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Panel on Administration of Justice and Legal Services

Meeting on 22 June 2020

**Background brief on the Law Reform Commission of Hong Kong's Report
on Review of Substantive Sexual Offences**

Purpose

This paper provides background information relating to the report of the Law Reform Commission of Hong Kong ("LRC") on "Review of Substantive Sexual Offences" ("the Report") published on 5 December 2019. It also summarizes the views and concerns expressed by members of the Panel on Administration of Justice and Legal Services ("the Panel") at its previous meetings on the substantive sexual offences covered in the Report.

Background

Review of Sexual Offences Sub-committee of the Law Reform Commission

2. In April 2006, the Review of Sexual Offences Sub-committee of LRC ("the Sub-committee") was appointed to review the law relating to sexual and related offences in Hong Kong (including a study on the desirability of setting up a register of sex offenders)¹. The overall review of substantive sexual offences ("the overall review") is the major part of the Sub-committee's study under its terms of reference.

¹ The terms of reference of the Review of Sexual Offences Sub-committee are: "To review the common and statute law governing sexual and related offences under Part XII of the Crimes Ordinance (Cap 200) and the common and statute law governing incest under Part VI of the Ordinance, including the sentences applicable to those offences, to consider whether a scheme for the registration of offenders convicted of such offences should be established, and to recommend such changes in the law as may be appropriate"

3. According to LRC, there is a wide range of sexual offences in Part XII of the Cap. 200) including rape, buggery, gross indecency, bestiality, indecent assault, abduction, incest and other unlawful sexual acts set out in sections 118 to 128 of Cap. 200. Many of these are based on similar provisions in English legislation dating back to 1956, the corresponding offences of which had been replaced in 2003 following a major overhaul of the law relating to sexual offences in England and Wales. The original offences, however, still remain on Hong Kong's statute book. According to LRC, some of the existing provisions in Cap. 200 dealing with sexual offences have been criticized as discriminatory, inconsistent and inadequate.

4. Having adopted the classification of sexual offences which was based on that adopted by the Scottish Law Commission, the Sub-committee had broken down its review into four discrete parts, namely:

- (a) Offences based on sexual autonomy (i.e., rape and other non-consensual sexual offences);
- (b) Offences based on the protective principle (i.e., sexual offences involving children and persons with mental impairment and sexual offences involving abuse of a position of trust);
- (c) miscellaneous sexual offences; and
- (d) sentencing.

5. The Sub-committee issued three consultation papers in September 2012, November 2016 and May 2018 respectively on the first three parts of its review as mentioned above ("the three consultation papers"), namely, Consultation Paper on Rape and Other Non-consensual Sexual Offences ("the First CP"), Consultation Paper on Sexual Offences involving Children and Persons with Mental Impairment ("the Second CP") and Consultation Paper on Miscellaneous Sexual Offences ("the Third CP"). According to LRC, the fourth part of its review on sentencing (namely, review of the Sexual Conviction Record Check Scheme, and other new sentencing orders for managing sex offenders etc.) was severed from the overall review in light of the demands from the community for expediting the work on the overall review. The consultation paper on sentencing and related matters would be published in due course.

The Report

6. The Sub-committee had made a total of 71 preliminary recommendations in the three consultation papers and received responses from members of the public. According to LRC, the Report discusses the responses received to the three consultation papers and sets out LRC's analysis and final recommendations on Review of Substantive Sexual Offences ("Final

Recommendations"). In light of the overwhelming support received from the respondents, LRC could confirm most of the Sub-committee's preliminary recommendations as the Final Recommendations, while it had re-shaped a number of the preliminary recommendations after considering the views and information provided by some of the respondents.²

7. According to LRC, the major recommendations in the Report include the creation of a range of non-consensual sexual offences such as a new offence of sexual penetration without consent, a uniform age of consent of 16 years old in Hong Kong, the creation of a range of new sexual offences involving children and persons with mental impairment which are gender neutral, and the reform of a series of miscellaneous sexual offences such as incest, exposure, bestiality, necrophilia and homosexual-related buggery and gross indecency offences.³ A summary of the Final Recommendations are set out in Chapter 5 of the Report.

