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**Report of the Bills Committee on
Evidence (Amendment) Bill 1999**

Purpose

This paper reports on the deliberations of the Bill Committee on the Evidence (Amendment) Bill 1999.

Background

2. As a general rule, evidence given against a defendant does not need to be corroborated. An accused can generally be convicted on the uncorroborated evidence of a single credible witness, provided that the judge or jury is satisfied, beyond reasonable doubt, with the accused's guilt. However, in certain categories of cases, 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. The corroboration rules were formulated in the interests of the accused, with the aim of avoiding wrongful convictions in three types of cases, namely, the evidence of accomplices, the evidence of children and the evidence of the complainants in sexual offences. The application of the rules in respect of the evidence of accomplices and children in Hong Kong were abolished in 1994 and 1995 respectively. The sole remaining category of cases in which the rules still apply in Hong Kong is therefore in respect of sexual offences.

3. 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 before an accused can be convicted of the offences concerned. A list of these offences is in **Appendix I**.

4. The Administration proposed the abolition of the corroboration rules in relation to sexual offences in 1996 by way of the Evidence (Amendment) Bill 1996 (the 1996 Bill) which was principally concerned with the gathering of evidence for the purposes of mutual legal assistance in criminal matters. The matters relating to mutual legal assistance were eventually incorporated in the Mutual Legal Assistance in Criminal Matters Ordinance and the Second Reading debate of the 1996 Bill was not resumed.

The Bill

5. The Bill seeks to -

- (a) amend the Evidence Ordinance (Cap. 8) to abolish the common law 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; and
- (b) abolish the statutory requirements in relation to the seven sexual offences under the Crimes Ordinance in respect of which prosecution evidence must be corroborated before an accused can be convicted.

The Bills Committee

6. At the House Committee meeting on 9 July 1999, Members agreed that a Bills Committee should be formed to study the Bill. The Bills Committee first met on 25 March 2000 and Hon Albert HO was elected Chairman. The membership list of the Bills Committee is in **Appendix II**.

7. The Bills Committee has held four meetings. It has met representatives of the Hong Kong Bar Association (the Bar), the Association Concerning Sexual Violence Against Women, the Equal Opportunities Commission (EOC) and the Hong Kong Council of Social Service at the third meeting. It has also considered the views expressed in submissions from the Law Society of Hong Kong (Law Society), the Hong Kong Human Rights Monitor and the Hong Kong Federation of Women.

Deliberations of the Bills Committee

8. The main deliberations of the Bills Committee are summarized in the following paragraphs.

Views of the Bar and the Law Society

The Bar's position

9. The Bar is of the view that the corroboration rules in respect of sexual offences should not be abrogated. Since allegations of sexual offences are easy to make but difficult to refute, the Bar is very concerned about the risk of conviction of an innocent person charged with a sexual offence. It also points out that sexual offences have certain characteristics which mark them apart from other criminal offences and call for not only different but particularly careful treatment by judges and juries alike. The more salient characteristics are as follows -

- (a) In a predominant number of cases, particularly rape or indecent assault, the incidents involve solely the word of the alleged victim against the word of the accused. There are seldom by-standers or eye-witnesses to such offences.
- (b) There is an inevitable and understandable tendency for prejudice to be generated against an accused, particularly where the alleged victim is of a young age or is otherwise apparently vulnerable or is distressed or embarrassed in giving evidence, and his/her position or demeanour may incite or invite the sympathy and protective feelings of the court.
- (c) The experience of the courts has shown that complaints of sexual misconduct are not infrequently fabricated. They may result from psychological or physiological problems, sexual neuroses, fantasy, jealousy, revenge, spite, embarrassment in front of a spouse or partner, or a simple refusal to admit consent to an act which is later regretted.
- (d) It is also the particular experience of criminal trial lawyers that juries in the High Court tend to convict defendants in rape trials in a disproportionately high number of cases, notwithstanding the warning as to corroboration.

