

THE LAW REFORM COMMISSION OF HONG KONG
REVIEW OF SEXUAL OFFENCES SUB-COMMITTEE

CONSULTATION PAPER

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

EXECUTIVE SUMMARY

(Further copies of the Consultation Paper can be obtained either from the Secretariat, Law Reform Commission, 20/F, Harcourt House, 39 Gloucester Road, Hong Kong, or on the internet at<<http://www.hkreform.gov.hk>>.)

Preface

Terms of reference

1. In April 2006, the Secretary for Justice and the Chief Justice of the Court of Final Appeal requested that the Law Reform Commission should review the law relating to sexual and related offences in Hong Kong. As a result of judicial comments 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 include a study relating to such a register. The expanded terms of reference are:

"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."

Previous work of the Sub-committee

2. The Sub-committee on Review of Sexual Offences was appointed in July 2006.

3. 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. 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.

4. 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 based on proposals made by the Sub-committee following their study on the relevant issue. Because the issue was considered straightforward and not expected to be controversial, the Commission proceeded straight to a final report without first issuing a consultation paper.

Overall review of sexual and related offences

5. The remaining task of the Sub-committee is an overall review of sexual and related offences.

6. 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 down the overall review into four parts and to issue separate consultation papers and reports on specific aspects of the subject (see paragraph 30 below).

Overseas developments of significance

7. 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 and the Sexual Offences (Scotland) Act 2009 of particular significance to our current study. The Sexual Offences Act 2003 ("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").¹ The Sexual Offences (Scotland) Act 2009 ("the Scottish Act") introduced major reform of the Scottish law on sexual offences. The Scottish Act was based on proposals made by the Scottish

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

Law Commission in its report on *Rape and Other Sexual Offences* ("the Scottish Law Commission Report").²

The consultation paper

8. 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

9. In 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.

10. 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.

Chapter 1: What are "sexual offences"?

Introduction

11. 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)

12. 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. Many of these offences are based on similar provisions in English legislation dating back to 1956.⁴

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

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.

⁴ Sexual Offences Act 1956, c.69, UK. Those offences based on the 1956 legislation are: rape

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

14. 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.

15. We have decided not to include offences relating to prostitution or pornography in our review of sexual offences for several reasons.

16. 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. 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. Therefore, any reform of the law relating to prostitution or pornography in the Hong Kong context would involve wider social and policy issues.

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

17. 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. However, the age of consent for homosexual intercourse (or "buggery") is 21. A number of the offences have been criticised for being gender-specific, while others are based on sexual orientation.⁵

(section 118 of the Crimes Ordinance), procurement by threats (section 119 of the Ordinance), procurement by false pretences (section 120), administering drugs to obtain or facilitate unlawful sexual act (section 121), indecent assault (section 122), intercourse with girl under 13 (section 123), intercourse with girl under 16 (section 124), intercourse with mentally incapacitated person (section 125), abduction of unmarried girl under 16 (section 126), abduction of unmarried girl under 18 for sexual intercourse (section 127), and abduction of mentally incapacitated person from parent or guardian for sexual act (section 128).

⁵ For example, the Court of Appeal in *Leung TC William Roy v SJ* [2006] 4 HKLRD 211 upheld the decision below of the Hon Hartmann J (as he then was) who held that some statutory sexual

18. 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. 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.

19. 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.

20. 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.

Classification of sexual offences

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

- (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.

First category – offences based on sexual autonomy

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

23. Under our existing law, these offences encompass the crimes of rape, indecent assault, non-consensual buggery, assault with intent to commit

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. Furthermore, the Court of Final Appeal in the subsequent decision of *SJ v Yau Yuk Ling Zigo and other* [2007] 3 HKLRD 903 declared that section 118F(1) is unconstitutional as being discriminatory on the basis of sexual orientation.

buggery and procurement by threats, false pretences and administering drugs to obtain or facilitate an unlawful sexual act.

Second category – offences based on the protective principle

24. 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. Under our existing law, these offences encompass the crimes of homosexual buggery with or by a man under 21, buggery with a girl under 21, buggery with a mentally incapacitated person, gross indecency with or by a man under 21, gross indecency by a man with a male mentally incapacitated person, intercourse with girl under 13 or 16 and intercourse with a mentally incapacitated person.

25. 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.

Third category – offences based on public morality

26. 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.

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

28. 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.

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

Division of the project into different parts

30. 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.

31. This consultation paper deals with the first of the four parts 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

32. 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.

33. 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 do not intend to delve into the controversial subject of appropriate moral standards for the community.

Recommendation 1: Guiding principles for reform

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.⁶**
- (ii) Respect for sexual autonomy.⁷**

⁶ 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. 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.

⁷ 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

- (iii) **The protective principle.**⁸
- (iv) **Gender neutrality.**⁹
- (v) **Avoidance of distinctions based on sexual orientation.**¹⁰
- (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.**

Chapter 3: Consent

Introduction

34. 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.

