

**THE LAW REFORM COMMISSION OF HONG KONG
REVIEW OF SEXUAL OFFENCES SUB-COMMITTEE**

CONSULTATION PAPER

MISCELLANEOUS SEXUAL OFFENCES

This consultation paper can be found on the Internet at:
<<http://www.hkreform.gov.hk>>

May 2018

This Consultation Paper has been prepared by the Review of Sexual Offences Sub-committee of the Law Reform Commission. It does not represent the final views of either the Sub-committee or the Law Reform Commission, and is circulated for comment and discussion only.

The Sub-committee would be grateful for comments on this Consultation Paper by 15 August 2018. All correspondence should be addressed to:

*The Secretary
The Review of Sexual Offences Sub-committee
The Law Reform Commission
4th Floor, East Wing, Justice Place
18 Lower Albert Road
Central
Hong Kong*

Telephone: (852) 3918 4097

Fax: (852) 3918 4096

E-mail: hklrc@hkreform.gov.hk

It may be helpful for the Commission and the Sub-committee, either in discussion with others or in any subsequent report, to be able to refer to and attribute comments submitted in response to this Consultation Paper. Any request to treat all or part of a response in confidence will, of course, be respected, but if no such request is made, the Commission will assume that the response is not intended to be confidential.

It is the Commission's usual practice to acknowledge by name in the final report anyone who responds to a consultation paper. If you do not wish such an acknowledgment, please say so in your response.

THE LAW REFORM COMMISSION OF HONG KONG

REVIEW OF SEXUAL OFFENCES SUB-COMMITTEE

CONSULTATION PAPER

MISCELLANEOUS SEXUAL OFFENCES

CONTENTS

<i>Chapter</i>	Page
Preface	1
Terms of reference	1
The Sub-committee	1
Previous work of the Sub-committee	3
<i>Sexual Offences Records Checks for Child-Related Work</i>	3
<i>Presumption that a Boy under 14 is Incapable of Sexual Intercourse</i>	4
<i>Overall Review of the Substantive Sexual Offences</i>	4
<i>Part 1 – Consultation Paper on Rape and other Non-consensual Sexual Offences</i>	6
<i>Part 2 – Consultation Paper on Sexual Offences involving Children and Persons with Mental Impairment</i>	6
This consultation paper	7
Public views invited	7
1. Incest	8
Introduction	8
The present law	8
<i>Incest by men</i>	8
<i>Incest by women of or over 16</i>	9
<i>Relationship of parties outside lawful wedlock</i>	9
<i>Consent of Secretary for Justice to prosecute</i>	9
The English familial sexual offences	9

Chapter	Page
The Scottish incest offences	9
History of incest statutes in Hong Kong and England	10
<i>England</i>	10
<i>Hong Kong</i>	10
Should incest be retained as a specific offence?	11
<i>Question raised by the Scottish Law Commission</i>	11
The arguments for retaining incest as a specific offence	11
<i>Protection of members of the family</i>	11
<i>Maintenance of family solidarity</i>	11
<i>Recognition of the repugnance felt by the community</i>	12
<i>Risk of genetic defects</i>	12
<i>Validity of consent and continuation of familial abuse beyond childhood</i>	13
<i>Proper labeling of the wrong</i>	13
The arguments against retaining a specific offence of incest	14
<i>Protection of family members does not provide justification for incest</i>	14
<i>Family solidarity is broken more frequently by other familial sexual activity than incest</i>	14
<i>The reasons for community views against incest must be identified to assess their validity</i>	15
<i>The genetic argument makes incest a "result" crime</i>	15
<i>The increased risk associated with inbreeding should not justify a criminal offence</i>	16
<i>Invalidity of consent does not justify an offence of incest</i>	16
<i>The need to highlight the wrong involved in sexual activity between close family members does not justify an offence of incest</i>	17
<i>Subsuming incest cases under general sexual offences</i>	17
<i>Subsuming incest cases under sexual abuse of a position of trust and authority</i>	18
Our views on the issue as to whether a specific offence of incest should be retained	18
Issues with the present law	20
Should the term incest be continued to be used?	21
<i>The English Act</i>	21
<i>The Scottish 1995 Act</i>	21
<i>Other Jurisdictions</i>	22
Our views	23
To what activity should the offence of incest apply?	23
<i>The English Act</i>	23
<i>The Scottish 1995 Act</i>	23
<i>Other Jurisdictions</i>	24
Our views	24
Should the new offence be gender-neutral?	24
<i>The English Act</i>	24
<i>The Scottish 1995 Act</i>	24
<i>Other Jurisdictions</i>	25

Chapter	Page
Our views	25
Should the new offence be extended beyond direct blood relatives and siblings?	25
Uncles and aunts	26
<i>The English Act</i>	26
<i>The Scottish 1995 Act</i>	26
<i>Other Jurisdictions</i>	27
<i>Hong Kong Marriage Ordinance (Cap 181)</i>	27
Our views	27
Adoptive parents	27
<i>The English Act</i>	27
<i>The Scottish 1995 Act</i>	27
<i>Other Jurisdictions</i>	28
<i>Hong Kong Marriage Ordinance (Cap 181)</i>	28
Our views	28
Adoptive siblings	29
<i>The English Act</i>	29
<i>The Scottish 1995 Act</i>	29
<i>Other Jurisdictions</i>	30
<i>Hong Kong Marriage Ordinance (Cap 181)</i>	30
Our views	30
Step-parents and foster-parents	31
<i>The English Act</i>	31
<i>The Scottish 1995 Act</i>	32
<i>Other Jurisdictions</i>	32
<i>Hong Kong Marriage Ordinance (Cap 181)</i>	32
Our views	33
Other familial relationships	33
<i>Other Jurisdictions</i>	34
Our views	34
Consent of the Secretary for Justice to prosecute	35
<i>Background</i>	35
Our views	37
2. Exposure	38
Introduction	38
Two types of exposure	38
The rationale for a new sexual offence to cover exposure targeting a specific victim	39
<i>Exposer targeting a specific victim is similar to sexual assault</i>	39
<i>Exposers targeting a specific victim are potentially dangerous and likely to commit other sexual offences</i>	39
<i>A number of overseas jurisdictions have offence to cover exposure targeting a specific victim</i>	40
Our views on the issue	41
Elements of the new offence	42

Chapter	Page
(1) <i>Exposure to be in a sexual manner</i>	42
(2) <i>Exposure be limited to exposure of genitals</i>	42
Our views	43
(3) <i>Purpose of the exposure</i>	43
Our views	44
(4) <i>Exposure to be in a public place or not</i>	44
(5) <i>Lack of consent</i>	45
The name of the new offence	46
The existing offence of indecent exposure	46
3. Voyeurism	48
Introduction	48
The present law	48
The offence of voyeurism – overseas jurisdictions	49
<i>Canada</i>	49
<i>England and Wales</i>	50
<i>New South Wales</i>	51
<i>New Zealand</i>	52
The need for a specific offence of voyeurism	53
<i>The circumstances covered by the offence are spelt out in overseas legislation</i>	53
4. Bestiality	55
Introduction	55
Arguments for a specific offence of bestiality	55
<i>Bestiality is an act offending the dignity of animals and people</i>	55
<i>Linkage between bestiality and other forms of sexual offending</i>	56
Arguments against a specific offence of bestiality	56
<i>The offence of bestiality is seldom prosecuted</i>	56
<i>Sexual activity with an animal should be covered by offences relating to public indecency or animal protection</i>	56
Our views	57
Overseas legislation on bestiality	57
<i>Canada</i>	57
<i>England and Wales</i>	58
<i>New South Wales (Australia)</i>	59
<i>New Zealand</i>	59
<i>Oregon (United States)</i>	59
<i>Utah (United States)</i>	60
Should the new offence cover sexual activity beyond sexual intercourse?	61
Our views	61
Living animal or not	62

Chapter	Page
Our views	62
The name of the new offence	62
Our views	63
The expression "buggery"	63
Our views	63
Purpose of the sexual act	63
Our views	64
5. Necrophilia	65
Introduction	65
Overseas legislation on sexual activity with a dead person	66
<i>Canada</i>	66
<i>California (United States)</i>	66
<i>England and Wales</i>	67
<i>New Zealand</i>	67
<i>Singapore</i>	68
Arguments for a sexual offence to deal with sexual interference with human remains	68
<i>Family expects dead body of their relative be treated with respect</i>	68
<i>Association between necrophilia and other forms of serious offending</i>	69
<i>No possibility of mutual consent</i>	69
<i>Although necrophilia is rare, it is a deviant behaviour</i>	69
<i>Advance in forensic technology can help proof of necrophilia</i>	69
Arguments against a sexual offence to deal with sexual interference with human remains	70
<i>The dead body is not a victim</i>	70
<i>Sexual interference with human remains is rare</i>	70
Our views	70
Penetrative and non-penetrative sexual activity	71
<i>Penetrative and non-penetrative sexual activity</i>	71
<i>Penetrative sexual activity only</i>	71
Our views	72
Pure sexual offence or not	72
<i>Purely a sexual offence</i>	72
<i>Sexual offence mingled with other offences</i>	72
Our views	73
Name of the new offence	73
Our views	73
6. Acts done with intention to commit a sexual offence	74
Introduction	74
Administering a substance	75

Chapter	Page
<i>The existing offence in Hong Kong</i>	75
<i>Problems with the existing offence</i>	75
<i>English offence - Administering a substance with intent</i>	76
<i>Scottish offence - Administering a substance for sexual purposes</i>	76
<i>Elements of the revised offence</i>	77
<i>"to do an unlawful sexual act" or "to engage in a sexual activity"</i>	77
<i>"drug, matter or thing" or "substance"</i>	78
<i>The appropriate mens rea</i>	78
<i>Name of the revised offence</i>	79
Committing an offence with intent to commit a sexual offence	80
<i>The existing offence in Hong Kong</i>	80
<i>Problems with the existing offence</i>	80
<i>The English offence</i>	80
Our views on reform of the existing offence	81
Trespass with intent to commit a sexual offence	82
<i>The existing offence of burglary</i>	82
<i>Problems with the existing offence of burglary</i>	83
<i>Recommendation of the Home Office Review Group in the UK for a new offence</i>	83
<i>The new offence of trespass with intent to commit a sexual offence</i>	84
Our views	85
<i>Elements of the revised offence</i>	85
<i>Types of sexual offences to be covered</i>	85
<i>When should the intent to commit a sexual offence be formed?</i>	85
7. Review of some existing homosexual or homosexual-related buggery and gross indecency offences	87
Homosexual sexual offences previously recommended be abolished	87
Homosexual or homosexual-related buggery and gross indecency offences remain to be reviewed	87
Our views on these homosexual or homosexual-related offences	88
8. Summary of recommendations	90
Annex	93
Website addresses of the English Sexual Offence Act 2003 and the Sexual Offences (Scotland) Act 2009	93

Preface

Terms of reference

1. In April 2006, the Secretary for Justice and the Chief Justice of the Court of Final Appeal requested that the Law Reform Commission should review the law relating to sexual and related offences in Hong Kong. As a result of judicial comment in various judgments in Hong Kong as well as the public's comments on the desirability of setting up a register of sex offenders, the terms of reference were expanded in October 2006 to include a study relating to such a register. The expanded terms of reference 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."

The Sub-committee

2. The Sub-committee on Review of Sexual Offences 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

Principal Lecturer
Department of Law
University of Hong Kong

Dr Chu Yiu Kong
[Until December 2007]

Assistant Professor
Department of Sociology
University of Hong Kong

Mr Fung Man-chung <i>[From August 2012 to April 2018]</i>	Assistant Director (Family & Child Welfare) Social Welfare Department
Mr Paul Harris, SC <i>[Until February 2012]</i>	Senior Counsel
Mr Ho Chun-tung <i>[From August 2017]</i>	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mr Paul Ho <i>[From May 2016]</i>	Senior Assistant Director of Public Prosecutions
Professor Karen A Joe Laidler <i>[From September 2008]</i>	Director Centre for Criminology also Professor Department of Sociology University of Hong Kong
Mr Stephen K H Lee <i>[From January 2008 to August 2010]</i>	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mr Lee Wai-man, Wyman <i>[From July 2014 to August 2017]</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 <i>[Until May 2011]</i>	Assistant Director (Family & Child Welfare) Social Welfare Department
Mr Man Chi-hung, Alan <i>[From September 2010 to May 2012]</i>	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mrs Millie Ng <i>[From June 2009 to November 2015]</i>	Principal Assistant Secretary Security Bureau

Ms Pang Mo-yin, Betty <i>[From May 2012 to June 2014]</i>	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mr Andrew Powner	Partner Haldanes, Solicitors
Ms Lisa D'Almada Remedios	Barrister
Mr Philip Ross <i>[From February 2012]</i>	Barrister
Dr Alain Sham <i>[Until May 2016]</i>	Deputy Director of Public Prosecutions Department of Justice
Mr Andrew YT Tsang <i>[From November 2015]</i>	Principal Assistant Secretary Security Bureau
Ms Caran Wong <i>[From June 2011 to August 2012]</i>	Assistant Director (Family & Child Welfare) Social Welfare Department
Mr Thomas Leung (Secretary) <i>[Until December 2017]</i>	Senior Government Counsel Law Reform Commission
Miss Sally Ng (Secretary) <i>[Co-Secretary from July 2016 to December 2017]</i>	Senior Government Counsel Law Reform Commission

Previous work of the Sub-committee

3. The terms of reference cover a diverse range of sexual offences, many of which involve controversial issues requiring careful and judicious balancing of the interests at stake. It was apparent from the outset that completion of the entire reference would take considerable time and it was therefore decided that the terms of reference should be dealt with in stages and with separate papers being issued in respect of different parts of the reference.

Sexual Offences Records Checks for Child-Related Work

4. Because of widespread public concern, the Sub-committee considered first the question of establishing a system of sexual conviction records checks for those engaged in child-related work. In July 2008, the Sub-committee issued a *Consultation Paper on Interim Proposals on a Sex Offender Register*.

5. Taking into account the views on consultation, the Law Reform Commission published in February 2010 a *Report on Sexual Offences Records Checks for Child-Related Work: Interim Proposals*. The report recommended, among other things, the establishment of an administrative scheme to enable employers of persons undertaking child-related work and work relating to mentally incapacitated persons to check the criminal conviction records for sexual offences of employees. The proposals in the report were subsequently implemented by the establishment of an administrative scheme, viz, the Sexual Conviction Record Check Scheme, with effect from 1 December 2011.

Presumption that a Boy under 14 is Incapable of Sexual Intercourse

6. The Sub-committee made a study into the common law presumption that a boy under 14 is incapable of sexual intercourse and made proposals to the Commission to abolish this presumption.

7. Based on proposals made by the Sub-committee, the Commission published in December 2010 a *Report on The Common Law Presumption that a Boy under 14 is Incapable of Sexual Intercourse*, recommending the abolition of this outdated common law presumption. Because the issue was considered straightforward and not expected to be controversial, the Commission proceeded straight to a final report without first issuing a consultation paper.

8. The Statute Law (Miscellaneous Provisions) Ordinance 2012 (No 26 of 2012) was enacted on 17 July 2012 to implement the Commission's recommendation on abolition of the presumption.

Overall Review of the Substantive Sexual Offences

9. The Sub-committee is currently working on an overall review of the substantive sexual offences. The review is the major part of Sub-committee's study under its terms of reference. Its scope is wide and it raises a number of sensitive and controversial issues which require careful consideration. It is clear that the entire review will take a considerable time to complete. It has therefore been decided that the review would be broken down into a number of discrete parts with separate consultation papers on specific aspects of the subjects being issued.

10. It was the Sub-committee's original plan, to be adjusted if necessary in the light of further deliberations, to divide the review into four parts, with separate consultation papers to be issued in respect of each of them and one global final report. The four parts are:

- (1) offences based on sexual autonomy (ie rape and other non-consensual sexual offences);

- (2) offences based on the protective principle (ie sexual offences involving children and persons with mental impairment and sexual offences involving abuse of a position of trust);
- (3) miscellaneous sexual offences; and
- (4) sentencing.

11. During the consultation exercises on the first two parts of the overall review of the substantive sexual offences, there were demands from the public as well as the Panel on Administration of Justice and Legal Services of the Legislative Council for expediting the work on the overall review. In response to these demands, the Sub-committee has decided to adjust its original work plan. It is the Sub-committee's revised plan to sever the fourth part relating to sentencing from the overall review and return to it when the overall review is completed. In other words, **the overall review will now cover the first three parts only, with three consultation papers issued (including this one). A final report would be compiled in respect of all these three papers.** Severance of the fourth part (on sentencing) will not affect the integrity of the overall review. This is because the fourth part is intended to cover matters not having a direct bearing on the reform of the substantive sexual offences (viz, review of the Sexual Conviction Record Check Scheme, and other new sentencing orders for managing sex offenders etc).

12. It is the Sub-committee's current plan to work on the Final Report on the Review of Substantive Sexual Offences after the publication of this consultation paper and completion of the relevant consultation exercise. It is the Sub-committee's belief that recommendations in this final report can be implemented by legislative amendments as soon as possible without the need to await the completion of the remaining tasks within the Sub-committee's terms of reference.

13. It should be noted that a number of new offences were created under the English Sexual Offences Act 2003 ("**the English Act**") following a major overhaul of the law relating to sexual offences in England and Wales in 2003.¹ The English Act was based on proposals made by a Home Office Review Group in the UK in its paper, *Setting the Boundaries: Reforming the Law on Sex Offences* ("**the Home Office Paper**").²

14. Similar reform of the law on sexual offences also took place in Scotland, resulting in the enactment of the Sexual Offences (Scotland) Act 2009 ("**the Scottish Act**") which provides a set of new statutory sexual offences to meet the needs of modern society.³ The Scottish Act was based on a review of the law on sexual offences by the Scottish Law Commission. The Commission consulted the public on its initial proposals in a discussion

¹ The English Act came into force on 1 May 2004 (see Sexual Offences Act 2003 (Commencement) Order 2004, SI 2004/874).

² Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* (July 2000).

³ The Scottish Act came into force on 1 December 2010 (see Sexual Offences (Scotland) Act 2009 (Commencement No 1) Order 2010, Scottish SI 2010/357).

paper on *Rape and Other Sexual Offences* ("**the Scottish Law Commission Discussion Paper**").⁴ The final proposals were made in the Scottish Law Commission's report on *Rape and Other Sexual Offences* ("**the Scottish Law Commission Report**").⁵

15. In undertaking our review of the substantive sexual offences, we have the benefit of the examination of recent studies and law changes in England, Scotland and other jurisdictions such as Australia, Canada, New Zealand and Singapore. We have decided to use the English Act as a starting point, while also taking into consideration the relevant principles identified by the Home Office Paper and the Scottish Law Commission Report, relevant provisions in other jurisdictions and the particular circumstances of Hong Kong. We have chosen to use the English Act as a starting point because many of the existing sexual offences in Hong Kong were originally based on similar provisions in English legislation.

Part 1 – Consultation Paper on Rape and other Non-consensual Sexual Offences

16. In September 2012, the Sub-committee issued a Consultation Paper on Rape and Other Non-consensual Sexual Offences ("**the Non-consensual Offences CP**"). The Non-consensual Offences CP represents the first of the three consultation papers issued (including this one) by the Sub-committee on the overall review of the substantive sexual offences. It covered the non-consensual sexual offences which are concerned with promoting or protecting a person's sexual autonomy, namely, rape, sexual assault by penetration, sexual assault and causing a person to engage in sexual activity without consent.

Part 2 – Consultation Paper on Sexual Offences involving Children and Persons with Mental Impairment

17. In November 2016, the Sub-committee issued a Consultation Paper on Sexual Offences involving Children and Persons with Mental Impairment. This consultation paper represents the second of the three consultation papers issued (including this one) by the Sub-committee on the overall review of the substantive sexual offences. It covers sexual offences involving children and persons with mental impairment and sexual offences involving abuse of a position of trust. These sexual offences are largely concerned with the protective principle, that is to say that the criminal law should give protection to certain categories of vulnerable persons against sexual abuse or exploitation. These vulnerable persons include children, persons with mental impairment, and young persons over whom others hold a position of trust.

