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THE LAW REFORM COMMISSION OF HONG KONG

REPORT

THE COMMON LAW PRESUMPTION THAT A BOY UNDER 14 IS INCAPABLE OF SEXUAL INTERCOURSE

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The Law Reform Commission of Hong Kong was established by the Executive Council in January 1980. The Commission considers for reform such aspects of the law as may be referred to it by the Secretary for Justice or the Chief Justice.

The members of the Commission at present are:

Chairman: ***Mr Wong Yan-lung, SC, JP, Secretary for Justice***

Members: ***The Hon Mr Justice Geoffrey Ma, Chief Justice***
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The Common Law Presumption that a Boy under 14 is Incapable of Sexual Intercourse

Introduction

1. This report considers the existing common law presumption in Hong Kong that a boy under 14 years of age is incapable of sexual intercourse. The report is part of the Law Reform Commission's overall review of the law governing sexual offences.

Terms of reference

2. In April 2006, the Secretary for Justice and the Chief Justice asked the Law Reform Commission to review the existing law on sexual and related offences in Hong Kong. In October 2006 the terms of reference were expanded to read as follows:

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

The sub-committee and its work to date

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

Mr Peter Duncan, SC *(Chairman)*	Senior Counsel
Hon Mrs Justice Barnes	Judge of the Court of First Instance of the High Court
Mr Eric T M Cheung	Assistant Professor Department of Professional Legal Education University of Hong Kong

Dr Chu Yiu Kong *[Until December 2007]*	Assistant Professor Department of Sociology University of Hong Kong
Mr Paul Harris, SC	Senior Counsel
Professor Karen A Joe Laidler *[From September 2008]*	Head of Department of Sociology University of Hong Kong
Mr Stephen K H Lee *[From January 2008 until August 2010]*	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mrs Apollonia Liu *[Until June 2009]*	Principal Assistant Secretary Security Bureau
Mr Ma Siu Yip *[Until January 2008]*	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mrs Anna Mak Chow Suk Har	Assistant Director (Family & Child Welfare) Social Welfare Department
Mr Alan Man Chi-hung *[From September 2010]*	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mrs Millie Ng *[From June 2009]*	Principal Assistant Secretary Security Bureau
Mr Andrew Powner	Partner Haldanes, Solicitors
Ms Lisa D'Almada Remedios	Barrister
Dr Alain Sham	Senior Assistant Director of Public Prosecutions Department of Justice
Mr Thomas Leung *(Secretary)*	Senior Government Counsel Law Reform Commission

4. The terms of reference cover a diverse range of sexual offences, many of which involve controversial issues requiring careful and judicious balancing of the interests at stake. It was apparent from the outset that completion of the entire review would take considerable time and it was therefore decided that the terms of reference should be dealt with in stages. Because of widespread public concern, the Commission considered first the question of establishing a system of sexual conviction records checks for

those engaged in child-related work. The Commission's recommendations in respect of that aspect of the review were published in February 2010 in a report entitled *Sexual Offences Records Checks for Child-Related Work: Interim Proposals*. The present report is the second in the series which will be produced to cover different aspects of the project's terms of reference.

The existing common law presumption and its consequences

5. The presumption that a boy under 14 is incapable of sexual intercourse is longstanding and has its origins in Roman law, which applied 14 as the age of puberty where this was relevant in judicial proceedings.[1] In the nineteenth century case of *R v Waite,* Lord Coleridge CJ said that the rule at common law clearly laid down that "*a boy under fourteen is under a physical incapacity to commit the offence [of rape].*"[2] He went on:

> "*That is a presumption juris et de jure, and judges have time after time refused to receive evidence to shew that a particular prisoner* was *in fact capable of committing the offence*"[3]

6. The presumption cannot be rebutted even where there is clear evidence that the boy was physically capable of sexual intercourse at the time of the alleged offence, and had in fact had unlawful sexual intercourse with a non-consenting victim. The result is that, regardless of the circumstances, a boy under 14 years of age cannot be convicted of rape, though he can be convicted of aiding and abetting another to commit rape, or of indecent assault.[4]

7. In Hong Kong, 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.*"

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1 See the Namibia High Court case of *The State v Bernard Guibeb and six others,* Case No: CC 41/97 1998/08/19, at 2, at http://www.saflii.org/na/cases/NAHC/1998/8.html. See also British Medical Journal, *Medico-Legal*, 27 April 1963 at 1170-1171: *"It seems to have its origin in English law in the ancient writings of Hale, who probably took it from the writings of Justinian. Before the time of Justinian there were two schools of thought among the jurists on this matter. The Proculians held that all boys became pubes at the fixed age of 14; the Sabinians said that it depended on the physical maturity of the individual. Justinian adopted the former rule, giving as his reason the indecency of the inspection of the body."*

