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Ms Doris Chan
Clerk to Bills Committee
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Central.

via Mr. Michael Scott, SASG/GAU

Dear Ms Chan,

Bills Committee on Evidence (Amendment) Bill 1999

Thank you for your three letters dated 11, 13 and 25 April 2000 respectively, enclosing submissions from various organizations for our comments. The Administration's responses are as follows.

Association Concerning Sexual Violence Against Women (the Association)

The Administration notes and welcomes the support of the Association for the proposed abolition of the corroboration rules in sexual offences.

The Hong Kong Bar Association (the BA)

The Administration notes the comments made by the BA. Enclosed marked 'A' is the Administration's response to the various points made by the BA.

The Hong Kong Council of Social Service (the Council)

The Administration notes and welcomes the support of the Council for the proposed abolition of the corroboration rules in sexual offences.

The Equal Opportunities Commission (the Commission)

The Administration notes and welcomes the support of the Council for the proposed abolition of the corroboration rules in sexual offences. Although compliance with the recommendations of CEDAW was not the primary reason for proposing the abolition, the Administration appreciates the opportunity to comply.

Hong Kong Human Rights Monitor (the HKHRM)

The Administration notes and welcomes the support of the HKHRM for the proposed abolition. As for the various queries raised by the HKHRM, enclosed marked 'B' is the Administration's response.

It would be appreciated if you would bring the above to the attention of the Bills Committee. Chinese translation of the two enclosed documents and this letter will be supplied next week.

Please do not hesitate to contact the undersigned if any elaboration is required.

Yours sincerely,

(Agnes Cheung)
Senior Government Counsel
Legal Policy Division

c.c. DSG(A)

#17926 v. 1

Bills Committee on Evidence (Amendment) Bill

The Administration's comments on the written submission (the Submission) on behalf of the Hong Kong Bar Association to the Bills Committee dated 6 April 2000

For ease of reference, the notation in the Submission has been adopted in the present comments from the Administration.

A. The Law

The Bar Association has set out the state of the current law on corroboration very clearly. It is agreed 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, where the English legislation has been shown to be a good and reasonable development and in step with development in other common law jurisdictions, the English background should not deter the same from being followed in Hong Kong.

It is correct that the corroboration rules developed through a line of authorities which, at least up to 1969 (in *Henry and Manning* (1969) 53 Cr. App. R 150, the case quoted in paragraph C(c) on page 4 of the Submission) and perhaps some time thereafter, reflected the then perception noted by Salmon LJ that "girls and women do **sometimes** tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate, and sometimes for no reason at all."

It is important to note, however, that the case law on the corroboration rules for sexual offences did not stop there. It continued to evolve, to the point where the corroboration rules have been abolished in a number of common law jurisdictions, including the United Kingdom (under section 32 of the Criminal Justice and Public Order Act, 1994, which came into effect in early 1995). 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.

It would not be right to rely only on that part of the authorities which produced the corroboration rules, and not take into account the development of the law thereafter, which in fact has led to the abolition of the rules.

B. The Administration's case

The Submission has, apart from citing compliance with the recommendations of the United Nations Committee on the Elimination of Discrimination against Women (CEDAW) as the first (or foremost) reason for the Administration's case, quite accurately set out the Administration's case.

The Administration proposed the abolition of the corroboration rules in sexual offence cases in November 1995 and provisions for the proposed abolition were included in the Evidence (Amendment) Bill 1996 (gazetted on 23 February 1996, the "1996 Bill"), long before the recommendations from CEDAW came about. Compliance with the recommendations of CEDAW was therefore not an original reason for proposing the abolition, although the Administration welcomes the incidental compliance.

The discrimination sought to be removed by the Administration by means of the proposed abolition is between the treatment of the evidence of witnesses or complainants in sexual offence cases and the treatment of the evidence of witnesses or complainants in any other kinds of cases; for example, in respect of cases involving the evidence of accomplices and children.

The old corroboration rules regarding the evidence of accomplices and children were abolished in 1994 and 1995 respectively. To say that the rules should remain for complainants in sexual offence cases is really saying that the testimony of a criminal or a child is more inherently believable than that of a victim in a sexual offence case. The Administration cannot find any rationale for such a distinction.

A trial judge is not required in all cases to warn the jury with respect to testimony of other witnesses with disreputable and untrustworthy backgrounds. Why, then, should a warning be *automatically* required when a victim in a sexual offence case takes the stand?

