

THE LAW REFORM COMMISSION OF HONG KONG

REVIEW OF SEXUAL OFFENCES SUB-COMMITTEE

CONSULTATION PAPER

**SEXUAL OFFENCES
INVOLVING CHILDREN AND PERSONS WITH MENTAL IMPAIRMENT**

EXECUTIVE SUMMARY

Preface

Terms of reference

1. See consultation paper.

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*.
4. 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*.
5. Based on proposals made by the Sub-committee, the Commission published in December 2010 a *Report on The Common Law Presumption that a Boy under 14 is Incapable of Sexual Intercourse*, recommending the abolition of this outdated common law presumption.

Overall review of sexual and related offences

6. The Sub-committee is currently working on an overall review of the substantive sexual offences. The review is the major part of Sub-committee's study under its terms of reference.
7. It is the Sub-committee's plan, to be adjusted if necessary in the light of further deliberations, to divide the review into four parts, with separate consultation papers to be issued in respect of each of them and one global final report. 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 sexual offences involving

- children and persons with mental impairment and sexual offences involving abuse of a position of trust);
- (iii) miscellaneous sexual offences; and
- (iv) sentencing.

8. In September 2012, the Sub-committee issued a *Consultation Paper on Rape and Other Non-consensual Sexual Offences* ("the Non-consensual Offences CP"). *The Non-consensual Offences CP* represents the first of the four consultation papers issued or to be issued by the Sub-committee on the remaining topics that it has set for itself.

This consultation paper

9. This consultation paper is the fourth paper issued by the Sub-committee under its terms of reference. It represents the second of the four consultation papers issued or to be issued by the Sub-committee in its overall review of the substantive sexual offences. It covers sexual offences involving children and persons with mental impairment and sexual offences involving abuse of a position of trust.

Public views invited

10. The recommendations in this paper are the result of extensive discussions by the Sub-committee. They 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: Overview of existing sexual offences involving children and young persons

11. This chapter gives an overview of the major sexual offences relating specifically to children and young persons in Part XII of the Crimes Ordinance (Cap. 200). (See consultation paper for further elaborations on the offences outlined below.)

Intercourse with a girl under 13 or 16

12. It is an offence under section 123 of the Crimes Ordinance for a man to have unlawful sexual intercourse with a girl under the age of 13.

13. A similar offence applies by virtue of section 124(1) of the Crimes Ordinance where a man has unlawful sexual intercourse with a girl under the age of 16.

Buggery with girl under 21

14. It is an offence under section 118D of the Crimes Ordinance for a man to commit buggery with a girl under the age of 21. The offence carries a maximum penalty of life imprisonment.

Homosexual buggery with or by man under 16

15. Section 118C of the Crimes Ordinance provides that it is an offence for a man to commit buggery with another man under the age of 16; or for a man who is under the age of 16 to commit buggery with another man.

16. Section 118C used to provide for an offence for a man to commit buggery with another man under 21; or for a man who is under 21 to commit buggery with another man. The Court of Appeal upheld the decision of the Court of First Instance in *Leung TC William Roy v SJ*¹ that the then section 118C was unconstitutional and invalid to the extent that it applied to a man aged 16 or over and under 21. The Statute Law (Miscellaneous Provisions) Ordinance 2014 (Ord. No. 18 of 2014) was subsequently enacted on 26 November 2014 to amend the then section 118C by substituting all references to “21” in that section with “16”.

Gross indecency with or by man under 16

17. Section 118H of the Crimes Ordinance provides that it is an offence for a man to commit an act of gross indecency with another man under the age of 16; or for a man who is under the age of 16 to commit an act of gross indecency with another man.

18. Section 118H used to provide for an offence for a man to commit an act of gross indecency with another man under 21; or for a man who is under 21 to commit an act of gross indecency with another man. The then section 118H was declared unconstitutional and invalid by the court in *Leung TC William Roy v SJ*, supra, to the extent that it applies to a man aged 16 or over and under 21. The Statute Law (Miscellaneous Provisions) Ordinance 2014 also amended the then section 118H by substituting all references to “21” in that section with “16”.

Indecent conduct towards child under 16

19. It is an offence under section 146 of the Crimes Ordinance for *“a person [to commit] an act of gross indecency with or towards a child under the age of 16, or [to incite] a child under the age of 16 to commit such an act with or towards him or her or another”*.² The offence carries a maximum penalty of 10 years' imprisonment.

Abduction of unmarried girl under 16 or 18

20. It is an offence under section 126 of the Crimes Ordinance for a person *“without lawful authority or excuse, [to take] an unmarried girl under the age of 16 out of the possession of her parent or guardian against the will of the parent or guardian”*.³

21. A similar offence applies by virtue of section 127 of the Crimes Ordinance: *“A person who takes an unmarried girl under the age of 18 out of the possession of her parent or guardian against the will of the parent or guardian with*

¹ *Leung TC William Roy v SJ*, [2005] HKCFI 713; [2005] 3 HKLRD 657; [2005] 3 HKC 77; HCAL160/2004, Court of First Instance. Decision upheld by Court of Appeal (CACV 317/2005).

² Crimes Ordinance, section 146(1).

³ Crimes Ordinance, sections 126(1).

the intention that she shall have unlawful sexual intercourse with men or with a particular man shall be guilty of an offence".⁴

Chapter 2: The age of consent

The meaning of "age of consent"

22. The expression "age of consent" does not appear in legislation. In its *Report on Rape and Other Sexual Offences* ("Scottish Law Commission Report"),⁵ the Scottish Law Commission defined the expression as meaning "*the age of a child below which any sexual activity is wrong and at or over which sexual activity is legally permissible*".⁶

23. The age of consent therefore is the threshold age below which sexual activity is unlawful.

The existing age of consent in Hong Kong

24. In general, the existing age of consent in Hong Kong is 16. There are hence a range of offences concerning sexual activity with a child under 16 in the Crimes Ordinance.

25. However, it is still an offence under section 118D of the Crimes Ordinance for a man to commit buggery with a girl under the age of 21. Thus, the age of consent for heterosexual buggery is still set at a higher age of 21. The age of consent for homosexual buggery has been lowered to 16 by the Statute Law (Miscellaneous Provisions) Ordinance 2014. There is hence a continued disparity between the age of consent for heterosexual buggery and homosexual activity.

Our view on the disparity in age of consent

26. In view of the *William Roy Leung* and related decisions and the increasing trend of a uniform age of consent in other jurisdictions, we find it hard to find any justification for allowing the disparity in the age of consent between homosexual and heterosexual sexual activity to continue to exist in Hong Kong. Our guiding principle for reform that the law on sexual offences should not involve distinctions based on sexual orientation or types of sexual practice also supports the view that the age of consent for sexual activity between people of different sexual orientations should be the same.

What should be the uniform age of consent?

27. The age of consent varies from country to country within a range between 13 and 18. However, the age of consent in the majority of the countries is 16 years of age.

⁴ Crimes Ordinance, sections 127(1).

⁵ Scottish Law Commission, *Report on Rape and Other Sexual Offences* (December 2007), Scot Law Com No 209.

⁶ Scottish Law Commission, *Ibid*, at para 4.18.

28. We cannot identify any strong justification for raising or lowering from the present level of 16 which has been well established and understood by the community. In fact, lowering the age of consent may have the undesirable result of encouraging premature child sexual activity at an early age. On the other hand, any suggestion to raise the age of consent may be criticised on the ground that such a suggestion fails to recognise that children mature physically and psychologically at much earlier age nowadays.

Recommendation 1: *A uniform age of consent of 16 years in Hong Kong*

We recommend that there should be a uniform age of consent in Hong Kong of 16 years of age, which should be applicable irrespective of gender and sexual orientation.

Chapter 3: General issues relating to reform of sexual offences involving children and young persons

Introduction

29. This chapter considers some general issues relating to offences involving children and young persons relevant to formulating reform proposals.

Should offences involving children and young persons in the new legislation be gender neutral?

30. The general trend of the legislation of overseas jurisdictions, including Australia, Canada, England and Wales, and Scotland, is for the equality of treatment between boys and girls as regards their protection against sexual exploitation and gender neutrality in offences involving children and young persons.

Recommendation 2: *Offences involving children and young persons be gender-neutral*

We recommend that offences involving children and young persons should be gender-neutral in the new legislation.

What should be the grouping of offences involving children and young persons?

31. We do not favour the retention of existing approach in the Crimes Ordinance. The existing approach (13, 16, 18 and 21 years) reflects different ages of consent which are gender-specific and discriminatory on the basis of sexual orientation. We have proposed in Recommendation 1 that there should be a uniform age of consent of 16 years of age, which should be applicable irrespective of gender and sexual orientation. The existing approach in the Crimes Ordinance is inconsistent with our proposal.

Should there be overlapping of offences?

32. A further issue is whether there should be overlapping of offences. There is an overlap in the Crimes Ordinance between the offence of sexual intercourse with a girl under 13 and the offence of sexual intercourse with a girl under 16. There is also an overlap in the English Act between the range of offences involving children under 13 and the separate range of offences involving children under 16. On the other hand, there is no overlap in the Scottish Act between the range of offences involving young children (i.e. those who has not attained the age of 13 years) and the separate range of offences involving older children (i.e. those who has attained the age of 13 years, but not the age of 16 years).

33. We favour the English approach in which there is an overlap of offences. This approach would avoid a possible lacuna when there is doubt as to whether or not the child was below 13 at the time of the commission of the offence. This could happen for example when the offence occurred a long time ago and the child could no longer recall clearly whether it was before he or she reached 13. In such a situation, the accused could be charged with an offence involving children under 16.

Recommendation 3: A range of offences involving children under 13 and another range of offences involving children under 16

We recommend that the law reflects the protection of two categories of young persons, namely, children under 13 and children under 16 respectively with a range of offences for each category rather than one single offence of child abuse.

Should the word "unlawful" be removed?

34. In the Crimes Ordinance, there are a number of offences relating to "unlawful sexual intercourse" or "unlawful sexual act".

