

Review of substantive sexual offences

THE LAW REFORM COMMISSION OF HONG KONG

REPORT

REVIEW OF SUBSTANTIVE SEXUAL OFFENCES

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December 2019

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Chapter 1

Introduction

1.1 The overall review of substantive sexual offences is the major part of the Law Reform Commission's Review of Sexual Offences Sub-committee's ("the Sub-committee") study under its terms of reference. Its scope is wide and it raises a number of sensitive and controversial issues which require careful consideration. The entire review has been broken down into a number of discrete parts with separate consultation papers and one report on specific aspects of the subjects issued.

1.2 Under this review exercise, to-date, three consultation papers prepared by the Sub-committee, namely *Consultation Paper on Rape and Other Non-consensual Sexual Offences* ("First CP"), *Consultation Paper on Sexual Offences involving Children and Persons with Mental Impairment* ("Second CP"), and *Consultation Paper on Miscellaneous Sexual Offences* ("Third CP") were published in September 2012, November 2016 and May 2018 respectively. In addition, the Law Reform Commission ("the Commission") published a *Report on Voyeurism and non-consensual upskirt-photography* ("the Report on Voyeurism") in April 2019 to provide the Commission's final recommendation for a new and specific offence of voyeurism to deal with an act of non-consensual observation or visual recording of another person for a sexual purpose; and a new and specific offence in respect of non-consensual upskirt-photography.

1.3 This report ("Report") discusses the responses received, and sets out our analysis and final recommendations on our review of substantive sexual offences.¹

¹ This Report is to be read in conjunction with the three published consultation papers:
(1) *Consultation Paper on Rape and Other Non-consensual Sexual Offences*, online at <https://www.hkreform.gov.hk/en/publications/rape.htm>
(2) *Consultation Paper on Sexual Offences involving Children and Persons with Mental Impairment*, online at <https://www.hkreform.gov.hk/en/publications/sexoffchild.htm>
(3) *Consultation Paper on Miscellaneous Sexual Offences*, online at <https://www.hkreform.gov.hk/en/publications/miscsexoff.htm>
This Report is also to be read in conjunction with the *Report on Voyeurism and non-consensual upskirt-photography*, online at <https://www.hkreform.gov.hk/en/publications/rvoyeurism.htm>
The 4th part on sentencing (viz, review of the Sexual Conviction Record Check Scheme, and other new sentencing orders for managing sex offenders etc.) is severed from the overall review in light of the demands from the community for expediting the work on the overall review. The consultation paper on sentencing and related matters will be published in due course.

Background

Terms of reference

1.4 In April 2006, the Secretary for Justice and the Chief Justice of the Court of Final Appeal requested that the 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

1.5 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
Ms Joceline Chui [From August 2019]	Principal Assistant Secretary Security Bureau
Mr Fung Man-chung [From August 2012 to April 2018]	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>	Acting Deputy 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 Kit-ling <i>[From April 2018]</i>	Assistant Director (Family & Child Welfare) Social Welfare Department
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 to August 2019]</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

The Scope of Review

Part XII of the Crimes Ordinance (Cap 200)

1.6 There is a wide range of sexual offences in Part XII of the Crimes Ordinance (Cap 200) ("the Crimes Ordinance") including rape, buggery, gross indecency, bestiality, indecent assault, abduction, incest and other unlawful sexual acts. These offences are set out in sections 118 to 128 of the Crimes Ordinance. Many of these are based on similar provisions in English legislation dating back to 1956.²

1.7 It should be noted that the corresponding offences in the 1956 legislation were replaced by new offences created by the English Sexual Offences Act 2003 ("the English Act") following a major overhaul of the law

² Sexual Offences Act 1956, c.69, UK. Those offences based on the 1956 legislation are: rape (section 118 of the Crimes Ordinance), procurement by threats (section 119 of the Ordinance), procurement by false pretences (section 120), administering drugs to obtain or facilitate unlawful sexual act (section 121), indecent assault (section 122), intercourse with girl under 13 (section 123), intercourse with girl under 16 (section 124), intercourse with mentally incapacitated person (section 125), abduction of unmarried girl under 16 (section 126), abduction of unmarried girl under 18 for sexual intercourse (section 127), and abduction of mentally incapacitated person from parent or guardian for sexual act (section 128).

relating to sexual offences in England and Wales in 2003. The original offences, however, still remain on Hong Kong's statute book.

Offences relating to prostitution or pornography

1.8 In addition to the sexual offences set out in sections 118 to 128 of the Crimes Ordinance, the remaining provisions in Part XII of the Crimes Ordinance (ie sections 129 to 159) cover a wide range of offences relating to prostitution or pornography.

1.9 We have decided not to include offences relating to prostitution or pornography in our review of sexual offences for several reasons.

1.10 Firstly, it is not entirely clear that offences relating to prostitution should be considered as "sexual offences". In most cases, they are not truly sexual offences. They may in fact be more properly classified as offences against public disorder or involving public nuisance. Secondly, the interaction of the criminal law and pornography raises a wide range of issues which go well beyond the perceived scope of a project on sexual offences. Those issues include questions as to whether criminalising pornography is compatible with freedom of expression, whether certain categories of pornography should be permitted or licensed, and whether certain pornographic materials should be criminalised because they typically present wrongful or harmful images of women. Any reform of the law relating to prostitution or pornography in the Hong Kong context would involve wider social and policy issues.

Criticisms of the existing provisions on sexual offences in the Crimes Ordinance

1.11 Some of the existing provisions in the Crimes Ordinance dealing with sexual offences have been criticised as discriminatory, inconsistent and inadequate. There is a difference between the age of consent for heterosexual buggery and homosexual sexual activity. The age of consent for heterosexual buggery is 21. However, the age of consent for homosexual sexual activity (including buggery) is 16. A number of the offences have been criticised for being gender-specific, while others are based on sexual orientation.

1.12 There are also concerns that the existing sexual offences may not adequately reflect the range of non-consensual conduct which should be subject to criminal sanction. Furthermore, there is an absence of clear guidelines in Part XII of the Crimes Ordinance as to how consent to sexual activity is to be determined.

1.13 Some of the terms used in Part XII of the Crimes Ordinance are outdated. For example, "buggery" is no longer used in overseas jurisdictions that have reformed their law on sexual offences.

Classification of sexual offences

1.14 In determining what conduct should fall within the parameters of a reformed range of sexual offences, we have found the following classification of sexual offences adopted by the Scottish Law Commission to be helpful:

- (1) offences which are concerned with promoting or protecting a person's sexual autonomy;
- (2) offences which seek to provide protection to persons who are vulnerable to sexual exploitation or about whom there are doubts concerning their capacity to engage in consensual sexual conduct; and
- (3) offences which seek to promote a social or moral goal other than in the previous two categories.

First category – offences based on sexual autonomy

1.15 Sexual offences under this category are those which prohibit conduct which infringes a person's sexual autonomy. This autonomy is infringed where a person participates in sexual conduct in which he or she has not freely chosen to be involved.

1.16 Under our existing law, these offences encompass the crimes of rape, indecent assault, non-consensual buggery, assault with intent to commit buggery and procurement by threats, false pretences and administering drugs to obtain or facilitate an unlawful sexual act.

Second category – offences based on the protective principle

1.17 This category refers to offences which protect persons who are vulnerable in respect of sexual matters. The two most obvious types of vulnerable persons are young persons and those with some form of mental disorder. Under our existing law, these offences encompass the crimes of homosexual buggery with or by a man under 16, buggery with a girl under 21, buggery with a mentally incapacitated person, gross indecency with or by a man under 16, gross indecency by a man with a male mentally incapacitated person, intercourse with a girl under 13 or 16 and intercourse with a mentally incapacitated person.

1.18 The law has been widened in some overseas jurisdictions on the basis of the protective principle to include regulation of sexual conduct between persons in a situation where one of the parties is in a position of trust or authority over the other.

Third category – offences based on public morality

1.19 This last category of sexual offences covers those where the underlying rationale is a social or moral principle or goal other than protecting

sexual autonomy or protecting vulnerable persons. These offences are generally referred to as offences against public morality.

1.20 Under our existing law, these offences encompass the crimes of bestiality, procuring others to commit homosexual buggery, gross indecency by a man with another man otherwise than in private, and procuring gross indecency by a man with another man.

1.21 The crimes of incest by men (section 47 of the Crimes Ordinance) and incest by women of or over 16 (section 48 of the Crimes Ordinance) also fall within this category of sexual offences based on public morality. As explained earlier, certain other offences coming under this category of public morality offences, such as prostitution-related offences and pornography, have not been considered in this review exercise.

Division of the project into different parts

1.22 Having adopted the above classification of sexual offences in undertaking the review, we have broken down our review into four discrete parts to deal with different aspects of the overall subject matter.³ This Report covers the first three parts.⁴

1.23 Part 1 of the review dealt with offences based on sexual autonomy, namely, the offences of rape, sexual assault by penetration, sexual assault and causing a person to engage in sexual activity without consent. The First CP was published on 17 September 2012.

