

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

CONSULTATION PAPER

MISCELLANEOUS SEXUAL OFFENCES

EXECUTIVE SUMMARY

Preface

Terms of reference

1. See consultation paper.

Previous work of the Sub-committee

2. The Sub-committee was appointed in July 2006.
3. In July 2008, the Sub-committee issued a *Consultation Paper on Interim Proposals on a Sex Offender Register*.
4. 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*.
5. 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The Common Law Presumption that a Boy under 14 is Incapable of Sexual Intercourse*, recommending the abolition of this outdated common law presumption.

Overall review of the substantive sexual offences

6. The Sub-committee is currently working on an overall review of the substantive sexual offences. The overall review is the major part of Sub-committee's study under its terms of reference and has three parts, with three consultation papers issued (including this one).¹ A final report would be compiled in respect of all these three papers.

¹ It was the Sub-committee's original plan to issue four consultation papers in respect of the overall review. During the consultation exercises on the first two parts of the overall review, there were demands from the public as well as LegCo's Panel on Administration of Justice and Legal Services for expediting the work on the overall review. In response to these demands, the Sub-committee has decided to adjust its original work plan by severing the fourth part (sentencing) from the overall review and return to it when the overall review is completed.

7. In September 2012, the Sub-committee issued the *Consultation Paper on Rape and other Non-consensual Sexual Offences*. This consultation paper represents the first of the three consultation papers issued on the overall review.

8. In November 2016, the Sub-committee issued the *Consultation Paper on Sexual Offences involving Children and Persons with Mental Impairment*. This consultation paper represents the second of the three consultation papers issued on the overall review.

This consultation paper

9. 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 including 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.

Public views invited

10. 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

The present law:

Incest by men

11. S 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 Consent of the woman is not a defence.⁴

Incest by women of or over 16

12. S 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

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).

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.

Consent of Secretary for Justice to prosecute

13. The consent of the Secretary for Justice to prosecute is required before a charge for an offence under s 47 or s 48 can be laid.⁷

Should incest be retained as a specific offence?

14. The Sub-committee has recommended in their 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 of the sexual abuses within the family may well be criminalised in terms of those general offences, a specific offence of incest is unnecessary.

Arguments for retaining incest as a specific offence

15. The Scottish Law Commission ("SLC") sets out the following arguments for retaining incest as a specific crime:⁸

- Protection of members of the family.
- Maintenance of family solidarity.
- Recognition of the repugnance felt by the community.
- Risk of genetic defects.
- Validity of consent and continuation of familial abuse beyond childhood.
- Proper labelling of the wrong.

Arguments against retaining a specific offence of incest

16. SLC sets out the arguments against retaining a specific offence of incest:⁹

- Protection of family members does not provide justification for incest.
- Family solidarity is broken more frequently by other familial sexual activity than incest.
- the reasons for community views against incest must be identified to assess their validity.
- the genetic argument makes incest a "result" crime.
- The increased risk associated with inbreeding should not justify a criminal offence.

⁷ Crimes Ordinance, s 51.

⁸ See paras 1.18 – 1.24 of consultation paper. See also Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences* (discussion 131, January 2006), paras 6.17 – 6.28.

⁹ See paras 1.25 – 1.32 of consultation paper. See also Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences* (discussion 131, January 2006), paras 6.17 – 6.28.

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

Our views

17. We take the view that the offence of incest should be retained. There are strong grounds for this view. There is always a risk of coercion in the case of familial sexual activity. 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.¹⁰ 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. Incest (or other offences covering familial sexual activity) has been retained in other jurisdictions.¹¹

Should the term incest be continued to be used?

18. The term incest is used in existing incest offences in the Crimes Ordinance.¹²

19. 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.

To what activity should the offence of incest apply?

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

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

22. 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 activity¹³. 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.

¹⁰ *HKSAR v Li Kin Ho* [1999] 2 HKC 589, at 605 (Power VP).

¹¹ See consultation paper, para 1.41.

¹² For positions in overseas jurisdictions, see consultation paper, paras 1.46 – 1.53.

¹³ This could cater for gender neutrality in the application of the offence.