⁴ Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences* (January 2006), Discussion Paper No 131.

⁵ Scottish Law Commission, *Report on Rape and Other Sexual Offences* (December 2007), Scot Law Com No 209.

This consultation paper

18. This consultation paper is the third and final part of the overall review of the substantive sexual offences. It covers a number of miscellaneous sexual offences such as incest, exposure, voyeurism, bestiality, necrophilia, acts done with intention to commit a sexual offence, and a review of homosexual or homosexual-related buggery and gross indecency offences in the Crimes Ordinance.

19. As with the previous consultation papers, we have referred to statutory provisions in Hong Kong and compared them with corresponding provisions in overseas jurisdictions for a comprehensive examination of the elements and issues involved in the reform of the relevant sexual offences. For specific topics such as the offence of incest, apart from the statutory provisions of some major common law jurisdictions like Australia, Canada, England and Wales and Scotland, which are of Western cultural background, the Sub-committee has also referred to the relevant statutory provisions in a few Asian jurisdictions of Chinese cultural background such as Mainland China, Taiwan and Singapore for a more comprehensive comparative analysis on the subject matter.

20. Apart from making recommendations to reform some of the existing sexual offences, the Sub-committee recommends introducing a number of new specific sexual offences including the offence of voyeurism, and the offence of sexual activity with a dead person. Furthermore, the Sub-committee recommends that the existing offence of burglary (with intent to rape) in section 11 of the Theft Ordinance (Cap 210) be replaced by a new sexual offence of trespass with intent to commit a sexual offence.

Public views invited

21. The recommendations in this paper are the result of extensive discussions by the Sub-committee. They represent our preliminary views, presented for consideration by the community. We welcome any views, comments and suggestions on any issues discussed in this paper, which will assist the Sub-committee to reach its final conclusions in due course.

Chapter 1

Incest

Introduction

1.1 The age of consent is the threshold age below which sexual activity is unlawful. The criminal law imposes liability on anyone who engages in sexual activity with a person below the age of consent or involves such a person in sexual activity. In general, the existing age of consent in Hong Kong is 16.¹ That is to say, it is unlawful for a person to have sexual activity with another person who is under 16. It would also mean that it is in general legally permissible for anyone to have sexual activity with another person who is aged 16 or over, provided that it is consensual. However, the criminal law does impose restrictions on sexual activity between parties who are over the age of consent if they are within certain specified familial relationships, for example, father and daughter, mother and son, and so on. The legal restrictions are imposed by the long-standing offence of incest.

The present law

1.2 At present, incest is included in Part VI of the Crimes Ordinance (whilst other sexual offences are in Part XII). Under the present law of Hong Kong, there are two types of incest.

Incest by men

1.3 Section 47 of the Crimes Ordinance provides that a man who has sexual intercourse with a woman who is to his knowledge his granddaughter, daughter, sister² or mother shall be guilty of incest.³

1.4 Consent of the woman is not a defence.⁴

¹ An exception is the offence of a man committing buggery with a girl under 21 (Crimes Ordinance, s 118D) where the age of consent is 21 years of age. The Sub-committee has recommended that this offence be abolished in its previous consultation paper. (Law Reform Commission of Hong Kong, *Consultation Paper on Sexual Offences Involving Children and Persons with Mental Impairment* (November 2016), Recommendation 19)

² S 49 of the Crimes Ordinance provides that "brother" and "sister" in Part VI respectively include half-brother and half-sister.

³ S 47 does not apply to an adopted daughter.

⁴ Crimes Ordinance, s 47(2).

Incest by women of or over 16

1.5 Section 48 of the Crimes Ordinance provides that a woman of 16 or above who with consent permits her grandfather, father, brother⁵ or son to have sexual intercourse with her shall be guilty of incest. In order to constitute the offence, the woman must know him to be her grandfather, father, brother or son, as the case may be.⁶

Relationship of parties outside lawful wedlock

1.6 The offences in sections 47 and 48 would apply even though the relationship of the parties is not traced through lawful wedlock.⁷

Consent of Secretary for Justice to prosecute

1.7 The consent of the Secretary for Justice to prosecute is required before a charge for an offence under section 47 or section 48 can be laid.⁸

The English familial sexual offences

1.8 There are two sets of English familial sexual offences in the Sexual Offences Act 2003 ("the English Act"), one involving children (sections 25 – 26) and another involving adult relatives (sections 64 – 65).

The Scottish incest offences

1.9 Incest and related offences are contained in sections 1 – 2 of the Criminal Law (Consolidation)(Scotland) Act 1995 ("the Scottish 1995 Act").

1.10 The incest offence in the Scottish 1995 Act was left untouched by the Sexual Offences (Scotland) Act 2009 which made comprehensive reform of the sexual offences in Scotland. No change was made to the incest offence in the Scottish 1995 Act because the Scottish Law Commission ("SLC") made no proposal to change the existing incest law in the Scottish 1995 Act:

"In the Discussion Paper we asked whether, given the scope of the law (both current and that proposed elsewhere in the Discussion Paper) on offences based on the lack of consent by the victim and offences based on the protective principle, there should continue to be a separate offence of incest. Although

⁵ S 49 of the Crimes Ordinance provides that "brother" and "sister" in Part VI respectively include half-brother and half-sister.

⁶ S 49 does not apply to an adopted daughter.

⁷ Crimes Ordinance, s 49(1).

⁸ Crimes Ordinance, s 51.

*some consultees considered that there was no need for a separate offence and others were unsure, the majority favoured retaining the offence. However, there was no suggestion from those consultees that the current definition of incest should be expanded. Accordingly we make no proposal for any change to the existing law in relation to the offence of incest."*⁹

History of incest statutes in Hong Kong and England

England

1.11 Historically incest was an ecclesiastical, not a criminal offence in England (but it was a criminal offence in Scotland since 1567). Before the Punishment of Incest Act 1908 ("the 1908 Act") was enacted, the Church prohibited sexual intercourse between persons related either by kinship (consanguinity) or by marriage (affinity).¹⁰

1.12 *"Following unsuccessful attempts to carry incest bills in 1899-1900, 1903 and 1907, the bill of 1908 was finally passed. The [1908] Act made sexual intercourse between persons within a specified degree of consanguinity a misdemeanour ..."*¹¹

Hong Kong

1.13 In Hong Kong, the Punishment of Incest Ordinance was enacted in 1916 ("the 1916 Ordinance").

1.14 The 1916 Ordinance was almost the same as the 1908 Act. The 1916 Ordinance also expressly referenced the 1908 Act. According to the Hong Kong Hansard,¹² the "*object*" of the Punishment of Incest Bill was to "*introduce ... the provisions of the Punishment of Incest Act, 1908."* When moving the second reading of that Bill, the Hong Kong Attorney General stated in the legislature that:- "*... the Bill follows almost verbally the provisions of that Act ..."*¹³(emphasis added)

1.15 Part VI of the Crimes Ordinance was modelled on its predecessor, the 1916 Ordinance.

⁹ Scottish Law Commission, *Report on Rape and Other Sexual Offences* (December 2007), Scot Law Com No 209, para 5.3.

¹⁰ Bailey, V. & Blackburn, S. (1979), "*The Punishment of Incest Act 1908: A Case Study of Law Creation*", *Criminal Law Review*, pp 708-718.

¹¹ Bailey and Blackburn, pp 709-710.

¹² Dated 20 April 1916, p 10.

¹³ Hong Kong Hansard dated 27 April 1916, p 13.

Should incest be retained as a specific offence?

1.16 As seen above, incest is a specific offence in Hong Kong under sections 47 and 48 of the Crimes Ordinance.¹⁴

Question raised by the Scottish Law Commission

1.17 SLC raised the following question in their *Discussion Paper on Rape and Other Sexual Offences*:

"In addition to offences based on lack of consent by the victim and offences based on the protective principle, should there continue to be a separate offence of incest? If so, why?"¹⁵

The arguments for retaining incest as a specific offence

1.18 SLC sets out the arguments for retaining incest as a specific crime:¹⁶

Protection of members of the family

1.19 A first ground for retaining incest is that sexual activity between family members causes harm not only to those taking part in it but also other non-participating family members, especially children:

"It is clear that where there is sexual activity between family members then harm will be done not only to participants but also other members. In particular, children should not be exposed to the risk of sexual abuse within a family. Leaving this conduct to be regulated by other offences does not distinguish between the stranger who molests children and the person who has abused his authority or breached familial trust."¹⁷

Maintenance of family solidarity

1.20 A second ground for retaining incest is maintenance of the family solidarity and strengthening of its fabric:

"A second ground for retaining incest as a separate crime is that the harm which it causes to family members can lead to a

¹⁴ Incest by a man (Crimes Ordinance, s 47), incest by a woman of or over 16 (Crimes Ordinance, s 48).

¹⁵ Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences* (discussion 131, January 2006), question 65.

¹⁶ Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences* (discussion 131, January 2006), paras 6.17-6.28.

¹⁷ Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences*, para 6.17.

breakdown of trust within the family and, as such, incest should be seen as attacking the solidarity of the family. Incest may in many cases result in disruptive rivalries within a family and its prohibition will help to protect the fabric of the family ..."¹⁸

Recognition of the repugnance felt by the community

1.21 The retention of incest gives recognition to the general feelings of repugnance felt by the community towards sexual intercourse between close relatives:

*"In our Memorandum we expressed the belief that significant numbers of the community opposed the idea of sexual intercourse between persons who were closely related. This belief has been confirmed by the overwhelming support we received for our proposal that incest be retained as a separate crime. Some commentators, in expressing their opposition to incestuous sexual relationships, referred to a taboo against incest which was variously described as ancient and universally prevalent, as representing public opinion, as a basic feeling that certain relationships are not fitting and as rendering sexual activity within the family unthinkable. Others referred to a basic public abhorrence of and repugnance to incest. As one commentator put it, 'The purpose of making incest a specific crime is to declare that society regards it with a high degree of revulsion and disgust.' Another suggested that, 'Until it can be shown more clearly that past abhorrence of incest is unjustified, it would seem inopportune to abandon what has traditionally, at least in Scotland, been regarded as an invaluable, if not critical, social regulator.' ..."*¹⁹

Risk of genetic defects

1.22 Making incest a crime would reduce the risk of birth of children with genetic defects because of sexual intercourse between close relatives:

"This argument for criminalising incest is that intercourse between certain related persons should be prohibited because the offspring of such persons are more liable to exhibit physical and mental abnormalities. The scientific evidence for the genetic effect was set out in detail in the Commission's Consultative Memorandum, where the Commission stated that the argument, which it called the argument from inbreeding, was of fundamental importance and was rightly used to justify the

¹⁸ Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences*, para 6.19.
¹⁹ Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences*, para 6.21. (The Scottish Law Commission was quoting from what they had said in their earlier report in 1981: Scot Law Com No 69 (1981), para 3.17).

*prohibition of incest. In its subsequent Report, the Commission accepted that this argument could not be given priority but argued that the criminal law should intervene to prevent the potentially tragic effects of avoidable genetic defects on the individuals concerned, namely the child and the parents. A particular strength of the argument from genetic effects is that it provides a reason why incest is concerned with only male-female intercourse and why only certain family relationships are or should be within the prohibited degrees."*²⁰

Validity of consent and continuation of familial abuse beyond childhood

1.23 Sexual relations between close relatives may not be truly consenting. It often begins when a child is below the age of consent but continues when the child reaches that age. The validity of the continued "consent" given by a child when he or she reaches the age of consent is questionable:

*"A further argument in favour of a specific offence of incest challenges the idea that incest between adults is truly consenting. Incest often begins when a child is below the age of consent but continues when the child reaches that age. As Jennifer Temkin puts the point: 'abuse does not cease to be abuse the moment the victim reaches a prescribed age. Many women will find it impossible to extricate themselves from such relationships.' The Commission had itself pointed out that it was an open question whether in a family setting one could usefully talk in terms of a child consenting to sexual intercourse with a parent. Under the present law section 3 of the Criminal Law (Consolidation) (Scotland) Act 1995 Act deals with the situation where (psychological) coercion and manipulation within a family setting may be used to obtain 'consent' to intercourse (for example, exploitation of a child's financial dependency). But such coercion and manipulation will not necessarily come to an end when a child reaches 16."*²¹

Proper labelling of the wrong

1.24 The name of a specific offence of incest would highlight the wrong involved in sexual activity occurring between close family members:

"A final argument in support of an offence of incest is that where wrongful sexual activity occurs between members of a family, the offence should expressly bring out that key element. Including such activity within a broader offence which applies equally in non-family situations fails to highlight the wrong

²⁰ Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences*, para 6.23.

²¹ Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences*, para 6.26.

involved. A sexual offence committed by one member of a family on another is not simply an aggravating element of a more general offence. It is a separate wrong and should be recognised as such."²²

The arguments against retaining a specific offence of incest

1.25 SLC sets out the arguments against retaining a specific offence of incest:²³

Protection of family members does not provide justification for incest

1.26 Protection of members of the family provides a justification not for incest but for offences based on breach of trust within a family setting:

*"[Protection of members of the family] is a justification not for incest but for offences based on breach of trust within a family setting. The need to protect members of a family from sexual abuse applies not only to sexual intercourse involving close relatives but to any type of sexual contact involving anyone living in a family unit who may be harmed by another person who breaches a position of trust within the family setting ..."*²⁴

Family solidarity is broken more frequently by other familial sexual activity than incest

1.27 Many forms of sexual activity between people living together but who are not within the prohibited degrees of relationship (and so are not classified as "incest") may threaten the maintenance of family solidarity. In fact, family solidarity is broken more frequently by adultery than consenting sexual intercourse between adult relatives:

"... Many things may threaten the maintenance of family solidarity, not just one form of (heterosexual) sexual intercourse between relatives. Many forms of sexual activity between people living together but who are not within the prohibited degrees of relationship can have this effect. It might be thought that what threatens family solidarity is the abuse of familial trust, in which case this argument adds nothing to the first. Furthermore, in practice family solidarity is broken more frequently by other sexual practices than consenting sexual

²² Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences*, para 6.27.
²³ Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences* (discussion 131, January 2006), paras 6.17-6.28.
²⁴ Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences*, para 6.18.

intercourse between adult relatives. In particular, the activity which is most likely to break up families is adultery ..."²⁵

The reasons for community views against incest must be identified to assess their validity

1.28 Even if there is empirical evidence that many people believe that incest to be wrong, the reasons for their view must be identified. If not, it is difficult to assess the strengths and weaknesses of their views. (It should be noted that SLC specifically pointed out that they did not claim that the views that there was opposition by the community to sexual intercourse between persons who were closely related, which were from its 1981 Report, "were representative of society generally but rather that they reflected the views of those persons who responded to its Consultative Memorandum".²⁶ Thus the claimed empirical evidence is weak):

*"The counter consideration to this view is to query the point which the argument is attempting to make. If it is empirically the case that there are strongly held views about incest, it is important to find out what reasons are given for those views. For example, the fact that many people believe that incest is wrong because it threatens family solidarity is not in itself a separate ground for criminalising incest. It simply adds weight to the argument about family solidarity. If strongly held views are based on a reason not identified here, then that reason should be expressed in order to assess its strengths and weaknesses. If the argument is that account should be taken of strongly held views which are based on no reason at all, then it is difficult to see what point is being made."*²⁷

The genetic argument makes incest a "result" crime

1.29 The use of genetic argument to justify an offence of incest shifts the wrong of incest from the sexual intercourse between the parties to the resultant birth of a child with physical or mental impairment. The offence becomes a "result" crime – liability would attach only if wrongful outcome occurs:

"Counter arguments against the genetic effects of incest are that it removes the wrong of incest away from the sexual intercourse between the parties to any resulting birth of a child with a physical or mental disorder. As such, the offence becomes a so-called 'result' crime, that is liability should attach only if the wrongful outcome occurs. Some people may find it offensive to

²⁵ Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences*, para 6.20.

²⁶ Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences*, footnote 20 of Part 6.

²⁷ Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences*, para 6.22.

*say that because a child has developed a genetic physical or mental disorder, therefore its parents should be subject to criminal prosecution and punishment"*²⁸

The increased risk associated with inbreeding should not justify a criminal offence

1.30 Moreover, as pointed out by the Home Office Review Group in the UK, although research has shown that marriages between closely related persons do run a greatly increased risk for a variety of diseases when compared to marriage between unrelated persons, it is doubtful whether these risks would justify a criminal offence. Marriage between unrelated persons who carry genetic markers for various hereditary diseases is not prohibited by the criminal law (nor should it be):

*"It is often assumed that the offence of incest is a protection for the potential offspring of such a union, to prevent inbreeding (the eugenics argument). However there is little evidence for this being used as the rationale for the law in the past. Research into closely related communities such as the Amish of North America (who have a high proportion of 'first cousin' marriages) reveals that they do run a greatly increased risk for a variety of diseases when compared to other populations. However it is doubtful whether these risks would justify a criminal offence. Marriage between unrelated persons who carry genetic markers for various hereditary diseases such as Huntington's Chorea or Sickle Cell Anaemia is not proscribed, nor should it be. It is treading a dangerous path to base the criminal law solely on any form of eugenic argument."*²⁹

Invalidity of consent does not justify an offence of incest

1.31 Although it can be argued that sexual relations between close relatives may not be truly consenting (since it often begins when a child is below the age of consent but continues when the child reaches that age), this is not a ground for having an offence of incest. Instead this is a ground for an offence which penalises abuse of trust and authority within a family setting even where the victim is older than 16. If the objective is to protect the victim whose consent is questionable, it should not be done by a crime of incest because incest attaches criminal liability to all of the participants:

"Counter arguments on this point are to the effect that this is a ground for an offence which penalises abuse of trust and authority within any family setting, even where the victim is older than 16. If the mischief is to protect the person whose consent

²⁸ Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences*, para 6.24.

²⁹ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 5.1.6.

is open to question, it should be done other than by a crime of incest, which attaches criminal liability to all of the participants."³⁰

The need to highlight the wrong involved in sexual activity between close family members does not justify an offence of incest

1.32 The need to highlight the wrong involved in sexual activity occurring between close family members does not provide justification for a specific offence but rather for separate offences covering different types of wrongful sexual activity takes place within a family. A specific offence of incest may lead to the mislabelling of sexual wrongs:

*"However, it might be thought that this point [ie the offence should expressly bring out its key element of wrongful sexual activity occurring between members of a family] does not argue for the specific offence of incest but rather for separate offences where wrongful sexual activity takes place within a family. This type of separate offence already exists in the current law (as in section 3 of the 1995 Act) and we have proposed a more general offence of abuse of trust within a family unit. Moreover, this argument may lead to the mislabelling of sexual wrongs. Where, for example, a man has intercourse with his 10 year-old daughter, describing this conduct as incest (an offence which can be committed where all the participants are consenting) fails to bring out the most crucial aspect of the wrongdoing, namely that a young child has been raped."*³¹

Subsuming incest cases under general sexual offences

1.33 The Sub-committee has recommended in its previous two consultation papers a range of non-consensual offences (based on sexual autonomy) and another range of offences involving children and persons with mental impairment (based on the protective principle). It may therefore be argued that, in as much as the sexual abuses within the family may well be criminalised in terms of those general offences, a specific offence of incest is unnecessary. Non-consensual sexual activity between close family members may be dealt with by the general non-consensual sexual offences. Incestuous sexual activity involving children could be dealt with by the general offences involving children.

³⁰ Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences*, para 6.26. (The Scottish Law Commission referred to J R Spencer, "The Sexual Offences Act 2003: (2) Child and Family Offences" [2004] Crim LR 347 at pp 357-358 on this point.)

³¹ Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences*, para 6.28.