35. The Crimes Ordinance (Cap. 200) provides no definition of consent and offers little guidance.

36. The lack of a statutory definition of consent is aggravated by the complexity of the case law on the issue.

Should there be a statutory definition of consent?

37. 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.

38. The principal argument against a statutory definition of consent is that it would remove an element of flexibility which judicial interpretation allows. We take the view that the greater degree of certainty and clarity provided by a statutory definition outweighs any marginal disadvantage posed by a reduction in flexibility.

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.

⁸ 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, namely, children, persons with a mental disorder, and persons over whom others hold a position of trust.

⁹ 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.

¹⁰ Homosexuality is clearly within the meaning of sexual orientation. In accordance with the guiding 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.

Recommendation 2: A statutory definition of consent

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

The proposed definition of consent

39. Having reviewed statutory definitions of consent used in overseas jurisdictions (namely, California, Canada, England and Wales, Queensland, Scotland, South Australia and Victoria), we find 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.

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

Recommendation 3: The proposed definition of consent

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

41. 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.

42. 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. 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.

43. The word "capacity" is not defined in the English Act. Section 17 of the Scottish Act deals with the capacity of persons with a mental disorder to consent to sexual activity.

44. We favour the Scottish provisions on mentally disordered persons' capacity to consent, since they strike a balance between respect for the right of mentally disordered persons to engage in sexual activity and protecting them from sexual exploitation.

45. We consider that the criteria for determining mentally incapacitated persons' capacity to consent, as set out in the Scottish provisions, should be applicable equally for cases of intoxication and minors.

Recommendation 4: Capacity to consent to sexual activity

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

46. 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.

47. 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).

48. In addition, 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. The conclusive presumptions in the English Act are similar to the circumstances of no consent in the Scottish and Queensland approaches.

49. We have rejected the evidential presumptions in the English Act on the basis that they appear to offer little practical assistance to the criminal justice process. We would therefore adopt the conclusive presumptions alone (the Scottish and Queensland approach). 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 law¹¹ and/or our existing legislation.¹²

Recommendation 5: No consent if deception as to its nature or purpose of sexual act, or impersonation

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.**

¹¹ 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).

¹² 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.

The scope and withdrawal of consent

50. Section 15 of the Scottish Act makes further provision to deal with two separate aspects of consent: the scope and withdrawal of consent.

51. We share the view 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.

Recommendation 6: The scope and withdrawal of consent

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

52. 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."*

53. 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.

54. 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.¹³ 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.¹⁴ The scope of rape was further extended by the English Act in 2003 to include also penile penetration of the mouth of another person.¹⁵ 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.¹⁶ 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.

55. 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: Scope of the offence of rape

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

56. The term rape has long been used in the Crimes Ordinance (Cap. 200) to describe the sexual offence involving sexual penetration with a 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.¹⁷ 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.

¹³ *R v Lee Wing On* [1994] 1 HKC 257, at 262 (CA).

¹⁴ 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.

¹⁵ The English Act, section 1(1).

¹⁶ The Scottish Act, section 1(1).

¹⁷ As noted earlier, 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 complainant.

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

58. 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 as 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: Distinction between rape and other forms of non-penile sexual penetrative acts

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.

Application to surgically constructed sexual organs

59. 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.

60. 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.

61. 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.

62. 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: Definitions of a penis and a vagina

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"

63. 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 ambiguity could give rise to difficulty where consent was initially given at the time of penetration but later withdrawn.

Recommendation 10: Meaning of "penetration"

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

64. 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.

65. 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. In the first place, the case of *R v Heard*¹⁸ suggests that the common law in Hong Kong is to the effect that recklessness is not enough for the act of penetration. More importantly, the concept of recklessness has caused some problems in criminal cases. 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.

66. *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: Mental element as to the act of penetration and other relevant sexual acts

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

67. 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. But what if the accused genuinely but mistakenly and unreasonably believes that the complainant is consenting?

¹⁸ *R v Heard* [2007] 3 All ER 306.

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

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

Option 1 – the subjective test

69. This is the approach under the *DPP v Morgan*¹⁹ (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 be reasonable. In other words, the accused lacks the necessary intent for the offence where the accused genuinely believed that the complainant was consenting, even if there were no reasonable grounds for that belief. However, under section 118(4) of the Crimes Ordinance, in determining whether the accused genuinely held the belief, the jury is to take into account the presence or absence of reasonable grounds for such a belief.

Option 2 – the objective test

70. 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.

Option 3 – the mixed test

71. 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.

72. 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). A totally objective test fails to take into account the personal attributes of the particular accused which explain why the accused makes the genuine but mistaken belief in consent. These attributes may include the accused's learning difficulties, mental disorder, or lack of social skills. We do not favour the first option. 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.

