Dennis Gammon*), and quoted that in a sexual offence, corroboration was always looked for, whatever the age of the complainant. It was always the duty of the tribunal in offences *of this nature* to invite the jury to look for corroboration and to warn them that they should be careful not to convict in the absence of corroboration unless the evidence completely satisfied them of the guilt of the accused. Mr HOO said that the quoted remarks pointed to the fact that it was the peculiar nature of sexual offences, not the gender of the complainants, that had called for the corroboration rules.

8. Mr HOO also pointed out that failure to give a warning was not, as the Administration suggested, fatal to a conviction. A conviction could still stand even if there was a misdirection in law as provided by the proviso in section 83(1) of the Criminal Procedure Ordinance (Cap.221).

9. Mr HOO informed members that he had, on behalf of the Bar, requested the Administration to provide the follow information to the Bills Committee -

(a) the statistics concerning the conviction rate of sexual offences in the magistrates' court, District Court and High Court;

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(b) the number of cases on appeal in respect of sexual offence conviction, and the number of cases that appeal had been allowed simply due to jury's confusion with judges' direction relating to corroboration; and

(c) the rationale of the Administration in singling out, historically, the seven offences under the Crimes Ordinance (Cap.200) which required corroboration as a matter of law.

Mr HOO supplemented that the Bar's position was that if the rationale no longer subsisted today, the Bar would support the abolition of the statutory requirement.

10. Mr HOO further invited members' attention to the paper prepared by the Administration [attachment A to LC Paper No. CB(2)2054/99-00(01)] giving a summary of the developments in respect of the corroboration rules in other common law jurisdictions, which had shown that not all of them had abolished the corroboration rules. He also referred to a newspaper report in the Telegraph of 8 April 2000 on a sexual offence case in England, where the corroboration rules had been abolished. In the case reported, there was a false allegation of rape made by a woman in 1986 but the accused had been convicted and jailed for 15 years. Mr HOO quoted that judges of the Court of Appeal had afterwards said that the case provided a reminder that an allegation of rape was not always true and that the accused was "not necessarily guilty". The case should "serve to ensure that proper safeguards against the wrongful conviction of innocent individuals are preserved".

11. In conclusion, Mr HOO said that the Bar was not suggesting that the status quo should remain unchanged. It took the view that if there was a problem with the rules, improvement could be made, such as by simplifying the warning or making it discretionary. He also reminded members of the unique situation in Hong Kong, which was the only jurisdiction in the common law world that the people had no right to jury trial. Moreover, in Hong Kong if one was convicted by a magistrate, one's right of appeal was not by way of a re-hearing. He further suggested that if the Administration felt that the corroboration rules were working towards injustice, it should refer the proposal for the abolition of the warning to the Law Reform Commission (LRC) for deliberations and he noted that the Law Society of Hong Kong had suggested the same. In addition, he said that members of the Bar Council had also discussed the issue with the Fight Crime Committees in Tuen Mun and the North District, which had also expressed support for referring the matter to LRC.

12. Dr Andy CHIU of the Association Concerning Sexual Violence Against Women said the Association was in support of the Bill and he made the following points -

(a) If the corroboration rules could really ensure the quality of evidence, the rules should apply in all kinds of offences instead of only in sexual offences.

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(b) The proposed abrogation of the rules would not affect the interests of defendants and leave them inadequately protected as trial judges were able to assess the credibility of the evidence given in a case by a full evaluation of the merits of the case.

(c) Statistical data had shown that only 5 out of 230 cases of alleged sexual offences had been reported to the police for investigation. It was believed that the main reason for victims not reporting sexual offences perpetrated against them was that they were worried that they could not produce adequate evidence. The Association believed that abolition of the rules would encourage more victims of sexual offences to report the crime.

(d) It was not convincing that the nature of sexual offences justified that corroboration rules should apply particularly in these offences as seen from the fact that the rules had already been abolished in many other jurisdictions.

(e) The corroboration rules were discriminatory not only against women but also victims of sexual offences. The basis of the rules was a belief that the evidence of victims of sexual offences was in general susceptible to fabrication and required to be corroborated. It was also worth nothing that the majority of the victims of sexual offences were female.

