Criminal Law Conference 2012
Reforming the Criminal Justice System of Hong Kong

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"Injustice, …, ignorance …. may be cured by reform..."[1]

1. In Hong Kong, prior to the establishment of the Law Reform Commission of Hong Kong (LRC) in 1980, there had been a number of formal and informal committees and groups which had considered aspects of law reform. The first permanent machinery for law reform appears to be the Hong Kong Law Reform Committee, which was established by the then Governor on 16 March 1956. Its terms of reference were restricted, however, to examining legislation enacted in the United Kingdom, "*having regard especially to the reports of the Law Reform Committee appointed by the Lord Chancellor on the 16 June 1952*." The Committee issued five reports during the period 1957 and 1964, when it ceased to operate.

2. In 1965, a Law Reform Drafting Unit was formed in the then Attorney General's Chambers, primarily tasked with the drafting of approved law reform measures and to a lesser extent with identifying UK legislative measures that were suitable for adoption in Hong Kong. The Unit was not in a position to propose wider reform of the law though.

3. In the late 1970s, a group of 14 lawyers drawn from the Government and the private sector formed an informal law reform committee under the chairmanship of a High Court Judge, the then Mr Justice T L Yang.

4. The arrival of a new Attorney General in Hong Kong in 1979 addressed calls for a more formal mechanism for law reform. In January 1980 the then Chief Justice and the Attorney General presented to the Executive Council their joint views as to how law reform should be handled. Their recommendation that a Law Reform Commission should be established was endorsed by the Executive Council on 15 January 1980, though with three significant amendments. The first was that the Attorney General should chair the LRC, rather than the Chief Justice. The second was that the members of the LRC should be appointed by the Governor, not the Chief Justice. The third was that the Secretary should be a counsel in the Attorney General's Chambers, rather than a judicial officer from the Supreme Court. A further minor adjustment was that references should be made to the LRC jointly by the Chief Justice and the Attorney General, rather than by one or the other.

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[1] Four Essays on Liberty (1969) Political Ideas in the Twentieth Century, Sir Isaiah Berlin, British Philosopher.

5. Currently, the Secretary for Justice chairs the LRC and the Chief Justice of the Court of Final Appeal and the Law Draftsman are the other two *ex officio* members. Other members of the LRC are appointed by the Chief Executive of the Hong Kong Special Administrative Region, on the advice of the Secretary for Justice. Members come from a range of backgrounds, enabling the LRC to consider reform of the law from the point of view of the community as a whole, rather than solely from that of the legal profession. The Prosecutions Division headed by the Director of Public Prosecutions has also been represented in the sub-committees charged with reviewing and recommending reforms in relation to criminal law or the criminal justice system.

6. Unlike law reform agencies in many other jurisdictions, the LRC has no full-time Commissioners. Instead, members of the LRC and its sub-committees volunteer their services, part-time and unpaid, to the work of law reform. While that may mean that LRC projects take longer than might be the case if there were full-time Commissioners, the countervailing advantage is that projects benefit from the wide range of expertise represented by LRC and sub-committee members which might not otherwise be available to the LRC.

Criteria for Referral to the LRC

7. The creation of the LRC reflected the widely-held view that there was a need for some permanent, formal, authoritative and independent machinery dedicated to the task of law reform.

8. Since its establishment in 1980, the LRC has considered a wide variety of subjects of varying complexity and breadth. There are no hard and fast rules as to which subjects are suitable for referral to the LRC, but a number of factors will usually be considered by the Chairman (Secretary for Justice) and the Chief Justice of the Court of Final Appeal as a member of the LRC:

- **Is there a problem or shortcoming in the law of general applications**?

The problem or shortcoming should be identifiable, and should not be one which relates only to a particular individual or case.

- **Are the issues raised more ones of policy than law?**

As a broad rule of thumb, a subject is not likely to be best suited for consideration by the LRC if the issues it raises are essentially ones of Government policy, rather than law or legal policy. While it would be unlikely, for instance, that the LRC would be asked to consider questions of taxation or immigration, as these are both areas where Government policy concerns predominate, that does not mean that the LRC could not be asked to consider the general policy issues raised in respect of a subject such as, say, the age of criminal responsibility on which the LRC did publish a report in May 2000.

