

**For discussion on
27 May 1999**

**Information Paper for
LegCo Panel on the Administration of Justice and Legal Services**

**On
Proposed Abolition of the Corroboration Rules in Sexual Offence cases
And
The giving of evidence by witnesses outside Hong Kong by live-television link**

CORROBORATION

WHAT IS CORROBORATION?

1. Corroboration is evidence which confirms the accuracy of other evidence in a material particular. In criminal cases, it must confirm or tend to confirm the guilt of the accused.
2. In certain categories of case, the judge is required specifically to warn the jury of the dangers of convicting on the uncorroborated evidence of a single witness, and to explain what can (and what cannot) amount to corroborative evidence. These “corroboration rules” originally applied to evidence given by accomplices, children and victims of sexual offence cases. The application of the rules in respect of an accomplice’s evidence was abolished in 1994. The application of the rules in respect of a child’s evidence was abolished by the Evidence (Amendment) Ordinance 1995 which came into effect on 28 July 1995. The sole remaining category of case in which the rules still apply in Hong Kong is therefore in respect of sexual offences.

CRITICISM OF THE CORROBORATION RULES

3. A “full” direction by the judge to a jury in cases where the corroboration rules apply has two main parts: acquainting the jury with the dangers of convicting on the uncorroborated evidence of the type of witness in question (the warning) and the explanation, where there is potentially corroborative evidence, of what can, and cannot corroborate (the *Baskerville* direction, after the early precedent of that name).¹

¹*Baskerville* [1916] 2 K.B. 658.

4. The Law Commission in England² observed that the warning was defective in that there was “no justification for automatically applying the same rules to evidence of all witnesses who fall within one of the categories to which the rules apply.”. The inflexibility of the rules meant that a direction was required “whatever the trial judge’s assessment of the reliability of the evidence or the assistance that the jury need to be given in assessing it”.³

5. The warning was also criticised for its complexity. The rules as to what could and could not count as corroboration were difficult and complex and they were “the cause of many actual or alleged errors and of many appeals.”⁴

6. The corroboration rules were abrogated in England in 1994 by section 32(1) of the Criminal Justice and Public Order Act 1994.

HISTORY OF THE CORROBORATION RULE IN HONG KONG

7. In September 1995 provisions for the abolition of corroboration in respect of sexual offences were included in an Evidence (Amendment) Bill which was to be introduced to deal with mutual legal assistance in criminal matters. The Bill (the “1996 Bill”), incorporating provisions for the proposed abolition was introduced into LegCo in March 1996. A copy of the part of the 1996 Bill relating to the proposed abolition is attached as **ANNEX A**.

8. The Law Society supported the proposal and opined that it preferred the English position “i.e. abolish the obligatory duty on the judge to give corroboration warning but give the judge the discretion to give a warning if he sees fit.”.

9. The Bar Association responded on 6 December 1995 and indicated opposition to the proposal. They proposed instead the introduction of a mandatory warning along the lines proposed in an Australian Law Reform Commission draft code.

10. The Administration ultimately did not seek resumption of the second reading of the 1996 Bill because the matters relating to mutual legal assistance had been dealt with by the Mutual Legal Assistance in Criminal Matters Ordinance (Ord. No. 87 of 1997). The part relating to the abolition of corroboration rules in sexual offences was not pursued.

11. Since then, however, the proposal to abolish the corroboration rules has been given new impetus by the observation of the Court of Appeal in HKSAR v. Kwok Wai-chau (Cr.

²Law Com. 202, *Corroboration of Evidence in Criminal Trials* CM.1620(1991)

³Law Com. 202 at 2.7

⁴Law Com. 202 at 2.9

App. 502/97 on 5 June 1998). The Court (comprising of Their Honours, Judge N.P. Power, Simon Mayo, and M. Stuart-Moore) observed 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 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.”

SUMMARY OF THE BAR ASSOCIATION’S 1996 PROPOSALS

12. The Bar Association supported the abolition of the corroboration rule in sexual offences but proposed that there should be a provision making it **mandatory** for the Judge to give a clear warning to the jury of the dangers of convicting on the complainant’s evidence alone, although they need not do so if they are sure that the complainant is telling the truth.

