

THE LAW REFORM COMMISSION OF HONG KONG

REVIEW OF SEXUAL OFFENCES SUB-COMMITTEE

CONSULTATION PAPER

**RAPE AND OTHER NON-CONSENSUAL
SEXUAL OFFENCES**

This consultation paper can be found on the Internet at:
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September 2012

This Consultation Paper has been prepared by the Review of Sexual Offences Sub-committee of the Law Reform Commission. It does not represent the final views of either the Sub-committee or the Law Reform Commission, and is circulated for comment and discussion only.

The Sub-committee would be grateful for comments on this Consultation Paper by 31 December 2012. All correspondence should be addressed to:

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Preface

Terms of reference

1. In April 2006, the Secretary for Justice and the Chief Justice of the Court of Final Appeal asked the Law Reform Commission to review the law relating to sexual and related offences in Hong Kong. The terms of reference were as follows:

"To review the common and statute law governing sexual and related offences under Part XII of the Crimes Ordinance (Cap. 200) and the common and statute law governing incest under Part VI of the Ordinance, and to recommend such in the law as may be thought appropriate."

2. As a result of judicial comment in various judgments in Hong Kong as well as the public's comments on the desirability of setting up a register of sex offenders, the terms of reference were expanded in October 2006 to add the words shown underlined:

"To review the common and statute law governing sexual and related offences under Part XII of the Crimes Ordinance (Cap. 200) and the common and statute law governing incest under Part VI of the Ordinance, including the sentences applicable to those offences, to consider whether a scheme for the registration of offenders convicted of such offences should be established, and to recommend such changes in the law as may be appropriate."

The Sub-committee

3. The Sub-committee on Review of Sexual Offences was appointed in July 2006 to consider and advise on the present state of the law and to make proposals for reform. The sub-committee members are:

Mr Peter Duncan, SC
(Chairman)

Senior Counsel

Hon Mrs Justice Barnes

Judge of the Court of First Instance
of the High Court

Mr Eric T M Cheung	Assistant Professor Department of Professional Legal Education University of Hong Kong
Dr Chu Yiu Kong <i>[Until December 2007]</i>	Assistant Professor Department of Sociology University of Hong Kong
Mr Fung Man Chung <i>[From August 2012]</i>	Assistant Director (Family & Child Welfare) Social Welfare Department
Mr Paul Harris, SC <i>[Until February 2012]</i>	Senior Counsel
Professor Karen A Joe Laidler <i>[From September 2008]</i>	Director Centre for Criminology also Professor Department of Sociology University of Hong Kong
Mr Stephen K H Lee <i>[From January 2008 to August 2010]</i>	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mrs Apollonia Liu <i>[Until June 2009]</i>	Principal Assistant Secretary Security Bureau
Mr Ma Siu Yip <i>[Until January 2008]</i>	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mrs Anna Mak Chow Suk Har <i>[Until May 2011]</i>	Assistant Director (Family & Child Welfare) Social Welfare Department
Mr Man Chi-hung, Alan <i>[From September 2010 to May 2012]</i>	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mrs Millie Ng <i>[From June 2009]</i>	Principal Assistant Secretary Security Bureau
Ms Pang Mo-yin, Betty <i>[From May 2012]</i>	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mr Andrew Powner	Partner Haldanes, Solicitors

Ms Lisa D'Almada Remedios	Barrister
Mr Philip Ross <i>[From February 2012]</i>	Barrister
Dr Alain Sham	Deputy Director of Public Prosecutions Department of Justice
Ms Caran Wong <i>[From June 2011 to August 2012]</i>	Assistant Director (Family & Child Welfare) Social Welfare Department
Mr Thomas Leung (<i>Secretary</i>)	Senior Government Counsel Law Reform Commission

Work to date of the Sub-committee

4. Since its formation the Sub-committee has met regularly to discuss the various issues within the terms of reference. During 2007, in view of judicial comments and various media reports reflecting public anxiety over the lack of a sex offender register in Hong Kong, the Sub-committee decided to interrupt the previously planned sequence of its deliberations by considering first the question of a sex offender register.

5. In July 2008, the Sub-committee issued a consultation paper on *Interim Proposals on a Sex Offender Register* to seek views and comments from the community on the desirability of establishing a sex offender register in Hong Kong. About 200 written responses were received and many of these were substantial.

6. Taking into account the views on consultation, the Law Reform Commission published in February 2010 a report on *Sexual Offences Records Checks for Child-related Work: Interim Proposals*. The report recommends, among other things, the establishment of an administrative scheme to enable employers of persons undertaking child-related work and work relating to mentally incapacitated persons to check the criminal conviction records of employees for sexual offences. In November 2011 the Security Bureau of the HKSAR Government announced the establishment of an administrative scheme with effect from 1 December 2011 which implemented the Commission's proposals.

7. In December 2010, the Law Reform Commission published a report on *The Common Law Presumption that a Boy under 14 is Incapable of Sexual Intercourse*, recommending the abolition of the presumption. The report was the second in the series of reports to be issued under the project's terms of reference. The Statute Law (Miscellaneous Provisions) Ordinance 2012 (No. 26 of 2012) was enacted on 17 July 2012 to implement the Commission's recommendation.

Overall review of sexual and related offences

8. Having completed its reports on the question of a sex offender register and the common law presumption that a boy under 14 is incapable of sexual intercourse, the Sub-committee resumed its overall review of sexual and related offences.

9. The scope of the review is wide and it raises a number of sensitive and controversial issues which require careful consideration. It is clear that the entire review will take a considerable time to complete. The Sub-committee has therefore decided to break up the overall review into a number of parts and to issue separate consultation papers and reports on specific aspects of the subject. The Sub-committee believes that this "multi-report" approach will not only enhance the efficiency of the Sub-committee in considering this huge and complex subject but also make it easier for stakeholders to digest and comment by presenting published papers which are more manageable in size and scope for the reader.

Overseas developments of significance

10. A number of overseas jurisdictions have enacted legislation in recent years to reform the law governing sexual offences. We have considered the relevant legislation in overseas jurisdictions such as Australia, Canada, England and Wales, New Zealand and Scotland. We have found the Sexual Offences Act 2003 in England ("the English Act") and the Sexual Offences (Scotland) Act 2009 ("the Scottish Act") of particular significance to our current study. The English Act represented a major overhaul of the English law on sexual offences and established a new comprehensive legal framework for sexual offences in England and Wales. It was based on proposals by the Home Office in its paper, *Setting the Boundaries: Reforming the Law on Sex Offences* ("Home Office Paper") which were the result of a review of the law on sexual offences.¹ We have made extensive references to the Home Office Paper in this study and have found many of its proposals of great assistance to us. Furthermore, we have broadly followed the breakdown of sexual offences in the English Act in our approach to the current study.

11. The Scottish Act introduced major reform of the Scottish law on sexual offences. The Scottish Act was based on a review of the law on sexual offences by the Scottish Law Commission, whose proposals were contained in its report on *Rape and Other Sexual Offences* ("the Scottish Law Commission Report").² We have also made extensive references to the

¹ Home Office, *Setting The Boundaries: Reforming the law on sex offences* (July 2000).

² Scottish Law Commission, *Report on Rape and Other Sexual Offences* (December 2007), Scot Law Com No 209.

Scottish Law Commission Report and found it of considerable assistance to our own review.

The consultation paper

12. This consultation paper represents the first of a series of papers to be issued by the Sub-committee on the overall review of sexual and related offences. It proposes to cover the non-consensual sexual offences which are concerned with promoting or protecting a person's sexual autonomy (ie, the right to choose whether or not to engage in sexual activity), namely, rape, sexual assault by penetration, sexual assault and causing a person to engage in sexual activity without consent.³

13. As will become evident later in this report, the present legislation on sexual offences needs a comprehensive overhaul. In undertaking our review, we have decided to use the English Act as a starting point, while also taking into consideration the relevant principles identified by the Home Office Paper and the Scottish Law Commission Report, relevant provisions in other jurisdictions and the particular circumstances of Hong Kong. We have chosen to use the English Act as a starting point because many of the existing sexual offences in Hong Kong were originally based on similar provisions in English legislation.

14. The recommendations in this paper represent our preliminary views, presented for consideration by the community. We welcome any views, comments and suggestions on any issues discussed in this paper, which will assist the Sub-committee to reach its final conclusions in due course.

³ Assault by penetration, sexual assault and causing a person to engage in sexual activity without consent are new sexual offences created by the Sexual Offences Act 2003. (Note: We propose to call the first offence "sexual assault by penetration": see paragraphs 5.7 to 5.8 below).

Chapter 1

What are "sexual offences"?

Introduction

1.1 The terms of reference refer to the review of "sexual and related offences under Part XII of the Crimes Ordinance (Cap. 200)" and "incest under Part VI of the Ordinance". In order to define the scope of our current study, it is necessary to consider the question of what constitute sexual offences.

Part XII of the Crimes Ordinance (Cap. 200)

Sexual offences

1.2 There is a wide range of sexual offences in Part XII of the Crimes Ordinance including rape, buggery, gross indecency, bestiality, indecent assault, abduction, incest and other unlawful sexual acts. These sexual offences are set out in sections 118 to 128 of the Crimes Ordinance.

1.3 Many of these offences are based on similar provisions in English legislation dating back to 1956.¹ Those offences based on the 1956 legislation are: rape (section 118 of the Crimes Ordinance),² procurement by threats (section 119 of the Ordinance),³ procurement by false pretences (section 120),⁴ administering drugs to obtain or facilitate unlawful sexual act (section 121),⁵ indecent assault (section 122),⁶ intercourse with girl under 13 (section 123),⁷ intercourse with girl under 16 (section 124),⁸ intercourse with mentally incapacitated person (section 125),⁹ abduction of unmarried girl under 16 (section 126),¹⁰ abduction of unmarried girl under 18 for sexual intercourse (section 127),¹¹ and abduction of mentally incapacitated person from parent or guardian for sexual act (section 128).¹²

1.4 It should be noted that the corresponding offences in the 1956 legislation were replaced by new offences created by the English Act following

¹ Sexual Offences Act 1956, c.69, UK.

² Compared with section 1 of Sexual Offences Act 1956.

³ Compared with section 2 of Sexual Offences Act 1956.

⁴ Compared with section 3 of Sexual Offences Act 1956.

⁵ Compared with section 4 of Sexual Offences Act 1956.

⁶ Compared with section 14 of Sexual Offences Act 1956.

⁷ Compared with section 5 of Sexual Offences Act 1956.

⁸ Compared with section 6 of Sexual Offences Act 1956.

⁹ Compared with section 7 of Sexual Offences Act 1956.

¹⁰ Compared with section 20 of Sexual Offences Act 1956.

¹¹ Compared with section 19 of Sexual Offences Act 1956.

¹² Compared with section 21 of Sexual Offences Act 1956.

a major overhaul of the law relating to sexual offences in England and Wales in 2003. The original offences, however, still remain on Hong Kong's statute book.

Offences relating to prostitution or pornography

1.5 In addition to the sexual offences set out in sections 118 to 128 of the Crimes Ordinance, the remaining provisions in Part XII of the Crimes Ordinance (ie sections 129 to 159) cover a wide range of offences relating to prostitution or pornography, such as control over persons for unlawful intercourse or prostitution,¹³ detention for intercourse or in vice establishment,¹⁴ living on earnings of prostitution of others,¹⁵ use, procurement or offer of persons under 18 for making pornography or for live pornographic performances¹⁶ and keeping a vice establishment.¹⁷

1.6 We have decided not to include offences relating to prostitution or pornography within the scope of our review of sexual offences. A similar approach was adopted by the Scottish Law Commission in their comprehensive review of the law relating to sexual offences. We share their rationale for not reviewing the law on prostitution or pornography.

1.7 In the first place, it is not entirely clear that offences relating to prostitution should be considered as "sexual offences". In most cases, they are not truly sexual offences. They may in fact be more properly classified as offences against public disorder or involving public nuisance.¹⁸ For instance, the offence of keeping a vice establishment (in section 139 of Crimes Ordinance) does not involve conduct forming any of the ingredients of a typical sexual offence. Instead, the keeping of a vice establishment may more appropriately be seen as an affront to public order or as a source of nuisance to the community.

1.8 Secondly, the interaction of the criminal law and pornography raises a wide range of issues which go well beyond the perceived scope of a project on sexual offences. Those issues include questions as to whether criminalising pornography is compatible with freedom of expression, whether certain categories of pornography should be permitted or licensed, and whether certain pornographic materials should be criminalised because they typically present wrongful or harmful images of women.¹⁹

1.9 Therefore, any reform of the law relating to prostitution or pornography in the Hong Kong context would involve major social and policy questions. We do not think it appropriate for this sub-committee to embark on a review of these aspects of the law.

¹³ Section 130 of Crimes Ordinance.

¹⁴ Section 134 of Crimes Ordinance.

¹⁵ Section 137 of Crimes Ordinance.

¹⁶ Section 138A of Crimes Ordinance.

¹⁷ Section 139 of Crimes Ordinance.

¹⁸ Scottish Law Commission Report, at para 1.13.

¹⁹ Scottish Law Commission Report, at para 1.14.

Criticisms of the existing provisions on sexual offences in the Crimes Ordinance

1.10 Some of the existing provisions in the Crimes Ordinance dealing with sexual offences have been criticised as discriminatory, inconsistent and inadequate. There are differences between the ages of consent for heterosexual sex and homosexual sex. The age of consent for heterosexual intercourse is 16.²⁰ However, the age of consent for homosexual intercourse (or “buggery”) is 21.²¹ In accordance with the protective principle, it is necessary for the law to set legal ages of consent for the protection of minors from sexual abuses and exploitation. However, subject to the age of consent, a person should be able to freely choose to engage in a sexual activity under the principle of sexual autonomy. A higher age of consent for homosexual sex would restrict the sexual autonomy of the gay community. Further, a number of the offences have been criticised for being gender-specific, while others are based on sexual orientation of the parties. For example, the Court of Appeal in *Leung TC William Roy v SJ*²² upheld the decision below of the Hon Hartmann J (as he then was) who held that some statutory sexual offences that could be committed only by the gay community (namely, sections 118C, 118F(2)(a), 118H and 118J(2)(a)) were unconstitutional as being discriminatory on the basis of sexual orientation.²³ Furthermore, the Court of Final Appeal in the subsequent decision of *SJ v Yau Yuk Lung Zigo and other*,²⁴ declared that section 118F(1) is unconstitutional as being discriminatory on the basis of sexual orientation. These decisions highlight the fact that some of the existing provisions on sexual offences may be inconsistent with some of the guiding principles later discussed in Chapter 2, for example, gender neutrality; avoidance of distinctions based on sexual orientation; and adherence to the Bill of Rights and Basic Law.

1.11 There are also concerns that the existing sexual offences may not adequately reflect the range of non-consensual conduct which should be subject to criminal sanction. In accordance with the principle of sexual autonomy, it is important that all non-consensual conduct should be penalised. Furthermore, there is an absence of clear guidelines in Part XII of the Crimes Ordinance as to how consent to sexual activity is to be determined.

1.12 Some of the terms used in Part XII of the Crimes Ordinance are outdated. For example, “buggery” is no longer used in overseas jurisdictions that have reformed their law on sexual offences. The use of outdated terms

²⁰ Under section 124 of the Crimes Ordinance (Cap. 200), a man who has unlawful sexual intercourse with a girl under the age of 16 is liable to imprisonment for 5 years.

²¹ Under section 118C of the Crimes Ordinance (Cap. 200), a man who commits buggery with another man under the age of 21 is liable to imprisonment for life.

²² CACV 317/2005, reported in [2006] 4 HKLRD 211 (on appeal from HCAL 160/2004, reported in [2005] 3 HKLRD 657).

²³ As the administration challenged only the decision below regarding the unconstitutionality of section 118C, the Court of Appeal in CACV 317/2005 dealt only with that section and not the other sections (which were conceded by the Administration).

²⁴ FACC 12/2006, reported in [2007] 3 HKLRD 903.

in legislation is inconsistent with the principle of clarity of the law. By replacing outdated terms with modern terminology, people would have better understanding of the law and clarity of the law can be achieved.

1.13 There may be different views as to the appropriate penalty levels in the sexual offences in Part XII of the Crimes Ordinance and maximum sentences that are applicable to the various offences may also need to be reviewed. For example, the maximum penalty for a crime under section 118E (buggery with mentally incapacitated person) is 10 years' imprisonment whilst the maximum penalty for a crime under section 118A (non-consensual buggery) is a life sentence.

1.14 As the existing provisions dealing with sexual offences in Part XII of the Crimes Ordinance are fraught with these types of problems, we take the view that it is desirable to replace the existing sexual offences in Part XII with new types of sexual offences or to redefine the ingredients of some of the existing offences. We also consider that a similar approach should be taken in relation to the offences of incest by men (section 47 of the Crimes Ordinance) and incest by women of or over 16 (section 48 of the Crimes Ordinance). These crimes had their origins in similar provisions in sections 1 and 2 of the English Punishment of Incest Act 1908. The relevant provisions in the 1908 Act have long been replaced in England and Wales by the Sexual Offences Act 1956 which contained new provisions on the crime of incest.²⁵

Classification of sexual offences

1.15 In determining what conduct should fall within the parameters of a reformed range of sexual offences we have found the classification of sexual offences adopted by the Scottish Law Commission to be helpful.

1.16 The Scottish Law Commission classified sexual offences into three broad categories in their discussion, as follows:

- (1) offences which are concerned with promoting or protecting a person's sexual autonomy;
- (2) offences which seek to provide protection to persons who are vulnerable to sexual exploitation or about whom there are doubts concerning their capacity to engage in consensual sexual conduct; and
- (3) offences which seek to promote a social or moral goal other than in the previous two categories.²⁶

²⁵ Section 10(1) of the Sexual Offences Act 1956 replaced section 1(1) of the Punishment of Incest Act 1908. Section 11(1) of the Sexual Offences Act 1956 replaced section 2 of the Punishment of Incest Act 1908. In turn, sections 10 and 11 of the 1956 Act were later repealed by the Sexual Offences Act 2003.

²⁶ Scottish Law Commission Report, at para 1.18.

First category – offences based on sexual autonomy

1.17 Sexual offences under this category are those which prohibit conduct which infringes a person's sexual autonomy.²⁷ This autonomy is infringed where a person participates in sexual conduct in which he or she has not freely chosen to be involved.²⁸

1.18 The Scottish Law Commission said this category of offences can generally be described as sexual assaults.²⁹ Under our existing law, these offences encompass the crimes of rape,³⁰ indecent assault,³¹ non-consensual buggery,³² assault with intent to commit buggery³³ and procurement by threats, false pretences and administering drugs to obtain or facilitate an unlawful sexual act.³⁴

Second category – offences based on the protective principle

1.19 This category refers to offences which protect persons who are vulnerable in respect of sexual matters. The two most obvious types of vulnerable persons are young persons and persons with some form of mental disorder.³⁵ Under our existing law, these offences encompass the crimes of homosexual buggery with or by a man under 21,³⁶ buggery with a girl under 21,³⁷ buggery with a mentally incapacitated person,³⁸ gross indecency with or by a man under 21,³⁹ gross indecency by a man with a male mentally incapacitated person,⁴⁰ intercourse with girl under 13 or 16⁴¹ and intercourse with a mentally incapacitated person.⁴²

1.20 The law has been widened in some overseas jurisdictions on the basis of the protective principle to include regulation of sexual conduct between persons in a situation where one of the parties is in a position of trust or authority over the other.⁴³

²⁷ Scottish Law Commission Report, at para 1.18.
²⁸ Scottish Law Commission Report, at para 1.25.
²⁹ Scottish Law Commission Report, at para 1.19.
³⁰ Section 118, Crimes Ordinance.
³¹ Section 122, Crimes Ordinance.
³² Section 118A, Crimes Ordinance.
³³ Section 118B, Crimes Ordinance.
³⁴ Sections 119-121, Crimes Ordinance.
³⁵ Scottish Law Commission Report, at para 1.20.
³⁶ Section 118C, Crimes Ordinance.
³⁷ Section 118D, Crimes Ordinance.
³⁸ Section 118E, Crimes Ordinance.
³⁹ Section 118H, Crimes Ordinance.
⁴⁰ Section 118I, Crimes Ordinance.
⁴¹ Section 123-124, Crimes Ordinance.
⁴² Section 125, Crimes Ordinance.
⁴³ Scottish Law Commission Report, at para 1.20.

Third category – offences based on public morality

1.21 This final category of sexual offences covers those where the underlying rationale is a social or moral principle or goal other than protecting sexual autonomy or protecting vulnerable persons. These offences are generally referred to as offences against public morality.

1.22 Under our existing law, these offences encompass the crimes of bestiality,⁴⁴ homosexual buggery committed otherwise than in private,⁴⁵ procuring others to commit homosexual buggery,⁴⁶ gross indecency by a man with another man otherwise than in private,⁴⁷ and procuring gross indecency by a man with another man.⁴⁸

1.23 The crimes of incest by men (section 47 of the Crimes Ordinance) and incest by women of or over 16 (section 48 of the Crimes Ordinance) also fall within this category of sexual offences based on public morality. As explained above, certain other offences coming under this category of public morality offences, such as prostitution-related offences and pornography, will not be considered in this project.

1.24 We have adopted the above classification of sexual offences in undertaking the current review.

The range of sexual offences to be covered in the current project

1.25 The English Act has created a range of new sexual offences. As many of our existing offences are based on similar English provisions which have been modified or replaced, it is useful for us to use the sexual offences in the English Act as a starting point, and to review them taking into consideration the circumstances in Hong Kong.

1.26 Applying the above classification of sexual offences to those in the English Act there are firstly offences based on sexual autonomy. They are rape,⁴⁹ assault by penetration,⁵⁰ sexual assault⁵¹ and causing a person to engage in sexual activity without consent.⁵²

1.27 Secondly, there are offences based on the protective principle. There is a wide range of offences involving children in sections 5 to 15 of the English Act, including the offences of sexual activity with a child;⁵³ causing or

⁴⁴ Section 118L, Crimes Ordinance.

⁴⁵ Section 118F, Crimes Ordinance.

⁴⁶ Section 118G, Crimes Ordinance.

⁴⁷ Section 118J, Crimes Ordinance.

⁴⁸ Section 118K, Crimes Ordinance.

⁴⁹ Sexual Offences Act 2003, section 1.

⁵⁰ Sexual Offences Act 2003, section 2.

⁵¹ Sexual Offences Act 2003, section 3.

⁵² Sexual Offences Act 2003, section 4.

⁵³ Sexual Offences Act 2003, section 9.

inciting a child to engage in sexual activity;⁵⁴ engaging in sexual activity in the presence of a child;⁵⁵ causing a child to watch a sexual act;⁵⁶ and child sex offences committed by children or young persons.⁵⁷

1.28 There are also offences involving mentally disordered persons in sections 30 to 37 of the English Act which are based on the protective principle, including the offences of sexual activity with a person with a mental disorder impeding choice;⁵⁸ causing or inciting a person with a mental disorder impeding choice to engage in sexual activity;⁵⁹ and engaging in sexual activity in the presence of a person with a mental disorder impeding choice.⁶⁰

1.29 Other offences based on the protective principle can be found in sections 16 to 24 of the English Act which are offences involving the abuse of position of trust. Sections 25 to 26 of the English Act contain familial child sex offences dealing with incestuous situations.

1.30 Thirdly, there are offences in the English Act under the category of offences against public morality, including exposure⁶¹ and intercourse with an animal.⁶² There is also the offence of voyeurism,⁶³ which has no Hong Kong equivalent. We note also that section 7 of the Scottish Act deals with unwelcome verbal or written sexual communications, which has no Hong Kong equivalent. As such, it may assist in the prosecution of cases involving verbal or written communications sent to the victim for sexual gratification or with a view to humiliating, distressing or alarming the victim.

1.31 We shall also look at other miscellaneous offences in the English Act which are largely preparatory offences to the commission of one or more of the sexual offences falling under the above classifications. For example, there are offences under sections 57 to 60 of the English Act dealing with the trafficking of persons into, within and outside the UK for the commission of a sexual offence under Part 1 of the Act. Unlike section 129 of the Crimes Ordinance which deals with the trafficking in persons to or from Hong Kong for the purpose of prostitution (a subject which we shall not consider for reasons stated above), the trafficking offences in sections 57 to 60 of the English Act deal with trafficking of persons for purposes of the commission of sexual offences (which may not be prostitution-related).

1.32 We shall further look at other preparatory offences including the offences of administering a substance with intent;⁶⁴ committing an offence

⁵⁴ Sexual Offences Act 2003, section 10.

⁵⁵ Sexual Offences Act 2003, section 11.

⁵⁶ Sexual Offences Act 2003, section 12.

⁵⁷ Sexual Offences Act 2003, section 13.

⁵⁸ Sexual Offences Act 2003, section 30.

⁵⁹ Sexual Offences Act 2003, section 31.

⁶⁰ Sexual Offences Act 2003, section 32.

⁶¹ Section 66 of the Sexual Offences Act 2003. The English offence of exposure is of similar nature to the offence of indecency in public under section 148 of the Crimes Ordinance.

⁶² Section 69 of the Sexual Offences Act 2003.

⁶³ Section 67 of the Sexual Offences Act 2003.

⁶⁴ Section 61 of the Sexual Offences Act 2003.

with intent to commit a sexual offence;⁶⁵ and trespass with intent to commit a sexual offence.⁶⁶

1.33 There are, however, some sexual offences in the Crimes Ordinance which do not have any equivalent in the English Act. They are: abduction of unmarried girl under 16,⁶⁷ abduction of unmarried girl under 18 for sexual intercourse⁶⁸ and abduction of mentally incapacitated person from parent or guardian for sexual act.⁶⁹ We shall look at these offences to see if there are any justifications for their continued existence in our statute book, and if not, whether they should be scrapped or be replaced by new offences.