C. The Bar Association's position

The possibility or risk of conviction of innocent persons charged with any crime, and not just those charged with sexual offences, is equally abhorrent to the Administration. The Administration's stance is that 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, provide sufficient protection for defendants in all cases. The prosecution is still required to prove its case beyond reasonable doubt. This stance is supported by Wigmore who noted that the purpose of the corroboration requirement is adequately fulfilled by the power of a judge to set aside a verdict on grounds of insufficient evidence.[1]

It is true that the maximum penalties for the seven sexual offences for which corroboration is statutorily required in Hong Kong are higher than those in the UK, but these are ceilings only. As for the more serious offences of rape, buggery and indecent assault, while the Hong Kong Court of Appeal said that the guidelines in the UK case of *Billam*[2], which set down a starting point of 5 years for rape cases, are not necessarily appropriate and that some cases might well call for a higher starting point than five years, the court did not say that a significantly higher starting point should be adopted. There is no tariff and the sentence varies according to the circumstances of the case. In England, sentences of life imprisonment[3] and 18 years' imprisonment[4] have been imposed. Hong Kong courts have consistently demonstrated that local considerations will be taken into account when passing sentences.

As for the assertion that sentences in Hong Kong are significantly higher than in other jurisdictions, this only goes towards reflecting the attitude of the community towards crimes of the subject nature. It does not in any way justify differences in treatment between the evidence from complainants in sexual offence cases and the evidence from other witnesses in other cases.

The Submission alleged that the public perception and condemnation of such offences is significantly different. The Administration takes issue with this

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[1] 7 J. Wigmore, Evidence , 2061, at 464 (Chadbourn rev. 1978)
[2] *R v. Billam and Others* (1986) 82 Cr. App. R. 347)
[3] *A.G's Reference No. 14 of 1998 (Lee McGregor)* [1999] 1 Cr. App. R. (S.) 205
[4] *R. v. King* [1992] 2 Cr. App. R. (S.) 376

allegation as it is not supported by evidence and it is unclear what this means and how this justifies difference in treatment of evidence given by witnesses in different categories of offences. Is it suggested that people in other jurisdictions may be of the view that sexual offences are more "acceptable"? If it means that people of Hong Kong consider sexual offences more heinous a crime than do people in other jurisdictions, it does not follow logically that they are more likely to convict with or without a corroboration warning.

(a) 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 <u>of</u> deception cases and robberies can also be the only persons making the allegations. No corroboration warning <u>is</u> required. If a victim of a rape is also robbed at the same time, as the law now stands, her evidence of the rape requires corroboration, yet, her evidence of the robbery does not. There is no logical basis for this distinction.

(b) As for the alleged sympathy for the young age, apparent vulnerability or distressed condition of a victim, such sympathy, if it exists and operates, would also be present in cases where the victim is old or impoverished – for example, a person who has had his or her life's savings swindled by crooks who exploit the ignorance of the elderly.

(c) As noted in Part A above, judicial opinion and observation has developed substantially since 1969. The major reason for change is the clear recognition that the alleged justifications for doubting the evidence of women and girls, and warning juries about their unreliability, have no basis in fact. It is also noted that even the case relied on by the Bar Association in this paragraph only states that "girls and women do ***sometimes*** tell …" which does not justify the assertion "not infrequently fabricated" in the opening sentence of this subparagraph.

Further Coldrey J commented in *Ware* that "it may be doubted whether the historical rationale advanced …..was ever founded upon more than…..specious generalisation".[5]

As to the generalized claim that women are more likely than men to

[5] *Ware* (1994) 73A Crim R 17 at 30

lie, some judges were beginning to recognize the absurdity of this belief even before the common law rules were amended by statute, and resented having to give the warning in all cases regardless of the merits.[6]

Research suggests that, when reports of rape are made to the police, false reports are no more likely than false reports of any other serious crime.[7] 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.[8] 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.