10. The Bar notes that no reference has been made to the Law Reform Commission (LRC) of Hong Kong which is in the best position to examine the need for reform of the existing rules. It considers the Administration's explanation that the matter has been examined by the Law Commission in the United Kingdom (UK)

is wholly untenable as -

- (a) even before 1997, Hong Kong had always had its own law reform integrity; and
- (b) the situation in Hong Kong differs vastly from the UK - e.g. there is no right to jury trial by the accused person in Hong Kong, unlike the position in England; and magisterial appeals in England are heard by way of rehearing, which is not the case in Hong Kong.

The Bar's recommendation is that the matter be rejected or at the very least referred to the LRC of Hong Kong.

11. As regards the seven sexual offences in the Crimes Ordinance, the Bar considers that they were obviously isolated for special treatment by the Administration at the time the legislation was passed. If the Administration can demonstrate that the special reasons for singling them out no longer exist, the Bar has no objection to putting these statutory offences in the same category as other sexual offences.

The Law Society's position

12. The Law Society appreciates that there are legitimate reasons for reform but is not satisfied that the proposals in the Bill provide sufficient safeguards to protect defendants' interest. It recommends that the matter should be referred to the LRC in Hong Kong for a full review of the legislative proposals both in the local and international context.

Views of other organizations

13. The Hong Kong Human Rights Monitor is not opposed to the Bill but hopes that the Administration can demonstrate that abolition of the corroboration rules will in no way impede a judge from giving such a warning to himself or a jury that he or she considers appropriate in a case. It also considers it instructive to know more about the situation in England and Wales where the requirement to warn was abolished six years ago.

14. The other four organizations referred to in paragraph 7 above which have made submissions to the Bills Committee, namely the EOC, the Association Concerning Sexual Violence Against Women, the Hong Kong Council of Social Service and the Hong Kong Federation of Women, welcome the proposed abolition of the corroboration rules in sexual offences. These organizations share the view that the existing corroboration rules are sex based. There is an assumption that the

evidence of victims in sexual offence cases is inherently unreliable and, since the majority of victims of sexual offences are women, this translates into a stereotypical assumption that the evidence of women is inherently unreliable. The effect of this is to deter women from reporting sexual offences perpetrated against them and/or from testifying against their aggressors in court. Thus the existing rules leave women doubly vulnerable.

15. The EOC has in its submission drawn the Bills Committee's attention to Article 15 of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) which provides that "State parties shall accord to women equality with men before the law". The EOC considers that the proposed changes will eliminate any form of distinction between the way the evidence of women is assessed in comparison to the evidence of men, as well as eliminate any restriction faced by women in their enjoyment of human rights and their equality before the law.

The Administration's response

16. The Administration agrees with the Bar that Hong Kong does not, and should not, always follow English legislation and tradition since local factors may well render direct copying of the English legislation inappropriate. However, it considers that where the English legislation has been shown to be a good and reasonable development in step with development in other common law jurisdictions, the English background should not deter the same from being followed in Hong Kong.

17. The Administration points out that the case law on corroboration rules for sexual offences has continued to evolve, to the point where the corroboration rules have been abolished in a number of common law jurisdictions, including the UK. Such evolution reflects the more recent judicial acceptance that there is no concrete evidence to suggest that females are prone to lie and fantasize in sexual offence cases and that the old corroboration rules in sexual offences have not worked well.

18. The Administration is of the view that the Bar's concerns regarding 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 rules in sexual offences. The duty of the trial judge to sum up the evidence according to the circumstances of the case, and the mechanism of appeal and scrutiny by the higher courts, already provide sufficient protection for defendants in all cases. The prosecution is still required to prove its case beyond reasonable doubt.

19. The Administration considers that the suggested salient features cited by the Bar as marking sexual offences from other criminal offences are not in fact peculiar

to sexual offences. There are other offences which involve the word of the victim against the word of the accused. Victims of deception and robberies can also be the only persons making the allegations and yet no corroboration is required. If a victim of a rape is robbed at the same time, as the law stands, her evidence of the rape requires corroboration but her evidence of the robbery does not. Therefore there is no logical basis for this distinction. As for the alleged sympathy for the young age, apparent vulnerability or distressed condition of a victim, if it exists and operates, would also be present in cases where the victim is old and impoverished.

