

Written Response to
LegCo Panel on Home Affairs Subcommittee
Discrimination on the ground of sexual orientation

At the last Subcommittee meeting held on 19 April 2001, Members requested the following –

- (a) relevant information on the past review as to whether the provisions of the Crimes Ordinance are consistent with the Hong Kong Bills of Rights Ordinance (BORO); and
- (b) Department of Justices' advice as to whether sections 118C and 118D (i.e. provisions on buggery) of the Crimes Ordinance are consistent with BORO and its justification.

Review of Crimes Ordinance as to whether it was consistent with the BORO

2. The relevant provisions governing homosexual offences were added to the Crimes Ordinance through the Crimes (Amendment) Bill 1991 (the Bill). The Bill aimed at decriminalising homosexual acts between consenting adults conducted in private. It was then considered that the amendments would remove the provisions which arguably might constitute derogation from the protection against arbitrary interference with privacy protected by Article 17 of the ICCPR to be incorporated by the Hong Kong Bill of Rights Bill. The Hong Kong Bill of Rights

Ordinance was enacted in June 1991, shortly before the enactment of the Crimes (Amendment) Ordinance 1991 in July 1991. In view of the above, consistency of the Crimes (Amendment) Ordinance 1991 with the BORO had been taken well into account during the amendment exercise in 1991.

Consistency of Sections 118C and 118D with the BORO

3. At the last meeting, Members noted the difference in treatment rendered by sections 118C and 118D of the Crimes Ordinance to the male and female party under the age of 21 who engage in consensual buggery, viz the former will be held criminally liable while the latter will not. Members asked whether the two provisions were consistent with BORO.

4. The rationale for the enactment of s.118C and 118D of the Crimes Ordinance is set out in the Legislative Council Brief on the Crimes (Amendment) Bill 1991 attached. The Department of Justice has advised that the two sections are consistent with the BORO and that the differences between the two sections do not contravene the non-discrimination principle under Article 22 of the BORO, because of the justification detailed below.

5. The differences in treatment as provided by sections 118C and 118D were fully considered by the Administration and the then Legislative Council in 1991. The rationale of making a man under 21 who commits consensual buggery with another man criminally liable was to guard against the possibility of blackmail against the other partner. However, in normal circumstances it is unlikely that proceedings would

be taken against the partner under 21 where there are no other aggravating circumstances since, as indicated in the LegCo Brief attached, the purpose of section 118C is the protection of the party under the age of 21. This difference in treatment was considered and accepted by the relevant Ad Hoc Committee in 1991 which made a conscious decision to allow for the discrepancy. This is reflected in the relevant Hansard record of the Ad Hoc Committee Chairman's speech at the resumption of Second Reading, which reads,

"Members questioned the apparent anomaly between the new sections 118C and 118D in the criminal liability on men and girls under the age of 21 who committed buggery. The Administration managed to convince members that homosexual and heterosexual conduct should not always be equated. The reason for making a male under 21 criminally liable for participating in consensual buggery was to guard against the likelihood of blackmail against the other partner."

6. The justification for allowing a difference in treatment in making the male partner under 21 also criminally liable in a consensual buggery is to protect the interest of the other partner, by guarding him against possible blackmail by the underaged partner. Safeguarding the interest of the other male partner is a legitimate purpose and will not constitute contravention of the BORO.

7. In view of the fact that homosexuality is still a sensitive and controversial subject within the community, which in turn still gives rise to potential for blackmail, we consider that section 118C continues to

provide a deterrent effect on possible blackmail against the homosexual partner by the other homosexual and should be retained, without compromising the non-discrimination principle under the BORO.

Security Bureau

June 2001

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(English version only)

File reference: SCR 2/.2801/83

Enclosure No:

LEGISLATIVE COUNCIL BRIEF

Offences Against the Person Ordinance
(Chapter 212)

Crimes Ordinance
(Chapter 200)

CRIMES (AMENDMENT) BILL 1991

REVIEW OF THE LAWS ON HOMOSEXUAL OFFENCES

INTRODUCTION

At the meeting of the Executive Council on 19 March 1991, the Council ADVISED and the Governor ORDERED that the Crimes (Amendment) Bill 1991, at Annex A, should be introduced into the Legislative Council.