Subsuming incest cases under sexual abuse of a position of trust and authority

1.34 In its previous consultation paper, the Sub-committee has put forward for public discussion possible legislation for sexual offences involving abuse of a position of trust or authority.³² Several overseas countries have introduced legislation for the protection of 16 and 17 year-olds arising out of positions of trust.³³ There is, for example, a range of offences concerning abuse of a position of trust in the English Act.³⁴ These offences cover situations where a person (A), who is in a position of trust in relation to another person (B) under 18, involves B in specified types of sexual activity.³⁵ On the other hand, section 153(1) of the Canadian Criminal Code creates an offence of sexual exploitation. It covers sexual exploitation of a young person aged 16 years or more but under 18 by a person who is: (i) in a position of trust or authority towards that young person; (ii) a person with whom the young person is in a relationship of dependency; or (iii) in a relationship with the young person that is exploitative of the young person.

1.35 It might be argued that incest cases could be subsumed under sexual abuse of a position of trust or authority and there would not be any need for a separate offence of incest. This could be done by extending the scope of sexual offences involving abuse of a position of trust or authority to cover all situations of familial sexual abuses, including, for example, step-parentage, etc.³⁶

Our views on the issue as to whether a specific offence of incest should be retained

1.36 Having considered the various arguments for and against the offence of incest, we take the view that, having regard in particular to the need to preserve the fabric of the family and the need to protect children and vulnerable people against sexual exploitation within the family, the place which people often look upon as safe haven, the offence of incest should be retained.

1.37 In our view, there are strong grounds for this view. In the first place, there is always a risk of coercion in the case of familial sexual activity. As the Home Office Review Group in the UK rightly pointed out, adult family

³² Law Reform Commission of Hong Kong, *Consultation Paper on Sexual Offences Involving Children and Persons with Mental Impairment* (November 2016), Chapter 12.

³³ Including New South Wales (Australia), Canada, England and Wales, and Scotland.

³⁴ English Sexual Offences Act 2003, sections 16 to 19.

³⁵ Although B is stated in the legislation as a person under 18, these offences are mainly designed to protect young persons aged 16 and 17. For children below 16, sexual crimes committed against them can be charged under the specific offences for the protection of children below the age of consent. (Home Office, *Working within the Sexual Offences Act 2003*, (Home Office Communications Directorate, May 2004, SOA/4), at page 3.)

³⁶ It could also be extended to other areas not related to incest, but are areas where these sexual offences have proved to be useful, for example, in educational, youth leadership roles etc where there may be apparent consent but where that has been secured through abuse of a position of trust or authority.

members take on rights and responsibilities of protecting and safeguarding the weaker members and in doing so they have a degree of power and authority over younger or weaker members:

*"The primary aim of the law in this area should be to protect against sexual exploitation within the family, especially young and vulnerable people. There is something very particular about the family – the place where we all should be safest – becoming the place of abuse and exploitation. The dynamics of relationships within families are different to those between friends. Adults within families take on rights and responsibilities of protecting and safeguarding the weaker members – in doing so they have a degree of power and authority over younger or weaker members. Any abuse of this power is individually destructive and socially disruptive."*³⁷

1.38 There is a clear message from the Court of Appeal in Hong Kong that incest is a serious offence which strikes at the fabric of family life. In *HKSAR v Li Kin Ho*, Power VP said:

"We are satisfied that the statement in the Second Edition of Sentencing in Hong Kong correctly sets out the position when it says:

*Such offences (incest) strike at the very fabric of family life. Sentences are required to both punish and deter. Depending upon the age of the victim, sentence has regularly run from imprisonment of between six and ten years. The offence will be aggravated if the intercourse occurred over a long period, if force is used, if pregnancy results, or if the victim is very young."*³⁸

1.39 What Power VP had said in *Li Kin Ho* was later echoed in other decisions of the Court of Appeal in Hong Kong including *HKSAR v Chan Yiu Leung*,³⁹ *香港特別行政區訴黎XX*,⁴⁰ and *香港特別行政區訴 LKM*.⁴¹

1.40 The offence of incest has been on the statute book for a long time and has been used on many occasions to prosecute offenders. This shows incest is not an obsolete offence and is a useful legal tool to deal with sexual exploitation within the family.

1.41 Incest (or other offences covering familial sexual activity) has been retained in other jurisdictions. There was no change to the offence of incest in Scotland following public consultation. In England and Wales, incest has been retained though a different term is used to describe the

³⁷ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 5.5.3.

³⁸ *HKSAR v Li Kin Ho* [1999] 2 HKC 589, at 605 (Power VP).

³⁹ *HKSAR v Chan Yiu Leung*, CACC 113/2015, at para 17 (Lunn VP).

⁴⁰ *香港特別行政區訴黎XX*, CACC481/2011, at para 22 (上訴法庭副庭長楊振權).

⁴¹ *香港特別行政區訴 LKM*, CACC 202/2001, at para 14 (高等法院上訴法庭法官胡國興).

offence. In Australia, there is an offence of incest in Australia Capital Territory,⁴² New South Wales,⁴³ Northern Territory,⁴⁴ Queensland,⁴⁵ South Australia,⁴⁶ Tasmania,⁴⁷ and Victoria.⁴⁸ There is an offence of sexual offences by relatives in Western Australia.⁴⁹ There is also an offence of incest in Canada⁵⁰ and Singapore.⁵¹ Moreover, incest is an offence in New Zealand.⁵²

1.42 As regards the possible approach of subsuming all cases of incest under sexual abuse of a position of trust and authority, we would point out that the Sub-committee have yet to review the public responses to our previous consultation paper to ascertain whether there is support or otherwise for such legislation. Having said that, it is our preliminary view that there would be problems with this approach. First, there could be cases of incest which do not involve abuse of a position of trust and authority, for example, where the parties are consensual in their sexual activity. Second, incest does not depend on the age of the victim. The overseas legislation on sexual offences involving a position of trust and authority is intended for the protection of young persons aged 16 or above but under 18. As they are above the age of consent, they are not protected by sexual offences involving children and so they need separate legislation to protect them. Hence, sexual offences involving a position of trust and authority may not cover all cases of incest.

1.43 Having expressed the view that incest should be retained as a specific offence in Hong Kong, we identify below some issues relevant to the existing law and consider how the existing offence of incest might be reformed.

Issues with the present law

1.44 The Home Office Review Group in the UK pointed out that historically incest applied to vaginal intercourse only and the offence was gender specific:

"The limited nature of the present law was cited as a problem. Incest applies to vaginal intercourse only, with separate offences for men and women. There are strong arguments that the law should be able to deal with other types of sexual penetration,

42 Crimes Act 1900 (Australian Capital Territory), s 62.

43 Crimes Act 1900 (New South Wales), s 78A.

44 Criminal Code (Northern Territory), s 134.

45 Criminal Code (Queensland), s 222.

46 Criminal Law Consolidation Act 1935 (South Australia), s 72.

47 Criminal Code Act 1924 (Tasmania), s 133.

48 Crimes Act 1958 (Victoria), s 44.

49 Criminal Code (Western Australia), s 329.

50 Canadian Criminal Code, s 155.

51 Singaporean Penal Code, s 376G.

52 New Zealand Crimes Act 1961, s 130.

which also cause psychological and physiological harm, and that it should include same sex abuse."⁵³

1.45 The UK Review Group also pointed out other issues with the law. The present offence of incest in Hong Kong is confined to lineal blood relatives (grandparents, parents, sons and daughters) and siblings, and does not include looser family structures including step-parents. Moreover, there is the stigma attached to the word "incest":

*"The present offence is limited to lineal blood relatives and siblings, and so does not include today's looser family structures including step-parents, nor does it encompass the transient nature of some family relationships. It was also argued during consultation that the stigma attached to the word 'incest' tainted both the victim and their family, because there was a perception that it was consensual behaviour, and therefore that the victim was complicit."*⁵⁴

Should the term incest be continued to be used?

The English Act

1.46 The term incest is not used in the English Act to describe familial sexual offences. For example, sexual activity with a child family member (section 25) and sex with an adult relative: penetration (section 64) are used instead.

The Scottish 1995 Act

1.47 There is the offence of incest (section 1) and another offence of intercourse with a step-child (section 2). Hence, incest is used in one offence and not in the other.

1.48 The issue is whether the term incest should continue to be used or not.

1.49 There are arguments for and against. Those in favour of the term incest may argue that it could highlight the key element of the offence, viz, wrongful sexual activity occurring between family members. As the SLC points out in its *Discussion Paper on Rape and Other Sexual Offences*, "[a] final argument in support of an offence of incest is that where wrongful sexual activity occurs between members of a family, the offence should expressly bring out that key element ..."⁵⁵

⁵³ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), at para 5.2.1.

⁵⁴ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), at para 5.2.4.

⁵⁵ Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences*, para 6.27.

1.50 Furthermore, the term incest has been used for a long time and people well understand its meaning.

1.51 Those against the term incest may cite the stigma attached to the word incest. The Home Office Review Group in the UK points out that there is a stigma attached to the word "incest" which affects the victim and the family, because there is a perception that the incestuous conduct is consensual behaviour, and so that the victim is a complicit in the crime:

*"... It was also argued during consultation that the stigma attached to the word 'incest' tainted both the victim and their family, because there was a perception that it was consensual behaviour, and therefore that the victim was complicit."*⁵⁶

1.52 It may also be argued that the word incest does not properly label the wrong involved in the sexual activity, especially when it involves children. As SLC points out, "[w]here, for example, a man has intercourse with his 10 year-old daughter, describing this conduct as incest (an offence which can be committed where all the participants are consenting) fails to bring out the most crucial aspect of the wrongdoing, namely that a young child has been raped."⁵⁷

Other Jurisdictions

1.53 In other overseas jurisdictions, the term incest is used in Australian Capital Territory,⁵⁸ New South Wales,⁵⁹ Northern Territory,⁶⁰ Queensland,⁶¹ South Australia,⁶² Tasmania,⁶³ Victoria⁶⁴ and Western Australia.⁶⁵ The term incest is also used in Canada,⁶⁶ Singapore⁶⁷ and New Zealand⁶⁸. In Taiwan, the term "*offence against morality*" is used.⁶⁹ In Mainland China, there is no law which prohibits (as between consenting adults) a person from having sexual intercourse with a lineal blood relative or a collateral blood relative. That said, under Article 7 of the Marriage Law of the People's Republic of China, no marriage may be contracted if the man and woman are lineal relatives by blood, or collateral relatives by blood up to the third degree of kinship.⁷⁰

⁵⁶ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 5.2.4.

⁵⁷ Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences*, para 6.28.

⁵⁸ Crimes Act 1900 (Australian Capital Territory), s 62.

⁵⁹ Crimes Act 1900 (New South Wales), s 78A.

⁶⁰ Criminal Code Act (Northern Territory), s 134 of Schedule 1 to the Act.

⁶¹ Criminal Code (Queensland), s 222.

⁶² Criminal Law Consolidation Act 1935 (South Australia), s 72.

⁶³ Criminal Code Act 1924 (Tasmania), s 133.

⁶⁴ Crimes Act 1958 (Victoria), s 44.

⁶⁵ Criminal Code (Western Australia), s 329.

⁶⁶ Canadian Criminal Code, s 155.

⁶⁷ Singaporean Penal Code, s 376G.

⁶⁸ New Zealand Crimes Act 1961, s 130.

⁶⁹ Taiwan's Criminal Code, Chapter 16-1.

⁷⁰ Marriage Law of the People's Republic of China, article 6.

Our views

1.54 We take the view that the term incest should continue to be used. We are aware that there may be some stigma attached to the term incest. However, the term is well known to the community to reflect a serious offence involving sexual activity between close relatives. It is difficult to find an alternative term that can convey the same level of understanding to the community. As regards the criticism that when intercourse takes place between a father and his child daughter, the term incest cannot bring out the true nature of the wrongdoing, namely, rape (see paragraph 1.52 above), we would point out that if there is clear evidence showing rape was committed, a charge of rape (rather than incest) would be appropriate. In this regard, one should also bear in mind the statutory alternative verdict under section 50 of the Crimes Ordinance. If there is insufficient evidence to prove the lack of consent, then a verdict of incest could be returned instead.

To what activity should the offence of incest apply?

1.55 The existing incest offences in the Crimes Ordinance cover vaginal intercourse only.

The English Act

1.56 The English offences involving sexual activity with children cover both penetrative and non-penetrative activity. On the other hand, the English offences involving sexual activity between adult relatives cover penetrative activity only. But in both set of offences, penetration of the vagina, anus or mouth is covered.

1.57 The Home Office Review Group in the UK points out that a problem with the present law is that incest applies to vaginal intercourse only and the offence is gender specific:

*"The limited nature of the present law was cited as a problem. Incest applies to vaginal intercourse only, with separate offences for men and women. There are strong arguments that the law should be able to deal with other types of sexual penetration, which also cause psychological and physiological harm, and that it should include same sex abuse."*⁷¹

The Scottish 1995 Act

1.58 The Scottish offences are confined to sexual intercourse.

⁷¹ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), at para 5.2.1.

Other Jurisdictions

1.59 In overseas jurisdictions such as Australian Capital Territory, New South Wales, Northern Territory, Queensland, South Australia, Tasmania, Victoria, Western Australia, Canada, New Zealand, Singapore, and Taiwan, the offence applies to penile penetration of the vagina, anus and mouth.⁷² Apart from Queensland, Tasmania and Canada, the offence also covers penetration of the anus and vagina by objects or any part of the body except for purpose of medical examination/treatment.

Our views

1.60 The Sub-committee is unanimously of the view that the offence should apply to all forms of penile penetration.

1.61 There were divergent views within the Sub-committee as to whether the offence should apply (as it does in Queensland, Tasmania and Canada) to other forms of penetration or sexual activity.⁷³ Noting that the inclusion of such activity in the offence would be a significant departure from the current law, the Sub-committee is of the view that this is a matter that should be left for public consultation.

Should the new offence be gender-neutral?

1.62 There are separate incest offences for men and women in the Crimes Ordinance (see paragraphs 1.3 and 1.5 above).

The English Act

1.63 The English familial sexual offences are gender-neutral. The accused is "a person (A)". The victim is "another person (B)".

The Scottish 1995 Act

1.64 The Scottish incest offence is gender-specific. It covers sexual intercourse between a "male person" with a female relative;⁷⁴ and intercourse between a "female person" with a male relative.⁷⁵ (By contrast, all the sexual offences in the Scottish Act, which was enacted in 2009, are gender-neutral.)

⁷² See respective provisions in footnote 58 – 69 above.

⁷³ This could cater for gender neutrality in the application of the offence.

⁷⁴ Mother, daughter, grandmother, grand-daughter, sister, aunt, niece, great grandmother, great grand-daughter, adoptive mother or former adoptive mother, adoptive daughter or former adoptive daughter. (Criminal Law (Consolidation)(Scotland) Act 1995, column 1 of table to s 1(1))

⁷⁵ Father, son, grandfather, grandson, brother, uncle, nephew, great grandfather, great grandson, adoptive father or former adoptive father, adoptive son or former adoptive son. (Criminal Law (Consolidation)(Scotland) Act 1995, column 2 of table to s 1(1))

1.65 The incest offence in the Scottish 1995 Act was left untouched by the Sexual Offences (Scotland) Act 2009 which made comprehensive reform of the sexual offences in Scotland. No reform was made to the incest offence in the Scottish 1995 Act because SLC made no proposal to change the existing incest law in the Scottish 1995 Act:

*"In the Discussion Paper we asked whether, given the scope of the law (both current and that proposed elsewhere in the Discussion Paper) on offences based on the lack of consent by the victim and offences based on the protective principle, there should continue to be a separate offence of incest. Although some consultees considered that there was no need for a separate offence and others were unsure, the majority favoured retaining the offence. However, there was no suggestion from those consultees that the current definition of incest should be expanded. Accordingly we make no proposal for any change to the existing law in relation to the offence of incest."*⁷⁶

Other Jurisdictions

1.66 In overseas jurisdictions such as Australian Capital Territory, New South Wales, Northern Territory, Queensland, South Australia, Tasmania, Victoria, Western Australia, Canada, New Zealand, and Taiwan, the offence is gender-neutral. In Singapore, the offence is gender-specific : the male shall be guilty of incest for the act, and the female shall be guilty of the offence only if she permits the act.⁷⁷

Our views

1.67 We consider that the new offence should be gender-neutral. Gender-neutrality is one of the guiding principles of our reform. We do not see any good reasons why, as under the existing Crimes Ordinance, incest can only be committed by a man on another female relative and by a woman on another male relative.

Should the new offence be extended beyond direct blood relatives and siblings?

1.68 The existing incest offence in the Crimes Ordinance is confined to relations in the direct blood line including half relations and siblings.⁷⁸ The

⁷⁶ Scottish Law Commission, *Report on Rape and Other Sexual Offences* (December 2007), Scot Law Com No 209, para 5.3.

⁷⁷ See footnote 72 above

⁷⁸ S 47(1) of the Crimes Ordinance provides:

"(1) Any man who has sexual intercourse with a woman, who is to his knowledge his granddaughter, daughter, sister or mother, shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 14 years..."

S 48 of the Crimes Ordinance provides:

issue is whether the new offence should be extended to cover other relationships discussed below.

Uncles and aunts

The English Act

1.69 The English offences cover sexual activity between uncles/aunts with their nephews/nieces.

The Scottish 1995 Act

1.70 The Scottish offences also cover uncles and aunts, nephews and nieces.

1.71 The UK Review Group points out that there are strong arguments for including uncles and aunts, nephews and nieces in the offence, citing findings of the Russell survey (which consisted of interviews with 930 randomly selected adult female residents of San Francisco) and the findings of D J West, *Sexual Victimization* (1985):

*"Russell found that abuse by uncles was the most prevalent form of abuse by relatives in her survey. 46 per cent of the abuse for which they were responsible was classified as very serious. Similarly, West found that in one of his two samples, sexual contact between a child and an adult uncle was the most prevalent form of such contact with relatives."*⁷⁹

1.72 The UK Review Group, however, considers that only uncles and aunts who are blood relatives should be included since in many families friendly but unrelated adults are called uncles and aunts:

"We considered the issue of uncles and aunts, with some concern that in many families friendly but unrelated adults are called uncle or aunt by the children. However we did not think this should be an objection because blood relatives are in a particular position of trust to their nieces and nephews; whatever the children may or may not know, the adults will understand the kinship and that any sexual relationship would be wrong. Accordingly we thought that any new offence should explicitly mention uncles and aunts who are blood relatives. Hence, the

"Any woman of or above the age of 16 years who with consent permits her grandfather, father, brother or son to have sexual intercourse with her (knowing him to be her grandfather, father, brother or son, as the case may be) shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 14 years."

⁷⁹ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 5.5.12. The quote is cited from Professor Jennifer Temkin, *Do we need the crime of incest?* – *Current Legal Problems* 1991 Vol 44.

first limb of the new familial sexual abuse offence should outlaw sexual penetration of children under 18 by their blood relatives as in the present law with the addition of uncles and aunts."⁸⁰

Other Jurisdictions

1.73 The offence is applicable to uncle/aunt and niece/nephew relationships (blood relatives) in Taiwan and Queensland. For the rest of the overseas jurisdictions including Australian Capital Territory, New South Wales, Northern Territory, South Australia, Tasmania, Victoria, Western Australia, Canada, New Zealand, and Singapore, the offence is not applicable to uncle/aunt and niece/nephew relationships (blood relatives).⁸¹

Hong Kong Marriage Ordinance (Cap 181)

1.74 Pursuant to section 27(1) and Schedule 5 to the Marriage Ordinance (Cap 181), marriage between uncle/aunt and niece/nephew is unlawful.

Our views

1.75 We consider that the new offence should be extended to cover uncles/aunts and their nephews/nieces who are blood relatives. People in those relationships are potentially easy preys to sexual abuse in the family.

Adoptive parents

1.76 The existing incest offence in the Crimes Ordinance does not cover parents who have a sexual relationship with their adopted children.

The English Act

1.77 The English offences involving children cover adoptive parents.⁸²

The Scottish 1995 Act

1.78 The Scottish offences cover adoptive parents.

⁸⁰ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 5.5.13.

⁸¹ See footnote 72 above.

⁸² S 67(1) of the Adoption and Children Act 2002 provides that "[a]n adopted person is to be treated in law as if born as the child of the adopters or adopter." Hence, adoptive parents are covered.