1.24 Part 2 of the review dealt with sexual offences involving children and persons with mental impairment (“PMIs”) and sexual offences involving abuse of a position of trust. These sexual offences are largely concerned with the protective principle (that the criminal law should give protection to certain categories of vulnerable persons against sexual abuse or exploitation).

³ 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.

⁴ During the consultation exercises on the early 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 cover the first three consultation papers and a report on voyeurism and non-consensual upskirt-photography. A final report (ie this Report) would be compiled in respect of all these consultation papers. Severance of the fourth part (on sentencing) will not affect the integrity of the overall review as 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).

These persons include children, PMIs, and young persons over whom others hold a position of trust. The Second CP was published on 1 November 2016.

1.25 Part 3 of the review dealt with miscellaneous sexual offences such as incest, exposure, voyeurism, bestiality, necrophilia, acts done with intention to commit a sexual offence, and a review of homosexual-related buggery and gross indecency offences in the Crimes Ordinance. The Third CP was published on 16 May 2018.

The Sub-committee's preliminary recommendations

1.26 The Sub-committee put forward 21, 41 and 9 recommendations in the First CP, the Second CP and the Third CP respectively (referred to in this Report as "Preliminary Recommendations"). These Preliminary Recommendations will be set out in full and discussed in Chapters 2 to 4.

The consultation process

The First CP

1.27 The Sub-committee's extended consultation period closed on 31 December 2012. In response to a number of requests for time extension, the consultation period was extended to 28 February 2013. In total, around 264 submissions were received, ranging from a simple acknowledgement of the Consultation Paper to detailed submissions on the Sub-committee's Preliminary Recommendations and associated issues.

1.28 In addition to speaking at four consultation forums and seminars, attending television and radio programs, and a luncheon to promote the consultation paper, some members of the Sub-committee attended the meeting of the Panel on Administration of Justice and Legal Services of the Legislative Council ("the Panel") on 14 December 2012, and a special meeting of the Panel on 8 January 2013 for hearing views from deputations.

The Second CP

1.29 The Sub-committee's extended consultation period closed on 10 February 2017. In response to a number of requests for time extension, the consultation period was extended to 10 March 2017. In total, around 129 submissions were received, ranging from a simple acknowledgement of the Consultation Paper to detailed submissions on the Sub-committee's Preliminary Recommendations and associated issues.

1.30 In addition to attending five consultation forums and seminars, and accepting interviews from the media, some members of the Sub-committee attended the meeting of the Panel on 27 February 2017, and a

special meeting of the Panel on 8 May 2017 for hearing views from deputations.

The Third CP

1.31 The Sub-committee's extended consultation period closed on 15 August 2018 but there were a few requests for late submissions. The last batch of responses was received on 15 September 2018. In total, around 118 submissions were received, ranging from a simple acknowledgement of the Consultation Paper to detailed submissions on the Sub-committee's Preliminary Recommendations and associated issues.

1.32 A few members of the Sub-committee attended the meeting of the Panel on 25 June 2018, and a special meeting of the Panel on 18 July 2018 for hearing views from deputations. Furthermore, members of the Sub-committee also accepted interviews from the media as well as speaking at a number of symposium, discussion forums and seminars.

Responses

1.33 A full list of those who submitted responses is set out in the Annex of this Report, (excluding those who expressly requested anonymity). We are most grateful to all those who commented on the three consultation papers. An overview of the consultation responses received in respect of each consultation paper is set out in Chapters 2 to 4 of this Report.

Chapter 2

Overview of the Consultation Responses and our Final Recommendations –

Consultation Paper on Rape and Other Non-consensual Sexual Offences

2.1 In September 2012, the Sub-committee issued the First CP setting out 21 recommendations for comment and discussion by the public. We have received 264 written responses from professional bodies, women affairs concern groups, children affairs concern groups, human rights concern groups, legal professional bodies, Government departments, social welfare concern groups, other organisations and individuals. The written responses have provided us with valuable information and insight into this area of reform from different perspectives. These different views and perspectives have helped us re-shape some of the recommendations in the consultation paper which will be discussed in greater detail below. We wish to thank all those who responded to the consultation paper once again for their contribution to this Report.

Preliminary Recommendation 1: Guiding principles for reform

2.2 The Sub-committee recommended that any reform of the substantive law on sexual offences should be guided by a set of guiding principles and any departure from those principles should be justified. The guiding principles should include:

- (i) Clarity of the law.
- (ii) Respect for sexual autonomy.
- (iii) The protective principle.
- (iv) Gender neutrality.
- (v) Avoidance of distinctions based on sexual orientation.
- (vi) The provisions of the International Covenant on Civil and Political Rights, the Hong Kong Bill of Rights Ordinance (Cap 383) and the Basic Law should be adhered to.

Consultees' responses

2.3 We received overwhelming support for the substance of the set of guiding principles recommended. In particular, the vast majority agreed with the need to respect sexual autonomy and the protective principle.

2.4 That said, we note one response from a women affairs concern group which suggested that the Commission should consider including the protection of the rights of sexual violence complainants in the principles guiding the reform.

Our views

2.5 We noted the overwhelming support for the substance of the guiding principles.

2.6 We maintain our view that a comprehensive review of the substantive sexual offences in Hong Kong involves complex and sensitive issues, including questions as to the law's underlying moral principles. We therefore believe it is desirable at the outset of our review to formulate a set of guiding principles to ensure consistency in our choice of reform options for the wide variety of sexual offences involving different forms of criminal conduct with different degrees of culpability.

2.7 While we appreciate the views expressed by the women affairs concern group mentioned in paragraph 2.4 above, we take the view that as issues in connection with protection of the rights of sexual violence complainants involve consideration of matters which fall outside the Sub-committee's scope of study set out in its terms of reference, we are unable to review those issues in this current review exercise.

2.8 In light of the overwhelming responses received, Preliminary Recommendation 1 is not amended.

Final Recommendation 1

We recommend that any reform of the substantive law on sexual offences should be guided by a set of guiding principles and any departure from those principles should be justified.

We recommend that the guiding principles should include:

- (i) Clarity of the law.**
- (ii) Respect for sexual autonomy.**
- (iii) The protective principle.**

- (iv) **Gender neutrality.**
- (v) **Avoidance of distinctions based on sexual orientation.**
- (vi) **The provisions of the International Covenant on Civil and Political Rights, the Hong Kong Bill of Rights Ordinance (Cap 383) and the Basic Law should be adhered to.**

Preliminary Recommendation 2: A statutory definition of consent

2.9 The Sub-committee recommended that there should be a statutory definition of "consent" in relation to sexual intercourse or sexual activity.

Consultees' responses

2.10 We received overwhelming support for this recommendation.

Our views

2.11 We noted the overwhelming support for a statutory definition of "consent" in relation to sexual intercourse or sexual activity.

2.12 We maintain our view that a perceived advantage of having a statutory definition of consent is the achievement of some degree of certainty and clarity. It might be expected that a statutory definition would make the judge's task of giving directions to the jury easier and might at the same time make it easier for the jury to grasp the meaning of consent.

2.13 The principal argument against a statutory definition of consent is that it would remove an element of flexibility which judicial interpretation allows. However, we maintain our view that the greater degree of certainty and clarity provided by a statutory definition would outweigh any marginal disadvantage posed by a reduction in flexibility.

2.14 Preliminary Recommendation 2 is retained.

Final Recommendation 2

We recommend that there should be a statutory definition of "consent" in relation to sexual intercourse or sexual activity.

Preliminary Recommendation 3: The proposed definition of consent

2.15 The Sub-committee recommended the adoption of a statutory definition of consent to the effect that a person consents to sexual activity if the person:

- (a) freely and voluntarily agrees to the sexual activity; and
- (b) has the capacity to consent to such activity.

Consultees' responses

2.16 We received overwhelming support for this recommendation.

Our views

2.17 We noted the overwhelming support of the adoption of a statutory definition of consent to the effect that a person consents to sexual activity if the person freely and voluntarily agrees to the sexual activity; and has the capacity to consent to such activity.

2.18 Having reviewed the statutory definitions of "consent" used in overseas jurisdictions (namely, California, Canada, England and Wales, Queensland, Scotland, South Australia and Victoria), we notice the common thread is the idea of free and voluntary agreement to sexual activity. It is this concept that we believe should be incorporated into the definition, consistent with the principle of respect for one's sexual autonomy. We therefore maintain our recommendation that the definition should make specific reference to the words "freely and voluntarily" and "agrees" which are easily understood by lay people and give effect to the sexual autonomy principle.

2.19 In addition, we maintain our view that the definition would be improved by adding the element of "capacity" as in the English definition. This is because a person may lack the capacity to give free and voluntary consent to sexual activity by reason of his mental condition, age or intoxication.