35. The term "unlawful sexual intercourse" was originally taken to mean sexual activity taking place outside marriage in *Regina v Chapman* [1959] 1 QB 100 (a decision which was subsequently affirmed in Hong Kong in *HKSAR v Chan Wing Hung* [1997] 3 HKC 472.) The effect of that original common law meaning of the term was that sexual activity between a husband and wife, even if obtained by coercion or deception, would not fall within the meaning of "unlawful sexual intercourse".

36. Subsequently, the House of Lords in *Reg v R* [1991] 4 All ER 483 discarded the original common law meaning of the term. The House of Lords took the view that husband and wife should enjoy equal rights and so should be entitled to refuse a request for sexual activity from the other party. Hence, the word "unlawful" in "unlawful sexual intercourse" in equivalent English legislation was mere "surplusage" and without any meaning.

37. The effect of the new meaning of the term taken by the House of Lords in *Reg v R* is that it is possible for a husband to be convicted of the offence of raping his wife if the wife did not consent to sexual intercourse. This new common law

meaning was given statutory effect in Hong Kong. The Statute Law (Miscellaneous Provisions) Ordinance was enacted in 2002 by the Legislative Council to add a new section 117(1B) to the Crimes Ordinance, which provides that for the purposes of sections 118, 119, 120 and 121, "... *'unlawful sexual intercourse' does not exclude sexual intercourse that a man has with his wife.*"

38. In the light of the above-mentioned judicial and legislative developments, it is difficult to see what purpose the retention of the word "unlawful" serves in any of the relevant provisions. We therefore take the view that the opportunity should be taken to do away with the anachronistic term "unlawful" still remaining in the Crimes Ordinance.⁷

Recommendation 4: *The word "unlawful" be removed from all offences involving sexual intercourse or sexual act*

We recommend that the word "unlawful" should be removed from all offences involving sexual intercourse or sexual act in the Crimes Ordinance.

Should the age of the accused be specified in the new legislation?

39. We favour the approach of a single set of offences which can be committed by an adult or child offender. This approach has the advantage of simplicity. What is more, it avoids the possibility of the wrong charge being laid where there is some uncertainty over the age of the accused.

40. Furthermore, a judge could use his or her sentencing discretion in imposing on the child offender lighter penalties than an adult offender, where the circumstances of the case justifying this being so.⁸

Recommendation 5: *Offences involving children and young persons be capable of being committed by either an adult or a child offender*

We recommend that the proposed offences involving children and young persons be capable of being committed by either an adult or a child offender thus rendering it unnecessary to specify the age of the offender in the relevant legislation.

⁷ The Sub-committee did not address the issue of the word "unlawful" in offences involving unlawful sexual intercourse or unlawful sexual act in their previous paper entitled, *Consultation Paper on Rape and Other Non-consensual Sexual Offences*. The Sub-committee have in this consultation paper reached the conclusion that the word "unlawful" should be removed. Hence, when reading the Sub-committee's previous consultation paper, readers should assume that all references to the word "unlawful" in offences involving unlawful sexual intercourse or unlawful sexual act are removed.

⁸ Prosecutorial discretion can also be exercised in cases involving child offenders to ensure that only the proper cases are brought to court.

Chapter 4: Absolute liability in sexual offences involving children between 13 years and 16 years

Introduction

41. At present, the offence of sexual intercourse with a person under 16 is of absolute liability in Hong Kong.⁹ It is no defence that the accused did not know and had no reason to suspect that the child was under 16.

42. Offences involving non-penetrative acts may or may not be of absolute liability, depending on the Court's interpretation of the legislative intent of the relevant provisions.

Intermediate solution: reasonable belief that the child was not under-age

43. In some overseas jurisdictions sexual offences in respect of children do not carry absolute liability. The main rationale for this is that the interests of justice and fairness would require that a person who makes a genuine mistake on reasonable grounds that the child is not under-age should not be penalised.

44. However, instead of adopting the other extreme position in requiring the prosecution to prove beyond reasonable doubt the absence of a genuine belief on the part of the accused that the child was not under-age, the non-applicability of absolute liability is achieved by either making it necessary for the prosecution to prove that the accused did not reasonably believe that the child was over the age of consent; or by having a provision which allows the accused to raise the defence that he or she reasonably believed that the child was over the age of consent.

*Arguments against absolute liability*¹⁰

- Genuine mistake made by the accused should be recognised
- Many overseas jurisdictions have the defence
- Older children may have experimental sex

*Arguments for absolute liability*¹¹

- Encourage people to avoid any acts towards children that may be unlawful
- The Protective Principle
- Wrong to have sexual activity with children
- Sending the wrong message that under-age sex is encouraged
- Successful prosecution becomes more difficult
- Less protection to the child at trial

⁹ Strict liability and absolute liability offences are those offences which do not require the prosecution to prove *mens rea* in respect of every element of the *actus reus*: *Archbold Hong 2013*, at paragraph 18-1. There is however one main difference between these two types of offences. A strict liability offence is one where the prosecution does not have to prove *mens rea* but this does not preclude a defence based on honest or reasonable belief. An absolute liability offence is one where it is not even open to the defence to prove that he did not have the necessary intention to commit the crime with which he is charged (see the judgment of the Court of Appeal in *HK SAR v So Wai Lun*, HCMA 39/2004 (at paras 8 and 22 of judgment)).

¹⁰ See paras 4.37 to 4.40 of consultation paper.

¹¹ See paras 4.41 to 4.47 of consultation paper.

Our views on the issue

45. There are arguments for and against having absolute liability in offences involving children between 13 and 16 and there are bound to be divergent views on the issue. There may also be different views as to whether or not a distinction should be made between penetrative and non-penetrative sexual activity. There were in fact divergent views during the Sub-committee's deliberations on those issues. Given this, we take the view that the issues should be the subject of public consultation.

46. It should be noted that consideration of the issue of absolute liability should be confined to offences involving children between 13 and 16. In the sub-committee's view offences involving children under 13 should always be of absolute liability.

Recommendation 6: *Whether absolute liability should apply to offences involving children between 13 and 16 years be considered by the Hong Kong community*

We are of the view that the issues as to whether absolute liability should apply to offences involving children between 13 and 16 years and whether or not in this context a distinction should be made between penetrative and non-penetrative sexual activity should be considered by the Hong Kong community. Accordingly, we invite the community to express their views on the issue.

Chapter 5: Defence of marriage to sexual offences involving children between 13 years and 16 years

Introduction

Marital defence to sexual intercourse with a girl under 16

47. Under the present law, a person charged with an offence contrary to section 124(1) of the Crimes Ordinance, can raise a marital defence.¹² The defence appears currently to be applicable to consensual sexual activity but not to non-consensual.

48. In order to establish the marital defence referred to above, the husband needs only to prove on a balance of probabilities that he believed the girl under 16 to be his wife and had reasonable cause for the belief. It should be noted that the marital defence is not available to an accused charged with an offence under section 123 of the Crimes Ordinance (which is an offence involving a girl under 13). The result is that the marital defence is available only if the wife is aged between 13 and 16.

¹² Section 153P(3) of the Crimes Ordinance also provides for a marital defence where the accused was charged with a sexual offence having extra-territorial effect in respect of an act committed outside Hong Kong.

Marital defence to indecent assault

49. Under Section 122(1) of the Crimes Ordinance, it is an offence to indecently assault another person. Under section 122(3), the accused is, however, not guilty of indecent assault in such a case if the accused believed on reasonable grounds that he or she was married to the victim.

50. The effect of section 122(3) is that a person is protected from liability for indecent assault if he or she performed an indecent act on another person under 16, provided that the act was performed with the other person's consent and they are legally married or there are reasonable grounds for believing that they are legally married.

Arguments for retention of the marital defence¹³

- Hong Kong has obligations to recognize valid overseas marriages
- Possible that a Hong Kong resident returns to his or her home country to get married according to law or customs of that country
- A number of overseas jurisdictions have the defence
- No problems have arisen in Hong Kong arising from the operation of the defence
- The marital defence would not affect legal protection of the under-age spouse against non-consensual sexual activity

Arguments against retention of the marital defence¹⁴

- The protective principle
- Possibility that a very young child is forced to marry in some overseas countries and it is difficult for Hong Kong to verify the validity of the marriage
- The marriage law of overseas countries may reflect different customs from Hong Kong
- A number of overseas jurisdictions have an express provision that marriage is not a defence or have removed the defence
- Different treatment between heterosexuals and homosexuals

Our views on the issue

51. We have set out above the arguments for and against retention of the marital defence in offences involving children between 13 and 16 and appreciate that the issue is highly controversial. In our view, the protective principle, which is central to any reform of the offences involving vulnerable persons such as children under 16, is the most important factor. It is generally accepted in Hong Kong that it is wrong for anyone to engage in sexual activity with a child under 16. Anyone who comes to Hong Kong should obey our law accordingly.

¹³ See paras 5.24 to 5.31 of consultation paper.

¹⁴ See paras 5.32 to 5.38 of consultation paper.

Recommendation 7: *Marital defence to offences involving children be abolished*

We recommend that there should not be any marital defence to offences involving children in the new legislation (and any such existing defence should be abolished).

Chapter 6: Consensual sexual activity between persons who are between 13 and 16 years of age

Introduction

52. It is considered absolutely wrong for anyone to engage in sexual activity with very young persons (under the age of 13). People may however have different views as to whether the criminal law should intervene in respect of consensual sexual activity between persons who are between 13 and 16 years of age such as that which takes place in puppy love situations.

Three main approaches to the issue as to whether consensual sexual activity between persons who are between 13 and 16 years of age should be criminalised

53. There are three possible approaches to the issue.

- (i) Consensual sexual activity between persons who are between 13 and 16 years of age is criminalised but with prosecutorial discretion being exercised as to whether a charge is brought.
- (ii) Consensual sexual activity between persons who are between 13 and 16 years of age is criminalised but exemption from liability is provided for where the teenagers are close in age.
- (iii) Consensual sexual activity between persons who are between 13 and 16 years of age is not a criminal offence.

54. The first is the existing approach in Hong Kong. It is also the approach adopted in England and Wales.

Rationale for the first approach:¹⁵

- The law should set parameters for behaviour of young people
- Consensual sexual relationships between children may not be truly consensual and can be exploitative
- Legalising consensual sexual activity between children may encourage more children to engage in pre-mature sexual activity
- Prosecution would only take place in cases of exploitation and when prosecution is in the public interest

55. The second approach is that adopted by some jurisdictions such as Australia and Canada.

¹⁵ See paras 6.7 to 6.11 of consultation paper.