1.34 Moreover, Hong Kong has retained the common law presumption that a boy under 14 years of age is incapable of sexual intercourse. This presumption was abolished in England and Wales by section 1 of the Sexual Offences Act 1993. We have earlier considered this subject and concluded that the presumption should likewise be abolished in Hong Kong. As a result, the Law Reform Commission Report on *The Common Law Presumption that a Boy under 14 is Incapable of Sexual Intercourse* was published in December 2010, recommending the abolition of the presumption. The Statute Law (Miscellaneous Provisions) Ordinance 2012 (No. 26 of 2012) was enacted on 17 July 2012 to implement the Commission's recommendation.

1.35 Finally, a complete overhaul of the law relating to sexual offences requires consideration of the sentences which may be imposed in relation to the relevant offences. We shall therefore consider sentencing, but in doing so, we shall look not just at the actual sentences for the individual offences. Rather, we shall look at the sentencing structure, including the relative gravity or seriousness of the offences, as well as whether judges should be empowered to impose new types of orders.

Division of the project into different parts

1.36 As mentioned in the Preface, we intend to break down our review into a number of discrete parts, each dealing with different aspects of the overall subject matter. It is our preliminary plan, to be adjusted if necessary in the light of further deliberations, to divide our project into four parts, with separate consultation papers or reports to be issued in respect of each of them. The four parts are: (i) offences based on sexual autonomy (ie rape and other non-consensual sexual offences); (ii) offences based on the protective principle (ie offences against children and mentally incapacitated persons and offences involving abuse of a position of trust); (iii) the miscellaneous sexual offences; and (iv) sentencing.

⁶⁵ Section 62 of the Sexual Offences Act 2003.

⁶⁶ Section 63 of the Sexual Offences Act 2003.

⁶⁷ Section 126 of Crimes Ordinance.

⁶⁸ Section 127 of Crimes Ordinance.

⁶⁹ Section 128 of Crimes Ordinance.

1.37 This consultation paper deals with the first of these and considers offences based on sexual autonomy, namely, the offences of rape; sexual assault by penetration, sexual assault and causing a person to engage in sexual activity without consent.

Chapter 2

Guiding principles for reform

The need for a set of guiding principles

2.1 A comprehensive review of the substantive sexual offences in Hong Kong involves complex and sensitive issues, including questions as to the law's underlying moral principles. We therefore think it desirable at the outset of our review to formulate a set of guiding principles to ensure consistency in our choice of reform options for the wide variety of sexual offences involving different forms of criminal conduct with different degrees of culpability.

2.2 Any reform of the law on sexual offences necessarily involves the making of legislative proposals to give effect to some underlying principles. It is therefore necessary for us to identify those which will form the bases of our guiding principles for reform. In this regard, we have noted the Scottish Law Commission's views:

"We do not see any discussion of principles for reforming this area of law as dealing with the 'enforcement of morals'. That debate, often presented in the context of sexual offences, is concerned about the extent to which social views should influence legal development. But, in one sense, all of the major issues about reforming the law on sexual offences involve giving legal effect to some or other underlying moral principles and for us the important issue is to identify what those principles are."¹

2.3 It is therefore important for us to stress at the outset that in identifying the underlying principles, we are not attempting to deal with the controversial subject of "enforcement of morals". The underlying principles are identified only to assist us in formulating the set of guiding principles for reform and to evaluate different reform options. We shall not delve into the controversial subject of appropriate moral standards for the community.²

¹ Scottish Law Commission Report, at para 1.23.

² According to the Scottish Law Commission, "not all legal regulation of sexual conduct needs to be done by way of the criminal law, and other types of legal process may be a more appropriate way of dealing with problematic sexual conduct. For example, in Scotland most offences committed by children do not result in prosecution in the criminal courts but are dealt with by the welfare-based children's hearings system. Still less should the criminal law cover every possible types of morally wrong sexual conduct. Matters such as adultery and infidelity are not issues for the criminal law or perhaps even for the law generally." (Scottish Law Commission Report, at para 1.30.) The Scottish Law Commission referred to this issue in their discussion but not as a guiding principle.

Guiding principles of the Scottish Law Commission

2.4 The Scottish Law Commission formulated a number of principles which were considered as appropriate sources of guidance for the reform of the law on sexual offences. We have found those guiding principles helpful and have adopted similar principles in our study, subject to some necessary refinements. The guiding principles identified by the Scottish Law Commission are discussed below.

(1) *Clarity of the law*

2.5 One important objective of any law reform project is to achieve clarity of the law. The need for clarity is particularly important in criminal law, as infringement may entail serious consequences, including deprivation of liberty or property. The need is perhaps all the greater in respect of sexual offences. Persons contemplating a particular form of sexual conduct should be able to know, or find out without difficulty, whether what they are intending to do is legal or not.³

2.6 We consider that clarity of the law should be a guiding principle but we are also conscious that it is difficult, if not impossible, to achieve absolute clarity or precision of the law. In the Court of Final Appeal decision of *Shum Kwok Sher v HKSAR*, Sir Anthony Mason NPJ said:

*"... a law must be adequately accessible in the sense that it gives a person an adequate indication of the law relevant to his situation so that (if need be with advice) he can regulate his conduct. On the other hand, it is well settled that the degree of precision required will vary according to the context of the law..."*⁴

*"... laws that are framed in general terms may be better suited to the achievement of their objectives, in as much as in fields governed by public policy circumstances may vary widely in time and from one case to the other. A very detailed enactment would not provide the required flexibility, and it might ... obscure its purposes behind a veil of detailed provisions.... One must be wary of using the doctrine of vagueness to prevent or impede state action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject-matter does not lend itself."*⁵

³ Scottish Law Commission Report, at para 1.24.

⁴ *Shum Kwok Sher v HKSAR* [2002] 2 HKC 117, at para 89E. Sir Anthony Mason NPJ was referring to the principle of law in *R v Nova Scotia Pharmaceutical Society* (1992) 74 CCC (3d) 289.

⁵ Cited above, at para 90D. Sir Anthony Mason NPJ was referring to the judgment of Gonthier J in *R v Nova Scotia Pharmaceutical Society* (at 312h-313c).

2.7 According to the Scottish Law Commission, there are two key aspects to clarity of the law. Firstly, each sexual offence must be defined in such a way that what it prohibits is directly stated. Secondly, each offence must be comprehensive in scope; it prohibits specified forms of conduct but nothing more. Hence, there should not be open-ended sexual offences. There has, for instance, been criticism of the Scottish common law offences of lewd, indecent and libidinous behavior (ie offences involving conduct against children which tends to corrupt the innocence of the victim) on the basis that the range of conduct tending to corrupt children's innocence is open-ended and there is a lack of clarity as to the specified forms of criminal conduct involved in these offences.⁶

(2) Respect for sexual autonomy

2.8 Respect for sexual autonomy operates at two levels. Firstly, a person's sexual autonomy is breached where that person is involved in a sexual act in respect of which he or she has not freely chosen to participate. Any activity which breaches someone's sexual autonomy is a wrong which the law should treat as a crime. Secondly, where a person freely chooses to engage in a sexual activity, the law in principle should not prohibit that activity. According to the Scottish Law Commission, a person's freedom of choice to engage in a sexual activity can be overridden in exceptional cases and for good reasons only:

*"There may be exceptional instances where a person's free choice in sexual activity is overridden and the conduct is made criminal. But these instances are truly exceptional and must be based on clear and convincing reasons."*⁷

2.9 Consent is a key element in the principle of respect for sexual autonomy. The principle can be re-stated in terms of consent: first, non-consenting sexual conduct should be criminalised; second, consenting sexual conduct should not be criminalised unless there are strong reasons for doing so.⁸

2.10 Whilst we accept that respect for sexual autonomy should be a guiding principle, we consider that the principle is not appropriate for those who are subject to the protective principle, such as children, mentally incapacitated persons, and persons over whom others hold a position of trust or authority. Young children and most mentally incapacitated persons do not have the capacity to consent to engage in sexual activities.⁹ The question of

⁶ Scottish Law Commission Report, at para 1.24.

⁷ Scottish Law Commission Report, at para 1.25.

⁸ Scottish Law Commission Report, at para 1.27.

⁹ It should be noted that not all mentally incapacitated persons lack the capacity to give consent to engage in sexual activities. Their capacity to give consent will depend on their ability to understand the nature of the act or to make decision as to whether to engage in the activity. That is the reason why specific provisions were enacted in section 17 of the Sexual Offences (Scottish) Act 2009 for determining the capacity of mentally disordered persons to consent to conduct.

respect for their sexual autonomy does not arise since they lack the capacity to choose to engage in sexual activities. As will be seen below, even in the case of persons having the capacity to give consent (for example, older children or persons over whom others hold a position of trust or authority) it may be necessary to override their sexual autonomy to protect them and to prevent exploitation. We therefore consider that the guiding principle of respect for sexual autonomy should apply save in cases where its application would contravene the protective principle.

(3) Protective principle

2.11 The underlying idea of the protective principle is that the criminal law should give protection to certain categories of persons for whom consenting to sexual activity is problematic. The Scottish Law Commission developed the protective principle to deal with *"children, persons with a mental disorder, and persons over whom others hold a position of trust."*¹⁰

2.12 In some situations (for example, in relation to young children), it can be said that the protective principle simply supplements the consent requirement, as such persons cannot consent to sexual activity. In situations where the person *can* give consent (for example older children or persons over whom others hold a position of trust or authority), the protective principle acts to protect the vulnerable and to prevent exploitation. In these latter situations, *"the protective principle overrides the principle that sexual conduct based on consent of the parties should not be criminalised."*¹¹

2.13 We agree with the protective principle in general but note that there may be difficulty in the application of the principle where both the perpetrator and the victim are minors. There may be arguments for having exemption or special sentencing options where minors commit sexual offences involving other minors. This will be discussed in greater detail at a later stage of the overall review of the substantive sexual offences.

(4) No distinctions based on sexual orientation or gender

2.14 According to the Scottish Law Commission, it is a guiding principle that *"the law on sexual offences should not involve distinctions based on sexual orientation or types of sexual practice"*.¹² A related point is that *"the criminal law on sexual offences should, as far as possible, not make distinctions based on gender."*¹³ Hence, there are two aspects of this guiding principle: gender neutrality and sexual orientation.

¹⁰ Scottish Law Commission Report, at para 1.28.

¹¹ Scottish Law Commission Report, at para 1.28.

¹² Scottish Law Commission Report, at para 1.29.

¹³ As above.

Gender neutrality

2.15 As the Scottish Law Commission pointed out, consensual sexual conduct between parties who do not fall within the scope of the protective principle should not be made criminal unless there are clear and convincing reasons to do so.¹⁴ The criminal law should therefore not be concerned with the gender of the parties to the sexual activity but should focus on the prevention of non-consensual sexual conduct and protection of vulnerable people from sexual abuse and exploitation. In accordance with the principle of gender neutrality, all offences in the English Act and the Scottish Act are now gender neutral in that all offences can be committed by a person of either sex.

Avoidance of distinctions based on sexual orientation

2.16 We now turn to the second aspect of this guiding principle, namely, that the law should avoid distinctions based on sexual orientation. Before we can decide whether this principle should be adopted, we need to ascertain the scope of the term "sexual orientation". The Scottish Law Commission did not define the term "sexual orientation". There are, however, some definitions of "sexual orientation" discussed below that can be useful for our study.

2.17 Black's Law Dictionary defines "sexual orientation" as:

"A person's predisposition or inclination toward a particular type of sexual activity or behavior; heterosexuality, homosexuality, or bisexuality.

- *There has been a trend in recent years to make sexual orientation a protected class, esp. in employment and hate-crime statutes.*¹⁵

2.18 Section 12(1) of UK's Equality Act 2010 defines "sexual orientation" as follows:

"Sexual orientation means a person's sexual orientation towards –

- (a) persons of the same sex,*
- (b) persons of the opposite sex, or*
- (c) persons of either sex."*

2.19 In section 4 of Western Australia's Equal Opportunity Act 1984, the term "sexual orientation" is defined to mean *"heterosexuality, homosexuality, lesbianism or bisexuality and includes heterosexuality, homosexuality, lesbianism or bisexuality imputed to the person."*

¹⁴ Scottish Law Commission Report, at para 1.29.

¹⁵ 7th Edition.

2.20 "Sexual orientation" is defined in numerous statutes in the United States,¹⁶ but the New Jersey statute¹⁷ is representative of sexual orientation anti-discrimination laws in general. It defines "affectional or sexual orientation" as:

"male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation."

2.21 Further, homosexuality is defined as:

"affectional, emotional or physical attraction or behavior which is primarily directed towards persons of the same gender."

2.22 In the recent Hong Kong Court of First Instance case of *W v Registrar of Marriages*, Hon Mr Justice Cheung (now Chief Judge of the High Court) said "sexual orientation" referred to *"the preferences for sexual relationship with a male or a female"*.¹⁸ The learned judge also said "sexual orientation" could be *"homosexual, heterosexual, asexual or bisexual"*.¹⁹ That case, however, was concerned with whether a post-operative male-to-female transsexual may legally marry a man in Hong Kong. The learned judge made it clear that the case was not about "sexual orientation" but rather was about people who were unhappy with their own biological sex. Anything said in the case about the meaning of "sexual orientation" was therefore *obiter*.

2.23 In the Hong Kong SAR Government's *Code of Practice against Discrimination in Employment on the Ground of Sexual Orientation* ("Code of Practice"), "sexual orientation" is defined to mean:

*"heterosexuality (sexual inclination towards persons of the opposite sex), homosexuality (sexual inclination towards persons of the same sex), and bisexuality (sexual inclination towards persons of both sexes)."*²⁰

¹⁶ "Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws" by Jack M Battaglia. University of Detroit Mercy Law Review 1999 (76 U. Det. Mercy L. Rev. 189).

¹⁷ N.J. Stat. Ann 10:5-5 (hh)(West Supp. 1995).

¹⁸ HCAL 120/2009. at para 14.

¹⁹ Cited above, at para 23.

²⁰ Constitutional and Mainland Affairs Bureau, HKSAR Government: <http://www.cmab.gov.hk/en/issues/sexual.htm>, retrieved on 14 February 2011. The definition appears at paragraph 2.1 of the Code of Practice. A similar definition of "sexual orientation" was adopted in the Home Affairs Bureau's paper, *Equal Opportunities: A Study on Discrimination on the Ground of Sexual Orientation – A Consultation Paper 1996*. In that consultation paper, a survey conducted by Survey Research Hongkong Ltd in October 1995 was included. In the survey questionnaire, heterosexuality, homosexuality or bisexuality were referred to as different forms of sexual orientation. For the purpose of the survey, heterosexuality was defined to mean sexual attraction to people of the opposite sex; homosexuality to mean sexual attraction to people of the same sex, and bisexuality to mean sexual attraction both to people of the opposite sex and the same sex. In another survey conducted by the Home Affairs Bureau on Public Attitudes towards Homosexuals in 2006, the survey questionnaire referred "sexual orientation" as "an

2.24 The definitions of "sexual orientation" reviewed above can be classified into four categories: (i) dictionary definitions; (ii) statutory definitions from other jurisdictions; (iii) judicial definitions; and (iv) definitions used in official sources in Hong Kong (ie the definition used by the Hong Kong SAR Government in the Code of Practice).

2.25 Of these definitions, we are inclined to adopt the definition already used by the Hong Kong SAR Government in the Code of Practice. Any relevant policy initiatives by the government are likely to proceed on the basis of that official definition. What is more, although the Code of Practice is concerned with equal opportunities in employment, the code makes clear that its principles apply to all aspects of life.²¹

Bestiality is not a form of sexual orientation

2.26 There is a common thread running through all the above-quoted definitions that the term "sexual orientation" generally refers to heterosexuality, homosexuality or bisexuality. Under the definition in the Code of Practice, heterosexuality, homosexuality or bisexuality means sexual inclination towards *persons* of the opposite sex; *persons* of the same sex; and *persons* of either sex, respectively. Furthermore, as the Hon Mr Justice Cheung (now Chief Judge of the High Court) said in *W v Registrar of Marriages*, above, "sexual orientation" referred to "*the preferences for sexual relationship with a male or a female*".

2.27 It is therefore clear that the term "sexual orientation" refers to the inclination for sexual behaviour between two human beings only and not bestiality, which involves sexual activity between a human being and an animal. Bestiality is not a form of sexual orientation, but rather as the Home Office Review Group put it, is an act offending the dignity of animals and people:

*"It [bestiality] was an act that offended against the dignity of animals and of people. Working as we do on the principle of free agreement to sexual activity, this was simply not possible with animals. An offence of bestiality would seek to protect animals but we thought that it was primarily a sex offence reflecting some profoundly disturbed behaviour..."*²²

2.28 As bestiality is not within the ambit of "sexual orientation", it cannot be justified on the basis of the principle that the law should not involve distinctions based on sexual orientation.

Homosexuality

2.29 As all of the above definitions show, homosexuality is clearly within the meaning of sexual orientation. In accordance with the guiding

enduring emotional, romantic, sexual or affectional attraction to another person. It includes homosexuality, heterosexuality or bisexuality".

²¹

Code of Practice, para 1.2.

²²

Home Office Paper, at para 8.5.3.

principle of avoidance of distinctions based on sexual orientation, consensual homosexual activities should not be criminalised unless any of the parties falls within the scope of the protective principle (that is, children, mentally incapacitated persons or persons over whom others hold a position of trust or authority) or the activity involves sexual activity in public. On this basis, there should not be any homosexual offences at all. Instead, protection will be provided by means of one of the non-consensual offences (namely, rape, sexual assault by penetration, sexual assault or causing a person to engage in sexual activity without consent) where there is lack of consent on the part of any of the parties. Protection will be provided by one of the offences under the protective principle (that is, offences against children, mentally incapacitated persons or persons over whom others hold a position of trust or authority) if any of the parties to the homosexual activity falls within the scope of that principle.

2.30 This was the approach taken by the Home Office Review Group and the Scottish Law Commission. The Home Office Review Group recommended that the offences of buggery and gross indecency should be repealed, with separate provision made for the protection of children and animals and for regulating sexual behaviour in public.²³ The Scottish Law Commission took the view that *"it is wrong in principle that offences should be based on sexual orientation rather than on forms of wrong"* and therefore recommended that *"all existing offences which relate to homosexual conduct should be removed"*.²⁴ The approach was adopted in both the English Act and the Scottish Act. In accordance with the principle of avoiding distinctions based on sexual orientation, there are no longer any homosexual offences (such as buggery and gross indecency) in either the English or Scottish legislation.

2.31 We agree that the law on sexual offences should avoid distinctions based on sexual orientation and any reform of law on homosexual offences should be guided by that principle.

(5) European Convention on Human Rights

2.32 The Scottish Law Commission considered that the European Convention on Human Rights ("the European Convention") was important as *"a statement of the basic values of the law on sexual offences"*.²⁵ The Scots law on sexual offences has been amended to ensure compliance with the European Convention.²⁶ The main theme of this guiding principle is that the law on sexual offences should conform to some recognised standards of human rights.

2.33 In the Hong Kong context, this guiding principle should be considered in the context of the Hong Kong Bill of Rights Ordinance (Cap. 383)

²³ Home Office Paper, recommendation 45 at para 6.6.10.

²⁴ Scottish Law Commission Report, at para 5.9.

²⁵ Scottish Law Commission Report, at para 1.31.

²⁶ As above.

("the HKBORO"), the Basic Law and the International Covenant on Civil and Political rights ("the ICCPR"), which is enshrined in the Basic Law. We accept as a guiding principle that the law on sexual offences should adhere to the ICCPR, the HKBORO and the Basic Law and that the developments in human rights laws in other jurisdictions should also be taken into account.

Basic assumptions/principles in the Home Office's paper

2.34 The Home Office Review Group set out some basic assumptions/principles *"that formed the conceptual framework within which the review operated"*.²⁷ Many of these assumptions/principles are similar to, or elaborate or expand on, the guiding principles discussed above.²⁸ We shall examine below these assumptions/principles and give our views on their relevance or otherwise as guiding principles for our study.

(1) *Any application of the criminal law should be fair, necessary and proportionate*

2.35 We agree with this basic principle/assumption which is in line with the Hong Kong human rights principle and include it under the heading of human rights.

(2) *The criminal law should not discriminate unnecessarily between men and women nor between those of different sexual orientation*

2.36 This basic principle/assumption is similar to the principle of gender neutrality and avoidance of distinctions based on sexual orientation which we have already decided should be adopted.

(3) *The law should not intrude on consensual sexual behaviour between those over the age of consent without good cause*

2.37 We agree with this principle/assumption. It elaborates on the sexual autonomy principle.

(4) *Those who coerce, force or deceive anyone into sexual activity are criminally culpable; any coercion, force or deception towards a child or vulnerable person is particularly serious*

2.38 We agree with this principle/assumption, which elaborates on the sexual autonomy principle and the protective principle.

²⁷ Home Office Paper, at para 1.3.2.

²⁸ The assumptions/principles were set out in bullet points in paragraph 1.3.2 of the Home Office paper.

- (5) *Those who induce or encourage children or other vulnerable people to participate in, or be exposed to, sexual behaviour are criminally culpable***

2.39 We agree with this principle/assumption, which expands on the protective principle.

- (6) *The age of consent must not be lower than 16***

2.40 As there are divergent views on the appropriate age of consent, we take the view that this principle/assumption should not be included as a guiding principle. That said, the "age of consent" is an important issue which we shall address at an appropriate juncture in our project.

- (7) *There should be a number of factors which could aggravate a sexual offence against a child, such as the age of the child and the relationship between the child and the offender***

2.41 We consider that factors which aggravate a sexual offence against a child are relevant to sentencing only. Hence, there is no need to include them as a guiding principle for reform of the substantive law on sexual offences.

- (8) *The law should recognise the extent to which people have the mental capacity to give informed consent to sexual activity***

2.42 Not all mentally incapacitated persons lack the capacity to give consent to sexual activity. It is therefore necessary for the law to recognise the extent to which mentally incapacitated persons can give informed consent. There is a need to strike a balance between recognising the sexual autonomy of mentally incapacitated persons on the one hand and protecting them from sexual exploitation on the other. We agree with this principle/assumption which strikes a balance between the principle of sexual autonomy and the protective principle.

- (9) *The law must ensure that people who do not have the mental capacity to give informed consent are protected***

2.43 We agree with this. It is an elaboration of the protective principle and the sexual autonomy principle.

Recommendations on guiding principles for reform

2.44 Having reviewed the guiding principles for reform adopted by the Scottish Law Commission and the Home Office Review Group, we set out in Recommendation 1 our conclusions.

Recommendation 1

We recommend that any reform of the substantive law on sexual offences should be guided by a set of guiding principles and any departure from those principles should be justified.

We recommend that the guiding principles should include:

- (i) Clarity of the law.**
- (ii) Respect for sexual autonomy.**
- (iii) The protective principle.**
- (iv) Gender neutrality.**
- (v) Avoidance of distinctions based on sexual orientation.**
- (vi) The provisions of the International Covenant on Civil and Political Rights, the Hong Kong Bill of Rights Ordinance (Cap. 383) and the Basic Law should be adhered to.**

Transitional arrangements

2.45 In passing, we would like to draw the draftsman's attention to the need to have some transitional arrangements in place to deal with any new offences designed to replace an existing offence.

2.46 The lack of transitional arrangements can lead to problems in cases such as *R v A (appeal under s 58 of the Criminal Justice Act 2003)*.²⁹ In that case, the accused was charged for a number of counts on the indictment for indecent assaults. However, the prosecution were unable to prove whether the assault took place before or after the commencement of the English Act on 1 May 2004 which repealed the offence of indecent assault and created a new offence of sexual assault. The Secretary of State had failed to make provisions for transitional arrangements.³⁰ The trial judge ruled that the

²⁹ *R v A (appeal under s 58 of the Criminal Justice Act 2003)* [2005] All ER (D) 242 (Dec).

³⁰ The Secretary of State had failed to exercise his power under section 141(2)(b) of the Criminal Justice Act 2003 to provide for transitional provisions to set out how cases like the present case should be dealt with.

indictment could not be left to the jury. The prosecution appealed against the trial judge's decision, arguing that a purposive approach should be taken to the English Act and its commencement order.³¹ The English Court of Appeal upheld the trial judge's ruling and rejected the prosecution's argument on the basis that it was not possible for the court to interpret the English Act and its commencement order so as to provide for transitional provisions which Parliament had intended should be made by the Secretary of State.

³¹ The prosecution appealed under section 58 of the Criminal Justice Act 2003.

Chapter 3

Consent

Introduction

3.1 A key element of the offence of rape and other "non-consensual" sexual offences such as the possible new offences of sexual assault by penetration, sexual assault and causing a person to engage in sexual activity without consent is that the complainant did not consent to have sexual intercourse with the accused or engage in sexual activity involving the accused.

3.2 The difficulty in determining whether the complainant consented or not and the need to clarify the law on consent was highlighted by the UK Government in a paper issued by the Home Office:

"The issue of whether the complainant consented or not is central to establishing whether a sex offence actually took place. It is vital that the law is as clear as possible about what consent means in order to prevent miscarriages of justice that result in an innocent party being convicted or the guilty walking free. Juries must decide that they are sure, beyond reasonable doubt, whether the complainant was consenting or not. This is an important and often difficult role.

Human beings have devised a complex set of messages to convey agreement or lack of it. Agreement or lack of agreement is not necessarily verbal, but both parties should understand it. Each must respect the right of the other to demonstrate or say 'no' and mean it"¹

The current law on consent

3.3 The Crimes Ordinance (Cap. 200) provides no definition of consent and offers little guidance. Section 118(4) of the Crimes Ordinance merely provides that in considering whether the accused believed that the complainant was consenting to the intercourse, *"the presence or absence of reasonable grounds for such a belief is a matter to which the jury should have regard, in conjunction with any other relevant matters."* The effect of section 118(4) is that if the accused may genuinely have believed that the complainant did consent, even though the accused was mistaken in that belief, the accused

¹ Home Office, *Protecting the Public: Strengthening protection against sex offenders and reforming the law in sexual offences*, (Cm 5668, November 2002), at paras 28-30.

must be acquitted by the jury.² Though section 118(4) provides some guidance, it falls short of providing a clear statutory definition of what amounts to "consent".

