

The Law Reform Commission of Hong Kong

Report

The common law presumption that a boy under 14 is incapable of sexual intercourse

Executive Summary

Introduction

1. This report considers the existing common law presumption in Hong Kong that a boy under 14 years of age is incapable of sexual intercourse. The report is part of the Law Reform Commission's overall review of the law governing sexual offences under the following terms of reference given to the Commission by the Secretary for Justice and the Chief Justice in 2006:

"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."

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

Mr Peter Duncan, SC (Chairman)	Senior Counsel
Hon Mrs Justice Barnes	Judge of the Court of First Instance of the High Court
Mr Eric T M Cheung	Assistant Professor Department of Professional Legal Education University of Hong Kong
Dr Chu Yiu Kong [Until December 2007]	Assistant Professor Department of Sociology University of Hong Kong
Mr Paul Harris, SC	Senior Counsel

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

3. The terms of reference cover a wide range of issues and it was apparent from the outset that completion of the entire review would take considerable time. It was therefore decided that the project should be dealt with in stages, with separate reports issued on discrete aspects of the project's terms of reference. The first report in the series (*Sexual Offences Records Checks for Child-Related Work: Interim Proposals*, published in February 2010) considered the question of establishing a system of sexual conviction records checks for those engaged in child-related work. The present report is the second in the series.

The existing common law presumption and its consequences

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

5. The presumption cannot be rebutted even where there is clear evidence that the boy was physically capable of sexual intercourse at the time of the alleged offence, and had in fact had unlawful sexual intercourse with a non-consenting victim. The result is that, regardless of the circumstances, a boy under 14 years of age cannot be convicted of rape, though he can be convicted of aiding and abetting another to commit rape, or of indecent assault.²

6. In Hong Kong, section 118(3) of the Crimes Ordinance (Cap 200) provides that a man commits rape if he has unlawful sexual intercourse with a woman without her consent. Section 65E of the Criminal Procedure Ordinance (Cap 221) provides that:

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

Even the slightest penetration will be sufficient to prove intercourse,³ but that does not affect the operation of the common law presumption: the law regards a boy under 14 as incapable of sexual intercourse, regardless of the actual circumstances.

The law in other jurisdictions

7. The common law presumption has been abolished in a number of other jurisdictions, including England and Wales (by section 1 of the Sexual Offences Act 1993), Canada, New Zealand, South Africa and the Australian jurisdictions of the Australian Capital Territory, New South Wales, South Australia and Victoria. The presumption has never applied in Scotland and applies in Tasmania only in respect of a boy under 7.

¹ [1892] 2 Q B 600, at 601.

² See *R v Angus* (1907) 26 NZLR 948, at 949 and *Archbold Hong Kong* 2009, at §21-17.

³ *Archbold Hong Kong* 2009, at §21-18.

The age of criminal responsibility in Hong Kong

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

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

Conclusion and recommendation

10. The notion that a boy under 14 years of age cannot be charged with and convicted of the offence of rape, founded on the irrebuttable presumption that such a boy is physically incapable of sexual intercourse, has been severely criticised by both legal academics and the courts.

11. Whatever the historical rationale for the presumption may have been, it is difficult to see what purpose the rule now serves. It flies in the face of common sense that the law in Hong Kong should refuse to accept that a boy under 14 may be capable of sexual intercourse, regardless of the evidence to the contrary. In England, where the presumption no longer applies, two 11-year-old boys were recently convicted before a jury of attempting to rape an eight-year-old girl.⁴ In Hong Kong, two 13-year-old boys were convicted in June 2009 of indecently assaulting a 12-year-old girl. It was clear that sexual intercourse had taken place between the first defendant and the victim but the defendant could only be charged with indecent assault, rather than rape, because of the application of the presumption. The magistrate was reported as having described the first defendant as "*very lucky*".⁵ More recently still, in September 2010 a 13-year-old boy was arrested for allegedly having sexual intercourse with a five-year-old girl in the Pamela Youde Nethersole Eastern Hospital in Chai

⁴ The boys were 10 at the time of the offence and had been charged with rape. See report of 18 August 2010 at <http://www.bbc.co.uk/news/uk-england-london-10693953>.

⁵ *Ming Pao Daily News*, Court News A08, 9 June 2009.

Wan. He was charged with indecent assault as the presumption prevented his being charged with rape.⁶

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

13. **We accordingly recommend that the presumption that a boy under the age of 14 years is incapable of sexual intercourse should be abolished.**

Law Reform Commission
December 2010

⁶ "Attack on girl sparks mixed wards rethink", *The Standard*, 4 October 2010.