Because of the low report rate, the intense filtering of charges by police and prosecutors, and the understandable reluctance of victims to proceed to trial, many men who rape are never required to defend themselves at all. Even in those cases selected for trial by the police and prosecution, conviction (whether by a plea of guilty or after a trial) is less likely than in other serious crimes. This is especially true when the rape is by one assailant known to the victim and there is no injury beyond the rape itself.[9]

The Law Reform Commission of Victoria noted that obstacles that confront a rape victim when she does come forward and the very low rate of reporting of actual rapes show that it cannot be an easy claim to make.[10]

(d) It is not clear what is meant by "a disproportionately high number of cases". As a matter of fact, in the Court of Appeal, the Hon. Power V.P., and Mayo and Stuart Moore, JJ. A. publicly commented in their judgment in *HKSAR v. Kwok Wai-chau*[11] , handed down 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 offence has not been done away with in

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[6] According to the Law Commission for England & Wales *Report No. 202, Criminal Law: Corroboration of Evidence in Criminal Trials* (1991)("Law Com. 202"), para. 4.5, judges asked about the corroboration warning expressed dislike and embarrassment at the standard direction. Judge Jacobs of the Supreme Court of South Australia has been quoted as saying, "I frankly resent having to tell juries that it is unsafe to convict in a case in which it does not appear to be at all unsafe." [S. Austrl., Parl. Deb. (Hansard). Legislative Council . at 1182 (Oct. 17, 1984)]

[7] J Bargen and E. Fishwick, 1995, *Sexual Assault Law Reform: A National Perspective,* Office of the Statutes of Women, Canberra, p. 47

[8] Bargen and Fishwick, 1995, above, p 47

[9] *Balancing the Scales*. *Rape Law Reform & Australian Culture*, Easteal, 1998 page 62, footnote 16

[10] Law Reform Commission of Vict., Report No. 13, Rape and Allied Offences p 97 (1988)

[11] Criminal Appeal No. 502 of 1997

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."

D. Reply to the Administration's case

(i) Compliance with UN Committee

The Administration has dealt with the Bar's comments regarding compliance with the UN Committee in Part B above. The Bar's comment that "the rationale for the corroboration rules and the corroboration warning have nothing whatever to do with the sex of the complainant", may be answered by the authority relied on in paragraph C(c) of the Submission. The explicit basis of such rules (as stated in the said paragraph C(c) of the Submission) was a belief (now largely acknowledged to be unfounded and outdated) in the untrustworthiness of women in general and their allegations of rape in particular. The rationale commonly given for the corroboration rules related to the putative nature of women and girls.

A review of the case law, which contributed to the development of the corroboration rules, shows that the majority of the complainants who were required to be corroborated were female.

Until the early 1980s, rape was, by definition, a sex-specific crime of men against women. The fact that under Hong Kong law, a man still cannot, by definition, be raped is a good indication of this concept. This remains true though the present gender-neutral definitions tend to conceal this. The modern form of the corroboration rule is also usually set out in gender-neutral language, reflecting the new descriptions of the offence.

In any event, the issue is whether it is appropriate to treat members of a class of witnesses differently on that account rather than emphasising the issue of the credibility and reliability of the individual witness. Branding all members of a class as being prone to give unreliable or false testimony is a type of discrimination which sits increasingly uneasily with contemporary notions of equal treatment and respect for the individual, particularly in respect of sexual complainants who tend more frequently to be women rather than men. Regardless of the gender-neutral language of the legislation, it is an undeniable fact that the requirement for a corroboration warning is still expressly based on beliefs about the untrustworthiness of women.

(ii) Inflexibility

There are two limbs to this criticism. The first limb is that the rules apply peremptorily to every witness within the category, in the present case, complainants in sexual offence cases. The judge cannot exercise discretion on the basis of the particular facts or the characteristics of the particular witness. Complainants in sexual offence cases are automatically regarded as unreliable.

The second limb relates to the content of the warning. Whilst Salmon L.J. opined in *Henry & Manning*[12] that there is no magic formula or mumbo jumbo required in a direction relating to corroboration, an examination of what must be included in the warning demonstrates how this opinion understates the difficulty involved in giving a proper warning that is immune to appeal in law.

According to Lord Ackner in *Spencer*,[13] the full warning embroiled the judge in the following considerations:

> "Where there is no corroboration, the rule of practice merely requires that the jury should be warned of the danger of relying upon the sole evidence of an accomplice or of the complainant in the sexual case……The warning to be sufficient must explain why it is dangerous so to act, since otherwise the warning will lack significance *(and this is usually where the prejudice about sexual offence cases and the testimony of female witness will come in)*. The jury are, of course, told that while as a general rule it is dangerous so to act, they are at liberty to do so if they feel sure that the uncorroborated witness is telling the truth. Where, however, there is evidence before the jury which they can properly consider to be corroborative evidence the position becomes less simple. The trial judge has the added obligation of identifying such material, and explaining to the jury that it is for them to decide whether to treat such evidence as corroboration. He should further warn them against treating as potential corroborative evidence, that which may appear to them to be such, but which is not so in law, e.g. evidence of a recent complaint in a sexual offence. Moreover where the prosecution are relying, as potential corroborative material, upon lies alleged to have been told by the accused, a particularly careful direction is needed. A special direction is often also needed where evidence of complainant's distress is relied on by the prosecution in sexual cases as potentially corroborative material. The trial judge has further the additional obligation of directing the jury that