1.79 The UK Review Group takes the view that the new offence should cover adoptive parents since some children are adopted when they are very young and may not know that their adoptive parents are not their natural parents. Moreover, as adoptive parents undertake lifelong trust and responsibility to the adopted children, adoptive parents should be treated the same as natural parents:

*"The second grouping of people we considered were those who join family units in a formal way, or who create new families by adoption or fostering. For all intents and purposes the law of England and Wales treats relationships by adoption as on a par with relationships by blood: legally the position of the adoptive parent is the same as that of a natural parent and there is a prohibition against marriage with an adopted child. Some children are adopted at a very young age and may have no idea that their adoptive parents are not their natural parents. In 1984 the CLRC recommended that the offence of incest should apply to adoptive relationships."*⁸³

*"We thought that adoptive parents undertook lifelong trust and responsibility to the children they adopted, and that they should be treated on a par with natural parents. We recommend that adoptive parents be included within the first limb of our new offence on the same basis as blood relatives ..."*⁸⁴

Other Jurisdictions

1.80 The offence covers adoptive parents in Queensland. For other overseas jurisdictions including Australian Capital Territory, New South Wales, Northern Territory, South Australia, Tasmania, Western Australia, Canada, Singapore and Taiwan, the offence does not cover adoptive parents. However, the positions are uncertain in Victoria and New Zealand.

Hong Kong Marriage Ordinance (Cap 181)

1.81 Pursuant to section 27(1) and Schedule 5 to the Marriage Ordinance (Cap 181), marriage between an adoptive parent and an adoptive child is unlawful.

Our views

1.82 As the UK Review Group has rightly pointed out, some children who are adopted at a very young age may not know that their adoptive

⁸³ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 5.6.1.

⁸⁴ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 5.6.2.

parents are not their natural parents. Besides that, adoptive parents undertake lifelong trust and responsibility to their adopted children. The Sub-committee does not see any justification for a distinction to be drawn between adoptive parents and natural parents as the law must apply equally to protect all children. However, the introduction of such a law would give rise to other considerations. If the adoptive parent and adoptive child are consenting adults should that constitute an offence? Should there be an age limit in respect of sexual relations with an adoptive child? The Sub-committee is of the view that these are matters which should be the subject of public consultation.

Adoptive siblings

1.83 The existing incest offence in the Crimes Ordinance does not cover adoptive siblings.

The English Act

1.84 Sexual activity between adoptive siblings is covered by the English offences involving sexual activity with children. On the other hand, adoptive siblings are not within the scope of English offences involving sexual activity between adult relatives. The result is that, under English law, it is an offence to engage in sexual activity with a child adoptive sibling (child is a person under 18 in this sense).⁸⁵ However, it is not an offence to engage in sexual activity with adult adoptive siblings who are adults (of 18 or over).

The Scottish 1995 Act

1.85 The Scottish offence does not apply to sexual activity between adoptive siblings.

1.86 The UK Review Group considers that sexual activity with a child adoptive sibling under the age of 18 should be prohibited because adoptive siblings are so intrinsically part of the family and they may not know that the other siblings are adopted and so should be treated on the same basis as natural siblings. The Review Group however takes a different view with regard to sexual activity between adult adoptive siblings who are 18 or over. The Review Group does not think such activity should be criminalised (and that is why it is not an offence in the English Act to engage in sexual activity with adoptive siblings who are adults of 18 or over). The rationale is that adult adoptive siblings have no ties of blood and once of age they are able to marry:

"The question of adoptive siblings is rather different to that of adoptive parents; they have no ties of blood but are brought up

⁸⁵ The English Act, ss 25(1)(e) and 26(1)(e).

together as part of the same family. Once of age they are able to marry. However we thought that they were so intrinsically part of the family, and many may not know that they or their siblings are adopted (or understand what that means even if they know it) that it was important that this part of the law apply to them. Sexual relationships between adoptive siblings under the age of 18 should be prohibited on the same basis as those between siblings."⁸⁶

*"We have proposed that adoptive siblings under the age of 18 should be prohibited from a sexual relationship. We did not extend this prohibition into adulthood, but they would of course be free to marry with consent over the age of 16. We would not seek to prevent sex within marriage, and although we think that such an early marriage between adoptive siblings is unlikely, it is not impossible. Hence there would have to be a defence of marriage for adoptive siblings over the age of 16."*⁸⁷

Other Jurisdictions

1.87 The offence covers adoptive siblings in Queensland. For other overseas jurisdictions including Australian Capital Territory, New South Wales, Northern Territory, South Australia, Tasmania, Victoria, Western Australia, Canada, New Zealand, Singapore and Taiwan, the offence does not cover adoptive siblings.

Hong Kong Marriage Ordinance (Cap 181)

1.88 Pursuant to section 27(1) and Schedule 5 to the Marriage Ordinance (Cap 181), marriage between adoptive siblings is lawful.

Our views

1.89 We consider that the new offence should not be extended to cover adoptive siblings given that they have no blood relation. Furthermore, quite distinct from adoptive parents, adoptive siblings do not have the same legal rights and responsibilities as that of natural siblings since their siblings relationship was brought upon by their parents through adoption. The Sub-committee also unanimously agreed that it is not necessary to create a new offence to cover adoptive siblings because underage siblings are already protected under existing offences involving children.

⁸⁶ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 5.6.3.

⁸⁷ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 5.6.4.

Step-parents and foster-parents

1.90 The existing incest offence in the Crimes Ordinance does not cover step-parents and foster-parents. There is no formal statutory definition of a foster relationship in Hong Kong. Foster care is only one type of the residential child care services provided for children under the age of 18 in a family setting. The nature of foster care is described by the Social Welfare Department in the following terms:

"Foster Care

Foster Care provides residential family care to children under 18 years of age whose parents cannot adequately take care of them due to various reasons, so that they can continue to enjoy family life until they can re-unite with their families, join an adoptive family or live independently.

Foster Care (Emergency)

Foster Care (Emergency) provides immediate and short-term residential family care to children under 18 years of age, whose parents cannot care for them because of emergency or crisis situations, so that they can continue to enjoy family life until they can reunite with their families or secure a long-term placement. The duration of care should not exceed 6 weeks."⁸⁸

The English Act

1.91 Step-parents and foster-parents are covered by the English offences involving sexual activity with children. On the other hand, step-parents and foster-parents are not within the scope of English offences involving sexual activity between adult relatives.

1.92 Foster relationship is defined in section 27(5)(c) of the English Act:

"a person is a child's foster parent if

- (i) he is a person with whom the child has been placed under section 22C of the Children Act 1989 in a placement falling within subsection (6)(a) or (b) of that section (placement with local authority foster parent),*
- (i)(a) he is a person with whom the child has been placed under section 59(1)(a) of that Act (placement by voluntary organisation),*
- (ii) he fosters the child privately, within the meaning given by section 66(1)(b) of that Act."*

⁸⁸ Social Welfare Department, the Government of the Hong Kong Special Administrative Region, "Foster care service"; http://www.swd.gov.hk/en/index/site_pubsvc/page_family/sub_listofserv/id_fostercare/

The Scottish 1995 Act

1.93 Step-parents are covered by the Scottish offence of intercourse with a step-child (section 2 of the Scottish 1995 Act).

1.94 Foster-parents are not covered.

1.95 The UK Review Group takes the view that any sexual relationship with a foster-child or step-child is a particular abuse of trust, and that merits intervention by the criminal law.

*"... Foster and step-parents are formal relationships (sanctioned by marriage, or organised by local authorities). It is widely recognised that new partners may present a risk of physical or sexual abuse to a child. Any sexual relationship with a foster-child or step-child is a particular abuse of trust, and that should be recognised by the criminal law. We therefore recommend that the second part of our offence of familial abuse should relate to step-parents and foster-parents who sexually penetrate (or are sexually penetrated by) their children under the age of 18. We also thought that this prohibition should extend to the age of 18 even where the foster (or step) relationship had ended because that adult would still be in a pseudo-parental role of authority over the young person."*⁸⁹

Other Jurisdictions

1.96 The offence covers step-parents in Australian Capital Territory, Queensland (not an offence if the relationship arose after the relevant persons became adults), Victoria, and Western Australia. For other overseas jurisdictions including New South Wales, Northern Territory, South Australia, Tasmania, Canada, New Zealand, Singapore and Taiwan, the offence does not cover step-parents.

1.97 In all of the above-mentioned jurisdictions, the offence does not cover foster-parents.

Hong Kong Marriage Ordinance (Cap 181)

1.98 Pursuant to section 27(1) and Schedule 5 to the Marriage Ordinance (Cap 181), marriage between step-parents (including step-grandparents) and step-child (including step-grandchild) is unlawful except if:-

- (i) both parties to the marriage have attained the age of 21 at the time of marriage; and

⁸⁹ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 5.6.

- (ii) the younger party has not at any time before attaining the age of 18 been a child of the family in relation to the other party.⁹⁰

Our views

1.99 We consider that the new offence should not be extended to cover step-parents/foster-parents given that they have no blood relation with the step-child/foster-child. Also, there is lack of a statutory definition of a foster relationship in Hong Kong. In fact, we are not aware of any consensus as to when and how a foster relationship would arise in Hong Kong. Attaching criminal liability to such an uncertain relationship would be against the principle of clarity of the law which is one of the Sub-committee's guiding principles. Furthermore, we are of the view that there is no need to extend the offence of incest to cover step-parents and foster-parents because (i) children are already protected under the current legislation;⁹¹ and (ii) underage children will also be covered by the proposed offences involving children as recommended in the previous consultation paper.⁹² For cases where step-parents are involved, we also note that the court will usually impose a harsher sentence as punishment.

Other familial relationships

1.100 The UK Review Group considers that in addition to the above relationships, the new offences should extend to cover "*other persons living in the household and in a position of trust or authority over a child*".⁹³

1.101 The review group points out that such extension of the scope of the new offence is necessary because the greatest risks to children come from people (outside the relationships mentioned above) who are in a short term relationship with a parent, or those who have sought a position of trust in a family in order to gain access to children:

"We also gave very careful thought to those who do not enter into any formal relationships in a family such as marriage or adoption but may play very important role in a child's life. It was put to us very strongly at our consultation conference that some of the greatest risks to children came from people, particularly men, who were in a short term relationship with a parent, or who have sought a position of trust in a family in order

⁹⁰ Paragraph 4 of Schedule 5 to the Marriage Ordinance (Cap 181).

⁹¹ There is a range of offences concerning sexual activity with a child under 16 in the Crimes Ordinance: indecent conduct towards child under 16 (Crimes Ordinance, s 146), intercourse with girl under 13 (Crimes Ordinance, s 123), and intercourse with girl under 16 (Crimes Ordinance, s 124). Moreover, a person under 16 cannot in law give any consent to what would otherwise be an offence of indecent assault (Crimes Ordinance, s 122(2)).

⁹² See Law Reform Commission of Hong Kong, *Consultation Paper on Sexual Offences Involving Children and Persons with Mental Impairment* (November 2016).

⁹³ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 5.6.13.

to gain access to children. If these people were to abuse a child under 16, then our proposed offences of sexual abuse of a child would apply, but that does not address the separate issue of how children within any kind of family structure should be protected by the law. While families may be loosely defined, we must look to ways to ensure that the law makes it crystal clear that abusing the trust of a child within the family is abhorrent and unacceptable"

1.102 The review group's view has been adopted in section 27(4) of the English Act which provides that A and B is within the specified family relationship if:

- "(a) A and B live in the same household, and*
- (b) A is regularly involved in caring for, training, supervising or being in sole charge of B."*

1.103 This provision is wide enough to cover more distant family members and the child, provided that they live in the same household. It can cover, for example, nannies who live in the same household as the child in their care.⁹⁴

Other Jurisdictions

1.104 Apart from Queensland, the offence does not cover "*other persons living in the household and in a position of trust or authority over a child*" in all other overseas jurisdictions including Australian Capital Territory, New South Wales, Northern Territory, South Australia, Tasmania, Victoria, Western Australia, Canada, New Zealand, Singapore and Taiwan. In Queensland, the offence is applicable only if the relationship arises because of legal arrangement.⁹⁵

Our views

1.105 We do not consider that the new offence should be extended to cover "*other persons living in the household and in a position of trust or authority over a child*" given that a blood relation does not exist between such persons and the respective child. Furthermore, it may be too wide an extension of the scope of this new offence. Incest is well known to be an offence covering sexual activity between close family members. Such extension would bring the scope of incest beyond sexual activity between close family members, for example, nannies looking after the child. Sexual abuse committed by those who have sought a position of trust in a family in

⁹⁴ Kim Stevenson *et al*, *Blackstone's Guide to the Sexual Offences Act 2003*, (Oxford University Press 2004), p 105.

⁹⁵ Section 222(6) Criminal Code Act 1899.

order to gain access to children should be dealt with by way of offences involving a breach of trust rather than incest.⁹⁶

Consent of the Secretary for Justice to prosecute

Background

Hong Kong

1.106 Section 51 of the Crimes Ordinance provides:- "*No prosecution for an offence under this Part shall be instituted without the consent of the Secretary for Justice.*"⁹⁷

1.107 Section 51 was modelled from section 7 of the Punishment of Incest Ordinance 1916, which provides:- "*No prosecution for an offence under this Ordinance shall be commenced without the sanction of the Attorney General.*"

1.108 Section 7 of the 1916 Ordinance expressly referenced "c. 45, s. 6" of the UK Act. Section 6 of the Punishment of Incest Act, 1908 (Chapter 45) provides:- "*No prosecution for any offence under this Act shall be commenced without the sanction of His Majesty's Attorney-General, but this section shall not apply to any prosecution commenced by or on behalf of the Director of Public Prosecutions.*"

1.109 When moving the second reading of the Punishment of Incest Bill (1916), the then Attorney General stated in the legislature that:- "*...the Bill follows almost verbally the provisions of that Act ...*" (emphasis added). However, we cannot find any information from the Hong Kong legislative materials which explains why consent of the Secretary for Justice/Attorney General was required.

England

1.110 We note the following passages from the UK Hansard which may be directly relevant:-

- (a) "*Parliamentary bills to punish incest were introduced in 1903 and in 1908 without detailed explanation because they dealt with 'a rather disagreeable subject' or 'a very painful subject'... state interference in the home and in family relationships was felt to be premature, not to say against the grain of laissez-faire practice in the sphere of social policy ...*"

⁹⁶ Such as those mentioned in Chapter 12 of the *Consultation Paper on Sexual Offences involving Children and Persons with Mental Impairment*.

⁹⁷ The term "*Attorney General*" became "*the Secretary for Justice*" as per an amendment near the Chinese resumption of HK's sovereignty.

In fact, in 1903, the Lord Chancellor (The Earl of Halsbury) opposed the relevant Bill in its entirety:

"if the law which has prevailed for some centuries on the subject is to be altered some greater case ought to have been presented ... legislation of this character is calculated to do an infinite amount of mischief"

Before 1908, the attempts to carry incest bills in 1899-1900, 1903 and 1907 had all failed. In the circumstances, it is understandable that the drafters of the 1908 Bill *may* have considered that the consent of the Attorney General/Director of Public Prosecution would provide more safeguard relative to the prosecution of such a sensitive matter;

- (b) In relation to this, some legislators have expressed the concern that some acts of incest happened in poor families, the members of which were forced to live together. It would be easy to make incest allegations which could not be disproved easily.⁹⁸ Again, that may explain why a more stringent approach from the prosecuting authority was required; and
- (c) When discussing the Incest Bill 1903, legislator Mr Caldwell pointed out the following:

*"the law of Scotland was much stronger on this subject than the law of England as proposed in the Bill. It should be noted, however that **prosecutions in Scotland were undertaken only by the Lord Advocate, so that it would be impossible to apply this Bill to Scotch procedure without a special clause being introduced. He suggested that it would be advisable to restrict prosecutions under the Bill to cases authorised by the Attorney-General or the Solicitor-General.**" (emphasis added).⁹⁹*

1.111 It is not entirely clear whether the 1903 debate affected the subsequent 1908 legislation. That said, it seems that the UK legislators had considered this factor in seeking an established practice among different parts of the UK.

⁹⁸ See Commons, 26.6.1908, 287; per Mr Lupton.

⁹⁹ See Commons, 26.6.1903, 705.

Our views

1.112 Seeing no special reason to depart from the usual practice, the Sub-committee considers that the Secretary for Justice's consent to prosecute should be retained.

Recommendation 1

We recommend that the offence of incest be retained and the term incest should continue to be used.

We also recommend that the offence of incest be reformed and the new offence should:

- (a) be gender neutral;**
- (b) cover all penile penetration of the mouth, vagina and anus; and**
- (c) be extended to cover uncles/aunts and nephews/nieces (who are blood relatives).**

We are of the view that the issue of whether the new offence should:

- (a) apply to other forms of penetration or sexual activity; and**
- (b) cover adoptive parents**

should be considered by the Hong Kong community. Accordingly, we invite the community to express their views on these issues.

We recommend the retention of the need for the Secretary for Justice's consent to prosecute.

Chapter 2

Exposure

Introduction

2.1 In Hong Kong, it is an offence under section 148 of the Crimes Ordinance for any person "*who, without lawful authority or excuse, in any public place or in view of the public indecently exposes any part of his body*".

2.2 Anyone guilty of indecency in public is liable on conviction to a fine of \$1,000 and to imprisonment for 6 months. This existing offence is essentially a "public order" offence rather than a sexual offence.

2.3 This chapter considers the ways in which the existing law relating to exposure as a sexual offence might be reformed.

Two types of exposure

2.4 The Scottish Law Commission ("SLC") pointed out that there are two types of exposure of a sexual organ. First, it can be directed toward a specific victim. Second, it can occur without targeting a specific victim (such as nude sunbathing or streaking).

*"... However, there is one situation which we believe requires further consideration. This is indecent exposure. The exposure of a sexual organ can occur both as conduct directed toward a specific victim and as a public order offence (such as nude sunbathing or streaking). The offence of public indecency would deal with the second but it is unclear what offence applies to the first. In the Discussion Paper we took the view that indecent exposure was in many ways similar to a sexual assault. It is a form of sexual attack but without any direct physical contact. We also took note of research which indicated that indecent exposure aimed at specific victims is not experienced as a minor nuisance or as trivial in nature."*¹

¹ Scottish Law Commission, *Report on Rape and Other Sexual Offences* (December 2007), Scot Law Com No 209, para 5.13.

The rationale for a new sexual offence to cover exposure targeting a specific victim

2.5 We set out below the rationale for the creation of a new offence to cover exposure which targets a specific victim.

Exposer targeting a specific victim is similar to sexual assault

2.6 SLC considered that exposure directed toward a specific victim is "*in many ways similar to sexual assault*" and "*is a form of sexual attack but without any direct physical contact.*" For conduct not directed at a specific victim (such as nude sunbathing or streaking), the offence charged should be a public order offence such as public indecency.

2.7 The SLC therefore took the view that the offence should be treated as a sexual offence and the exposure should be sexual in nature and that the test of sexual in the legislation should be applicable to this offence:

*"We are concerned, however, that the offence should be treated as a sexual offence and not as one relating to public order or public decency (as where a man exposes his penis in a public place in order to urinate). We are therefore of the view that for purposes of the offence the exposure should itself be sexual in nature and that the test for what counts as sexual should be the same as that used throughout the Bill, namely what the reasonable person would regard as sexual."*²

Exposers targeting a specific victim are potentially dangerous and likely to commit other sexual offences

2.8 The Review Group in the UK pointed out the purpose of the law is not to prohibit any exposure. The Review Group said that there had been studies showing that there are two types of exposers. The first is those exposers who do not intend to threaten and are not targeted at individual victims. They include streakers and other exhibitionists who strip off in public for fun. This type of exposers should be dealt with by one of the public order offences.