13. Ms Alexandra PAPADOPOULOS of the Equal Opportunities Commission (EOC) said that although the corroboration rules were not unlawful under the Sex Discrimination Ordinance (Cap.480), they were sex based and discriminatory, in that there was an assumption that women could not be relied on to tell the truth in sexual offences. She said EOC considered that the effect of this was not only deterring women from reporting sexual offences but also denying women the same right as men in other types of cases of which the victims were predominantly male. She said that the rules also reinforced a very old-fashioned stereotype i.e. women's evidence was inherently unreliable and women could be malicious, vindictive against men and so on.

14. Ms PAPADOPOULOS disagreed that allegations of sexual offences were easy to make. She said that there were statistics showing that from March 1997 to December 1998, there were 230 cases of rape reported to a particular non-governmental organization, of which only five had been brought to the police.

15. Ms PAPADOPOULOS criticized the rules for being gender-based. She said that although the rules applied to sexual offences irrespective of the sex of the victims involved, the rules had affected female more than male since the majority of these victims were female. EOC was therefore of the view that the rules had a disproportionate impact on one sex. Ms PAPADOPOULOS explained that the only reason that the rules were not unlawful under Cap.480 was that they were a rule

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of law. However, EOC was of the view that it was time for Hong Kong to abolish the rules in line with other common law jurisdictions.

16. Miss Vera LAM of Hong Kong Council of Social Service (HKCSS) said that the Council was supportive of the Bill. She considered that the Bar's argument that the rules were not sex-based because they applied in sexual offences involving male victims as well had all the more supported that the rules should be abolished. It was because this had pointed to the fact that the rules were affecting not just the female but also the male in our society and the justifications for their retention should therefore be critically examined.

17. Miss LAM said that since the victims of sexual offences were predominantly female, it was arguable that the rules were discriminatory against women. She believed that if Hong Kong decided to retain the rules, it would be criticized as failing to comply with the spirit of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), of which Hong Kong was a signatory. Furthermore, she shared the view that the rules would deter women from reporting sexual offences perpetrated against them and she reminded the Administration that rape had a substantial adverse effect on the society.

18. In response to the point made by the Bar that allegations of sexual offences were easy to make but difficult to refute, Miss LAM pointed out that it should also be noted that allegations of sexual offences were difficult to be corroborated. She said since many other kinds of offences (such as graft and bribery) also took place in private, she queried why corroboration rules did not apply in those offences.

19. Miss LAM said that HKCSS supported the abolition of the corroboration rules and suggested that with the abolition, there should be enhanced training for judges to caution them of the risks involved in convicting without corroborated evidence and help them understand more deeply the feeling of victims of sexual offences.

20. In response to the Chairman, Ms Alexandra PAPADOPOULOS said that she would provide some old English cases where judges had made comments that the evidence given by women in allegations of sexual offences was not reliable.

21. The Chairman asked Mr Alan HOO whether the Bar accepted that historically the court was sceptical about women victims. Mr HOO replied in the negative and stressed that comments cast in each judgment referred to the context of the facts of each case. He reiterated that it was the special nature of sexual offences rather than the gender of the complainants of the offences that gave rise to the need for the corroboration rules.

22. Mr Martin LEE Chu-ming questioned that in the absence of corroborative evidence, it might become difficult to prove whether in a sexual offence (e.g. rape), that sexual intercourse had taken place without the victim's consent. He pointed out that in some cases, the alleged victim only withdrew her consent at a later stage

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and that had rendered the accused potentially liable to offence. That withdrawal of consent, however, was entirely a matter between the two persons involved and it was very difficult to judge afterwards who was telling the truth. Mr LEE also recalled that one very important principle in the spirit of the common law was that it was better to let 99 guilty persons go free rather than wrongly convict one innocent person.

23. Mr LEE further said that if the statutory requirement was repealed and the police were no longer required to collect DNA or other evidence for corroboration, the trial of an allegation of sexual offence might easily result in an acquittal. It was because if the confession statement was challenged at the trial and excluded, what was left was only the evidence of the complainant without corroboration. He added that with scientific advancement, it had now become less difficult to collect corroborative evidence which was more readily available, and fibre of clothes, hair, DNA and so on were examples of it. On the proposal of abolishing the corroboration warning, Mr LEE pointed out that since the Hong Kong jury were required to be matriculated, they should be able to follow any direction given by the trial judge.

24. Dr Andy CHIU then made the following points in response to Mr LEE's views -

(a) What was at issue was not whether it was easy to collect corroborative evidence but why the rules applied only in sexual offences and whether sexual discrimination was inherent in the rules.