3.4 The lack of a statutory definition of consent is aggravated by the complexity of the case law on the issue, as can be seen from the following summary in *Archbold Hong Kong*:

"The minimum requirement is evidence of actual lack of consent, which might take many forms; the most obvious is the complainant's simple assertion, which may or may not be backed up by evidence of force or threats. Alternatively, it may consist of evidence that by reason of drink, drugs, sleep, age or mental handicap the complainant was unaware of what was occurring and/ or incapable of giving consent; or it may consist of evidence that the complainant was deceived as to the identity of the man with whom she had intercourse ...

... Although juries should be told that 'consent' in the context of the offence of rape is a word that must be given its ordinary meaning, it is sometimes necessary for the judge to go further. For example, he should point out, if necessary, that there is a difference between consent and submission. In cases where intercourse took place after threats not involving violence, or fear of it, a jury should be directed to concentrate on the state of mind of the victim immediately before the act of intercourse. The jury should be reminded too of the wide spectrum of states of mind that consent could comprehend and that where a dividing line had to be drawn between real consent and mere submission, they should apply their combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of the case ..."³

Should there be a statutory definition of consent?

3.5 The question arises as to whether a statutory definition of consent would be the most effective way of providing greater clarity in the law. Some jurisdictions elsewhere have adopted (or have proposed) a statutory definition, while others (such as New Zealand) have not.

3.6 A perceived advantage of having a statutory definition of consent is the achievement of some degree of certainty and clarity. It might be expected that a statutory definition would make the judge's task of giving directions to the jury easier and might at the same time make it easier for the jury to grasp the meaning of consent. Moreover, as pointed out by the Home Office Review Group in the UK, the process of considering the appropriate

² *Archbold: Hong Kong 2012*, at para 16-46.

³ *Archbold Hong Kong 2012*, at para 21-19.

statutory definition of consent would enable the legislature "to consider and recommend what should and should not form acceptable standards of behaviour in a modern society":

"In law consent is given its ordinary meaning, which means that in the particular circumstances of each case the jury has to decide that they are sure, beyond reasonable doubt, whether the complainant was consenting or not. This is an important, and often difficult, role. Clarifying the meaning of consent in statute would enable judges to be able to explain what the law said and for juries to understand just what is meant by consent. It would also enable Parliament to consider and recommend what should and should not form acceptable standards of behaviour in a modern society. One of the messages that had come to us in consultation was that consent was something that could be seen as being sought by the stronger and given by the weaker. In today's world it is important to recognise that sexual partners are each responsible for their own actions and that there should be parity of status. In defining consent we are not seeking to change its meaning, rather to clarify the law so that it is clearly understood."⁴

3.7 The principal argument against a statutory definition of consent is that it would remove an element of flexibility which judicial interpretation allows. Circumstances may arise which were not foreseen when the statutory definition was enacted and the rigidity of legislation might therefore have unintended consequences. Moreover, the absence of a definition thus far in Hong Kong does not appear to have caused significant problems. However, it is fair to observe that most jurisdictions which have recently considered this point have included a statutory definition. Such a definition would reflect the principles of sexual autonomy and protection and would serve an educational purpose. On balance, therefore, we take the view that the greater degree of certainty and clarity provided by a statutory definition outweigh any marginal disadvantage posed by a reduction in flexibility.

Recommendation 2

We recommend that there should be a statutory definition of "consent" in relation to sexual intercourse or sexual activity.

The proposed definition of consent

3.8 Having decided that consent should be defined by statute, the next question is what that definition should be. The following are examples of statutory definitions of consent used in overseas jurisdictions:

⁴ Home Office Paper, para 2.10.3.

- (i) **California:** *"consent' shall be defined to mean positive co-operation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved."* (Penal Code, section 261.6)
- (ii) **Canada:** *"consent' means ... the voluntary agreement of the complainant to engage in the sexual activity in question."* (Criminal Code, section 273.1)
- (iii) **England and Wales:** *"... a person consents if he agrees by choice, and has the freedom and capacity to make that choice."* (Sexual Offences Act 2003, section 74)
- (iv) **Queensland:** *"consent' means consent freely and voluntarily given by a person with the cognitive capacity to give the consent."* (Criminal Code Act 1899, section 348(1))
- (v) **Scotland:** *"consent' means free agreement (and related expressions are to be construed accordingly)."* (Sexual Offences (Scotland) Act 2009, section 12)
- (vi) **South Australia:** *"a person consents to sexual activity if the person freely and voluntarily agrees to the sexual activity."* (Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2008, section 5)⁵
- (vii) **Victoria:** *"consent' means free agreement."* (Crimes Act 1958, section 36)

3.9 It appears from the above that the common thread is the idea of free and voluntary agreement to sexual activity. It is this concept that we believe should be incorporated into the definition, consistent with the principle of respect for one's sexual autonomy. We therefore recommend that the definition makes specific reference to the words "freely and voluntarily" and "agrees" which are easily understood by lay people and give effect to the sexual autonomy principle that a person has a right to choose to engage in sexual activity or to refuse participation in unwanted sexual activity. A person does not "freely and voluntarily" agree to engage in sexual activity if, for example, the person was subject to actual or threatened violence or was unlawfully detained.

3.10 In addition, we take the view that the definition would be improved by adding the element of "capacity" as in the English definition. This is

⁵ Section 5 of the South Australian (Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2008 Act amended the Criminal Law Consolidation Act 1935 (the 1935 Act) by deleting the original section 48 of the 1935 Act and substituting for it a new section 46 (consent to sexual activity).

because a person may lack the capacity to give free and voluntary consent to sexual activity by reason of his or her mental condition, age or intoxication.

Recommendation 3

We recommend the adoption of a statutory definition of consent to the effect that a person consents to sexual activity if the person:

- (a) freely and voluntarily agrees to the sexual activity; and**
- (b) has the capacity to consent to such activity.**

Capacity to consent to sexual activity

3.11 As the capacity to consent would be a key element of our proposed definition of consent, the issue then is whether the circumstances in which a person has or does not have the capacity to consent should be spelt out.

3.12 The word "capacity" is not defined in the English Act. The lack of a definition of the capacity to consent in the English Act has caused problems in England. Since 2003, the British Government has however decided against introducing a statutory definition of "capacity" stating that the English Court of Appeal in *R v Bree*⁶ had provided sufficient guidance on how this area of the law should operate.⁷ In *Bree*, the English Court of Appeal held that a drunken consent is still consent though the capacity to consent may evaporate well before a complainant becomes unconscious.⁸

3.13 There have been views expressed among some barristers in the UK that the court in *Bree* fails to provide the jury with any guidance as to the meaning of the word "capacity", a factor that is pivotal in cases involving voluntary intoxication. While we note that the English court in *Bree* has

⁶ [2007] 2 All ER 676, [2007] EWCA Crim 804, [2008] QB 131.

⁷ "Alcohol-related Rapes Cases: Barristers' Perspectives on the Sexual Offences Act 2003 and Its Impact on Practice", JCL 74 (579) (1 December 2010), at page 3.

⁸ Sir Igor Judge P said in *R v Bree*:

"In our judgment, the proper construction of s 74 of the 2003 Act, as applied to the problem now under discussion, leads to clear conclusions. If, through drink (or for any other reason) the complainant has temporarily lost her capacity to choose whether to have intercourse on the relevant occasion, she is not consenting, and subject to questions about the defendant's state of mind, if intercourse takes place, this would be rape. However, where the complainant has voluntarily consumed even substantial quantities of alcohol, but nevertheless remains capable of choosing whether or not to have intercourse, and in drink agrees to do so, this would not be rape. We should perhaps underline that, as a matter of practical reality, capacity to consent may evaporate well before a complainant becomes unconscious. Whether this is so or not, however, is fact specific, or more accurately, depends on the actual state of mind of the individuals involved on the particular occasion.": [2007] 2 All ER 676, at 684 (para 34).

provided some explanations to help the jury reach a decision on the issue of “capacity”, we believe it is better to set out more concrete guidance on the meaning of the word "capacity" in the legislation. We are aware that the Hong Kong Court of Appeal has overturned a conviction of rape as a result of the trial judge’s omission to provide the jury with the necessary guidance in the light of *Bree*.⁹ We believe there are some deficiencies in the law arising from the lack of a definition of capacity. Judges have to tell the jury that consent alone is not enough and there must also be the capacity to consent and yet capacity is not defined by legislation. We therefore take the view that there should be a statutory definition of capacity to provide the jury with the necessary guidance on the issue.

3.14 The common law position is that there is no consent if the complainant was incapable of giving consent or of exercising any judgment on the matter because of age, the consumption of alcohol or drugs or mental incapacity.¹⁰ Hence, we take the view that the statutory definition of capacity to consent should be considered from three perspectives, namely, mental incapacity, intoxication (whether by alcohol or drugs) and minors.

(i) Mental incapacity

3.15 The lack of capacity arising from a mental disorder was highlighted by the recent decision of the House of Lords in *R v Cooper*.¹¹ However, it is not always the case that persons with a mental disorder do not have the capacity to consent to engage in sexual activity. A mentally disordered person's capacity to give consent depends on his or her ability to understand the nature of the act and to decide whether to engage in the activity. It would be a violation of mentally disordered persons' sexual autonomy to deprive them of any capacity to consent to sexual activity irrespective of their individual circumstances or ability. At the same time, it is necessary under the protective principle to protect mentally disordered persons from sexual exploitation. The Scottish Law Commission considered that a balance should be struck between respecting mentally disordered persons' sexual autonomy on the one hand and protecting them from sexual exploitation, on the other:

"The challenge in making provision for sexual activity with people with mental disorder is to recognise the rights of those persons to engage in sexual activity and promote their sexual autonomy as far as possible. This aim must be balanced with the need to protect vulnerable persons from sexual exploitation and to recognise that in certain situations mental disorder may act as a barrier to meaningful understanding of, and valid consent to,

⁹ See *HKSAR v Tang Siu Fung & Another* (CACC 418/2008). The official English translation of this judgment is reported at [2010] 2 HKLRD 1013.

¹⁰ *Archbold Hong Kong 2011*, at para 21-19 (page 1357).

¹¹ [2009] 4 ER 1033, at para 32.

*sexual activity. The difficulties which this balancing involves have been widely recognized.*¹²

The Scottish Act

3.16 Section 17 of the Scottish Act deals with the capacity of persons with a mental disorder to consent to sexual activity. The section applies to the offences in sections 1 to 9.¹³ Section 17(2) provides that:

"A mentally disordered person is incapable of consenting to conduct where, by reason of mental disorder, the person is unable to do one or more of the following –

- (a) understand what the conduct is,*
- (b) form a decision as to whether to engage in the conduct (or as to whether the conduct should take place),*
- (c) communicate any such decision."*

3.17 "Mental disorder" has the same meaning as in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003, which defines mental disorder as mental illness; personality disorder; or learning disability, however caused or manifested.

3.18 The Scottish provisions seek to strike a balance between respect for the right of mentally disordered persons to engage in sexual activity on the one hand and protecting them from sexual exploitation, on the other. Under the Scottish provisions, the sexual autonomy of a mentally disordered person is still generally recognised. However, if the mentally disordered person is unable to do one or more of the three matters specified in section 17(2), the law will deprive the person of the capacity to consent. A mentally disordered person who is unable to do any one of those three matters would be easy prey to sexual exploitation. The sexual autonomy of the mentally disordered person is therefore overridden by the law under the protective principle.

The English Act

3.19 Unlike the Scottish Act, there is no specific provision in the English Act on the capacity of those with a mental disorder to consent to sexual activity.¹⁴

¹² Scottish Law Commission Report, at para 4.88.

¹³ These are rape (section 1), sexual assault by penetration (section 2), sexual assault (section 3), sexual coercion (section 4), coercing a person into being present during a sexual activity (section 5), coercing a person into looking at a sexual image (section 6), communicating indecently (section 7), sexual exposure (section 8) and voyeurism (section 9).

¹⁴ Instead, the English Act deals with the issue by providing a definition of "unable to refuse" in the offences against a person with a mental disorder. For example, the offences in sections 30 to 33 of the English Act are concerned with the situation where a person (A) involves another person (B) in sexual activity where B has a mental disorder and because of that mental disorder, or for reasons related to it, B is unable to refuse involvement in the sexual activity. Under subsection (2) of each of those sections, there is a definition of what is meant by B being

Conclusions

3.20 We consider that specific provisions on mentally disordered persons' capacity to consent are necessary in order to strike a balance between respect for mentally disordered persons' right to engage in sexual activity and protecting them from sexual exploitation.

(ii) Intoxication (whether by alcohol or drugs)

3.21 The *Bree* case highlighted the fact that the capacity to consent may be affected by drunkenness. However, that decision also indicated that a drunken person may still have the capacity to consent, though as a matter of practical reality, the capacity to consent "may evaporate well before a complainant becomes unconscious".¹⁵ Although *Bree* was a case concerning the consumption of alcohol, we take the view that similar principles should apply to intoxication by drugs. In our view, it is necessary to have a specific provision to provide the jury with guidance as to when an intoxicated person will lose the capacity to consent. In this respect, we consider that the criteria for determining mentally incapacitated persons' capacity to consent as set out in sections 17(2) of the Sexual Offences (Scotland) Act 2009 should equally be applicable for intoxication cases.

(iii) Minors

3.22 In most cases, minors are incapable of giving consent to sexual activity. However, some older minors may be capable of giving consent. It is necessary to strike a balance between the need to respect sexual autonomy of those older minors who are capable of giving consent and the need to protect minors from sexual exploitation. Hence, it is necessary to have a specific provision to provide the jury with guidance as to when a minor will not have the capacity to consent. Again, we take the view that the criteria for determining the capacity to consent as set out in sections 17(2) of the Sexual Offences (Scotland) Act 2009 should equally be applicable to the case of minors.

3.23 Having reviewed the issue of capacity to consent in cases of mental incapacity, intoxication and minors, we set out our relevant recommendations below.¹⁶

"unable to refuse". B is unable to refuse if he lacks the capacity to choose whether to agree to the sexual activity in question (whether because he lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason), or he is unable to communicate such a choice to A.

¹⁵ [2007] 2 All ER 676, at 684.

¹⁶ In making the recommendation, we are not dealing with the issue of the age of consent. The issue of the age of consent will be dealt with when offences under the protective principle are discussed at a later stage of the overall review of the sexual offences.

Recommendation 4

We recommend that the new legislation should contain a provision to the effect that a person is incapable of consenting to sexual activity where, by reason of mental condition, intoxication, or age (as the case may be), the person is unable to do one or more of the following:

- (a) understand what the conduct is;**
- (b) form a decision as to whether to engage in the conduct (or as to whether the conduct should take place); or**
- (c) communicate any such decision.**

Statutory provisions on the determination of consent

3.24 Whereas a statutory definition of consent assists in understanding the meaning of the term, it does not provide any guidance in determining whether or not consent exists in a particular case. The legislation in some jurisdictions includes provisions on this question of determination of consent. In some jurisdictions this takes the form of a non-exhaustive list of circumstances (or "conclusive" presumptions as they are called in the English Act) where consent was not present. If the evidence establishes that one or more of the circumstances in the list (or the "conclusive" presumptions) existed at the time of the act in question, it will be considered by law that the complainant did not consent. In that case, the accused cannot argue that there was consent (or to rebut the "conclusive" presumptions of no consent). An alternative approach is to provide "evidential" presumptions. Under this approach, the complainant will be taken as not having consented if the evidence establishes that certain specified circumstances existed at the time of the act in question, unless the accused points to evidence which raises an issue as to whether the complainant consented. Under this approach, the accused is able to overcome the presumption by pointing to some evidence showing that there is a real issue about consent which would justify the jury's consideration. We examine below the different approaches adopted in the legislation in England, Scotland and Queensland.

The English Act

Rationale for distinction between evidential presumptions and conclusive presumptions

3.25 The English Act draws a distinction between evidential and conclusive presumptions. Whilst evidential presumptions are rebuttable,

conclusive presumptions cannot be rebutted as they are circumstances under which consent is conclusively presumed by law to be not present.

3.26 According to the UK Government, the rationale for the evidential presumptions is *"to strike the right balance between protecting victims and ensuring fairness under the law for defendants by helping juries with the fundamental questions of whether the victim was able to, and did in fact, give his or her consent on the occasion in question."*¹⁷ Thus the evidential presumptions are intended to balance the competing interests of protecting victims by making it easier for the prosecution to prove the lack of consent and of ensuring fairness to the accused by allowing him or her to lead evidence to rebut the presumption of no consent.

3.27 On the other hand, if it is the existing law that consent is considered inconceivable under certain circumstances, it will not be unfair to the accused for the law to say definitely or presume conclusively that there is no consent in those circumstances. It is unnecessary to give the accused the opportunity to rebut the presumptions in those circumstances as he or she cannot argue that there is consent under the existing law. Conclusive presumptions will therefore be put in place in those circumstances, or as the UK Government said, *"In line with current law, where a person is deceived as to the nature of sexual activity or where his or her consent is induced by impersonation of someone else, that person will be deemed [conclusively] not to consent to it."*¹⁸

Evidential presumptions about consent

3.28 Section 75 of the English Act contains evidential presumptions about consent, which apply to the offences of rape (section 1), assault by penetration (section 2), sexual assault (section 3) and causing a person to engage in sexual activity without consent (section 4). These presumptions may be challenged by the accused. Subsection (2) provides that the presumptions arise where:

- "(a) any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;*
- (b) any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;*
- (c) the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act;*

¹⁷ *Protecting the Public*, quoted above, at para 32.

¹⁸ *Protecting the Public*, at para 30.

- (d) *the complainant was asleep or otherwise unconscious at the time of the relevant act;*
- (e) *because of the complainant's physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented;*
- (f) *any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act."*

In the case of a continuous series of sexual activities, the reference to the time immediately before the relevant act began in (a) and (b) above is a reference to the time immediately before the first sexual activity began.¹⁹

3.29 Where the prosecution proves the accused did a relevant act (as defined in section 77)²⁰ and that the circumstances in subsection (2) existed and that the accused knew that those circumstances existed, the complainant will be presumed not to have consented to the relevant act and the accused will be presumed not to have reasonably believed that the complainant consented. In order for those presumptions not to apply, the accused needs to satisfy the judge by adducing evidence that there is a real issue about consent that is worth putting to the jury. If the judge is satisfied that there is sufficient evidence to justify putting the issue of consent to the jury, the judge will direct the jury to determine the issue of consent. Otherwise, the judge will direct the jury to convict the accused.

Evaluation of the evidential presumptions in the English Act

3.30 In order for the evidential presumptions not to apply, the accused must point to some evidence showing that there is a real issue about consent worth putting to the jury. To do this, the accused in most cases would be required to give sworn evidence. If the accused chooses to do this, he or she would leave him or herself open to cross-examination by the prosecution. If, however, the accused chooses not to take the stand and give sworn evidence, he or she may have few or no other means of discharging the evidential burden.

¹⁹ The English Act, section 75(3).

²⁰ Under section 77 of the English Act, a "relevant act" is:
 for rape – *"The defendant intentionally penetrating, with his penis, the vagina, anus or mouth of another person (the complainant)";*
 for assault by penetration – *"The defendant intentionally penetrating, with a part of his body or anything else, the vagina or anus of another person (the complainant), where the penetration is sexual";*
 for sexual assault – *"The defendant intentionally touching another person (the complainant), where the touching is sexual";*
 for causing a person to engage in sexual activity without consent – *"The defendant intentionally causing another person (the complainant) to engage in an activity, where the activity is sexual".*

This contrasts with the normal situation in which the burden of proof is on the prosecution and the accused is not under any pressure to take the stand.

3.31 However, the Home Office pointed out in a consultation paper published in 2006 that it is in practice not particularly onerous for the accused to rebut the presumptions and for that reason they have not been widely used:

"... there is little evidence that the existing evidential presumptions [under section 75 of the Sexual Offences Act 2003] have enjoyed great usage. The presumptions apply unless the defendant raises 'sufficient evidence' to raise an issue as to whether the victim consented. Where the defendant does raise such evidence, the judge will direct the jury that the presumption does not apply and the jury should consider the issue of consent in the normal way. In practice, it is not particularly onerous for defendants to enter the witness box and give 'sufficient evidence' to disengage the presumption."²¹

3.32 The relative under-use of the evidential presumptions in the English Act was confirmed to the Scottish Law Commission by a senior prosecutor in the Crown Prosecution Service.²² That fact reinforces our view that evidential presumptions along the lines of those in the English Act are in practice unlikely to offer anything of significant value. In the case of items (a) and (b) of the list of circumstances quoted at paragraph 3.28 above, actual or threatened violence to the complainant or another could generally be expected to negate any consent without the need for a separate presumption to that effect. Similarly, if the complainant is unlawfully detained (item (c) on the list) any consent given is likely to be called in question by the element of coercion intrinsic to the detention. In the case of items (d) and (e) (complainant asleep or unconscious or unable to communicate), the establishment of those facts could in most cases be expected to invalidate any purported consent. Finally, a presumption that there has not been consent if a substance has been administered to the complainant (without consent) which is capable of causing the complainant to be stupefied or overpowered at the time of the sexual act (item (f) in the list) seems unlikely to add anything to the existing law. In our view, where evidence was presented of the existence of any of the circumstances listed in section 75(2) of the English Act, a decision as to whether or not the complainant had consented to the sexual activity in question could safely be left to the jury to decide without the need for statutory presumptions.

Conclusive presumptions about consent in the English Act

3.33 In addition to the evidential presumptions, there are two conclusive presumptions about consent in section 76 of the English Act which

²¹ Office for Criminal Justice Reform, *Convicting Rapists and Protecting Victims – Justice for Victims of Rape: A Consultation Paper* (Spring 2006), at page 15.

²² Scottish Law Commission Report, at footnote 37 to chapter 2.

apply to the offences of rape, assault by penetration, sexual assault and causing a person to engage in sexual activity without consent. Under section 76(1), where the prosecution proves the accused did a relevant act (as defined in section 77) and that the circumstances in section 76(2) existed, it will be conclusively presumed that the complainant did not consent to the relevant act and that the accused did not believe that the complainant consented. As the conclusive presumptions cannot be rebutted, the accused will be convicted.

3.34 The circumstances in section 76(2) are that:

- "(a) *the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act; or*
- (b) *the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.*"

Evaluation of the conclusive presumptions in the English Act

3.35 The effect of the conclusive presumptions in the English Act is that intentional deceit by the accused as to (i) the "nature or purpose" of the relevant act and (ii) the identity of the person involved would vitiate consent. The common law position before the enactment of the English Act was that the only types of fraud which would vitiate consent in rape were fraud as to the "nature" of the act or as to the identity of the person doing the act.²³ The common law position was therefore that fraud as to the "purpose" of the act would not have the effect of vitiating consent.

3.36 The English Act's extension of the types of fraud vitiating consent to include fraud as to the "purpose" of the act followed the approach which had been adopted in some Australian states, where intentional deceit as to the "nature or purpose" of the act was a circumstance which vitiated consent.²⁴ The Scottish Act has also adopted deception as to the "nature or purpose" of the conduct as a circumstance which vitiates consent. Under section 13(d) of the Scottish Act, there will be no free agreement to the conduct (and hence no consent) "*where B agrees or submits to the conduct because B is mistaken, as a result of deception by A, as to the nature or purpose of the conduct*".

²³ See *R v Linekar* [1995] 2 Cr App R 49 (CA). There were, however, other authorities which cast doubt on whether fraud as to the identity of the person might vitiate consent. According to Stephen's *Digest of the Criminal Law* (1883) at page 185, "*where consent is obtained by fraud the act does not amount to rape*". The 19th century English authorities were ambivalent whether sexual intercourse obtained by impersonation of a woman's husband would be rape. The uncertainty in the common law had to be resolved by legislative means by the Criminal Law Amendment Act 1885 which provided that intercourse in such circumstances would be deemed to be rape. <<http://law.anu.edu.au/criminet/trape.html#E11E3>> at page 5, retrieved on 13 December, 2010.

²⁴ For example, under section 348(2)(f) of Queensland's Criminal Code Act 1899, a person's consent is not freely and voluntarily given if it is obtained "*by false and fraudulent representations about the nature or purpose of the act*".

3.37 The courts of Hong Kong have dealt with a number of cases involving deception as to the "purpose" of the sexual act. In a January 2010 case, the accused deceived a teenage girl into believing that the purpose of sexual intercourse with the accused was to complete a ritual to improve her luck.²⁵ In another case in December 2010, the accused deceived a teenage girl into having sexual intercourse with him by claiming that he could exorcise ghosts, which he said were following the girl.²⁶ In both these cases, the victim knew the "nature" of the act (which was sexual intercourse), but was deceived as to the actual "purpose" of the intercourse. The real purpose of the intercourse was not to improve luck in the former case nor to exorcise ghosts in the latter but was for the accused's sexual gratification in both cases. These cases confirm that there are good reasons for including deceit as to the "purpose" of the act as a circumstance vitiating consent.

3.38 There is the further question of whether deceit as to the nature and purpose of the act or as to identity has to be practised by the accused. Under the two conclusive presumptions in the English Act, deceit has to be intentionally practised by the accused. There is a slightly different approach taken in the New South Wales' Crimes Act 1900, under which deceit practised by a third party would also vitiate consent. Section 61HA(5) of the New South Wales' Act provides:

"(5) *A person who consents to sexual intercourse with another person:*

- (a) ***under a mistaken belief as to the identity of the other person, or***
- (b) *under a mistaken belief that the other person is married to the person, or*
- (c) ***under a mistaken belief that the sexual intercourse is for medical or hygienic purposes (or under any other mistaken belief about the nature of the act induced by fraudulent means),***

does not consent to the sexual intercourse ..."
[emphasis added]

3.39 In contrast to the English provision's reference to an intentional deception or inducement by the accused, section 61HA(5) of the New South Wales' Crime Act 1900 refers to a "mistaken belief" on the part of the complainant as to the identity of the other person or about the nature of the act. The mistaken belief in the latter case (though not in the former) must have been "induced by fraudulent means" but there is no requirement that the fraud was perpetrated by the accused or that the accused was responsible for the complainant's mistaken belief. Any fraudulent means practised by a third party will therefore be sufficient for the purposes of section 61HA(5)(c).