13. The Bar Association proposed following an Australian formula (recommended by the Law Reform Commission of Australia but apparently not adopted by any of the Australian states) which is as follows-

“Where there is a jury and a party so requests, the Judge shall, unless there are good reasons for not doing so-

- (a) warn the jury that the evidence may be unreliable;*
- (b) inform the jury of matters that may cause it to be unreliable; and*
- (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.*

It is not necessary that a particular form of words be used in giving the warning or information.”

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

convicted.

THE ADMINISTRATION'S 1996 RESPONSE TO THE BAR ASSOCIATION'S COUNTER-PROPOSALS

15. In the Administration's view the Bar Association's counter-proposal is, in practice, replacing one set of complex rules by another.

16. The provision that "a warning should be given *unless there are good reasons not to do so*" would be equally confusing from a juror's point of view.

17. Different courts may apply different criteria in deciding what are good reasons for the giving or not giving of a warning. Where a warning is to be given, it is arguable what evidence may be regarded as unreliable and which are the matters that rendered the evidence unreliable

18. The application of a corroboration warning as recommended by the Bar Association is too wide as it is intended to cover all types of sexual cases so long as *there is a jury and a party so requests*. The rigidity and inflexibility of the corroboration rules remain unchanged, hence preventing justice from being done to victims of sexual offences.

THE PRESENT PROPOSAL

19. In view of the criticisms made of the existing corroboration rules, most recently by the Court of Appeal, the Administration consider that there is a sound case for pursuing abolition of the rules. A copy of the current Bill is attached as **ANNEX B**.

20. The Administration is of the view that the objective of the Bar Association's 1996 counter-proposals, namely minimising the possibility of an innocent person being convicted, can be, and is already, met by the current law, even with the proposed abolition of the corroboration rule in sexual offence cases. Accordingly, the present proposal to abolish the corroboration rule is in the same terms as the 1996 proposal.

21. The provisions leave intact the requirements regarding identification evidence and the cases in which a *Turnbull*⁵ warning is necessary. Accordingly, where an accused alleges that a complainant has mistakenly identified him as the person who raped or indecently

⁵[1997] Q.B. 224. The decision neither requires corroboration as a matter of law nor requires the judge to give a corroboration warning.

assaulted her (or him) the trial judge will still have to apply the *Turnbull* principles in directing the jury on this issue of identity. The principles are-

- (a) *Whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before conviction in reliance on such evidence.⁶ He should give the reason for the warning and refer to the possibility that a mistaken witness can be a convincing one that a number of such witnesses can all be mistaken. If this is done in clear terms, no particular form of words is required.*
- (b) *The judge should direct the jury to examine closely the circumstances of identification by each witness. The judge should remind the jury of any specific weaknesses in the identification evidence.*
- (c) *Where the witness purports to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.*
- (d) *If the quality of the identifying evidence is good, the jury can be left to assess its value even where it is not supported by other evidence: provided always that an adequate warning has been given about the special need for caution.*
- (e) *When, in the judgement of the judge, the quality of the identifying evidence is poor, the judge should withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support its correctness.*
- (f) *The judge should identify to the jury evidence capable of supporting the identification evidence, indicating any evidence which the jury might think to be supportive but which, in fact is not.*
- (g) *The judge should take care when directing the jury about supportive evidence derived from the fact that they have rejected an alibi. It is only when the jury is satisfied that the sole reason for the fabrication is to deceive them, and that there is no other explanation for its being put forward, that fabrication can provide support for the identification evidence. The jury should be told*

⁶The warning should be given even if the opportunities for observation were good and the identifying witness is convinced that he has correctly identified the accused: *R V Tyson* [1985] Crim LR 48(CA)

that evidence that the accused has told lies about where he was at the material time does not, but itself, prove that he was where the identifying witness says he was.

22. The provisions also leave intact other types of cases in which the courts have held that trial judges have duties to direct juries to proceed with caution in acting on certain evidence. These cases include, for the purpose of the present issue, those where witnesses have their own purpose to serve, but are not technically accomplices,⁷ and where co-accused testifying in their own defence⁸. In such cases the nature of the obligation of a trial judge, and the extent of the discretion as to the terms in which a jury may be directed, remain as before.

