

THE LAW REFORM COMMISSION OF HONG KONG
CONSULTATION PAPER ON
EXCEPTED OFFENCES UNDER SCHEDULE 3 OF THE
CRIMINAL PROCEDURE ORDINANCE (CAP 221)

Executive Summary

Introduction

1. Chapter 1 of this consultation paper sets out the background to the call for reforming the law relating to excepted offences. Chapter 2 discusses the current law on excepted offences, while Chapter 3 examines the law in other jurisdictions. Chapter 4 discusses the interplay between Judiciary's sentencing discretion and the legislature's constraints on such discretion. Chapter 5 sets out arguments for and against reform, and our recommendation.

Existing provisions on excepted offences

2. There are two provisions relating to the "excepted offences" in the Criminal Procedure Ordinance (Cap 221). Section 109B(1) of Cap 221 provides:

"(1) A court which passes a sentence of imprisonment for a term of not more than 2 years for an offence, other than an excepted offence, may order that the sentence shall not take effect unless, during a period specified in the order, being not less than 1 year nor more than 3 years from the date of the order, the offender commits in Hong Kong another offence punishable with imprisonment and thereafter a court having power to do so orders under section 109C that the original sentence shall take effect."

3. Section 109A(1) and (1A) of Cap 221 provide:

"(1) No court shall sentence a person of or over 16 and under 21 years of age to imprisonment unless the court is of opinion that no other method of dealing with such person is appropriate; and for the purpose of determining whether any other method of dealing with any such person is appropriate the court shall obtain and consider information about the circumstances, and shall take into account any information before the court which is relevant to the character of such person and his physical and mental condition."

- (1A) *This section shall not apply to a person who has been convicted of any offence which is declared to be an excepted offence by Schedule 3.*"

The "excepted offences" under Schedule 3 of Cap 221

4. The excepted offences under Schedule 3 of Cap 221 are:
- "1. *Manslaughter.*
 2. *Rape or attempted rape.*
 3. *Affray.*
 4. *Any offence against section 4, 5 or 6 of the Dangerous Drugs Ordinance (Cap 134).*
 5. *Any offence contrary to section 10, 11, 12, 13, 14, 17, 19, 20, 21, 22, 23, 28, 29, 30, 36 or 42 of the Offences Against the Person Ordinance (Cap 212).*
 6. *Any offence or attempted offence against section 122 of the Crimes Ordinance (Cap 200).*
 7. *An offence under any section in Part III of the Firearms and Ammunition Ordinance (Cap 238).*
 8. *Any offence against section 10 or 12 of the Theft Ordinance (Cap 210).*
 9. *Any offence against section 33 of the Public Order Ordinance (Cap 245).*
 10. *Any offence under section 4 or 10 of the Weapons Ordinance (Cap 217)."*

Background of the present law

5. The Criminal Procedure (Amendment) Bill 1971 introduced the concept of suspended sentences to Hong Kong. The Bill's provisions broadly followed those of the Criminal Justice Act 1967 in England. However, neither the Bill put forward by the Government nor the English Act incorporated any reference to "excepted offences". The creation of excepted offences was the result of strong opposition from the unofficial members of LegCo, who expressed concern at "*the sharp increase in crime, and especially violent crime, since 1960*".¹

¹ HK Hansard, 20 January 1971, at 350, *per* Mr Oswald Cheung.

6. In response, the then Attorney General, Denys Roberts, emphasised that a suspended sentence was "*not intended to provide a soft way of dealing with criminals.*"² He added that the Government conceded to the demand of the unofficial members but expressed that it was the Government's hope that the excepted offences could be done away with at some point.³

Overseas position in summary

7. Chapter 3 of the consultation paper have examined the relevant laws in Australia, Canada, New Zealand, Singapore and the United Kingdom. The option of suspending an imprisonment sentence in most of the overseas jurisdictions reviewed where this option is available is applicable to all offences. That is to say, there are no excepted offences.

8. However, the State of Victoria in Australia and Canada have recently moved towards a regime with excepted offences in respect of serious criminal offences.