[12] (1969) 53 Cr. App. R. 150
[13] [1987] A. C. 128 at 140

> accomplices, who are parties to the same charge, cannot corroborate each other." (words in italics within parenthesis being the Administration's comments)

The judge must warn the jury of the danger of convicting the accused unless the evidence of the complainant was corroborated and must explain the rationale for such danger but then a jury is free to convict in the absence of corroborative evidence. A failure by the trial judge to give the corroboration warning might result in the conviction being quashed on appeal.[14]

The full direction comprises two parts: -

(1) acquainting the jury with the dangers of convicting on the uncorroborated evidence of the type of witness in question (the warning); and

(2) the explanation, where there is potentially corroborative evidence, of what can, and cannot corroborate (the *Baskerville* direction, after the early precedent of that name.)[15]

The *Baskerville* direction has been criticized as complex[16] and making it very difficult to direct juries in terms that they could clearly understand. Because the rules as to what could and could not count as corroboration were difficult and complex they were "the cause of many actual or alleged errors and of many appeals".[17] To take a simple example: in a rape case, to what degree must the appearance of the complainant be dishevelled, or a garment torn, in order to constitute evidence capable of amounting to corroboration as to non-consent?

As can be seen from the above, it is unrealistic to suggest that the issues that must be dealt with in a corroboration warning can be encompassed by simple language. The Administration, in making this point, does not intend any disrespect to members of the bench or juries, but is only reflecting the observations and conclusions made by respected judicial authorities.

(iii) Complexity

The Administration's comments under the heading "Inflexibility" are also applicable under this heading.

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[14] Law Reform Commission of Victoria, March 1988, Report No. 13, *Rape and Allied Offences: Procedure and Evidence,* p. 39

[15] [1916] 2 K. B. 658

[16] Law Com. 202 at 2.8, a criticism echoed in many Court of Appeal decisions including *Thorne* (1977) 66 Cr. App. R. 6 and *Spencer* (1984) 80 Cr. App. R. 264

[17] Law Com. 202 at 2.9

If the judge uses the term "corroboration", the concept should be explained. Corroborative evidence must "confirm in some material particular, not only the evidence that the crime occurred, but that the prisoner committed it". In the course of such explanation, the judge has to deal with issues such as:-

- The evidence of a complaint made by the alleged victim of a sexual offence is not corroborative, as it is not independent.

- The lies of the defendant may corroborate the case against him, but the jury must be made to understand that there must be independent proof of the lie, and that it implicates him in the offence rather than merely suggesting, e.g. panic on his part or the desire to cover up some other unrelated misdemeanour.

- Distress may corroborate, if it can be said to be independent, e.g. where the distress is observed by someone whom the complainant does not realise is watching her, and to point to the accused, e.g. where the defendant and the victim have been alone together immediately before the victim becomes upset.

In each of the above examples, evidence which is not corroborative may still be admissible, and may be left to the jury as evidence which may lend support to the witness's account without actually corroborating it.

In a sexual assault case, a jury seeking corroboration must look for independent evidence that sexual intercourse took place, that it was without the victim's consent, that the accused was the perpetrator, and that he had the requisite mental state. Corroboration might include flight or lies by the accused or evidence of a medical examination. Note, though, that no single item of evidence will necessarily provide support for all "material particulars". For example, medical evidence may confirm that the accused had sexual intercourse with the victim, but provide no independent support for the victim's evidence of lack of consent. Similarly, physical injuries may be taken as evidence of non-consent, but they do not independently support an identification of the accused as the rapist. Practically speaking, the facts that will require corroboration in a particular case depend on the circumstances and what is actually in issue.

The trial judge is required to instruct the jury on what evidence might constitute corroboration if believed. As Lord Diplock has observed,[18] this

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[18] *Director of Public Prosecutions v. Hester,* [1973] A.C. 296, [1972] 3 All E. R. 1056, [1972] 3 W.L.R. 910, 57 Cr. App. 212: at 327A.C., at 1075 All E.R., at 931 W. L. R. , at 247 Cr. App. R.

instruction is "a frequent source of bewilderment" to the jury.