²⁵ The Standard, 5 January 2010.

²⁶ South China Morning Post, 1 December 2010. Case No: HCCC80/10.

3.40 On balance, we favour the English approach. The presumptions under the English legislation are more limited in scope than their New South Wales equivalents but we consider that the English legislation is preferable where conclusive presumptions are involved. As regards mistaken identity, we prefer the English requirement that that was intentionally induced by the accused, rather than the much looser requirement under the New South Wales legislation that the complainant was under a mistaken belief, however it may have been caused. It is, in any case, difficult to conceive of circumstances in which the complainant could have had a mistaken belief as to the accused's identity other than where that mistake was intentionally induced by the accused him or herself. If such circumstances did arise, however, and the complainant's mistaken belief was not induced by the accused (and not made known to the accused) it would seem unduly harsh on the accused to apply a conclusive presumption that the complainant had not consented, when the accused might have genuinely and reasonably believed that there was consent.

3.41 As regards the nature or purpose of the sexual act, we consider that the presumption is more appropriately limited (as in the English Act) to circumstances where the accused intentionally deceived the complainant. Again, it is difficult to envisage circumstances where the complainant's mistaken belief was the result of a deception by a third party rather than by the accused, or where, even if such circumstances existed, the accused unaware of the deception who believed that there was consent should be subject to such an adverse conclusive presumption.

3.42 In summary, we can identify three main positive features of the conclusive presumptions in the English Act. Firstly, they reflect the existing common law position in respect of fraud as to the "nature" of the act and the identity of the person. Secondly, the inclusion of the "purpose" of the act within the conclusive presumptions can cover situations in which the victim knows the nature of the sexual act but is deceived as to its true purpose (circumstances which have arisen in a number of cases in Hong Kong). Thirdly, the inclusion of the "purpose" of the act within the conclusive presumptions is in line with the existing legislation in Hong Kong: section 120 of the Crimes Ordinance (Cap. 200) makes it an offence to procure another "by false pretences or false representations" to do an unlawful sexual act.

The Scottish Act

3.43 Section 13(2) of the Scottish Act (which builds on the general definition of consent in section 12) sets out particular circumstances in which section 13(1) provides that there is no free agreement by the complainant to sexual activity, and hence no consent. That section provides that there is no free agreement by a person ("B") to conduct with another person ("A"):

"(a) where the conduct occurs at a time when B is incapable because of the effect of alcohol or any other substance of consenting to it,

- (b) *where B agrees or submits to the conduct because of violence used against B or any other person, or because of threats of violence made against B or any other person,*
- (c) *where B agrees or submits to the conduct because B is unlawfully detained by A,*
- (d) *where B agrees or submits to the conduct because B is mistaken, as a result of deception by A, as to the nature or purpose of the conduct,*
- (e) *where B agrees or submits to the conduct because A induces B to agree or submit to the conduct by impersonating a person known personally to B, or*
- (f) *where the only expression or indication of agreement to the conduct is from a person other than B."*

3.44 In addition, section 14 provides that a person is incapable, while asleep or unconscious, of giving consent to any conduct. This is a stand-alone provision and not part of the list in section 13(2). It is similar in effect to item (d) of the English evidential presumptions at section 75(2) of the English Act ("*the complainant was asleep or otherwise unconscious at the time of the relevant act*").

3.45 Items (a), (b) and (c) of the list of factual situations negating consent set out in section 13(2) of the Scottish Act are broadly similar to items (a), (b), (c) and (f) in the list of evidential presumptions in the English Act set out at paragraph 3.28 above. In addition, items (d) and (e) of the Scottish Act's list are similar to the two conclusive presumptions in the English Act set out at paragraph 3.34 above. The only item in the Scottish Act's list which has no equivalent in the English Act is item (f) ("*the only expression or indication of agreement to the conduct is from a person other than B.*"). This does not appear a necessary addition, since a person other than B cannot consent on B's behalf to B's participation in sexual activity.

3.46 As with the evidential presumptions under the English Act discussed earlier, in our view, where evidence was presented of the existence of any of the circumstances listed in section 13(2) of the Scottish Act, a decision as to whether or not the complainant had consented to the sexual activity in question could safely be left to the jury to decide without the need for statutory presumptions. Just as we saw merit in the two conclusive presumptions in the English Act, so we also see merits in the two similar items on the Scottish non-exhaustive list (ie, deception as to the "nature or purpose" of the act (item (d)) and impersonation (item (e))).

The Queensland Criminal Code Act 1899

3.47 Section 348(2) of Queensland's Criminal Code Act 1899 provides that a person's consent will not be freely and voluntarily given (and therefore not consent at all) if it is obtained:

- "(a) by force; or*
- (b) by threat or intimidation; or*
- (c) by fear of bodily harm; or*
- (d) by exercise of authority; or*
- (e) by false and fraudulent representations about the nature or purpose of the act; or*
- (f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner."*

3.48 The circumstances listed in section 348(2) of the Queensland Act are largely the same as those on the list at section 13(2) of the Scottish Act, except for the inclusion of "by exercise of authority" at item (d) of the Queensland list. We do not favour the Queensland approach of including "exercise of authority" as a factor triggering a presumption that there has been no consent, partly because the term lacks precision and is open to debate as to its true meaning and partly because consent other than freely given cannot in any case constitute consent. As with the circumstances at items (a) to (c) of section 348(2)'s list (and their equivalents in the English and Scottish Acts), we consider that a jury is capable of deciding by itself without any statutory guideline whether a particular "exercise of authority" would have the effect of vitiating consent.

Different reform options for the determination of consent

3.49 In the light of the foregoing discussion of the legislative approach adopted in England, Scotland and Queensland, we can identify two types of legislative provisions for the determination of consent:

- (i) The complainant will be taken as not having consented if the evidence establishes that certain circumstances specified in the legislation existed at the time of the act in question, and the accused cannot rebut this presumption that there was no consent (the approach adopted in the legislation in Scotland and Queensland).
- (ii) The complainant will be taken as not having consented if the evidence establishes that certain circumstances specified in the legislation existed at the time of the act in question, unless the accused adduces sufficient evidence to raise an issue as to whether the complainant consented (the "evidential presumptions" adopted in the English Act).

3.50 The options for legislative reform in Hong Kong would accordingly appear to be to: (a) adopt conclusive presumptions alone (the Scottish and Queensland approach); (b) adopt evidential presumptions alone; or (c) adopt a combination of conclusive and evidential presumptions (the English approach). We have discussed above and rejected the evidential presumptions in the English Act on the basis that they appear to offer little practical assistance to the criminal justice process. For that reason, we do not favour options (b) or (c) but prefer instead option (a). In doing so, however, we propose that only the two conclusive presumptions in the English Act (deceit as to the nature and purpose of the act and mistaken identity) should be adopted, and not the more extensive list of such presumptions in the legislation in Scotland and Queensland. Under this option, the new legislation would expressly state that the circumstances which trigger the two conclusive presumptions of deceit as to the nature and purpose of the act and mistaken identity would vitiate consent. The merit of this option is that it would not criminalise any new conduct, as sexual conduct taking place in those circumstances is already criminalised under the common law²⁷ and/or our existing legislation.²⁸

3.51 We note in conclusion that the use of the term "presumption" in the context of the circumstances described in the English Act may be somewhat misleading. Rather than presumptions these may be better characterised as statements of law, to the effect that sexual acts carried out as a result of deception or impersonation are non-consensual.

Recommendation 5

We recommend that the new legislation should incorporate provisions along the lines of section 76(2)(a) and (b) of the English Sexual Offences Act 2003 to the effect that there can be no consent by the complainant, and the accused cannot have believed that the complainant consented, where the accused:

- (a) intentionally deceived the complainant as to the nature or purpose of the relevant sexual act; or**
- (b) intentionally induced the complainant to consent to the relevant sexual act by impersonating a person known personally to the complainant.**

²⁷ Fraud as to the nature of the sexual act or as to the identity of the person doing the act would vitiate consent: *R v Linekar* [1995] 2 Cr App R 49, CA.

²⁸ For example, under section 118(2) of the Crimes Ordinance (Cap. 200), a man commits rape if he induces a married woman to have sexual intercourse with him by impersonating her husband. Under section 120 of the Crimes Ordinance, it is an offence for a person to procure another person, by false pretences or false representations, to do an unlawful sexual act.

Reasonable belief in consent

3.52 Human beings may communicate their consent to sexual activity or lack of it in many different ways and not necessarily verbally. Some may even choose silence rather than taking any positive steps to communicate their consent or the lack of it. Problems may arise when the complainant did not consent to engage in sexual activity with the accused but the accused asserts that he believed the complainant had consented. Some guidance is necessary from the law as to how to resolve the conflict between the complainant's lack of consent on the one hand and the accused's subjective belief in the presence of consent, on the other. In this respect, we are attracted to the approach of reasonable belief in sections 1(1)(c) and 1(2) of the English Act.²⁹ Under those provisions, a conviction requires that the prosecution must prove that, in addition to the lack of consent, the accused did not reasonably believe that the complainant consented. Whether a belief in consent is reasonable is to be determined having regard to all the circumstances, including any steps the accused took to ascertain whether the complainant consented.

3.53 We shall discuss in greater detail the issue of "reasonable belief" in the following chapter on rape, since the legal developments regarding reasonable belief in consent have largely evolved from the determination of consent in rape.

The scope and withdrawal of consent

The Scottish Act

3.54 Section 15 of the Scottish Act makes further provision to deal with two separate aspects of consent: the scope and withdrawal of consent. This section applies to the offences in sections 1 to 9 of that Act.³⁰ Section 15(2) provides that consent given to particular sexual conduct "*does not, of itself, imply consent to any other conduct*". That is to say, for example, consent to a kiss does not necessary imply consent to sexual intercourse.

3.55 Subsection (3) provides that consent to sexual conduct "*may be withdrawn at any time before, or in the case of continuing conduct, during, the conduct*". Consent may therefore be withdrawn at any time before the sexual conduct begins or while the sexual conduct is taking place.

²⁹ The "reasonable belief" provisions in sections 1(1)(c) and 1(2) of the English Act apply to the offence of rape. Similar "reasonable belief" provisions apply to the offences of assault by penetration (sections 2(1)(d) and 2(2)), sexual assault (sections 3(1)(d) and 3(2)) and causing a person to engage in sexual activity without consent (sections 4(1)(d) and 4(2)).

³⁰ These are rape (section 1), sexual assault by penetration (section 2), sexual assault (section 3), sexual coercion (section 4), coercing a person into being present during a sexual activity (section 5), coercing a person into looking at a sexual image (section 6), communicating indecently (section 7), sexual exposure (section 8) and voyeurism (section 9).

3.56 Subsection (4) provides that *"If conduct takes place, or continues to take place, after consent has been withdrawn, it takes place, or continues to take place, without consent"*.

The English Act

3.57 There is no corresponding provision on the scope and withdrawal of consent in the English Act.

Reasons for specific provisions on scope and withdrawal of consent in Scottish Act

3.58 The Scottish Law Commission took the view that consent to sexual activity might be qualified or restricted and so there should be specific provisions on the scope of consent, notwithstanding there were no similar provisions in the English Act:

*"Consent may be qualified or restricted in some way. An example of consent of this type is where a woman consents to have sexual intercourse with a man provided he wears a condom. In this situation the woman cannot be said to have consented to unprotected sex, and if the man disregards this element of the consent he would be guilty of rape or a sexual assault. Similarly, the fact that a woman consents to one type of sexual contact does not of itself imply she consents to a different type. Kissing, for example, is not a sign of consenting to sexual intercourse. The fact that a woman consents to engaging in one type of sexual act (for example, touching, oral sex) does not imply that she has consented to other types of act (for example, vaginal intercourse)..."*³¹

3.59 The Scottish Law Commission also considered that there should be specific provisions on the withdrawal of consent because the exercise of sexual autonomy should involve the right to withdraw, at any time, consent previously given.³² There is Commonwealth authority that where the accused has consensual intercourse with the complainant, the accused is guilty of rape if the complainant's consent is withdrawn during intercourse but the accused continues.³³

3.60 We share the views of the Scottish Law Commission that consent to sexual activity may be qualified or restricted and may be withdrawn at any time. The right to qualify, restrict or withdraw consent to sexual activity is a manifestation of the principle of sexual autonomy.

³¹ Scottish Law Commission Report, at para 2.82.

³² Scottish Law Commission Report, at para 2.85.

³³ *Kaitamaki v R* [1985] AC 147, PC (New Zealand).

Recommendation 6

We recommend that the new legislation should incorporate provisions along the lines of sections 15(2), (3) and (4) of the Sexual Offences (Scotland) Act 2009 to the effect that:

- (a) consent to particular sexual conduct does not imply, of itself, consent to any other sexual conduct;**
- (b) consent to sexual conduct may be withdrawn at any time before or, in the case of continuing conduct, during the sexual conduct; and**
- (c) if conduct takes place, or continues to take place, after consent has been withdrawn, it takes place, or continues to take place, without consent.**

Chapter 4

Rape

The present law

4.1 Under the present law of Hong Kong, rape is committed by a man having non-consensual sexual intercourse with a woman. Section 118(3) of the Crimes Ordinance (Cap. 200) provides that a man commits rape if:

- "(a) *he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and*
- (b) *at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it.*"

4.2 As reflected in the wording of section 118(3), only a man can be found guilty of rape as a principal offender, and only a woman can be a victim of rape. The act of sexual intercourse must consist of penetration of the woman's vagina by the man's sexual organ, ie his penis. The slightest penile penetration of the vagina is sufficient to prove sexual intercourse.¹ Penile penetration of a part of the victim's body other than the vagina, such as the mouth or anus, does not therefore amount to rape, nor does penetration of the vagina by an object or a part of the body other than a penis.

4.3 It is necessary to prove penetration but not "the emission of seed". Section 65E of the Criminal Procedure Ordinance (Cap. 221) provides:

"Where in any criminal proceedings it is necessary to prove sexual intercourse, buggery or bestiality, it shall not be necessary to prove the completion of the intercourse by the emission of seed, but intercourse shall be deemed complete upon proof of penetration only."

The slightest degree of penetration is sufficient, but there must be some evidence of penetration.

¹ In *R v Lee Wing On* [1994] 1 HKC 257, at 262 (CA), Wong J said: "*The judge correctly told the jury that there were three elements to the offence of rape, and sexual intercourse was one of them. He also correctly told the jury that it was not necessary to prove full sexual intercourse. The slightest penetration by the man's sexual organ into the woman's vagina was sufficient proof of sexual intercourse.*"

4.4 To put beyond doubt the fact that a man may be guilty of raping his wife, an amendment was made to the Crimes Ordinance (Cap. 200) in 2002 to add a new section 117(1B) which provides that "*unlawful sexual intercourse' does not exclude sexual intercourse that a man has with his wife.*" The term "unlawful sexual intercourse" is not defined but with the amendment's purported clarification that a man can be guilty of raping his wife, it is difficult to see what purpose the retention of the word "unlawful" in section 118(3)(a) serves, other than to confuse: the act of sexual intercourse is rendered unlawful by the lack of consent and the inclusion of the word "unlawful" is therefore unnecessary. In *R v R*, Lord Keith described the inclusion of the word "unlawful" in the equivalent English legislation as "mere surplusage" and said:

*"The fact is that it is clearly unlawful to have sexual intercourse with any woman without her consent, and ... the use of the word [unlawful] in the subsection adds nothing."*²

4.5 Section 118(2) of the Crimes Ordinance (Cap. 200) provides that a man who has sexual intercourse with a married woman by impersonating her husband commits rape.

4.6 There is an irrebuttable presumption at common law that a boy under 14 is incapable of sexual intercourse. While that means that a boy under 14 cannot be guilty of rape as a principal, he may in appropriate circumstances be convicted of aiding and abetting another to commit rape, or of indecent assault. As mentioned in the Preface, the Commission has recommended in December 2010 the abolition of the presumption since its continued application would serve no useful purpose, is at odds with reality and means that on occasion the true criminality of the accused's conduct cannot be reflected in the charge. It should however be noted that with the abolition of the presumption, the separate rebuttable presumption of *doli incapax* would continue to apply to a boy between the ages of 10 and 14, requiring the prosecution to prove beyond reasonable doubt that the boy knew his actions were seriously wrong and not merely naughty or mischievous.

Scope of the offence of rape

4.7 The scope of the offence of rape in section 118(3) of Crimes Ordinance (Cap. 200) is confined to penile penetration of the vagina of a woman.³ It does not apply to penile penetration of the anus or mouth of the complainant. In 1994, the scope of rape in the law of England and Wales was extended to include penile penetration of the anus of a woman or another man.⁴ The scope of rape was further extended by the English Act in 2003 to

² [1991] 4 All ER 481, at 489.

³ *R v Lee Wing On*, quoted above.

⁴ Criminal Justice and Public Order Act 1994, section 142. Under section 1 of the Sexual Offences Act 1956 (as amended by the Criminal Justice and Public Order Act 1994), a man commits rape if he has non-consensual sexual intercourse with a person (whether vaginal or anal) and he knows that the person does not consent or he is reckless whether that person consents.

include also penile penetration of the mouth of another person.⁵ The result of those changes is that the scope of rape in England and Wales covers penile penetration of the vagina, anus or mouth of another person. Likewise, the scope of rape in the law of Scotland was extended by the Scottish Act in 2009 to cover penile penetration of the vagina, anus or mouth of another person.⁶ As the term "another person" is used in the relevant legislation, both men and women can be victims of rape in England and Wales and Scotland.

4.8 The Scottish Law Commission set out the rationale for the extension of the scope of rape as follows:

*"Under the existing law, rape is defined as penetration of a vagina by a penis but does not include any other form of penile penetration. This has the effect that, in popular though inaccurate terms, only a man can commit rape and only a woman can be raped ... Penile violation of a person's anus or mouth is as severe an infringement of sexual autonomy as violation of a vagina. Furthermore the present definition means that while penile penetration of a man is criminal ... it is not regarded as rape. Again, we can identify no reason why men and women victims of penile assault should be treated in different ways ..."*⁷

4.9 We share the view that penile penetration of another person's anus or mouth is as severe an infringement of sexual autonomy as violation of a vagina. We also see no good reasons why men and women victims of non-consensual penile penetration should be treated differently. It is therefore our view that the scope of rape should be extended to cover non-consensual penile penetration of the vagina, anus or mouth of "another person".

Recommendation 7

We recommend that the new legislation should incorporate provisions along the lines of section 1(1)(a) of the English Sexual Offences Act 2003 to the effect that the scope of rape should cover penile penetration of the vagina, anus or mouth of another person.

Distinction between rape and other forms of sexual penetrative acts

4.10 The term rape has long been used in the Crimes Ordinance (Cap. 200) to describe the sexual offence involving sexual penetration with a

⁵ The English Act, section 1(1).

⁶ The Scottish Act, section 1(1).

⁷ Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences* (Discussion Paper No. 131, January 2006), at para 4.18.

man's sexual organ, ie his penis. While rape is confined to penile penetrative acts, non-penile penetrative acts are dealt with separately by the offence of indecent assault. Likewise, the term "rape" is used in the English and the Scottish Acts to refer to non-consensual penile penetration of another person.⁸ Non-penile penetrative acts are dealt with separately by the offence of "assault by penetration" in the English Act and the offence of "sexual assault by penetration" in the Scottish Act.

4.11 Some jurisdictions do not differentiate between rape and other non-penile penetrative offences. The word rape is not used in their sexual offences legislation and all forms of penetrative acts (ie both penile and non-penile) are put under one category of offences. In Australia, penetrative sexual offences are described as "sexual assault" in New South Wales;⁹ "sexual intercourse without consent" in the Australian Capital Territory and the Northern Territory;¹⁰ and "sexual penetration without consent" in Western Australia.¹¹ The word rape is not used at all in the legislation of those Australian states. On the other hand, the penetrative offence is called "sexual violation" in New Zealand's Crimes Act.¹² The New Zealand offence covers all forms of sexual penetrative acts. Unlike the Australian legislation, the word rape is used in the New Zealand legislation as part of the description of the offence. A person commits the offence of sexual violation if he: "*(a) rapes another person; or (b) has unlawful sexual connection with another person*".¹³

4.12 There are two issues for us to consider. The first is whether sexual penetrative offences should be divided into penile penetrative and non-penile penetrative acts. The second issue, if the answer to the first question is in the affirmative, is whether the term rape should continue to be used, or whether some other term should be used to describe the specific offence involving penile penetration.

Should rape be separated from other penetrative acts?

4.13 We take the view that a distinction should continue to be made between rape and other non-penile penetrative acts. In our view, it is not desirable to over-extend the definition of rape, which in our view should be confined to penile penetration. We note that some jurisdictions, such as Australia, no longer distinguish between penile and other penetrative offences. The constituent elements of the offence of rape (non-consensual penile penetration) are of long standing and in our view are well known to the general public in Hong Kong. Rape has never been understood to include non-penile penetration. We believe the general public (and hence juries) have preconceptions of the meaning of certain words we therefore do not think it

⁸ Though unlike the offence of rape in Hong Kong, which is limited to penetration of the vagina, the offence of rape under the English and Scottish Acts extends to penetration of the vagina, anus or mouth of the victim.

⁹ Crimes Act 1900 (NSW), section 61I.

¹⁰ Crimes Act 1900 (ACT), section 54; Criminal Code Act (NT), section 192.

¹¹ Criminal Code (WA), section 325.

¹² Crimes Act 1961 (New Zealand), section 128B.

¹³ Crimes Act 1961 (New Zealand), section 128.

desirable to extend the definition of rape in this regard beyond its present meaning of penile penetration.

Should the word rape continue to be used?

4.14 The arguments for and against the use of the word rape were summarised by the Scottish Law Commission as follows:

"... A main argument in support of this approach [i.e. not using the word rape to describe the offence of non-consensual penile penetration] is that the term rape is seen as stigmatic as far as concerns victims of the crime. A further point is that it also stigmatises persons accused of rape and as a result juries might not be prepared to attach the label of rapist to an accused in cases which do not fit into a stereotypical image of rape as involving violent assault between persons who were strangers to each other. However, there is now little support for abandoning the term rape. It is considered that, by not using the term, the seriousness of the offence became downgraded. Moreover its stigmatic effects have important functions in labelling a particular form of wrongdoing. Temkin quotes the views of the Law Reform Commission of Victoria, who wrote that the 'main argument for retention regardless of the form and substance of the law is that the term "rape" is synonymous in our culture with a particularly heinous form of behaviour.'"¹⁴

4.15 We take the view that the term rape should be retained to refer to the offence which involves non-consensual penile penetration of the complainant. The term rape is well-understood in our culture to mean a particular form of serious wrongdoing. If the term rape is not used, the seriousness of the offence may not be properly reflected and may be downgraded. Although the term rape may have stigmatic effects, that serves the important function of labelling this particular form of wrongdoing appropriately grave. More importantly, as the general public in Hong Kong is familiar with the meaning of the term rape, the retention of the term may enhance understanding of the law.

Recommendation 8

We recommend that the term rape should continue to be used to describe the offence of non-consensual penile penetration.

We further recommend that a distinction should be made

¹⁴ Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences* (Discussion Paper No. 131, January 2006), at para 4.13.

between rape and other non-consensual sexual offences which involve non-penile sexual penetrative acts.

Application to surgically constructed sexual organs

4.16 Since we have decided that rape should cover penile penetration of the vagina, anus or mouth of another person, it is necessary to decide whether non-consensual penetration involving surgically constructed sexual organs should amount to rape.

The English Act

4.17 Section 79(3) provides that "*References to a part of the body include references to a part surgically constructed (in particular, through gender reassignment surgery)*".¹⁵ This provision reflected the view of the Home Office Review Group in the UK that the law should equally apply to surgically constructed organs:

*"... We also recognised the concerns of transsexuals that the law could exempt them from the protection of the criminal justice system. If modern surgical techniques could provide sexual organs, the law should be clear enough to show that penetration of or by such organs would be contained within the scope of the offence. The law must give protection from all sexual violence. Whether or not sexual organs are surgically created, the law should apply. Accordingly we thought to put it beyond doubt that the law should apply to surgically constructed organs – whether vaginal or penile ..."*¹⁶

The Scottish Act

4.18 Section 1(4) of the Scottish Act has a similar effect to the English provision and extends the meaning of a "penis" and "vagina" to include surgically constructed organs:

"In this Act –

'penis' includes a surgically constructed penis if it forms part of [a person (A)], having been created in the course of surgical treatment, and

'vagina' includes –

¹⁵ This interpretation section applies for the purposes of Part 1 of the Act.
¹⁶ Home Office Paper, at para 2.8.4.

- (a) *the vulva, and*
- (b) *a surgically constructed vagina (together with any surgically constructed vulva), if it forms part of [another person (B)], having been created in the course of such treatment."*

4.19 We share the view that if modern surgical techniques could provide a surgically constructed penis, penetration by such an artificial organ should be contained within the scope of the offence of rape. It is as severe an infringement of a person's sexual autonomy if the person's vagina, anus or mouth is penetrated without consent by a surgically constructed penis as by a natural penis. We therefore consider that the definition of penis should include a surgically constructed penis. This definition should apply to all sexual offences and not just rape.

4.20 Equally, we consider that transsexuals who have surgically constructed vaginas should be protected by the criminal justice system. It is a severe infringement of the sexual autonomy of a transsexual whose sexual organ, although surgically constructed, is penetrated against the transsexual's will. The definition of a vagina should therefore include a surgically constructed vagina.

4.21 Section 79(9) of the English Act and section 1(4) of the Scottish Act provides that "vagina" includes the vulva. The vulva (or a surgically constructed vulva) is part of the female genitalia and as such should also be included as part of the vagina for the purposes of any sexual offence.

Recommendation 9

We recommend that the new legislation should provide that for the purposes of any sexual offence a penis should include a surgically constructed penis and a vagina should include (a) the vulva and (b) a surgically constructed vagina (together with a surgically constructed vulva).

