

Submission to LegCo Panel on Administration of Justice and Legal Services

on Law Reform Commission's Consultation Paper

on Sexual Offences Involving Children and Persons with Mental Impairment

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1. In considering this law reform proposal, Law Reform Commission (LRC) should not rely only on Basic Law, ICCPR and BORO as guiding principles.¹ **Other core human rights conventions** as applied to Hong Kong, in particular, the United Nations (UN) Convention on the Right of the Child (**CRC**) and the Convention on the Rights of Persons with Disabilities (**CRPD**) **should be the guiding principles** of this **law reform**. These Conventions with other instruments and guidelines that should be taken into account are set out in annex.

2. I **opposed the Recommendations no. 5 & 8** as they may violate rights of the child. In General Comment No. 20 on the implementation of the rights of the child during adolescence dated 6 December 2016, the UN Committee on the Rights of the Child states, “[s]tates parties should take into account the need to balance protection and evolving capacities, and define an acceptable

¹ LRC Consultation Paper on Sexual Offences Involving Children and Persons with Mental Impairment, Nov 2016, Paragraph 10.8

minimum age when determining the legal age for sexual consent. **States should avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity.**”

(CRC/C/GC/20, Para 40)

3. At present, case law of indecent assault rendered grooming an aggravating factor of sentence.² I do not support Recommendation no. 22 as grooming (as a preventative measure) together with other preliminary offences (such as causing and inciting in Recommendation no. 12) will criminalize too many acts that are too remote from the harmful act. Alternatively, the law should clearly stipulate that no preliminary offences in respect of grooming. Hence, causing or inciting grooming should not be criminalized.

4. **All recommendations regarding mental impairment should be reconsidered** by your LRC as they **may not fully comply with CRPD.**

5. First, in the definition of disability by CRPD, UN emphasized its social aspect whereas Hong Kong model takes a medical approach. Article 1 of CRPD states, “[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may **hinder their full and effective participation in society on an equal basis**

² *HKSAR v Ipp Tin Fan* [2016]4 HKLRD 486, CACC 9/2016, 27 July 2016, paragraphs 32-34

with others.” In article 3, it states that the principles of CRPD includes, “(1) Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons; (2) Non-discrimination; (3) Full and effective participation and inclusion in society”. I am afraid that the impact of implementing the law reform proposals may undermine the rights of the persons with disabilities in respect of the above principles.

6. In the General comment No. 1 (2014) Article 12: Equal recognition before the law by UN Committee on the Rights of Persons with Disabilities, it states “[t]he right to equal recognition before the law implies that legal capacity is a universal attribute inherent in all persons by virtue of their humanity and must be upheld for persons with disabilities on an equal basis with others. Legal capacity is indispensable for the exercise of civil, political, economic, social and cultural rights...The **denial of legal capacity** to persons with disabilities has, in many cases, led to their being **deprived** of many fundamental rights, including...the **right to give consent for intimate relationships**”.

(CRPD/C/GC/1, 19 May 2014, paragraph 8)

7. In the above General comment no. 1, it also states, “[t]he Committee reaffirms that a person’s status as a person with a disability or the existence of an impairment (including a physical or sensory impairment) must never be grounds for denying legal capacity or any of the rights provided for in article 12. All practices that in purpose or effect violate article 12 must be abolished in order to

ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.”

(paragraph 9)

8. In paragraph 14 of the above General comment no. 1, it states “[m]ental capacity is not, as is commonly presented, an objective, scientific and naturally occurring phenomenon. Mental capacity is contingent on social and political contexts, as are the disciplines, professions and practices which play a dominant role in assessing mental capacity.”

9. In paragraph 25 of the above General comment no. 1, it states, “[i]n order to fully recognize “universal legal capacity”, whereby all persons, regardless of disability or decision-making skills, inherently possess legal capacity, States parties must abolish denials of legal capacity that are discriminatory on the basis of disability in purpose or effect.”

10. When reconsidering the law reform proposals, LRC should **invite human rights experts**, especially child rights and rights of the persons with disabilities to join the LRC Sub Committee and then **make proposals for a second round public consultation**.

11. LRC should **speed up their work** and the Government **should provide adequate resources to LRC in conducting study and consultation** of the law reform. LRC should consult the public, in particular

children (in adolescent-friendly version) and persons with disabilities (in disabled persons-friendly versions) proactively. In the Concluding observations on the reports of China, the UN Committee on the Elimination of Discrimination against Women states that “The Committee notes that the Law Reform Commission in Hong Kong, China, has made proposals for the reform of legislation that governs sexual offences, including the definition of rape, which is currently restricted to penile penetration. The Committee is, however, concerned that Hong Kong, China, has not yet produced any proposals concerning sexual offences against children and persons with intellectual disabilities to adopt the reform proposals made by the Commission.” (CEDAW/C/CHN/CO/7-8, 14 Nov 2014, paragraph 54)

12. In the above Concluding observations, it states in paragraph 55, “[t]he Committee urges the State party to expedite the consideration of the reform proposals made by the Law Reform Commission and to adopt a clear and specific time frame within which to revise the legislation on sexual offences, including those against children and persons with intellectual disabilities, and the definition of rape so that it is in line with international standards. In this context, **Hong Kong, China, should allocate adequate resources to ensure the effective combat of all forms of violence against women,** including domestic violence by, inter alia, providing adequate shelters and enforcing protection orders.” The Government should provide adequate resources to LRC to conduct thorough and in-depth research as well as genuine and comprehensive consultation in respect of law reform.

Annex: The following references should be taken into account in the law reform on sexual offences involving children and persons with mental impairment

1965	ICERD: International Convention on the Elimination of All Forms of Racial Discrimination
1966	ICESCR: International Covenant on Economic, Social and Cultural Rights
1979	CEDAW: Convention on the Elimination of all forms of Discrimination against Women
1989	CRC: Convention on the Right of the Child
2006	CRPD : Convention on the Rights of Persons with Disabilities ()
2006	UN Secretary-General’s Study on Violence against Children (accompanying Pinheiro, World Report on Violence against Children)
2007	Council of Europe <i>Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse</i> (“the Lanzarote Convention”)
2010	Human Rights Council (HRC) Resolution A/HRC/13/L.21 on the Rights of the Child: The Fight Against Sexual Violence.
2011	UN Committee on the Rights of the Child General Comment No. 13 on the Right of the Child to Freedom from All Forms of Violence
2011	European Union (EU) Directive 2011/93 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography
2014	UN Committee on the Rights of Persons with Disabilities General comment No. 1 on Article 12: Equal recognition before the law
2016	Interagency Working Group, Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse

By email to panel_ajls@legco.gov.hk on 21st April 2017