Rationale for the second approach¹⁶

- Young persons do engage in sexual activity at an early age
- Avoid inadvertently criminalising consensual sexual activity between young people

56. The third approach is a liberal approach. Under this approach, consensual activity between persons who are between 13 and 16 years of age is not criminalised.

57. This approach was favoured by the Scottish Law Commission.

Rationale for the third approach¹⁷

- If prosecution of consenting sexual activity between children is largely theoretical in most cases, then the activity should not be criminal
- Young people may be deterred from seeking appropriate advice

Our view as to the possible criminalisation of consensual sexual activity between persons who are between 13 and 16 years of age

58. One cannot assume that sexual relationships between children will be fully consensual just because they are close in age.

59. The protective principle would also mean that children should not be encouraged to engage in sexual activity before they are emotionally and physically ready to cope with the consequences.

60. The fact that young people do engage in sexual activity is not a proper ground for legalising the activity and giving them any form of encouragement to do so. The law should set parameters for young people's behaviour.

61. The imposition of criminal liability on the child or young person who is sexually exploitative of another child or young person does not necessarily mean that he or she would be prosecuted in all cases. Prosecutorial discretion can ensure that only appropriate cases are brought to court. Cases not involving sexual exploitation can be dealt with by cautions under the Police Superintendents' Discretion Scheme - a scheme which appears to have been operating well in Hong Kong. Thus, we are generally in favour of the first approach and consider that it is desirable to have guidelines for the exercise of prosecutorial discretion.

Recommendation 8: ***Consensual sexual activity between persons who are between 13 and 16 be criminalised but with prosecutorial discretion to bring a charge in appropriate cases***

We recommend that all consensual sexual activity between persons who are between 13 and 16 years of age should be criminalised but

¹⁶ See paras 6.22 to 6.24 of consultation paper.

¹⁷ See paras 6.27 to 6.28 of consultation paper.

recognising that prosecutorial discretion will be exercised as to whether a case is appropriate for a charge to be brought.

Chapter 7: Sexual offences involving children in the new legislation

Introduction

62. This chapter deals with the creation of offences relating to sexual crimes committed against children.

The state and inadequacy of existing legislation

63. Although the existing legislation addresses the two categories it covers only two types of sexual activities, namely, sexual intercourse and indecent assault. We consider that the protection of children should extend to other sexual activities. In this respect, the Sub-committee has proposed in its previous consultation paper that there should be non-consensual sexual offences of rape, sexual assault by penetration, sexual assault and causing a person to engage in sexual activity without consent.¹⁸ We consider that there should be new child offences mirroring the proposed non-consensual sexual offences. Furthermore, we take the view that there should be other provisions to protect children against specific incidents of sexual exploitation. Such an approach has been adopted in England and Wales and Scotland.

Penile penetration of a child

64. The inadequacy of the existing offence of sexual intercourse with a girl under 13 (section 123 of the Crimes Ordinance) is two-fold. First, it covers only penile penetration of the child victim's vagina, but not the anus or mouth. Second, it does not cover any child victim who is a boy.

65. We therefore consider that there should be a new offence involving children under 13 which is gender-neutral and covers penile penetration of the child's vagina, anus or mouth.

The name of the new offence

66. Both the English and Scottish offences are called "rape" of a child.

67. According to the Home Office Review Group in the UK, the rationale for adopting the term of "rape" in the name of the offence was that "*... Rape is the most serious sexual offence and a reformed law would be fundamentally flawed if the rape of a child was not charged as such.*"¹⁹

68. We are not inclined to adopt the term "rape" in the name of the new proposed offence which involves penile penetration of a child under 13. Rape is

¹⁸ Law Reform Commission of Hong Kong, *Consultation Paper on Rape and Other Non-consensual Sexual Offences* (September 2012), at recommendations 7, 16, 18, 19, 20 and 21.

¹⁹ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), at paragraph 3.6.3.

commonly understood to mean non-consensual sexual intercourse. However, for such an offence involving a person under 13, consent is never at issue. The mere act of penile penetration against a person under 13 is a very serious offence. There is no need to give it the label of rape. Furthermore, some child victims may wish to avoid any possible stigma that they have been raped. This can be avoided by using a term other than “rape” for the name of the new proposed offence.

69. We consider that a new offence named penile penetration of a child under 16 should be created. The existing offence of sexual intercourse with a girl under 16 (section 124 of the Crimes Ordinance) is gender-specific and does not cover sexual penetrative assault on a boy. Moreover, it covers vaginal intercourse only but not sexual penetration of the child's anus or mouth with a part of one's body. On the other hand, the existing offences of indecent assault (section 122 of the Crimes Ordinance) and indecent conduct towards a child (section 146 of the Crimes Ordinance) are inadequate to reflect the gravity of this type of serious criminal conduct.

Recommendation 9: *Proposed new offence: Penile penetration of a child under 13/16*

We recommend that the new legislation should include an offence of penile penetration of a child under 13, along the lines of section 5 of the English Sexual Offences Act 2003.²⁰

We also recommend a similar offence of penile penetration of a child under 16.

Penetration of a child

70. Non-penile penetration of a child's vagina or anus is currently covered by the offences of indecent assault (section 122 of the Crimes Ordinance) and indecent conduct towards a child (section 146 of the Crimes Ordinance).²¹ Each of these offences carries a maximum sentence of imprisonment of 10 years only.

71. In our view, the existing offences are inadequate to reflect the gravity of non-penile penetration of a child's vagina or anus and a new offence should be created to cover this type of serious conduct. The proposed new offence would cover non-penile penetration of the vagina or anus of a child under 13.

72. We consider that a similar offence involving children under 16 should be created. There are deficiencies in the existing offences in dealing with non-penile penetration of the vagina or anus of an older child. The existing offence of sexual intercourse with a girl under 16 (section 124 of the Crimes Ordinance) is gender-specific and does not cover sexual penetrative assault on a boy. Moreover, it covers vaginal intercourse only but not sexual penetration of the child's vagina or anus with a part of one's body. On the other hand, the existing offences of indecent

²⁰ Section 5(1) of the English Act provides:
"A person commits an offence [of rape of a child under 13] if –
(a) he intentionally penetrates the vagina, anus or mouth of another person with his penis,
and
(b) the other person is under 13."

²¹ The offence in section 146 of the Crimes Ordinance applies to a child under 16.

assault (section 122 of the Crimes Ordinance) and indecent conduct towards a child (section 146 of the Crimes Ordinance) are inadequate to reflect the gravity of this type of serious criminal conduct.

Recommendation 10: *Proposed new offence: Penetration of a child under 13/16*

We recommend that the new legislation should include an offence of penetration of a child under 13, along the lines of section 6 of the English Sexual Offences Act 2003.²²

We also recommend a similar offence of penetration of a child under 16.

We recommend the adoption of a provision along the lines of section 19(2) of the Sexual Offences (Scottish) Act 2009 to the effect that for the purposes of the offences of penetration of a child under 13 and penetration of a child under 16, a reference to penetration with a part of person's body is to be construed as including a reference to penetration with the person's penis.²³

We recommend that Schedule 1 of the Crimes Ordinance should be amended to allow a statutory alternative verdict for penetration of a child under 13, where the accused is charged with penile penetration a child under 13; similarly, a statutory alternative verdict for penetration of a child under 16, where the accused is charged with penile penetration a child under 16.

Sexual assault of a child

73. The Sub-committee has proposed in its previous consultation paper that (for adults) there should be three categories of sexual assaults. The first is sexual touching, ejaculating semen on others, and emitting urine or saliva onto others sexually. The second is a sexual act which causes another person (B) to apprehend the use or threat of use of immediate and unlawful personal violence. The third is a sexual act which would have been likely to cause another person (B) fear, degradation or harm had it been known to B, irrespective of whether it was known to B.

74. Given that the second and third categories are concerned with non-consensual situations we consider that it is unnecessary for this child offence to cover those categories. (Such activity, if done without consent, would nevertheless be an offence by virtue of the general provision applicable irrespective of the age of the

²² Section 6(1) of the English Act provides:
"A person commits an offence [of assault of a child under 13 by penetration] if –
(a) he intentionally penetrates the vagina or anus of another person with a part of his body or anything else,
(b) the penetration is sexual, and
(c) the other person is under 13".

²³ Section 19(2) of the Scottish Act provides:
"(2) Without prejudice to the generality of subsection (1), the reference in that subsection to penetration with any part of A's body is to be construed as including a reference to penetration with A's penis."

victim.) We consider that this child offence should follow the English and Scottish offences in covering sexual touching, ejaculating semen on a child, and emitting urine or saliva onto a child sexually (i.e. sexual acts in the first category above) only.

75. We consider that a similar offence involving children under 16 should be created to provide protection to older children against acts of sexual assault.

Recommendation 11: Proposed new offence: Sexual assault of a child under 13/16

We recommend that the new legislation should include an offence of sexual assault of a child under 13. The offence should be constituted by a person (A) who intentionally does any of the following acts to another person (B) and B is a child under 13:

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

We also recommend a similar offence of sexual assault of a child under 16.

Causing or inciting a child to engage in sexual activity

76. The Sub-committee has proposed in its previous consultation paper an offence of causing a person to engage in sexual activity without consent. We take the view that a child offence mirroring that non-consensual offence should be created. We consider it culpable conduct for anyone to cause or incite a child to engage in any form of sexual activity and a new offence should be created to cover such conduct.

Recommendation 12: Proposed new offence: Causing or inciting a child under 13/16 to engage in sexual activity

We recommend that the new legislation should include an offence of causing or inciting a child under 13 to engage in sexual activity, along the lines of section 8 of the English Sexual Offences Act 2003.²⁴

We also recommend a similar offence of causing or inciting a child under 16 to engage in sexual activity.