Meaning of "penetration"

4.22 There is a possible ambiguity in the term "penetration" in that it could mean either (i) the initial act of penetrating only; or (ii) the state of being penetrated, ie a continuing act from entry to withdrawal. The Scottish Law Commission explained that the ambiguity could give rise to difficulty where consent was initially given at the time of penetration but later withdrawn:

"... Penetration could mean solely the initial act of penetrating or it could also include the state of being penetrated. The difficulty is where penetration was initially consented to but consent was

*withdrawn while the state of being penetrated continued. It could be argued that on the first, narrow sense of penetration there had been no penetration without consent ...*¹⁷

4.23 Both the English and Scottish Acts have specific provisions to deal with this possible ambiguity by adopting the second wider meaning.

The English Act

4.24 Section 79(2) of the English Act provides that "*Penetration is a continuing act from entry to withdrawal.*" This definition applies to all the sexual offences in Part 1 of the English Act.

The Scottish Act

4.25 Sections 1(2) and 1(3) of the Scottish Act provide:

"(2) For the purposes of this section, penetration is a continuing act from entry until withdrawal of the penis; but this subsection is subject to subsection (3)."

"(3) In a case where penetration is initially consented to but at some point of time the consent is withdrawn, subsection (2) is to be construed as if the reference in it to a continuing act from entry were a reference to a continuing act from that point of time."

4.26 One consequence of the Scottish provisions is that penetration may commence with consent but may still be continuing when the consent is later withdrawn. In such a situation, the penetration needed to commit rape will begin only at the point at which consent is withdrawn.¹⁸

4.27 It should be noted that the definition in sections 1(2) and 1(3) of the Scottish Act applies only to section 1 (ie the offence of rape). However, a similar definition of penetration is repeated for other sexual offences involving penetration.¹⁹

4.28 We consider that the Scottish provisions on the meaning of penetration should be adopted because they reflect the sexual autonomy principle that a person should have the right to withdraw consent previously given. In *HKSAR v Chan Sau Man*,²⁰ the victim had willingly gone to the hotel with the accused and consensual sexual intercourse took place twice when the accused had been using a condom. After intercourse had begun to

¹⁷ Scottish Law Commission Report, at para 3.32.

¹⁸ See note to clause 1 of the Scottish Law Commission's Draft Sexual Offences (Scotland) Bill. The draft bill is at appendix A of the Scottish Law Commission Report.

¹⁹ For example, similar definition of "penetration" is repeated for the offences of sexual assault by penetration (sections 2(2) and 2(3)) and sexual assault (sections 3(2) and 3(3)).

²⁰ [2001] 3 HKLRD 593.

take place with her consent on the second occasion, a stage was reached when the accused removed the condom he was using. Notwithstanding that the victim had made it plain throughout that she would only have sex with him if he was wearing a condom, the accused forcefully penetrated the victim, despite her verbal protest and actual resistance. The accused's conviction of rape was upheld by the Court of Appeal. The Scottish provisions would be useful, for example, in a situation in which a woman initially gave no indication that she did not consent because she thought the man wore a condom. When she later realised that the man did not wear a condom, she indicated that she did not consent but the man refused to withdraw his penis. Under the Scottish provisions, even if it can be argued that the woman consented to the penetration at the time of entry, the consent was withdrawn when the woman later indicated that she did not consent and the man would be guilty of rape. This also seems to accord with the common law position. For example, in *R v Anderson Greaves* [1999] 1 Cr. App. R (S) 319 and *R v S (James) (A Juvenile)* [2001] EWCA Crim 2640, the accused was convicted of rape where the victim changed her mind during intercourse and requested the accused to stop but the accused refused to withdraw.

Recommendation 10

We recommend that for the purposes of any sexual offence, penetration should be defined to mean a continuing act from entry to withdrawal.

We further recommend that where penetration is initially consented to but at some point of time the consent is withdrawn, "a continuing act from entry" should mean a continuing act from that point of time at which the consent previously given is withdrawn.

Mental element as to the act of penetration and other relevant sexual acts

4.29 The definition of rape in section 118 of the Crimes Ordinance (Cap. 200) makes no reference to the perpetrator's intention to carry out the act of penetration. It is not therefore apparent from the terms of the Hong Kong legislation whether actual intention is required, or whether mere recklessness will suffice. In contrast, the English Act makes specific reference to intention in relation to the act of penetration in rape and the relevant sexual acts in the other non-consensual sexual offences.²¹ The Scottish Act goes further and provides that the act of penetration in rape and the relevant sexual acts in other non-consensual sexual offences may be

²¹ The relevant sexual acts are: "intentionally penetrates" in rape (section 1(1)(a)); "intentionally penetrates" in assault by penetration (section 2(1)(a)); "intentionally touches" in sexual assault (section 3(1)(a)); and "intentionally causes" in causing a person to engage in sexual activity without consent (section 4(1)(a)).

carried out intentionally or recklessly. The issue for us to consider is whether we should follow the English Act in requiring that the act of penetration in rape and the relevant sexual acts in the other non-consensual sexual offences must be carried out intentionally, or we should follow the Scottish Act in allowing either intention or recklessness to satisfy the mental element necessary for commission of the offence.

4.30 We take the view that the Hong Kong law should follow the English approach in requiring the act of penetration in rape and the relevant sexual acts in other non-consensual sexual offences to be carried out intentionally, meaning that recklessness will not be sufficient *mens rea*. There are several reasons for our view.

4.31 In the first place, the case of *R v Heard*²² suggests that the common law in Hong Kong is to the effect that recklessness is not enough for the act of penetration. According to *R v Heard*, it was the common law position before the enactment of the English Act in 2003 that indecent assault could only be committed by intentional touching and the act of intercourse could only be committed intentionally. Moreover, the enactment of the English Act was not intended to change that common law position. It has therefore always been the common law position in Hong Kong that the act of intercourse and other sexual acts can only be committed intentionally. We cannot identify any good reasons why the existing common law should be changed.

4.32 More importantly, the concept of recklessness has caused some problems in criminal cases. The Court of Final Appeal in *Sin Kam Wah* described the concept of recklessness in the following terms:

*"... it has to be shown that the defendant's state of mind was culpable in that he acted recklessly in respect of a circumstance if he was aware of a risk which did or would exist, or in respect of a result if he was aware of a risk that it would occur, and it was, in the circumstances known to him, unreasonable to take the risk. Conversely, a defendant could not be regarded as culpable so as to be convicted of the offence if, due to his age or personal characteristics, he genuinely did not appreciate or foresee the risks involved in his actions."*²³

If recklessness was included in relation to the act of penetration and other sexual acts, unnecessary complexity would be added to the jury's task and to judicial directions.

4.33 The effect of the Scottish provisions is that the *mens rea* as to the sexual act can be established by virtue of recklessness. Under the Scottish provisions, there would be sufficient *mens rea* in the hypothetical example of a man resting his penis on a woman's vagina only intending to play around but penetrating her recklessly. Whilst it is possible to conceive of

²² *R v Heard* [2007] 3 All ER 306.

²³ *Sin Kam Wah* [2005] 2 HKLRD 375, at para 391 D (per Sir Anthony Mason NPJ).

such a hypothetical case such an occurrence is likely to be rare and such conduct is likely to be caught by other sexual offences such as sexual assault. In conclusion, we do not consider that the Scottish provisions are necessary.

4.34 The next issue for us to decide is whether the new legislation on sexual offences should be silent on the mental element of the act of penetration and other relevant sexual acts, thus leaving the position to be continued to be determined by the existing common law. As the new legislation will codify the common law and there will be some changes in the terms used (for example, from the existing "sexual intercourse" to "penetration"), we consider it necessary to spell out expressly in the new legislation that the act of penetration and other relevant sexual acts must be committed intentionally.

4.35 *R v Heard* made it clear that voluntary intoxication was not a defence at common law to rape and indecent assault. We take the view that in codifying the law in the new legislation, a provision should be included to the effect that self-intoxication is not a defence to rape and other non-consensual sexual offences.

Recommendation 11

We recommend that the new legislation should expressly provide that the act of penetration in rape and the relevant acts in the other non-consensual sexual offences (namely, the possible new offences of sexual assault by penetration, sexual assault, and causing a person to engage in sexual activity without consent) must be committed intentionally.

We also recommend that the new legislation should provide that self-intoxication is not a defence to rape and the other non-consensual sexual offences.

Mental element as to consent in rape

4.36 Under section 118(3)(b) of the Crimes Ordinance, the *mens rea* as to consent in rape is that the accused "*at that time ... knows that she does not consent to the intercourse or he is reckless as to whether she consents to it*". Therefore, the existing *mens rea* as to consent in rape is actual knowledge of the lack of consent or recklessness as to whether there is consent. For this purpose, the accused is reckless if the accused foresees the risk of lack of consent but does not care whether the complainant is consenting or not, and carries on regardless to have sexual intercourse with complainant.²⁴ But what if the accused genuinely but mistakenly and

²⁴

See for example *HKSAR v Siu Tat Yuen* CACC 201/2005, 8 June 2007.

unreasonably believes that the complainant is consenting? This has presented problems which are discussed below.

The Morgan principle – a subjective test in belief as to consent

4.37 In *DPP v Morgan*,²⁵ the House of Lords held that the accused who believed by mistake that the complainant was consenting was not liable for rape and there was no requirement that it was reasonable for the accused to hold that belief. Hence, it would be of no relevance that such belief was based on wrong or unreasonable grounds. Thus, if at the time of intercourse the accused genuinely believed, albeit wrongly, that the complainant was consenting, even if there were no reasonable grounds for the accused to hold that belief, then the accused was not guilty of rape. *Morgan* therefore established that the mental element as to consent in rape is a totally subjective one – it depended wholly on the belief in the accused's mind.²⁶

4.38 It is noted that such a belief has been referred to as "honest belief" or "genuine belief" in judicial decisions and academic commentaries, and very often the two terms are used interchangeably.²⁷ However, in *HKSAR v Wong Shing Chung*,²⁸ the Hong Kong Court of Appeal highlighted that the relevant mental element was whether the accused "genuinely believed" rather than "honestly believed" that the complainant consented to have sexual intercourse with the accused. We agree that using the term "genuine belief" is preferable over "honest belief" because the latter term may be misinterpreted as focussing on the moral probity of the accused or whether the accused is an honest person. Hence, we shall adopt the term "genuine belief" in this paper.

4.39 Although *Morgan* dealt only with rape, the principle in that case applied generally at common law to offences requiring proof of *mens rea* as to consent. For example, the court in *Kimber*²⁹ held that a mistaken or even unreasonable belief held by the accused in the complainant's consent negated liability for indecent assault.

The enactment of section 118(4) of the Crimes Ordinance – clarification of the Morgan principle

4.40 The *Morgan* principle was strongly criticised because it provided little protection to a victim as the whole matter would be looked at from the angle of the accused's subjective mind. Under the *Morgan* principle, no matter what the victim said or did, or however violated the victim was, there was no crime of rape so long as the accused "genuinely" believed, albeit mistakenly, that the victim consented. Notwithstanding the strong criticism, Mrs Justice

²⁵ *DPP v Morgan* [1976] AC 182.

²⁶ Home Office Paper, para 2.2.4.

²⁷ See for example *DPP v Morgan* [1976] AC 182, *HKSAR v Tang Kwok Wah Dixon* [2001] 2 HKC 301, CA and Criminal Law in *Halsbury's Laws of Hong Kong*, para [130.369].

²⁸ *HKSAR v Wong Shing Chung*, CACC 66/1999.

²⁹ *Kimber* [1983] 1 WLR 1118.

Heilbronn and the Advisory Committee on Rape thought the principle in *Morgan* was right, but that the mental element in rape should be clarified.³⁰ This resulted in the enactment of the explanation given in section 118(4) of the Crimes Ordinance (Cap. 200) in Hong Kong in 1978 (or the similar provisions in section 1(2) of the Sexual Offences (Amendment) Act 1976 in England).³¹

4.41 Section 118(4) of the Crimes Ordinance (Cap 200.) provides:

"It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed."

4.42 Section 118(4) of the Crimes Ordinance (Cap. 200) effectively gave statutory force to the words of Lord Fraser in *Morgan* that the reasonableness of any belief was a matter that the jury would have to consider.³² Lord Fraser said in *Morgan*:

"If the effect of the evidence as a whole is that the defendant believed, or may have believed, that the woman was consenting, then the Crown has not discharged the onus of proving the commission of the offence as fully defined and, as it seems to me, no question can arise as to whether the belief was reasonable or not. Of course the reasonableness or otherwise of the belief will be important as evidence tending to show whether it was really held by the defendant, but that is all."³³

4.43 The clarification in section 118(4) of the Crimes Ordinance (Cap. 200) has not changed the main point in *Morgan* that the question of consent should be looked at from the perspective of the accused's subjective belief in the complainant's consent. As Lord Fraser's above-quoted dictum shows, if the evidence as a whole shows that the accused genuinely, though mistakenly, believed in the complainant's consent, *"no question can arise as to whether the belief was reasonable or not"* and the accused must be acquitted. The reasonableness or otherwise of the accused's belief is only one piece of evidence tending to show whether the accused did in fact hold that belief. That is to say, the whole matter is still viewed from the perspective of the accused's subjective belief. Section 118(4) has the effect only of requiring the jury to take into account *"the presence or absence of reasonable grounds for such a belief"* along with all the other relevant evidence in determining whether or not he so held the genuine but mistaken belief.

³⁰ Home Office Paper, at para 2.2.5.

³¹ Section 118(4) of the Crimes Ordinance (Cap 220) was modelled on section 1(2) of the Sexual Offences (Amendment) Act 1976 in England.

³² Home Office Paper, at para 2.2.5. This observation was made in the Home Office Paper in relation to section 1(2) of the Sexual Offences (Amendment) Act 1976.

³³ *DPP v Morgan* [1976] AC 182 at 237E-F (per Lord Fraser of Tullybelton).

4.44 Section 118(4) of the Crimes Ordinance (Cap. 200) has therefore not provided all the answers to the criticism of the *Morgan* principle. We therefore take the view that the Hong Kong law on the accused's belief in consent is in need of reform.

4.45 The English and Scottish Acts now deal with the issue of the accused's mistaken belief in the complainant's consent by requiring a reasonable belief that there was consent. We shall discuss this approach later in this chapter.

Different reform options for dealing with genuine (but mistaken) belief in consent

4.46 We can identify three reform options for dealing with the issue of genuine, albeit mistaken, belief in consent.

Option 1 – the subjective test

4.47 This is the approach under the *Morgan* principle and represents the present law in Hong Kong. Under this approach, the accused's belief in the complainant's consent must be genuinely held but need not to be reasonable. In other words, the accused lacks the necessary intent for the offence where he genuinely believed that the complainant was consenting, even if there were no reasonable grounds for his belief.³⁴

4.48 The main argument in support of this subjective test for belief in consent is that a person who makes a genuine mistake about the central feature of a crime cannot be said to have the necessary guilty mind for that crime. Furthermore, it may be unfair to judge a person's actions by some external criteria. There may well be legitimate reasons (for example, cultural background or learning difficulties) why the accused misinterpreted the complainant's behaviour. There are complexities in "reading the signs" in the context of sexual interaction.³⁵

4.49 The "genuine though unreasonable belief" test can be criticised for providing little protection to the victim of sexual crimes. The test has the effect that so long as the accused "genuinely" believed the complainant had consented, the accused cannot be convicted of rape even where it was unreasonable for the accused to have held that belief, such as where the complainant has indicated that there was no consent. In this respect it undermines the principle of sexual autonomy. Moreover, the test "*bolsters the legitimacy of myths and stereotypes about women and sexual choice*".³⁶ Moreover, "*it encourages people to adhere to myths about sexual behaviour*

³⁴ However, under section 118(4) of the Crimes Ordinance, in determining whether the accused honestly held the belief, the jury is to take into account the presence or absence of reasonable grounds for such a belief.

³⁵ Scottish Law Commission Report, at para 3.71.

³⁶ Scottish Law Commission Report, at para 3.72.

*and in particular that all women like to be overborne by a dominant male, and that 'no' really means 'yes'".*³⁷ In our view, the test undermines the modern concept of sexual autonomy which underpins the legislative changes proposed by us.³⁸

Option 2 – the objective test

4.50 Under the objective approach, the accused's belief is assessed solely in terms of what a reasonable person would have believed or whether there were reasonable grounds for a belief. Personal attributes of the accused may not be taken into account. Assertion of such belief is likely to be rejected where the reasons for the accused's belief in consent are objectionable or bizarre, *"for example, where an accused considers himself so sexually attractive that no woman could ever resist his charms"*.³⁹

4.51 The main problem with a purely objective test is that generally speaking the criminal law avoids convicting a person for purely negligent behaviour (ie failing to act according to the standard of a reasonable person). A problem with using the "reasonable person" standard in the abstract is that the attributes of the reasonable person are unclear.⁴⁰

Option 3 – the mixed test

4.52 The third approach is a mixed test which combines aspects of the other two tests. This approach has been adopted in the English and Scottish Acts.

The English Act

4.53 Section 1(1)(c) of the English Act requires the prosecution to prove in relation to rape that, in addition to the lack of consent, the accused did not "reasonably believe" that the complainant consented. A similar requirement is imposed in respect of the other non-consensual sexual offences.

4.54 Under section 1(2), whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps the accused has taken to ascertain whether the complainant consents. The

³⁷ Home Office Paper, at para 2.13.7.

³⁸ We consider that the legislative changes proposed in this report should be accompanied by government efforts to promote the modern concept of sexual autonomy and eliminate stereotypes about sexual images of women, such as that a woman who says nothing or does not say "no" is really consenting to have sex, or women dressing sexily are inviting sex or are open to sexual relationships. The promotion of the modern concept of sexual autonomy should form part of the themes of sex education at school and general crime prevention education.

³⁹ Scottish Law Commission Report, at para 3.73.

⁴⁰ As above.

same statutory framework for determining the reasonableness of a belief applies to the other non-consensual sexual offences.⁴¹

The Scottish Act

4.55 In relation to rape, section 1(1)(b) of the Scottish Act requires the prosecution to prove that, in addition to the lack of consent, the accused carried out the act of penetration "without any reasonable belief" that the complainant consented. The same requirement of "without any reasonable belief" applies to all the non-consensual sexual offences in Part 1 of the Scottish Act.⁴²

4.56 Section 16 provides that, for the purposes of the offences in Part 1, in determining whether a person's belief as to consent was reasonable, regard is to be had to whether the person took any steps to ascertain whether there was consent, and if so, to what those steps were. It should be noted that, unlike the English Act, there is no reference to "all the circumstances" in the Scottish statutory framework for determining whether a belief is reasonable.

Our proposed option

4.57 We consider that the choice is between the first option (subjective test together with the clarification in section 118(4) of the Crimes Ordinance) and the third option (mixed test) only. We do not favour the second option (totally objective test).

4.58 The reason for rejecting the second option was explained by the Scottish Law Commission:

*"a test [ie the objective test] which assesses the accused's belief solely in terms of what a reasonable person would have believed or whether there were reasonable grounds for a belief moves attention too far from the actual accused."*⁴³

4.59 A totally objective test fails to take into account the personal attributes of the particular accused which explain why he makes the genuine but mistaken belief in consent. These attributes may include the accused's learning difficulties, mental disorder, or lack of social skills.

⁴¹ The reasonable belief requirement and the statutory framework for determining reasonableness of belief applies also to assault by penetration (sections 2(1)(d) and 2(2)); sexual assault (sections 3(1)(d) and 3(2)); and causing sexual activity without consent (sections 4(1)(d) and 4(2)).

⁴² The reasonable belief requirement applies to all the non-consensual sexual offences in Part 1 of the Scottish Act: rape (section 1), sexual assault by penetration (section 2), sexual assault (section 3), sexual coercion (section 4); coercing a person into being present during a sexual activity (section 5); coercing a person into looking at a sexual image (section 6); communicating indecently (section 7); sexual exposure (section 8); voyeurism (section 9); and administering a substance for sexual purposes (section 11).

⁴³ Scottish Law Commission Report, para 3.76.

4.60 The first option (subjective approach) represents the existing position in the law of Hong Kong. As mentioned above, the subjectivity of the *Morgan* principle has been criticised because its effect is that there is no rape where the accused "genuinely" believed that the complainant consented, even if the complainant has indicated that there was no consent (by the complainant) to sexual intercourse. We do not favour this option because it undermines respect for sexual autonomy.

4.61 As to the third option, the Scottish Law Commission explained the mixed test in the following terms:

*"The test is not a subjective one (which would focus just on the mental state of the particular accused) nor is it purely objective (which would ask whether a reasonable person would have believed that the victim was consenting), but it is a mixed test. The court or jury is required to decide whether the accused had a belief which was reasonable (which has an objective element), but in reaching this decision regard is to be had to whether the particular accused took steps (and if so, what they were) to ascertain whether the other party was consenting (which imports an element of subjectivity)."*⁴⁴

4.62 We favour the adoption of the third option of a mixed test which, as the Scottish Law Commission put it, adopts *"a test which while avoiding a totally subjective approach still directs its focus on the accused."*⁴⁵ The merit of the mixed test is that it avoids the subjectivity of the *Morgan* principle by requiring the accused's belief in consent to be reasonable, but still focuses on the particular accused by determining the reasonableness or otherwise of that belief having regard to any steps the accused has taken to ascertain whether the complainant consents.

4.63 Whilst there are similar requirements in both the English and Scottish Acts for the prosecution to prove the accused's lack of reasonable belief in consent, there are some differences in the provisions in the English and Scottish legislation as regards the statutory framework for determining whether a belief is reasonable or not. The relevant provisions read as follows:

The English Act:

*"Whether a belief is reasonable is to be determined having regard to **all the circumstances**, including any steps [a person (A)] has taken to ascertain whether [another person (B)] consents." (emphasis added)*⁴⁶

⁴⁴ See note to clause 12 of the Scottish Law Commission's Draft Sexual Offences (Scotland) Bill. The draft bill is at appendix A of the Scottish Law Commission Report.

⁴⁵ Scottish Law Commission Report, para 3.76.

⁴⁶ The English Act, section 1(2).

The Scottish Act:

"In determining, for the purposes of Part 1, whether a person's belief as to consent or knowledge was reasonable, regard is to be had to whether the person took any steps to ascertain whether there was consent or, as the case may be, knowledge; and if so, to what those steps were."⁴⁷

4.64 The omission of the phrase "all the circumstances" from the Scottish provision was a deliberate drafting decision. The Scottish Law Commission explained the omission of the phrase as follows:

"... the phrase 'having regard to all circumstances' as used in the [English Sexual Offences] 2003 Act may allow for the inclusion of all the attributes of the accused to be used in assessing the reasonableness of the belief. In other words, the test becomes: given the accused's attributes, including his belief systems, was his belief as to consent reasonable? But this approach does not significantly differ from the subjective test of 'honest' belief. We therefore favour omitting from the proposed definition of mens rea any reference to 'all the circumstances'..."⁴⁸

4.65 We do not dispute the comment that the phrase "all the circumstances" may mean that the personal attributes of the accused, including the accused's belief systems, can be taken into account in assessing whether the accused's belief is reasonable. That said, we consider that the phrase "all the circumstances" covers not only the accused's belief systems but also other factors or matters viewed not entirely from the accused's perspective. These other factors or matters may include the parties' previous sexual relationship, their usual manner of communication, their relative bargaining position, their difference in age and so on. Thus the phrase "all the circumstances" does not necessarily make the approach a subjective test of genuine belief since factors or matters not viewed entirely from the accused's perspective may also be taken into account.

4.66 We favour the adoption of the English provisions which include the phrase "all the circumstances". The merit of the inclusion of this phrase is that the personal attributes of the accused and other relevant matters or factors can be taken into account in assessing whether the belief in consent is reasonable. This will avoid unfairness to the particular accused who for such personal reasons as learning difficulty, mental disorder or lack of social skills fails to take any steps to ascertain whether the complainant consents. Although the accused has failed to take any steps to ascertain whether the complainant consents, there may be other relevant factors or matters (such as the parties' previous sexual relationship, usual manner of communication, relative bargaining position, difference in age) which the jury should also take into account in assessing whether his belief is reasonable.

⁴⁷ The Scottish Act, section 16.

⁴⁸ Scottish Law Commission Report, para 3.77.

4.67 With the adoption of the mixed test in the English Act, there is no place for section 118(4) of the Crimes Ordinance (Cap. 200) (which is pertinent to the first option only). Hence, we recommend that section 118(4) should be deleted upon enactment of the new legislation.

4.68 In conclusion, we take the view that in relation to the offence of rape and other non-consensual sexual offences, it should be necessary for the prosecution to prove that the complainant did not consent and that the accused did not reasonably believe that the complainant consented. Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps the accused took to ascertain whether the complainant consented.

Recommendation 12

We recommend in relation to the offence of rape and other non-consensual sexual offences that the new legislation should incorporate provisions along the lines of sections 1(1)(b), 1(1)(c), 1(2), 2(1)(c), 2(1)(d), 2(2), 3(1)(c), 3(1)(d), 3(2), 4(1)(c), 4(1)(d) and 4(2) of the English Sexual Offences Act 2003 to the effect that:

- (a) it should be necessary for the prosecution to prove that (i) the complainant did not consent; (ii) the accused did not reasonably believe that the complainant consented; and**
- (b) whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps the accused took to ascertain whether the complainant consented.**

We further recommend that section 118(4) of the Crimes Ordinance (Cap. 200) should be repealed upon enactment of the new legislation.

Should the offence of procurement of an unlawful sexual act by false pretences be retained?

4.69 Under section 120 of the Crimes Ordinance (Cap. 200), it is an offence for a person to procure another person, *by false pretences or false representations*, to do an unlawful sexual act in Hong Kong or elsewhere. The question arises as to whether or not the procurement offence should be abolished and encompassed by rape.

4.70 The common law position before the enactment of the English Act was that only fraud as to the nature of the act or as to the identity of the

person would vitiate consent for rape: *R v Linekar*.⁴⁹ Deception as to the nature of the act or as to the identity of the person doing the act would therefore amount to rape under the existing law in Hong Kong.