Should the new offence be gender-neutral?

23. There are separate incest offences for men and women in the Crimes Ordinance. The existing incest offences are therefore gender-specific.¹⁴

24. We consider that the new offence should be gender-neutral. Gender-neutrality is one of the guiding principles of our reform.

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

25. The existing incest offence in the Crimes Ordinance is confined to relations in the direct blood line including half relations and siblings. The issue is whether the new offence should be extended to cover other relationships discussed below:

Uncles and aunts

26. The existing incest offence in the Crimes Ordinance does not cover uncles and aunts.¹⁵ Pursuant to s 27(1) and Schedule 5 to the Marriage Ordinance (Cap 181), marriage between uncle/aunt and niece/nephew is unlawful.

27. 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

28. The existing incest offence in the Crimes Ordinance does not cover parents who have a sexual relationship with their adopted children.¹⁶

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

30. 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 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 child are consenting adults should that constitute an offence? Should there be an age limit in respect of sexual relations with an adopted child? The Sub-committee is of the view that these are matters which should be the subject of public consultation.

¹⁴ For positions in overseas jurisdictions, see consultation paper, paras 1.63 – 1.66.

¹⁵ For positions in overseas jurisdictions, see consultation paper, paras 1.69 – 1.73.

¹⁶ For positions in overseas jurisdictions, see consultation paper paras 1.77 – 1.80.

Adoptive siblings

31. The existing incest offence in the Crimes Ordinance does not cover adoptive siblings.¹⁷ Pursuant to s 27(1) and Schedule 5 to the Marriage Ordinance (Cap 181), marriage between adopted siblings is lawful.

32. 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.

Step-parents and foster-parents

33. The existing incest offence in the Crimes Ordinance does not cover step-parents and foster-parents.¹⁸

34. 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. 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; and (ii) underage children will also be covered by the proposed offences involving children as recommended in the previous consultation paper.¹⁹ For cases where step-parents are involved, we also note that the court will usually impose a harsher sentence as punishment.

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*

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**

¹⁷ For positions in overseas jurisdictions, see consultation paper paras 1.84 – 1.87.

¹⁸ For positions in overseas jurisdictions, see consultation paper paras 1.91 – 1.97.

¹⁹ Law Reform Commission of Hong Kong, *Consultation Paper on Sexual Offences Involving Children and Persons with Mental Impairment* (November 2016).

- (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

35. In Hong Kong, it is an offence under s 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*". Anyone guilty of indecency in public is liable on conviction to a fine of \$1000 and to imprisonment for 6 months. This existing offence is essentially a "*public order*" offence rather than a sexual offence.

Two types of exposure

36. The 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).²⁰

*The rationale for a new sexual offence to cover exposure targeting a specific victim*²¹

37. The rationale noted is as follows:

- Exposer targeting a specific victim is similar to sexual assault.
- Exposers targeting a specific victim are potentially dangerous and likely to commit other sexual offences.
- A number of overseas jurisdictions have offence to cover exposure targeting a specific victim.

²⁰ Scottish Law Commission, *Report on Rape and Other Sexual Offences* (December 2007), Scot Law Com No 209, para 5.13.

²¹ See paras 2.5 – 2.13 of consultation paper.

38. 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.²²

Elements of the new offence

39. 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*

40. In order to constitute the offence of sexual exposure in s 8 of the Scottish Act, the exposure of the accused's genitals must be carried out "*in a sexual manner*".

41. 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*

42. 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.²³

43. As mentioned above, persons who expose their genitals are more aggressive and pose a great threat to other people. These more aggressive expositors are potentially dangerous and likely to commit other sexual offences. The purpose of the proposed new offence is to catch these expositors. 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*

44. The issue is what the purpose of the exposure should be, in order to constitute the new offence.²⁴

²² 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)

²³ For positions in overseas jurisdictions, see consultation paper, paras 2.19 – 2.23.

²⁴ For positions in overseas jurisdictions, see consultation paper, paras 2.26 – 2.30.

45. 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.²⁵ 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*

46. 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*".²⁶

47. 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. 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.

48. 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.

49. 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*

50. 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.