2.20 Preliminary Recommendation 3 is not amended.

Final Recommendation 3

We recommend the adoption of a statutory definition of consent to the effect that a person consents to sexual activity if the person:

- (a) **freely and voluntarily agrees to the sexual activity;
and**
- (b) **has the capacity to consent to such activity.**

Other issues

2.21 Notwithstanding the overwhelming support received for Preliminary Recommendation 3, we noted that some responses expressed concern as to whether the proposed definition of consent would be too general and raised doubts as to whether women would be sufficiently protected. Various women affairs concern groups suggested the Australian approach.¹

2.22 One further concern raised by some other women affairs concern groups was whether one may presume there was consent if the victim did not shout for help when she was raped due to various reasons (for example, the victim was being false imprisoned, or was under threat or violence). It seems to be a common stereotype against women when consent is at issue.

2.23 We have considered the responses received and have come to the conclusion that an elaborated definition of consent is not necessary. We consider that in a case where consent is at issue, it is usual that the victim will be asked to explain why he/she did not shout for help at the material time when the sexual assault happened. Our view is that this is part of the fact finding exercise which should be left to the judge and jury to consider as appropriate at the trial.

2.24 Furthermore, we believe there are certain advantages in keeping the definition of consent broad as it is difficult to list all possible scenarios or circumstances which constitute consent or lack of same.

2.25 We are of the view that the issue as to whether there was valid consent should be left to the decision of the judges on a case by case basis, with reference to the evidence available.

Preliminary Recommendation 4: Capacity to consent to sexual activity

2.26 The Sub-committee recommended that the new legislation should contain a provision to the effect that a person is incapable of consenting to sexual activity where, by reason of mental condition, intoxication, or age (as the case may be), the person is unable to do one or more of the following:

- (a) understand what the conduct is;

¹ For instance, the Association Concerning Sexual Violence Against Women suggested that the Australian sentencing guideline should be included in the definition. Similar comments were also made by the Voices, and RainLily.

- (b) form a decision as to whether to engage in the conduct (or as to whether the conduct should take place); or
- (c) communicate any such decision.

Consultees' responses

2.27 We received overwhelming support for this recommendation.

Our views

2.28 As the capacity to consent is a key element of our proposed definition, an issue is whether the circumstances in which a person has or does not have the capacity to consent should be spelt out.

2.29 The common law position is that there is no consent if the complainant was incapable of giving consent or of exercising any judgment on the matter because of age, the consumption of alcohol or drugs or mental incapacity. We maintain our view that the statutory definition should be considered from these three perspectives.

2.30 The word "capacity" is not defined in the English Act. On the other hand, section 17 of the Sexual Offences (Scotland) Act 2009 ("the Scottish Act") on which Preliminary Recommendation 4 was based deals with the capacity of persons with a mental disorder to consent to sexual activity.

2.31 We favour the Scottish provisions on mentally disordered persons' capacity to consent, since they strike a balance between respect for the right of mentally disordered persons to engage in sexual activity and protecting them from sexual exploitation.

2.32 As such, we maintain our view that the criteria for determining mentally incapacitated persons' capacity to consent, as set out in the Scottish provisions, should be applicable equally for cases of intoxication and minors.

2.33 We have accordingly retained Preliminary Recommendation 4.

Final Recommendation 4

We recommend that the new legislation should contain a provision to the effect that a person is incapable of consenting to sexual activity where, by reason of mental condition, intoxication, or age (as the case may be), the person is unable to do one or more of the following:

- (a) understand what the conduct is;**

- (b) form a decision as to whether to engage in the conduct (or as to whether the conduct should take place); or
- (c) communicate any such decision.

Preliminary Recommendation 5: No consent if deception as to its nature or purpose of sexual act, or impersonation

2.34 The Sub-committee recommended that the new legislation should incorporate provisions along the lines of section 76(2)(a) and (b) of the English Act to the effect that there can be no consent by the complainant, and the accused cannot have believed that the complainant consented, where the accused:

- (a) intentionally deceived the complainant as to the nature or purpose of the relevant sexual act; or
- (b) intentionally induced the complainant to consent to the relevant sexual act by impersonating a person known personally to the complainant.

Consultees' responses

2.35 We received overwhelming support for this recommendation.

Our views

2.36 While a statutory definition of consent assists in understanding the meaning of the term, it does not provide any guidance in determining whether or not consent exists in a particular case. The legislation in some jurisdictions² includes provisions on this question of determination of consent.

2.37 We can identify two types of legislative provisions for the determination of consent:

- (i) The complainant will be taken as not having consented if the evidence establishes that certain circumstances specified in the legislation existed at the time of the act in question, and the accused cannot rebut this presumption that there was no consent (the approach adopted in the legislation in Scotland and Queensland).
- (ii) The complainant will be taken as not having consented if the evidence establishes that certain circumstances specified in the

² See paragraphs 3.25 to 3.48 of the First CP.

legislation existed at the time of the act in question, unless the accused adduces sufficient evidence to raise an issue as to whether the complainant consented (the "evidential presumption approach" adopted in the English Act).

2.38 In addition, the English Act draws a distinction between evidential and conclusive presumptions. Whilst evidential presumptions are rebuttable, conclusive presumptions cannot be rebutted as they are circumstances under which consent is conclusively presumed by law to be not present. The conclusive presumptions in the English Act are similar to the circumstances of no consent in the Scottish and Queensland approaches.

2.39 We have rejected the evidential presumption approach in the English Act on the basis that it appears to offer little practical assistance to the criminal justice process. We maintain our view that the conclusive presumption approach (the Scottish and Queensland legislation) should be adopted. In doing so, however, we propose that only the two conclusive presumptions in the English Act (deceit as to the nature and purpose of the act and mistaken identity) should be adopted, and not the more extensive list of presumptions in the legislation in Scotland and Queensland. Under this option, the new legislation would expressly state that the circumstances which trigger the two conclusive presumptions of deceit as to the nature and purpose of the act and mistaken identity would vitiate consent. The merit of this option is that it would not criminalise any new conduct, as sexual conduct taking place in those circumstances is already criminalised under the common law and/or our existing legislation.

2.40 In light of the overwhelming support received, Preliminary Recommendation 5 is not amended.

Final Recommendation 5

We recommend that the new legislation should incorporate provisions along the lines of section 76(2)(a) and (b) of the English Sexual Offences Act 2003 to the effect that there can be no consent by the complainant, and the accused cannot have believed that the complainant consented, where the accused:

- (a) intentionally deceived the complainant as to the nature or purpose of the relevant sexual act; or**
- (b) intentionally induced the complainant to consent to the relevant sexual act by impersonating a person known personally to the complainant.**

Preliminary Recommendation 6: The scope and withdrawal of consent

2.41 The Sub-committee recommended that the new legislation should incorporate provisions along the lines of sections 15(2), (3) and (4) of the Scottish Act to the effect that:

- (a) consent to particular sexual conduct does not imply, of itself, consent to any other sexual conduct;
- (b) consent to sexual conduct may be withdrawn at any time before or, in the case of continuing conduct, during the sexual conduct; and
- (c) if conduct takes place, or continues to take place, after consent has been withdrawn, it takes place, or continues to take place, without consent.

Consultees' responses

2.42 We received overwhelming support for this recommendation. However, we also note one response from the medical profession asking for clarity of the type of conduct covered and suggesting the adding of "sexual" before "conduct" in Preliminary Recommendations 6(b) and (c).

Our views

2.43 We share the view that consent to sexual activity may be qualified or restricted and may be withdrawn at any time. The right to qualify, restrict or withdraw consent to sexual activity is a manifestation of the principle of sexual autonomy. Hence, there is a need for the legislation to provide for the scope and withdrawal of consent.

2.44 That said, we note the responses requesting for clarity of the type of conduct covered. We have reviewed our recommendation and agree that for clarity, "sexual" should be added before "conduct" in Preliminary Recommendations 6(b) and (c). As a result, paragraphs 6(b) and (c) have been amended to ensure all "conduct" referred therein will clearly reflect it is "sexual conduct".

Final Recommendation 6

We recommend that the new legislation should incorporate provisions along the lines of sections 15(2), (3) and (4) of the Sexual Offences (Scotland) Act 2009 to the effect that:

- | |
|---|
| <ul style="list-style-type: none">(a) consent to particular sexual conduct does not imply, of itself, consent to any other sexual conduct;(b) consent to sexual conduct may be withdrawn at any time before or, in the case of continuing sexual conduct, during the sexual conduct; and(c) if sexual conduct takes place, or continues to take place, after consent has been withdrawn, it takes place, or continues to take place, without consent. |
|---|

Preliminary Recommendation 7: Scope of the offence of rape

Preliminary Recommendation 8: Distinction between rape and other forms of non-penile sexual penetrative acts

2.45 Preliminary Recommendations 7 and 8 are considered together as we have seen some repeated concerns raised in the responses received.

2.46 For Preliminary Recommendation 7, the Sub-committee recommended that the new legislation should incorporate provisions along the lines of section 1(1)(a) of the English Act to the effect that the scope of rape should cover penile penetration of the vagina, anus or mouth of another person.

