

THE LAW REFORM COMMISSION OF HONG KONG
REPORT ON
EXCEPTED OFFENCES UNDER SCHEDULE 3 OF THE
CRIMINAL PROCEDURE ORDINANCE (CAP 221)

Executive Summary

Introduction

1. Chapter 1 of this Report sets out the background to the call for the law relating to excepted offences. Chapter 2 discusses the current law on excepted offences, while Chapter 3 examines the law in other jurisdictions. Chapter 4 discusses the interplay between Judiciary's sentencing discretion and the legislature's constraints on such discretion. Chapter 5 sets out arguments for and against reform, responses from the public and the recommendation.

Existing provisions on excepted offences

2. There are two provisions relating to the "excepted offences" in the Criminal Procedure Ordinance (Cap 221). Section 109B(1) of Cap 221 provides:

"(1) A court which passes a sentence of imprisonment for a term of not more than 2 years for an offence, other than an excepted offence, may order that the sentence shall not take effect unless, during a period specified in the order, being not less than 1 year nor more than 3 years from the date of the order, the offender commits in Hong Kong another offence punishable with imprisonment and thereafter a court having power to do so orders under section 109C that the original sentence shall take effect."

3. Section 109A(1) and (1A) of Cap 221 provide:

"(1) No court shall sentence a person of or over 16 and under 21 years of age to imprisonment unless the court is of opinion that no other method of dealing with such person is appropriate; and for the purpose of determining whether any other method of dealing with any such person is appropriate the court shall obtain and consider information about the circumstances, and shall take into account any information before the court which is relevant to the character of such person and his physical and mental condition."

- (1A) *This section shall not apply to a person who has been convicted of any offence which is declared to be an excepted offence by Schedule 3.*"

The "excepted offences" under Schedule 3 of Cap 221

4. The excepted offences under Schedule 3 of Cap 221 are:
1. Manslaughter.
 2. Rape or attempted rape.
 3. Affray.
 4. Any offence against section 4, 5 or 6 of the Dangerous Drugs Ordinance (Cap 134).
 - s4 Trafficking in dangerous drug
 - s5 Dangerous drug not to be supplied except to person authorized or licensed to be in possession thereof
 - s6 Manufacture of dangerous drug
 5. Any offence contrary to section 10, 11, 12, 13, 14, 17, 19, 20, 21, 22, 23, 28, 29, 30, 36 or 42 of the Offences Against the Person Ordinance (Cap 212).
 - s10 Administering poison or wounding with intent to murder
 - s11 Destroying or damaging building with intent to murder
 - s12 Setting fire to or casting away ship with intent to murder
 - s13 Attempting to administer poison, or shooting, or attempting to shoot or drown, etc, with intent to murder
 - s14 Attempting to commit murder by means not specified
 - s17 Shooting or attempting to shoot, or wounding or striking with intent to do grievous bodily harm
 - s19 Wounding or inflicting grievous bodily harm
 - s20 Attempting to choke, etc, in order to commit indictable offence
 - s21 Using chloroform, etc, in order to commit indictable offence
 - s22 Administering poison, etc, so as to endanger life or inflict grievous bodily harm
 - s23 Administering poison, etc, with intent to injure, etc
 - s28 Causing bodily injury by gunpowder, etc
 - s29 Causing gunpowder to explode, etc, or throwing corrosive fluid, with intent to do grievous bodily harm