Engaging in sexual activity in the presence of a child

77. The typical scenario of the commission of this offence is that of a

²⁴ Section 8(1) of the English Act provides:
"A person commits an offence [of causing or inciting a child under 13 to engage in sexual activity] if –
(a) he intentionally causes or incites another person (B) to engage in an activity,
(b) the activity is sexual, and
(c) B is under 13."

paedophile who seeks to obtain sexual pleasure knowing a child is in the room watching him masturbate or having sexual activity with another person.²⁵

The child may be physically present or via webcam

78. This offence is intended to cover the conduct of someone who engages in some form of sexual activity in the presence of a child. The child may be physically present before the perpetrator when he or she engages in a sexual activity, or the child may be present somewhere else and be seen via, for example, a webcam.

79. Under the protective principle, children should be protected against sexual exploitation by perpetrators who engage in a sexual activity in the presence of children for the purpose of obtaining sexual gratification, or causing humiliation, distress or alarm to the child. Equally, children should also be protected against sexual exploitation by perpetrators who cause children to be present when a third party engages in a sexual activity. We therefore propose a new offence involving young children under 13 should be created to cover such criminal conduct. We also propose a similar offence involving children under 16 to provide protection to older children.

Recommendation 13: Proposed new offence: Engaging in sexual activity in the presence of a child under 13/16

We recommend that the new legislation should include an offence of engaging in sexual activity in the presence of a child under 13 along the lines of section 22 of the Sexual Offences (Scotland) Act 2009.²⁶

We also recommended a similar offence of engaging in sexual activity in the presence of a child under 16.

These two offences should also be constituted by causing such a child to be present while a third person engages in a sexual activity. Moreover, the purpose of the accused's act should be for obtaining sexual gratification, humiliating, distressing or alarming the child, or any combination of these purposes.

Causing a child to look at a sexual image

80. There is no existing offence to cover the act of causing a young child to look at a sexual image. The protective principle requires a new offence to protect

²⁵ Kim Stevenson, Anne Davies, and Michael Gunn, *Blackstone's Guide to the Sexual Offences Act 2003* (Oxford University Press, 2004), at page 66.

²⁶ Sections 22(1) and (2) of the Scottish Act provide:

"(1) If a person ("A"), either—
(a) intentionally engages in a sexual activity and for a purpose mentioned in subsection (2) does so in the presence of a child ("B") who has not attained the age of 13 years, or
(b) intentionally, and for a purpose mentioned in subsection (2) causes B to be present while a third person engages in such an activity,
then A commits an offence, to be known as the offence of causing a young child to be present during a sexual activity.
(2) The purposes are—
(a) obtaining sexual gratification,
(b) humiliating, distressing or alarming B."

young children from such form of sexual exploitation for one's sexual motives. We therefore take the view that there should be a new offence to cover such an act against young children under 13. Nor is there an existing offence to cover the act of causing an older child to look at a sexual image. We take the view that a similar offence should be created to cover such conduct.

Recommendation 14: Proposed new offence: Causing a child under 13/16 to look at a sexual image

We recommend that the new legislation should include an offence of causing a child under 13 to look at a sexual image along the lines of section 23 of the Sexual Offences (Scotland) Act 2009.²⁷

We also recommend a similar offence of causing a child under 16 to look at a sexual image.

The purpose of the accused's act should be for obtaining sexual gratification, humiliating, distressing or alarming the child, or any combination of these purposes. The definition of a sexual image in section 23(3) of the Sexual Offences (Scotland) Act 2009 should be adopted.²⁸

Arranging or facilitating commission of a child sex offence

81. The offence covers the case in which a person (A) who intentionally:
- (i) arranges or facilitates an act that A intends to do;
 - (ii) arranges or facilitates an act that A intends another person (B) to do;
 - (iii) arranges or facilitates an act that A believes B will do,

in any part of the world and the act will involve commission of any child offence.

Examples of the commission of the offence

82. An example of the commission of the first two limbs of the offence: a person (A) approaches an agency and requests the agency to procure a child for the purpose of sexual activity either with himself or with a friend. The offence is committed whether or not the sexual activity takes place or not.²⁹

83. An example of the commission of the third limb of the offence: A

²⁷ Sections 23(1) and (2) of the Scottish Act provides:
"(1) If a person ("A") intentionally and for a purpose mentioned in subsection (2) causes a child ("B") who has not attained the age of 13 years to look at a sexual image, then A commits an offence, to be known as the offence of causing a young child to look at a sexual image.
(2) The purposes are—
(a) obtaining sexual gratification,
(b) humiliating, distressing or alarming B."

²⁸ Section 23(3) of the Scottish Act provides:
"For the purposes of subsection (1), a sexual image is an image (produced by whatever means and whether or not a moving image) of—
(a) A engaging in a sexual activity or of a third person or imaginary person so engaging,
(b) A's genitals or the genitals of a third person or imaginary person."

²⁹ Explanatory Notes to Sexual Offences Act 2003, at paragraph 24.

intentionally drives another person (X) to meet a child and A believes X will have sexual activity with the child.³⁰

84. We consider that a similar offence should be adopted in Hong Kong. The proposed offence would enable the authorities to take early steps to catch paedophiles who take preparatory steps to make arrangements for abusing child or facilitating others to do so. It would be a significant step towards better protection of children against sexual exploitation. It should be noted that the proposed offence would cover arranging or facilitating commission of an offence involving a child under the age of consent. In other words, it would apply in respect of both children under 13 and children under 16.

Recommendation 15: *Proposed new offence: Arranging or facilitating the commission of a child sex offence*

We recommend that the new legislation should include an offence of arranging or facilitating the commission of a child sex offence along the lines of section 14 of the English Sexual Offences Act 2003.³¹

Health and treatment issues as exceptions to aiding, abetting and counseling a child sex offence

85. We share the view that people involved in giving help, advice, treatment and support to young people in matters of sexual health such as contraception should not normally be regarded as aiding and abetting a criminal offence. Otherwise, healthcare workers would be deterred from rendering assistance to young people on sex matters and youngsters would be discouraged from seeking appropriate professional help and advice on sex-related problems.

Recommendation 16: *Health and treatment issues as exceptions to aiding, abetting and counselling a child sex offence*

We recommend there should be exceptions to aiding, abetting and counseling an offence involving children along the lines of section 14 of the English Sexual Offences Act 2003, where a person's actions are intended to protect the child from pregnancy or sexually transmitted infection, to protect the physical safety of a child or to promote child's emotional well-being of a child by the giving of advice.

Review of some existing offences involving children

86. As we have recommended above a number of new offences involving children, we shall review below some existing offences to consider if there is a need for their continued existence.

³⁰ Explanatory Notes to Sexual Offences Act 2003, at paragraph 24.

³¹ Section 14(1) of the English Act provides as follows:

"(1) A person commits an offence of ["arranging or facilitating commission of a child sex offence"] if—

(a) he intentionally arranges or facilitates something that he intends to do, intends another person to do, or believes that another person will do, in any part of the world, and

(b) doing it will involve the commission of an offence under any of sections 9 to 13."

Intercourse with a girl under 13/16 (sections 123 and 124 of Crimes Ordinance)

87. These two existing offences are gender-specific and provide protection to under-aged girls only but not under-aged boys. Moreover, they cover vaginal intercourse only but not sexual penetrative assault on a child's anus or mouth.

Recommendation 17: *Sexual intercourse with a girl under 13/16 be abolished*

We recommend that the offences of sexual intercourse with a girl under 13 (section 123 of the Crimes Ordinance) and sexual intercourse with a girl under 16 (section 124 of the Crimes Ordinance) should be abolished upon the enactment of the new legislation.

Indecent conduct towards a child under 16 (section 146 of Crimes Ordinance)

88. The commission or the incitement of the commission of an act of gross indecency is an ingredient of this offence. Gross indecency is a term lacking in precise definition and there are a number of possible formulations of the term in the authorities. In accordance with the principle of clarity of the law, we consider this offence should be abolished upon the enactment of the new legislation.

89. The corresponding English offence in section 1 of the Indecency with Children Act 1960 has already been repealed.

Recommendation 18: *Indecent conduct towards a child under 16 be abolished*

We recommend that the offence of indecent conduct towards a child under 16 in section 146 of the Crimes Ordinance should be abolished upon the enactment of the new legislation.

A man commits buggery with a girl under 21 (section 118D of Crimes Ordinance)

90. Firstly, it is gender-specific in that it covers anal intercourse with a girl only. Secondly, it does not tally with the legal age of consent (of 16) for anal intercourse as held in *Leung TC William Roy v SJ*.³² The effect of *Leung TC William Roy* is that it is not unlawful for a gay couple to commit buggery with one another provided that they are aged 16 or over. Hence, it would be unfair to a heterosexual couple if they cannot lawfully have consensual anal intercourse with one another if the girl is aged 16 or over but under 21.

Recommendation 19: *A man committing buggery with a girl under 21 be abolished*

We recommend that the offence of a man committing buggery with a girl

³² *Leung TC William Roy v SJ*, [2005] HKCFI 713; [2005] 3 HKLRD 657; [2005] 3 HKC 77; HCAL160/2004, Court of First Instance. Decision upheld by Court of Appeal (CACV 317/2005).

under 21 in section 118D of the Crimes Ordinance should be abolished upon the enactment of the new legislation.

Homosexual offences involving young persons

91. There are two homosexual offences involving young persons, namely, homosexual buggery with or by man under 16 (section 118C of Crimes Ordinance) and gross indecency with or by man under 16 (section 118H of Crimes Ordinance).

92. We consider that the two homosexual offences should not continue to exist in our statute books. The principles of gender neutrality and avoidance of distinctions based on sexual orientation would lead to homosexual offences being removed.

Recommendation 20: *Homosexual buggery with or by man under 16 and gross indecency with or by man under 16 be abolished*

We recommend that the offence of homosexual buggery with or by man under 16 (section 118C of Crimes Ordinance) and gross indecency with or by man under 16 (section 118H of Crimes Ordinance) should be abolished upon the enactment of the new legislation.

Abduction offences

93. Section 126 of the Crimes Ordinance provides that it is an offence to take an unmarried girl under 16 out of the possession of her parent or guardian against the will of the parent or guardian. Section 127 of the Crimes Ordinance provides that it is an offence to take an unmarried girl under 18 out of the possession of her parent or guardian against the will of the parent or guardian for unlawful sexual intercourse with men or with a particular man.

94. These two abduction offences can be criticized for being gender-specific. There are no valid reasons why these two offences should apply to girls but not boys.