2.47 For Preliminary Recommendation 8, the Sub-committee recommended that the term rape should continue to be used to describe the offence of non-consensual penile penetration. The Sub-committee further recommended that a distinction should be made between rape and other non-consensual sexual offences which involve non-penile sexual penetrative acts.

Consultees' responses

2.48 Most of the responses received were supportive of the scope of the offence under Preliminary Recommendation 7. However, some were opposed to a distinction between rape and other forms of non-penile sexual penetrative acts in Preliminary Recommendation 8. Broadly speaking, the responses include: opposing the continuation of the term "rape" as it carries a social stigma for the victim; suggesting replacement of the term "rape" with the offence of "sexual assault by way of penetration (penile or non-penile)"; and pointing to the existence of other forms of sexual assault which not only would result in the same level of harm done, but also could be as serious as rape.

2.49 It was noted that these views came mostly from women affairs concern groups, social welfare concern groups, and human rights concern groups. These groups were all opposed to retaining the term "rape".

2.50 Noting the strong sentiments received, we have carefully reviewed the recommendation and have come to the view that we should respect the majority's preference to discard the term "rape" which carries a stigma against women, and does not correctly reflect one of our guiding principles – namely gender neutrality. That said, we recommend retaining the offence to cover an act of penetration by way of sexual assault.

2.51 In light of this new position, we have examined the law in a few overseas jurisdictions (including Canada and Australia) to assist us in forming a view as to what offence we can recommend in this Report to cover "rape" (as it has previously been understood), and other forms of non-consensual sexual penetration.

Overseas jurisdictions

2.52 The term "rape" is not used in the Canadian Criminal Code ("the Code").³ Instead, the law criminalises "sexual assault". Section 265 of the Code defines the offence of assault to include sexual assault, which refers to sexual contact with another person without that other person's consent.

2.53 As for the Australian states and territories, penetrative sexual offence is described as "rape" in Victoria,⁴ Queensland,⁵ South Australia,⁶ and Tasmania.⁷ "Rape" includes penile penetration of the mouth.

2.54 In the rest of the Australian states and territories, non-consensual sexual penetration is described as "sexual assault" in New South Wales,⁸ "sexual intercourse without consent" in the Australian Capital Territory⁹ and the Northern Territory;¹⁰ and "sexual penetration without consent" in Western Australia.¹¹ All these offences cover penile penetration of the mouth of the victim.

2.55 Having compared and considered these overseas provisions, our view is that the legislation of Western Australia best reflects the "sexual" nature of the conduct as described generally in our earlier recommendations. Furthermore, we also note the Western Australian provision has provided an exception for proper medical purposes –

³ Canadian Criminal Code.
online at <https://laws-lois.justice.gc.ca/eng/acts/C-46>

⁴ Crimes Act 1958 (Vic) section 38.

⁵ Criminal Code (Qld) section 48.

⁶ Criminal Law Consolidation Act 1935 (SA) section 48.

⁷ Criminal Code (Tas) section 185.

⁸ Crimes Act 1900 (NSW) section 61I.

⁹ Crimes Act 1900 (ACT) section 54.

¹⁰ Criminal Code Act (NT) section 192.

¹¹ Criminal Code Act Compilation Act 1913 (WA) section 325.

"325 Sexual penetration without consent

- (1) *A person who sexually penetrates another person without the consent of that person is guilty of a crime and is liable to imprisonment for 14 years."*

319 Terms used

"(1) *In this Chapter –*
to sexually penetrate means —

- (a) *to penetrate the vagina (which term includes the labia majora), the anus, or the urethra of any person with —*
 - (i) *any part of the body of another person; or*
 - (ii) *an object manipulated by another person, except where the penetration is carried out for proper medical purposes; or*
- (b) *to manipulate any part of the body of another person so as to cause penetration of the vagina (which term includes the labia majora), the anus, or the urethra of the offender by part of the other person's body; or*
- (c) *to introduce any part of the penis of a person into the mouth of another person; or*
- (d) *to engage in cunnilingus or fellatio; or*
- (e) *to continue sexual penetration as defined in paragraph (a), (b), (c) or (d)."*

2.56 Noting the majority of the responses received were opposed to the continuation of the term "rape", and having considered the terms used in the Australian states and territories, we have come to the conclusion that the term "rape" should be discarded and the offence should be named "sexual penetration without consent" as it best reflects the substance of the offence which includes penetration of the anus, vagina and mouth.

2.57 However, as regards the definition of "to sexually penetrate", our view is that as the terms *cunnilingus* and *fellatio* referred to in section 319(1)(d) of the Western Australian Criminal Code Act Compilation Act 1913 ("CCA") are not commonly used in the Hong Kong legislation, instead of introducing these terms into the local legislation, we recommend that the spirit of the conduct of *cunnilingus* and *fellatio* should be covered in the proposed new offence by suitable drafting.

2.58 Furthermore, we do not think it is necessary for the new offence to cover *urethra* which appears in the CCA.

2.59 As regards proper medical purposes, we have deliberated on whether there is any merit in expressly stating that "sexually penetrate" would not cover a situation where the penetration was carried out for proper medical

purposes. Our view is that while we note the concerns raised by the medical profession in the responses collected, whether an act was done for proper medical purposes should be a matter for the judge and jury to consider and decide at the trial with reference to the evidence available. Our view is that if the penetration was carried out for proper medical purposes, it would not be the subject of a prosecution.

Our views

2.60 In light of the above discussion, we recommend the discarding of the term "rape"; we recommend that the name of the offence be "sexual penetration without consent", and that the new legislation should incorporate provisions along the lines of sections 319 and 328 of the CCA; and we do not maintain our view that a distinction should be made between non-consensual sexual offences which involved penile sexual penetrative acts and non-penile penetrative acts.

2.61 Against the aforesaid, Preliminary Recommendation 7 is amended, and Preliminary Recommendation 8 is discarded.

Final Recommendation 7

We recommend that the new legislation should incorporate provisions along the lines of sections 319 and 328 of the Western Australian Criminal Code Act Compilation Act 1913 to the effect that the scope of sexual penetration without consent should cover penetration of the vagina or anus; and penile penetration of the mouth of another person.

Preliminary Recommendation 9: Definitions of a penis and a vagina

2.62 The Sub-committee recommended that the new legislation should provide that for the purposes of any sexual offence a penis should include a surgically constructed penis and a vagina should include (a) the vulva and (b) a surgically constructed vagina (together with a surgically constructed vulva).

Consultees' responses

2.63 We received overwhelming support for this recommendation.

Our views

2.64 We noted the overwhelming support of the recommended new definitions of a penis and a vagina.

2.65 We maintain our view that if modern surgical techniques could provide a surgically constructed penis, penetration by such an artificial organ should be contained within the scope of the offence of sexual penetration without consent. It is as severe an infringement of a person's sexual autonomy if the person's vagina, anus or mouth is penetrated without consent by a surgically constructed penis as by a natural penis. We therefore consider that the definition of penis should include a surgically constructed penis. This definition should apply to all sexual offences.

2.66 Equally, we maintain our view that transsexuals who have surgically constructed vaginas should be protected by the criminal justice system. It is a severe infringement of the sexual autonomy of a transsexual whose sexual organ, although surgically constructed, is penetrated against the transsexual's will. The definition of a vagina should therefore include a surgically constructed vagina.

2.67 Section 79(9) of the English Act and section 1(4) of the Scottish Act provide that "vagina" includes the vulva. The vulva (or a surgically constructed vulva) is part of the female genitalia and as such should also be included as part of the vagina for the purposes of any sexual offence.

2.68 Preliminary Recommendation 9 is retained.

Final Recommendation 9

We recommend that the new legislation should provide that for the purposes of any sexual offence a penis should include a surgically constructed penis and a vagina should include (a) the vulva and (b) a surgically constructed vagina (together with a surgically constructed vulva).

Preliminary Recommendation 10: Meaning of "penetration"

2.69 The Sub-committee recommended that for the purposes of any sexual offence, penetration should be defined to mean a continuing act from entry to withdrawal. The Sub-committee further recommended that where penetration is initially consented to but at some point of time the consent is withdrawn, "a continuing act from entry" should mean a continuing act from that point of time at which the consent previously given is withdrawn.

Consultees' responses

2.70 We received overwhelming support for this recommendation.

Our views

2.71 We are aware of the possible ambiguity in the term "penetration" in that it could mean either (i) the initial act of penetrating only; or (ii) the state of being penetrated, ie, a continuing act from entry to withdrawal. The ambiguity could give rise to difficulty where consent was initially given at the time of penetration but later withdrawn. Hence, we maintain the recommendation that for the purposes of any sexual offence, penetration should be defined to mean a continuing act from entry to withdrawal.

2.72 Against the aforesaid, Preliminary Recommendation 10 is not amended.

Final Recommendation 10

We recommend that for the purposes of any sexual offence, penetration should be defined to mean a continuing act from entry to withdrawal.