Major views and concerns of members

8. Since 2012, the Panel had held six meetings at which the three consultation papers were discussed (including three meetings at which deputations were invited for their views). A list of the meetings and the consultation papers considered are in **Appendix**. The major views and concerns of members are summarized in the ensuing paragraphs.

Consultation on Rape and Other Non-consensual Sexual Offences

9. The First CP was considered at the Panel meetings on 14 December 2012 8 January 2013, with deputations invited to attend the meeting on 8 January 2013 to give their views.

The offence of rape

10. At the Panel meeting on 14 December 2012, some members raised the concern that the proposed reform of the law governing sexual offences was overly severe, as more criminal acts would be classified as rape. They quoted as the example that, with the creation of a new offence of sexual assault which

² In addition, the Law Reform Commission published the "Report on Voyeurism and non-consensual upskirt-photography" ("the Report on Voyeurism") in April 2019 to provide LRC's final recommendation for a new and specific offence of voyeurism to deal with an act of non-consensual observation or visual recording of another person for a sexual purpose; and a new and specific offence in respect of non-consensual upskirt-photography.

³ Accessed from the website of the Law Reform Commission on 15 June 2020
https://www.hkreform.gov.hk/en/publications/rsubstantive_sexual_offences.htm

shifted the focus from "indecent" to "sexual", a person who deceived another person to have sexual intercourse for healing that person's sickness would be charged for rape which carried a life sentence.

11. The Sub-committee explained that the proposed reform of the law on sexual offences was guided by a set of guiding principles and would not change the common law approach on the determination of rape. By way of illustration, the Sub-committee pointed out that a doctor who used medical examination to have a sexual intercourse with a patient would be charged with rape. On the other hand, if a person, by false pretence, engaged another person to have a sexual intercourse to improve that person's health would be charged for the offence of procurement of an unlawful sexual act by false pretence under section 120 of Cap. 200.

Definition of consent

12. At the Panel meeting on 8 January 2013, some members considered that the proposed definition of consent in the First CP was unclear, and should be modified to set out particular circumstances in which there was no free agreement by the complainant to sexual activity. Some members considered that public education on the definition of consent was of great importance. The Sub-committee responded that LRC considered the proposed definition of consent, i.e. free and voluntary agreement to sexual activity which was based on overseas legislation was sufficiently clear, and cautioned whether the adoption of rebuttable evidential presumptions on the determination of consent proposed by some deputations was desirable as it could compromise the protection for the victims by imposing a higher threshold for conviction.

13. Some members noted that the existing sexual offences had been criticized for being gender specific, based on the sexual orientation of the parties, and might not adequately reflect the range of non-consensual conduct which should be subject to criminal sanction. They shared the views of the two legal professional bodies that clarity and precision in the drafting of the definition and scope of every sexual offence in the new legislation was essential, in order to achieve the desired effect.

Consultation paper on Sexual Offences Involving Children and Persons with Mental Impairment

14. The Second CP was considered at the Panel meetings on 27 February and 8 May 2017, with deputations invited to attend the meeting on 8 May to give their views.

Criminalization of consensual sexual activity between persons who were between 13 and 16 years of age

15. On whether consensual activity between persons who were between the age of 13 and 16 should be criminalized, some members considered that a more liberal approach should be taken for consensual sexual activities, especially those took place in puppy love situations, and these situations should be clearly distinguished from cases of sexual grooming and/or sexual exploitation. Some members expressed that any proposal which would result in the keeping of criminal records for young persons who engaged in consensual activities should be carefully considered.

16. Some members asked whether the method of dealing with children or young persons charged with sexual offence would be left to the discretion of the judge/magistrate, including the decision of whether a criminal record would be kept. The Sub-committee had clarified that consensual sexual activities between persons who were between the age of 13 and 16 years of age, if charged, would still be under the purview of criminal offence. Nevertheless, those cases normally would not be brought to the court unless they involved special circumstance, such as, sexual exploitation.

17. Members noted with concern that if two persons between 13 and 16 years of age were found to have sexual activity, the boy would be prosecuted and even if ultimately he was given probation, he would still have a criminal record. The girl, on the other hand, would likely to be only placed on a care and protection order. The Sub-committee had clarified that the "differential treatment" to boys and girls was not due to prosecution policy but the position of the current legislation. It pointed out that under the current legislation, a man who had unlawful sexual intercourse with a girl under the age of 16 shall be guilty of an offence but no relevant provision was applicable to a male victim. The Sub-committee hoped that all the offences which were inconsistent with the principles of gender neutrality would be reviewed and abolished as appropriate in the review.