4.71 There were arguments as to whether deception as to the purpose of the act would vitiate consent for rape under the common law but the English and Scottish Acts provide that such type of deception would have the effect of vitiating consent. We pointed out in Chapter 3 that there are good reasons for including intentional deceit as to the purpose of the act as a circumstance vitiating consent as there have been cases in Hong Kong in which the victims knew the nature of the act (which was sexual intercourse) but were deceived as to its actual purpose. In our view, deception as to the purpose of the act should not be considered less blameworthy than deception as to the nature of the act and such conduct should be charged as rape.

4.72 In conclusion, only deception as to the nature or purpose of the act or identity of the person doing the act should vitiate consent for rape. The issue then is how the criminal law should deal with deception not relating to the nature or purpose of the act or identity of the person doing the act.

4.73 In the Australian High court case of *Papadimitropoulos*⁵⁰ the accused lied to a young Greek woman recently arrived in Australia that they had gone through a marriage ceremony. In fact, the accused had only given notice of his intention to marry at the Melbourne Registry Office. The evidence showed that the young woman would have agreed to have sexual intercourse with the accused only if they had been married. The accused's lie was only in relation to the marriage. The Australian High Court held that the girl's mistake did not relate to the nature of the sexual act or the identity of the accused and so the accused was not guilty of rape. The Australian High Court recognised, however, that the accused's fraudulent conduct could be punished under another less serious criminal offence, namely, procuring sexual intercourse by fraud or false pretences.⁵¹

4.74 The decision in *Papadimitropoulos* shows that it is necessary to have the offence of procurement by false pretences to cover sexual intercourse obtained by deception not relating to the nature or purpose of the act or the identity of the person since such conduct would not constitute rape. There would be a loophole in the law if procurement by false pretences were to be abolished.

4.75 By retaining the offence of procurement by false pretences, the unfairness to the victim of deception in cases similar to *R v Linekar* can be avoided. In *Linekar*,⁵² the accused deceived a prostitute into thinking that he would pay her for sexual intercourse. He never had any such intention,

⁴⁹ [1995] 2 Cr App R 49, CA.

⁵⁰ (1957) 98 CLR 249, BFW 878.

⁵¹ Procuring sexual intercourse by fraud or false pretences was an offence under the then section 66 of New South Wales' Crimes Act 1900. The offence of procuring sexual intercourse by fraud or false pretences has since been repealed: Crimes Amendment (Sexual Offences) Act 2003 (NSW), at schedule 1.

⁵² [1995] 2 Cr App R 49, CA.

however. His conviction for rape was quashed on appeal on the grounds that his deception did not relate to the nature of the act, but only to the payment promised by him. Although the accused in situations similar to *Linekar* could not be liable for rape, he could be guilty of procurement by false pretences. Likewise, a 2007 Hong Kong case would show the need for the retention of the procurement offence.⁵³ In the Hong Kong case, one of the co-accused promised the victim that he would return to her audio recordings of voices made by her during sexual activity if she made him happy. He never intended to return the audio recordings though the victim had sexual intercourse with him on several occasions relying on that promise. The victim knew the nature of the act (which was sexual intercourse). She also knew the actual purpose of the act (which was the accused's sexual gratification) since the accused made it clear that she had to make him happy. She was clear about the identity of the accused. The only deception was in respect of the sham promise to return the audio recordings.

4.76 The statistics below show that although the number of cases is not high, there have been actual prosecutions and convictions in respect of the offence of procurement by false pretences in recent years. This gives further support for the need to retain the procurement offence. In conclusion, we take the view that the offence of procurement by false pretences should be retained.

**Prosecution and conviction statistics under section 120 of Crimes Ordinance
(Procurement by false pretences)**

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011 (Jan-Mar)
Not convicted	1	0	2	0	0	1	0	0	0	1	0
Convicted	0	0	0	2	1	0	0	4	0	3	1
Total prosecuted	1	0	2	2	1	1	0	4	0	4	1

(Source: The Integrated Law and Order Statistical System ("ILOSS") of the Security Bureau)

Recommendation 13

We recommend that the offence of procurement by false pretences under section 120 of the Crimes Ordinance (Cap. 200) should be retained upon enactment of the new legislation.

⁵³ HCCC246/07.

Sexual intercourse obtained by threat or intimidation not involving the use of force (such as economic threat)

4.77 We take the view that it is unnecessary to have a separate offence to cover sexual intercourse obtained by economic threat or pressure since the issue could be determined by reference to the concept of consent. Economic pressure would not vitiate consent in most cases. However, in an extreme case the court may rule that there is no consent if the evidence shows that the complainant does not voluntarily agree to have sexual intercourse as a result of economic pressure from the accused (for example the loan shark cases). It is difficult to draw a statutory line between a true bargain for sex and obtaining sexual intercourse by unduly exerting economic pressure. In our view, such cases should be dealt with on a case by case basis to decide whether there was rape or not by reference to the concept of consent.

Recommendation 14

We recommend that sexual intercourse obtained by economic pressure should be dealt with on a case by case basis to decide whether rape was committed by reference to the concept of consent and it is not necessary to have a new offence to cover such cases.

Chapter 5

Sexual assault by penetration

Introduction

5.1 This chapter considers whether a new offence should be created, constituted by penetration of the complainant's vagina or anus by an object (for example, a bottle) or a part of the accused's body other than a penis (for example, a finger).¹ Such acts do not fall within the meaning of the crime of rape. Instead, non-penile penetrative assaults are charged under the present law in Hong Kong as indecent assault. Indecent assault, however, covers a vast spectrum of criminal conduct of different degrees of gravity, from merely touching to non-penile sexual penetration, which may be perceived in some circumstances as being as serious as rape.

The need for the creation of a new offence to cover non-penile penetrative assaults

5.2 The Home Office Review Group in the UK took the view that it was necessary to create a new offence since the existing offence of indecent assault was inadequate to reflect the gravity of non-penile penetrative assaults, the physical and psychological impact of which could be as serious as rape.

5.3 The new offence was also considered necessary for those situations in which there was doubt as to the nature of the penetration, such as when a child or mentally impaired adult was unable to furnish details of exactly what had penetrated them:

"We recognised that other penetrative assaults [ie non-penile penetrative assaults] could be as serious in their impact on the victim as rape and that they should not be regarded lightly. We thought the present law of indecent assault was inadequate to tackle these serious crimes. It is an offence which covers a wide spread of behaviour from touching to truly appalling violations, and the current penalty of 10 years is inadequate for the worst cases. Accordingly we recommend a new offence of sexual assault by penetration with a penalty the same as that for rape to be used for all non-penile penetrative sexual offences. This offence would include the non-consensual penetration of the anus, vagina and/or the external genitalia by objects or parts of

¹ These examples were given in paragraph 11 of the Explanatory Notes to the English Sexual Offences Act 2003.

*the body other than the penis. This offence should also be defined in a way that would enable it to be used if there were any doubt as to the nature of the penetration (for example when a child or mentally impaired adult is unable to furnish details of exactly what had penetrated them). This offence could be committed by a man or a woman on a man or a woman.*²

5.4 We share the view that the offence of indecent assault is inadequate to reflect the gravity of non-penile penetrative assault of the complainant's anus or vagina and a new offence should be created to cover this type of serious crime.

Elements of the new offence

The English Act

5.5 The elements of the English offence of "assault by penetration" are as follows:

- A person (A) penetrates the vagina or anus (but not the mouth) of another person (B) with a part of A's body or anything else;
- the penetration is intentional;
- the penetration is sexual;
- B does not consent; and
- A does not reasonably believe that B consents.³

The Scottish Act

5.6 The elements of the Scottish offence of "sexual assault by penetration" are essentially the same as those of the English offence. The only difference is that penetration must be carried out intentionally in the English offence whilst it can be carried out intentionally or recklessly in the Scottish offence.⁴ It should be noted that we have recommended in

² Home Office Paper, para 2.9.1.

³ Section 2(1) of the English Act provides:

"A person (A) commits an offence [of assault by penetration] if -

(a) he intentionally penetrates the vagina or anus of another person (B) with a part of his body or anything else,

(b) the penetration is sexual,

(c) B does not consent to the penetration, and

(d) A does not reasonably believe that B consents."

⁴ Section 2(1) of the Scottish Act provides:

"If a person ('A'), with any part of A's body or anything else -

(a) without another person ('B') consenting, and

(b) without any reasonable belief that B consents,

penetrates sexually to any extent, either intending to do so or reckless as to whether there is

Chapter 4 (recommendation 11) that the act of penetration must be carried out intentionally.

Name of the new offence

5.7 The new offence is called "assault by penetration" in the English Act and "sexual assault by penetration" in the Scottish Act. The issue is whether we should adopt the English or the Scottish name of the offence.

5.8 The Scottish Law Commission considered that the word "sexual" should be added to the English name of the offence on the grounds that the English name "*does not highlight the sexual element of the offence*".⁵ We share the view that the new offence should be called "sexual assault by penetration". We think it desirable from a public perception point of view that the key elements of an offence should be apparent from its name and it is therefore necessary to highlight in its name the sexual element of the new offence. Moreover, the new offence is a very serious offence of gravity similar to rape. It is vital for educational purposes to reflect in its name that the new offence is a serious crime involving sexual penetrative assaults which is distinguishable from the lesser offence of ordinary common assaults. In addition, highlighting the sexual element of the offence will alleviate any concerns that medical intervention into a patient's vagina or anus might attract criminal liability under the new offence. Medical intervention will attract criminal liability only if the penetration is sexual in the sense that it is carried out for the sexual gratification of the medical staff concerned.⁶

Definition of "sexual"

5.9 It is an element of the new offence in both the English and the Scottish Acts that the offence is committed only if the penetration is sexual. The issue then is what is meant by the word "sexual". In both the English and Scottish Acts, there is a statutory definition of the word sexual which applies generally to all conduct, including penetration and touching. The English and Scottish definitions are different and are discussed below.

The English Act

5.10 Section 78 of the English Act provides:

penetration, the vagina or anus of B then A commits an offence, to be known as the offence of sexual assault by penetration."

⁵ Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences* (Discussion Paper No 131, January 2006), at para 4.24.

⁶ The Scottish Law Commission considered that a medical intervention done for proper medical reasons would not attract criminal liability since a reasonable person would not regard it as a sexual act and so it was unnecessary to have any provision for the exemption from criminal liability of medical acts: Scottish Law Commission Report, at para 3.79.

"For the purposes of this Part (except section 71), penetration, touching or any other activity is sexual if a reasonable person would consider that –

- (a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or*
- (b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual."*

The Scottish Act

5.11 Section 60(2) of the Scottish Act provides:

"For the purposes of this Act –

- (a) penetration, touching, or any other activity,*
- (b) a communication,*
- (c) a manner or exposure, or*
- (d) a relationship,*

is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual."

5.12 The English definition has two limbs, each covering activity of a different kind. Limb (a) covers an activity (such as sexual intercourse) which by its nature would always be considered by a reasonable person to be sexual. Limb (b) covers an activity which may or may not be sexual by nature. Whether or not an activity within limb (b) is considered sexual would depend on the circumstances or the intentions of the person carrying it out, or both. The English definition is explained in the official Explanatory Notes to the Act in the following terms:

"There are two alternative limbs to the definition of 'sexual' in section 78. Paragraph (a) covers activity that the reasonable person would always consider to be sexual because of its nature, such as sexual intercourse. Paragraph (b) covers activity that the reasonable person would consider, because of its nature, may or may not be sexual depending on the circumstances or the intentions of the person carrying it out, or both: for example, digital penetration of the vagina may be sexual or may be carried out for a medical reason. Where the activity is, for example, oral sex, it seems likely that the reasonable person would only need to consider the nature of the activity to determine that it is sexual. But where it is digital penetration of the vagina, the reasonable person would need to consider the nature of the activity (it may or may not be sexual), the circumstances in which it is carried out (eg a doctor's surgery) and the purpose of any of

the participants (if the doctor's purpose is medical, the activity will not be sexual; if the doctor's purpose is sexual, the activity also is likely to be sexual).

If, from looking at the nature of the activity, it would not appear to the reasonable person that the activity might be sexual, the activity does not meet the test in either paragraph (a) or (b), even if a particular individual may obtain sexual gratification from carrying out the activity. The effect of this is that obscure fetishes do not fall within the definition of sexual activity."⁷

Activities which are always considered sexual by a reasonable person

5.13 The majority of the cases would fall within limb (a) of the English definition since whether an activity (such as sexual intercourse or oral sex) is sexual or not should be very obvious in most cases. The English definition provides a simple approach to the majority number of cases and the judge can always give directions easily by using limb (a) of the English definition. On the other hand, the Scottish definition is simple but has the major drawback of requiring the jury to consider all the circumstances of the case even in the majority of cases in which the activity is clearly sexual. If the nature of the activity is clearly sexual, there is no good reason why the jury should be required to consider all the circumstances of the case (as required under the Scottish approach) before they can say it is sexual.

Activities which may or may not be sexual

5.14 For the small number of cases falling within limb (b) of the English definition (such as touching), where the sexual nature of the activity is not clear-cut, the English definition provides a more useful framework than the Scottish approach of "*in all circumstances of the case*" which fails to focus the jury's attention on such important matters as the motive of the participants in the activity. The English definition is particularly useful in cases of medical examination of the vagina or anus. Such an activity is not sexual if it was carried out for proper medical reasons. But if it was carried out for the doctor's sexual gratification, it would be considered as sexual.

5.15 An added advantage of adopting the English approach is that we can continue to have the benefit of judicial precedents in other places. In conclusion, we favour the adoption of the English approach.

Refinements of the limb (b) of the English approach

5.16 Whilst we consider that the English approach should be adopted,

⁷ Explanatory Notes to the Sexual Offences Act 2003, at paras 146 and 147.

we take the view that some necessary refinements should be made to limb (b) of the English definition.

5.17 Limb (b) of the English definition of "sexual" reads: "*because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual*".⁸ Limb (b) of the English definition (which applies to activities which, because of its nature, may or may not be sexual) mandates a two-stage approach. According to the English Court of Appeal in *R v H*, two questions must be asked by the jury under the two-stage approach.⁹ First, the jury must ask whether the act in the instant case could be sexual (because of its nature). In considering the first question, the jury would not be concerned with other factors such as the circumstances before or after the act, or any evidence as to the purpose of any person in relation to the act. If answer to the first question is "Yes", the second question is whether in view of the circumstances and/or the purpose of any person in relation to the act, the act was in fact sexual.

5.18 In *R v H*, the trial judge did not take the two-stage approach in applying section 78(b) of the English Act but adopted a comprehensive approach by looking at the matter as a whole to determine whether the touching in that case was sexual. On appeal, the English Court of Appeal took the view that section 78(b) of the English Act mandated a two-stage test (rather than the comprehensive test adopted by the trial judge):

*"... if there were not two requirements in sub-s (b), the opening words 'because of its nature it may be sexual' would be surplus. If it was not intended by the legislature that effect should be given to those opening words, it would be sufficient to create an offence by looking at the touching and deciding whether because of its circumstances it was sexual. In other words, there is not one comprehensive test. It is necessary for both halves of s 78(b) to be complied with."*¹⁰

5.19 The two stage test in section 78(b) was based on Lord Ackner's speech in *R v Court*.¹¹ The English Court of Appeal in *R v H*, however, expressed difficulty in applying Lord Ackner's approach in light of the earlier authority of *R v George*.¹²

"It is no doubt because of this aspect of s 78(b) and the article in the Criminal Law Review that Mr West who appears on behalf of the appellant referred to R v Court [1988] 2 All ER 221, [1989] AC 28. That case dealt with an alleged indecent assault. An assistant in a shop struck a 12-year-old girl visitor 12 times, for no apparent reason, outside her shorts on her buttocks. The assistant was convicted. Both this court and the House of Lords

⁸ The English Act, section 78(b).

⁹ *R v H* [2005] 2 All ER 859, at paras 13-14.

¹⁰ *R v H* [2005] 2 All ER 859, at para 9.

¹¹ *R v Court* [1988] 2 All ER 221 at 229-230, [1989] AC 28 at 42-43.

¹² *R v George* [1956] Crim LR 52.

dismissed the assistant's appeal. Lord Ackner ([1988] 2 All ER 221 at 229-230, [1989] AC 28 at 42-43) set out his general approach. On reading that passage it is understandable why the article should have made the comment to which we referred. **It is quite clear to the court that the staged approach which we have observed in s 78 of the 2003 Act is reflected in Lord Ackner's speech. The only difficulty that we have with applying Lord Ackner's approach is that he referred to R v George [1956] Crim LR 52.** In that case the prosecution relied on the fact that on a number of occasions the defendant had removed a shoe from a girl's foot. He had done so, as he admitted, because it gave him a perverted sexual gratification. Streatfield J ruled that an assault became indecent only if it was accompanied by circumstances of indecency towards the person alleged to have been assaulted and that none of the assaults in that case (namely the removal or attempted removal of the shoes) could possibly amount to an indecent assault.¹³

We would express reservations as to whether or not it would be possible for the removal of shoes in that way, because of the nature of the act that took place, to be sexual as sexual is defined now in s 78. That in our judgment may well be a question that it would be necessary for a jury to determine.¹⁴ (emphasis added)

5.20 Notwithstanding their criticism of the comprehensive approach adopted by the trial judge, the English Court of Appeal in *R v H* acknowledged that *"The fact that there were two different questions in section 78(b) complicated the task of the judge and that of the jury."*¹⁵

5.21 As discussed above, the majority of cases would fall under limb (a) of the English definition, as the nature of an act (e.g. sexual intercourse or oral sex) is inherently sexual in most cases. However, in other less common situations falling under limb (b) of the English definition (in which the sexual nature of the act is not clear-cut), it is difficult to separate the nature of the act from the circumstances before or after the act and/or the motive of any person in relation to the act. For example, in the case of *R v George*, supra, Streatfield J ruled that the removal of a shoe from a girl's foot on a number of occasions to derive perverted sexual gratification was not an indecent assault because the act was not accompanied by circumstances of indecency. The judge in *R v George* paid no attention to the motive of the accused which was to derive perverted sexual gratification. The English Court of Appeal in *R v H*, supra, expressed doubt over the decision in *R v George* and took the view it should be left to the jury to decide whether removing a girl's shoe in those circumstances could be considered indecent/sexual. In our view, in determining whether the act was sexual, it is difficult to separate the removal of

¹³ *R v H* [2005] 2 All ER 859, at para 10.

¹⁴ *R v H* [2005] 2 All ER 859, at para 11.

¹⁵ *R v H* [2005] 2 All ER 859, at para 12.

a shoe from a girl's foot from the motive of the accused, namely, to derive perverted sexual gratification.

5.22 In *R v H*, supra, the accused encountered a girl in a quiet park. He asked the girl the time and asked if she wanted to have sex with him. She ignored him but he was grabbing the girl's tracksuit bottoms by the fabric in the area of the right pocket and attempting to pull her towards him, trying to place his hand over her mouth. She backed away, broke free of his grip on her clothing and ran away. In deciding whether the touching of the girl was sexual, it is difficult to separate the touching from the circumstances (such as the uttering of sexual words and grabbing of the girl's clothing) and/or the accused's intention (to have sexual intercourse with the girl).

5.23 As it is difficult to separate the nature of the act from the circumstances before or after the act and/or the motive of any person in relation to the act, we take the view that the opening words in section 78(b) "*because of its nature it may be sexual*" should be dropped so as to avoid the two-stage complicated test and to make it a comprehensive test.

Recommendation 15

We recommend that for the purposes of any sexual offence, the definition of "sexual" in section 78(a) and (b) of the English Sexual Offences Act 2003 should be adopted, subject to the deletion of "*because of its nature it may be sexual and*" from section 78(b). The definition of sexual will therefore be along the following lines: it is sexual if a reasonable person would consider that –

- (a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or**
- (b) because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.**

Should the offence of sexual assault by penetration cover penetration of the mouth?

5.24 In both the English and the Scottish Acts, the offence of (sexual) assault by penetration covers only non-penile penetration of the vagina or anus of another person. That is to say, the offence does not cover penetration of the mouth. The rationale behind the creation of the new offence is that the impact of some non-penile penetrative assaults is considered as serious as rape. Given that our proposed new definition of rape covers penile penetration of the mouth of another person, the issue then is whether the offence of sexual assault by penetration should likewise cover penetration of the mouth.

5.25 According to the Scottish Law Commission, the problem with extending the offence to cover penetration of the mouth was that the offence as so defined would cover activities such as a "stolen" kiss.¹⁶ No one would consider the impact of a "stolen" kiss, which involves penetrating one's tongue into the mouth of another person, to be as serious as rape. Likewise, other forms of oral penetration say, by a bottle or a finger would not generally be regarded as being as serious a rape. In any event, we do not consider non-penile penetrative assault of another person's mouth, which is not part of the genitalia, should be considered akin to rape. Accordingly, we agree with the approach adopted under the English and Scottish legislation that the offence of sexual assault by penetration should not cover penetration of the mouth. Depending on the circumstances of the case, non-penile sexual penetration of the mouth can be dealt with by the proposed offences of sexual assault and causing a person to engage in sexual activity without consent.

Section 2(4) of the Scottish Act

5.26 Section 2(4) of the Scottish Act provides that *"the reference [in subsection 1] to penetration with any part of A's body is to be construed as including a reference to penetration with A's penis."* The effect of this provision is that the offence of sexual assault by penetration will include penetration by a penis. As penile penetrative assault constitutes the offence of rape, there is a resulting overlap between the offences of rape and sexual assault by penetration in the Scottish Act. There is no corresponding provision in the English Act.

5.27 According to the Scottish Government, the provision in section 2(4) of the Scottish Act was intended to cover the situation in which the victim was not sure what actually penetrated him or her but the evidence was to the effect that he or she was in fact penetrated by a penis. It was considered that the provision would enable the prosecution to prove a charge of sexual assault by penetration, notwithstanding that the evidence at trial was that the victim was in fact penetrated by something but she was unsure as to whether this was a penis or something else. In response to a question raised at committee in the Scottish Parliament by Cathie Craigie, MSP, as to why section 2(4) was necessary when section 1 of the Scottish Act already defined rape quite clearly, Fergus Ewing, MSP, speaking for the Scottish Government, explained as follows:

"... The new offence [of sexual assault by penetration] is committed when a person sexually penetrates with any part of his or her body, or with anything else, the vagina or anus of another person without their consent and without any reasonable belief that they consent. As Cathie Craigie rightly points out, there is an overlap with the offence of rape, as subsection (4) of

¹⁶ Scottish Law Commission Report, at para 3.36.

the new section that is introduced by amendment 4 provides that penetration includes penetration with the accused's penis.

It is not intended that rape will be prosecuted under the new section that is introduced by amendment 4, but rather that, when the victim is not sure what he or she was penetrated with, for example because they were blindfolded in the course of the attack, a prosecution can be brought under the new section. The new section ensures that, in that specific fact situation, when a victim is uncertain what the object of penetration was, we would not fail to prove a very serious crime because of a fault of draftsmanship. That is an important fact situation in which the new section could be used and in which, were there only the offence of rape, someone might avoid conviction."¹⁷

5.28 We favour a provision along the lines of section 2(4) of the Scottish Act. The provision is useful in dealing with situations in which the victim is unclear whether he or she was penetrated by a penis or something else because for example, he or she was blindfolded or unconscious at the time or is a mentally incapacitated person. In those circumstances, the offender can be charged with sexual assault by penetration under the Scottish approach. Although the adoption of the Scottish approach would result in an overlap between the offence of rape and that of sexual assault by penetration, we believe that this would be justified to avoid a situation whereby criminal activity has clearly been committed but is unable to be proved.

5.29 Issues which then arise include:

- (i) how to deal with the situation in which the victim thought he or she was penetrated by a penis but the evidence at trial showed it was something else;
- (ii) how to deal with the situation in which the victim is unclear exactly what penetrated him or her, but the evidence at trial established that was a penis.

5.30 As to (i): we believe that this can be catered for by making sexual assault by penetration a statutory alternative to rape pursuant to section 149 and Schedule 1 of the Crimes Ordinance (Cap. 200).

5.31 As to (ii): we believe that no express provision is called for: the accused will be charged with and convicted of the proposed offence of sexual assault by penetration, which should attract the same maximum sentence as that for rape.

5.32 We observe further that the creation of an alternative charge (as suggested in 5.30 above) will not prevent the prosecution from laying alternative charges in appropriate cases.¹⁸

¹⁷ Scottish Parliament Justice Committee Official Report, 17 March 2009, Col 1647-1648.

¹⁸ The possibility of laying alternative charges at the same time was in fact mentioned by Fergus

Buggery offences to be reviewed

5.33 There are a number of buggery offences in the Crimes Ordinances (Cap. 200), as follows:

- Section 118A – Non-consensual buggery
- Section 118B – Assault with intent to commit buggery
- Section 118C – Homosexual buggery with or by man under 21
- Section 118D – Buggery with girl under 21
- Section 118E – Buggery with mentally incapacitated person
- Section 118F – Homosexual buggery committed otherwise than in private
- Section 118G – Procuring others to commit homosexual buggery.

5.34 Buggery is not defined in the Crimes Ordinance (Cap. 200) and so retains its common law meaning of anal intercourse.¹⁹ The offence is deemed complete upon proof of penetration only without the need to prove the emission of seed.²⁰ We have recommended in Chapter 4 (recommendation 8) that the scope of rape should be extended to cover penile penetration of the anus of another person. In addition, we have proposed in this chapter a new offence of sexual assault by penetration which covers non-penile penetration of the anus of another person. The offences of rape (as newly defined) and sexual assault by penetration will cover the same criminal conduct as the offence of buggery, ie, penetration of the anus. The issue then is whether the buggery offences in the Crimes Ordinance (Cap. 200) should be abolished upon enactment of the new legislation.

5.35 The offence of non-consensual buggery (section 118A) is the only non-consensual buggery offence in the Crimes Ordinance (Cap. 200).²¹

Ewing, MSP, speaking for the Scottish Government in the Scottish Parliament (though he was talking in the context of supporting section 2(4)):

"... I reassure Cathie Craigie that the new offence that is introduced by amendment 4 is a most serious one. Each case falls on its particular circumstances and facts. It will be up to the Crown to decide how to proceed and, indeed, whether to proceed with both charges, in an either/or or both scenario; it will depend on the facts of each case. Where, for example, there is some dubiety on the part of the victim about what object he or she was penetrated with, there might well be merit in proceeding with a charge of rape and a charge of sexual assault by penetration to see where the evidence falls. In many instances of rape, there are serious and difficult evidential challenges for the prosecution, because such incidents tend to take place in private circumstances such as in homes or other locations where there is no third-party evidence available..." (Scottish Parliament Justice Committee Official Report, 17 March 2009, Col 1649.)