95. The two abduction offences are anachronistic in that they draw a difference between unmarried and married girls as regards participation in sexual activity. They also imply that a guardian or parent's approval is required if an unmarried girl should choose to leave home to have sex.

96. The two abduction offences, which were modelled on similar provisions in the English Sexual Offences Act 1956, were repealed in England and Wales in 2003.³³

97. We are not aware of any case that has come before the court, at least in the past decade, which involves a charge for any of the two abduction offences in sections 126 and 127. There appears to be no practical reason for retaining the two offences.

³³ See Sexual Offences Act 2003, Schedule 7.

Recommendation 21: *Abduction of an unmarried girl under 16 and abduction of an unmarried girl under 18 for sexual intercourse be abolished*

We recommend that the offences of abduction of an unmarried girl under 16 (section 126 of the Crimes Ordinance and abduction of an unmarried girl under 18 for sexual intercourse (section 127 of the Crimes Ordinance) should be abolished upon the enactment of the new legislation.

Chapter 8: Sexual grooming

Introduction

98. Sexual grooming refers to the phenomenon of a paedophile who "grooms" a child with a view to engaging in conduct which constitutes a sexual crime against the child. The paedophile may groom the child by communicating on a number of occasions with a child in order to gain the child's trust and confidence. This is often done through electronic means and it is commonly carried out on a mobile phone or on the internet. The paedophile would eventually arrange to meet the child with the intention to sexually abuse the child victim when they meet.

99. England and Wales was the forerunner in creating a specific offence in 2003 to target sexual grooming. Other jurisdictions enacted legislation creating a similar offence, including New Zealand and Scotland in 2005, New South Wales (Australia) and Singapore in 2007.

The need for legislation on sexual grooming³⁴

- *Surging internet usage by children and young persons*
- *Child molestation and paedophilia is serious but often grossly under-reported*
- *Preventive measures should be taken before commission of actual sexual crimes against children*

100. The merit of legislation related to sexual grooming is that it allows Police to take early action to investigate suggested cases of the abuse or proposed abuse of children and young persons. It may prevent commission of the actual sexual crimes against children and young persons, serve as a deterrent to would-be sex predators and enhance protection of children and young persons against sexual exploitation.

101. In some cases if, for example, a child's parents or older friends know about the fact that the child is being groomed, they could report the case to the Police. The Police could then take early action to check on the internet to investigate and prevent the commission of a sexual offence against the child. Action by the Police to

³⁴ See paras 8.5 to 8.11 of consultation paper.

investigate cases of grooming would have deterrent effects on offenders even if there is not enough evidence to bring a charge.

Elements of the English offence

102. The essential elements of the English sexual grooming offence are as follows:

- A person (A) aged 18 or over intentionally meets a child (B) aged under 16 or travels with the intention of meeting B;
- A has met or communicated with B on at least two earlier occasions;
- A intends to commit a sexual offence against B during the meeting or when A travels to meet B;
- A does not reasonably believe the B is 16 or over.

103. The offence is a preventive offence and the intended sexual offence does not have to take place in order to trigger the offence.

Should the new offence require meeting or communication on one earlier occasion only or at least two earlier occasions?

104. The issue is whether the new offence should require meeting or communication between the perpetrator and the child victim on one earlier occasion only (the New Zealand and Scottish approach) or at least two earlier occasions (the English and Singaporean approach). We consider that "grooming" means an extended, planned and continuous process and it would be too draconian to require meeting or communication with the young person on one earlier occasion only. We therefore do not favour the New Zealand and Scottish approach.

105. We take the view that the new offence should be constituted by the perpetrator proceeding to meet or travel to meet the child with the intention to commit a sexual offence on the child, having met or communicated with the child on at least two earlier occasions.

Should the new offence be also constituted by making arrangements to travel?

106. The New Zealand offence of sexual grooming is also constituted by making arrangements to travel with the intention to meet the child.

107. We are of the view that there is merit in the New Zealand approach. By including making arrangements to travel, it would be unnecessary to prove attempt which is difficult. We consider that the New Zealand approach should be adopted to avoid any problem relating to the law of attempt.

Fictitious young persons provision in New Zealand sexual grooming legislation

108. Reform was introduced in 2011 to the New Zealand sexual grooming legislation to facilitate police undercover operations to catch offenders, particularly those grooming children over the internet.

109. The new *fictitious young person* provision will enable a prosecution in a situation where the accused believes he or she is communicating with a person under 16 but is in fact communicating with a police constable operating in a covert role.³⁵

110. We take the view that there is merit in the New Zealand *fictitious young person* provision. In sexual grooming cases, the child being groomed by paedophiles may not co-operate with the police in investigation. In order to carry out an effective investigation, the police officer could pretend to be a child in communicating with the groomer. The police could nip the matter in the bud and catch the groomer before the child was actually sexually abused.

Should reasonable belief in the child's age be an ingredient or a defence?

111. As there is, in the majority of cases, no physical contact between the accused and the child in sexual grooming cases, it may be difficult for the accused to take reasonable steps to ascertain whether the child was under 16 or not. Moreover, the harm to the child in sexual grooming cases is less than that in other cases because sexual grooming is a preventive offence and does not seek to punish the accused for actual harm done to the victim. It would be too harsh to require the accused to prove reasonable belief in the child's age. We therefore take the view that the ingredient approach should be adopted for sexual grooming. Thus, the Prosecution would have the burden of proving beyond reasonable doubt the accused did not reasonably believe that the child was 16 or over.

Recommendation 22: *Proposed new offence: Sexual grooming*

We recommend that the new legislation should include an offence of sexual grooming, along the lines of section 15 of the English Sexual Offences Act 2003.

We also recommend that apart from meeting the child or travelling with the intention of meeting the child, sexual grooming may also be constituted by making arrangements to travel with the intention to meet the child.

We also recommend that it should be an ingredient of the offence that the accused did not reasonably believe that the child was 16 or over at the time of the offence.

We also recommend that the "fictitious young person" provision in section 131B(1A) of the New Zealand Crimes Act 1961 should be adopted.

³⁵ Report of the Ministry of Justice (New Zealand): Crimes Amendment Bill (No.2), (July 2011), at page 5.

Chapter 9: Overview of existing offences in respect of Mentally Incapacitated Persons and issues that arise

Current Offences

112. Currently, specific offences in respect of Mentally Incapacitated Persons (“MIP’s”) are to be found in sections 118E, 118I, 125 and 128 of the Crimes Ordinance, together with section 65 (2) of the Mental Health Ordinance. (See consultation paper for further elaborations on the offences below.)

Buggery by a man with an MIP

113. It is an offence under section 118E of the Crimes Ordinance for a man to commit buggery with an MIP. However, the man is not guilty of this offence if he does not know and has no reason to suspect the other to be an MIP.³⁶ Where the buggery is committed with a female MIP, he is not guilty “if he is, or believes on reasonable grounds that he is, married to that woman”.³⁷

Gross indecency by man with male MIP

114. It is an offence under section 118I of the Crimes Ordinance for a man to commit an act of gross indecency with another man who is an MIP.

115. However, the man is not guilty of this offence if he does not know and has no reason to suspect the other to be a MIP.³⁸

A man having intercourse with a woman MIP

116. It is an offence under section 125 of the Crimes Ordinance for a man to have unlawful sexual intercourse with a woman MIP.

117. However, the man is not guilty of this offence if he does not know and has no reason to suspect the woman to be an MIP.³⁹

Abduction of MIP from parent or guardian for sexual act

118. It is an offence under section 128 of the Crimes Ordinance for a person to take an MIP out of the possession of her or his parent or guardian against the will of the parent or guardian, intending that the MIP to do an unlawful sexual act.

119. However, the person is not guilty of this offence if he or she does not know and has no reason to suspect the other to be an MIP.⁴⁰

³⁶ Crimes Ordinance, section 118E(2).

³⁷ Crimes Ordinance, section 118E(3).

³⁸ Crimes Ordinance, section 118I(2).

³⁹ Crimes Ordinance, section 125(2).

⁴⁰ Crimes Ordinance, section 128(2).

Sexual intercourse with patients

120. Section 65(2) of the Mental Health Ordinance (Cap. 136) provides for an offence of “sexual intercourse with patients”. The offence covers the situation where any male officer or employee of mental hospital, Correctional Services Department Psychiatric Centre, or general hospital has unlawful sexual intercourse with a woman patient. The offence can only be committed by a male person and covers penetrative sexual activity only.

Chapter 10: Consideration of Approaches that may be adopted for reform of legislation in respect of persons with mental impairment (“PMIs”)

Introduction

121. In this chapter, we consider what approaches might be adopted for reform of legislation in respect of PMIs.⁴¹

122. A review of current legislation in Hong Kong and overseas reveals that the types of offences provided for in respect of sexual activity with PMIs fall into two broad categories.

First category - offences reflecting an absolute bar to sexual activity with certain types of PMIs

123. This approach is exemplified in Hong Kong where, if a PMI fits the definition of a mentally incapacitated person (“MIP”)⁴² certain defined types of sexual activity with such a person are outlawed, e.g. buggery by a man with a mentally incapacitated person,⁴³ gross indecency by a man with a male mentally incapacitated person,⁴⁴ a man having intercourse with a female mentally incapacitated person,⁴⁵ and abduction of mentally incapacitated person from parent or guardian for sexual act.⁴⁶

124. Further examples of this approach can be found in the legislation of some Australian states (South Australia, Western Australia and Queensland).

⁴¹ In this paper persons with mental impairment (“PMIs”) is used as a general term as opposed to the specific definition of a mentally incapacitated person as defined in section 117(1) of the Crimes Ordinance, Cap 200.

⁴² Section 117(1) of the Crimes Ordinance, Cap 200 provides:
“a mentally disordered person or a mentally handicapped person (within the meaning of the Mental Health Ordinance (Cap. 136)) whose mental disorder or mental handicap, as the case may be, is of such a nature or degree that that person is incapable of living an independent life or guarding himself against serious exploitation, or will be so incapable when of an age to do so.”

⁴³ Crimes Ordinance, section 118E.

⁴⁴ Crimes Ordinance, section 118I.

⁴⁵ Crimes Ordinance, section 125.