BACXGROUND

2. A motion was moved in the Legislative Council on 11 July 1990 by the Chief Secretary proposing that measures be taken to remove the criminal penalties relating to homosexual acts committed in private by consenting men who have reached the age of 21, and that the protection from sexual abuse and exploitation, afforded to women and girls by the Crimes Ordinance, should be extended, where appropriate, to men and

boys. Thirty-one Members voted in favour of the motion and thirteen against; six Members abstained.

THE BILL

Overview

3. The purpose of the Bill is to decriminalise homosexual acts performed in private by consenting adult males. At present such acts are illegal in all circumstances: the maximum penalty for an act of gross indecency between men is imprisonment for two Years; for an act of buggery it is life. The latter offence covers both heterosexual and homosexual buggery for which the penalty is the same.

4. The Bill also amends the Crimes Ordinance to provide penalties for homosexual acts which are committed otherwise than in private by consenting adult males. For instance, homosexual acts will remain illegal if the act is non-consensual, if more than two people are present, if one or both partners are under 21 even where the act is consensual and in private, or if the act takes place otherwise than in private. The Bill in addition extends to men and boys many of the provisions protecting women and girls from sexual exploitation.

5. The provisions of the Bill implement the main recommendations of the 1983 Law Reform Commission Report on Laws Governing Homosexual Conduct. A clause-by-clause description of the Bill can be found in the explanatory memorandum attached to the Bill. The following paragraphs give a description and analysis of the provisions of the Bill by subject.

Decriminalisation of Homosexual Acts

6. Decriminalisation of homosexual acts is achieved by the repeal of Sections 49 to 53 of the Offences Against the Person Ordinance (Clause 26) and by the abolition of the common law offence of buggery (Clause 3: new Section 118M). However, it is not proposed that homosexual acts will be decriminalised in all circumstances. The circumstances in which homosexual acts will remain illegal are detailed below.

7. New sections are added to the Crimes Ordinance by Clause 3 of the Bill to create new offences for non-consensual buggery, attempted buggery and gross indecency between men, and to provide penalties for such offences.

(i) Section 118A provides a penalty of life imprisonment for non-consensual buggery. Section 118B provides a penalty of ten years' imprisonment for assaulting a person with intent to commit buggery.

(ii) Section 118C provides a penalty of life imprisonment for a man who commits buggery with a man under the age of 21; it also provides the same penalties for a man under 21 who commits buggery with another man. This contrasts with the law relating to consensual heterosexual intercourse with an underage girl, which is only an offence for the man, and where the age of consent for the girl is 16. This age of consent is long-established and there are no proposals for change. The Law Reform Commission proposed that for male homosexual acts the age of consent should be 21. We agree that males aged over 16 and under 21 still require protection from the law in respect of homosexual acts. Medical opinion is that men of those ages in Hong Kong:

- (a) often only have a limited and perhaps distorted knowledge of homosexual activity and its ramifications;
- (b) may be curious about, and inclined to experiment with, new activities and thus could be easily led into homosexual practices; and
- (c) are often dependent both emotionally and financially on others, and are thus more likely to be tempted by material or other incentives to consent to homosexual acts.

Penalties are provided for both parties in an act of consensual homosexual buggery where one or both partner(s) is under the age of 21. If the partner under 21 were not committing an offence then there would be a considerable potential for blackmail against the other partner which would be undesirable. However, in normal circumstances it is unlikely that proceedings would be taken against the partner under 21 where there are no other aggravating circumstances since the purpose of this new provision is the protection of males under the age of 21.

- (iii) Section 118E provides a penalty of two years' imprisonment for a man who commits an act of gross indecency with a man under the age of 21; it provides the same penalties for a man under 21 who commits an act of gross indecency with another man.
- (iv) Section 118F provides a penalty of five years' imprisonment for a man who commits buggery otherwise than in private. Where the act occurs with more than two persons being present it is treated as not being in

private. If the act occurs in a lavatory or bathhouse to which the public has access this is also treated as not being in private. In other situations, whether a place is private depends on all the circumstances - the nature of the place, the time, the lighting, the likelihood of a third person coming on the scene, etc. Section 118J provides penalties of 2 years imprisonment for acts of gross indecency committed otherwise than in private.

(v) Section 118E provides a penalty of 10 years' imprisonment for a man who commits buggery with a defective (male or female); a defence is provided if the man did not know and had no reason to suspect the other person to be a defective or he was married, or reasonably believed himself to be so married, to the female defective. Section 118I provides penalties of 2 years' imprisonment for a man who commits an act of gross indecency with a male defective with the corresponding defence available. (The existing section 125 provides for penalties of up to 5 years' imprisonment for intercourse with a female defective.).