We further recommend that where penetration is initially consented to but at some point of time the consent is withdrawn, "a continuing act from entry" should mean a continuing act from that point of time at which the consent previously given is withdrawn.

Preliminary Recommendation 11: Mental element as to the act of penetration and other relevant sexual acts

2.73 The Sub-committee recommended that the new legislation should expressly provide that the act of penetration in rape and the relevant acts in the other non-consensual sexual offences (namely, the possible new offences of sexual assault by penetration, sexual assault, and causing a person to engage in sexual activity without consent) must be committed intentionally. The Sub-committee also recommended that the new legislation should provide that self-intoxication is not a defence to rape and the other non-consensual sexual offences.

Consultees' responses

2.74 We noted that the majority of the responses were not in support of only requiring the act of penetration to be committed intentionally. The responses (which came from women affairs concern groups, human rights

concern groups, a social worker's group and a few individuals) expressed that the offence should also cover acts of penetration committed recklessly for better protection of the victim.

Our views

2.75 We noted that most of the responses were not in support of this recommendation. In particular, we noted the community's preference to cover an act of penetration committed recklessly.

2.76 Our original view is that notwithstanding an act of penetration was done recklessly or intentionally, the offender will still be punished if the act was done without the victim's consent. That said, we appreciate the sentiments expressed as regards recklessness. Having reviewed this issue carefully, our view is that while it may be rare for a person to commit an act of sexual penetration without consent recklessly, we cannot completely rule out such a possibility. Hence, in order to accord better safeguard to the public under the protective principle, we agree that the offence should also cover an act of penetration committed recklessly.

2.77 We hope that through adding the element of recklessness, a clear message can be given to the community that a person's sexual autonomy is to be respected. If an accused claims that he/she did not intend to penetrate the victim, but he/she created the risk or had taken risk which caused a penetration, the accused should still be criminally liable for his/her conduct.

2.78 In light of the above, we have reviewed the matter and recommend that "recklessness" be covered. Furthermore, the reference to "rape" should be amended to "sexual penetration without consent" to be consistent with our earlier comments on Final Recommendation 7; also, "sexual assault by penetration" should be deleted to be consistent with Final Recommendation 16.

Final Recommendation 11

We recommend that the new legislation should expressly provide that the act of sexual penetration without consent and the relevant acts in the other non-consensual sexual offences (namely, the possible new offences of sexual assault, and causing a person to engage in sexual activity without consent) must be committed intentionally or recklessly.

We also recommend that the new legislation should provide that self-intoxication is not a defence to sexual penetration without consent and the other non-consensual sexual offences.

Preliminary Recommendation 12: Reform option for dealing with genuine (but mistaken) belief in consent

2.79 The Sub-committee recommended that in relation to the offence of rape and other non-consensual sexual offences the new legislation should incorporate provisions along the lines of sections 1(1)(b), 1(1)(c), 1(2), 2(1)(c), 2(1)(d), 2(2), 3(1)(c), 3(1)(d), 3(2) and 4(1)(c), 4(1)(d) and 4(2) of the English Act to the effect that:

- (a) it should be necessary for the prosecution to prove that (i) the complainant did not consent; (ii) the accused did not reasonably believe that the complainant consented; and
- (b) whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps the accused took to ascertain whether the complainant consented.

The Sub-committee further recommended that section 118(4) of the Crimes Ordinance should be repealed upon the enactment of the new legislation.

Consultees' responses

2.80 We received overwhelming support for this recommendation.

Our views

2.81 We noted the overwhelming support of the adoption of a statutory definition of consent to the recommended reform option for dealing with genuine (but mistaken) belief in consent.

2.82 Under section 118(3)(b) of the Crimes Ordinance, the *mens rea* as to consent in rape is that the accused "*at that time ... knows that she does not consent to the intercourse or he is reckless as to whether she consents to it*". Therefore, the existing *mens rea* as to consent in rape is actual knowledge of the lack of consent or recklessness as to whether there is consent. But what if the accused genuinely but mistakenly and unreasonably believes that the complainant is consenting?

2.83 Three reform options were identified in the First CP¹² for dealing with the issue of genuine, albeit mistaken, belief in consent. They are option 1 – the subjective test; option 2 – the objective test; and option 3 – the mixed test.

2.84 We maintain our view that the choice is between the first option (subjective test together with the clarification in section 118(4) of the Crimes Ordinance) and the third option (mixed test) only. We do not favour the

¹² See paragraphs 4.47 to 4.56 of the First CP.

second option (totally objective test). A totally objective test fails to take into account the personal attributes of the particular accused which explain why the accused makes the genuine but mistaken belief in consent. These attributes may include the accused's learning difficulties, mental disorder, or lack of social skills. We do not favour the first option. The subjectivity of the *Morgan* principle¹³ has been criticised because its effect is that there is no sexual penetration without consent where the accused "genuinely" believed that the complainant consented, even if the complainant had indicated that there was no consent (by the complainant) to sexual intercourse. We do not favour this option because it undermines respect for sexual autonomy.

2.85 We favour the adoption of the third option of a mixed test. The merit of the mixed test is that it avoids the subjectivity of the *Morgan* principle by requiring the accused's belief in consent 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 the complainant consents.

2.86 To conclude, we maintain our view that in relation to the offence of sexual penetration without consent and other non-consensual sexual offences, it should be necessary for the prosecution to prove that the complainant did not consent and that the accused did not reasonably believe that the complainant consented. Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps the accused took to ascertain whether the complainant consented.

2.87 Preliminary Recommendation 12 is not amended, apart from replacing "rape" with "sexual penetration without consent".

Final Recommendation 12

We recommend in relation to the offence of sexual penetration without consent and other non-consensual sexual offences that the new legislation should incorporate provisions along the lines of sections 1(1)(b), 1(1)(c), 1(2), 2(1)(c), 2(1)(d), 2(2), 3(1)(c), 3(1)(d), 3(2), 4(1)(c), 4(1)(d) and 4(2) of the English Sexual Offences Act 2003 to the effect that:

- (a) it should be necessary for the prosecution to prove that (i) the complainant did not consent; (ii) the accused did not reasonably believe that the complainant consented; and**

¹³ See paragraphs 4.37 to 4.39 of the First CP.

- (b) whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps the accused took to ascertain whether the complainant consented.

We further recommend that section 118(4) of the Crimes Ordinance (Cap 200) should be repealed upon the enactment of the new legislation.

Preliminary Recommendation 13: The offence of procurement of an unlawful sexual act by false pretences should be retained

2.88 The Sub-committee recommended that the offence of procurement by false pretences under section 120 of the Crimes Ordinance should be retained upon the enactment of the new legislation.

Consultees' responses

2.89 We received overwhelming support for this recommendation.

Our views

2.90 Under section 120 of the Crimes Ordinance, it is an offence for a person to procure another person, *by false pretences or false representations*, to do an unlawful sexual act in Hong Kong or elsewhere. The question arises as to whether or not the procurement offence should be abolished and encompassed by sexual penetration without consent.

2.91 We maintain our view that it is necessary to have the offence of procurement by false pretences to cover sexual intercourse obtained by deception not relating to the nature or purpose of the act or the identity of the person, since such conduct would not constitute sexual penetration without consent. There would be a loophole in the law if procurement by false pretences were to be abolished. We take the view that the offence of procurement by false pretences should be retained.

2.92 Against the aforesaid, Preliminary Recommendation 13 is not amended.

Final Recommendation 13

We recommend that the offence of procurement by false pretences under section 120 of the Crimes Ordinance (Cap 200) should be retained upon the enactment of the new legislation.

Preliminary Recommendation 14: Sexual intercourse obtained by threat or intimidation not involving the use of force (such as economic threat)

2.93 The Sub-committee recommended that sexual intercourse obtained by economic pressure should be dealt with on a case by case basis to decide whether rape was committed by reference to the concept of consent and it is not necessary to have a new offence to cover such cases.

Consultees' responses

2.94 We note that the majority are in support of this recommendation. Most of the dissenting views expressed in general the need to have a new offence to cover sexual intercourse obtained by threat or intimidation in order to accord better protection to the public.

Our views

2.95 Having carefully considered the dissenting views expressed, we believe that it is unnecessary to have a separate offence to cover sexual intercourse obtained by economic threat or pressure. In our view the issue can be determined by reference to the concept of consent. Economic pressure would not vitiate consent in most cases. However, in an extreme case the court may rule that there is no consent if the evidence shows that the complainant does not voluntarily agree to have sexual intercourse as a result of economic pressure from the accused (for example the loan shark cases). It is difficult to draw a statutory line between a true bargain for sex and obtaining sexual intercourse by unduly exerting economic pressure. We maintain the view that such cases should be dealt with on a case by case basis to decide whether there was sexual penetration without consent or not by reference to the general concept of consent.