- s30 Placing gunpowder near building, etc, with intent to do bodily injury
 - s36 Assault with intent to commit offence, or on police officer, etc
 - s42 Forcible taking or detention of person, with intent to sell him
6. Any offence or attempted offence against section 122 of the Crimes Ordinance (Cap 200).
- s122 Indecent assault
7. An offence under any section in Part III of the Firearms and Ammunition Ordinance (Cap 238).
- s13 Possession of arms or ammunition without licence
 - s14 Dealing in arms or ammunition without a licence
 - s15 Giving possession of arms or ammunition to unlicensed person and obtaining possession by false pretences
 - s16 Possession of arms or ammunition with intent to endanger life
 - s17 Resisting arrest with or committing offence while in possession of arms or ammunition or imitation firearm
 - s18 Carrying arms or ammunition or imitation firearm with criminal intent
 - s19 Trespassing with arms or ammunition or imitation firearm
 - s20 Possession of an imitation firearm
 - s21 Converting imitation firearm into a firearm
 - s22 Dangerous or reckless use of firearm, etc
 - s23 Failure to comply with terms and conditions of licence, etc
8. Any offence against section 10 or 12 of the Theft Ordinance (Cap 210).
- s10 Robbery
 - s12 Aggravated burglary
9. Any offence against section 33 of the Public Order Ordinance (Cap 245).
- s33 Possession of offensive weapon in public place
10. Any offence under section 4 or 10 of the Weapons Ordinance (Cap 217).
- s4 Possession of prohibited weapons
 - s10 Offences relating to martial arts weapons

Background of the present law

5. The Criminal Procedure (Amendment) Bill 1971 introduced the concept of suspended sentences to Hong Kong. The Bill's provisions broadly followed those of the Criminal Justice Act 1967 in England. However, neither the Bill put forward by the Government nor the English Act incorporated any reference to "excepted offences". The creation of excepted offences was the result of strong opposition from the unofficial members of the Legislative Council, who expressed concern at "*the sharp increase in crime, and especially violent crime, since 1960*".¹

6. In response, the then Attorney General, Denys Roberts, emphasised that a suspended sentence was "*not intended to provide a soft way of dealing with criminals*."² He added that the Government conceded to the demand of the unofficial members but expressed that it was the Government's hope that the excepted offences could be done away with at some point.³ Moreover, the Government considered that if certain offences were to be excluded from suspended sentences, it was appropriate that the same offences should be excluded from the operation of section 109A of Cap 221, which laid down the principle that young offenders should not be sent to prison unless the court was satisfied that no other method of dealing with the offender was suitable.

Overseas position in summary

7. Chapter 3 of the Report have examined the relevant laws in Australia, Canada, New Zealand, Singapore and the United Kingdom. The option of suspending an imprisonment sentence in Australia (except Victoria) and the United Kingdom is applicable to all offences. That is to say, there are no excepted offences.

8. In Victoria, an Act in 2013 provides for the full abolition of suspended sentences in stages. In New Zealand and Singapore, the option of suspended sentence is not available to the court.

9. In Canada, "conditional sentences of imprisonment"⁴ cannot be ordered in relation to certain serious offences such as serious personal injury offences (including sexual assault), a terrorism offence or a criminal organization offence. The 2012 amendment of the Criminal Code has expanded the list of offences for which imprisonment sentence cannot be served in the community.

¹ HK Hansard, 20 January 1971, at 350, *per* Mr Oswald Cheung.

² HK Hansard, cited above, at 355.

³ HK Hansard, cited above, at 356.

⁴ A hybrid of suspended sentence, intensive supervision and probation order.

Argument in favour of maintaining the list of excepted offences⁵

10. The main argument in favour of maintaining the list of excepted offences appears to be the concern in the early 1970s with the prevalence of violent crime in Hong Kong that required exceptions to what appeared to local legislators then as being a soft sentencing option.

Arguments in favour of reform⁶

11. There are six reasons for abolishing the list entirely or removing those offences that do not invariably cause serious physical violence to others.

- (1) The significant fall in the prevalence of violent crimes in Hong Kong since the 1970s is an important societal circumstance to consider when evaluating the need to maintain or reform the list of excepted offences. Hong Kong is now a much safer place than before and the prevalence of violent offences has decreased significantly since the 1970s. The original rationale for having exceptions therefore no longer applies.
- (2) In the absence of a suspended sentence option, offenders, whose circumstances could merit a suspension, will normally be imprisoned. Some of the excepted offences, such as attempted indecent assault and the weapons related offences, can occur in a wide range of circumstances, including exceptional circumstances (eg offence occurring without circumstances of aggravation, first-time remorseful offender with little risk of re-offending) which would ordinarily justify a suspended sentence. On the contrary, the court may have no better alternative but to order probation (or a community service order) when a suspended sentence is more appropriate. Whether the sentence is too harsh (imprisonment) or too soft (probation), there will inevitably be cases involving excepted offences that will push the court in either of these directions given the lack of a suspended sentence option. In both scenarios, injustice could result.
- (3) Another important consideration is the need to allow judges and magistrates a wide degree of discretion to achieve a just and appropriate sentence. The list of excepted offences is not only anachronistic (unanchored by its historical justification), but also applies across-the-board in a disproportionate manner to all offenders charged with certain offences irrespective of circumstances.
- (4) There is no reason to believe that repealing the exceptions will lead to either more offending or an increased risk of harm to the community. Suspension will continue to be made for only exceptional cases. Hong