⁴⁶ Crimes Ordinance, section 128.

Second category – offences reflecting potential exploitation of PMIs

(a) Particular means being used by perpetrator to obtain the PMI's consent

125. Examples of this can be found in the legislation of England and Wales where the exploitative means addressed consist of an inducement, threat or deception.

(b) Exploitation involved in the care of PMIs

- (i) in specified institutions***
- (ii) outside specified institutions***

126. Both (b)(i) and (b)(ii) are again exemplified by the legislation of England and Wales.

(c) Exploitation arising from abuse of a position of trust or authority, or a relationship of dependency, in respect of a PMI

127. This is exemplified in the legislation in Canada where specific offences are provided for where the perpetrator abuses his/her position of trust or authority or dependency relationship with regard to the affected PMI.

Consideration of the first category of offences

128. In many jurisdictions (including Hong Kong) certain offences are based on the mere fact of the mental impairment. A problem with this approach however is that it does not pay due regard to the sexual autonomy of the PMI. In Hong Kong, for example, the MIP definition is not based on the absence of capacity or ability to consent.

129. On the other hand, the legislation of Scotland is based on whether the PMI has the capacity to consent and so does recognise sexual autonomy.

130. There, sexual conduct with a PMI is covered by the general non-consensual (i.e. necessity to prove lack of consent) offences (such as rape, sexual assault by penetration, sexual assault). In deciding whether a non-consensual offence applies to a particular case, the question to ask is whether the PMI has the capacity to consent to the act.

131. We are attracted by the Scottish method of dealing with the protection of PMIs given our previous comments on the issue of consent in sexual offences. In our Sub-committee's previous consultation paper, we stated as follows:⁴⁷

⁴⁷ Law Reform Commission of Hong Kong, *Consultation Paper on Rape and Other Non-consensual Sexual Offences* (September 2012), at Recommendation 4.

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

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

132. We consider that the first category of offences can be subsumed under the general lack of consent model previously recommended by the sub-committee. By choosing this option, there would not be any need for specific offences based purely on impairment. Reliance could be placed on the general non-consensual sexual offences recommended in our previous consultation paper.

Consideration of the second category of offences

Offences addressing exploitation of PMIs by perpetrators using particular means to obtain PMI's consent

(Sub-category (a) of the second category of offences)

133. These offences apply to PMIs whose extent of mental impairment is not so severe that they lack the capacity to consent to sexual activity. Although they are capable of giving consent, their "consent" is improperly obtained by perpetrators using exploitative means.

134. This category of offences would cover, by way of example, a situation where a perpetrator (A) is a regular customer of a fast food shop and B is a PMI who is employed by the fast food shop. A knows that B suffers from mental illness from his regular dealing with B. A provides B gifts to induce her to consent to sexual activity (such as letting him sexually touch her, or agreeing to engage in a sexual activity with him). As B is a PMI, she should be protected from sexual exploitation by A using particular exploitative means to obtain her "consent".

How should exploitative means be described?

135. In the English Act, the description of exploitative means is "*an inducement offered or given, a threat made or a deception practised*"⁴⁸ by the perpetrator for the purpose of obtaining the vulnerable person's "consent" to sexual activity.

136. Different terms are used to describe exploitative means in the legislation of some other countries: New Zealand ("*by taking advantage of the impairment*"),⁴⁹ Singapore ("*by means of an inducement offered or given, a threat made or a deception practised by A for that purpose*"),⁵⁰ and New South Wales of Australia ("*taking advantage of that person's cognitive impairment*").⁵¹

⁴⁸ See sections 34(1)(c), 35(1)(a), 36(1)(d) and 37(1)(c) of the English Act.

⁴⁹ New Zealand Crimes Act 1961, section 138.

⁵⁰ Singaporean Penal Code, section 376F.

⁵¹ New South Wales Crimes Act 1900, section 66F(3).

137. We consider that the descriptions in the New Zealand and the New South Wales legislation are too vague. We favour the descriptions in the English and the Singaporean legislation which are similar to each other. They describe in clear terms the three types of means to obtain consent which are considered as exploitative, namely, (i) an inducement offered or given, (ii) a threat made, or (iii) a deception practised.

138. We favour the adoption of the range of English offences given their wider scope of coverage may give greater protection to PMIs.

Actual or constructive knowledge of mental disorder

139. It is an ingredient of the offences in this category that the accused must have actual or constructive knowledge that the victim was a person with a mental disorder.⁵²

140. As the extent of mental impairment of these persons may not be very severe, others may not be able to know from their demeanour that they suffer from mental illness. It would only be fair to the accused that he or she should not be held liable if he or she did not have actual or constructive knowledge that the other party to the sexual activity was mentally ill. We therefore consider that there should be such a requirement.

***Offences addressing exploitation involved in the care of PMIs inside or outside specified institutions
(Sub-category (b) of the second category of offences)***

141. This category of offences covers sexual behaviour of persons who are involved in the care of PMIs. These offences are concerned with a situation where a person, who is engaged in the care of a PMI, engages the latter in some form of sexual activity. The PMI concerned could be receiving care inside or outside a specified institution.

142. A deficiency of the existing legislation in Hong Kong is that it gives inadequate protection to PMIs against sexual exploitation by people involved in their care. The offences in this category would address that deficiency. We therefore favour the adoption of this category of offences.

Situations where a relationship of care exists

143. This category of offences applies when a relationship of care exists and so it is necessary to define situations where such a relationship would exist.

144. We consider that there would be merit in adopting the English legislation in determining situations where a relationship of care exists. The English legislation covers a wide variety of situations in which PMIs are potentially vulnerable to sexual exploitation by persons involved in their care.

⁵² The English Act, sections 34(1)(d), 35(1)(d), 36(1)(f), and 37(1)(d).

145. In our view, a relationship of care should exist in two situations where care is provided to PMIs:

Care of PMIs in specified institutions

146. Firstly, this category of offences should cover PMIs receiving care in specified institutions. These persons should be protected from any form of sexual activity with “*any person employed or not in a specified institution and who has function to perform or providing volunteering service in that specified institution*” (modelling on sections 42(2)(b) and 42(4)(a) of the English Act with modifications). The scope of the offences in this first situation would cover sexual exploitation committed on PMIs by persons who have function to perform in the institutions irrespective of whether they are employees of the institutions or not. These offences also cover sexual exploitation committed by volunteers who provide services at specified institutions. This would prevent perpetrators trying to sexually exploit PMIs under the guise of providing volunteer service. However, mere visitors to a defined institution who have no function to perform in the institution would not be covered.

147. As to the categories of specified institutions to be covered, we consider that it should be determined by the Administration when the new legislation is put in place. The Administration would be in a sound position to decide this in collaboration with relevant stakeholders.

Care of PMIs outside specified institutions

148. Secondly, this category of offences should cover situations where a person (A) is a “*provider of care, assistance or services to B in connection with B’s mental disorder or mental handicap*” (modelling on section 42(4)(a) of the English Act with modifications).

149. This second situation would cover care providers outside specified institutions.

Exception where care provider and PMI are married or in pre-existing relationship

150. An exception to liability may be provided for where the care provider and the PMI are married. Under the exception in section 43(1) of the English Act, a person (A) would not have liability under any of the offences in this category if the PMI (B) is 16 or over; and A and B are married.

151. The Home Office Review Group in the UK pointed out the rationale for the exception as follows:

“One area of potential difficulty is that where care is given by husband or wife within the family or by partners in long-standing relationships. These relationships were sexual long before illness, accident or dementia intervened. In circumstances where individuals retained some capacity to consent it would be wrong and unreasonable to intrude into the private life of such couples. It is important therefore that there should not be an offence where the carer and patient were

*married or in an existing sexual relationship.*⁵³

152. We share the view of the Review Group and consider that there should be such an exception.

153. Under another exception in section 44(1) and (2) of the English Act, a person (A) would not have liability under any of the offences in this category if a lawful sexual relationship existed between A and the PMI (B) immediately before A became involved in B's care (in a way A falls within a relationship of care as defined in section 42).

154. This exception would cover the situation where A and B, who are an unwed couple (such as boyfriend and girlfriend), had a lawful sexual relationship immediately before B developed a mental illness or before B is admitted to the care of A; and A and B continue the sexual relationship. As this exception applies to a lawful sexual relationship, it would apply to a pre-existing consensual sexual relationship between A and B only.

155. We consider that there should be an exception for a sexual relationship which pre-dated the care relationship. Otherwise a person who has previously had a sexual relationship with a PMI might be deterred from taking care of him/her. The offences in this category would apply to PMIs who are capable of consenting to sexual activity. The exception would give effect to their sexual autonomy by allowing a consensual sexual relationship to continue after the PMI has developed mental illness or after the PMI is admitted to the care of the other person.

156. Whilst we consider that there is a case for the exception, we consider that "immediately before A became involved in B's care" may be too restrictive. We consider that the exception should apply where a lawful sexual relationship existed between A and B "within a reasonable period before A became involved in B's care, assistance or services". There is no good reason why a boyfriend and a girlfriend who were in a consensual sexual relationship within a reasonable period before one of them developed mental illness or is admitted to the care of the other should not be allowed to continue that relationship.

The legislation in Canada: exploitation that might arise from abuse of a position of trust or authority, or a relationship of dependency, in respect of a PMI (Sub-category (c) of the second category of offences)

157. There may be cases of exploitation where no "care relationship" exists but where the perpetrator is abusing his/her position of trust or authority or dependency relationship in respect of a PMI. The legislation in Canada provides for an offence to address these cases.

Sexual exploitation of a person with disability

158. In Canada, section 153.1(1) of the Canadian Criminal Code creates an offence of sexual exploitation of a person with mental or physical disability arising

⁵³ Home Office, Setting The Boundaries: Reforming the law on sex offences (July 2000), at paragraph 4.8.17.

from a position of trust or authority, or a relationship of dependency with regard to such person.

Should the Canadian approach also be adopted?

159. The Canadian offence is wider than those offences in the English legislation. It extends to a position of trust or authority, or a relationship of dependency whilst the English legislation covers a care relationship only. The Canadian approach covers, for example, cases in which guardians, teachers or other professionals abuse their position or relationship with PMIs. We consider it desirable that legislation caters for this abuse and therefore propose that the English offences be extended to cover it.