(b) A professional judge should be entrusted to assess the credibility of the evidence given based on the merits of the case after the corroboration rules were abolished.

25. Miss Cyd HO Sau-lan wanted to know whether the deputations were aware of the consequential amendments proposed in the Bill. In response, representatives of HKCSS, EOC and the Association Concerning Sexual Violence Against Women confirmed their awareness. All of them expressed support for abolishing the corroboration warning as well as the statutory requirement in respect of the seven offences as proposed in the Bill.

26. Mr Jasper TSANG Yok-sing asked if there was documentation supporting that the corroboration rules evolved on the basis of a perception that the evidence of female victims in sexual offences was unreliable. In response, Ms Alexandra PAPADOPOULOS reiterated that there were such comments made by judges in very old cases about the inherent unreliability of women giving evidence. She said that they had formed the background to the introduction of the rules in these types of offences. However, she could not say for sure how far it was accepted that the corroboration rules had developed due to scepticism about the truthfulness of women's evidence, but she noted that this was widely accepted especially by women commentators.

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27. At the Chairman's invitation to respond, Deputy Solicitor General (DSG) said that the inherent discriminatory nature of the corroboration rules had already been clearly explained by the deputations and he did not want to further elaborate on this point. He concurred that the abolition of the rules would help eliminate the indirect discrimination constituted by the rules against women and victims of sexual offence and encourage the victims to report such crimes.

28. DSG considered that the rules could not resolve problems arising from the fact that complaints of sexual offences were easy to make but difficult to refute. On the other hand, he invited members to note the problems arising from the rules: that in those statutory offences which required corroboration, where a conviction had been handed down in the absence of corroboration, it would be overturned. In those common law offences which required a corroboration warning, the absence of such was a ground of appeal as also illustrated by the result of the case of *Lee Kam-wing* referred to by Mr HOO earlier. In view of these problems, the Administration considered that there was no need to impose this straitjacket of the corroboration rules on sexual offences.

29. DSG further said that as the corroboration rules for accomplices and children had already been abrogated in 1994 and 1995 respectively, there was no reason for singling out the evidence of complainants in sexual offences for a different treatment. Moreover, the Administration was of the view that a professional judge should be able to decide, based on the quality and consistency of the evidence given in a case, who was to be believed, as in the case of trial of other kinds of offences. He pointed out that as a general principle, it was the quality, rather than the quantity, of evidence which should count in a criminal trial. He further said that in an alleged rape case where the defendant admitted that intercourse took place but alleged that it was consensual, very often corroboration could not provide independent support for the victim's evidence that the intercourse taken place was non-consensual.

30. DSG said that the Administration did not accept the Bar's suggestion of adopting a simplified corroboration warning and took the view that if the warning was not desirable, it should be dispensed with altogether. He also clarified 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 he considered this necessary.

31. DSG said the Administration considered that it would only unnecessarily defer the abolition of the rules by referring the proposal to LRC. He pointed out that preparation for introducing amendments to the Evidence Ordinance for abolition of corroboration in respect of sexual offences commenced in 1995 and there had already been a lot of discussions and studies on the subject. He said the Administration believed that the Bills Committee should be able to make a decision in the light of abundant information papers made available by the Administration. He was confident that discussion of the proposal by LRC first would not make any differences to the outcome.

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32. In response to the submission made by the Law Society of Hong Kong, DSG disagreed that the "present legislative proposals did not provide sufficient safeguards to protect defendants' interests". He pointed out that with the abolition of the rules, the general obligations of a trial judge and the general rule that the defence must be put fairly and adequately would remain the same. In addition, there was the control exercised by the Court of Appeal.

33. DSG further said that as a signatory of CEDAW, the Hong Kong Special Administrative Region Government was obliged to take every step to eliminate discrimination. He said that in his discussion with members of the United Nations Committee on the Elimination of Discrimination against Women, they had expressed support for the abolition of the corroboration rules in Hong Kong and so did members of the United Nations Committee on Torture.

34. Deputy Director of Public Prosecutions (DD(PP)) pointed out that the application of the corroboration rules in respect of sexual offences, in respect of the evidence of an accomplice and of a child witness evolved in the common law. Since it had been accepted that the accomplices and children were no longer "suspect witnesses" and the rules no longer applied in respect of their evidence, there was no reason for women to be treated differently. He said that it was clear that the rules and the basis for the rules had long since passed its use-by-date. They had evolved in the early and the latter part of the 19$^{th}$ century and the society had progressed significantly since this rule evolved.