⁵ Centre for Comparative and Public Law (University of Hong Kong), *Report on Reforming Suspended Sentences in Hong Kong* (Sep 2012) (the "CCPL Report"), at 15.

⁶ CCPL Report, at 15 to 21.

Kong courts can be trusted to continue to imprison offenders who pose a substantial risk to the community. The current suspended sentence power allows for the imposition of conditions, which if breached during the operational period can trigger the court to order that the suspended sentence be served in its entirety.

- (5) The anomalies of the list of excepted offences are of two kinds. First, the list is not comprehensive. Other violent and serious offences have been left out. In addition, many other serious sexual offences are not on the list.⁷ This means that those convicted of such offences (say intercourse with a girl under 13 years), in theory, can be entitled to a suspended sentence of imprisonment. The second kind of anomalies concerns the less serious offences that exist on the list (say attempt indecent assault), with the possible result that the court has no discretion but to impose a term of immediate imprisonment where a non-custodial sentence is not appropriate.⁸ These anomalies can give rise to a general sense of unfairness and arbitrariness.
- (6) Of the jurisdictions studied that have a similar suspended sentence power, none of them has maintained exceptions as wide and extensive as those in Hong Kong.

12. It should be noted that no similar restriction applies in respect of community service orders. Section 4(1) of the Community Service Orders Ordinance (Cap 378) empowers the court to make a community service order "*where a person of or over 14 years of age is convicted of an offence punishable with imprisonment*". There is no exclusion in respect of excepted offences.

Views of Hong Kong judges and judicial officers

13. Views of all judges and judicial officers at different levels who hear mainly or exclusively criminal cases as to whether in their experiences there was any unease or feeling of injustice arising from the statutory restriction imposed by Schedule 3 of Cap 221 (ie no suspended sentences for excepted offences) were sought in mid-2012. The vast majority (80% of those who responded) of the judges and judicial officers who responded, for the following reasons, agree with or support complete removal of the statutory restriction or at least the restriction in respect of certain offences (namely, indecent assault and wounding):

⁷ See Crimes Ordinance (Cap 200), such as non-consensual buggery, assault with intent to commit buggery, gross indecency, bestiality, intercourse with a girl under 13 or under 16, intercourse with mentally incapacitated person, abduction of unmarried girl under 16, trafficking in persons to or from Hong Kong.

⁸ These are the summary conviction offences for which the maximum penalty is three years imprisonment or less. Many of these offences can be committed without any actual physical violence inflicted on another person, eg the firearm and weapons offences and the inchoate offence of attempted indecent assault.

- (a) the court's discretion should not be fettered;
- (b) for serious offences, the restriction is superfluous since it is unlikely to be applicable, but for less serious offences where the power to suspend sentence is needed, the restriction will tie the court's hands; and
- (c) the court is forced to pass a sentence which is disproportionate or does not reflect the criminality of the offence.

Views of the Law Society and the Bar Association

14. The Law Society commissioned the Centre for Comparative and Public Law of the University of Hong Kong to compile a report on whether there is a case for reforming the exceptions to the power of the Hong Kong courts to impose suspended sentences under Cap 221 (the "CCPL Report"). The CCPL Report concludes that there are "*substantial reasons for eliminating the list of exceptions altogether or at least removing those offences that do not invariably cause serious physical violence to others*".⁹

15. Upon considering the CCPL Report, the Law Society's Criminal Law and Procedure Committee concludes that the concept of "excepted offences" is outdated and Schedule 3 of Cap 221 should be abolished in its entirety. This conclusion is shared by the Bar Association.