2.9 The second is those exposers who are much more aggressive who expose for sexual gratification or to frighten others. They may expose their genitals such as an erect penis. Exposure of one's genitals can be a great threat to other people. Such act may induce fear, shock, disgust and a powerful fear of rape or death to those whom such exposure is targeted. The more aggressive exposers are potentially dangerous and may be likely to commit other sexual offences. The Review Group took the view that a more

² Scottish Law Commission, *Report on Rape and Other Sexual Offences* (December 2007), Scot Law Com No 209, para 5.15.

serious offence (which is a sexual offence) should be created to cover the more aggressive type:

"... We were impressed by the evidence of research amongst victims that it can indeed be a very traumatic experience. It is not just the unpleasantness of the experience: in incidents where the exposed penis is erect or being masturbated, the effect is to induce fear, shock, disgust and a powerful fear of rape or death. Jennifer Temkin's research study for the review also demonstrated that the common perception of men who expose themselves as sad and lonely but not dangerous was not valid. Studies have identified two types of exposers, one of whom is sad and humiliated; the other however is much more aggressive, who may expose an erect penis sometimes accompanied by obscenities. From practical experience, the police felt that many of the more aggressive exposers were potentially dangerous and likely to be involved in other sexual offending..."

There are other types of public exposure that are not intended to threaten and are not targeted at individual victims. Naturists were concerned that the review should not affect their enjoyment of their chosen way of living. Indeed our terms of reference oblige us to take full account of their right to a private life under article 8 of the Convention. There is also a valid distinction to be made between those who expose for sexual gratification, or to frighten women, and streakers and other exhibitionists who strip off in public for fun or to shock. That kind of behaviour is different in kind to the more serious kind of exposure. The courts need to be able to deal with exhibitionist behaviour as a social nuisance when necessary, but a more serious offence that is properly contained in sexual offences is needed to replace the old offences of indecent exposure"³

A number of overseas jurisdictions have offence to cover exposure targeting a specific victim

2.10 Unlike the existing offence of indecency in public which focussed on the indecency of the act, a number of overseas jurisdictions have legislated for a specific offence to cover exposure which targets a specific victim.

Canada

2.11 Section 173(2) of the Criminal Code provides for the offence of "exposure" as follows:

³ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), paras 8.2.3 to 8.2.5.

"(2) Every person who, in any place, for a sexual purpose, exposes his or her genital organs to a person who is under the age of 16 years

- (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than two years and to a minimum punishment of imprisonment for a term of 90 days; or*
- (b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than six months and to a minimum punishment of imprisonment for a term of 30 days."*

England and Wales

2.12 Section 66(1) of the English Act provides for an offence of exposure as follows:

"A person commits an offence [of exposure] if—

- (a) he intentionally exposes his genitals, and*
- (b) he intends that someone will see them and be caused alarm or distress."*

Scotland

2.13 Section 8 of the Scottish Act provides for an offence of sexual exposure as follows:

"(1) If a person ("A")—

- (a) without another person ("B") consenting, and*
- (b) without any reasonable belief that B consents,*

intentionally and for a purpose mentioned in subsection (2), exposes A's genitals in a sexual manner to B with the intention that B will see them, then A commits an offence, to be known as the offence of sexual exposure.

(2) The purposes are—

- (a) obtaining sexual gratification,*
- (b) humiliating, distressing or alarming B."*

Our views on the issue

2.14 We share the view of the Review Group in the UK and the SLC that a new sexual offence should be created to cover exposure targeting a specific victim for sexual gratification or to threaten the victim. Such type of

exposure is more aggressive and may induce a great degree of fear, shock, disgust to the victim. Such conduct is similar to a sexual assault and as such, should be covered by a new sexual offence rather than a public order offence. We therefore consider that there should be a new sexual offence to cover exposure targeting specific victims.⁴

Elements of the new offence

2.15 In considering the new offence, issues arise as to whether the following should be the elements of the new offence:

(1) Exposure to be in a sexual manner

2.16 In order to constitute the offence of sexual exposure in section 8 of the Scottish Act, the exposure of the accused's genitals must be carried out "*in a sexual manner*". The issue is whether it should be an element of the new offence that exposure should be made "in a sexual manner" following the Scottish approach.

2.17 We take the view that exposure "in a sexual manner" should be an element of our proposed new offence. Without this the offence may not be a sexual offence but a public order one. By way of example, our proposed offence would not cover a situation where an artist was to stand naked in the street purely for artistic purposes.

(2) Exposure be limited to exposure of genitals

2.18 The issue is whether it should be an element of the new offence that exposure should be confined to exposure of one's genitals or be extended to exposure of other parts of one's body. The position in overseas jurisdictions with regard to this issue is as follows:

Canada

2.19 In Canada, exposure is confined to one's genitals only.⁵

England and Wales

2.20 The English offence covers exposure of one's genitals only.⁶

⁴ The Sub-committee has previously recommended that the offence of indecent exposure should be retained. (Law Reform Commission of Hong Kong, *Consultation Paper on Rape and Other Non-consensual Sexual Offences* (September 2012), recommendation 20).

⁵ Canadian Criminal Code, s 173(2).

⁶ Sexual Offences Act 2003, s 66(1).

Scotland

2.21 The Scottish offence covers exposure of one's genitals only.⁷

Other jurisdictions

2.22 In Australia, the scope of the relevant offences in Australian Capital Territory;⁸ Northern Territory;⁹ Queensland;¹⁰ and Tasmania¹¹ is confined to an indecent act in public. The indecent act is not confined to exposure of one's genitals.

2.23 In New Zealand, the indecent act is not confined to exposure of one's genitals.¹²

Our views

2.24 As mentioned above, persons who expose their genitals are more aggressive and pose a great threat to other people. These more aggressive exposers are potentially dangerous and likely to commit other sexual offences. The purpose of the proposed new offence is to catch these exposers. It is our view that the proposed new offence should cover exposure of one's genitals only. As to public exposure of other parts of the body than one's genitals in an indecent manner, such conduct should be continue to be covered by the existing offence of indecency in public which we have proposed to retain.

(3) Purpose of the exposure

2.25 The issue is what the purpose of the exposure should be, in order to constitute the new offence. The position in overseas jurisdictions with regard to this issue is as follows:

Canada

2.26 It is an ingredient of the Canadian offence that the exposure is carried out "*for a sexual purpose*".

England and Wales

2.27 It is an ingredient of the English offence that the accused intended that the act caused "*alarm or distress*" to someone else. The act however need not be for the purpose of obtaining sexual gratification.

⁷ Sexual Offences (Scotland) Act 2009, s 8.

⁸ Crimes Act 1900 (Australian Capital Territory), s 60.

⁹ Criminal Code Act (Northern Territory), s 133 of Schedule 1 to the Act.

¹⁰ Criminal Code (Queensland), s 227.

¹¹ Criminal Code Act 1924 (Tasmania), s 137.

¹² Crimes Act 1961 (New Zealand), ss 125 and 126 respectively.

New Zealand

2.28 It is an ingredient of the New Zealand offence of indecent act with intent to insult or offend that the indecent act is intended to "*insult or offend*" any person.

Scotland

2.29 It is an ingredient of the Scottish offence that the purposes of A's act are "*obtaining sexual gratification*" or "*humiliating, distressing or alarming B*".

2.30 As seen above, the Canadian approach covers exposure made for a sexual purpose. The English and New Zealand approaches are the same – they cover exposure made for alarming or distressing others (or insulting or offending others). The Scottish approach covers exposure made for all of these purposes and therefore gives wider protection to people witnessing exposure.

Our views

2.31 In the Sub-committee's previous consultation paper on sexual offences involving children and persons with mental impairment, it was proposed that where the purpose of the accused's act is relevant to the proposed offences involving children, the purpose of the accused's act should be for obtaining sexual gratification, humiliating, distressing or alarming the child or any combination of these purposes.¹³ Adopting the Scottish approach would be consistent with the Sub-committee previous approach. We therefore take the view the Scottish approach should be adopted and that the purposes of the exposure should be for obtaining (i) sexual gratification, or (ii) humiliating, distressing or alarming the victim.

(4) Exposure to be in a public place or not

2.32 The issue is whether the proposed new offence should cover exposure in public only or in any place. The existing offence of indecency in public requires the exposure to be "*in any public place or in view of the public*".

2.33 The relevant offences of the following jurisdictions require the exposure to be done in public or a place to which the public have access:

Australia (Northern Territory,¹⁴ Queensland¹⁵ and Tasmania)¹⁶ New Zealand (the offence of an indecent act in public place).¹⁷

¹³ Law Reform Commission of Hong Kong, *Consultation Paper on Sexual Offences Involving Children and Persons with Mental Impairment* (November 2016), para 7.72.

¹⁴ Criminal Code Act (Northern Territory), s 133 of Schedule 1 to the Act.

¹⁵ Criminal Code (Queensland), s 227.

2.34 The exposure involved in the relevant offences of the following jurisdictions can be carried out in any place (ie, public or private): Australian Capital Territory;¹⁸ Canada, England and Wales, New Zealand (indecent act with intent to insult or offend)¹⁹ and Scotland.

2.35 We consider that the proposed new offence should cover exposure in any place. There are several reasons for our view. In the first place, the proposed new offence is in many ways similar to sexual assault. As seen above, the SLC took the view that sexual exposure is similar to sexual assault in many respects as being a form of sexual attack but without any direct physical contact. The place where the exposure takes place is of no relevance to the culpability of the offender. Sexual exposure taking place in public and private is equally culpable. Furthermore, by covering exposure in any place, it would highlight the fact that it is a sexual offence rather than a public order offence.

2.36 A further argument for the proposed new offence to cover exposure in any place is that the relevant offences in a number of jurisdictions cover exposure in any place including Canada, England and Wales as well as Scotland.

2.37 What is more, if the proposed new offence covers exposure in any place, it will extend protection to victims of exposure carried out in a private place. It would mean wider protection to potential victims.

(5) Lack of consent

2.38 The issue is whether the lack of consent should be an element of the proposed new offence. It is an ingredient of the Scottish offence that the act is carried out without the consent of another person ("B") and without any reasonable belief that B consents.

2.39 The merit of the Scottish approach is that it reflects the nature of the proposed new offence viz, an offence similar to sexual assault. A sexual assault is a non-consensual sexual offence which requires the prosecution to prove the lack of consent and absence of reasonable belief in consent. The ingredient in the Scottish offence therefore accords with that of sexual assault.

2.40 A further advantage of the Scottish approach is that it caters for the situation where the proposed new offence is committed in a private place. If the lack of consent is not an ingredient of the proposed new offence, consensual exposure carried out in a private place may be caught by the proposed new offence. The criminal law should not intervene to prohibit exposure of one's genitals in a private place before another person if it is carried out with the consent of another person. Such exposure is

¹⁶ Criminal Code Act 1924 (Tasmania), s 137.

¹⁷ Crimes Act 1961 (New Zealand), s 125.

¹⁸ Crimes Act 1900 (Australian Capital Territory), s 60.

¹⁹ Crimes Act 1961 (New Zealand), s 126.

consensual and causes no harm to other people since it is carried out in private. This may cover a situation where, for example, consensual exposure of one's genitals before one's spouse or lover in private for sexual gratification.

2.41 We favour the Scottish approach. The overriding consideration is that the proposed new offence is some kind of sexual assault. An essential element of sexual assault, which is a non-consensual sexual offence, is lack of consent and absence of reasonable belief in consent. The Scottish approach also accords with our previous approach with regard to non-consensual offences.

The name of the new offence

2.42 The name of the relevant offence in Canada and England and Wales is exposure, whereas it is sexual exposure in Scotland. The issue is whether we should call the new offence "exposure" or "sexual exposure".

2.43 We take the view that sexual exposure is preferable to exposure. The new offence is aimed at protecting sexual autonomy of people who witness, against their will, exposure of genitals by others in a sexual manner and as such, is a sexual offence. The name sexual exposure can highlight the fact that the new offence is a sexual offence rather than a public order offence.

The existing offence of indecent exposure

2.44 It should be emphasised that we are not proposing that the new offence of sexual exposure replace the existing offence of indecent exposure under section 148 of the Crimes Ordinance (Cap 200) for a person "*who, without lawful authority or excuse, in any public place or in view of the public indecently exposes any part of his body*". We note that this existing offence is designed primarily for the protection of public morals, and it may cover indecent bodily exposure in public which does not target any victim and does not constitute any violation of another person's sexual autonomy.

Recommendation 2

We recommend that the new legislation should include an offence of sexual exposure along the lines of section 8 of the Sexual Offences (Scotland) Act.

We also recommend that the offence of sexual exposure should have all of the following elements:

- (1) exposure of one's genitals in a sexual manner to another person ("B") with the intention that B will see them;**
- (2) the exposure is made in a public or private place;**
- (3) the exposure is made without the consent of B and without any reasonable belief that B consents; and**
- (4) the purpose of the exposure is for**
 - (i) obtaining sexual gratification, or**
 - (ii) humiliating, distressing or alarming the victim.**

Chapter 3

Voyeurism

Introduction

3.1 This chapter considers whether a new specific offence of voyeurism should be introduced to deal with an act of non-consensual observation or visual recording (for example, a photograph, videotape, or digital image) of another person for a sexual purpose.

The present law

3.2 There is no specific legislation in Hong Kong dealing with an act of voyeurism involving observation or visual recording for a sexual purpose.

3.3 Such type of activity, if committed in a public place, and depending on the facts of the case, may be prosecuted for loitering contrary to section 160 of the Crimes Ordinance (Cap 200)¹ or for disorder in public place contrary to section 17B(2) of the Public Order Ordinance (Cap 245).² For these two offences, the element of "*public*" is required.

3.4 If the act of voyeurism concerns the use of computers (whether in a public or private place), the offenders may be prosecuted under section 161 of the Crimes Ordinance for access to computer with criminal or dishonest intent.³

¹ "(1) A person who loiters in a public place or in the common parts of any building with intent to commit an arrestable offence commits an offence and is liable to a fine of \$10000 and to imprisonment for 6 months.

(2) Any person who loiters in a public place or in the common parts of any building and in any way wilfully obstructs any person using that place or the common parts of that building, shall be guilty of an offence and shall be liable on conviction to imprisonment for 6 months.

(3) If any person loiters in a public place or in the common parts of any building and his presence there, either alone or with others, causes any person reasonably to be concerned for his safety or well-being, he shall be guilty of an offence and shall be liable on conviction to imprisonment for 2 years.

(4) In this section "common parts" (公用部分), in relation to a building, means-

(a) any entrance hall, lobby, passageway, corridor, staircase, landing, rooftop, lift or escalator;

(b) any cellar, toilet, water closet, wash house, bath-house or kitchen which is in common use by the occupiers of the building;

(c) any compound, garage, carpark, car port or lane."

² "(2) Any person who in any public place behaves in a noisy or disorderly manner, or uses, or distributes or displays any writing containing, threatening, abusive or insulting words, with intent to provoke a breach of the peace, or whereby a breach of the peace is likely to be caused, shall be guilty of an offence and shall be liable on conviction to a fine at level 2 and to imprisonment for 12 months."

³ "(1) Any person who obtains access to a computer-

The offence of voyeurism – overseas jurisdictions

3.5 Both Canada and England and Wales have already enacted a specific offence of voyeurism which covers both observation (without visual recording) and visual recording of another person for a sexual purpose.

3.6 The offence of voyeurism has the following features:

- A person (A) observes or makes a visual recording of another person (B) who is doing a private act or who is in circumstances giving rise to a reasonable expectation of privacy.
- What constitutes a private act or in circumstances giving rise to a reasonable expectation of privacy is spelt out in the provisions of the offence.
- The observation or recording is carried out for sexual gratification or a sexual purpose.

Canada

3.7 Section 162 of the Canadian Criminal Code provides for an offence of voyeurism:

"Voyeurism

162 (1) Every one commits an offence who, surreptitiously, observes — including by mechanical or electronic means — or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if

- (a) the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity;*
- (b) the person is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or engaged in such an activity; or*
- (c) the observation or recording is done for a sexual purpose."*

-
- (a) with intent to commit an offence;*
 - (b) with a dishonest intent to deceive;*
 - (c) with a view to dishonest gain for himself or another; or*
 - (d) with a dishonest intent to cause loss to another, whether on the same occasion as he obtains such access or on any future occasion, commits an offence and is liable on conviction upon indictment to imprisonment for 5 years."*

3.8 A visual recording is defined in subsection (2) as including "a *photographic, film or video recording made by any means.*"

3.9 Subsection (4) provides for an offence for printing, publication, etc, of voyeuristic recordings:

*"(4) Every one commits an offence who, knowing that a recording was obtained by the commission of an offence under subsection (1), prints, copies, publishes, distributes, circulates, sells, advertises or makes available the recording, or has the recording in his or her possession for the purpose of printing, copying, publishing, distributing, circulating, selling or advertising it or making it available."*⁴

England and Wales

3.10 Section 67 of the English Act provides for an offence of voyeurism:

- "(1) A person commits an offence if—*
- (a) for the purpose of obtaining sexual gratification, he observes another person doing a private act, and*
 - (b) he knows that the other person does not consent to being observed for his sexual gratification.*
- (2) A person commits an offence if—*
- (a) he operates equipment with the intention of enabling another person to observe, for the purpose of obtaining sexual gratification, a third person (B) doing a private act, and*
 - (b) he knows that B does not consent to his operating equipment with that intention.*
- (3) A person commits an offence if—*
- (a) he records another person (B) doing a private act,*
 - (b) he does so with the intention that he or a third person will, for the purpose of obtaining sexual gratification, look at an image of B doing the act, and*
 - (c) he knows that B does not consent to his recording the act with that intention.*
- (4) A person commits an offence if he installs equipment, or constructs or adapts a structure or part of a structure, with the*

⁴ The purpose of publishing or transmitting an intimate image is irrelevant for the commission of the offence.

intention of enabling himself or another person to commit an offence under subsection (1)."

3.11 Under section 68(1), a person is doing a private act if he or she:

"is in a place which, in the circumstances, would reasonably be expected to provide privacy, and —

- (a) the person's genitals, buttocks or breasts are exposed or covered only with underwear,*
- (b) the person is using a lavatory, or*
- (c) the person is doing a sexual act that is not of a kind ordinarily done in public."*

New South Wales

3.12 The legislation of New South Wales in Australia provides for a narrower offence of voyeurism. The offence covers observation but not intimate visual recording of another person. This narrow offence of voyeurism is supplemented by other specific offences covering intimate visual recording.

3.13 Section 91J of the Crimes Act 1900 (New South Wales) provides for an offence of voyeurism which covers observation only:

"(1) A person who, for the purpose of obtaining sexual arousal or sexual gratification, observes a person who is engaged in a private act:

- (a) without the consent of the person being observed to being observed for that purpose, and*
- (b) knowing that the person being observed does not consent to being observed for that purpose,*

is guilty of an offence"

3.14 Under section 91L (the definitions section), a person is engaged in a private act if:

- "(a) the person is in a state of undress, using the toilet, showering or bathing, engaged in a sexual act of a kind not ordinarily done in public, or engaged in any other like activity, and*
- (b) the circumstances are such that a reasonable person would reasonably expect to be afforded privacy."*

3.15 Regarding intimate visual recording, there are specific offences which deal with such acts, viz,

- Filming a person engaged in a private act (section 91K).⁵
- Filming a person's private parts (section 91L).⁶
- Installing device to facilitate observation or filming (section 91M).⁷

New Zealand

3.16 Contrary to the situation in New South Wales, the offence of voyeurism in New Zealand covers only visual recording (for example, a photograph, videotape, or digital image) using any device. In other words, it does not cover observation of another person for sexual purposes.

3.17 Section 216H of the Crimes Act 1961 (New Zealand) provides as follows:

"Everyone is liable to imprisonment for a term not exceeding 3 years who intentionally or recklessly makes an intimate visual recording of another person"

3.18 An "intimate visual recording" is defined in section 216G(1) as follows:

"a visual recording (for example, a photograph, videotape, or digital image) that is made in any medium using any device without the knowledge or consent of the person who is the subject of the recording, and the recording is of —"

⁵ S 91K(1) of the Crimes Act 1900 (New South Wales) provides:
"A person who, for the purpose of obtaining, or enabling another person to obtain, sexual arousal or sexual gratification, films another person who is engaged in a private act:
 (a) *without the consent of the person being filmed to being filmed for that purpose, and*
 (b) *knowing that the person being filmed does not consent to being filmed for that purpose,*
is guilty of an offence."