(iv) Anomalies/injustice

The Administration has never indicated that failure to give a corroboration warning automatically leads to either an acquittal or to a conviction being overturned. In those statutory offences which require corroboration, there can be no conviction in the absence of such, and where a conviction has nevertheless been handed down, it will be overturned. It is a standard of proof. In those common law offences which require a corroboration warning, the absence of such is a ground of appeal.

It is important that a balance be struck between protection for the defendant and for the complainant.

The consequences of a judge getting it wrong are quite serious. Although a properly warned jury can lawfully convict without corroboration, a judge's failure to give a warning when needed, or a misstatement to the jury about corroboration, will usually result in a conviction being reversed on appeal. The appeal court can order a retrial or even an acquittal. For example, in *B*, the High Court accepted that there was adequate corroboration, but because the judge was too emphatic about the existence of corroboration and did not leave it up to the jury to decide about the existence of corroboration, and did not leave it up to the jury to decide whether the evidence was corroborative, the conviction was quashed.[19]

If a judge gives a warning in circumstances where it is not required, or in the harsh terms of the common law, and the result is an acquittal, there is no avenue for the victim to challenge this judicial error or to seek a new trial. Under some circumstances, the prosecution can appeal to clarify the point of law, though this cannot result in a new trial.

A judge's decision to warn harshly is usually unchallengeable within the legal system. While there is no remedy for the witness whose credibility is impermissibly attacked by improper warnings or improper cross-examination, the defendant can complain after conviction of failure to give a corroboration warning. And failure to warn, if a warning seems appropriate according to the law's peculiar view of human behaviour, can lead to reversal. For example, where the defence claims that there are grounds for thinking that a victim has a motive for falsely incriminating the accused, the jury should be directed to proceed with caution and to consider this allegation carefully when assessing

[19] *B* (1992) 110 ALR 432

the victim's evidence. A failure to give such a warning would be grounds for appeal. A specific defence that a complainant is lying or fantasising about a sexual assault must be put squarely before the jury. As with any direct challenge to the credibility of a witness, a trial judge might well think it appropriate to advise the jury to look carefully at the other evidence in the case in deciding on the weight to be given to the impugned testimony.

Anomalies may arise from the meaning of the term "sexual offence". In *Simmons* [20], the accused (a professional tarot reader) was charged with false imprisonment; his victim, having come to his flat in response to an advertisement offering a tarot reading, was driven to lock herself in the bathroom in order to avoid his unwanted sexual attentions. The Court of Appeal rejected the accused's argument that the offence was sexual (and that, accordingly, a full corroboration warning should have been given). It offends common sense that a person who suffers more harm (if the victim had not been able to barricade herself) must have a warning about the general reliability of her evidence before her evidence could be accepted as sufficient for conviction.

In the case of a sexual offence in which consent is in issue, evidence both of the fact that a complaint was made by the alleged victim shortly after the offence, and of the substance of the complaint, is admissible as showing the consistency of her conduct with her testimony and, where consent is in issue, as being inconsistent with consent. Nevertheless, a complaint of this kind cannot amount to corroboration. Thus, when consent is in issue, the judge should tell the jury that, on the one hand, they may regard the complaint as supporting the complainant's testimony but that, on the other hand, it is not open to them to treat the complaint as corroboration (in its legal sense). This is not only anomalous but also another example of the burdensome task that the rules impose on the jury.

Bearing in mind that the corroboration rules apply to summary trials as well as those on indictment, one distinguished commentator[21] observed that it is-

> "somewhat odd to require a magistrate to reason as follows on a charge of indecent assault brought by a respectable middle-aged female: 'I believe her evidence, but I must think twice before acting upon it because sex is a mysterious thing', whereas, on a charge of assault brought by a man with numerous convictions for violence, the magistrate can simply say to himself ' I believe his evidence and I need not think twice about acting upon it

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[20] [1987] Crim LR 630

[21] Cross on Evidence, 6th de. (1985), p. 237

> because there is no particular danger that charges of violence will be made on account of neurosis, jealousy, fantasy or spite."