(vi) Section 118G provides a penalty of 2 years' imprisonment for a person who procures a man to commit an act of buggery with another man. The same penalty is also provided under Section 118K for a person who procures a man to commit an act of gross indecency with another man.

8. We consider the existing law to safeguard standards of public decency adequate to ensure that public behaviour by homosexuals likely to cause offence to the public would continue to be an offence. It is a common law misdemeanour to commit an act outraging public decency in such a way that more than one person sees, or is at least able to see, the act. The common law

offence applies to all open lewdness, grossly scandalous behaviour and whatever openly outrages decency or is offensive and disgusting; it covers both homosexual and heterosexual behaviour in public. The offence may be committed by one person, the most common example being indecent exposure. Offenders have been convicted for acts committed on private premises and seen by persons on nearby private premises. Also, to prove the offence, it is not necessary to show that the act was seen by a member of the public, only that one or more persons must at least have been able to see the act. Nor is it necessary to prove that anyone was offended or disgusted, only that the act was one which may reasonably be considered to be beyond the bounds of accepted standards of public decency.

Decriminalisation of Heterosexual Buggery

9. Decriminalisation of heterosexual buggery is achieved by the repeal of sections 49 and 50 of the Offences Against the Person Ordinance and by the abolition of the common law offence of buggery (Clause 3: new section 118M). However, as with homosexual buggery, it is not proposed that heterosexual buggery be decriminalised in all circumstances.

10. Some of the new sections added to the Crimes Ordinance by Clause 3 of the Bill also apply to heterosexual buggery. These are:

- i) Section 118A. Life imprisonment for non-consensual buggery.
- ii) Section 118B. 10 years' imprisonment for assaulting a person with intent to commit buggery.
- iii) Section 118E. 10 years' imprisonment for buggery with a defective (see para. 7(v) above).

11. Section 118D provides a penalty of life imprisonment for a man who commits buggery with a girl under 21. It is not proposed that the girl should be criminally liable - this is consistent with the existing provisions designed to protect women or girls where the female party to the sexual act is not made criminally liable.

12. There are divergent views on the minimum age of a woman with whom a man can commit consensual buggery without legal penalty. Two options examined below discuss whether the minimum age should be 16 or 21.

13. The argument in favour of 16 years is that this is the same age limit as that at which a female can consent to sexual intercourse and at which she can marry (with parental consent). The argument suggests that there is little or no equivalence between homosexual buggery and heterosexual buggery; that consensual heterosexual buggery is a form of heterosexual sex and, as such, the law regarding it would be better related to the laws concerned with other aspects of heterosexual behaviour; that there is no reason to single out buggery from other kinds of heterosexual behaviour and apply to it a higher age of consent. This argument considers public opinion in Hong Kong having for long recognised that girls at age 16 are old enough to consent or not to sexual intercourse, would repose sufficient trust in girls of that age to be able to consent or not to heterosexual buggery.

14. The argument in favour of 21 years is that this is the same age limit as that under section 118C at which a male may commit consensual buggery in private without legal penalty. The argument posits an equivalence between homosexual buggery and heterosexual buggery and suggests that public opinion in Hong Kong would want girls to be as protected from heterosexual buggery as boys be protected from homosexual buggery. A further

argument is that younger people may not be aware of the greater risk of AIDS from buggery than other forms of sexual intercourse and for this reason may require legal protection from the possible consequences of this lack of knowledge.

15. In all the circumstances, we favour setting the age limit at 21 years, although this would make it an offence for a man to commit buggery with his consenting wife under the age of 21. We had considered whether it was appropriate to not make it an offence for the husband of a woman under 21 to commit consensual buggery with his wife but considered that it would be inappropriate if the corresponding consensual act between a man and a woman under 21, who were not legally married, would render the man criminally liable. If women under 21 are considered to require the protection of the law then this protection should apply equally to all women of that age; the fact of marriage should not be a bar to that protection.

Past Offences

16. Section 118N provides that a past act of buggery or of gross indecency by a male with a male shall not be the subject of a prosecution if the act would not be criminal under the laws as amended by this Bill.

Bestiality

17. Bestiality was formerly covered under the offence of buggery which we propose should be repealed. In its place Section 118L provides that bestiality remains an offence but punishable by lowered penalties of imprisonment for one year and a fine of \$5,000 and imprisonment for five years for procuring another person to commit bestiality.