⁶ S 91L of the Crimes Act 1900 (New South Wales) provides:
"A person who, for the purpose of obtaining, or enabling another person to obtain, sexual arousal or sexual gratification, films another person's private parts, in circumstances in which a reasonable person would reasonably expect the person's private parts could not be filmed:
 (a) *without the consent of the person being filmed to being filmed for that purpose, and*
 (b) *knowing that the person being filmed does not consent to being filmed for that purpose,*
is guilty of an offence."

("Private parts" means "a person's genital area or anal area, whether bare or covered by underwear") (s 91I)

⁷ S 91M of the Crimes Act 1900 (New South Wales) provides:
"A person who, with the intention of enabling that person or any other person to commit an offence against section 91J, 91K or 91L, installs any device, or constructs or adapts the fabric of any building, for the purpose of facilitating the observation or filming of another person, is guilty of an offence."

- (a) *a person who is in a place which, in the circumstances, would reasonably be expected to provide privacy, and that person is—*
 - (i) *naked or has his or her genitals, pubic area, buttocks, or female breasts exposed, partially exposed, or clad solely in undergarments; or*
 - (ii) *engaged in an intimate sexual activity; or*
 - (iii) *engaged in showering, toileting, or other personal bodily activity that involves dressing or undressing; or*
- (b) *a person's naked or undergarment-clad genitals, pubic area, buttocks, or female breasts which is made—*
 - (i) *from beneath or under a person's clothing; or*
 - (ii) *through a person's outer clothing in circumstances where it is unreasonable to do so."*

The need for a specific offence of voyeurism

3.19 Having considered the abovementioned overseas legislation, we are of the view that it would be to the benefit of our community if a specific offence of voyeurism is introduced in order to criminalise acts of non-consensual observation or visual recording (for example, a photograph, videotape, or digital image) of another person for a sexual purpose. Such an act is a serious violation of another person's sexual autonomy.

The circumstances covered by the offence are spelt out in overseas legislation

3.20 The circumstances usually covered by the offence of voyeurism are spelt out in overseas legislation. In the Canadian legislation, voyeurism covers situations where the victim is (or in a place which can reasonably be expected to be) "*nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity*".

3.21 In the English legislation, voyeurism covers situations where the the victim is doing a private act. As aforementioned in paragraph 3.11, private act is defined in the legislation.

3.22 In deciding between the Canadian Criminal Code and the English Act together with the legislation referred to above, we favour the English approach because it covers all aspects of the conduct including observation, channelling and recording; the obtaining sexual gratification is an

element of the offence; and the definition of "a private act" is provided for in the legislation.

Recommendation 3

We recommend introducing a new specific offence of voyeurism.

We recommend that such an offence be along the lines of section 67 of the English Sexual Offences Act 2003.

Chapter 4

Bestiality

Introduction

4.1 In Hong Kong, section 118L of the Crimes Ordinance provides for the offence of bestiality as follows:

"A person who commits buggery with an animal shall be guilty of the crime of bestiality and shall be liable on conviction on indictment to a fine of \$50000 and to imprisonment for 10 years."

4.2 There has been some discussion as to whether there is a need for retaining a specific offence of bestiality or whether it should be part of the law on protection of animals rather than a sexual offence.¹ The Scottish Law Commission ("SLC") queried the need for a specific offence of bestiality and considered that it was unnecessary to have a specific offence and sexual activity with an animal *"should be regarded as a form of public indecency and as a form of cruelty to animals"*.² By contrast, the Home Office Review Group in the UK was of the view that there was the need for a specific offence and the existing offence should be retained.³

4.3 The arguments for and against retaining a specific offence of bestiality are set out below.

Arguments for a specific offence of bestiality

Bestiality is an act offending the dignity of animals and people

4.4 As the Home Office Review Group in the UK pointed out, bestiality is an act offending the dignity of animals and people:

"It [bestiality] was an act that offended against the dignity of animals and of people. Working as we do on the principle of free agreement to sexual activity, this was simply not possible with animals. An offence of bestiality would seek to protect

¹ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 8.5.2.

² Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences*, (Discussion Paper No 131, January 2006), para 6.40.

³ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), Recommendation 57.

animals but we thought that it was primarily a sex offence reflecting some profoundly disturbed behaviour ..."⁴

Linkage between bestiality and other forms of sexual offending

4.5 The Review Group also pointed out that there was evidence of a link between the commission of bestiality and other forms of sexual offences:

*"... There is evidence of a linkage between abuse of animals and other forms of sexual offending. Research has shown a link between abuse of animals and abuse of children. In some instances severe physical mutilation of horses has been accompanied by sex with them. We felt that society had a profound abhorrence for this behaviour and that it should continue to be a criminal offence ..."*⁵

Arguments against a specific offence of bestiality

The offence of bestiality is seldom prosecuted

4.6 The SLC pointed out that it appeared that bestiality was prosecuted very rarely. According to the statistics of the Scottish Executive Justice Department Analytical Services Division, proceedings were taken against one person for bestiality during the period from 1994 to 2004.⁶

4.7 In Hong Kong, there have been only rare prosecutions for the offence of bestiality under section 118L of the Crimes Ordinance according to the records of the Department of Justice. We are aware of 2 convictions of bestiality to-date, one in 2000⁷ and another in 2017.⁸

Sexual activity with an animal should be covered by offences relating to public indecency or animal protection

4.8 The SLC was not convinced that there was any need for a specific offence of bestiality because sexual activity with an animal "*should be regarded as a form of public indecency and as a form of cruelty to animals*". In other words, such conduct should be dealt with by offences relating to

⁴ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 8.5.3.

⁵ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 8.5.3.

⁶ Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences*, (Discussion Paper No 131, January 2006), para 6.38 and footnote 44 to Part 6.

⁷ *HKSAR v Wong Pak Kau* [2000] 2 HKC.

⁸ On 21 April 2017, a man was convicted of bestiality and sentenced to 7 months imprisonment. See "Hong Kong construction worker convicted of bestiality and assault jailed for seven months", *South China Morning Post*, <<http://www.scmp.com/news/hong-kong/law-crime/article/2089515/hong-kong-construction-worker-convicted-bestiality-and>> (21 April 2017).

public indecency or animal protection rather than by way of a sexual offence such as bestiality.

Our views

4.9 We take the view that a specific sexual offence relating to sexual activity with an animal should be retained.

4.10 As the Home Office Review Group in the UK pointed out, there is evidence of a linkage between abuse of animals and other forms of sexual offending such as abuse of children (see quotation in paragraph 4.5 above). Sexual activity with an animal could cause problems beyond cruelty to animals and may lead to other forms of sexual offending. An offence dealing with cruelty to animals would not be sufficient to deal with such problems.

4.11 Since the existing offence of bestiality is a sexual offence, the offender's conviction would be covered by the existing Sexual Conviction Record Check Scheme ("SCRCS"). On the other hand, as an offence of cruelty to animals is not a sexual offence, the offender's conviction would not appear on the records of SCRCS and the public would not be aware of the conviction. Hence, there would be less protection to the public if sexual activity with an animal were to be dealt with by way of an offence relating to animal protection rather than by means of a specific sexual offence.

4.12 The fact that there have been only rare prosecutions of the offence of bestiality in Hong Kong (see paragraph 4.7 above) does not mean that the offence should be removed from our statute books. What is more, the existence of the specific offence in our statute books will serve as a deterrent to potential offenders.

4.13 Whilst we take the view that a specific sexual offence relating to sexual activity with an animal should be retained, we consider that the existing offence of bestiality should be reformed. We give below a review of legislation on sexual activity with an animal in some selected overseas countries and then consider a number of issues relating to the possible reform of the existing offence.

Overseas legislation on bestiality

4.14 The following is a review of legislation on bestiality in a number of selected overseas countries:

Canada

4.15 Section 160(1) of the Canadian Criminal Code provides for the offence of bestiality as follows:

"Every person who commits bestiality is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction."

England and Wales

4.16 Section 69 of the English Act provides for the offence of intercourse with an animal.

4.17 The English offence covers:

- (i) penile penetration of the vagina or anus of a living animal (but not mouth); and
- (ii) causing or allowing a living animal to penile penetrate one's vagina or anus (but not mouth).

4.18 Section 69 provides as follows:

"(1) A person commits an offence if—

- (a) he intentionally performs an act of penetration with his penis,*
- (b) what is penetrated is the vagina or anus of a living animal, and*
- (c) he knows that, or is reckless as to whether, that is what is penetrated.*

(2) A person (A) commits an offence if—

- (a) A intentionally causes, or allows, A's vagina or anus to be penetrated,*
- (b) the penetration is by the penis of a living animal, and*
- (c) A knows that, or is reckless as to whether, that is what A is being penetrated by.*

(3) A person guilty of an offence under this section is liable—

- (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;*
- (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years."*

New South Wales (Australia)

4.19 Section 79 of the Crimes Act 1900 provides for the offence of bestiality as follows:

"Any person who commits an act of bestiality with any animal shall be liable to imprisonment for fourteen years."

New Zealand

4.20 Section 143 of the Crimes Act 1961 provides for the offence of bestiality as follows:

"143 Bestiality

- (1) Every one is liable to imprisonment for a term not exceeding 7 years who commits bestiality.*
- (2) This offence is complete upon penetration."*

4.21 Section 144 of the Crimes Act 1961 provides for the offence of indecentcy with animal as follows:

"144 Indecency with animal

Every one is liable to imprisonment for a term not exceeding 3 years who commits any act of indecency with an animal."

Oregon (United States)

4.22 §167.333⁹ of the Oregon Statutes provides for the offence of sexual assault of an animal.

4.23 The Oregon offence covers sexual touching (penile or non-penile) of the mouth, anus or sex organs of an animal or animal carcass. It also covers causing an animal or animal carcass to sexually touch one's mouth, anus or sex organs.

4.24 §167.333 provides as follows:

"Sexual assault of an animal

- (1) A person commits the crime of sexual assault of an animal if the person:*
 - (a) Touches or contacts, or causes an object or another person to touch or contact, the mouth, anus or sex*

⁹ O.R.S. §167.333.

organs of an animal or animal carcass for the purpose of arousing or gratifying the sexual desire of a person; or

- (b) Causes an animal or animal carcass to touch or contact the mouth, anus or sex organs of a person for the purpose of arousing or gratifying the sexual desire of a person.*
- (2) Subsection (1) of this section does not apply to the use of products derived from animals.*
- (3) Sexual assault of an animal is a Class C felony."*

Utah (United States)

4.25 § 76-9-301.8¹⁰ of the Utah Code provides for the offence of bestiality.

4.26 The Utah offence covers physical sexual contact involving the genitals of a person and those of an animal; or involving the genitals of a person or an animal and the mouth or anus of the person or the animal; or use of an object in contact with the genitals or anus of an animal.

4.27 § 76-9-301.8 provides as follows:

"(1) A person commits the crime of bestiality if the actor engages in any sexual activity with an animal with the intent of sexual gratification of the actor.

(2) For purposes of this section only:

(a) "Animal" means any live, nonhuman vertebrate creature, including fowl.

(b) "Sexual activity" means physical sexual contact:

(i) between the actor and the animal involving the genitals of the actor and the genitals of the animal;

(ii) the genitals of the actor or the animal and the mouth or anus of the actor or the animal; or

(iii) through the actor's use of an object in contact with the genitals or anus of the animal.

(3) A crime of bestiality is a class B misdemeanor."

¹⁰

U.C.A. 1953 § 76-9-301.8.

Should the new offence cover sexual activity beyond sexual intercourse?

4.28 The issue is whether the new offence should cover sexual activity beyond sexual intercourse.

4.29 The existing bestiality offence in the Crimes Ordinance covers "*buggery with an animal*". According to the common law definition of "buggery", it consists of sexual intercourse by a man with a beast.¹¹ Therefore, the existing offence covers "sexual intercourse" with an animal only.

4.30 The English offence of sexual intercourse with an animal covers penile penetration of the vagina or anus of a living animal (see paragraphs 4.17 – 4.18). The English offence is therefore confined to "sexual intercourse" with an animal.

4.31 The New Zealand offence of indecency with an animal (see paragraph 4.21) covers any form of indecency committed on an animal. In other words, it covers sexual activity beyond sexual intercourse.

4.32 The Oregon offence of sexual assault of an animal covers sexual touching of the mouth, anus or sex organs of an animal or animal carcass (see paragraphs 4.23 – 4.24). It therefore covers sexual activity beyond sexual intercourse.

4.33 The Utah offence of bestiality covers physical sexual contact involving the genitals of a person and those of an animal; or involving the genitals of a person or an animal and the mouth or anus of the person or the animal; or use of an object in contact with the genitals or anus of an animal (see paragraphs 4.26 – 4.27). As the Utah offence extends to sexual contact by means of an object, it covers sexual activity beyond sexual intercourse.

Our views

4.34 There are only a few overseas jurisdictions which have extended scope of their offences to sexual activity beyond "sexual intercourse". The existing offence in Hong Kong and those of most overseas jurisdictions under review are confined to "sexual intercourse" with an animal. The reasons for extension of scope beyond "sexual intercourse" in a few overseas jurisdictions are unclear. Moreover, we cannot identify good reasons for extension of the scope beyond "sexual intercourse". We therefore consider that the new offence should continue to apply to "sexual intercourse" with an animal.

¹¹ 1 Hale 669; 1 Hawk C 4; 1 East PC 480; 1 Russ Cr, 12th edn, 735 (cited in *Archbold Hong Kong 2015*, §21-117).

Living animal or not

4.35 The issue is whether the new offence should apply to sexual activity with a living animal only or should apply to sexual activity with a living or dead animal.

4.36 The existing offence of bestiality in the Crimes Ordinance applies to "*buggery with an animal*". The existing offence therefore applies to buggery with a living animal.

4.37 The Oregon offence of sexual assault of an animal (see paragraphs 4.23 – 4.24) is expressly specified to apply to an animal or an animal carcass.

4.38 On the other hand, the English offence of sexual intercourse with an animal (see paragraphs 4.17 – 4.18) and the Utah offence of bestiality (see paragraphs 4.26 – 4.27) apply to a living animal only.

Our views

4.39 We consider that the new offence should apply to sexual activity with a living animal. Whilst sexual activity with a living animal should be punished since it may cause physical or other injuries to the animal, no such injuries would be caused to an animal carcass. Sexual activity with a dead animal should therefore be covered by an offence relating to public indecency or animal protection rather than a specific sexual offence. Moreover, the existing offence in the Crimes Ordinance applies to sexual activity between a person and a living animal. We cannot identify good reasons for extending its application to a dead animal.

The name of the new offence

4.40 The name "bestiality" is a seldom used out-dated expression. The issue is whether that expression should be replaced.

4.41 Different names are used in the legislation of overseas jurisdictions to describe the offence of sexual activity with an animal as follows:

Bestiality – Canada, New South Wales, New Zealand and Utah.

Indecency with an animal – New Zealand.

Intercourse with an animal – England and Wales.

Sexual assault of an animal – Oregon.

Our views

4.42 We consider the name bestiality should no longer be used. It is an out-dated term and does not convey the message as to what would constitute the commission of the offence.

4.43 We favour the name "sexual intercourse with an animal".

The expression "buggery"

4.44 The term "buggery" is another out-dated expression used in the existing provision that needs to be reformed.

Our views

4.45 Since we have decided above that the scope of the new offence should be confined to sexual intercourse with an animal, we consider that "buggery" can simply be replaced by "sexual intercourse with an animal". That latter expression defines the scope of the new offence in simple terms.

4.46 The provisions of the new offence can therefore be worded along these lines: "*A person who has sexual intercourse with an animal shall commit an offence of sexual intercourse with an animal and shall be liable on conviction ...*".

Purpose of the sexual act

4.47 The issue is whether the purpose of the sexual act should be of any relevance to the commission of the new offence.

4.48 The purpose of the sexual activity with an animal is irrelevant to the commission of the existing offences in the Crimes Ordinance (see paragraph 4.1), the relevant offences in England and Wales (see paragraph 4.18), New South Wales (see paragraph 4.19) and New Zealand (see paragraphs 4.20 and 4.21). The sexual activity of these offences can be carried out for any purpose or indeed for no particular purpose at all.

4.49 On the other hand, it is an ingredient of the Oregon offence (see paragraph 4.24) that the sexual activity with an animal is done for the purpose of "*arousing or gratifying the sexual desire of a person*".

4.50 It is an ingredient of the Utah offence (see paragraph 4.27) that a person engages in sexual activity with an animal with the intent of "*sexual gratification of the actor*".

Our views

4.51 Since we have recommended above that the offence will only cover sexual intercourse with an animal, we consider that the purpose of the sexual activity should be irrelevant to the commission of the new offence.

Recommendation 4

We recommend that the offence of bestiality in section 118L of the Crimes Ordinance (Cap 200) should be replaced by an offence of sexual intercourse with an animal.

Chapter 5

Necrophilia

Introduction

5.1 It may come as a surprise to people that necrophilia or sexual activity with a dead human body is not a criminal offence in Hong Kong.¹ All the existing sexual offences cover sexual activity with a living person only. Equally, most of the members of the Home Office Review Group in the UK were surprised to know that necrophilia was not illegal at the time of the review:

"An issue that was raised with us during the course of the review was whether the law should prohibit sexual interference with human remains. It came as a surprise to most members of the review that there was no such protection in law for human remains and that necrophilia was not illegal. We were given some anecdotal evidence that necrophilia did take place from time to time, and that it could be associated with some other very serious offending – notably murder that was followed by sexual acts."²

¹ There is however an offence dealing with unauthorised removal of human remains from mortuary. Under s 124(2) of the Public Health and Municipal Services Ordinance (Cap 132), it is an offence for anyone, who does not have a claim to a dead body or not having the consent of the relevant authority specified under that ordinance, to dispose of a dead body from any mortuary:

"Any person who knowingly disposes of the human remains, or any part of the human remains, of any person from any mortuary otherwise than in accordance with a claim made by a person having a right to make the same or in accordance with a direction, or with the consent, of the Authority shall be guilty of an offence:

Provided that nothing in this subsection shall make it an offence to transfer the human remains of a person into a mortuary belonging to the Government from a mortuary not so belonging."

Under common law, there is an indictable offence of prevention of lawful burial of a dead body punishable under section 1011 of the Criminal Procedure Ordinance (Cap 221). The maximum penalty is 7 years' imprisonment. As such, for instance in a murder case, if a person also interfered with a dead body (eg by keeping the dead body at home), the act might constitute a further indictable offence.

² Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 8.6.1. The offence of sexual penetration of a corpse was subsequently enacted in s 70 of the Sexual Offences Act 2003 implementing the recommendation of the Home Office Review Group.

Overseas legislation on sexual activity with a dead person

5.2 The following is a review of legislation on sexual activity with a dead person in some selected overseas countries:

Canada

5.3 Section 182(b) of the Canadian Criminal Code provides for the offence of indecent interference with a dead human body or human remains as follows:

"182 Every one who

- (a) neglects, without lawful excuse, to perform any duty that is imposed on him by law or that he undertakes with reference to the burial of a dead human body or human remains, or*
- (b) improperly or indecently interferes with or offers any indignity to a dead human body or human remains, whether buried or not,*

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years."

California (United States)

5.4 It is a felony under §7052 of the Health and Safety Code of California for any person to commit an act of sexual penetration on or has sexual contact with human remains:

"7052.

- (a) Every person who willfully mutilates, disinters, removes from the place of interment, or commits an act of sexual penetration on, or has sexual contact with, any remains known to be human, without authority of law, is guilty of a felony. This section does not apply to any person who, under authority of law, removes the remains for reinterment, or performs a cremation.*
- (b) For purposes of this section, the following definitions apply:*
 - (1) 'Sexual penetration' means the unlawful penetration of the vagina or anus, however slight, by any part of a person's body or other object, or any act of sexual contact between the sex organs of a person and the mouth or anus of a dead body, or any oral copulation of a dead human body for*

the purpose of sexual arousal, gratification, or abuse.