Viewed as a whole, the direction was also manifestly irrational, in that it included giving the jury express permission to convict on uncorroborated evidence, i.e. to take that very course of action which, as the full warning was designed to explain to them, was highly dangerous. Furthermore there were other witnesses whose evidence might well be equally suspect, but who, illogically, fell outside the requirement to give a full direction in all cases.[22]

(v) Failure to protect the accused

The corroboration rules are intended to operate for the benefit of the accused. However, Lord Diplock explained in *Hester*[23] that

> "….to incorporate in the summing up a general disquisition upon the law of corroboration in the sort of language used by lawyers may make the summing up immune to appeal upon a point of law, but it is calculated to confuse a jury of laymen and, if it does not pass so far over their heads that when they reach the jury room they simply rely upon their native common sense, may, I believe, as respects the weight to be attached to evidence requiring corroboration, have the contrary effect to a sensible warning couched in ordinary language directed to the facts of the particular case."

The Supreme Court of Canada also suggested that "the accused was in the unhappy position" of hearing the judge draw particular attention to the testimony to be corroborated, so that cogent prejudicial evidence was repeated and thus, however undesignedly, highlighted.[24]

E. Conclusion

(i) The seven offences under the Crimes Ordinance

The one common denominator in the seven offences is the fact that they are all sex-related offences. If corroboration rules are not required for sexual offences, there is no justification for maintaining the requirement for these seven offences.

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[22] Law Com. 202 at 2.10, citing the case of the co-accused, who is the subject of less rigid rules, and *Simmons* [1987] Crim. L. R. which concerned a non-sexual offence (false imprisonment) with alleged sexual overtones and where the full warning was not required.

[23] [1973] AC 296, 327G-328A

[24] *Vetrovec* (1982) 136 DLR 93d) 89, 95

(ii) The Submission has not identified any Australian jurisdiction that in fact adopted the proposal recommended by the Law Reform Commission of Australia (the Administration has been unable to trace the proposal, the citation of which was not provided by the Bar). However, the Administration is of the view that to replace one type of mandatory warning with another would be a futile exercise. The "new" warning would still be based on the automatic classification of a class of complainants as inherently unreliable without regard to the facts of any particular case and the witness in question.

(iii) Urgency for Reform

The corroboration rules for accomplices and children were abrogated in 1994 and 1995 respectively. There is no reason for singling out the evidence of complainants in sexual offence cases for different treatment. Matters should not be left until they are urgent before they are dealt with. Senior judges of the Hong Kong bench have publicly expressed surprise at the fact that the rules were still not abrogated in 1998. It is now 2000 and the Administration is of the view that the present timing for the proposed reform is appropriate.

Not every issue has to be referred to the Law Reform Commission 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. The state of law in other jurisdictions has also been studied. Corroboration warning requirements have been studied by a number of law reform commissions,[25] and some legislative changes have been introduced. The most usual reform is simply abolition of the requirement to warn, without any prohibition on giving the warning, and no further guidance as to when some warning is or is not appropriate. The UK decision in *R v. Makanjuola* [26] cited in the in the Submission (page 2 under Part A) has since set down guidelines on the various issues which will no doubt be adopted, where appropriate, by the courts in Hong Kong.

It is not clear from the Submission what it is about Hong Kong that should make our law on sexual offences different to that in other developed common law jurisdictions. The right to a jury trial should not make a significant difference. The rules still operate in the same way. Instead of reminding members of the jury, the judge would have to remind himself. It is submitted that the fact that more cases are tried by judges sitting alone in Hong

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[25] For example, *Australian Law Commission Report, No. 38* (1987); Criminal Law and Penal Methods Reform Comm. Of S. Austl., *Report No. 3, Court Procedure and Evidence* (1975); Law Commission for England & Wales, *Report No. 202, Criminal Law: Corroboration of Evidence in Criminal Trials* (1991); Law Reform Commission of Vict.

[26] (1995) 2 Cr. App. R. 469

Kong makes the obligatory self-reminding even more absurd; a professional judge should be able to decide, based on the quality and consistency of the evidence given by the complainant and the other parties and their demeanour, who is to be believed without having to remind himself, when he may have no doubt about the veracity of the complainant's evidence, that there is danger in convicting on the sole evidence of the complainant.

The Administration is of the view that the time is right to abrogate the corroboration rules in sexual offences.

Department of Justice
May 2000

#17794 v.7

Bills Committee on Evidence (Amendment) Bill

The Administration's comments on the written submission (the Submission) made by the Hong Kong Human Rights Monitor (HKHRM) to the Bills Committee dated 20 April 2000

The Administration welcomes the comments from the HKHRM.