51. We favour the Scottish approach. 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.

²⁵ Law Reform Commission of Hong Kong, *Consultation Paper on Sexual Offences Involving Children and Persons with Mental Impairment* (November 2016), para 7.72.

²⁶ For positions in overseas jurisdictions, see consultation paper, paras 2.33 – 2.34.

52. 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.²⁷

The name of the new offence

53. 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".

54. 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

55. 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). 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: Proposed new offence of sexual exposure

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.**

²⁷ See para 2.40 of consultation paper.

Chapter 3: Voyeurism

The present law

56. There is no specific legislation in Hong Kong dealing with an act of voyeurism involving observation or visual recording for a sexual purpose.²⁸

The offence of voyeurism – overseas jurisdictions

57. Both Canada²⁹ and England and Wales³⁰ 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.³¹

58. 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.³² This narrow offence of voyeurism is supplemented by other specific offences covering intimate visual recording.³³

59. 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.³⁴

The need for a specific offence of voyeurism

60. 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

61. 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)

²⁸ 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 s 160 of the Crimes Ordinance (Cap 200) or for disorder in public place contrary to s 17B(2) of the Public Order Ordinance (Cap 245). For these two offences, the element of "public" is required. If the act of voyeurism concerns the use of computers (whether in a public or private place), the offenders may be prosecuted under s 161 of the Crimes Ordinance for access to computer with criminal or dishonest intent.

²⁹ Canadian Criminal Code, s 162.

³⁰ Sexual Offences Act 2003, s 67.

³¹ See paras 3.7 – 3.11 of consultation paper.

³² Crimes Act 1900 (New South Wales), s 91J. See paras 3.12 – 3.14 of consultation paper.

³³ Filming a person engaged in a private act (s 91K), Filming a person's private parts (s 91L) and Installing device to facilitate observation or filming (s 91M).

³⁴ Crimes Act 1961 (New Zealand), s 216H. See paras 3.16 – 3.18 of consultation paper.

"nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity".

62. In the English legislation, voyeurism covers situations where the victim is doing a private act. Private act is defined in the legislation.

63. 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: Proposed new specific offence of voyeurism

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

64. 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."

65. 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.³⁵

Arguments for a specific offence of bestiality³⁶

66. Arguments for a specific offence:

- Bestiality is an act offending the dignity of animals and people.
- Linkage between bestiality and other forms of sexual offending.

Arguments against a specific offence of bestiality³⁷

67. Arguments against a specific offence:

³⁵ Home Office, *Setting The Boundaries: Reforming the law on sex offences* (July 2000), para 8.5.2.

³⁶ See paras 4.4 – 4.5 of consultation paper.

³⁷ See paras 4.6 – 4.8 of consultation paper.

- The offence of bestiality is seldom prosecuted.
- Sexual activity with an animal should be covered by offences relating to public indecency or animal protection.

Our views

68. We take the view that a specific sexual offence relating to sexual activity with an animal should be retained. 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. Moreover, as an offence of cruelty to animals is not a sexual offence, the offender's conviction would not appear on the records of Sexual Conviction Record Check Scheme and the public would not be aware of the conviction. The fact that there have been only rare prosecutions of the offence of bestiality in Hong Kong 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.

69. While 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.

Overseas legislation on bestiality

70. A review of legislation on bestiality in a number of selected overseas countries is at paras 4.15 – 4.27 of consultation paper.

Should the new offence cover sexual activity beyond sexual intercourse?

71. The issue is whether the new offence should cover sexual activity beyond sexual intercourse. 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.³⁸ Therefore, the existing offence covers "sexual intercourse" with an animal only.

72. 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.

³⁸ 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

73. 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.

74. 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

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

76. 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.

77. 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. We favour the name "*sexual intercourse with an animal*".

Recommendation 4: *Bestiality be replaced by an offence of sexual intercourse with an animal*

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

78. 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.³⁹ All the existing

³⁹ 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). Under common law, there is

sexual offences cover sexual activity with a living person only.

Overseas legislation on sexual activity with a dead person

79. A review of legislation on sexual activity with a dead person in a number of selected overseas countries is at paras 5.3 – 5.7 of the consultation paper.