- **Could the subject be more effectively considered elsewhere?**

Where there is a specialist body with expertise in the particular area of law in question, the subject is unlikely to be referred to the LRC. So, for instance, the Standing Committee on Company Law Reform, or the Court Users' Committees, would be better placed than the LRC to consider company law or court procedural matters respectively.

- **Is there a realistic prospect of implementation?**

The purpose of the LRC's work is to improve the law. Its resources are limited, and it would be wasteful of those resources to embark on a project if it was unlikely that any resulting proposals would be implemented. The LRC would therefore be unlikely to consider an area of law where the Government had clearly indicated that it saw no need for change.

9. In addition to these factors, the Chairman and the Chief Justice need to consider the question of timing, and decide when the Commission is able to take on a new project. While the decision whether or not to refer a subject to the LRC rests solely with the Chairman and the Chief Justice, the LRC may, through the Secretary for Justice or its Secretariat without compromising the LRC's autonomy, seek and consider preliminary views from relevant bureaux and departments when starting a new LRC project.

Method of Law Reform Work

10. The first step in any project referred to the LRC for consideration is the preparation of a detailed research paper by the full-time lawyers of the LRC Secretariat. This paper will essentially form the basis for discussion by a sub-committee of experts (supported by a full-time lawyer of the LRC Secretariat) who are appointed by the Chairman to examine the subject. Where appropriate, the LRC may decide to dispense with a sub-committee and to consider the matter itself on the basis of the LRC Secretariat's research analyses and findings - the "fast-track" approach.

11. Whether or not a sub-committee is appointed to deal with a particular topic, the LRC always ensures that there is extensive public consultation on any of its projects before it reaches its conclusions. In almost every case, the public's views will be sought by way of a consultation paper, which sets out the sub-committee's preliminary conclusions and recommendations - the latest one being on the review of rape and other non-consensual sexual offences published in September 2012[2]. The publication of each sub-committee's consultation paper frequently starts with a press conference, and the paper is made available both in hard copy and on the LRC website. On certain occasions, the LRC will contract a market research firm to undertake a survey to gauge public opinions. During the public consultation period, members of

[2] The Review of Sexual Offences Sub-committee of the LRC published a consultation paper on Rape and Other Non-consensual Sexual Offences in September 2012, which can be found on the internet at <http://www.hkreform.gov.hk. The consultation will end on 31 December 2012 and comments on the consultation paper are most welcome.

the sub-committee or the Secretariat will provide a briefing on the proposals to organisations with a particular interest in the subject. It is also their practice to organise or attend open forums or seminars. The responses to the consultation play a crucial part in assisting the sub-committee to finalise its proposals. In appropriate cases, and subject to the availability of increased resources within the Department of Justice for this purpose, the Secretary for Justice (in his capacity as Chairman of the LRC and as head of the Department of Justice) has undertaken to consider including draft legislation in the final LRC report.

12. Once completed, the sub-committee's report is passed to the LRC for consideration. The LRC considers the sub-committee's report in detail, assisted by the chairman and members of the sub-committee, before issuing a final LRC report. Reports are, wherever possible, published simultaneously in both English and Chinese, and in hard copy and on the LRC's website. Where the subject is likely to be of general public interest, the final report will be brought to the public's attention initially by way of a media briefing. After publication, the final report will be passed to the Administration for consideration.

13. The publication of the final LRC report marks the completion of the reference, but lawyers in the LRC Secretariat will continue to play a part in the implementation of the LRC's recommendations. This may include assisting in the preparation of legislative drafting instructions and the process of drafting any necessary legislation, or providing further research materials and information to the Government bureau which has the policy carriage for the subject.

Reforming the Criminal Justice System

14. The mission of the LRC is two-fold. One is to present proposals for reform which make the law in Hong Kong more effective, more accessible, and more in tune with the community's needs. The other is to engage the public in the law reform process, and to arouse public interest in that process by the dissemination of law reform material and by effective communication with the community.