160. The English offences, as extended, would cover exploitation that might arise from (i) care of PMIs inside or outside specified institutions; and (ii) abuse of a position of trust or authority, or a relationship of dependency, in respect of a PMI. The ingredients of (ii) would be: (a) a position of trust or authority, or a relationship of dependency between the perpetrator and PMI; (b) abuse of such a position or relationship by the perpetrator; and (c) the perpetrator's actual or constructive knowledge that the other person is a PMI.

Conclusions with regard to Second Category Offences

161. Having regard to the matters above set out, we favour the adoption of offences in the second category. They strike an appropriate balance between respecting the sexual autonomy of those persons whose extent of mental impairment is not so severe as to prevent their capacity to consent and the need to protect them from sexual exploitation by perpetrators using exploitative means or having imbalanced relationship with them.

Chapter 11: Sexual offences involving persons with mental impairment (“PMIs”) in the new legislation

Introduction

162. In Chapter 10, we considered the approaches that may be adopted for reform of legislation in respect of PMIs.

163. Consistent with that consideration, we propose below a range of new offences involving PMIs. We shall also consider whether in the light of our recommendations some existing offences should be abolished and whether the current definition of mentally incapacitated person should be retained or amended in some way.

(A) Offences addressing exploitation of PMIs by perpetrators using particular means to obtain PMIs' consent:

164. We propose a range of new offences to address potential exploitation of

PMIs by perpetrators using exploitative means to obtain the consent of those PMIs who have some capacity to consent.

165. There are no existing offences to address such exploitation. Nor do the existing offences take into account the sexual autonomy of those PMIs who do have the capacity to consent.

Inducement, threat or deception to procure sexual activity with a person with mental impairment

166. This proposed new offence is modelled on the offence of “inducement, threat or deception to procure sexual activity with a person with a mental disorder” in section 34(1) of the English Sexual Offences Act 2003.

167. The proposed offence would cover a situation where a person touches a PMI sexually and the PMI’s consent is obtained by means of inducement, threat or deception.

Recommendation 23: ***Proposed new offence: Inducement, threat or deception to procure sexual activity with a person with mental impairment***

We recommend that the new legislation should include an offence of inducement, threat or deception to procure sexual activity with a person with mental impairment, along the lines of section 34(1) of the English Sexual Offences Act 2003.

We also recommend that the proposed offence should cover both penetrative and non-penetrative sexual activity.

Causing a person with mental impairment to engage in or agree to engage in sexual activity by inducement, threat or deception

168. This proposed new offence is modelled on the offence of “causing a person with a mental disorder to engage in or agree to engage in sexual activity by inducement, threat or deception” in section 35(1) of the English Sexual Offences Act 2003.

169. The proposed offence would cover a situation where a person causes a PMI to engage in, or to agree to engage in, a sexual activity by means of inducement, threat or deception.

Recommendation 24: ***Proposed new offence: Causing a person with mental impairment to engage in or agree to engage in sexual activity by inducement, threat or deception***

We recommend that the new legislation should include an offence of causing a person with mental impairment to engage in or agree to engage in sexual activity by inducement, threat or deception, along the lines of section 35(1) of the English Sexual Offences Act 2003.

Engaging in sexual activity in the presence, procured by inducement, threat or deception, of a person with mental impairment

170. This proposed new offence is modelled on the offence of “engaging in sexual activity in the presence, procured by inducement, threat or deception, of a person with a mental disorder” in section 36(1) of the English Sexual Offences Act 2003.

171. The proposed offence would cover a situation where a person engages in sexual activity in the presence of a PMI for the purpose of obtaining sexual gratification, humiliating, distressing or alarming the PMI, or any combination of these purposes. In order to constitute the proposed offence, the PMI’s “consent” to his or her presence should be obtained by inducement, threat or deception.

Recommendation 25: ***Proposed new offence: Engaging in sexual activity in the presence, procured by inducement, threat or deception, of a person with mental impairment***

We recommend that the new legislation should include an offence of engaging in sexual activity in the presence, procured by inducement, threat or deception, of a person with mental impairment, along the lines of section 36(1) of the English Sexual Offences Act 2003.

In order to constitute the offence, the accused’s act should be for the purpose of obtaining sexual gratification, humiliating, distressing or alarming the PMI, or any combination of these purposes.

Causing a person with mental impairment to watch a sexual act by inducement, threat or deception

172. This proposed new offence is modelled on the offence of “causing a person with a mental disorder to watch a sexual act by inducement, threat or deception” in section 37(1) of the English Sexual Offences Act 2003.

173. The proposed offence would cover a situation where a person causes a PMI to watch a third person engaging in a sexual activity, or to look at an image of any person engaging in a sexual activity for the purpose of obtaining sexual gratification, humiliating, distressing or alarming the PMI, or any combination of these purposes. In order to constitute the proposed offence, the PMI’s “consent” to watch a third person engaging in a sexual activity, or look at an image of any person engaging in a sexual activity should be obtained by inducement, threat or deception.

Recommendation 26: ***Proposed new offence: Causing a person with mental impairment to watch a sexual act by inducement, threat or deception***

We recommend that the new legislation should include an offence of causing a person with mental impairment to watch a sexual act by

inducement, threat or deception, along the lines of section 37(1) of the English Sexual Offences Act 2003.

In order to constitute the offence, the accused's act should be for the purpose of obtaining sexual gratification, humiliating, distressing or alarming the PMI, or any combination of these purposes.

(B) *Offences addressing exploitation involved in the care of PMIs inside or outside specified institutions, and abuse of a position of trust or authority, or a relationship of dependency, in respect of a PMI:*

Sexual activity with a person with mental impairment (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency

174. This proposed new offence is modelled on the offence of “sexual activity with a person with a mental disorder by care workers” in section 38(1) of the English Sexual Offences Act 2003.

175. The proposed offence would cover a situation where a person, who is involved in the care of a PMI or who abuses a position of trust or authority, or a relationship of dependency, in relation to the PMI, sexually touches or penetrates the PMI.

Recommendation 27: *Proposed new offence: Sexual activity with a person with mental impairment (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency*

We recommend that the new legislation should include an offence of sexual activity with a person with mental impairment (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency.

This proposed offence should cover touching or penetration which is sexual.

Causing or inciting sexual activity of a person with mental impairment (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency

176. This proposed new offence is modelled on the offence of “causing or inciting sexual activity by care workers” in section 39(1) of the English Sexual Offences Act 2003.

177. The proposed offence would cover a situation where a person who is involved in the care of a PMI or who abuses a position of trust or authority, or a relationship of dependency, in relation to the PMI, causes or incites the PMI to engage in a sexual activity.

Recommendation 28: *Proposed new offence: Causing or inciting sexual activity of a person with mental impairment (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency*

We recommend that the new legislation should include an offence of causing or inciting sexual activity of a person with mental impairment (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency.

Sexual activity in the presence of a person with mental impairment (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency

178. This proposed offence is modelled on the offence of “sexual activity in the presence of a person with a mental disorder by care workers” in section 40(1) of the English Sexual Offences Act 2003.

179. The proposed offence would cover a situation where a person who is involved in the care of a PMI or who abuses a position of trust or authority, or a relationship of dependency, in relation to the PMI, engages in sexual activity in the presence of the PMI for the purpose of obtaining sexual gratification, humiliating, distressing or alarming the PMI, or any combination of these purposes.

Recommendation 29: *Proposed new offence: Sexual activity in the presence of a person with mental impairment (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency*

We recommend that the new legislation should include an offence of sexual activity in the presence of a person with mental impairment (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency.

In order to constitute the proposed offence, the accused’s act should be for the purpose of obtaining sexual gratification, humiliating, distressing or alarming the PMI, or any combination of these purposes.

Causing a person with mental impairment to watch a sexual act (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency

180. This proposed offence is modelled on the offence of “causing a person with a mental disorder to watch a sexual act by care workers” in section 41(1) of the English Sexual Offences Act 2003.

181. The proposed offence would cover a situation where a person, who is involved in the care of a PMI or who abuses a position of trust or authority, or a

relationship of dependency, in relation to the PMI, causes the PMI to watch a third person engaging in a sexual activity, or to look at an image of any person engaging in a sexual activity, for the purpose of obtaining sexual gratification, humiliating, distressing or alarming the PMI, or any combination of these purposes.

Recommendation 30: *Proposed new offence: Causing a person with mental impairment to watch a sexual act (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency*

We recommend that the new legislation should include an offence of causing a person with mental impairment to watch a sexual act (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency.

In order to constitute the proposed offence, the accused's act should be for the purpose of obtaining sexual gratification, humiliating, distressing or alarming the PMI, or any combination of these purposes.

Situations where a relationship of care exists

Recommendation 31: *Proposed definition of situations where a relationship of care exists*

We recommend that a relationship of care should exist if a person (A) who is involved in the care of a person with mental impairment (B) in any one of two situations:

firstly, A is any person employed or not in a specified institution and who has a function to perform or provides volunteering service in that defined institution.

secondly, A is a provider of care, assistance or services to B in connection with B's mental illness.

We further recommend that the meaning of specified institutions should be determined by the Administration when the new legislation is put in place.

Exceptions to liability

Recommendation 32: *Exceptions where care provider and person with mental impairment are married or in pre-existing relationship*

We recommend that in respect of the proposed new offences covering situations where a relationship of care exists, there should be exceptions to liability (i) where the person with mental impairment and the person who is involved in his or her care are married; or (ii) where there is a lawful sexual relationship between them which pre-dated the care relationship.

We further recommend that the exception in respect of pre-existing sexual relationship should apply where a lawful sexual relationship existed between the parties *within a reasonable period* before a party became involved in the care, assistance or services of a person with mental impairment.

Knowledge of mental illness

Recommendation 33: *Requirement as to knowledge of mental illness*

We recommend that it should be a requirement of the proposed new offences involving persons with mental impairment that the accused had actual or constructive knowledge that the victim was a person with mental impairment.