2.96 Preliminary Recommendation 14 is not amended apart from replacing "rape" with "sexual penetration without consent".

Final Recommendation 14

We recommend that sexual intercourse obtained by economic pressure should be dealt with on a case by case basis to decide whether sexual penetration without consent was committed by reference to the concept of consent and it is not necessary to have a new offence to cover such cases.

Preliminary Recommendation 15: Definition of "sexual"

2.97 The Sub-committee recommended that for the purposes of any sexual offence, the definition of "sexual" in section 78(a) and (b) of the English Act should be adopted, subject to the deletion of "because of its nature it may be sexual and" from section 78(b). The definition of sexual would therefore be along the following lines: it is sexual if a reasonable person would consider that –

- (a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or
- (b) because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.

Consultees' responses

2.98 We received overwhelming support for this recommendation.

2.99 That said, we have noted similar concerns raised by the medical profession as regards penetration of a person's vagina or anus in the course of a proper medical examination or treatment. Some of the views are as follows –

"We further take the view that there should be some exemption clauses for doctors from the offence by penetration of the complainant's vagina or anus by an object in some circumstances such as doing sigmoidoscopies, colonoscopies or performing physical examination of private parts. It will minimize embarrassment to doctors and not compromise the thoroughness of health examination."

"The Council needs to emphasize that:-

- (1) *A proviso should be included in the legislation to exclude bona fide medical examinations and treatments from the new offence of "sexual assault" (first category), in order to make clear that genuine medical acts do not constitute the offence.*

- (2) *The definition of "sexual" should make clear that genuine medical acts are not of a sexual nature."*

Our views

2.100 It is an element of the new offence in both the English and the Scottish Acts that the offence is committed only if the penetration is sexual. The issue then is what is meant by the word "sexual". In both the English and Scottish Acts, there is a statutory definition of the word sexual which applies generally to all conduct, including penetration and touching.¹⁴

2.101 We note that the majority was in support of this recommendation. Hence, we maintain the view that legislative amendments (such as adding exemption clauses and a proviso) may not be necessary as whether a specific conduct would constitute a "sexual act" will be a matter for the judge and jury to consider and decide with reference to the evidence available. A definition of "sexual" as we recommended in Preliminary Recommendation 15 will be sufficient.

2.102 As regards the concern raised by the medical profession requesting a proviso to be included in the legislation to exclude bone fide medical examinations and treatments from the new offence of "sexual assault", our view is that while we appreciate the concern expressed, we believe that it is a matter which should be left to the judge and jury to decide, with reference to the facts and circumstances of the case before them. If there is evidence proving the relevant act was done solely for the purpose of a genuine medical examination or treatment, it would not be "sexual".

2.103 Preliminary Recommendation 15 is not amended.

Final Recommendation 15

We recommend that for the purposes of any sexual offence, the definition of "sexual" in section 78(a) and (b) of the English Sexual Offences Act 2003 should be adopted, subject to the deletion of "*because of its nature it may be sexual and*" from section 78(b). The definition of sexual will therefore be along the following lines: it is sexual if a reasonable person would consider that –

- (a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or**
- (b) because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.**

¹⁴

See paragraphs 5.9 to 5.11 of the First CP.

Preliminary Recommendation 16: Sexual assault by penetration; abolition of the offence of non-consensual buggery

2.104 The Sub-committee recommended that in the new legislation there should be an offence of sexual assault by penetration, which would be constituted by a person (A) who, without the consent of another person (B) and without a reasonable belief that B consents, intentionally penetrates the vagina or anus of B with a part of A's body or anything else.

2.105 The Sub-committee recommended the adoption of a provision along the lines of section 2(4) of the Scottish Act to the effect that for the purposes of the offence of sexual assault by penetration, a reference to penetration with a person's body is to be construed as including a reference to penetration with the person's penis.

2.106 The Sub-committee recommended that Schedule 1 to the Crimes Ordinance should be amended to allow a statutory alternative verdict for sexual assault by penetration where the accused is charged with rape.

2.107 The Sub-committee further recommended that the offence of non-consensual buggery under section 118A of the Crimes Ordinance should be abolished upon the enactment of the new legislation.

Consultees' responses

2.108 We received overwhelming support for this recommendation.

2.109 However, we also noted the following suggestions and concerns raised by a women affairs concern group and a Government department. The gist of their views is as follows –

A women affairs concern group

- expressed reservations on [the Sub-committee's] proposal that sexual assault should only include penetration of the victim's vagina or anus; and
- took the view that the gravity of the offence should be commensurate with the injury that it inflicted on the victim and that caused by penetration of the mouth could be equally serious.

A Government department

- concern on the effect of the new offence "assault by penetration" on the daily operations of correctional institutions;
- identified rule 9 of Prison Rules (Cap 234A) which empowered the Medical Officer, or a Chief Officer, Principal Officer, Officer or Nurse, authorised by the Medical Officer, to search the rectum, nostrils, ears and any other external orifice of a prisoner for the

purpose of taking away from him any article he is not authorized to possess (the search is conducted manually and the staff has to use his fingers to penetrate into the prisoners' rectum, vagina, etc.);

- expressed concern on whether under the new offence, one may argue that such search is non-medical and hence may attract criminal liability; and
- suggested that drafting of the new offence could take into account of such circumstance and relieve their concern on the possible criminal liability.

Our views

2.110 Section 2(4) of the Scottish Act provides that *"the reference [in subsection 1] to penetration with any part of A's body is to be construed as including a reference to penetration with A's penis."* The effect of this provision is that the offence of sexual assault by penetration will include penetration by a penis.¹⁵

2.111 Given that we have already recommended the discarding of the term rape and renaming of the offence as sexual penetration without consent, and that the offence will cover any penetration of the anus or vagina; and penile penetration of the mouth, we do not consider that the offence of sexual assault by penetration will be required.

2.112 With regard to the act of non-penile penetration of the mouth, if this is of a sexual nature it will be covered by the proposed offence of sexual assault.

2.113 Regarding buggery offences to be reviewed, the offence of non-consensual buggery (section 118A) is the only non-consensual buggery offence in the Crimes Ordinance.¹⁶ All the other buggery offences are consensual offences.¹⁷ We would therefore recommend at this stage the abolition of the offence of non-consensual buggery only. We have also recommended the abolition of a series of other buggery offences in this Report.¹⁸

2.114 In response to the views of the Government department in relation to conducting a legitimate search (ie not for a sexual purpose) on a person's rectum or vagina, we believe that whether the search was "sexual" should be a matter for the judge and jury to decide, with reference to the facts

¹⁵ See paragraph 5.26 of the First CP.

¹⁶ It is an offence of non-consensual buggery under section 118A of the Crimes Ordinance for a person to commit buggery with another person who at the time of the buggery *"does not consent to it"*.

¹⁷ There is no reference to the phrase *"does not consent to it"* or similar wording in the other buggery offences under sections 118C, 118D, 118E and 118F of the Crimes Ordinance.

¹⁸ See paragraphs 4.97 to 4.103 of this Report.

and circumstances of the case before them. If the penetration of the rectum or vagina was done for the purpose of genuine legitimate search, it will not be "sexual" and hence will not be an offence.

2.115 In light of the aforesaid discussion, this recommendation will be amended by deleting all recommendations relating to the offence of sexual assault by penetration. Final Recommendation 16 will cover only our recommendation to abolish the offence of non-consensual buggery under section 118A of the Crimes Ordinance upon the enactment of the new offence of sexual penetration without consent.¹⁹

Final Recommendation 16

We recommend that the offence of non-consensual buggery under section 118A of the Crimes Ordinance (Cap 200) should be abolished upon the enactment of the new offence of sexual penetration without consent.

Preliminary Recommendation 17: Definition of touching

Preliminary Recommendation 18: Sexual assault (first category)

2.116 These two recommendations are to be considered together as very similar concerns were raised in the responses received in respect of these 2 recommendations.

2.117 For Preliminary Recommendation 17, the Sub-committee recommended the adoption of the definition of "touching" in section 79(8) of the English Act to the effect that, for the purposes of any sexual offence, touching includes touching:

- (a) with any part of the body,
- (b) with anything else,
- (c) through anything,

and in particular includes touching amounting to penetration.

2.118 For Preliminary Recommendation 18, the Sub-committee recommended that the offence of sexual assault in the new legislation should be constituted by a person (A) who, without the consent of another person (B) and without a reasonable belief that B consents, intentionally does any of the following things:

- (a) touches B where the touching is sexual;

¹⁹ See Final Recommendation 7 in paragraphs 2.60 to 2.61 of this Report.

- (b) ejaculates semen onto B;
- (c) emits urine or saliva onto B sexually.

2.119 The Sub-committee further recommended that the offence of indecent assault in section 122 of the Crimes Ordinance should be abolished upon the enactment of the new legislation.

Consultees' responses

2.120 We received overwhelming support for both of these recommendations.

2.121 However, we noted some responses raised concern as to whether the new provision should include other kinds of bodily fluid such as other types of secretions from the body, including the prostate fluid of a penis and vaginal discharge.