2 [1892] 2 Q B 600, at 601. The case involved a boy aged 13 having carnal knowledge of a girl aged eight. The boy's conviction of the felony of carnal knowledge of a girl under 13 was quashed, but he was sentenced to two months' imprisonment for common assault. The sentence of whipping was also cancelled. Blackstone's Commentaries on the Laws of England also wrote that "*A male infant, under the age of fourteen years, is presumed by law incapable to commit a rape, and therefore it seems cannot be found guilty of it*." (Loc cit., IV 212).

3 [1892] 2 Q B 600, at 601.

4 See *R v Angus* (1907) 26 NZLR 948, at 949 and *Archbold Hong Kong 2009*, at §21-17.

8. Section 65E of the Criminal Procedure Ordinance (Cap 221) provides that:

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

Even the slightest penetration will be sufficient to prove intercourse,[5] but that does not affect the operation of the common law presumption: the law regards a boy under 14 as incapable of sexual intercourse, regardless of the actual circumstances.

9. The common law presumption is a long established one and many of the leading cases date back to the 19th century. In *R v Brimilow*,[6] the accused was charged with rape of an 11-year-old girl. Notwithstanding the fact that intercourse was proved, the judge directed the jury to acquit the accused of rape, on the basis that the accused was under 14 years of age. The accused was instead convicted of assault.

10. The common law presumption that a boy under 14 is incapable of sexual intercourse cannot be rebutted, "*even though it be proved that he has arrived at the full state of puberty*".[7] Indeed, evidence is inadmissible to show that a boy below 14 years of age can in fact perform the act of sexual intercourse. In *R v Philips,* Patteson J said:

> "*I think that the prisoner could not, in point of law, be guilty of the offence of assault with intent to commit a rape, if he was, at the time of the offence, under the age of fourteen. And I think also, that if he was under that age, no evidence is admissible to shew that, in point of fact; he could commit the offence of rape.*"[8]

The law in other jurisdictions

11. It appears that the common law presumption has been abolished in a number of other jurisdictions (if, indeed, it existed at all). Section 1 of the Sexual Offences Act 1993 abolished the presumption in England and Wales. That section provides:

> "*The presumption of criminal law that a boy under the age of fourteen is incapable of sexual intercourse (whether natural or unnatural) is hereby abolished.*"

The presumption has never applied in Scotland.

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5 *Archbold Hong Kong 2009*, at §21-18.
6 (1840) 2 Mood. 122-123.
7 *R v Jordan & Cowmeadow* (1839) 9 C & P 118.
8 (1839) 8 C & P 736.

12. The presumption has also been done away with in New Zealand and a number of the Australian jurisdictions. In the Australian Capital Territory, New South Wales, South Australia and Victoria, the presumption was abolished completely by, respectively, section 68(1) of the Crimes Act 1900, section 61S(1) of the Crimes Act 1900, section 73(2) of the Criminal Law Consolidation Act 1935 and section 62(1) of the Crimes Act 1958. The effect is that in these jurisdictions there is no longer any presumption of law that a person is incapable of sexual intercourse because of his age.

13. In Tasmania, the presumption continues to apply but only in respect of a boy under the age of seven. Paragraph 18(3) of section 13 of the Criminal Code Act 1924 provides that "*[a] male person under 7 years of age is conclusively presumed to be incapable of having sexual intercourse.*"

14. In Malaysia, section 113 of the Evidence Act 1950 provides that "*[i]t shall be an irrebuttable presumption of law that a boy under the age of thirteen years is incapable of committing rape.*" In circumstances where Islamic Law applies, the applicable age limit might be different.