Recommendation 34: *Evidential burden as regards the accused's knowledge of the victim's mental illness*

We recommend that in respect of the proposed new offences involving persons with mental impairment covering situations where a relationship of care exists and those involving abuse of a position of trust or authority, or a relationship of dependency, there should be a provision imposing an evidential burden on an accused as regards the accused's knowledge of the victim's mental illness, along the lines of sections 38(2), 39(2), 40(2) and 41(2) of the English Sexual Offences Act 2003.

Definition of a Mentally Incapacitated Person ("MIP")

182. Section 117(1) of the Crimes Ordinance defines a Mentally Incapacitated Person (MIP) for the purposes of the sexual offences (in Part XII of the Crimes Ordinance).

183. Section 117(1) provides that a MIP means:

"a mentally disordered person or a mentally handicapped person (within the meaning of the Mental Health Ordinance (Cap 136)) whose mental disorder or mental handicap, as the case may be, is of such a nature or degree that that person is incapable of living an independent life or guarding himself against serious exploitation, or will be so incapable when of an age to do so."

184. The above definition of an MIP thus has two limbs:

- (i) a mentally disordered person or a mentally handicapped person as defined in the Mental Health Ordinance (Cap 136); and
- (ii) incapability of living an independent life or guarding himself against serious exploitation, or will be so incapable when of an age to do so.

Conferring protection on those with relatively significant mental impairment only

185. As the second limb of the current definition of an MIP requires that a mentally disordered or handicapped person be "*incapable of living an independent life or guarding himself against serious exploitation, or will be so incapable when of an age to do so*", it applies only to a person with relatively significant mental impairment only.

186. The current definition of an MIP is unsatisfactory in that if the victim cannot satisfy the high requirements of the second limb, he or she cannot be classified as an MIP and would not be afforded adequate protection against exploitation. As our proposed new offences seek to strike a proper balance between respecting the sexual autonomy of those persons whose extent of mental impairment is not so severe as to prevent their capacity to consent and the need to protect them from sexual exploitation, we propose that the second limb should be removed from the definition of a PMI in the new legislation. With our proposal, the new proposed offences involving persons with mental impairment would apply to any mentally disordered person or mentally handicapped person.

Recommendation 35: ***Proposed new offences involving persons with mental impairment applicable to mentally disordered persons or mentally handicapped persons***

We recommend that the proposed new offences involving persons with mental impairment should apply to mentally disordered persons or mentally handicapped persons (as defined in the Mental Health Ordinance).

Should the existing term "mentally incapacitated person" continue to be used to describe a person with mental impairment?

187. The main drawback of the existing term MIP is that it refers to a person who is "incapacitated" mentally. That is to say, literally speaking it refers to a person of such significant mental impairment that he or she has no mental capacity at all. That is also the meaning conveyed by the term MIP in Chinese (精神上無行為能力的人). However, our proposed new offences in this chapter would apply to those people with some mental impairment but who are capable of consenting to sexual activity. If the existing term continues to be used in the new legislation but without reference to the "incapability" limb, it may be confusing to the public. Furthermore, the term MIP seems to be outdated and not used in similar legislation overseas.

188. Our view is that a new term should be used; however it is perhaps best left to the draftsman to decide what term should be used in the new legislation. The draftsman would be in a better position than us to decide on the choice of appropriate terminology.

Recommendation 36: ***Draftsman to decide what term to describe the person with mental impairment***

We recommend that the issue as to what term to be used to describe the

person with mental impairment in the new legislation should be left to the draftsman to decide.

Review of some existing offences involving of persons with mental impairment

A man committing buggery with a mentally incapacitated person, a man committing gross indecency with a male mentally incapacitated person, a man having intercourse with a woman mentally incapacitated person

189. The offences of a man committing buggery with an MIP and a man having intercourse with a woman MIP are gender-specific. The offence of a man committing gross indecency with a male MIP is gender-specific and based on sexual orientation. These offences are inconsistent with the principles of gender neutrality and/or avoidance of distinctions based on sexual orientation and should therefore be removed. The conduct covered by these offences would be included in the general non-consensual sexual offences recommended in our previous consultation paper and/or the above proposed offences involving PMIs which are gender-neutral.

Recommendation 37: *A man committing buggery with a mentally incapacitated person, a man committing gross indecency with a male mentally incapacitated person, a man having intercourse with a woman mentally incapacitated person be abolished*

We recommend that the offences of a man committing buggery with a mentally incapacitated person (section 118E of Crimes Ordinance), a man committing gross indecency with a male mentally incapacitated person (section 118I of Crimes Ordinance), a man having intercourse with a woman mentally incapacitated person (section 125 of Crimes Ordinance) should be abolished upon the enactment of the new legislation.

Abduction of a mentally incapacitated person from her or his parent or guardian for a sexual act

190. A similar offence (in section 21 of Sexual Offences Act 1956) was repealed in England and Wales in 2003.⁵⁴

191. We are not aware of any case that has come before the court, at least in the past few decades, which involves a charge for this offence. There appears to be no practical reason for retaining it. The removal of this offence from the statute book would not derogate from the protection of PMIs given our proposals for a whole new range of offences involving PMIs.

Recommendation 38: *Abduction of a mentally incapacitated person from her or his parent or guardian for a sexual act be abolished*

We recommend that the offence of abduction of a mentally incapacitated

⁵⁴ See Sexual Offences Act 2003, Schedule 7.

person from her or his parent or guardian for a sexual act (section 128 of the Crimes Ordinance) should be abolished upon the enactment of the new legislation.

Sexual intercourse with patients (section 65(2) of the Mental Health Ordinance (Cap 136))

192. This offence covers the situation where any male officer or employee of mental hospital, Correctional Services Department Psychiatric Centre has unlawful sexual intercourse with a woman detained there, or a male officer or employee of a mental or general hospital has unlawful sexual intercourse with a woman receiving treatment for a mental disorder. This offence can be criticised for being gender-specific and covering penetrative sexual activity only.

Recommendation 39: *Sexual intercourse with patients be abolished*

We recommend that the offence of sexual intercourse with patients in section 65(2) of the Mental Health Ordinance (Cap 136) should be abolished upon the enactment of the new legislation.

Chapter 12: Consideration of approaches that may be adopted for reform of sexual offences involving abuse of a position of trust

Introduction

193. The Sub-committee have already recommended in Chapter 7 a range of offences for the protection of children under 16. These offences protect children below the age of consent. A further issue relates to the protection of young persons aged 16 or above but under 18 (that is to say, 16 and 17 year-olds). These young persons are above the age of consent but are not yet adults. As they are above the age of consent, they are not protected.

194. Several overseas countries have introduced legislation for the protection of 16 and 17 year-olds arising out of positions of trust. In these countries, two different approaches are adopted.

First approach - positions of trust defined by an exhaustive list

195. This approach is exemplified by the legislation of New South Wales (Australia), England and Wales, and Scotland. Under this approach, the relationships giving rise to a position of trust are specified in the legislation by an exhaustive list.

Second approach - positions of trust position not defined

196. In Canada, section 153(1) of the Canadian Criminal Code creates an offence of sexual exploitation. It covers sexual exploitation of a young person by a person who is (i) in a position of trust or authority towards a young person, (ii) a person with whom the young person is in a relationship of dependency or (iii) in a relationship with a young person that is exploitative of the young person.

197. Neither the position of trust or authority, nor the relationship of dependency is defined in the Canadian legislation. The Supreme Court of Canada held in *R v Aude*⁵⁵ that in the absence of a statutory definition, these terms should be interpreted in accordance with their ordinary meaning.

Arguments in favour of legislation for the protection of 16 and 17 year-olds⁵⁶

- *The protective principle*⁵⁷
- *Good practice and professional codes do not provide adequate protection*
- *The consent given by the young person may not be regarded as genuine*
- *Overseas jurisdictions have legislation*
- *Legislation does not exclude all sexual activity*

Arguments against legislation for the protection of 16 and 17 year-olds⁵⁸

- *Genuine relationship should be recognised*
- *16 and 17-year olds are mature enough to choose*

Our views on the issue

198. There are arguments for and against the enacting of legislation for the protection of young persons aged 16 or above but under 18 and there are bound to be divergent views on the issue. There were in fact divergent views during the Sub-committee's deliberations on this issue. Given this, we take the view that the issue should be the subject of public consultation.

Recommendation 40: *Whether there should be legislation for the protection of young persons aged 16 or above but under 18 be considered by the Hong Kong community*

We are of the view that the issue as to whether there should be legislation for the protection of young persons aged 16 or above but under 18 should be considered by the Hong Kong community. Accordingly, we invite the community to express their views on the issue.

Considerations in the event the community indicate that they are in favour of legislation

199. If the views of the community (yet to be ascertained during consultation) indicate that it is in favour of legislation, consideration will then have to be given to the extent of means to be given.⁵⁹

⁵⁵ The Supreme Court of Canada in *R v Aude* [1996] 2 S.C.R.171 interpreted the meaning of these terms in relation to the offence of sexual exploitation of a young person in section 153.1 of the Canadian Criminal Code.

⁵⁶ See paras 12.21 to 12.27 of consultation paper.

⁵⁷ The United Nations Convention on the Rights of the Child (Article 1) provides that a child is a person below 18 years of age, unless under the law applicable, the age of majority is lower. Therefore, a young person aged 16 or above but under 18 is a child under that definition.

⁵⁸ See paras 12.28 to 12.29 of consultation paper.

⁵⁹ These considerations are discussed at paras 12.31 to 12.49 of consultation paper.

Extraterritorial effect of offences involving children and persons with mental impairment

200. We consider that in order to ensure that the new legislation is effective in covering paedophiles who travel abroad to commit offences involving children, we should follow the English approach in providing for extraterritorial effect of the new offences involving children, including sexual grooming proposed by us in this paper.

201 Furthermore, we consider that the proposed new offences involving persons with mental impairment should also have extraterritorial effect. Persons with mental impairment should enjoy the same protection as children against perpetrators who travel abroad to commit sexual offences on these persons.

Recommendation 41: *Proposed new offences involving children (including sexual grooming) and those involving persons with mental impairment to have extraterritorial effect*

We recommend that the proposed new offences involving children including sexual grooming and the proposed new offences involving persons with mental impairment should have extraterritorial effect.

Review of Sexual Offences Sub-committee
The Law Reform Commission of Hong Kong
November 2016

Annex

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

The English Sexual Offences 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>