35. DD(PP) further said that the rules were not only gender-biased but were also complicated and difficult to administer. He noted that in Australia, New Zealand, Canada and the United Kingdom (UK), they had satisfied themselves that the rationale for the rules was no longer justifiable. He then invited members to note that in these jurisdictions where the rules had been abrogated, there had not been any upsurge in the level of conviction or any criticisms of inadequate protection being rendered to the accused after the abolition.

36. DD(PP) said it was not acceptable to say that there was no need to remove the rules because the Court of Appeal had the ability to apply the proviso in section 83(1) of Cap.221. He argued that this was only putting the cart before the horse because if corroboration warning was not needed, it should be dispensed with altogether to avoid causing unnecessary confusion in the court proceedings and save going to the Court of Appeal.

37. DD(PP) pointed out that the rules created a paradox and gave the example of a case in which a victim of a rape was also robbed at the same time. In this case, the victim's evidence of the rape required corroboration while her evidence of the robbery did not, despite the fact that the two allegations involved the same surrounding circumstances, the same victim and defendant.

38. DD(PP) said the Administration did not accept that "there was a

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disproportionately high percentage of conviction in rape cases in Hong Kong" as stated by the Bar in its submission. He also queried that if there were, whether this implied that the jury in Hong Kong was more likely to convict defendants of rape offences, notwithstanding the application of corroboration rules in these offences.

39. In response to the question raised by Mr Alan HOO as to the reason for singling out the seven offences under Cap. 200 which required corroboration as a matter of law, DD(PP) said that the seven offences were established with no justifiable basis whatsoever for the distinction made. They were inherited in 1956. The legislation was basically lifted in its present form from the then UK legislation.

40. Mr Alan HOO pointed out that corroboration rules applied in sexual offences not because women were suspect witnesses but the nature of the offences involved. He said that sexual activity in itself was legitimate and lawful. What made it an illegal act was the lack of consent and therefore we needed to look for supporting evidence to prove whether consent had been given by the alleged victim. Corroboration rules were no more than describing the difference between sexual offences and all the other criminal offences. He considered that it was never a personal attack on the victims of sexual offences when their evidence was required to be corroborated. He explained that this was needed only due to the nature of the offences. Addressing a question asked by Dr Andy CHIU earlier, Mr HOO said that buggery was different because in Hong Kong buggery as an activity in itself was illegal and thus corroboration was not required for buggery.

41. However, Dr Andy CHIU pointed out that sexual offences involved not only sex activity but also violence. He referred to *HKSAR v Kwok Kau Kan* [2000] 1 HK 789 where no corroboration warning had been expressly given by the trial judge. Nevertheless, the conviction had not been thus overturned because the trial judge had demonstrated that she had exercised great care in examining the evidence of the case. Dr Priscilla CHUNG of EOC said that it was internationally accepted that rape was interpreted as violence which was expressed through sex. She said that rape was equivalent to an act of violence and the two should not be separated. However, Mr Martin LEE Chu-ming said that as a matter of law, the definition of "rape" was intercourse without consent but he agreed that in most rape offences, violence was involved.

42. Mr Martin LEE Chu-ming asked if it would be in breach of CEDAW if the statutory requirement of corroboration in respect of the seven offences was not repealed. DSG replied that it was difficult to say whether it was against our treaty obligation not to abolish the rules but he noted that the United Nations Committee on the Elimination of Discrimination against Women welcomed the abolition. Ms Alexandra PAPADOPOULOS said that article 15 of CEDAW provided that "State parties shall accord to women equality with men before the law". She reiterated that although the rules were not unlawful under the Sex Discrimination Ordinance, they were against the spirit of CEDAW. She also informed members that there would be a hearing by the said United Nations Committee in six months' time and EOC and other NGOs would attend it. If the rules were not abrogated by then, she

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believed that Hong Kong would be regarded as not acting within the spirit of CEDAW and in breach of its international obligations.

43. Miss Cyd HO Sau-lan expressed support for the suggestion made by HKCSS that more training should be provided to the legal profession and the judges to enable them to look at sexual offences from the female's perspective.

## II. Date of next meeting

44. Members agreed to meet again on 30 May 2000 at 8:30 am.

45. There being no other business, the meeting ended at 6:15 pm.

Legislative Council Secretariat
4 August 2000