15. Since 1980, the LRC has published 61 final reports, of which 19 relate to criminal law or the criminal justice system. Subjects range from laws governing homosexual conduct; competence and compellability of spouses in criminal proceedings to the rule against double jeopardy. Many of the recommended reforms have been taken on board or implemented, whether in part or in their entirety, either by way of a stand-alone ordinance (e.g. Community Service Orders Ordinance, Cap 378) or an omnibus legislation (e.g. Statute Law (Miscellaneous Provisions) Ordinance (No. 32 of 2000) for the recommendation on the Year and A Day Rule in Homicide), or an administrative scheme (e.g. Sexual Offences Records Checks for Child-related Work 2010). A list of the LRC's publications on proposed reforms in criminal law or the criminal justice system since 1983, as well as their corresponding implementation results or progress, is at Annex I.

16. Whilst the LRC is, by constitution, "required simply to consider …. and to report. …. [n]o guidelines are laid down."[3], some guiding principles in relation to criminal law or criminal justice system reforms have been formulated and followed :

- Due consideration of the role of the law[4];
- Protecting the vulnerable[5];
- Preserving and strengthening communal life of the family[6];
- Complying with principles of Human Rights protection and adhering to provisions of the UN International Covenant on Civil and Political Rights, Hong Kong Bill of Rights Ordinance, and the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China[7];
- Legality[8];
- Proportionality[9];
- Accountability[10];
- Evidentiary rules should, within the limits of justice and fairness to all parties, facilitate and not hinder the determination of relevant issues[11];
- All accused have a fundamental right to make full answer and defence to a criminal charge[12];
- Evidentiary rules should be clear, simple, accessible, easily understood, logical, consistent and based on principled reasons[13];
- Questions of admissibility should be determinable with a fair degree of certainty prior to trial so that the legal adviser may properly advise the client on the likely trial outcome[14];
- Evidence law should reflect increasing global mobility and modern advancements in electronic communications[15];
- Clarity of the law[16];
- Respect for sexual autonomy[17];
- Gender neutrality[18]; and
- Avoidance of distinctions based on sexual orientation[19].

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3 LRC Report on Laws Governing Homosexual Conduct 1983

4 LRC Reports on Laws Governing Homosexual Conduct 1983; Sexual Offences Records Checks for Child-related work: Interim Proposals

5 LRC Report on Laws Governing Homosexual Conduct 1983; Consultation Paper on Rape and Other Non-consensual Sexual Offences 2012

6 LRC Report on Laws Governing Homosexual Conduct 1983

7 LRC Reports on Privacy: the Regulation of Covert Surveillance 2006; Sexual Offences Records Checks for Child-related Work: Interim Proposals 2010;and Consultation Paper on Rape and Other Non-consensual Sexual Offences 2012

8 LRC Reports on Privacy: the Regulation of Covert Surveillance 2006

9 Ibid

10 Ibid

11 LRC Report on Hearsay in Criminal Proceedings 2009

12 Ibid

13 Ibid

14 Ibid

15 Ibid

16 LRC Review of Sexual Offences Sub-committee Consultation Paper on Rape and Other Non-consensual Sexual Offences 2012

17 Ibid

18 Ibid

19 Ibid

Implementing Reform Proposals

17. The recommendations put forward in an LRC report are the result of detailed study by the LRC itself and, in most cases, a specialist sub-committee. It is in the interests of both the Administration and the LRC, and of the community, that the results of LRC's work are given full and fair consideration within a reasonable timeframe. The longer the delay, the greater the risk that the LRC's efforts will have to be duplicated by a fresh review and round of consultations. In the meantime, the original shortcomings in the law remain unresolved. However, it must also be borne in mind that the complexity and scope of the subject-matter of LRC reports vary greatly and some reports are likely to require longer than others for bureaux to consider.

a) The Administrative Guidelines 2011

18. In some other jurisdictions, statutory or administrative guidelines for the consideration of law reform agency reports have been adopted. The advantage of such guidelines is that they encourage early consideration of law reform proposals and decisions on implementation while the law reform agency's original research and consultation remain valid, so avoiding later unnecessary duplication of effort to update the research and re-run the consultation. At the same time, it is important that any such scheme allows the government sufficient time for proper consideration of law reform proposals, especially when they raise complex and controversial issues.