- (2) *'Sexual contact' means any willful touching by a person of an intimate part of a dead human body for the purpose of sexual arousal, gratification, or abuse."*

England and Wales

5.5 Section 70 of the English Sexual Offences Act 2003 provides for the offence of sexual penetration of a corpse as follows:

"70 Sexual penetration of a corpse

- (1) *A person commits an offence if—*
- (a) *he intentionally performs an act of penetration with a part of his body or anything else,*
 - (b) *what is penetrated is a part of the body of a dead person,*
 - (c) *he knows that, or is reckless as to whether, that is what is penetrated, and*
 - (d) *the penetration is sexual.*
- (2) *A person guilty of an offence under this section is liable—*
- (a) *on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;*
 - (b) *on conviction on indictment, to imprisonment for a term not exceeding 2 years."*

New Zealand

5.6 Section 150 of the New Zealand Crimes Act 1961 provides for the offence of misconduct in respect of human remains as follows:

"150 Misconduct in respect of human remains

Every one is liable to imprisonment for a term not exceeding 2 years who—

- (a) *neglects to perform any duty imposed on him or her by law or undertaken by him or her with reference to the burial or cremation of any dead human body or human remains; or*
- (b) *improperly or indecently interferes with or offers any indignity to any dead human body or human remains, whether buried or not."*

Singapore

5.7 Section 377 of the Singaporean Criminal Code provides for the offence of sexual penetration of a corpse as follows:

"Sexual penetration of a corpse

377. (1) *Any man who penetrates, with his penis, the vagina, anus or mouth, as the case may be, of a human corpse, shall be guilty of an offence.*
- (2) *A man who is guilty of an offence under subsection (1) shall be punished with imprisonment for a term which may extend to 5 years, or with fine, or with both.*
- (3) *Any person (A) who causes any man (B) to penetrate with B's penis, the vagina, anus or mouth, as the case may be, of a human corpse, shall be guilty of an offence if B did not consent to the penetration.*
- (4) *A person who is guilty of an offence under subsection (3) shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning."*

5.8 The UK Review Group reviewed some of the arguments for and against creating a sexual offence to deal with sexual interference with human remains. These arguments are considered below.

Arguments for a sexual offence to deal with sexual interference with human remains

Family expects dead body of their relative be treated with respect

5.9 The UK Review Group pointed out that the strongest argument for creating an offence is that people expect dead body of their relatives to be treated with respect:

*"The strongest arguments for the offence are that the families of those who have died have every right to expect human remains to be treated with respect and propriety. We thought that most people would expect necrophilia to be an offence and would be surprised that it was not."*³

³ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 8.6.6.

Association between necrophilia and other forms of serious offending

5.10 The UK Review Group pointed out that necrophilia could be associated with other forms of serious offences:

*"... We were given some anecdotal evidence that necrophilia did take place from time to time, and that it could be associated with some other very serious offending – notably murder that was followed by sexual acts."*⁴

No possibility of mutual consent

5.11 The Review Group pointed out that sexual activity should be mutually agreed between the parties but there is no possibility of such mutual consent in necrophilia:

*"We thought that society should be able to say that certain kinds of sexual behaviour are so deviant as to be unacceptable. Our fundamental principle is that sexual activity should be mutually agreed – in this context [ie necrophilia], and that of bestiality, there is no possibility of mutual agreement."*⁵

Although necrophilia is rare, it is a deviant behaviour

5.12 Although necrophilia is rare, the need for the intervention of the criminal law was highlighted by the UK Government in a paper issued by the Home Office:

*"There is currently no law that covers sexual interference with human remains. Although there is no indication that such activity is anything but extremely rare, we believe that this behavior is so deviant as to warrant the intervention of the criminal law ..."*⁶

Advance in forensic technology can help proof of necrophilia

5.13 Necrophilia may be difficult to prove since the dead body cannot give evidence. However, as the UK Review Group pointed out, "*[a]dvance in DNA and forensic technology should enable evidence gathering in the absence of other testimony.*"⁷ DNA and other forensic evidence gathered

⁴ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 8.6.1.

⁵ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 8.6.4.

⁶ Home Office, *Protecting the Public: Strengthening protection against sex offenders and reforming the law in sexual offences*, (Cm 5668, November 2002), at para 80.

⁷ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 8.6.6.

from the dead body can be adduced as evidence against the accused. Moreover, there may be other available evidence pointing to commission of an offence, for example, CCTV and evidence by a third party witness.

Arguments against a sexual offence to deal with sexual interference with human remains

The dead body is not a victim

5.14 The Review Group pointed out that "*[i]n general the dead body ceases to have rights in law, and it is arguable that it is not a victim*".⁸

5.15 If a dead body does not have legal rights and cannot be a victim, arguably, it is unnecessary for the criminal law to give the dead body any protection from such behaviour.

Sexual interference with human remains is rare

5.16 As mentioned above, sexual interference with human remains is rare, arguably, it is unnecessary for the criminal law to intervene to regulate such behaviour.

Our views

5.17 We take the view that a new sexual offence should be created to deal with sexual activity with a dead person.

5.18 As the Home Office Review Group in the UK pointed out, the fundamental principle is that sexual activity should be mutually agreed and there is no possibility of mutual agreement in sexual activity with a dead person.⁹

5.19 Furthermore, necrophilia is an insult to the deceased, especially if there is sexual intercourse with the dead body. Such act should be outlawed.

5.20 Although necrophilia may be rare, it does not mean that there should not be an offence to cover such act. A specific offence in our statute books may serve as a deterrent to potential offenders. Moreover, a specific offence would give family of the deceased some assurance that there is legal protection for the dead body of their relatives against sexual abuses.

⁸ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 8.6.2.

⁹ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 8.6.4.

5.21 Having decided that a new offence should be created, we consider a number of issues set out below relating to the proposed new offence.

Penetrative and non-penetrative sexual activity

5.22 The issue is whether the new offence should be confined to penetrative sexual activity with a dead body or should cover both penetrative and non-penetrative sexual activity.

Penetrative and non-penetrative sexual activity

5.23 The offences in Canada and New Zealand cover both penetrative and non-penetrative sexual activity. They apply to "*sexual penetration on, or sexual contact with, any remains known to be human*".

Penetrative sexual activity only

5.24 Both the English offences and Singaporean offences cover penetrative sexual activity only.

5.25 The English offence covers "*an act of penetration with a part of his body or anything else*". It therefore covers both penile and non-penile penetration.

5.26 On the other hand, the Singaporean offence is constituted by a man "*who penetrates, with his penis the vagina, anus or mouth, as the case may be, of a human corpse*". It therefore covers penile penetration only.

5.27 The strongest argument for a new offence to cover sexual activity with a dead body is that people expect dead body of their relatives to be treated with respect. If people expect body of their relatives to be treated with respect, they would expect the dead body not to be subject to any form of sexual abuses, irrespective of whether it is penetrative or non-penetrative.

5.28 On the other hand, non-penetrative sexual act (such as sexual touching) on a human corpse may sometimes be difficult to prove since such act normally may not leave any marks sufficient to leave DNA or forensic evidence to support a charge with an offence. However, evidence can be captured by CCTV or witnessed by a third party. Such evidence, if available, would be sufficient to bring a charge with an offence.

Our views

5.29 We consider that the new offence should cover both penetrative and non-penetrative sexual activity. Penetration should include both penile and non-penile.

5.30 As Home Office Review Group in the UK pointed out, people expect dead body of their relatives to be treated with respect.¹⁰ Both penetrative (penile or non-penile) and non-penetrative sexual activity with the dead body are disrespectful to the deceased and should be prohibited.

Pure sexual offence or not

5.31 The issue is whether the new offence should be a pure sexual offence covering sexual activity with a dead person only, or it should cover also other forms of improper dealing with a human corpse.

Purely a sexual offence

5.32 The offences in section 70 of the English Act and section 377 of the Singaporean Criminal Code are purely sexual offences dealing with sexual interference with a human corpse.

Sexual offence mingled with other offences

5.33 The Canadian and New Zealand offences: §7052 of the Health and Safety Code of California and section 150 of the New Zealand Crimes Act 1961 cover not only sexual interference with a human corpse but also other forms of improper dealing with a human corpse.

5.34 The offences in section 182(b) of the Canadian Criminal Code and s 150 of the New Zealand Crimes Act 1961 (which are the same) cover "improperly or indecently interferes with or offers any indignity to a dead human body or human remains"

5.35 The offence in §7052 of the Health and Safety Code of California covers "willfully mutilates, disinters, removes from the place of interment, or commits an act of sexual penetration on, or has sexual contact with, any remains known to be human, without authority of law,"

¹⁰ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 8.6.6.

Our views

5.36 Since there is already a common law offence for unlawful burial of dead body which is indictable under section 1011 of the Criminal Procedure Ordinance (Cap 221), we take the view that the new offence should be a pure sexual offence covering sexual activity with a dead person only, without extending to cover other forms of improper dealing with a human corpse.

Name of the new offence

5.37 Different names are used in the legislation of overseas jurisdictions to describe the offence of sexual activity with a dead human body: sexual penetration of a corpse (England and Wales; Singapore), misconduct in respect of human remains (New Zealand).

Our views

5.38 The merit of the name sexual penetration of a corpse is that it would convey the message that the offence covers penetrative sexual activity done on a human corpse. This name is not appropriate since we have decided that the new offence should cover both penetrative and non-penetrative sexual activity done on a dead body.

5.39 The merit of the name misconduct in respect of human remains is that it would cover a wide range of abuses, sexual or not, penetrative or otherwise. The problem with that term is that it fails to convey any message that it is a sexual offence.

5.40 Since the new offence will cover all forms of sexual activity with a dead person, we consider that it should be called "sexual activity with a dead person".

Recommendation 5

We recommend that there should be a new offence of sexual activity with a dead person.

Chapter 6

Acts done with intention to commit a sexual offence

Introduction

6.1 In general the criminal law does not punish mere intention to carry out a criminal act. A person would only be held criminally liable if he or she has actually carried out the intended criminal act. An exception would be an attempt to commit an offence. However, a charge for an attempt to commit an offence would require that the accused has actually carried out some acts which are more than preparatory to the commission of the intended criminal offence.

6.2 There can be situations where the accused has done an act, which is short of an attempt at law, with intention to commit a sexual offence but is caught before committing the intended sexual offence. An example is where the accused assaults the victim intending to rape the victim but is caught by the police before taking any steps to rape the victim. In such a case, the accused cannot be charged with rape. Neither can the accused be charged with attempted rape.

6.3 In order to protect people against sexual abuse and give recognition to their sexual autonomy, there are at present three statutory offences in Hong Kong which address these situations:

- (1) Administering drugs to obtain or facilitate unlawful sexual act (Crimes Ordinance (Cap 200) section 121).
- (2) Assault with intent to commit buggery (Crimes Ordinance (Cap 200), section 118B).
- (3) Burglary (with intent to rape) (Theft Ordinance (Cap 210), section 11).

6.4 This chapter considers whether the existing offences in Hong Kong should be revised along the lines of the following offences:

- (1) Administering a substance with intent/administering a substance for sexual purposes.¹

¹ Administering a substance with intent (English Sexual Offences Act 2003, s 61) and administering a substance for sexual purposes (Sexual Offences (Scotland) Act 2009, s 11).

- (2) Committing an offence with intent to commit a sexual offence.²
- (3) Trespass with intent to commit a sexual offence.³

Administering a substance

6.5 In Hong Kong, there is an existing offence of administering drugs, matter or thing to obtain or facilitate unlawful sexual act; this covers the use of a drug, matter or thing to stupefy or overpower another person to enable anyone to have unlawful sexual act with the victim.⁴

6.6 In England and Wales as well as in Scotland, an offence has been revised to cover the administering of a substance to stupefy or overpower another person to enable anyone to engage in sexual activity with the victim.

The existing offence in Hong Kong

6.7 Section 121 of the Crimes Ordinance (Cap 200) provides for an offence of administering drugs, matter or thing to obtain or facilitate unlawful sexual act. It reads as follows:

"A person who applies or administers to, or causes to be taken by, another person any drug, matter or thing with intent to stupefy or overpower that other person so as thereby to enable anyone to do an unlawful sexual act with that other person shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 14 years."

Problems with the existing offence

6.8 There are several problems with the existing offence.

6.9 Firstly, the offence is confined to the application or administration of a "drug, matter or thing" to enable anyone to do "an unlawful sexual act" with the victim. Any sexual activity falling outside the meaning of an unlawful sexual act⁵ would not be covered. An accused would not be

² English Sexual Offences Act 2003, s 62.

³ English Sexual Offences Act 2003, s 63.

⁴ "Unlawful sexual act" is defined in s 117(1A) of Crimes Ordinance (Cap 200) to include unlawful sexual intercourse, buggery or an act of gross indecency.

S 117(1A) provides as follows:

"For the purposes of this Part a person does an unlawful sexual act if, and only if, that person-

(a) has unlawful sexual intercourse;

(b) commits buggery or an act of gross indecency with a person of the opposite sex with whom that person may not have lawful sexual intercourse; or

(c) commits buggery or an act of gross indecency with a person of the same sex."

⁵ See footnote 4 above for meaning of an unlawful sexual act.

caught by the offence, if, for example, the accused's intention is to enable anyone to commit indecent assault on the victim. Furthermore, as the victim would be stupefied or overpowered, he/she would in many cases have difficulty in recalling whether an unlawful sexual act or other sexual activity was committed on him/her. Confining the offence to an unlawful sexual act may lead to difficulty in bringing a charge.

6.10 Secondly, the existing offence in Hong Kong refers to applying or administering any "*drug, matter or thing*". The meaning of the phrase "*drug, matter or thing*" is unclear. The phrase could mean that the offence would be limited to the administration of a drug or a like substance. It could be argued that it would cover, for example, the use of a rope to overpower the victim. However, it is unclear if the offence is intended to cover such a situation.⁶ Such uncertainty over the meaning of the phrase is inconsistent with the principle of clarity of the law, one of the Sub-committee's guiding principles.

6.11 In view of these problems with the existing offence, we consider that it should be revised as it has been revised in England and Wales and in Scotland as follows:

English offence - Administering a substance with intent

6.12 Section 61(1) of the English Act provides as follows:

"(1) A person commits an offence if he intentionally administers a substance to, or causes a substance to be taken by, another person (B)—

- (a) knowing that B does not consent, and*
- (b) with the intention of stupefying or overpowering B, so as to enable any person to engage in a sexual activity that involves B."*

6.13 This offence would cover, for example, a situation where "date rape drugs" are administered without the victim's knowledge or consent. It would also cover the use of any other substance with the intention to stupefying or overpower the victim to enable any person to engage in sexual activity with the victim.⁷

Scottish offence - Administering a substance for sexual purposes

6.14 Section 11 of the Scottish Act provides as follows:

⁶ According to the learned writer of *Archbold Hong Kong*, the essence of the existing offence in Hong Kong is the administering of a drug. (See *Archbold Hong Kong 2015*, §21-44.)

⁷ Explanatory Notes to Sexual Offences Act 2003, para 115.

"(1) If a person ("A") intentionally administers a substance to, or causes a substance to be taken by, another person ("B") -

(a) without B knowing, and

(b) without any reasonable belief that B knows,

and does so for the purpose of stupefying or overpowering B, so as to enable any person to engage in a sexual activity which involves B, then A commits an offence, to be known as the offence of administering a substance for sexual purposes.

(2) For the purposes of subsection (1), if A, whether by act or omission, induces in B a reasonable belief that the substance administered or taken is (either or both)—

(a) of a substantially lesser strength, or

(b) in a substantially lesser quantity,

than it is, any knowledge which B has (or belief as to knowledge which B has) that it is being administered or taken is to be disregarded."

Elements of the revised offence

6.15 Having decided that the existing offence should be revised, some issues fall to be considered:

"to do an unlawful sexual act" or "to engage in a sexual activity"

6.16 The existing offence refers to *"to do an unlawful sexual act"*,⁸ whereas the English and Scottish offences refer to *"to engage in a sexual activity"*. The issue is whether the revised offence should retain the scope of the existing offence or adopt that of the English and Scottish offences. We take the view that the scope of the English and Scottish offences should be adopted. The scope of the existing offence may lead to difficulty in bringing a charge since the victim may be stupefied or overpowered and may have difficulty in recalling whether an unlawful sexual act (as defined) or other sexual activity was committed on him/her. The scope of the English and Scottish offences would avoid such difficulty because it covers all sexual activity and is not confined to an unlawful sexual act. Moreover, scope similar to that used in the English and Scottish offences is used in other new

⁸ "Unlawful sexual act" is defined in s 117(1A) of Crimes Ordinance (Cap 200) to include unlawful sexual intercourse, buggery or an act of gross indecency.

S 117(1A) provides as follows:

"For the purposes of this Part a person does an unlawful sexual act if, and only if, that person-

(a) has unlawful sexual intercourse;

(b) commits buggery or an act of gross indecency with a person of the opposite sex with whom that person may not have lawful sexual intercourse; or

(c) commits buggery or an act of gross indecency with a person of the same sex."

offences proposed in our previous consultation paper.⁹ To adopt "*to engage in a sexual activity*" would bring consistency to our recommendations. What is more, we have proposed the word "unlawful" be removed from all offences involving sexual intercourse or sexual act because the word "unlawful" is mere "surplusage" and without any substantive meaning.¹⁰

"drug, matter or thing" or "substance"

6.17 The existing offence refers to any "*drug, matter or thing*", whereas the English and Scottish offences refer to a "*substance*". The issue is whether the revised offence should retain the terminology in the existing offence or adopt that of the English and Scottish offences. We take the view that the terminology of the English and Scottish offences should be adopted. As pointed out above, the meaning of any "*drug, matter or thing*" is ambiguous and may lead to uncertainty as to the scope the offence. By contrast, the term "*substance*" is clear. Moreover, some stupefying substances may not necessarily be drugs. The replacement of "*drug*" with "*substance*" would mean greater protection to people against sexual abuse and better respect their sexual autonomy. By adopting the term "*substance*", the revised offence would, for example, apply to a situation where, as the Scottish Law Commission ("SLC") cited, "*B asks A for a glass of orange juice to which A adds alcohol or another drug.*"¹¹

The appropriate mens rea

6.18 The issue is what the appropriate *mens rea* of the proposed revised offence should be. The *mens rea* of the English offence is knowledge that B does not consent (to the administering of the substance). The *mens rea* of the Scottish offence is that A acts "*without any reasonable belief that B knows*" and that B does not know. And the meaning of "reasonable belief" is subject to s 16 of the Scottish Act which reads as follows:

"In determining, for the purposes of Part 1, whether a person's belief as to consent or knowledge was reasonable, regard is to be had to whether the person took any steps to ascertain whether there was consent or, as the case may be, knowledge; and if so, to what those steps were."

6.19 The English approach is a purely subjective test. If the knowledge of the accused was genuinely held but yet unreasonable, he/she

⁹ For example, the proposed new offence of engaging in sexual activity in the presence of a child under 13/16. (Law Reform Commission of Hong Kong, *Consultation Paper on Sexual Offences Involving Children and Persons with Mental Impairment* (November 2016), recommendation 13.)

¹⁰ Law Reform Commission of Hong Kong, *Consultation Paper on Sexual Offences Involving Children and Persons with Mental Impairment* (November 2016), recommendation 4.

¹¹ Scottish Law Commission, *Report on Rape and Other Sexual Offences* (December 2007), Scot Law Com No 209, para 3.65.

would still be acquitted. In this respect it undermines the principle of sexual autonomy.

6.20 On the other hand, the Scottish approach is a mixed test. It requires the accused's belief to be reasonable an objective element. But in deciding whether the accused's belief was reasonable, regard is to be had as to whether the person took any steps to ascertain whether there was knowledge on B's part (an element of subjectivity).

6.21 We favour the Scottish approach because it avoids the subjectivity of the English approach by requiring the accused's belief in B's knowledge to be reasonable, but still focuses on the particular accused by determining the reasonableness or otherwise of that belief having regard to any steps the accused has taken to ascertain whether B knows.

Name of the revised offence

6.22 The issue is what the name of the revised offence should be. The English offence is called "administering a substance with intent" and the Scottish offence is called "administering a substance for sexual purposes".