Our views

2.122 There is a definition of "touching" in section 79(8) of the English Act which applies to all sexual offences in Part 1 of the English Act. Penetration is included within the definition. We favour the adoption of the English definition since it reflects the major interpretations of the meaning of touching (ie it sets out the general definition of touching in the interpretation section).²⁰

2.123 If penetration is included within the definition of touching, a charge of sexual assault may be brought in all cases of penetrative assault. However, in this type of case, we do not envisage that the prosecution will bring a charge of sexual assault if there is evidence showing there was penile penetration of the victim's vagina, anus or mouth; or non-penile penetration of the victim's vagina or anus. Instead, we believe the proper charge would be sexual penetration without consent.

2.124 As regards concerns raised as to whether the new provision should include other kinds of bodily fluid, we acknowledge that other types of bodily fluid which might be emitted sexually, although rare, are still possible. Hence, we agree to include "other bodily fluid" into the offence.

2.125 In light of the aforesaid, and noting the overwhelming support of Preliminary Recommendations 17 and 18, we have retained Preliminary Recommendations 17 and 18 but have added "or any other bodily fluid" after "saliva" in Preliminary Recommendation 18(c).

²⁰ See paragraphs 6.10 to 6.14 of the First CP.

Final Recommendation 17

We recommend the adoption of the definition of "touching" in section 79(8) of the English Sexual Offences Act 2003 to the effect that, for the purposes of any sexual offence, touching includes touching:

- (a) with any part of the body,**
- (b) with anything else,**
- (c) through anything,**

and in particular includes touching amounting to penetration.

Final Recommendation 18

We recommend that the offence of sexual assault in the new legislation should be constituted by a person (A) who, without the consent of another person (B) and without a reasonable belief that B consents, intentionally does any of the following things:

- (a) touches B where the touching is sexual;**
- (b) ejaculates semen onto B;**
- (c) emits urine, saliva or any other bodily fluid onto B sexually.**

We further recommend that the offence of indecent assault in section 122 of the Crimes Ordinance (Cap 200) should be abolished upon the enactment of the new legislation.

Preliminary Recommendation 19: Sexual assault (second category)

2.126 The Sub-committee recommended that the offence of sexual assault in the new legislation should also be constituted by a person (A) who, without the consent of another person (B) and without a reasonable belief that B consents, intentionally does an act of a sexual nature which causes B to apprehend the use or threat of use of immediate and unlawful personal violence.

Consultees' responses

2.127 We received overwhelming support for this recommendation.

Our views

2.128 We noted the overwhelming support of this recommendation and has nothing further to add. Hence, this recommendation is not amended.

Final Recommendation 19

We recommend that the offence of sexual assault in the new legislation should also be constituted by a person (A) who, without the consent of another person (B) and without a reasonable belief that B consents, intentionally does an act of a sexual nature which causes B to apprehend the use or threat of use of immediate and unlawful personal violence.

Preliminary Recommendation 20: Sexual assault (third category); retention of the offence of indecent exposure

2.129 The Sub-committee recommended that the offence of sexual assault in the new legislation should further be constituted by a person (A) who, without the consent of another person (B) and without a reasonable belief that B consents, intentionally does an act of a sexual nature which would have been likely to cause B fear, degradation or harm had it been known to B, irrespective of whether it was known to B.

2.130 The Sub-committee further recommended that the offence of indecent exposure under section 148 of the Crimes Ordinance should be retained upon the enactment of the new legislation.

Consultees' responses

2.131 We noted that the majority is not in support of this recommendation. Most of the responses commented on "upskirt-photography" and opposed the expanding of the scope of sexual assault to include "upskirt-photography". Their main concern is that "upskirt-photography" is not a form of sexual assault. Instead, they suggested a new offence of voyeurism be created to cover non-consensual upskirt-photography.

Our views

2.132 Given that we already published the Report on Voyeurism in April 2019 (recommending the introduction of a new and specific offence of voyeurism to deal with an act of non-consensual observation or visual recording of another person for a sexual purpose; and a new and specific offence in respect of non-consensual upskirt-photography), the first part of Preliminary Recommendation 20 (ie sexual assault (third category)) is discarded, save as to maintain our recommendation that the offence of indecent exposure under section 148 of the Crimes Ordinance should be retained upon the enactment of the new legislation of sexual assault. We shall discuss in greater length in Chapter 4 of this Report on the proposed specific offence to deal with non-consensual upskirt-photography with reference to the Report on Voyeurism.

2.133 Preliminary Recommendation 20 has thus been amended by deleting the first part thereof and with slight modifications.

Final Recommendation 20

We recommend that the offence of indecent exposure under section 148 of the Crimes Ordinance (Cap 200) should be retained upon the enactment of the new legislation in respect of non-consensual upskirt-photography.

Preliminary Recommendation 21: Causing a person to engage in sexual activity without consent; and abolition of the offence of procurement by threats or intimidation

2.134 The Sub-committee recommended that the new legislation should include an offence of causing a person to engage in sexual activity without consent, along the lines of section 4 of the English Act with necessary modification.

2.135 The Sub-committee also recommended that the words "*in Hong Kong or elsewhere*" should be added to the ingredients of the proposed offence of causing a person to engage in sexual activity without consent so that the sexual activity can take place inside or outside Hong Kong, though the act of causing must take place inside Hong Kong.

2.136 The Sub-committee further recommended that the offence of procurement by threats or intimidation in section 119 of the Crimes Ordinance should be abolished upon the enactment of the new legislation.

Consultees' responses

2.137 We received majority support for this recommendation.

2.138 However, we also noted there were isolated responses raised by a few women affairs concern groups which were opposed to the abolition of section 119 of the Crimes Ordinance for fear of a possible reduction of protection to the public.

Our views

2.139 We maintain the view that a new offence should be created to cover the act of compelling others to engage in sexual activity. We believe that there should be a specific offence to deal with such conduct since it is a serious violation of another person's sexual autonomy.

2.140 The English and Scottish offences are based on the same rationale and are intended to catch similar criminal conduct, namely, the act of compelling others to perform or take part in sexual acts against their will. The question is whether we should call the new offence "causing a person to engage in sexual activity without consent" following the English approach, or "sexual coercion" following the Scottish approach.

2.141 We maintain the view that the English approach is clearer and recommend its adoption. The English approach gives a clearer idea of the major ingredients of the offence, namely, the act of causing another person to engage in some form of sexual activity and the absence of consent by the other person. This is preferable to the approach adopted by the Scottish legislation, where the name of the offence indicates only that the offence covers coercion of some kind but fails to give any indication of the other major ingredients, namely, the act of "causing" and the absence of consent by another person to participate in the compelled sexual activity.

2.142 We also maintain the view that the existing procurement offence under section 119 of the Crimes Ordinance should be abolished upon the creation of the new causing offence. The existing procurement offence is too narrow in that it covers only unlawful sexual acts procured by threat or intimidation. By contrast, the causing offence is committed so long as a person "causes" another person to engage in a sexual activity without the latter's consent; it will cover threats of violence, inducement or even persuasion. This causing offence, therefore, catches a wider range of compelled sexual activity than the existing procurement offence, and would provide the necessary protection against compelled sexual activity without the need for continued existence of the procurement offence.

2.143 The existing procurement offence catches an unlawful sexual act *"in Hong Kong or elsewhere"* procured by threats or intimidation. The act of procurement must take place in Hong Kong, though the sexual activity may take place inside or outside Hong Kong. We maintain the view that the words

"in Hong Kong or elsewhere" should similarly be added to the ingredients of the new causing offence. Otherwise, the new causing offence would be narrower than the existing procurement offence. By adding the words *"in Hong Kong or elsewhere"* to the ingredients of the causing offence, the sexual activity can take place inside or outside Hong Kong, though the act of causing must take place inside Hong Kong. This would be conducive to prevention of cross-border sexual crimes.

2.144 In reply to the responses received, we do not agree that the abolition of section 119 of the Crimes Ordinance will reduce the protection given to the public. Our view is that consent is not at issue if the elements of threat and intimidation are present. We wish to repeat our discussion in paragraphs 3.8 to 3.10 of the First CP where we recommended the adoption of a statutory definition of consent to the effect that a person consents to sexual activity if the person (a) freely and voluntarily agrees to the sexual activity; and (b) has the capacity to consent to such activity. Hence, if there is threat or intimidation, clearly there is no consent as such person under threat or intimidation would not be able to give consent freely and voluntarily.

2.145 In light of the above discussion, Preliminary Recommendation 21 is not amended.

Final Recommendation 21

We recommend that the new legislation should include an offence of causing a person to engage in sexual activity without consent, along the lines of section 4 of the English Sexual Offences Act 2003 with necessary modifications.

We also recommend that the words *"in Hong Kong or elsewhere"* should be added to the ingredients of the proposed offence of causing a person to engage in sexual activity without consent so that the sexual activity can take place inside or outside Hong Kong, though the act of causing must take place inside Hong Kong.