Public Consultation

16. The consultation paper was published in June 2013, and the consultation period ended in September 2013. During the consultation exercise, there were responses from 39 respondents as set out in the Annex at the end of the Report. Twenty eight of these respondents were in favour of the recommendation, while five were against it. The remaining six were neutral or chose not to express views.

17. Those in favour generally endorsed the consultation paper's rationale for repealing the entire Schedule 3. They are mainly from the legal profession and law related Government Departments.

18. The five respondents who opposed the recommendation are Association Concerning Sexual Violence Against Women, Commissioner of Police, Fan Wong & Tso (a law firm), Rain Lily and Raymond Chiu. The reasons of their opposition could be categorised as follows:

⁹ Centre for Comparative and Public Law (University of Hong Kong), *Report on Reforming Suspended Sentences in Hong Kong* (Sep 2012), at 2 and 21.

- (1) Deterrent effect of imprisonment
- (2) Adequate sentencing options
- (3) Consistency: an important factor in sentencing
- (4) Public sentiments at the time of introducing Schedule 3 still ring true
- (5) Revising (instead of repealing) Schedule 3

Conclusion and Recommendation

Suspended sentence under section 109B

19. There are problems with the existing operation of the excepted offences regime, and thus there is overwhelming support in the public consultation for the change of the *status quo*. Academics are also of the view that the current regime should be reformed, as this was cogently argued in the CCPL Report. The Law Society has adopted the views and conclusion in the CCPL Report, and the Bar shares the view of the Law Society that the concept of excepted offences was "outdated" and should be abolished in its entirety. As set out in the above paragraphs, about 80% of the responses of the judges and judicial officers support the removal of the restriction.

20. The Commission has carefully considered the views and comments of the respondents for and against the recommendation, as well as their other suggestions. In particular, the Commission has, in the Report,¹⁰ addressed the five reasons of opposition set out in above paragraph. **The Commission therefore recommends repealing the excepted offences as listed in Schedule 3 of the Criminal Procedure Ordinance, Chapter 221 of the Laws of Hong Kong in relation to section 109B.**

Restriction on imprisonment of persons between 16 and 21 years of age under section 109A

21. In response to the consultation paper, some respondents suggested clarifying whether the proposed repealing of Schedule 3 is also applicable to section 109A(1) and (1A) of Cap 221. It is against this background that the Report considered the implication of repealing Schedule 3 on section 109A.

22. Section 109A(1), introduced in 1967, provides that young offenders, aged between 16 and 21 years, should not be imprisoned unless there is no other appropriate method of dealing with them. However, this provision does not apply to excepted offences in Schedule 3 according to section 109A(1A)). There are three options available:

¹⁰ See paras 5.13 to 5.20 of the Report.

- (1) repealing section 109A in its entirety - the result is that offenders of this age group will be treated in the same way as adult offenders, meaning that the court would have full discretion to impose any sentence, including imprisonment and suspended sentence;
- (2) repealing section 109A(1A) only - the effect is that section 109A(1) would apply without being subject to excepted offences, ie back to the position before section 109A(1A) was added in 1971 (because of the rise in youth violent crimes at that time);
- (3) Schedule 3 will continue to apply to young offenders, aged between 16 and 21 years, by virtue of section 109A(1A) (in other words, repealing Schedule 3 only in relation to section 109B).

23. The Commission concludes that section 109A(1), introduced in 1967, has been a long-standing rule which should not be tampered with unless there is a strong reason to do so. In contrast, violent crime in general is no longer a real concern as in the 70's (which was the reason for enacting section 109A(1A)). **The Commission recommends repealing section 109A(1A) only.** The effect is that the long-standing statutory general rule introduced in 1967, which stipulates that young offenders (aged between 16 and 21 years) should not be imprisoned unless there is no other appropriate method of dealing with them, would no longer be subject to excepted offences in Schedule 3.

END

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