6.23 The revised offence covers intentionally administrating a substance for the purpose of enabling any person to engage in a sexual activity with B. Hence, a "sexual purpose" is a major ingredient of the proposed new offence. We therefore consider that the revised offence should be called "administering a substance for sexual purposes" following the Scottish offence.

Recommendation 6

We recommend that the offence of administering drugs to obtain or facilitate an unlawful sexual act in section 121 of the Crimes Ordinance (Cap 200) be replaced by the offence of administering a substance for sexual purposes.

We recommend that the proposed offence be along the lines of section 11 of the Sexual Offences (Scotland) Act 2009.

Committing an offence with intent to commit a sexual offence

The existing offence in Hong Kong

6.24 In Hong Kong, section 118B of the Crimes Ordinance, Cap 200 provides for an offence of assault with intent to commit buggery; it reads as follows:

"A person who assaults another person with intent to commit buggery shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 10 years."

6.25 The existing offence would, for example, cover the situation where the accused assaulted the victim so that he/she could more easily commit buggery on the victim but was caught before actually committing the buggery.

Problems with the existing offence

6.26 There are two major problems with the existing offence.

6.27 Firstly, the existing offence is confined to an assault. The rationale behind the offence is protection of one's sexual autonomy before the intended sexual crime is actually committed. As all sexual crimes involve the invasion of one's sexual autonomy, there is no good reason why the law should make a distinction between a person committing an assault with intent to commit a sexual offence and someone committing a non-assault offence in order to commit a sexual offence.

6.28 Secondly, the *mens rea* of the existing offence is confined to an intention to commit buggery and appears to be based on sexual orientation. Again, as all sexual crimes involve the invasion of one's sexual autonomy, there is no good reason why the *mens rea* of the offence should be confined to an intention to commit buggery. Moreover, it is one of Sub-committee's guiding principles that offences should not be based on sexual orientation.

6.29 A new offence has been adopted in England and Wales as follows:

The English offence

6.30 Section 62(1) of the English Act provides for the offence of "committing an offence with intent to commit a sexual offence" as follows:

*"A person commits an offence under this section if he commits any offence with the intention of committing a relevant sexual offence."*¹²

6.31 This new offence is intended to cover the situation where a person commits *any* offence with the intention of committing a subsequent sexual offence, regardless of whether or not the sexual offence is committed. Examples of commission of this offence are:

A assaults B to subdue B so that A could more easily rape B.¹³

Possession of a dangerous drug, for example, GHB¹⁴ (more commonly known as 迷姦水 in Chinese) in order to facilitate the commission of rape.

Our views on reform of the existing offence

6.32 In view of the problems with the existing offence identified in paragraphs 6.27 and 6.28 above, we consider that it should be replaced by a new offence of committing an offence with intent to commit a sexual offence modelled on the English offence. There would be several advantages with this offence.

6.33 Firstly, whereas the existing offence is confined to an assault with intent to commit buggery, the English offence covers the situation where a person commits *any* offence with the intention of committing *any* sexual offence. The wider scope of the English offence would mean greater protection to people against sexual abuse and better respect for their sexual autonomy.

6.34 Secondly, the existing offence refers to buggery and is based on sexual orientation. By contrast, the English offence is not based on sexual orientation.

6.35 Thirdly, although the existing offence is already covered by the Sexual Conviction Record Check Scheme ("SCRC Scheme") in Hong Kong, it is confined to an assault with intention to commit buggery. With the introduction of a new offence modelled on the English offence, a person convicted of *any* offence with the intention of committing *any* sexual offence would be covered by the SCRC Scheme. Society would therefore be better informed as to the accused's conviction for a sexual crime.

¹² "Relevant sexual offence" are all those sexual offences contained in Part 1 of the English Sexual Offences Act 2003 (including aiding, abetting, counselling or procuring those offences) (see s 62(2) of the English Act).

¹³ Explanatory Notes to Sexual Offences Act 2003, para 121.

¹⁴ GHB (Gamma Hydroxybutyric Acid, Chinese name γ -羧丁酸) is a central nervous system (CNS) depressant that is commonly referred to as a "club drug" or "date rape" drug.

6.36 Finally, because of the wider scope of the English offence, it may be useful where a person took steps to commit *any* sexual offence but his/her actions were not more than preparatory to the commission of the intended sexual offence such that a charge for an attempt could not be brought.

Recommendation 7

We recommend that the offence of assault with intent to commit buggery in section 118B of the Crimes Ordinance (Cap 200) be replaced by a new offence of committing an offence with intent to commit a sexual offence.

We recommend that the new offence be along the lines of section 62 of the English Sexual Offences Act 2003.

Trespass with intent to commit a sexual offence

The existing offence of burglary

6.37 In Hong Kong, section 11 of the Theft Ordinance (Cap 210) (which is modelled on section 9 of the Theft Act 1968 in the UK) provides for the offence of burglary as follows:

"11. Burglary

- (1) *A person commits burglary if—*
 - (a) **he enters any building or part of a building as a trespasser and with intent to commit any such offence as is mentioned in subsection (2); or**
 - (b) *having entered any building or part of a building as a trespasser he steals or attempts to steal anything in the building or that part of it or inflicts or attempts to inflict on any person therein any grievous bodily harm.*
- (2) *The offences referred to in subsection (1)(a) are—*
 - (a) *stealing anything in the building or part of a building in question;*
 - (b) *inflicting on any person therein any grievous bodily harm or **raping any woman therein**; and*
 - (c) *doing unlawful damage to the building or anything therein.*

- (3) *References in subsections (1) and (2) to a building shall apply also to an inhabited vehicle or vessel, and shall apply to any such vehicle or vessel at times when the person having a habitation in it is not there as well as at times when he is" (emphasis added)*

Problems with the existing offence of burglary

6.38 There are various problems with the existing offence.

6.39 Firstly, the offence is committed only where the accused entered a "building". Thus, it does not cover areas outside a building such as a garden or a yard.¹⁵

6.40 Secondly, the existing offence applies only to trespass with an intention to rape; not to other forms of sexual assault.¹⁶

6.41 Thirdly, the existing offence applies only to trespass with an intention to rape a woman. In other words, the existing offence does not apply to a male victim.

Recommendation of the Home Office Review Group in the UK for a new offence

6.42 The Home Office Review Group in the UK recommended that a new sexual offence of trespass with intent to commit a sexual offence should replace the existing offence of burglary with intent to rape.¹⁷

6.43 The Review Group took the view that the new offence should cover trespass with intent to commit any serious sexual offence, not just rape:

*"The existing offence of burglary with intent to rape would need to be redefined to take account of our proposals to reform the law of serious sex offences. In order to differentiate our new offence, we thought that the word trespass was preferable to burglary – and covers the same elements of unwanted intrusion. We also thought that as the intent to commit a sex offence was central to the offence, the redefinition should apply to trespass with intent to commit any **serious** sex offence – rape, sexual assault by penetration, sexual assault or adult sexual abuse of a*

¹⁵ Kim Stevenson, et al, *Blackstone's Guide to the Sexual Offences Act 2003* (Oxford University Press, 2004), at page 135.

¹⁶ Kim Stevenson, et al, *Blackstone's Guide to the Sexual Offences Act 2003* (Oxford University Press, 2004), at page 135.

¹⁷ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), recommendation 12.

child – and that it should be codified with other sex offences."¹⁸
(emphasis added)

6.44 The Review Group considered whether this new offence should continue to be a burglary offence or should be a sexual offence instead. The Review Group concluded that as the essence of the new offence is the sexual intent rather than burglary, it should be regarded as a sexual offence.¹⁹

The new offence of trespass with intent to commit a sexual offence

6.45 The Review Group's recommendation was implemented and a new offence of trespass with intent to commit a sexual offence was created in section 63 of the English Act as follows.²⁰

"Trespass with intent to commit a sexual offence

- (1) *A person commits an offence if—*
 - (a) *he is a trespasser on any premises,*
 - (b) *he intends to commit a relevant sexual offence on the premises, and*
 - (c) *he knows that, or is reckless as to whether, he is a trespasser.*

- (2) *In this section—*
 - "premises" includes a structure or part of a structure;*
 - "relevant sexual offence" has the same meaning as in section 62;*²¹
 - "structure" includes a tent, vehicle or vessel or other temporary or movable structure"*

6.46 This new offence is intended to cover, for example, a situation where a person (A) enters B's building, garden or garage without consent, and intends to commit any sexual offence against the occupier. The offence is committed regardless of whether the intended substantive sexual offence is committed. The offence is committed if A has the intent to commit a sexual offence at any time while A is a trespasser.²²

¹⁸ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 2.16.3.

¹⁹ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 2.16.2.

²⁰ Notwithstanding the recommendation of the Home Office Review Group, the legislation extends to trespass with intent to commit any "relevant sexual offence" (which means any offence under Part 1 of the Sexual Offences Act 2003).

²¹ That is all sexual offences in Part I of the English Sexual Offences Act, 2003.

²² Explanatory Notes to Sexual Offences Act 2003, para 122.

Our views

6.47 We take the view that a new sexual offence of trespass with intent to commit a sexual offence should be created to replace the existing offence of burglary (with intent to rape). The new offence would address the problems with the existing offence:

- (i) The existing offence is committed only where the accused entered a "building", whereas the new offence covers any premises.
- (ii) The existing offence applies only to trespass with an intention to rape. The new offence applies to all forms of sexual assault.
- (iii) The existing offence is gender-specific, applying only to trespass with an intention to rape a woman. The new offence is gender-neutral, applying to trespass with an intention to commit a sexual offence on person of either gender.

Elements of the revised offence

6.48 Having decided that the existing offence should be replaced by a new offence, there are some issues with regard to the new offence that need to be considered:

Types of sexual offences to be covered

6.49 The new offence created in section 63 of the English Sexual Offences Act 2003 applies to any sexual offence and not just serious sexual offences. We think it is a good idea to follow the English legislation. Obviously, the protection to victims would be greater if the new offence is to cover all sexual offences. Furthermore, if the new offence is to be confined to serious sexual offences, there would be the need to define a serious sexual offence. It would not be easy to come up with a satisfactory definition and any definition (for example, by reference to the maximum sentences and/or nature of the conduct) would be arbitrary. The lack of a satisfactory definition would lead to uncertainty in the law and be inconsistent with the principle of clarity of the law which is one of the Sub-committee's guiding principles.

When should the intent to commit a sexual offence be formed?

6.50 The issue is whether the intention to commit a sexual offence should be formed at the time the accused enters any premises as a trespasser, or at any time while being a trespasser.

6.51 To be guilty of the existing offence, the accused had to form the intention to rape by the time he entered the building as a trespasser. By

contrast, the English offence is committed if the accused has the intent to commit a sexual offence at any time while being a trespasser.

6.52 We consider that the intention to commit a sexual offence must be formed by the time the accused enters any premises as a trespasser. Entering premises as trespasser does not constitute a criminal offence. It would be overcriminalisation to hold a person criminally liable where that person enters premises without sexual intent but forms that intent only later.

Recommendation 8

We recommend that the offence of burglary (with intent to rape) in section 11 of the Theft Ordinance (Cap 210) be replaced by a new sexual offence of trespass with intent to commit a sexual offence.

We recommend that the new offence be along the lines of section 63 of the English Sexual Offences Act 2003.

We further recommend that the new offence should cover trespass with intent to commit any sexual offence and such intent must have been formed at the time when the accused enters the premises as a trespasser.

Chapter 7

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

Homosexual sexual offences previously recommended be abolished

7.1 The Sub-committee has previously reviewed the following homosexual sexual offences and recommended their abolition:

- (i) Homosexual buggery with or by man under 16 (section 118C of Crimes Ordinance).¹
- (ii) Gross indecency with or by man under 16 (section 118H of Crimes Ordinance).²
- (iii) A man committing gross indecency with a male mentally incapacitated person (section 118I of Crimes Ordinance).³

Homosexual or homosexual-related buggery and gross indecency offences remain to be reviewed

7.2 There are some homosexual or homosexual-related buggery offences which remain to be reviewed. These offences were added to the Crimes Ordinance (Cap 200) in 1991⁴ to implement the recommendations of *LRC's Report on Laws Governing Homosexual Conduct*.⁵ This chapter will review these remaining offences.

7.3 These remaining offences are:

- (i) Assault with intent to commit buggery (section 118B).⁶ (Note: We have already recommended in Chapter 6 (at

¹ Law Reform Commission of Hong Kong, *Consultation Paper on Sexual Offences Involving Children and Persons with Mental Impairment* (November 2016), Recommendation 20.

² Law Reform Commission of Hong Kong, *Consultation Paper on Sexual Offences Involving Children and Persons with Mental Impairment* (November 2016), Recommendation 20.

³ Law Reform Commission of Hong Kong, *Consultation Paper on Sexual Offences Involving Children and Persons with Mental Impairment* (November 2016), Recommendation 37.

⁴ Crimes (Amendment) Ordinance (90 of 1991).

⁵ Law Reform Commission of Hong Kong, *Report on Laws Governing Homosexual Conduct* (June 1983).

⁶ S 118B of the Crimes Ordinance provides:

recommendation 7) that this offence be replaced by the proposed new offence of committing an offence with intent to commit a sexual offence.)

- (ii) Procuring others to commit homosexual buggery (section 118G).⁷
- (iii) Gross indecency by man with man otherwise than in private (section 118J).⁸
- (iv) Procuring gross indecency by man with man (section 118K).⁹

Our views on these homosexual or homosexual-related offences

7.4 We consider that these homosexual or homosexual-related offences should not continue to exist in our statute books. The principles of gender neutrality and avoidance of distinctions based on sexual orientation should lead to these offences being removed. The conduct covered by assault with intent to commit buggery will be included in the proposed new offence of committing an offence with intent to commit a sexual offence.

"A person who assaults another person with intent to commit buggery shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 10 years."

⁷ S 118G of the Crimes Ordinance provides:

"A person who procures a man to commit an act of buggery with a third person, who is another man, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 2 years."

⁸ S 118J of the Crimes Ordinance provides:

"(1) A man who commits an act of gross indecency with another man otherwise than in private shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 2 years.

(2) An act which would otherwise be treated for the purposes of this section as being done in private shall not be so treated if done-

(a) (Repealed 18 of 2014 s. 6)

(b) in a lavatory or bathhouse to which the public have or are permitted to have access, whether on payment or otherwise.

*(3) In this section, **bathhouse** (浴室) means any premises or part of any premises maintained for the use of persons requiring a sauna, shower-bath, Turkish bath or other type of bath."*

⁹ S 118K of the Crimes Ordinance provides:

"A person who procures a man to commit an act of gross indecency with a third person, who is another man, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 2 years."

Recommendation 9

We recommend that the following offences be abolished:

- (i) Assault with intent to commit buggery (section 118B of the Crimes Ordinance (Cap 200)).¹⁰**
- (ii) Procuring others to commit homosexual buggery (section 118G of the Crimes Ordinance (Cap 200)).**
- (iii) Gross indecency by man with man otherwise than in private (section 118J of the Crimes Ordinance (Cap 200)).**
- (iv) Procuring gross indecency by man with man (section 118K of the Crimes Ordinance (Cap 200)).**

¹⁰

We have already recommended in Chapter 6 (at recommendation 7) that assault with intent to commit buggery be replaced by the proposed new offence of committing an offence with intent to commit a sexual offence.

Chapter 8

Summary of recommendations

Recommendation 1: **The specific offence of incest be retained but should be reformed. Whether it should apply to other forms of penetration or sexual activity and cover adoptive parents be considered by the Hong Kong community (see near paragraph 1.112)**

We recommend that the offence of incest be retained and the term incest should continue to be used.

We also recommend that the offence of incest be reformed and the new offence should:

- (a) be gender neutral;
- (b) cover all penile penetration of the mouth, vagina and anus; and
- (c) be extended to cover uncles/aunts and nephews/nieces (who are blood relatives).

We are of the view that the issue of whether the new offence should:

- (a) apply to other forms of penetration or sexual activity; and
- (b) cover adoptive parents

should be considered by the Hong Kong community. Accordingly, we invite the community to express their views on these issues.

We recommend the retention of the need for the Secretary for Justice's consent to prosecute.

Recommendation 2: **Proposed new offence of sexual exposure (see near paragraph 2.44)**

We recommend that the new legislation should include an offence of sexual exposure along the lines of section 8 of the Sexual Offences (Scotland) Act.

We also recommend that the offence of sexual exposure should have all of the following elements:

- (1) exposure of one's genitals in a sexual manner to another person ("B") with the intention that B will see them;
- (2) the exposure is made in a public or private place;
- (3) the exposure is made without the consent of B and without any reasonable belief that B consents; and
- (4) the purpose of the exposure is for
 - (i) obtaining sexual gratification, or
 - (ii) humiliating, distressing or alarming the victim.

Recommendation 3: Proposed new specific offence of voyeurism (see near paragraph 3.22)

We recommend introducing a new specific offence of voyeurism.

We recommend that such an offence be along the lines of section 67 of the English Sexual Offences Act 2003.

Recommendation 4: Bestiality be replaced by an offence of sexual intercourse with an animal (see near paragraph 4.51)

We recommend that the offence of bestiality in section 118L of the Crimes Ordinance (Cap 200) should be replaced by an offence of sexual intercourse with an animal.

Recommendation 5: Proposed new offence of sexual activity with a dead person (see near paragraph 5.40)

We recommend that there should be a new offence of sexual activity with a dead person.

Recommendation 6: Administering drugs to obtain or facilitate an unlawful sexual act be replaced by the offence of administering a substance for sexual purposes (see near paragraph 6.23)

We recommend that the offence of administering drugs to obtain or facilitate an unlawful sexual act in section 121 of the Crimes Ordinance (Cap 200) be replaced by the offence of administering a substance for sexual purposes.

We recommend that the proposed offence be along the lines of section 11 of the Sexual Offences (Scotland) Act 2009.

Recommendation 7: Assault with intent to commit buggery be replaced by a new offence of committing an offence with intent to commit a sexual offence (see near paragraph 6.36)

We recommend that the offence of assault with intent to commit buggery in section 118B of the Crimes Ordinance (Cap 200) be replaced by a new offence of committing an offence with intent to commit a sexual offence.

We recommend that the new offence be along the lines of section 62 of the English Sexual Offences Act 2003.

Recommendation 8: Burglary (with intent to rape) be replaced by a new sexual offence of trespass with intent to commit a sexual offence (see near paragraph 6.52)

We recommend that the offence of burglary (with intent to rape) in section 11 of the Theft Ordinance (Cap 210) be replaced by a new sexual offence of trespass with intent to commit a sexual offence.

We recommend that the new offence be along the lines of section 63 of the English Sexual Offences Act 2003.

We further recommend that the new offence should cover trespass with intent to commit any sexual offence and such intent must have been formed at the time when the accused enters the premises as a trespasser.

Recommendation 9: Assault with intent to commit buggery, procuring others to commit homosexual buggery, gross indecency by man with man otherwise than in private, and procuring gross indecency by man with man be abolished (see near paragraph 7.4)

We recommend that the following offences be abolished:

- (i) Assault with intent to commit buggery (section 118B of the Crimes Ordinance (Cap 200)).¹
- (ii) Procuring others to commit homosexual buggery (section 118G of the Crimes Ordinance (Cap 200)).
- (iii) Gross indecency by man with man otherwise than in private (section 118J of the Crimes Ordinance (Cap 200)).
- (iv) Procuring gross indecency by man with man (section 118K of the Crimes Ordinance (Cap 200)).

¹ We have already recommended in Chapter 6 (at recommendation 7) that assault with intent to commit buggery be replaced by the proposed new offence of committing an offence with intent to commit a sexual offence.

**Website addresses of the English Sexual Offences Act 2003
and the Sexual Offences (Scotland) Act 2009**

The following overseas legislation can be downloaded from the internet at the website addresses as follows –

The English Sexual Offences Act 2003:

<http://www.legislation.gov.uk/ukpga/2003/42/contents>

The Sexual Offences (Scotland) Act 2009:

<http://www.legislation.gov.uk/asp/2009/9/contents>