19. To address the concerns which have been expressed at delays in considering and implementing LRC proposals, the Director of Administration issued, in October 2011, a set of guidelines to bureaux and departments having policy responsibility over the subject matter of an LRC report. Under the guidelines (at Annex II), bureaux and departments concerned are required to provide at least an interim response within six months of publication of the report and a detailed public response within 12 months of its publication. The bureaux and departments are required to give full consideration to the recommendations made by LRC and set out which recommendations they accept, reject or intend to implement in modified form in the detailed public response.

b) The LegCo Monitoring Mechanism 2012

20. The Administration of Justice and Legal Services (AJLS) Panel of the Legislative Council (LegCo) also expressed concern that with long delay in implementation, the validity and relevance of LRC's recommendations are likely to be diminished and the efforts wasted. The AJLS Panel acknowledged that the recommendations put forward in an LRC report are the result of detailed study by LRC members, including both academic and practising lawyers and prominent members of the community who have rich experience and expertise in their respective professional or other fields, with input from its various subcommittees comprising members drawn from a wide pool of talents in the community and within the Administration. The AJLS Panel is of the view that Secretary for Justice, in addition to his role as the

Chairman of the LRC, has the responsibility to keep Hong Kong's system of laws up-to-date, and other Panels of the LegCo also have a role to play in facilitating the law reform work.

21. To ensure that LRC's recommendations are given consideration within a reasonable timeframe and would be implemented without undue delay, the AJLS Panel proposed in February 2012, as subsequently endorsed by the LegCo House Committee, that the Secretary for Justice should submit for discussion an annual report on progress of implementation of the LRC recommendations, which will be copied to the relevant LegCo Panels to facilitate their follow-up with the relevant bureaux and departments (details at Annex III).

22. The aim of any LRC project is to present workable proposals for improving the law, intended for implementation. While the process of carrying out a review of an area of law is itself beneficial in that it stimulates public debate and awareness, the ultimate purpose is to improve the law by actually implementation of reforms. It is important for the health of our legal system that the LRC reform proposals are given full and timely consideration and, where thought appropriate, implemented without undue delay. The Secretary for Justice, as Chairman of the LRC, has specifically impressed upon responsible government policy bureaux such importance. It is expected that the introduction of the 2011 Guidelines and 2012 Mechanism will help strengthen the law reform system in Hong Kong.

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Annex I

The Law Reform Commission of Hong Kong
Publications on Criminal Justice System 1983 – 2012*

	Report / Consultation Paper (Month and year)	*Implementing legislation / measures*
1	Laws governing homosexual conduct (Jun 1983)	Crimes (Amendment) Ordinance (90 of 1991) (Jul 1991)
2	Sentencing – Community Service Orders (Jun 1983)	Community Service Orders Ordinance (Cap 378) (Nov 1984)
3	Confession statements and their admissibility in criminal proceedings (Oct 1985)	– – –
4	Witnesses – Competence and compellability of spouses in criminal proceedings (Dec 1988)	Evidence (Miscellaneous Amendments) Ordinance (23 of 2003) (Jun 2003)
5	Bail in criminal proceedings (Dec 1989)	Criminal Procedure (Amendment) Ordinance (56 of 1994) (Jun 1994)
6	Loitering (Jul 1990)	Crimes (Amendment) (No 2) Ordinance (74 of 1992) (Jul 1992)
7	Arrest (Nov 1992)	Partially implemented by a number of administrative and legislative measures, including the Dangerous Drugs, Independent Commission Against Corruption and Police Force (Amendment) Ordinance (68 of 2000) (Jul 2000)
8	Codification: the preliminary offences of incitement, conspiracy and attempt (May 1994)	Crimes (Amendment) Ordinance (49 of 1996) (Jul 1996)
9	Creation of a substantive offence of fraud (Jul 1996)	Theft (Amendment) Ordinance (45 of 1999) (Jul 1999)

* The Law Reform Commission of Hong Kong was established in 1980 as an independent body which would consider areas of the law suitable for reform. The first two reports were published in 1982. The first report on criminal justice system was published in 1983.