73. We favour the adoption of the third option of a mixed test. 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

¹⁹ *DPP v Morgan* [176] AC 182.

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.

74. 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: Reform option for dealing with genuine (but mistaken) belief in consent

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.

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

75. 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.

76. 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.

77. Statistics²⁰ 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.

Recommendation 13: The offence of procurement of an unlawful sexual act by false pretences should be retained

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.

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

78. 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.

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

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

79. 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).²¹ 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.

²⁰ The relevant statistics are shown in the table at paragraph 4.76 of the consultation paper.

²¹ These examples were given in paragraph 11 of the Explanatory Notes to the English Sexual Offences Act 2003.

80. 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.

Name of the new offence

81. The new offence is called "assault by penetration" in the English Act and "sexual assault by penetration" in the Scottish Act.

82. We share the view that the new offence should be called "sexual assault by penetration". 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.

Definition of "sexual"

83. 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.

Recommendation 15: Definition of "sexual"

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.**

Section 2(4) of the Scottish Act

84. 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.

85. 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.

86. 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 it was a penis.

87. 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).

88. 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.

89. We observe further that the creation of an alternative charge will not prevent the prosecution from laying alternative charges in appropriate cases.

Buggery offences to be reviewed

90. 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.

91. The offence of non-consensual buggery (section 118A) is the only non-consensual buggery offence in the Crimes Ordinance (Cap. 200).²² All the other buggery offences are consensual offences.²³ 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.

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

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.

²² 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*".

²³ 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).

Chapter 6: Sexual assault

Introduction

92. 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.

93. The Sub-committee notes that the focus of the current offence is on "indecentry" rather than on respect for sexual autonomy.

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

94. We consider that there is a case for the creation of a new offence which shifts the focus from "indecentry" to "sexual" and yet provides protection from the kind of criminal conduct currently covered by indecent assault. Such a shift of focus accords with the principle of protection of sexual autonomy.

95. 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 indecentry 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.

Elements of the offence of sexual assault

96. 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.

97. 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:

- (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.

A general definition of touching

98. 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. Penetration is included within the definition.

99. We favour the adoption of the English definition since it reflects the major interpretations of the meaning of touching.

100. 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: Definition of touching

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.

Sexual assault to cover non-contact assaults?

101. 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 can be committed if the accused caused the complainant to apprehend that he or she was about to be touched indecently.

102. 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 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.

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

"Under-the-skirt" photography

103. 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,²⁴ loitering²⁵ or the common law offence of outraging public decency. Where none of those three charges are appropriate, a charge for dishonest use of computer²⁶ may be brought as a last resort where the photography involved the use of computer.

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

105. 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.²⁷

106. 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.

How should the scope of sexual assault be expanded?

107. 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.

²⁴ Public Order Ordinance (Cap. 245), section 17B(2).

²⁵ Crimes Ordinance (Cap. 200), section 160.

²⁶ Crimes Ordinance (Cap 200), section 161.

²⁷ The prosecution may in some cases bring a charge for dishonest use of computer under section 161 of the Crimes Ordinance (Cap 200).

Bodily exposure in a public place

108. 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. 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.

109. 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.

Recommendation 18: Sexual assault (first category)

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)

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

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

110. 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).²⁸ The last category covers also the situation in which A compels B to engage in sexual activity with an animal.²⁹

111. 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.

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

112. 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 –

- (a) he intentionally causes another person (B) to engage in an activity,*
- (b) the activity is sexual,*
- (c) B does not consent to engaging in the activity, and*
- (d) A does not reasonably believe that B consents."*

²⁸ Explanatory Notes to English Sexual Offences Act 2003, at para 13.
²⁹ Home Office Paper, at para 2.20.1.

The Scottish offence – Sexual coercion

113. 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

114. The English and Scottish offences are based on similar rationale and are 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.

115. 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.

The offence of procurement by threats

116. 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.

117. 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.³⁰ 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.

³⁰ *Blackstone's Criminal Practice 2012*, at para B3.41.

118. Moreover, as discussed above, the rationale for a specific offence dealing with compelled sexual activity is that such conduct is a 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 an unlawful sexual act. By contrast, the causing offence lays emphasis on sexual autonomy by making the requirement of consent part of its constituent ingredients. The presence of consent is central to sexual autonomy.

119. It is worth noting that the English offence of procurement of a woman by threats³¹ (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.³²

Sexual activity "in Hong Kong or elsewhere"

120. 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 21: Causing a person to engage in sexual activity without consent; and abolition of the offence of procurement by threats or intimidation

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.

³¹ The old English offence of procurement of woman by threats was in section 2 of the English Sexual Offences Act 1956.

³² The English Act, section 140 and Schedule 7.

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.

Review of Sexual Offences Sub-committee
The Law Reform Commission of Hong Kong
December 2012

Annex

The following overseas legislation can be downloaded from the internet at the website addresses below.

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>

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