80. The UK Review Group reviewed some of the arguments for and against creating a sexual offence to deal with sexual interference with human remains:

Arguments for a sexual offence to deal with sexual interference with human remains⁴⁰

81. Arguments for the offence:

- Family expects dead body of their relative be treated with respect.⁴¹
- Association between necrophilia and other forms of serious offending.⁴²
- No possibility of mutual consent.⁴³
- Although necrophilia is rare, it is a deviant behaviour.⁴⁴
- Advance in forensic technology can help proof of necrophilia.⁴⁵

Arguments against a sexual offence to deal with sexual interference with human remains⁴⁶

82. Arguments against the offence:

- The dead body is not a victim.⁴⁷
- Sexual interference with human remains is rare.

83. We take the view that a new sexual offence should be created to deal with sexual activity with a dead person. 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.⁴⁸ Furthermore, necrophilia is an insult to the deceased, especially if there is sexual intercourse with the dead body. Although necrophilia may be rare, it does not

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 (e.g. by keeping the dead body at home), the act might constitute a further indictable offence.

⁴⁰ See paras 5.9 – 5.13 of consultation paper.

⁴¹ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 8.6.6.

⁴² Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 8.6.1.

⁴³ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 8.6.4.

⁴⁴ Home Office, *Protecting the Public: Strengthening protection against sex offenders and reforming the law in sexual offences*, (Cm 5668, November 2002), at para 80.

⁴⁵ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 8.6.6.

⁴⁶ See paras 5.14 – 5.16 of consultation paper.

⁴⁷ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 8.6.2.

⁴⁸ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 8.6.4.

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.

Penetrative and non-penetrative sexual activity

84. 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. The offences in Canada and New Zealand cover both penetrative and non-penetrative sexual activity. Both the English offences and Singaporean offences cover penetrative sexual activity only.

85. We consider that the new offence should cover both penetrative and non-penetrative sexual activity. Penetration should include both penile and non-penile. As Home Office Review Group in the UK pointed out, people expect dead body of their relatives to be treated with respect.⁴⁹ Both penetrative (penile or non-penile) and non-penetrative sexual activity with the dead body are disrespectful to the deceased and should be prohibited.

Name of the new offence

86. 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

87. 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: Proposed new offence of sexual activity with a dead person

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

88. 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. 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

⁴⁹ Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), para 8.6.6.

before committing the intended sexual offence.⁵⁰

89. 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).

(1) Administering a substance

90. In Hong Kong, there is an existing offence (in section 121 of the Crimes Ordinance (Cap 200)) 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.⁵¹

91. 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.

Problems with the existing offence

92. 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 act⁵² would not be covered. 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. 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.

93. 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

94. Section 61(1) of the English Act provides for the offence of

⁵⁰ 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.

⁵¹ See para 6.7 of consultation paper for the relevant provision.

⁵² "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.

*Administering a substance with intent.*⁵³ 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.⁵⁴

Scottish offence - Administering a substance for sexual purposes

95. Section 11 of the Scottish Act provides for the offence of *Administering a substance for sexual purposes*.⁵⁵

96. 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"

97. The existing offence refers to *"to do an unlawful sexual act"*, whereas the English and Scottish offences refer to *"to engage in a sexual activity"*. 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. Moreover, scope similar to that used in the English and Scottish offences is used in other new offences proposed in our previous consultation paper.⁵⁶ 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.⁵⁷

"drug, matter or thing" or "substance"

98. The existing offence refers to any *"drug, matter or thing"*, whereas the English and Scottish offences refer to a *"substance"*. We take the view that the terminology of the English and Scottish offences should be adopted. The meaning of any *"drug, matter or thing"* is ambiguous. By contrast, the term *"substance"* is clear. Moreover, some stupefying substances may not necessarily be drugs.

The appropriate mens rea

99. 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

⁵³ See para 6.12 of consultation paper for the relevant provision.

⁵⁴ Explanatory Notes to Sexual Offences Act 2003, para 115.

⁵⁵ See para 6.14 of consultation paper for the relevant provision.

⁵⁶ 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), recommendations 13.)