Lesbianism

18. There are no criminal sanctions against lesbianism as such and none are proposed. Public displays of lesbianism will continue to be subject to sanctions under the common law offence of outraging public decency. Lesbian acts committed with a non-consenting woman would continue to be an offence of indecent assault. Lesbian acts committed with a girl under 16 will, if section 146 is amended as we propose (in paragraph 24), be an offence under that section.

Extension to men and boys of protection from sexual exploitation afforded to women and girls

19. A number of existing sexual offences largely relate to “unlawful sexual intercourse” which means, essentially, intercourse otherwise than between a man and his wife. Under existing legislation a person who has “unlawful sexual intercourse” does not necessarily commit an offence. However, in certain circumstances such an act will amount to an offence, eg, if the act is procured by threats or obtained by the administration of drugs. In order to extend these offences to protect men and boys, Clause 2 introduces the term “unlawful sexual act” to replace “unlawful sexual intercourse” in those offences which will be extended to protect men and women equally from sexual abuse. “Unlawful sexual act” is defined as meaning any of the following -

- (a) unlawful sexual intercourse (broadly speaking, this means intercourse outside marriage);
- (b) homosexual buggery and acts of gross indecency; and

- (c) buggery and acts of gross indecency between a man and a woman outside marriage.

By describing such acts as “unlawful sexual acts” and designating them as immoral for the purposes of section 147 (soliciting for immoral purposes) it is made clear that they are not acts which the law condones or will support.

20. The Crimes Ordinance contains provisions which protect females from certain aspects of heterosexual conduct. We propose that the majority of these provisions should be extended to protect males from the corresponding heterosexual or homosexual conduct (ie, an “unlawful sexual act”). There are a few provisions (eg, rape) which we consider either unnecessary or undesirable to extend to cover heterosexual conduct with men. This is because we consider that men are not in need of the same protection in relation to heterosexual conduct as women are. We therefore propose that certain existing sections shall not be extended to cover heterosexual conduct with men. However, men and boys will be protected in respect of corresponding homosexual conduct.

21. At Annex B is a list of all the existing protective measures for females found in the Crimes Ordinance; against this list are the proposals to extend the offence to protect males from the corresponding homosexual or heterosexual conduct (or, where one or both are not proposed to be extended, an explanation).

Prostitution

22. The clauses relating to prostitution extend to men and boys the protection currently afforded to women and girls in

relation to prostitution. The purpose is to ensure that male homosexual prostitution does not become established in Eong Kong; the clauses also apply to male heterosexual prostitution. The purpose is effected by deleting references to the sex of the prostitute or person living on the earnings of prostitution. This is detailed in Annex B (Clauses 9 - 19 and 22). In addition Clause 21 amends section 147 (soliciting for immoral purposes) to make it clear that buggery by a man with another man and acts of gross indecency by a man with another man are immoral acts; a male soliciting for these purposes would be guilty of an offence.

Other Changes

23. Clause 7 extends the offence of indecent assault in section 122 of the Crimes Ordinance to protect males as well as females. It also increases the maximum penalty for such an offence from five to ten years' imprisonment. This is in line with the penalty for indecent assault on a man under section 50(b) of the Offences Against the Person Ordinance, a section which is repealed by the Bill. The psychological trauma inflicted by the worst case of indecent assault can be little different from that inflicted by rape, and it is considered more appropriate to increase the protection given to women than to decrease the protection given to men.

24. Clause 20 amends section 146 of the Crimes Ordinance (indecent conduct towards a child under 14) to bring children between 14 and 16 within its protection. This brings section 146 into line with section 122 (indecent assault) which provides that a child under 16 cannot give consent to an indecent assault which would prevent the assault being an offence.

LEGISLATIVE TIMETABLE

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| 25. | Publication in the Gazette | 22 March 1991 |
| | First Reading and commencement of the
Second Reading debate | 17 April 1991 |
| | Resumption of Second Reading debate,
Committee stage and Third Reading | to be notified |

FINANCIAL AND STAFFING IMPLICATIONS

26. Enactment of the Bill will have no financial or staffing implication.

PUBLICITY

27. A press release will be issued. It will stress the fullness of the debate in the Legislative Council in July and the fact that the Bill does not encourage homosexuality, but rather removes from its practice by adults unjust and unenforceable punishments out of keeping with Hong Kong's life and laws in general. The moderate approach being taken, to reflect public concerns, will also be emphasized.

Security Branch

20 March 1991

SCR 2/2801/83 X

Disc 0036A/0368A(MM)