¹⁹ The offence of buggery at common law was abolished by section 118M of the Crimes Ordinance (Cap. 200).

²⁰ Section 65E of the Criminal Procedure Ordinance (Cap. 221).

²¹ It is an offence of non-consensual buggery under section 118A of the Crimes Ordinance (Cap. 200) for a person to commit buggery with another person who at the time of the buggery "does not consent to it".

All the other buggery offences are consensual offences.²² In other words, all the buggery offences in the Crimes Ordinance (Cap. 200), with the exception of non-consensual buggery, would still be committed even if the buggery was carried out with consent of the participants. By contrast, rape and sexual assault by penetration are non-consensual offences, and as such, will cover only the criminal conduct punishable under the offence of non-consensual buggery and not the other buggery offences. We would therefore recommend at this stage the abolition of the offence of non-consensual buggery only. We shall review the other buggery offences at a later stage of our overall study.

5.36 As regards the offences of assault with intent to commit buggery (section 118B) and procuring others to commit homosexual buggery (section 118G), we shall review those two offences later when we deal with the preparatory offences. There is a preparatory offence under 62 of the English Act of "*committing an offence with intent to commit a sexual offence*". We shall explore whether the two buggery offences in the Crimes Ordinance (Cap. 200) should be replaced by the incorporation of legislation similar to the English preparatory offence, or whether there are better options.

Recommendation on sexual assault by penetration

5.37 Having discussed the rationale for the creation of the new offence of sexual assault by penetration and the elements of the offence, we set out in Recommendation 16 our conclusions.

Recommendation 16

We recommend that in the new legislation there should be an offence of sexual assault by penetration, which would be constituted by a person (A) who, without the consent of another person (B) and without a reasonable belief that B consents, intentionally penetrate the vagina or anus of B with a part of A's body or anything else.

We recommend the adoption of a provision along the lines of section 2(4) of the Sexual Offences (Scottish) Act 2009 to the effect that for the purposes of the offence of sexual assault by penetration, a reference to penetration with a person's body is to be construed as including a reference to penetration with the person's penis.

We recommend that Schedule 1 to the Crimes Ordinance (Cap. 200) should be amended to allow a statutory

²² There is no reference to the phrase "*does not consent to it*" or similar wording in the other buggery offences under sections 118C, 118D, 118E and 118F of the Crimes Ordinance (Cap. 200).

alternative verdict for sexual assault by penetration where the accused is charged with rape.

We further recommend that the offence of non-consensual buggery under 118A of the Crimes Ordinance (Cap. 200) should be abolished upon enactment of the new legislation.

Chapter 6

Sexual assault

Introduction

6.1 Under Section 122(1) of the Crimes Ordinance (Cap. 200), it is an offence to indecently assault another person. The offence carries a maximum sentence of imprisonment for 10 years.

6.2 Consent negates the assault and so provides a defence to a charge of indecent assault.¹ However, section 122(2) of the Crimes Ordinance (Cap. 200) provides that a person under the age of 16 cannot in law give any consent which would prevent an act from being an indecent assault. It is therefore not a defence to a charge of indecent assault that a person under the age of 16 has consented to the act.² The accused is, however, not guilty of indecent assault in such a case if the accused believed on reasonable grounds that he or she was married to the victim.³ Section 122(4) provides that "*a woman who is a mentally incapacitated person cannot in law give any consent which would prevent an act being an indecent assault*". However, a person will only be guilty of indecent assault in those circumstances if that person "*knew or had reason to suspect her to be a mentally incapacitated person*".⁴

Issues arising from the present law

6.3 Section 122 of the Crimes Ordinance (Cap. 200) does not state the ingredients of the offence of indecent assault. Recourse must be had to case law to discover what circumstances would amount to indecent assault. The test for indecent assault was set out by Lord Ackner in the House of Lords decision of *R v Court* as follows:

¹ *Archbold Hong Kong 2012*, para 21-152.

² Cases concerning children under 16 will be dealt with when offences under the protective principle are discussed at a later stage of the overall review of the sexual offences.

³ See section 122(3). Notwithstanding the provisions in section 122(2), section 122(3) protects a person from liability for indecent assault if he or she performed an indecent act on another person under 16, provided that the act was performed with the other person's consent and they are legally married or there are reasonable grounds for believing that they are legally married. Thus, for example, a husband who legally married a wife under 16 in accordance with the marriage law of an overseas jurisdiction may claim protection under section 122(3) if he performs indecent acts (such as touching the private parts) on his wife with her consent. It should be noted that all non-consensual indecent acts are always caught by indecent assault. This applies even within marriage.

⁴ Cases concerning mentally incapacitated persons will also be dealt with when offences under the protective principle are discussed at a later stage of the overall review of the sexual offences.

*"On a charge of indecent assault the prosecution must prove: (1) that the accused intentionally assaulted the victim; (2) that the assault, or the assault and the circumstances accompanying it, are capable of being considered by right-minded persons as indecent; (3) that the accused intended to commit such an assault as is referred to in (2) above."*⁵

6.4 The three-stage test for indecent assault in *R v Court* should present no practical problems for the prosecution as Lord Ackner went on to say: *"These requirements, as counsel for the prosecution confirmed, should give rise to no difficulty or complication."*⁶ However, the Sub-committee notes that the focus of the current offence is on "indecenty" rather than on respect for sexual autonomy.

6.5 The element of indecency embodied in the test for indecent assault is not defined and its meaning is left to be determined in the light of the facts of the particular case.⁷ The jury must decide whether right-minded persons would consider the conduct in question indecent or not.⁸ However, as pointed out by the learned writers of *Blackstone's Guide to the Sexual Offences Act 2003*, whether the conduct is indecent or not is not always clear-cut: *"[w]hile touching of the genitals is unquestionably indecent the position was always less clear-cut as regards the touching of buttocks (and possibly even breasts), kissing, or deliberately brushing up against a person (frottage)."*⁹

The case for the creation of a new offence of sexual assault

6.6 We consider that there is a case for the creation of a new offence which shifts the focus from "indecenty" to "sexual" and yet provides protection

⁵ *R v Court* [1989] AC 28, at 45H-46A.

⁶ *R v Court* [1989] AC 28, at 46A.

⁷ For example, in *R v Lam Chi Chee* (Magistracy App No 783 of 1992, [1992] HKLD L21 (Ryan J), the accused grasped the upper arms of a 21-year-old girl who was standing on the concourse of a Mass Transit Railway station and tried to kiss her on the face. She tried to push him away and they both fell to the ground. The accused continued to hold the girl's arms while trying to kiss her before he was finally pulled away from the girl by a passer-by. It was the accused's claim that he had mistaken the girl as his estranged girlfriend with whom he was trying to have a joke and that he only realised she was not the girlfriend when they fell to the ground. His conviction for indecent assault was quashed on appeal and a conviction for common assault substituted on the grounds that *"If right-minded persons saw what occurred, they would not consider anything indecent to have happened."* By contrast, kissing a girl on the lips in other circumstances was held to be an indecent assault in *HKSAR v Lau Kwai Chung* [2000] 3 HKC 658. In *Lau Kwai Chung*, the accused was a 40 year old man who worked as an office assistant at the Hong Kong Arts Centre. He asked a 12 year old girl who studied music at the centre to meet him some hours later after practice. When the girl finished her practice, he took her to a small storage room. A bag of sweets had been placed in advance in the room. He gave the sweets to the girl, talked to her and then kissed her on the lips. She resisted and then he let her go and she left. The accused was convicted of indecent assault and the conviction was affirmed on appeal on the grounds that the circumstances accompanying the kiss (offering sweets to the girl, taking her to an isolated room, planning on the part of the accused) would make a right-minded person consider the kissing to amount to indecency.

⁸ *Archbold Hong Kong 2012*, para 21-148.

⁹ Kim Stevenson, et al., *Blackstone's Guide to the Sexual Offences Act 2003* (Oxford University Press, 2004), at page 43.

from the kind of criminal conduct currently covered by indecent assault.¹⁰ Such a shift of focus accords with the principle of protection of sexual autonomy.

6.7 Such a new offence of sexual assault has been created in the English and the Scottish Acts to replace the offence of indecent assault. The new offence shifts the focus from the concept of indecency to whether a reasonable person would consider the conduct to be "sexual". Thus the main concern of the new offence is protection of a person's sexual autonomy from unwanted sexual conduct rather than upholding the public's standards. Moreover, by using the word "sexual" (which is defined in the legislation), the problems associated with proving indecency can be alleviated. In any event, it becomes easier for the jury to decide from a reasonable person's perspective whether an activity is sexual than to agree on whether it is indecent or not. (As to the meaning of sexual, readers may recall that we proposed a definition of "sexual" in Chapter 5 (Recommendation 15), which is intended to be applicable to all sexual offences.) In conclusion, we take the view that the offence of indecent assault should be replaced by a new offence of sexual assault.

Elements of the offence of sexual assault

The English Act

6.8 The elements of the English offence of sexual assault are as follows:

- a person (A) touches another person (B);
- the touching is intentional;
- the touching is sexual;
- B does not consent; and
- A does not reasonably believe that B consents.¹¹

The Scottish Act

6.9 The Scottish offence of sexual assault consists of a person (A) carrying out any one of five sexual acts intentionally or recklessly on another person (B), without B's consent and without any reasonable belief that B consents. The five sexual acts are as follows:

¹⁰ With a new approach which focuses on respect for sexual autonomy, there will be a conviction for sexual assault in cases similar to *Lam Chi Chee's case*, supra.

¹¹ Section 3(1) of the English Act provides:
"A person (A) commits an offence [of sexual assault] if –
(a) he intentionally touches another person (B),
(b) the touching is sexual,
(c) B does not consent to the touching, and
(d) A does not reasonably believe that B consents."

- (a) penetrating sexually B's vagina, anus or mouth by any means;
- (b) touching B sexually;
- (c) engaging in any other sexual physical contact with B (whether bodily contact or contact through clothing or contact by means of an implement);
- (d) ejaculating semen onto B;
- (e) emitting urine or saliva onto B sexually.¹²

A general definition of touching?

6.10 There is a definition of "touching" in section 79(8) of the English Act which applies to all sexual offences in Part 1 of the Act, as follows:

"Touching includes touching –

- (a) with any part of the body,*
- (b) with anything else,*
- (c) through anything,*

and in particular includes touching amounting to penetration."

6.11 By contrast, there is no general definition of touching in the Scottish Act. Instead, the Scottish approach is to set out the specific sexual acts which form the constituent elements of a sexual assault. As seen at paragraph 6.9 above, these acts include non-consensual sexual physical contact (whether bodily contact or contact through clothing or contact by means of an implement)¹³ and sexual penetration of the vagina, anus or mouth by any means.¹⁴ Both these types of sexual conduct would fall within the general definition of touching in section 79(8) of the English Act. In the absence of such a general definition in the Scottish Act, however, these two types of sexual conduct are repeated in the constituent elements of other Scottish sexual offences involving sexual touching, including sexual assault on

¹² Section 3(1) and (2) of the Scottish Act provides:

"(1) If a person ('A') –

- (a) without another person ('B') consenting, and*
 - (b) without any reasonable belief that B consents,*
- does any of the things mentioned in subsection (2), then A commits an offence, to be known as the offence of sexual assault.*

(2) Those things are, that A –

- (a) penetrates sexually, by any means and to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B,*
- (b) intentionally or recklessly touches B sexually,*
- (c) engages in any other form of sexual activity in which A, intentionally or recklessly, has physical contact (whether bodily contact or contact by means of an implement and whether or not through clothing) with B,*
- (d) intentionally or recklessly ejaculates semen onto B,*
- (e) intentionally or recklessly emits urine or saliva onto B sexually."*

¹³ The Scottish Act, section 3(2)(c).

¹⁴ The Scottish Act, section 3(2)(a).

a young child¹⁵ and engaging in sexual activity with or towards an older child.¹⁶

6.12 In summary, the English approach is to include a general definition of touching in an interpretation section, while the Scottish approach is to set out the different types of sexual touching in the constituent elements of each and every sexual offence involving sexual touching. The advantage of the latter approach is that each of the sections in the Act delineating an offence provides the reader with a complete outline of that offence, without the need to refer to a separate interpretation section elsewhere in the Act. The advantage of the English approach is that it avoids repetition. On balance, we prefer the English approach of having a general definition of touching. There are many possible offences involving sexual touching, including the English offences of sexual assault of a child under 13;¹⁷ sexual activity with a child by a person in a position of trust;¹⁸ sexual activity with a child by a family member;¹⁹ sexual activity with a person with a mental disorder impeding choice;²⁰ and sexual activity with a person with a mental disorder by care workers.²¹ It would be cumbersome to repeat in each separate offence provision the different meanings of touching. A general definition of touching in the interpretation section would avoid that.

6.13 Having decided that there should be a general definition of touching, the issue then is whether the definition in section 79(8) of the English Act should be adopted. In general, we favour the adoption of the English definition since it reflects the major interpretations of the meaning of touching. Having said that, we need to further consider whether it is necessary to have the proviso "*in particular includes touching amounting to penetration*" in our proposed definition of touching. The proviso in effect means that penetration is a form of touching and hence penetrative assaults can also be charged as sexual assault. The proviso reflects the current position in respect of the offence of indecent assault. As the Home Office Review Group in the UK observed, "*[t]he present offence of indecent assault is one that applies to a variety of behaviour done without consent from unwelcome groping to some kinds of penetration.*"²² The most serious penetrative assaults have already been covered by the offence of rape and the new offence of sexual assault by penetration. However, whereas the offence of rape and the new offence of sexual assault by penetration have removed some of the most serious penetrative assaults from indecent assault, other lesser forms of penetrative assault remain uncovered by any new offence. For example, non-penile sexual penetration of B's mouth is not caught by the new offence of sexual assault by penetration (which covers only non-penile sexual penetration of the complainant's vagina or anus *but not the mouth*). Neither is such penetrative assault caught by the offence of rape, since rape applies only to penile

¹⁵ The Scottish Act, section 20(2)(a) and (c).

¹⁶ The Scottish Act, section 30(2)(a) and (c).

¹⁷ The English Act, section 7.

¹⁸ The English Act, section 16.

¹⁹ The English Act, section 25.

²⁰ The English Act, section 30.

²¹ The English Act, section 38.

²² Home Office Paper, para 2.14.1.

penetration. There would be a gap in the law if the new offence of sexual assault were not to cover lesser forms of penetrative assault (such as sexual penetration of the mouth by an object) since we would be doing away with the existing offence of indecent assault. In our view, non-penile sexual penetration of any part of the complainant's body other than the complainant's vagina or anus should constitute sexual assault since it constitutes indecent assault at present and is not covered by the offences of rape and sexual assault by penetration. In summary, we consider that the definition of touching should include "*touching amounting to penetration*".

6.14 If penetration is included within the definition of touching, however, a charge of sexual assault may be brought in all cases of penetrative assault. We do not envisage, however, that the prosecution will bring a charge of sexual assault where the evidence points to penile penetration of B's vagina, anus or mouth (where a charge of rape would be appropriate) or non-penile penetration of B's vagina or anus (where a charge of sexual assault by penetration would be appropriate).

Recommendation 17

We recommend the adoption of the definition of "touching" in section 79(8) of the English Sexual Offences Act 2003 to the effect that, for the purposes of any sexual offence, touching includes touching:

- (a) with any part of the body,**
- (b) with anything else,**
- (c) through anything,**

and in particular includes touching amounting to penetration.

Sections 3(2)(d) and (e) of the Scottish Act

6.15 Sections 3(2)(d) and (e) of the Scottish Act specifically provide that two forms of non-consensual sexual conduct are among those which constitute a sexual assault: (i) the ejaculation of semen onto another person,²³ and (ii) the emission of urine and saliva onto another person sexually.²⁴

6.16 The Scottish Law Commission took the view that the ejaculation of semen onto another person should be sexual assault since it clearly constituted indecent assault:

²³ The Scottish Act, section 3(2)(d).

²⁴ The Scottish Act, section 3(2)(e).

*"... We now recommend that there should be one further type of activity which should amount to sexual assault. This is where A ejaculates semen onto B without B's consent. At common law²⁵ this activity would clearly constitute indecent assault ..."*²⁶

6.17 The Scottish Government considered that the emission of urine and saliva onto another person sexually should also be a sexual assault, since otherwise such conduct would have to be charged separately as indecent assault. Fergus Ewing, MSP, speaking for the Scottish Government, explained as follows:

*"... Discussions with the Crown Office have highlighted that the emission of urine and saliva can also be constituent elements of a sexual assault. If that conduct is not covered by the bill, it would have to be charged under common law as assault aggravated by indecency separately from the offence of sexual assault under the bill. The Government's view is that such conduct should be included in the definition of sexual assault. That will enable a single incident that features such conduct, as well as other elements of sexual assault, to be charged as an offence under the bill. That would avoid the need for it to be charged separately as common-law assault."*²⁷

6.18 We agree that both the ejaculation of semen and the emission of urine or saliva sexually onto another person should be included within the scope of the proposed offence of sexual assault since such conduct would constitute indecent assault under the existing law. According to *Blackstone's Criminal Practice*, "it remains arguable that ejaculation onto a victim without contact with any part of an accused's body still constitutes a touching".²⁸ Although the ejaculation of semen and the emission of urine or saliva sexually onto another person would arguably fall within our proposed definition of touching (which would include touching "with anything else"), we believe it is better for the avoidance of doubt to expressly spell out that such acts constitute sexual assault to prevent possible legal arguments. We should make sure that such acts, which are serious violation of a person's sexual autonomy, are caught by sexual assault.

Sexual assault to cover non-contact assaults?

6.19 The scope of the new offence of sexual assault in the English and Scottish Acts does not cover assaults involving no touching or contact between the parties. The scope of the offence of sexual assault in both Acts is narrower than that of the existing offence of indecent assault in that the latter

²⁵ It should be noted that as a matter of strict Scots law, there is no offence known as indecent assault. Rather the crime consists of "assault aggravated by indecency in the manner of its commission" which is a common law crime of Scotland (Scottish Law Commission Report, at para 3.1).

²⁶ Scottish Law Commission Report, at para 3.39.

²⁷ Scottish Parliament Justice Committee Official Report, 17 March 2009, Col 1650.

²⁸ *Blackstone's Criminal Practice 2012*, at B3.36.

can be committed if the accused caused the complainant to apprehend that he or she was about to be touched indecently. According to *Blackstone's Criminal Practice*, "In one area, sexual assault is narrower than indecent assault which could be committed if the accused caused the complainant to apprehend that she was about to be touched indecently (cf *Rolfe (1952)* 36 Cr App R4). If touching does not occur, the offence is not completed, although the circumstances may amount to an attempt."²⁹ That is to say, an indecent assault does not necessarily involve touching or contact between the parties. The "assault" in indecent assault means an assault or a battery. The law of assault uses the idea of attack, which is given a wide meaning and goes beyond touching or contact to cover any conduct that may cause another person to apprehend the use of immediate and unlawful personal violence. In this connection, Lord Ackner said in *R v Court*:

*"It was common ground before your Lordships, and indeed it is self evident, that the first stage in the proof of the offence [of indecent assault] is for the prosecution to establish an assault. The 'assault' usually relied upon is a battery, the species of assault conveniently described by Lord Lane CJ in Faulkner v Talbot [1981] 1 WLR 1528, 1534 as 'any intentional touching of another person without the consent of that person and without lawful excuse. It need not necessarily be hostile or rude or aggressive, as some of these cases indicate.' But the 'assault' relied upon need not involve any physical contact but may consist merely of conduct which causes the victim to apprehend immediate and unlawful personal violence. In the case law on the offence of indecent assault, both categories of assault feature."*³⁰

6.20 The Home Office Review Group in the UK considered the English offence should be called "sexual touching" but decided to retain the concept of an assault which was not limited to non-consensual touching:

*"The review did consider whether the offence should be described as sexual touching, as in other parts of the world, but decided that it was better to retain the concept of an assault... We wanted to retain the concept of an assault, because it includes not only the touching element but also behaviour which puts the victim in fear of force of some kind (ie where no touch takes place). It was important not to diminish the importance of the offence of sexual assault. An offence that may not involve a severe assault could include a high level of fear, coercion, degradation and harm inflicted on victims."*³¹

6.21 We take the view that the proposed offence of sexual assault should go beyond touching or physical contact since the existing offence of indecent assault is not restricted to contact behaviour. The law should not be

²⁹ *Blackstone's Criminal Practice* 2012, at B3.36.

³⁰ *R v Court* [1989] AC 28 at 41H-42A.

³¹ Home Office Paper, at para 2.14.2.

changed in such a way as would make the scope of sexual assault narrower than indecent assault since that would reduce protection to victims. Moreover, non-contact assaults may cause the same level of fear and harm to the victim as sexual touching. If we were to confine sexual assault to touching or contact behaviour we would exclude some non-contact indecent acts currently covered by the existing offence of indecent assault.³² The case of *Rolfe*³³ is an example of an indecent assault involving no bodily contact with the victim. The accused in *Rolfe* got into the compartment of a train where a woman was sitting alone. While the train was in motion, the accused undid his trousers and, with his person exposed, walked towards the woman and made an indecent suggestion to her.³⁴ There was no bodily contact between the victim and the accused. The accused was convicted of indecent assault and his appeal was dismissed. Hence, there would be a gap in the law if non-contact assaults were not covered by the new offence of sexual assault. In summary, we consider that the new offence of sexual assault should also cover non-contact assaults of a sexual nature which cause the complainant to apprehend the use or threat of use of immediate and unlawful personal violence.

Extension of sexual assault to cover "under-the-skirt" photography and public bodily exposure

"Under-the-skirt" photography

6.22 The prosecution often has difficulty in finding the right charge for prosecuting the shooting of videos or taking of photographs in a public place up inside a female's clothing or skirt. Such criminal activity is often collectively referred to as "under-the-skirt" photography. The usual charge brought for such criminal conduct is either disorderly conduct in public places,³⁵ loitering³⁶ or the common law offence of outraging public decency. Where none of those three charges are appropriate, a charge for dishonest use of computer³⁷ may be brought as a last resort where the photography involved the use of computer.

6.23 The charges mentioned above do not appear to us to be entirely satisfactory for incidents of "under-the-skirt" photography. In the first place, they are general offences covering various types of misconduct in a public place, and as such, are not specific offences dealing with "under-the-skirt" photography. More importantly, those charges fail to bring out the sexual

³² Although some non-contact sexual assaults might be caught by the offence of causing a person to engage in sexual activity without consent under section 4 of the English Act ("the causing offence"), others would not. The "causing offence" covers a situation in which a person (A) intentionally causes another person (B) to engage in a sexual activity without B's consent and A does not reasonably believe that B consents. The "causing offence" would not therefore cover a non-contact assault where the complainant was not caused to engage in a sexual activity.

³³ *R v Rolfe* (1952) 36 Cr App R 4.

³⁴ *R v Rolfe* (1952) 36 Cr App R 4.

³⁵ Public Order Ordinance (Cap. 245), section 17B(2).

³⁶ Crimes Ordinance (Cap. 200), section 160.

³⁷ Crimes Ordinance (Cap. 200), section 161.

nature of the criminal activity concerned and also fail to focus on the respect for sexual autonomy.

6.24 Further, there are difficulties in choosing the right charge where "under-the-skirt" photography takes place in a private place. The offenders in such cases cannot be prosecuted for disorderly conduct, loitering or outraging public decency since the activity is not carried out in a public place.³⁸

6.25 As "under-the-skirt" photography (whether in a public or private place) is a serious violation of a person's sexual autonomy, we consider that there should be a specific statutory offence dealing with such criminal activity. We take the view that the scope of sexual assault should be extended to cover such criminal activity. This would provide a specific offence which could be used to prosecute all forms of "under-the-skirt" photography. Moreover, by classifying such criminal activity under sexual assault, the sexual nature of such activity and need for respect for sexual autonomy would be highlighted. We have therefore decided to recommend the expansion of the scope of sexual assault.

How should the scope of sexual assault be expanded?

6.26 The issue is how to define the scope of sexual assault so as to cover "under-the-skirt" photography in a public or private place. Adapting the words used by the Home Office Review Group in the quote in paragraph 6.20 above, we consider that the scope of sexual assault should be expanded to cover any act of a sexual nature which would have been likely to cause another person "*fear, degradation or harm*" had it been known to the other person, irrespective of whether it was known to the other person. Our proposed formulation would apply irrespective of whether the activity takes place in a public or private place.

6.27 The Sub-committee notes that the legislatures in Canada and New Zealand have adopted other methods of dealing with the invasion of privacy by means of photography.³⁹ However, we note that their focus is on

³⁸ The prosecution may in some cases bring a charge for dishonest use of computer under section 161 of the Crimes Ordinance (Cap. 200). The offence of dishonest use of computer covers access to a computer with intent to commit an offence or with a dishonest intent to deceive. It is a computer-related offence and is not a specific offence dealing with "under-the-skirt" photography in a private place. The computer offence also fails to bring out the sexual nature of the criminal activity involved.

³⁹ Section 162(1) of the Canadian Criminal Code provides for the offence of voyeurism: "*Every one commits an offence who, surreptitiously, observes — including by mechanical or electronic means — or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if (a) the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity; (b) the person is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or engaged in such an activity; or (c) the observation or recording is done for a sexual purpose.*" Section 216 G of the New Zealand Crimes Act 1961 provides for an offence relating to visual recording (for example, a photograph, videotape, or digital image) made without the knowledge or consent of another person who is in a place which, in the circumstances, would reasonably be expected to provide privacy, and that the person is either naked or has his or her genitals, pubic area, buttocks, or female breasts exposed or clad solely in undergarments: or

invasion of privacy, which brings in the concept of a reasonable expectation of privacy. It is outside the scope of the Sub-committee to address whether conducts other than "under-the-skirt" photography which involve an infringement of privacy should be covered by the criminal law.