Reform of legislation in respect of mentally incapacitated persons / persons with mental impairment

18. Noting that the definition of a mentally incapacitated person ("MIP") was discussed in the Second CP and that, in the context of the current reform that the proposed offences involving persons with mental impairment ("PMI") would apply to any mentally disordered persons or mentally handicapped persons, some members expressed that the distinction between persons with mental disorders/diseases and mentally handicapped persons had to be made.

19. Some members noted that there might be the situation where a genuine relationship had developed between an adult and an MIP, they expressed concern whether consensual sexual activity taking place in this situation should attract criminal liability. The Sub-committee was invited to look into the situation where the relationship between a person in the care of a PMI (including a carer and/or volunteer in a specified institution) and the PMI had the full support and endorsement by his/her parents, and to give consideration to respecting the sexual autonomy of PMI, especially those who were capable of consenting to sexual activities.

20. The Sub-committee noted that some members had suggested the defence relating to "parental consent" which it had not considered before. It also clarified that the current reform aimed at distinguishing two categories of offences, firstly, offences reflecting an absolute bar to sexual activity with certain types of PMIs (basically those who were unable to consent) and secondly, offences reflecting the potential exploitation of PMIs. The new offences were proposed to address the second category with a view to striking a proper balance between respecting the sexual autonomy of those persons whose extent of mental impairment was not so severe that they lacked the capacity to consent, and the need to protect them from sexual exploitation.

The age of consent and gender issues

21. Whilst agreeing to the recommendation which proposed a uniform age of consent of 16 years in Hong Kong, irrespective of gender and sexual orientation, and the recommendation which proposed that offences involving children and young persons should be gender-neutral, some members considered that the Administration should also take this opportunity to abolish any offences which reflected unequal treatment between heterosexual and homosexual offenders.

22. The Sub-committee responded that elimination of discrimination on the basis of sexual orientation was the direction of the current reform on sexual offences and that one of the areas of reform under both of the First CP and the Second CP was to get rid of separate sets of offences based on the sexual orientation of the offenders.

Proposed new offence: sexual grooming

23. Some members expressed concern that there might be situations where an offender might groom a child, where the act of grooming was commonly carried out on the Internet, with a view to engaging in conduct which constituted a sexual crime against the child. The Sub-committee responded that the proposed new offence of sexual grooming would allow early action to be taken by the Police to investigate into suggested cases of abuse of children and

get an early chance of charging people of attempted offences before the sexual offences took place.

24. Whilst understanding the legislative intent of the proposed new offence of sexual grooming under the recommendation as a preventive measure to enhance protection of children against exploitation, some members expressed concern that it might criminalize acts which were too remote from harmful act or even induce the offence of blackmail. The Sub-committee responded that the chance was slim since, in order to substantiate the abovementioned new offence, the proof as to both "meeting twice or above" and "the intention of meeting the child with a view to having sexual act" had to be shown.

Consultation paper on miscellaneous sexual offences

25. The Third CP was considered at the Panel meetings on 25 June and 18 July 2018, with deputations invited to give their views at the meeting on 18 July.

Incest

26. Whilst noting the diverse views expressed by deputations on whether the offence of incest should be retained, some members considered that a significant number of the community members were opposed to the idea of sexual intercourse between persons who were direct blood relatives, and they took the view that specific offence of incest should be retained.

27. The Sub-committee explained that while it was legally permissible in general for anyone aged 16 or above to have sexual activity with each other provided that it was consensual, the long-standing offence of incest did impose restrictions on sexual activity (albeit consensual) between parties who were over the age of consent if they were within certain specified familial relationships.

28. A member considered that the offence of incest should not just apply to the sexual activity of vaginal intercourse, but to all forms of penile penetration and other forms of penetration or sexual activity which might also represent serious sexual interferences with the victims.

29. Members noted that it was one of the preliminary recommendations in the Third CP that the offence of incest should not be extended to cover step-parents/foster-parents, while public views would be gauged on whether it should cover adoptive parents and members had different views on that. Noting the experience in the UK, some members suggested that the offence of incest should be extended to cover adoptive parents, step-parents and foster-

parents in order to better protect adoptive siblings, step-children and foster-children. Some other members, however, expressed reservation on extending the new offence of incest to cover adoptive parents. They considered that, if the adoptive parent and child were consenting adults, sexual acts between them should not constitute an offence.