23. 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. This rule, described in *Spencer*⁹ as the “overriding rule”, will come into play wherever the circumstances suggest a doubt about the truthfulness of a witness who testifies against the accused.

24. Where a specific defence is put forward that the complainant has a motive for falsely incriminating the accused, or that the complainant is fantasising, or exaggerating the accused’s part in the offence, the judge is under a duty, derived from *Beck*¹⁰, to give a warning about certain witnesses who may have an interest of their own to serve in giving evidence.

25. The superiority of the duty evinced in *Beck* derives, firstly, from the fact that the obligation it creates is witness-specific, arising only where there is material to suggest that a particular witness’s evidence may be tainted by an improper motive; secondly, from its flexibility (the terms of the warning are that the jury is advised to proceed with caution in approaching the evidence of the witness in question, but the strength of the advice varies according to the facts of the case), and, thirdly, from its avoidance of complexity: there is no magic formula to be followed as to the way in which resort may be had to other evidence to support the witness’s testimony.

26. A failure to give such a warning would be grounds for appeal. On the other hand, the strength and terms of the warning would be within the judge’s discretion. The test

⁷See *Beck* [1982] 1 W.L.R. 461.

⁸See *Knowlden* (1983) 77 Cr. App. R. 94.

⁹[1960] 2 Q.B.. 464

¹⁰[1982] 1 W.L.R. 461

should be the overall spirit and effect of the directions, not whether particular words or formulae were used.

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

DEVELOPMENTS ELSEWHERE

28. Information on developments elsewhere has been provided in an Information Paper previously circulated to Members of the Legislative Council. A copy of the relevant part is attached as ANNEX C.

GIVING OF EVIDENCE BY WITNESSES OUTSIDE HONG KONG BY LIVE-TELEVISION LINK

29. The present Evidence (Amendment) Bill also includes proposals to introduce the taking of evidence of witnesses outside Hong Kong by live-television link. This would allow a witness who is in a foreign jurisdiction to give evidence without the inconvenience and expense of travelling. A witness may also feel more comfortable giving evidence in surroundings less alien to him.

30. A system of television-linked evidence has been in place in respect of vulnerable witnesses since 1995 and it has been working well.

31. Other jurisdictions which have provided for such a method of taking evidence include the United Kingdom and Canada. There is no evidence that the system has not worked well or has produced any injustice.

32. The proposed system would offer the same protection to the defendant as where a witness is in court. As the link-up is to be simultaneous, counsel for the defendant can cross-examine the witness as if the latter is in the same court room and the judge and jury will have the benefit of being able to observe the demeanour of the witness at the same time. Documents can be dispatched to the location where the witness is giving evidence as and when they are produced in court, and the witness can be asked to scrutinize these and respond.

33. It is contemplated that reciprocal arrangements may be required in some cases to

support the system. Where an overseas witness is willing to give evidence, it may not be necessary to involve law enforcement or court officers in the exercise since sufficient safeguards (such as the fact that the witness has legal representation at all times), are in place. However, it is considered advantageous to provide for the system in our laws first so that approaches could be made to other jurisdictions to make formal arrangements where necessary.

34. The proposed scheme is dependent on legislation being enacted to provide that evidence taken from abroad by live-television link is admissible in a Hong Kong court. This would complement reciprocal arrangements for the taking and receiving of evidence made with other jurisdictions. If new legislation were in place, practical arrangements could be made for the provision of facilities, premises and staffing in order to implement the reciprocal arrangements.

Department of Justice

Legal Policy Division

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A BILL

To

Amend the Evidence Ordinance.

Enacted by the Governor of Hong Kong, with the advice and consent of the Legislative Council thereof.

1. Short title and commencement

(1) This Ordinance may be cited as the Evidence (Amendment) Ordinance 1996.

(2) This Ordinance shall come into operation on a day to be appointed by the Attorney General by notice in the Gazette.

2. Section added

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

“4C. Abolition of corroboration rule in respect of sexual offences

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

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

(3) This section shall not apply to -

(a) any trial; or

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

that commenced before the commencement of this section.”.