15. In South Africa, the presumption that a boy under the age of 14 years is incapable of sexual intercourse was abolished by the Law of Evidence and the Criminal Procedure Act Amendment Act 1987, which now provides that evidence of sexual intercourse by a boy under the age of 14 years may be adduced.[9]

16. Laws governing sexual offences in Canada are found in its Criminal Code which applies to all Canadian provinces and territories. Since 1892, Canada has had a codified criminal law and the original version was derived heavily from English law. The criminal laws applicable to heterosexual intercourse remained largely unchanged until a major review in the early 1980's.[10] Earlier versions of Canada's Criminal Code contained the provision that "*No male person shall be deemed to commit an offence [of rape] … while he is under the age of fourteen years*."[11] In 1987, this provision was repealed, in line with an earlier recommendation by the Law Reform Commission of Canada.[12]

17. The present Canadian provisions governing sexual offences by under-age persons are more nuanced. Section 150 of the Criminal Code now makes it an offence to have sexual contact with a boy or girl under the age of 14. Sub-section (2) provides a "close in age exception" for cases in which the complainant is 12 or 13 years old. The accused can raise consent as a

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9 Para 4.4.3, at Chapter 4, the South African Law Commission Issue Paper 10 (Project 108), at http://www.saflii.org/za/other/zalc/ip/10/10-CHAPTER-4.html.

10 Janine Benedet, "The Age of Innocence: A Cautious Defence of Raising the Age of Consent in Canadian Sexual Assault Law", at pages 3-4. In 1983, for example, the offences of rape, indecent assault and gross indecency were abolished and replaced by the gender neutral offence of sexual assault.

11 This provision was found in section 139 of the Criminal Code 1953-54, section 147 of the Criminal Code 1970, and section 154 of the Criminal Code 1985.

12 Law Reform Commission of Canada, "Sexual Offences" 1978 Working Paper 22, at page 35.

defence if the accused was less than two years older than the complainant, under the age of 16, and was not in a position of trust or authority towards the complainant. The minimum age of criminal responsibility would also operate to protect a young offender under the age of 12.

18. In Singapore, section 82 of the Singapore Penal Code states that nothing is an offence which is done by a child under seven years of age. Section 83 of the Penal Code further stipulates that in the case of an offence committed by a child between seven and 12 years, there would be no criminal responsibility if the child has not attained sufficient maturity of understanding to judge the nature and consequence of his conduct on that occasion. For most of the 19th century, English criminal law applied in Singapore[13] insofar as local circumstances permitted. The Straits Settlements Penal Code, practically a re-enactment of the Indian Penal Code, was enacted in 1871. Hence, it is most likely that the presumption was at one time applied in Singapore, but we have not found any recent discussion of its application there.[14]

The age of criminal responsibility in Hong Kong

19. In Hong Kong, section 3 of the Juvenile Offenders Ordinance (Cap 226) fixes the minimum age of criminal responsibility as 10 by providing that "*it shall be conclusively presumed that no child under the age of 10 years can be guilty of an offence*." The minimum age was raised from seven years to 10 years in 2003 as a result of proposals in the Law Reform Commission's 2000 report on the *Age of Criminal Responsibility in Hong Kong*. In respect of a child aged between 10 and 14 years a rebuttable presumption of *doli incapax* applies. That means that the child will be presumed to be incapable of committing a crime unless the prosecution can prove beyond reasonable doubt that, at the time of the offence, the child was well aware that his or her act was seriously wrong, and not merely naughty or mischievous. If the presumption is rebutted, full criminal responsibility will be imposed on the child, who may then be charged, prosecuted and convicted.

20. The rebuttable presumption that a child between 10 and 14 is *doli incapax* is distinct from the irrebuttable presumption that a boy under the age of 14 is incapable of sexual intercourse. If the latter presumption were to be abolished, the prosecution would still need to rebut the presumption of *doli incapax* before a boy between the ages of 10 and 14 years could be charged with rape. The prosecution would therefore need to prove that the boy knew that his conduct was seriously wrong.

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13 As part of the Straits Settlements, including also Penang and Malacca.

14 There are discussions, however, on whether a boy under 16 years could be prosecuted for incest.

The case for change

21. The notion that a boy under 14 years of age cannot be charged with and convicted of the offence of rape, founded on the irrebuttable presumption that such a boy is physically incapable of sexual intercourse, has been severely criticised by Professor Glanville Williams:

> "*The other person who cannot be convicted of rape is a boy under 14, the reason advanced being that he is irrebuttably presumed not to have reached the age of puberty. This fiction is doubly silly. First, puberty may be attained before 14, and secondly, puberty is not necessary for rape. Rape requires only penetration, not fertilisation, so that it is only an ability to have an erection, not an ability to emit semen, that is physically necessary for the crime.*"[15]

22. Hannah J in the High Court of Namibia found himself obliged to apply a presumption he described as "absurd" and called for its review:

> "*There is a rule derived from Roman law that a boy under the age of 14 is irrefutably presumed incapable of sexual intercourse and therefore of rape and that rule has been accepted as part of the common law in England and the common law of this country prior to independence. And in terms of Article 140 of the Constitution such laws which were in force immediately before Independence shall remain in force until repealed or amended by Act of Parliament or until declared unconstitutional. The rule is patently an absurd one which should have no place in our common law in this day and age. But unlike the position in England and in South Africa it has not been repealed by statute. It is still part of our law.*
>
> *I express the hope … that the current review of criminal procedure and evidence will include a review of this anachronistic presumption*."[16]

23. Whatever the historical rationale for the presumption may have been, it is difficult to see what purpose the rule now serves. It flies in the face of common sense that the law in Hong Kong should refuse to accept that a boy under 14 may be capable of sexual intercourse, regardless of the evidence to the contrary. In England, where the presumption no longer applies, two 11-year-old boys were recently convicted before a jury of attempting to rape an eight-year-old girl.[17] In Hong Kong, two 13-year-old boys were convicted in June 2009 of indecently assaulting a 12-year-old girl.

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15 Glanville Williams, *Textbook of Criminal Law*, 2nd edition, 1983, London Stevens & Sons, at 237.

16 In the High Court of Namibia's decision in *The State versus Bernard Guibeb and six others* Case No CC 41/97 1998/08/19, at 2 to 3, at http://www.saflii.org/na/cases/NAHC/1998/8.html.

17 The boys were 10 at the time of the offence and had been charged with rape. See report of 18 August 2010 at http//www.bbc.co.uk/news/uk-england-london-10693953.

It was clear that sexual intercourse had taken place between the first defendant and the victim but the defendant could only be charged with indecent assault, rather than rape, because of the application of the presumption. The magistrate was reported as having described the first defendant as "*very lucky*".[18] More recently still, in September 2010 a 13-year-old boy was arrested for allegedly having sexual intercourse with a five-year-old girl in the Pamela Youde Nethersole Eastern Hospital in Chai Wan. He was charged with indecent assault as the presumption prevented his being charged with rape.[19]

24. The case for abolition in England was put by Lord Lucas in his speech to the House of Lords on 22 June 1993 in support of the Sexual Offences Bill 1992 (subsequently enacted as the Sexual Offences Act 1993):

> "*The Bill implements a recommendation of the Criminal Law Revision Committee in its 1984 report on sexual offences. The committee could see no justification for retaining the presumption and all who commented on the issue supported its abolition …..*
>
> *The ancient presumption that a boy under the age of 14 is incapable of sexual intercourse is not in accord with the facts and perhaps it never was. It clearly raised Lord Chief Justice Hale's eyebrows over 300 years ago. It belongs to the family of legal fictions that exist to protect the young, but developments in recent years in criminal law and in sentencing policy have removed any need for it and, in abolishing it, we would do some good and no harm.*
>
> *The principal practical effect of the Bill would be to allow some of the 25 or so boys under 14 who are convicted each year of indecent assault to be convicted of rape if that, rather than indecent assault, is what they have done. That is surely desirable. It will allow justice to be done to the victim of the crime to whom the lesser charge is a grave insult. Rape causes terrible distress. That distress is compounded if victims find that their assailants cannot be charged or convicted of the offence which they have actually committed. Victims' confidence that the law properly recognises their ordeal will be improved and their recovery may be assisted.*"[20]

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18 *Ming Pao Daily News*, Court News A08, 9 June 2009.

19 "Attack on girl sparks mixed wards rethink", *The Standard*, 4 October 2010.

20 Hansard, *HL Deb 22 June 1993 vol 547 cc295-8*, at http://hansard.millbanksystems.com/lords/1993/jun/22/sexual-offences-bill.

Conclusion and recommendation

25. We have difficulty discerning any useful purpose that is served by the continued application of the presumption. It has been abolished (or never applied) in a number of other jurisdictions. The application of the presumption is at odds with reality and means that on occasion the true criminality of the defendant's conduct cannot be reflected in the charge. As explained above, if the presumption were to be abolished, the separate rebuttable presumption of *doli incapax* would continue to apply to a boy between the ages of 10 and 14, requiring the prosecution to prove beyond reasonable doubt that the boy knew his actions were seriously wrong. The effect of abolition would be that the offence of rape would no longer be singled out for special treatment: the rebuttable presumption of *doli incapax* would apply in respect of any criminal offence.

26. Taking account of these various considerations, **we accordingly recommend that the presumption that a boy under the age of 14 years is incapable of sexual intercourse should be abolished.**

Law Reform Commission
December 2010