30. The Sub-committee advised that as children were already protected under Cap. 200 at present, and the proposed offences recommended in the previous consultation paper on sexual offences involving children and persons with mental impairment would cover underage children, it was of the view that there was no need to extend the offence of incest to cover step-parents and foster-parents given that they had no blood relation with the step-child/foster-child. As regards adoptive parents, the Subcommittee did not see any justification for a distinction to be drawn between adoptive parents and natural parents since some children who were adopted at a very young age might not know that their adoptive parents were not their natural parents. It also noted that adoptive parents had the same rights and obligations as natural parents.

Review of some existing homosexual or homosexual-related buggery and gross indecency offences

31. Some members had asked about the rationale behind the Subcommittee's proposed abolition of some of the existing homosexual or homosexual-related offences, namely, assault with intent to commit buggery (section 118B of Cap. 200), procuring others to commit homosexual buggery (section 118G of Cap. 200), gross indecency by man with man otherwise than in private (section 118J of Cap. 200) and procuring gross indecency by man with man (section 118K of Cap. 200).

32. In response, the Sub-committee advised that it had adopted gender neutrality and avoidance of distinctions based on sexual orientation in conducting its work, and these principles should lead to the removal of the above homosexual or homosexual-related offences from the statute books.

33. Whilst indicating support for the recommendation, some members considered that the Subcommittee should explain in more detail to the public its relevant work as they envisaged that the issue would generate much controversy. Some members supported it in principle on the condition that the institution of marriage would not be undermined in anyway.

Acts done with intention to commit a sexual offence

34. Some members expressed support for the proposed creation of a new offence of administering a substance for sexual purposes to replace the existing

offence of administering drugs to obtain or facilitate an unlawful sexual act. They considered that it would better protect people against sexual abuse and give recognition to their sexual autonomy.

Latest position

35. LRC will brief the Panel on the Report on Review of Substantive Sexual Offences at the Panel meeting to be held on 22 June 2020.

Relevant papers

36. A list of relevant papers is in the **Appendix**.

Council Business Division 4
Legislative Council Secretariat
18 June 2020

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List of relevant papers

Meeting	Date	Item
Panel on Administration of Justice and Legal Services	18.7.2018 (Item V)	Minutes (LC Paper No. CB(4)446/18-19) https://www.legco.gov.hk/yr17-18/english/panels/ajls/minutes/ajls20180718.pdf
	25.6.2018 (Item V)	Minutes (LC Paper No. CB(4)319/18-19) https://www.legco.gov.hk/yr17-18/english/panels/ajls/minutes/ajls20180625.pdf Consultation paper on Miscellaneous Sexual Offences (May 2018) https://www.hkreform.gov.hk/en/publications/miscsexoff.htm
	8.5.2017 (Item I)	Minutes (LC Paper No. CB(4)1514/16-17) https://www.legco.gov.hk/yr16-17/english/panels/ajls/minutes/ajls20170508.pdf
	27.2.2017 (Item IV)	Minutes (LC Paper No. CB(4)1513/16-17) https://www.legco.gov.hk/yr16-17/english/panels/ajls/minutes/ajls20170227.pdf Consultation on Sexual Offences Involving Children and Persons with Mental Impairment (November 2016) https://www.hkreform.gov.hk/en/publications/sexoffchild.htm

Meeting	Date	Item
	10.7.2013	LC Paper No. CB(4)860/12-13 Report of the Panel on Administration of Justice and Legal Services to the Legislative Council on 10 July 2013
	8.1.2013 (Item I)	Minutes (LC Paper No. CB(4)22/13-14) https://www.legco.gov.hk/yr12-13/english/panels/ajls/minutes/aj20130108.pdf Consultation paper on Rape and Other Non-consensual Sexual Offences (September 2012) https://www.hkreform.gov.hk/en/publications/rape.htm
	14.12.2012 (Item III)	Minutes (LC Paper No. CB(4)603/12-13) https://www.legco.gov.hk/yr12-13/english/panels/ajls/minutes/aj20121214.pdf

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