9. Victoria enacted the Sentencing Amendment Act 2010 and the Sentencing Further Amendment Act 2011 whereby suspended sentences are abolished for "serious offences" and "significant offences". As a result, suspended sentences are not available for such offences as murder, manslaughter, child homicide, rape, violent and sexual offences, causing serious injury recklessly, aggravated burglary, arson, and trafficking in a large commercial quantity of drug of dependence.

10. In Canada, pursuant to Bill C-9 amending the Criminal Code (conditional sentence of imprisonment) "conditional sentences of imprisonment" was abolished in relation to certain serious offences such as serious personal injury offences (including sexual assault), a terrorism offence or a criminal organization offence.

Argument in favour of maintaining the list of excepted offences⁴

11. The main argument in favour of maintaining the list of excepted offences appears to be the concern in the early 1970s with the prevalence of violent crime in Hong Kong that required exceptions to what appeared to local legislators then as being a soft sentencing option.

² HK Hansard, cited above, at 355.

³ HK Hansard, cited above, at 356.

⁴ Centre for Comparative and Public Law (University of Hong Kong), *Report on Reforming Suspended Sentences in Hong Kong* (Sep 2012), at 15.

Arguments in favour of reform⁵

12. There are six reasons for abolishing the list entirely or removing those offences that do not invariably cause serious physical violence to others.

- (1) The significant fall in the prevalence of violent crimes in Hong Kong since the 1970s is an important societal circumstance to consider when evaluating the need to maintain or reform the list of excepted offences. Hong Kong is now a much safer place than before and the prevalence of violent offences has decreased significantly since the 1970s. The original rationale for having exceptions therefore no longer applies.
- (2) In the absence of a suspended sentence option, offenders, whose circumstances could merit a suspension, will normally be imprisoned. Some of the excepted offences, such as attempted indecent assault and the weapons related offences, can occur in a wide range of circumstances, including exceptional circumstances (eg offence occurring without circumstances of aggravation, first-time remorseful offender with little risk of re-offending) which would ordinarily justify a suspended sentence. On the contrary, the court may have no better alternative but to order probation (or a community service order) when a suspended sentence is more appropriate. Whether the sentence is too harsh (imprisonment) or too soft (probation), there will inevitably be cases involving excepted offences that will push the court in either of these directions given the lack of a suspended sentence option. In both scenarios, injustice could result.
- (3) Another important consideration is the need to allow judges and magistrates a wide degree of discretion to achieve a just and appropriate sentence. The list of excepted offences is not only anachronistic (unanchored by its historical justification), but also applies across-the-board in a disproportionate manner to all offenders charged with certain offences irrespective of circumstances.
- (4) There is no reason to believe that repealing the exceptions will lead to either more offending or an increased risk of harm to the community. Suspension will continue to be made for only exceptional cases. Hong Kong courts can be trusted to continue to imprison offenders who pose a substantial risk to the community. The current suspended sentence power allows for the imposition of conditions, which if breached during the operational period can trigger the court to order that the suspended sentence be served in its entirety.
- (5) The anomalies of the list of excepted offences are of two kinds. First, the list is not comprehensive. Other violent and serious offences have been left out. In addition, many other serious sexual offences are not

⁵ *Report on Reforming Suspended Sentences in Hong Kong*, cited above, at 15 to 21.

on the list.⁶ This means that those convicted of such offences (say intercourse with a girl under 13 years), in theory, can be entitled to a suspended sentence of imprisonment. The second kind of anomalies concerns the less serious offences that exist on the list (say attempt indecent assault), with the possible result that the court has no discretion but to impose a term of immediate imprisonment where a non-custodial sentence is not appropriate.⁷ These anomalies can give rise to a general sense of unfairness and arbitrariness.

- (6) Of the jurisdictions studied that have a similar suspended sentence power (Victoria (Australia), Canada, UK), none of them has maintained exceptions as wide and extensive as those in Hong Kong. To be an excepted offence in these jurisdictions, the offence must typically involve significant violence or an element of organized crime.

13. It should be noted that no similar restriction applies in respect of community service orders. Section 4(1) of the Community Service Orders Ordinance (Cap 378) empowers the court to make a community service order "*where a person of or over 14 years of age is convicted of an offence punishable with imprisonment*". There is no exclusion in respect of excepted offences.