	Report / Consultation Paper (Month and year)	***Implementing legislation / measures***
10	The year and a day rule in homicide (Jun 1997)	Statute Law (Miscellaneous Provisions) Ordinance (32 of 2000) (Jun 2000)
11	The age of criminal responsibility in Hong Kong (May 2000)	Juvenile Offenders (Amendment) Ordinance (6 of 2003)(Mar 2003)
12	The procedure governing the admissibility of confession statements in criminal proceedings (Jul 2000)	LRC Report recommended no change to the existing law.
13	Stalking (as Part 3 of the report on Privacy) (Oct 2000)	The Constitutional and Mainland Affairs Bureau issued a consultation paper in December 2011, and the consultation ended in March 2012.
14	Privacy – The regulation of covert surveillance (Mar 2006)	– – –
15	Hearsay in criminal proceedings (Nov 2009)	The Department of Justice has asked the Law Society and the Bar Association for their views before reaching a conclusion on the report's recommendations.
16	Sexual offences records checks for child-related work : interim proposals (Feb 2010)	Recommendations implemented by way of an administrative scheme.
17	Criteria for service as jurors (Jun 2010)	The Department of Justice has decided to put forward legislation to implement those recommendations.
18	The common law presumption that a boy under 14 is incapable of sexual intercourse (Dec 2010)	The Security Bureau is working with the Department of Justice on the arrangements for amending the legislation with a view to implementing the recommendation of the LRC as soon as possible.
19	Double jeopardy (Feb 2012)	An interdepartmental working group, led by the Department of Justice, will be formed to consider the LRC Report
20	Consultation Paper: Rape and other non-consensual sexual offences (Sep 2012)	Issued by the Review of Sexual Offences Sub-committee, consultation ending on 31 December 2012.

Annex II

Guidelines for consideration of the Law Reform Commission ("LRC") reports issued by the Director of Administration in October 2011

(a) When a consultation paper is issued by the LRC, the Administration should at that stage decide (and resolve should there be any disagreement) which bureau (or bureaux) will take primary responsibility for consideration/implementation of the final report and should so notify the LRC.

(b) Bureaux/departments should provide the Secretary to the LRC with the contact details of the bureau's officer with responsibility for the LRC report within 14 days of receipt of the letter from the Secretary for Justice forwarding an LRC report to the responsible Policy Secretary and requesting his consideration of the report.

(c) Bureaux and departments having policy responsibility in respect of any LRC report should give full consideration to its recommendations and provide a detailed public response (setting out which recommendations they accept, reject or intend to implement in modified form) to the Secretary for Justice (as Chairman of the LRC)as soon as practicable. In any event, they should provide at least an interim response within six months of publication of the report which sets out a clear timetable for completion of the detailed response and the steps taken so far.

(d) Bureaux or departments having policy responsibility in respect of any LRC report should provide a detailed public response to the Secretary for Justice within 12 months of its publication, unless otherwise agreed by him as Chairman of the LRC.

Annex III

Mechanism for monitoring the Government's progress in implementing recommendations made by the Law Reform Commission ("LRC") endorsed by the House Committee of the Legislative Council (LegCo) in February 2012

(a) The Secretary for Justice (in addition to his role as the Chairman of LRC) to submit to the Administration of Justice and Legal Services (AJLS) Panel of the LegCo for discussion an annual report flagging up the progress in respect of the LRC reports which have not yet been implemented, say, after the Policy Address in each year.

(b) The AJLS Panel to copy the annual report to the relevant Panels [of the LegCo] to facilitate their follow-up with the bureaux and departments having policy responsibility over the respective LRC reports.

(c) The relevant Panels [of the LegCo] to include the Administration's responses to the respective LRC reports in their lists of outstanding items for discussion, and to invite members of the AJLS Panel and all other Members to join the future discussion.

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