3. Part heading amended

The heading to Part VIII of the Evidence Ordinance (Cap. 8) is amended by adding “CIVIL” after “FOR”.

4. Section repealed

Section 77B is repealed.

5. Part added

The following is added -

“PART VIIIAA

EVIDENCE FOR CRIMINAL MATTERS IN PLACES OUTSIDE HONG KONG

77DA. Interpretation

(1) In this Part, unless the context otherwise requires - “ancillary criminal matter” means a matter relating to -

(a) the restraining of dealing with, or the seizure, forfeiture or confiscation of, property in connection with an external offence; or

(b) the obtaining, enforcement or satisfaction of an external confiscation order;

Crimes Ordinance

4. Repeal of sections 119(2), 120(3), 121(2), 130(2), 131(2), 132(2) and 133(3)

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

Explanatory Memorandum

The object of this Bill is to amend the Evidence Ordinance (Cap. 8) to -

- (a) remove the requirement that a jury must be given a warning about the danger of convicting an accused charged with any sexual offence (including incest) on the uncorroborated evidence of the person in respect of whom that offence is alleged to have been committed (new section 4C at clause 2);
- (b) repeal the provision of that Ordinance which empowers the High Court to assist in obtaining evidence for criminal proceedings in overseas courts (clause 4);
- (c) replace that provision with a new Part VIII A A setting out enhanced powers of the High Court to assist in obtaining evidence not only for criminal proceedings in other jurisdictions, but also for criminal investigations in other jurisdictions (clause 5); and
- (d) consequentially repeal the provisions of the Crimes Ordinance (Cap. 200) which, in the case of a sexual offence, prohibit the conviction of the accused on the uncorroborated evidence of one witness only.

A BILL

To

Amend the Evidence Ordinance.

Enacted by the Legislative Council.

1. Short title and commencement

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

(2) This Ordinance shall come into operation on a day to be appointed by the Secretary for Justice by notice in the Gazette.

2. Section added

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

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

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

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

(3) This section shall not apply to -

(a) any trial; or

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

that commenced before the commencement of this section.”.

3. Section added

The following is added -

“17B. Evidence by live television link

(1) A person other than the accused may give evidence by way of a live television link in any criminal proceedings if he is outside Hong Kong but evidence may not be so given without the leave of the court.

(2) A statement made on oath by a person outside Hong Kong and given in evidence by way of a live television link by virtue of subsection (1) shall be treated for the purposes of section 31 of the Crimes Ordinance (Cap. 200) as having been made in the proceedings in which it is given in evidence.

(3) The Chief Justice may make rules or give directions for the purposes of this section.”.

Consequential Amendments

Crimes Ordinance

4. Repeal of sections 119(2), 120(3), 121(2),

130(2), 131(2), 132(2) and 133(3)

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

Criminal Procedure Ordinance

5. Evidence by live television link

Section 79B of the Criminal Procedure Ordinance (Cap. 221) is amended by adding -

“(4A) Where a witness who is outside Hong Kong is to give evidence in proceedings in respect of any offence, the court may, on application or on its own motion, permit the person to give evidence by way of a live television link, subject to such conditions as the court considers appropriate in the circumstances.”.

Mutual Legal Assistance in Criminal Matters Ordinance

6. Requests by Hong Kong for taking of evidence, etc.

Section 9(1) of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) is repealed and the following substituted -

“(1) The Secretary for Justice may request an appropriate authority of a place outside Hong Kong to arrange for -

- (a) evidence to be taken in the place and the transmission of the evidence to
Hong Kong;

(b) evidence to be taken by way of a live television link in the place and the transmission of the evidence to Hong Kong; or

(c) a thing (including a thing belonging to a class of things) in the place to be produced and the transmission of the thing to Hong Kong,

for the purposes of a criminal matter in Hong Kong.”.

7. Requests to Hong Kong for taking evidence, etc.

Section 10(1) is repealed and the following substituted-

“(1) Where a request is made by an appropriate authority of a place outside Hong Kong that -

(a) evidence be taken in Hong Kong;

(b) evidence be taken by way of a live television link in Hong Kong; or

(c) a thing (including a thing belonging to a class of things) in Hong Kong be produced,

for the purposes of a criminal matter in the place, then the Secretary for Justice may authorize in writing the taking of evidence or the production of the thing, and the transmission of the evidence or, subject to subsection (14), thing to that place.”.

