

LRC releases consultation paper on rape and other non-consensual sexual offences

The Review of Sexual Offences Sub-committee of the Law Reform Commission today (17 September 2012) released a consultation paper making preliminary proposals for the reform of the sexual offences in the Crimes Ordinance. These proposals include a newly-defined offence of rape and the creation of a range of other non-consensual sexual offences.

The consultation paper noted that some of the existing sexual offences in the Crimes Ordinance have been criticised for being gender-specific, while others are based on the sexual orientation of the parties. There are also concerns that the existing offences may not adequately reflect the range of non-consensual conduct which should be subject to criminal sanction.

The Chairman of the Review of Sexual Offences Sub-committee, Mr Peter Duncan, SC, said the paper was the first of a series of four consultation papers intended to cover the overall review of sexual offences. The paper deals with the non-consensual offences which are concerned with promoting or protecting a person's sexual autonomy. It proposes to cover the offences of rape, sexual assault by penetration, sexual assault and causing a person to engage in sexual activity without consent.

Mr Duncan said, "In conducting the review, the sub-committee has considered in detail the perceived inadequacies of the current law. To ensure consistency in our approach, the sub-committee has adopted a number of guiding principles, namely: clarity of the law; respect for sexual autonomy; the protective principle; gender neutrality; avoidance of distinctions based on sexual orientation; and adherence to the Human Rights laws and practices guaranteed under the Basic Law. The sub-committee has examined recent studies and law changes in England, Scotland and many other jurisdictions."

The main recommendations in the paper are:

- (i) the creation of a statutory definition of "consent" to sexual activity which reflects the need for "free and voluntary agreement" to the sexual activity and the capacity to consent;
- (ii) a newly-defined offence of rape which can be committed against a person of either sex and covers penile penetration of the vagina, anus or mouth;
- (iii) a reformed mental element with regard to the issue of "consent", moving away from a focus simply on the subjective belief of the accused as to whether the complainant consented, to a mixed test of subjectivity and objectivity. Currently, if an accused subjectively holds a genuine belief that the complainant consented, the accused is entitled to be acquitted even if that belief was unreasonable;

- (iv) the abolition of the offence of “non-consensual buggery”, so that the conduct which is the subject of such an offence would be covered in future by the gender neutral offence of rape;
- (v) the creation of a new offence of “sexual assault by penetration” to cater for the more serious forms of conduct, not constituting rape, and currently covered by the offence of “indecent assault”;
- (vi) substituting the offence of "indecent assault" with a new offence of "sexual assault" focusing on conduct which is "sexual" rather than "indecent", with a proposed definition of "sexual". It is considered that this would best accord with respect for the principle of protecting one’s sexual autonomy;
- (vii) “under-the-skirt photography” should, amongst other intentional acts of a sexual nature, constitute "sexual assault"; and
- (viii) the abolition of the offence of procuring another to do an unlawful sexual act by the use of threats or intimidation (section 119 of the Crimes Ordinance) and the creation of the offence of "causing a person to engage in sexual activity without consent", emphasising the protection of one’s sexual autonomy.

Mr Duncan said that the recommendations in the consultation paper are intended to facilitate discussion and do not necessarily represent the sub-committee’s final conclusions. He added that the sub-committee would welcome views, comments and suggestions on any issues discussed in the consultation paper.

The Review of Sexual Offences Sub-committee was formed in 2006 and has since completed a consultation paper and a report on the issue of a register of sex offenders. It has also completed another report recommending the abolition of the common law presumption that a boy under 14 is incapable of sexual intercourse. The Statute Law (Miscellaneous Provisions) Ordinance 2012 was enacted in July this year to implement the Commission’s recommendation. The overall review of sexual offences is the remaining task which the sub-committee has set for itself.

Copies of the consultation paper are available on request from the Secretariat of the Law Reform Commission at 20/F Harcourt House, 39 Gloucester Road, Wanchai, Hong Kong. The consultation paper can also be accessed on the Commission’s website at <[www. hkreform.gov.hk](http://www.hkreform.gov.hk)>.

All the views should be addressed to The Secretary, Review of Sexual Offences Sub-committee, Law Reform Commission (20th Floor, Harcourt House, 39 Gloucester Road, Wanchai) by mail, by fax (2865 2902) or by e-mail (hklrc@hkreform.gov.hk) on or before December 31, 2012.

Ends/Monday, September 17, 2012