Bodily exposure in a public place

6.28 The Sub-committee notes that our recommendation above to expand the scope of sexual assault may cover not only "under-the-skirt" photography, but also unwanted bodily exposure of a sexual nature. Such an unwanted act would have been likely to cause another person fear, degradation or harm had it been known to the other person. We believe covering such an unwanted act in the expanded scope of sexual assault is justified because it is also a violation of another person's sexual autonomy.

6.29 It should be emphasised that we are not proposing that the new offence of sexual assault is to replace the existing offence of indecent exposure under section 148 of the Crimes Ordinance (Cap. 200) for a person *"who, without lawful authority or excuse, in any public place or in view of the public indecently exposes any part of his body"*. We note that this existing offence is designed primarily for the protection of public morals, and it may cover indecent bodily exposure in public which does not target any victim and does not constitute any violation of another person's sexual autonomy.

Recommendations with regard to sexual assault

6.30 Having discussed the rationale for the creation of the new offence of sexual assault and the elements of the offence, we set out in Recommendations 18, 19 and 20 our conclusions.

Recommendation 18

We recommend that the offence of sexual assault in the new legislation should be constituted by a person (A) who, without the consent of another person (B) and without a reasonable belief that B consents, intentionally does any of the following things:

- (a) touches B where the touching is sexual;**
- (b) ejaculates semen onto B;**
- (c) emits urine or saliva onto B sexually.**

We further recommend that the offence of indecent assault in section 122 of the Crimes Ordinance (Cap. 200) should be abolished upon enactment of the new legislation.

engaged in an intimate sexual activity; or engaged in showering, toileting, or other personal bodily activity that involves dressing or undressing, etc.

Recommendation 19

We recommend that the offence of sexual assault in the new legislation should also be constituted by a person (A) who, without the consent of another person (B) and without a reasonable belief that B consents, intentionally does an act of a sexual nature which causes B to apprehend the use or threat of use of immediate and unlawful personal violence.

Recommendation 20

We recommend that the offence of sexual assault in the new legislation should further be constituted by a person (A) who, without the consent of another person (B) and without a reasonable belief that B consents, intentionally does an act of a sexual nature which would have been likely to cause B fear, degradation or harm had it been known to B, irrespective of whether it was known to B.

We further recommend that the offence of indecent exposure under section 148 of the Crimes Ordinance (Cap. 200) should be retained upon the enactment of the new legislation.

Chapter 7

Causing a person to engage in sexual activity without consent

Introduction

7.1 This chapter considers whether a new offence should be created to cover the conduct of a person (A) who compels another person (B) to engage in sexual acts against B's will. The compelling conduct may take one of several forms. Firstly, A may compel B to engage in sexual activity with A (for example, one person compels another person to penetrate him or her). Secondly, A may compel B to engage in sexual activity with him or herself (for example, one person forces another person to masturbate him or herself). Thirdly, A may cause B to engage in sexual activity with a third party (for example, one person makes someone else masturbate a third person).¹ The last category covers also the situation in which A compels B to engage in sexual activity with an animal.²

The need for a new offence of compelling others to engage in sexual activities

7.2 The Home Office Review Group in the UK took the view that where a person compels another person to perform a sexual act which may itself be a criminal act, the guilt should lie with the person who compels the act rather than the person being compelled. The Review Group elaborated on the rationale for the creation of a new offence as follows:

"One aspect of sexual behaviour which is potentially very serious, and clearly criminal, is that of compelling others to carry out sexual acts against their will. It is possible, for example, for someone to force another person to perform a sexual act on themselves, the compellor or a third party. That act is not voluntary – it may indeed be a criminal act such as sexual assault or even rape or sexual assault by penetration. The compellor may want sexual acts performed on him or herself, want the person to masturbate in front of them, or to perform acts with or on a third person, or even on or with an animal. The law should be able to state very clearly that compelling others to do such acts against their will is an offence and that the guilt lies

¹ Explanatory Notes to English Sexual Offences Act 2003, at para 13.

² Home Office Paper, at para 2.20.1.

*with the person who compels the act rather than his or her immediate victims. We had evidence of incidents of forced masturbation which was accompanied by the threat that the victim was committing a crime of indecent assault, but that the compellor was not doing anything wrong. We have also noted concerns about women who compel men to penetrate them. We do not regard that as rape, but as a serious assault on the man's sexual autonomy. We think that compelled penetration should be caught by this new offence ...*³

7.3 The Scottish Law Commission also considered that a new offence should be created to cover the act of compelling another person to engage in sexual activity since such an act was a major infringement of the other person's sexual autonomy:

*"In the Discussion Paper we explored a situation, which though not necessarily involving sexual assault as such, dealt with conduct which is broadly similar. In cases of sexual assault the victim has some form of contact with the offender without the consent of the victim. A different scenario is where the offender compels the victim to engage in sexual activity which may, but need not, involve contact with the offender. There is a wide variety of ways in which this sort of conduct could occur. For example the offender could compel the victim to have sex with a third party or to have sexual conduct with an animal or an object or with herself. In our view in all of these situations the victim does not choose to engage in the sexual activity in question and therefore suffers a major infringement of her sexual autonomy."*⁴

7.4 The Scottish Law Commission's proposal to create a new offence to deal with coerced sexual conduct attracted overwhelming support during consultation but one consultee expressed concern that the new offence might overlap with other offences such as sexual assault and rape. The Scottish Law Commission accepted that there would be overlap with other offences but pointed out that the accused would be prosecuted for the offence appropriate to the compelled conduct concerned:

*"We accept that however the offence was defined there would be overlap with sexual assault in cases where the compelled conduct involved contact between the offender and the victim but in our view conduct which amounted to rape and sexual assault would be prosecuted as such. The merit of the proposed offence of coercion is that it would capture many other types of sexual conduct to which the victim did not consent."*⁵

7.5 Another major reason justifying the creation of the new offence was that there were gaps in the law that dealt with coerced sexual conduct.

³ Home Office Paper, at para 2.20.1.

⁴ Scottish Law Commission Report, at para 3.48.

⁵ Scottish Law Commission Report, at para 3.49.

The Scottish Law Commission said one example was the so-called "female rape" in which a woman compels a man to penetrate her. The woman could not be liable for rape even though she had had sexual intercourse with the man without his consent:

"Our proposed definition of rape restricts the commission of offence to a person who has a penis. Where a woman compels a man to penetrate her, although there is intercourse obtained without consent, it is not the victim's body which has been penetrated. This is undoubtedly a violation of the victim's physical integrity and sexual autonomy, but it is questionable whether it can properly be described as 'rape'. The wrong in this situation is that a person has been compelled into taking active steps to engage in sexual activity without his consent. This is a different type of violation from the victim's own body being penetrated and should not be classified as rape but as coerced sexual conduct."⁶

7.6 Another example is the case in which A compels B to rape a third person. A can only be charged by virtue of being an accessory by aiding and abetting. In this case, the guilt lies mainly with A and yet A is liable only as an accessory, not as principal. B is an innocent party because B was compelled to rape the third person. However, by prosecuting A for aiding and abetting the rape committed by B, there will be the implication that B is also culpable (though B may not be prosecuted). A specific offence is necessary to deal with cases similar to this so that, as pointed out by the Home Office Review Group, *"The law should be able to state very clearly that compelling others to do such acts against their will is an offence and that the guilt lies with the person who compels the act rather than his or her immediate victims."*⁷

7.7 In conclusion, we consider that a new offence should be created to cover the act of compelling others to engage in sexual activity. There should be a specific offence to deal with such conduct since it is a serious violation of another person's sexual autonomy. Moreover, the new offence is necessary to fill gaps in the law dealing with coerced sexual conduct.

Elements of the new offence

The English offence – Causing a person to engage in sexual activity without consent

7.8 Section 4(1) of the English Act provides:

"A person (A) commits an offence [of causing a person to engage in sexual activity without consent] if –

⁶ Scottish Law Commission Report, at para 3.50.

⁷ Home Office Paper, at para 2.20.1.

- (e) *he intentionally causes another person (B) to engage in an activity,*
- (f) *the activity is sexual,*
- (g) *B does not consent to engaging in the activity, and*
- (h) *A does not reasonably believe that B consents."*

The Scottish offence – Sexual coercion

7.9 Under section 4 of the Scottish Act, the offence of "sexual coercion" is committed if a person (A) intentionally causes another person (B) to participate in a sexual activity without B's consent to participate in the activity and without any reasonable belief that B so consents.

The name of the new offence

7.10 The English and Scottish offences are based on similar rationale and intended to catch similar criminal conduct, namely, the act of compelling others to perform or take part in sexual acts against their will. The question is whether we should call the new offence "causing a person to engage in sexual activity without consent" following the English approach, or "sexual coercion" following the Scottish approach.

7.11 We take the view that the English approach is clearer and recommend its adoption. The English approach gives a clearer idea of the major ingredients of the offence, namely, the act of causing another person to engage in some form of sexual activity and the absence of consent by the other person. We think this preferable to the approach adopted by the Scottish legislation, where the name of the offence indicates only that the offence covers coercion of some kind but fails to give any indication of the other major ingredients, namely, the act of "causing" and the absence of consent by another person to participate in the compelled sexual activity.

"Engage in" or "participate in"

7.12 The English approach adopts "engage in" an activity which is sexual. By contrast, the Scottish approach adopts "participate in" a sexual activity. The terms "engage in" and "participate in" have the same meaning. We have no particular preference for either of the two terms since they can be used interchangeably. However, as we have recommended the adoption of the English name of the offence, we are more inclined to adopt "engage in" for the sake of consistency.

Different penalties depending on compelled acts

7.13 Under section 4(4) of the English Act, a sentence up to life imprisonment can be imposed if the activity compelled by the accused is any of the following four types of conduct:

- (a) penetration of B's anus or vagina,
- (b) penetration of B's mouth with a person's penis,
- (c) penetration of a person's anus or vagina with a part of B's body or by B with anything else, or
- (d) penetration of a person's mouth with B's penis.

7.14 Under section 4(5) of the English Act, any compelled sexual activity not involving one of these categories of conduct carries less severe penalties, with the accused liable on summary conviction, to imprisonment not exceeding 6 months and/or a fine not exceeding the statutory maximum; and on conviction on indictment, imprisonment not exceeding 10 years.

7.15 The English offence therefore makes a distinction as regards penalties between sexual activities caused by the accused which are penetrative in nature and those which are non-penetrative. Heavier maximum penalties are imposed for sexual activities which are penetrative in nature than those which are non-penetrative.

7.16 The Home Office Review Group in the UK explained the different treatment of penetrative and non-penetrative sexual activities as follows:

"We also thought that it would be necessary to structure any new offence to reflect the seriousness of the compelled acts. Although compelling another to do sexual acts is intrinsically serious, it does vary in severity according to the nature of the compelled acts. A compelled touching may be comparatively minor, whilst compelling sexual penetration would be very serious. We thought therefore that there could be two offences with different penalties:

- *a more serious offence of compelling sexual penetration of a person or an animal by a person, an object or an animal; and*
- *an offence of compelling other sexual acts (including sexual touching).⁸*

7.17 By contrast, the Scottish approach does not distinguish between penetrative and non-penetrative compelled sexual activities as regards

⁸ Home Office Paper, at para 2.20.4.

penalties. For the Scottish offence, different penalty levels are imposed on the basis of whether the conviction is entered summarily or on indictment, and not on the basis of whether the compelled sexual activities are penetrative or not. The penalties for the Scottish offence are set out in schedule 2 to the Scottish Act. The maximum penalty on summary conviction is imprisonment for 12 months and/or a fine not exceeding the statutory maximum; and life imprisonment and/or a fine on conviction on indictment.

7.18 The question is whether we should follow the English approach in stipulating in the legislation a higher penalty where the compelled sexual activities are penetrative in nature than where they are non-penetrative. As the Home Office Review Group observed, compelled penetrative sexual activities are very serious. There is therefore likely to be little difference in practical effect between the approaches adopted by the English and Scottish Acts, as it is to be assumed that compelled penetrative acts would invariably be prosecuted on indictment in view of the gravity of the conduct involved. Nevertheless, we think it preferable to draw a clear distinction in the legislation between the penalties applicable where penetrative acts are involved and those where the acts are non-penetrative. Although we shall consider the sentence structure in respect of sexual offences only towards the latter stages of our overall review, we should mention at this stage that we believe the penalties applicable to the proposed offence of causing a person to engage in sexual activity without consent should be so structured that heavier penalties should be imposed for compelled sexual activities which are penetrative in nature than those which are non-penetrative.

The offence of procurement by threats

7.19 Under section 119 of the Crimes Ordinance (Cap. 200), the offence of procurement by threats or intimidation is committed if "*A person ... procures another person, by threat or intimidation, to do an unlawful sexual act in Hong Kong or elsewhere ...*". The offence carries a maximum penalty of imprisonment for 14 years.

7.20 The offence of procurement by threats or intimidation ("the procurement offence") and the proposed offence of causing a person to engage in sexual activity without consent ("the causing offence") cover similar criminal conduct, namely, compelling another person to engage in a sexual activity against that person's will. The question is whether the existing procurement offence should be subsumed within the proposed causing offence.

7.21 We take the view that the existing procurement offence should be abolished upon the creation of the new causing offence. The existing procurement offence is too narrow in that it covers only unlawful sexual acts procured by threat or intimidation. By contrast, the causing offence is committed so long as a person "causes" another person to engage in a sexual activity without the latter's consent. According to *Blackstone's Criminal Practice*, any causative conduct may suffice since the word "causes" is not

defined in the English legislation. Causing may cover threat of violence, inducement or even persuasion.⁹ The causing offence, therefore, catches a wider range of compelled sexual activity than the existing procurement offence. This being so, the causing offence would provide the necessary protection against compelled sexual activity without the need for continued existence of the procurement offence.

7.22 Moreover, as discussed above, the rationale for a specific offence dealing with compelled sexual activity is that such conduct is serious violation of another person's sexual autonomy. The existing procurement offence, however, fails to focus on sexual autonomy. The main focus of the offence is on use of threat or intimidation in procuring unlawful sexual act. By contrast, the causing offence lays emphasis on sexual autonomy by making the requirement of consent as part of its constituent ingredients. The presence of consent is central to sexual autonomy.

7.23 It is worth noting that the English offence of procurement of a woman by threats¹⁰ (on which the existing procurement offence in Hong Kong was based) was repealed by the English Act in 2003 upon the creation of the new causing offence.¹¹

Sexual activity "*in Hong Kong or elsewhere*"

7.24 The existing procurement offence catches an unlawful sexual act "*in Hong Kong or elsewhere*" procured by threats or intimidation. The act of procurement must take place in Hong Kong though the sexual activity may take place inside or outside Hong Kong. We take the view that the words "*in Hong Kong or elsewhere*" should similarly be added to the ingredients of the new causing offence. Otherwise, the new causing offence would be narrower than the existing procurement offence. By adding the words "*in Hong Kong or elsewhere*" to the ingredients of the causing offence, the sexual activity can take place inside or outside Hong Kong though the act of causing must take place inside Hong Kong. This would be conducive to prevention of cross-border sexual crimes.

Recommendation on causing a person to engage in sexual activity

7.25 Having discussed the rationale for the creation of the new offence of causing a person to engage in sexual activity without consent and the elements of the offence, we set out in Recommendation 21 our conclusions.

⁹ *Blackstone's Criminal Practice 2012*, at para B3.41.

¹⁰ The old English offence of procurement of woman by threats was in section 2 of the English Sexual Offences Act 1956.

¹¹ The English Act, section 140 and Schedule 7.

Recommendation 21

We recommend that the new legislation should include an offence of causing a person to engage in sexual activity without consent, along the lines of section 4 of the English Sexual Offences Act 2003 with necessary modifications.

We also recommend that the words "*in Hong Kong or elsewhere*" should be added to the ingredients of the proposed offence of causing a person to engage in sexual activity without consent so that the sexual activity can take place inside or outside Hong Kong, though the act of causing must take place inside Hong Kong.

We also recommend that the offence of procurement by threats or intimidation in section 119 of the Crimes Ordinance (Cap. 200) should be abolished upon the enactment of the new legislation.

Chapter 8

Summary of recommendations

Recommendation 1: Guiding principles for reform (paragraph 2.44)

We recommend that any reform of the substantive law on sexual offences should be guided by a set of guiding principles and any departure from those principles should be justified.

We recommend that the guiding principles should include:

- (i) Clarity of the law.
- (ii) Respect for sexual autonomy.
- (iii) The protective principle.
- (iv) Gender neutrality.
- (v) Avoidance of distinctions based on sexual orientation.
- (vi) The provisions of the International Covenant on Civil and Political Rights, the Hong Kong Bill of Rights Ordinance (Cap. 383) and the Basic Law should be adhered to.

Recommendation 2: A statutory definition of consent (paragraphs 3.5 – 3.7)

We recommend that there should be a statutory definition of "consent" in relation to sexual intercourse or sexual activity.

Recommendation 3: The proposed definition of consent (paragraphs 3.8 – 3.10)

We recommend the adoption of a statutory definition of consent to the effect that a person consents to sexual activity if the person:

- (a) freely and voluntarily agrees to the sexual activity; and
- (b) has the capacity to consent to such activity.

Recommendation 4: Capacity to consent to sexual activity (paragraphs 3.11 – 3.23)

We recommend that the new legislation should contain a provision to the effect that a person is incapable of consenting to sexual activity where, by reason of mental condition, intoxication, or age (as the case may be), the person is unable to do one or more of the following:

- (a) understand what the conduct is;
- (b) form a decision as to whether to engage in the conduct (or as to whether the conduct should take place); or
- (c) communicate any such decision.

Recommendation 5: No consent if deception as to its nature or purpose of sexual act, or impersonation (paragraphs 3.49 – 3.51)

We recommend that the new legislation should incorporate provisions along the lines of section 76(2)(a) and (b) of the English Sexual Offences Act 2003 to the effect that there can be no consent by the complainant, and the accused cannot have believed that the complainant consented, where the accused:

- (a) intentionally deceived the complainant as to the nature or purpose of the relevant sexual act; or
- (b) intentionally induced the complainant to consent to the relevant sexual act by impersonating a person known personally to the complainant.

Recommendation 6: The scope and withdrawal of consent (paragraphs 3.54 – 3.60)

We recommend that the new legislation should incorporate provisions along the lines of sections 15(2), (3) and (4) of the Sexual Offences (Scotland) Act 2009 to the effect that:

- (a) consent to particular sexual conduct does not imply, of itself, consent to any other sexual conduct;
- (b) consent to sexual conduct may be withdrawn at any time before or, in the case of continuing conduct, during the sexual conduct; and
- (c) if conduct takes place, or continues to take place, after consent has been withdrawn, it takes place, or continues to take place, without consent.

Recommendation 7: Scope of the offence of rape (paragraphs 4.7 – 4.9)

We recommend that the new legislation should incorporate provisions along the lines of section 1(1)(a) of the English Sexual Offences Act 2003 to the effect that the scope of rape should cover penile penetration of the vagina, anus or mouth of another person.

Recommendation 8: Distinction between rape and other forms of non-penile sexual penetrative acts (paragraphs 4.10 – 4.15)

We recommend that the term rape should continue to be used to describe the offence of non-consensual penile penetration.

We further recommend that a distinction should be made between rape and other non-consensual sexual offences which involve non-penile sexual penetrative acts.

Recommendation 9: Definitions of a penis and a vagina (paragraphs 4.16 – 4.21)

We recommend that the new legislation should provide that for the purposes of any sexual offence a penis should include a surgically constructed penis and a vagina should include (a) the vulva and (b) a surgically constructed vagina (together with a surgically constructed vulva).

Recommendation 10: Meaning of "penetration" (paragraphs 4.22 – 4.28)

We recommend that for the purposes of any sexual offence, penetration should be defined to mean a continuing act from entry to withdrawal.

We further recommend that where penetration is initially consented to but at some point of time the consent is withdrawn, "a continuing act from entry" should mean a continuing act from that point of time at which the consent previously given is withdrawn.

Recommendation 11: Mental element as to the act of penetration and other relevant sexual acts (paragraphs 4.29 – 4.35)

We recommend that the new legislation should expressly provide that the act of penetration in rape and the relevant acts in the other non-consensual sexual offences (namely, the possible new offences of sexual assault by penetration,

sexual assault, and causing a person to engage in sexual activity without consent) must be committed intentionally.

We also recommend that the new legislation should provide that self-intoxication is not a defence to rape and the other non-consensual sexual offences.

Recommendation 12: Reform option for dealing with genuine (but mistaken) belief in consent (paragraphs 4.46 – 4.68)

We recommend in relation to the offence of rape and other non-consensual sexual offences that the new legislation should incorporate provisions along the lines of sections 1(1)(b), 1(1)(c), 1(2), 2(1)(c), 2(1)(d), 2(2), 3(1)(c), 3(1)(d), 3(2) and 4(1)(c), 4(1)(d) and 4(2) of the English Sexual Offences Act 2003 to the effect that:

- (a) it should be necessary for the prosecution to prove that (i) the complainant did not consent; (ii) the accused did not reasonably believe that the complainant consented; and
- (b) whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps the accused took to ascertain whether the complainant consented.

We further recommend that section 118(4) of the Crimes Ordinance (Cap. 200) should be repealed upon enactment of the new legislation.

Recommendation 13: The offence of procurement of an unlawful sexual act by false pretences should be retained (paragraphs 4.69 – 4.76)

We recommend that the offence of procurement by false pretences under section 120 of the Crimes Ordinance (Cap. 200) should be retained upon enactment of the new legislation.

Recommendation 14: Sexual intercourse obtained by threat or intimidation not involving the use of force (such as economic threat) (paragraph 4.77)

We recommend that sexual intercourse obtained by economic pressure should be dealt with on a case by case basis to decide whether rape was committed by reference to the concept of consent and it is not necessary to have a new offence to cover such cases.

Recommendation 15: Definition of "sexual" (paragraphs 5.9 – 5.23)

We recommend that for the purposes of any sexual offence, the definition of "sexual" in section 78(a) and (b) of the English Sexual Offences Act 2003 should be adopted, subject to the deletion of "*because of its nature it may be sexual and*" from section 78(b). The definition of sexual will therefore be along the following lines: it is sexual if a reasonable person would consider that –

- (a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or
- (b) because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.

Recommendation 16: Sexual assault by penetration; abolition of the offence of non-consensual buggery (paragraph 5.37)

We recommend that in the new legislation there should be an offence of sexual assault by penetration, which would be constituted by a person (A) who, without the consent of another person (B) and without a reasonable belief that B consents, intentionally penetrate the vagina or anus of B with a part of A's body or anything else.

We recommend the adoption of a provision along the lines of section 2(4) of the Sexual Offences (Scottish) Act 2009 to the effect that for the purposes of the offence of sexual assault by penetration, a reference to penetration with a person's body is to be construed as including a reference to penetration with the person's penis.

We recommend that Schedule 1 to the Crimes Ordinance (Cap. 200) should be amended to allow a statutory alternative verdict for sexual assault by penetration where the accused is charged with rape.

We further recommend that the offence of non-consensual buggery under 118A of the Crimes Ordinance (Cap. 200) should be abolished upon enactment of the new legislation.

Recommendation 17: Definition of touching (paragraphs 6.10 – 6.14)

We recommend the adoption of the definition of "touching" in section 79(8) of the English Sexual Offences Act 2003 to the effect that, for the purposes of any sexual offence, touching includes touching:

- (a) with any part of the body,
- (b) with anything else,
- (c) through anything,

and in particular includes touching amounting to penetration.

Recommendation 18: Sexual assault (first category) (paragraph 6.30)

We recommend that the offence of sexual assault in the new legislation should be constituted by a person (A) who, without the consent of another person (B) and without a reasonable belief that B consents, intentionally does any of the following things:

- (a) touches B where the touching is sexual;
- (b) ejaculates semen onto B;
- (c) emits urine or saliva onto B sexually.

We further recommend that the offence of indecent assault in section 122 of the Crimes Ordinance (Cap. 200) should be abolished upon enactment of the new legislation.

Recommendation 19: Sexual assault (second category) (paragraph 6.30)

We recommend that the offence of sexual assault in the new legislation should also be constituted by a person (A) who, without the consent of another person (B) and without a reasonable belief that B consents, intentionally does an act of a sexual nature which causes B to apprehend the use or threat of use of immediate and unlawful personal violence.

Recommendation 20: Sexual assault (third category); retention of the offence of indecent exposure (paragraph 6.30)

We recommend that the offence of sexual assault in the new legislation should further be constituted by a person (A) who, without the consent of another person (B) and without a reasonable belief that B consents, intentionally does an act of a sexual nature which would have been likely to cause B fear, degradation or harm had it been known to B, irrespective of whether it was known to B.

We further recommend that the offence of indecent exposure under section 148 of the Crimes Ordinance (Cap. 200) should be retained upon the enactment of the new legislation.

Recommendation 21: Causing a person to engage in sexual activity without consent; and abolition of the offence of procurement by threats or intimidation (paragraph 7.25)

We recommend that the new legislation should include an offence of causing a person to engage in sexual activity without consent, along the lines of section 4 of the English Sexual Offences Act 2003 with necessary modifications.

We also recommend that the words "*in Hong Kong or elsewhere*" should be added to the ingredients of the proposed offence of causing a person to engage in sexual activity without consent so that the sexual activity can take place inside or outside Hong Kong, though the act of causing must take place inside Hong Kong.

We also recommend that the offence of procurement by threats or intimidation in section 119 of the Crimes Ordinance (Cap. 200) should be abolished upon the enactment of the new legislation.

**Website addresses of the English Sexual Offence Act 2003 and
the Sexual Offences (Scotland) Act 2009**

The following overseas legislation can be downloaded from the internet at the website addresses as follows –

The English Sexual Offence Act 2003:

<http://www.legislation.gov.uk/ukpga/2003/42/contents>

The Sexual Offences (Scotland) Act 2009:

<http://www.legislation.gov.uk/asp/2009/9/contents>