20. The Administration also points out that it is not clear from the Bar's submission what it is about Hong Kong that should make our law on sexual offences different from that in other developed common law jurisdictions. The right to a jury trial should not make a difference as the corroboration rules still operate in the same way. Instead of warning members of the jury regarding corroboration, the judge would have to warn himself. The Administration considers that the fact that more cases are tried by judges sitting alone in Hong Kong makes the obligatory self-warning even more absurd.

21. As to the generalized claim that women are more likely than men to lie, the Administration has pointed that research suggests that, when reports of rape are made to the police, false reports are no more likely than false reports of any other crime. Police scepticism and /or prediction that conviction is unlikely, even when the police believe that a rape has occurred, are significant factors in women choosing not to complete a report or to withdraw from prosecution prior to trial. A woman must be very tenacious to persist with a claim of rape, and she has to persuade sceptical police and prosecutors, so that formal charges based on false allegations are very rare.

22. As to the original reason for singling out the seven sexual offences under the Crimes Ordinance which require corroboration as a matter of law, the Administration has advised that they were established with no justifiable basis for the distinction made. The legislation was basically lifted in its present form from the then UK legislation in 1956.

Problems arising from the corroboration rules

23. Members note that in those statutory offences which require corroboration, where an accused has been convicted in the absence of corroboration, the conviction will be overturned. In those common law offences which require a corroboration warning, the trial judge is not only required to give such a warning but also to explain what is meant by corroborated evidence and what kinds of evidence constitute corroboration. Should the judge fail to give a warning or make a misstatement to the jury about corroboration, it would usually result in a conviction

being reversed on appeal. The appeal court could order a retrial or even an acquittal. It is therefore important that a balance be struck between the protection for the accused and for the complainant.

24. Members note that the abolition of the corroboration 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 considers it 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.

Compliance with the recommendations of the United Nations Committee on the Elimination of Discrimination against Women

25. In response to members' questions, the Administration has clarified that it proposed the abolition of the corroboration rules in sexual offence cases in November 1995 and provisions for the proposed abolition were included in the 1996 Bill long before the recommendations from the United Nations Committee on the Elimination of Discrimination against Women came about. Compliance with the recommendations of the Committee was therefore not the original reason for proposing the abolition, although the Administration welcomes the incidental compliance. Members note that members of the Committee and members of the United Nations Committee against Torture have expressed support for the abolition of the corroboration rules in Hong Kong.

26. In reply to a further question whether it would be in breach of CEDAW if the statutory requirement of corroboration in respect of the seven sexual offences is not repealed, the EOC has pointed out that the corroboration rules in sexual offences are against the spirit of CEDAW. EOC has also informed members that there will be a hearing by the United Nations Committee on the Elimination of Discrimination against Women in six months' time. If the corroboration rules are not abrogated by then, she believes that Hong Kong will be regarded as not acting within the spirit of CEDAW and in breach of its international obligations.

Urgency for reform

27. As regards the urgency for reform, the Administration has pointed out that the corroboration rules in respect of the evidence of accomplices and the evidence children were abolished in 1994 and 1995 respectively. There is no reason for singling out the evidence of complainants in sexual offence cases for different treatment. Moreover, in their judgment in *HKSAR v. Kwok Wai-chau* (Cr. App. 502/97) delivered on 5 June 1998, senior judges of the Court of Appeal took the view that they were unable to understand why the requirement for corroboration of

the evidence of a complainant in a sexual offence had not been abolished in Hong Kong even though it was abrogated in 1994 in the UK. It is now 2000 and the Administration considers that the present timing for the proposed reform is appropriate.

28. As both the Bar and the Law Society have recommended that the matter be referred to the LRC, members have asked the Administration to explain why it does not consider it necessary to do so.

29. The Administration explains that not every issue has to be referred to the LRC for consideration. Legislative changes in Hong Kong have often benefited from studies made in other jurisdictions. The proposed abrogation is not based only on the UK Law Commission report. Since corroboration warning requirements have been studied by a number of law reform commissions, the state of law in other jurisdictions has also been studied. The matters raised by the Bar in its submission are issues which had been addressed in detail by the UK Law Commission in 1994.