The effect of the abolition

The general rule that the defence must be put fully and fairly to the jury by the trial judge will remain, as will the general control of the Court of Appeal. It is noted by Wigmore that the purpose of the corroboration requirement is adequately fulfilled by the power of a judge to set aside a verdict on grounds of insufficient evidence.[1] Witnesses now within the corroboration rules would be treated, as other witnesses already are, on their merits. The Court of Appeal has, and will exercise, the power to quash a conviction where it is satisfied that a direction required by the nature of the evidence required has not been given.

The general rule requiring the judge to put the defence fully and fairly to the jury include, if appropriate, a critical analysis of the prosecution evidence, and will be effective to protect the accused in respect of evidence falling within the present corroboration category, as it is in other areas of difficulty. This rule, described in *Spencer*[2] as the "overriding rule", will come into play whenever the circumstances suggest a doubt about the truthfulness of a witness who testifies against the accused. The judgment of the judge who actually hears the evidence and can assess its effect and weight in the overall context of the trial is of the greatest importance in determining what, if anything, should be said by him to the jury about that evidence.

The necessity to strike a balance between protection for the accused and protection for the victim

The consequences for a judge getting the corroboration rules wrong are quite serious. Although a properly warned jury can lawfully convict without corroboration, a judge's failure to give a warning when needed, or a misstatement to the jury about corroboration, will usually result in a conviction being reversed on appeal. The appellate court can order a retrial or even an acquittal. For example, in *B,* the High Court accepted that there was adequate

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[1] J. Wigmore, Evidence, 2061, at 464 (Chadbourn rev. 1978)
[2] [1987] A. C. 128, at p. 142

corroboration, but because the trial judge was too emphatic about the existence of corroboration, did not leave it up to the jury to decide about the existence of corroboration, and did not leave it up to the jury to decide whether the evidence was corroborative, the conviction was quashed.[3]

If a judge gives a warning in circumstances where it is not required, or in the harsh terms of the common law, and the result is an acquittal, there is no avenue for the victim to challenge this judicial error or to seek a new trial. Under some circumstances, the prosecution can appeal to clarify the point of law, though this cannot result in a new trial.

A judge's decision to warn harshly is usually unchallengeable within the legal system. While there is no remedy for the witness whose credibility is impermissibly attacked by improper warnings or improper cross-examination, the defendant can complain after conviction of failure to give a corroboration warning.

Post-abolition development in the UK

The landmark case in England after the abolition of the corroboration rules there is *R v Makanjuola* [4]. The judgment in that case sets out the following guidelines which, if the proposed abolition were enacted in Hong Kong, would no doubt be followed, as guidelines set out in other areas by other UK judgments have been followed. The guidelines are-

(1) It is a matter for the judge's discretion what, if any, warning he considers appropriate in respect of a witness in a sexual offence case, as indeed in respect of any other witness in whatever type of case. Whether he chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness' evidence.

(2) In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross-examining counsel.

(3) If any question arises as to whether the judge should give a special warning in respect of a witness, it is desirable that the question be resolved by discussion with counsel in the absence of the jury before final

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[3] (1992) 110 ALR 432
[4] [1995] 3 All ER

speeches.

(4) Where the judge does decide to give some warning in respect of a witness, it will be appropriate to do so as part of the judge's review of the evidence and his comments as to how the jury should evaluate it rather than as a set-piece legal direction.

(5) Where some warning is required, it will be for the judge to decide the strength and terms of the warning. It does not have to be invested with the whole florid regime of the old corroboration rules.

(6) Attempts to re-impose the straitjacket of the old corroboration rules are strongly to be deprecated.

Opposition to the bill by some lawyers

The consultation undertaken by the Administration has shown that the proposed abrogation of the corroboration rules in sexual offences in fact has substantial support among lawyers. Further, as noted above, the post-abolition experience in the UK and other jurisdictions which have abolished the old corroboration rules shows that judges are indeed especially careful when dealing with the testimony of a victim of a sexual offence. All that the abolition of the former mandatory requirement to give a corroboration warning means is that the courts are now better able to do justice between both parties according to the circumstances of the case. It is important to note that, in those jurisdictions, the requirement to give a corroboration warning, *where appropriate*, has not been abolished. However, the injustices which arose from the requirement automatically to give a corroboration warning regardless of the merits of the victim's evidence and other circumstance of the case may now be avoided.