

16 January 2013

The Clerk to the Panel on Administration of Justice and Legal Services  
Legislative Council  
Legislative Council Complex  
1 Legislative Council Road  
Central  
Hong Kong

Dear Madam,

**Panel on Administration of Justice and Legal Services**

**Special Meeting on 8 January 2013**

**Rape and Other Non-Consensual Sexual Offences: Law Reform Commission  
Consultation Paper**

I refer to my attendance before the Special Meeting LegCo Panel on Administration of Justice and Legal Services on 8 January 2013 to receive submissions from delegations in relation to the Law Reform Commission Consultation Paper on Rape and Other Non-Consensual Sexual Offences. Officers assisting your Panel have requested that I reduce to writing the position that I put at that meeting.

As you are aware, I was invited to represent the Hong Kong Bar Association. As I hope I made clear, the Bar Association has yet to formulate a formal position on this very important Consultation Paper. As you are aware, the time for consultation has not yet expired and given the importance of this paper both to the Hong Kong community and, in particular, to the administration of Justice in that community, we are firmly of the view that this matter needs careful review before expressing a final position.

ANDREW BRUCE QC SC

Nevertheless, as I indicated to the meeting on 8 January 2013, a number of matters in the Consultation Paper speak very clearly and I could not imagine any circumstances in which the Bar Association would not firmly support those matters. In particular, it would be obvious that the guiding principles for reform in Recommendation 1 were to be applauded and the other recommendations in the Consultation Paper had to be held against that standard. The guiding principles are themselves largely self-evident but I made the point at the meeting that in relation to these guiding principles, I sought to make 3 points. Firstly, whether it is by reference to the guiding principle of clarity of the law or adherence to human rights norms, care must be taken to avoid unintended consequences. Second, the principles in Recommendation 1 (ii), (iii), (iv) and (v) must be carefully applied. Finally, adherence to the provisions of human rights laws include the right to a fair trial and equality before the law.

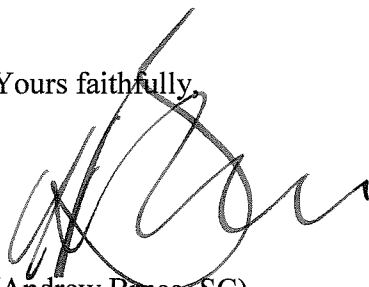
Against this background, I suggested that care must be taken with the formulation of laws with respect to Recommendation 4 (Capacity to consent to sexual activity), Recommendation 5 (no consent if there is deception as to the nature or purpose of a sexual act or where there is impersonation), Recommendation 8 (the scope and withdrawal of consent and Recommendation 12 (reform of dealing with genuine but mistaken belief in consent). In relation to Recommendation 12, I made the point that the concept of mistaken belief in consent was something that made academics very excited but had very little practical reality. In particular, I made the point that where a defence of honest but mistaken belief in consent was applied, even today judges direct the jury to test the belief of the accused against what might be considered reasonable. The idea that the law needed to be changed in this regard rather overlooked what is in the DNA of juries. I further made the point that real care would need to be taken with the drafting of any such provision as proposed by the Law Reform Commission because of the very bad experience we have had with reasonable belief provisions in section 25 of the Organized and Serious Crimes Ordinance, Cap 455.

When the Bar Association finally formulates a considered position with respect to the Consultation Paper, we will make such position public and I am sure that a copy of our stated position will be forwarded to the Panel.

In the course of the meeting, a number of questions on various practical matters were put to me by members of the panel. As the answers I gave in an attempt to assist those members was not part of my formal presentation I have not sought to summarise those answers in this letter. No doubt there is a transcript which will help the Panel in this regard.

I hope that the foregoing is of assistance to you.

Yours faithfully,



(Andrew Bruce, SC)

CC Peter Duncan, SC, Hong Kong Bar Association