30. Members note that back in 1993-94 when the Administration prepared legislative amendments for the abolition of the corroboration rules in respect of accomplices and child witnesses, it had reviewed the case of victims of sexual offences as well. There was further study on the subject when it prepared the 1966 Bill. In a recent public consultation on the proposed abolition conducted by the Administration, out of the 23 organizations which had responded, 20 indicated support, one reserved its position and only two indicated opposition. In view of the extensive studies on the subject, the Administration does not consider that referring the matter to the LRC would generate any new information on the subject. As the LRC has a long list of issues for its examination, the Administration estimates that the proposed abolition would be deferred by a few years if it were referred to the LRC.

31. Members note that in jurisdictions where the corroboration rules have been abrogated, there has not been an upsurge in the level of conviction or any criticism of inadequate protection for the accused after the abolition of the rules. After considering the supplementary information outlined above, members accept the Administration's explanation for not referring the matter to the LRC.

Methodology of the proposed amendments

32. Members have asked the Administration to explain why it proposes to abolish the statutory requirement for corroboration just by way of consequential amendments in the Bill and has also asked for further information on the proposed abolition.

33. In a supplementary brief for the Bills Committee, the Administration points out that the statutory requirement and the common law practice are really two sides of the same coin. The statutory requirement provides that a person cannot be convicted of the seven sexual offences under the Crimes Ordinance unless the witness's evidence is corroborated. The common law practice requires that a warning must be given of the danger of convicting an accused charged with a sexual offence on the uncorroborated evidence of the witness. The corroboration evidence required under the statutory provisions is often exactly the same kind of evidence the lack of which would automatically trigger the common law requirement for a corroboration warning.

34. The Administration also points out that the historical assumption of an inherent lack of credibility of the evidence of women and girls in sexual offence cases which led to the evolution of the corroboration rules under the common law is now widely regarded as discredited and without any scientific basis. The Administration has therefore decided that the common law practice should be abrogated, and that the statutory provisions, which are based on the same discredited assumption, be abolished consequentially.

35. The Administration has further explained that the requirement for giving a warning about the danger of convicting an accused of an offence under Part VI or XII of the Crimes Ordinance on the uncorroborated evidence of the victim is proposed to be completely abrogated by virtue of clause 2 of the Bill. The abolition is suggested to be applied across the board in respect of all offences involving a sexual element. If the consequential amendments in clause 3 are not made, the proposed clause 2 will be vitiated to a large extent. Therefore the amendments to be made to the Crimes Ordinance as specified in clause 3 are consequential amendments necessitated by the principle adopted by the Administration in proposing clause 2 of the Bill.

36. Members note that the effect of abolishing the statutory requirements by way of a substantive provision or by way of consequential amendments is the same.

Consultation with the House Committee

37. The Bills Committee consulted the House Committee on 9 June 2000 and obtained its support for the Second Reading debate on the Bill to be resumed on 21 June 2000.

Legislative Council Secretariat
12 June 2000

Appendix I

Crimes Ordinance, Cap. 200

- s. 119 Procuring a person by threats or intimidation to do an unlawful sexual act
- s. 120 Procuring a person by false pretences or false representations to do an unlawful sexual act
- s. 121 Administering drugs to another person to obtain or facilitate an unlawful sexual act
- s. 130 Exercising control or direction over another person for purposes of unlawful sexual intercourse or prostitution
- s. 131 Procuring a person to become a prostitute
- s. 132 Procuring a girl under 21 to have unlawful sexual intercourse
- s. 133 Procuring a woman who is a defective to have unlawful sexual intercourse

Bills Committee on Evidence (Amendment) Bill 1999

Membership List

Hon Albert HO Chun-yan (Chairman)

Hon Cyd HO Sau-lan

Hon Margaret NG

Hon Christine LOH

Hon CHAN Yuen-han

Hon Jasper TSANG Yok-sing, JP

Hon Ambrose LAU Hon-chuen, JP

Hon CHOY So-yuk

Total : 8 Members