Explanatory Memorandum

The object of this Bill is to -

(a) amend the Evidence Ordinance (Cap. 8) to -

- (i) remove the requirement that a jury must be given a warning about the danger of convicting an accused charged with any sexual offence (including incest) on the uncorroborated evidence of the person in respect of whom that offence is alleged to have been committed (clause 2);
 - (ii) allow a person who is outside Hong Kong to give evidence by way of a live television link in any criminal proceedings (clause 3);
- (b) make consequential amendments to -
- (i) repeal certain provisions of the Crimes Ordinance (Cap. 200) which, in the case of a sexual offence, prohibit the conviction of the accused on the uncorroborated evidence of one witness only (clause 4);
 - (ii) amend the Criminal Procedure Ordinance (Cap. 221) and the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) regarding the giving of evidence by a person outside Hong Kong by way of a live television link in any criminal proceedings (clauses 5, 6 and 7).

required) concerning the credibility of a witness. This control applies as much in sexual offences cases as in any other kind of case.

EFFECT OF ABOLITION

If the corroboration rules are abolished in respect of sexual offences, the general rule that the defence must be put fairly and adequately will remain, as will the general control of the Court of Appeal. Witnesses now within the corroboration rules would be treated, as other witnesses already are, on their merits.

Freed from the mechanical obligation to give a corroboration warning, judges *may* form the view in some cases that no warning of any kind is required. Judges will nevertheless continue to have an overriding obligation to put the defence fairly and adequately to the jury and to give a warning about the evidence of complainants whom they consider to be unreliable.

DEVELOPMENTS ELSEWHERE

England

The corroboration rules in respect of sexual offences were abolished by the Criminal Justice and Public Order Act 1994. The following guidelines have been adopted by the courts-

- The requirement to give a corroboration warning in respect of an alleged accomplice or a complainant of a sexual offence, simply because a witness falls into one of those categories has been abrogated.
- It is a matter for the judge's discretion what, if any, warning is appropriate in respect of such a witness, as indeed in respect of any other witness in whatever type of case.
- It might be appropriate for the judge in some cases to warn the jury to exercise caution before acting on the unsupported evidence of a witness. There would need to be an evidential basis for suggesting that the evidence of the witness might be unreliable and not because the witness falls into any particular category.
- If any question arises as to whether the judge should give a special warning, it is desirable that the question be resolved by a discussion with counsel in the jury's absence before final speeches
- Where a warning is considered necessary, it should be as part of the review of the evidence and his comments as to how the jury should evaluate it, rather than as a mechanical legal requirement.
- It is for the judge to decide the strength and terms of any warning that the circumstances of the case may require.

Canada

The corroboration rules were abolished in 1987 in relation to some specific offences including a range of sexual offences. The abolition has gone even further and provided that the judge should not instruct the jury that it may be unsafe to convict in the absence of corroboration. This approach has been criticized as inflexible because categories are again relied on and the judge's discretion is also fettered, albeit in a different direction.

Australia

In the Australian Capital Territory and Victoria, the trial judge is prohibited in most cases from giving a traditional corroboration warning. However, in these jurisdictions the judge may still give a warning upon the basis of the particular facts and circumstances which may affect the reliability of the witness in question.

In New South Wales, South Australia, Tasmania and Western Australia, a corroboration warning regarding the evidence of an alleged victim of a sexual offence is not required by any rule of law or practice. In these jurisdictions, a trial judge may still give such a warning but it is an error for a trial judge to caution a jury in terms which relate the warning to complainants in sexual cases generally as distinct from the complainant in the particular case.

In Queensland, South Australia and Tasmania, there are still mandatory corroboration or warning requirements in the case of complainants of specified sexual offences.

New Zealand

The requirement for a corroboration warning was abolished in 1985 and if a judge decides to comment on the absence of any evidence tending to support any other evidence, no particular form of words is required.

Department of Justice

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