Views of Hong Kong judges and judicial officers

14. Views of all judges and judicial officers at different levels who hear mainly or exclusively criminal cases as to whether in their experiences there was any unease or feeling of injustice arising from the statutory restriction imposed by Schedule 3 of Cap 221 (ie no suspended sentences for excepted offences) were sought in mid-2012. The vast majority (80% of those who responded) of the judges and judicial officers who responded, for the following reasons, agree with or support complete removal of the statutory restriction or at least the restriction in respect of certain offences (namely, indecent assault and wounding):

- (a) the court's discretion should not be fettered;
- (b) for serious offences, the restriction is superfluous since it is unlikely to be applicable, but for less serious offences where the power to suspend sentence is needed, the restriction will tie the court's hands; and
- (c) the court is forced to pass a sentence which is disproportionate or does not reflect the criminality of the offence.

⁶ See Crimes Ordinance (Cap 200), such as non-consensual buggery, assault with intent to commit buggery, gross indecency, bestiality, intercourse with a girl under 13 or under 16, intercourse with mentally incapacitated person, abduction of unmarried girl under 16, trafficking in persons to or from Hong Kong.

⁷ These are the summary conviction offences for which the maximum penalty is three years imprisonment or less. Many of these offences can be committed without any actual physical violence inflicted on another person, eg the firearm and weapons offences and the inchoate offence of attempted indecent assault.

Views of the Law Society and the Bar Association

15. The Law Society commissioned the Centre for Comparative and Public Law of the University of Hong Kong to compile a report on whether there is a case for reforming the exceptions to the power of the Hong Kong courts to impose suspended sentences under Cap 221 (the "CCPL Report"). The CCPL Report concludes that there are "*substantial reasons for eliminating the list of exceptions altogether or at least removing those offences that do not invariably cause serious physical violence to others*".⁸

16. Upon considering the CCPL Report, the Law Society's Criminal Law and Procedure Committee concludes that the concept of "excepted offences" is outdated and Schedule 3 of Cap 221 should be abolished in its entirety.

17. The Bar Association shares the view of the Law Society that the concept of excepted offences is "outdated" and should be abolished in its entirety.

Conclusion and Recommendation

18. There are problems with the existing operation of the excepted offences regime, and thus there is support for the change of the *status quo*. The Law Society has adopted the views and conclusion in the CCPL Report. As set out in the above paragraphs, about 80% of the responses of the judges and judicial officers support the removal of the restriction.

19. Academics are also of the view that the current regime should be reformed, as this was cogently argued in the CCPL Report. In particular, the public sentiments behind the creation of the excepted offences in the Criminal Procedure (Amendment) Bill 1971, some 40 years ago, have long gone. The community nowadays has different views on whether it remains justified for some or all of the offences listed in Schedule 3 of Cap 221 to be classed as excepted offences.

20. We agree with the CCPL Report that it is desirable to allow judges and magistrates a wide degree of discretion to achieve a just and appropriate sentence depending on the circumstances of the case, with the option of suspending sentences. Otherwise, the courts' hands may be tied. The result is that the sentence may be either too harsh (imprisonment) or too lenient (probation). Either way would lead to the undesirable result of doing injustice, whether to the victims or defendants.

21. We note that some members of the general public may take the view that excepted offences are justified on the grounds that they ensure that offenders of serious crimes do not "walk free" with a suspended sentence, and a clear message is made that certain kinds of serious crimes should not be dealt with leniently by the law. We agree with the CCPL Report that there is no cause to worry that repealing Schedule 3 will increase the risk of harm to the community. We have full confidence

⁸ Centre for Comparative and Public Law (University of Hong Kong), *Report on Reforming Suspended Sentences in Hong Kong* (Sep 2012), at 2 and 21.

in the judges and magistrates in Hong Kong who would exercise their sentencing discretion without restrictions.

22. **We therefore recommend repealing the excepted offences as listed in Schedule 3 of the Criminal Procedure Ordinance, Chapter 221 of the Laws of Hong Kong.**

23. We emphasise that this is a consultation paper, and the recommendation presented here is put forward to facilitate discussion. We welcome views, comments and suggestions on any issues discussed in this Paper. We will carefully consider all responses in drawing up final recommendations in due course.

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The Law Reform Commission Secretariat
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