⁵⁷ Law Reform Commission of Hong Kong, *Consultation Paper on Sexual Offences Involving Children and Persons with Mental Impairment* (November 2016), recommendations 4.

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."

100. We favour the Scottish approach because it avoids subjectivity 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

101. 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: *Administering drugs to obtain or facilitate an unlawful sexual act be replaced by the offence of administering a substance for sexual purposes*

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.

(2) *Committing an offence with intent to commit a sexual offence*

The existing offence in Hong Kong

102. In Hong Kong, section 118B of the Crimes Ordinance, Cap 200 provides for an offence of assault with intent to commit buggery. 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.

103. A new offence of "*committing an offence with intent to commit a sexual offence*" has been adopted in England and Wales.⁵⁸ 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 are: A assaults B to subdue B so that A could more easily rape B. Possession of a dangerous drug, for example, GHB⁵⁹ (more commonly known as 迷姦水 in Chinese) in order to facilitate the commission of rape.

⁵⁸ See para 6.30 of consultation paper for the relevant provision.

⁵⁹ GHB (Gamma Hydroxybutyric Acid, Chinese name γ -羥丁酸) is a central nervous system (CNS) depressant that is commonly referred to as a "club drug" or "date rape" drug.

104. We consider that the existing offence 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.

105. 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.

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

107. 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.

108. 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: *Assault with intent to commit buggery be replaced by a new offence of committing an offence with intent to commit a sexual offence*

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.

(3) *Trespass with intent to commit a sexual offence*

The existing offence of burglary

109. In Hong Kong, section 11 of the Theft Ordinance (Cap 210)⁶⁰ (which is modelled on section 9 of the Theft Act 1968 in the UK) provides for the offence of burglary (with intent to rape).

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

110. A new offence of trespass with intent to commit a sexual offence was

⁶⁰ See para 6.37 of consultation paper for the relevant provision.

created in section 63 of the English Act.⁶¹

111. 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.⁶²

Our views

112. 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.

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

113. 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.

114. 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: *Burglary (with intent to rape) be replaced by a new sexual offence of trespass with intent to commit a sexual offence*

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.

⁶¹ See para 6.45 of consultation paper for the relevant provision.

⁶² Explanatory Notes to Sexual Offences Act 2003, para 122.

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

115. 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).⁶³
- (ii) Gross indecency with or by man under 16 (section 118H of Crimes Ordinance).⁶⁴
- (iii) A man committing gross indecency with a male mentally incapacitated person (section 118I of Crimes Ordinance).⁶⁵

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

116. 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 1991⁶⁶ to implement the recommendations of *LRC's Report on Laws Governing Homosexual Conduct*.⁶⁷ These remaining offences are:

- (i) Assault with intent to commit buggery (section 118B).⁶⁸
- (ii) Procuring others to commit homosexual buggery (section 118G).
- (iii) Gross indecency by man with man otherwise than in private (section 118J).
- (iv) Procuring gross indecency by man with man (section 118K).

⁶³ Law Reform Commission of Hong Kong, *Consultation Paper on Sexual Offences Involving Children and Persons with Mental Impairment* (November 2016), Recommendation 20.

⁶⁴ Law Reform Commission of Hong Kong, *Consultation Paper on Sexual Offences Involving Children and Persons with Mental Impairment* (November 2016), Recommendation 20.

⁶⁵ Law Reform Commission of Hong Kong, *Consultation Paper on Sexual Offences Involving Children and Persons with Mental Impairment* (November 2016), Recommendation 37.

⁶⁶ Crimes (Amendment) Ordinance (90 of 1991).

⁶⁷ Law Reform Commission of Hong Kong, *Report on Laws Governing Homosexual Conduct* (June 1983).

⁶⁸ We have already recommended in Chapter 6 (at recommendation 7) that this offence be replaced by the proposed new offence of committing an offence with intent to commit a sexual offence

Our views on these homosexual or homosexual-related offences

117. 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.

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*

We recommend that the following offences be abolished:

- (i) Assault with intent to commit buggery (section 118B of the Crimes Ordinance (Cap 200)).**
- (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)).**

Annex

118. 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>