We also recommend that the offence of procurement by threats or intimidation in section 119 of the Crimes Ordinance (Cap 200) should be abolished upon the enactment of the new legislation.

Chapter 3

Overview of the Consultation Responses and our Final Recommendations –

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

3.1 In November 2016, the Sub-committee issued the Second CP setting out 41 recommendations for comment and discussion by the public. The consultation exercise originally scheduled to end on 10 February 2017 was extended to 10 March 2017 in light of requests received for time extension to submit responses.

3.2 We have received 129 written responses from professional bodies, women affairs concern groups, children affairs concern groups, human rights concern groups, medical professionals, legal professional bodies, Government departments, social welfare concern groups, other organisations and individuals. The written responses have provided us with valuable information and insight into this area of reform from different perspectives. These different views and perspectives have helped us re-shape some of the recommendations in the consultation paper and will be discussed below. We wish to thank all those who responded to the consultation paper once again for their contribution to this Report.

Preliminary Recommendation 1: A uniform age of consent of 16 years in Hong Kong

3.3 The Sub-committee recommended that there should be a uniform age of consent in Hong Kong of 16 years of age, which should be applicable irrespective of gender and sexual orientation.

Consultees' responses

3.4 We received overwhelming support for this recommendation.

Our views

3.5 In view of the judicial decision in *Leung TC William Roy v SJ*¹ and the increasing trend of a uniform age of consent in other jurisdictions, we find it difficult to find any justification for allowing a disparity in the age of consent between homosexual and heterosexual sexual activity to continue to exist in Hong Kong. Our guiding principle for reform that the law on sexual offences should not involve distinctions based on sexual orientation or types of sexual practice also supports the view that the age of consent for sexual activity between people of different sexual orientations should be the same.

3.6 The age of consent varies from country to country within a range between 13 and 18. However, the age of consent in the majority of the countries is 16 years of age.

3.7 Similarly, we cannot identify any strong justification for raising or lowering from the present level of 16 which has been well established and understood by the Hong Kong community. In fact, lowering the age of consent may have the undesirable result of encouraging premature child sexual activity at an early age. On the other hand, any suggestion to raise the age of consent may be criticised on the grounds that such a suggestion fails to recognise that children mature physically and psychologically at a much earlier age nowadays.

3.8 As such, and noting the overwhelming support received, we maintain the view that there should be a uniform age of consent in Hong Kong of 16 years of age, be applicable irrespective of gender and sexual orientation. Hence, Preliminary Recommendation 1 is not amended.

Final Recommendation 1

We recommend that there should be a uniform age of consent in Hong Kong of 16 years of age, which should be applicable irrespective of gender and sexual orientation.

Preliminary Recommendation 2: Offences involving children and young persons be gender neutral

3.9 The Sub-committee recommended that offences involving children and young persons should be gender neutral in the new legislation.

¹ *Leung TC William Roy v SJ*, [2005] HKCFI 713; [2005] 3 HKLRD 657; [2005] 3 HKC 77; HCAL160/2004, Court of First Instance. This decision was upheld by the Court of Appeal (CACV 317/2005).

Consultees' responses

3.10 We received overwhelming support for this recommendation.

Our views

3.11 The general trend of the legislation of overseas jurisdictions, including Australia, Canada, England and Wales, and Scotland, is for equality of treatment between boys and girls as regards their protection against sexual exploitation and also gender neutrality.² We maintain the view that offences involving children and young persons should be gender neutral in the new legislation.

3.12 Noting the overwhelming support received, Preliminary Recommendation 2 is not amended.

Final Recommendation 2

We recommend that offences involving children and young persons should be gender neutral in the new legislation.

Preliminary Recommendation 3: A range of offences involving children under 13 and another range of offences involving children under 16

3.13 The Sub-committee recommended that the law reflects the protection of two categories of young persons, namely, children under 13 and children under 16 respectively with a range of offences for each category rather than one single offence of child abuse.

Consultees' responses

3.14 We received overwhelming support for this recommendation.

Our views

3.15 We do not favour the retention of the existing approach in the Crimes Ordinance. The existing approach comprises different ages of consent (13, 16, 18 and 21 years) which are gender-specific and discriminatory on the basis of sexual orientation. It was proposed in Preliminary Recommendation 1 that there should be a uniform age of consent

² See paragraphs 3.4 to 3.9 of the Second CP.

of 16 years of age, which should be applicable irrespective of gender and sexual orientation.

3.16 A further issue is whether there should be overlapping of offences. There is an overlap in the Crimes Ordinance between the offence of sexual intercourse with a girl under 13 and the offence of sexual intercourse with a girl under 16. There is also an overlap in the English Act between the range of offences involving children under 13 and the separate range of offences involving children under 16. On the other hand, there is no overlap in the Scottish Act between the range of offences involving young children (ie those who has not attained the age of 13 years) and the separate range of offences involving older children (ie those who has attained the age of 13 years, but not the age of 16 years).³

3.17 We favour the English approach in which there is an overlap of offences. This approach would avoid a possible lacuna when there is doubt as to whether or not the child was below 13 at the time of the commission of the offence. This could happen for example when the offence occurred a long time ago and the child could no longer recall clearly whether it was before he or she reached 13. In such a situation, the accused could be charged with an offence involving children under 16.

3.18 Against the aforesaid and noting the overwhelming support received, Preliminary Recommendation 3 is not amended.

Final Recommendation 3

We recommend that the law reflects the protection of two categories of young persons, namely, children under 13 and children under 16 respectively with a range of offences for each category rather than one single offence of child abuse.

Preliminary Recommendation 4: The word "unlawful" be removed from all offences involving sexual intercourse or sexual act

3.19 The Sub-committee recommended that the word "unlawful" should be removed from all offences involving sexual intercourse or sexual act in the Crimes Ordinance.

Consultees' responses

3.20 We received overwhelming support for this recommendation.

³ See paragraphs 3.24 to 3.32 of the Second CP.

Our views

3.21 We noted the overwhelming support.

3.22 In the Crimes Ordinance, there are a number of offences relating to "unlawful sexual intercourse" or "unlawful sexual act". In light of the judicial and legislative developments as set out in the Second CP,⁴ we find it difficult to see what purpose the retention of the word "unlawful" serves in any of the relevant provisions. We therefore maintain the view that we should take this opportunity to remove the anachronistic term "unlawful" from all offences involving sexual intercourse or sexual act in the Crimes Ordinance.⁵

3.23 Against the aforesaid, Preliminary Recommendation 4 is not amended.

Final Recommendation 4

We recommend that the word "unlawful" should be removed from all offences involving sexual intercourse or sexual act in the Crimes Ordinance (Cap 200).

Preliminary Recommendation 5: Offences involving children and young persons be capable of being committed by either an adult or a child offender

3.24 The Sub-committee recommended that the proposed offences involving children and young persons be capable of being committed by either an adult or a child offender thus rendering it unnecessary to specify the age of the offender in the relevant legislation.

Consultees' responses

3.25 The Sub-committee received overwhelming support for this recommendation.

⁴ See paragraphs 3.46 to 3.50 of the Second CP.

⁵ The Sub-committee did not address the issue of the word "unlawful" in offences involving unlawful sexual intercourse or unlawful sexual act in the First CP. The Sub-committee had in the Second CP reached the conclusion that the word "unlawful" should be removed. Hence, when reading the Sub-committee's First CP, readers should assume that all references to the word "unlawful" in offences involving unlawful sexual intercourse or unlawful sexual act are removed.

Our views

3.26 We noted the overwhelming support.

3.27 We favour the approach of a single set of offences which can be committed by an adult or a child offender. This approach has the advantage of simplicity. What is more, it avoids the possibility of the wrong charge being laid where there is some uncertainty over the age of the accused.

3.28 Furthermore, a judge could use his or her sentencing discretion in imposing on a child offender lighter penalties than an adult offender, where the circumstances of the case call for it.⁶

3.29 Preliminary Recommendation 5 is not amended.

Final Recommendation 5

We recommend that the proposed offences involving children and young persons be capable of being committed by either an adult or a child offender thus rendering it unnecessary to specify the age of the offender in the relevant legislation.

Preliminary Recommendation 6: Whether absolute liability should apply to offences involving children between 13 and 16 years and whether or not in this context a distinction should be made between penetrative and non-penetrative sexual activity should be considered by the Hong Kong community

3.30 The Sub-committee was of the view that the issue as to whether absolute liability should apply to offences involving children between 13 and 16 years and whether or not in this context a distinction should be made between penetrative and non-penetrative sexual activity should be considered by the Hong Kong community. Accordingly, the Sub-committee invited the community to express their views on the issue.

Consultees' responses

3.31 We received overwhelming support for absolute liability to apply to offences involving children between 13 and 16 years of age. Most of the responses expressed the need to protect this age group under the protective principle. While some of them acknowledged that teenagers at this age

⁶ Prosecutorial discretion can also be exercised in cases involving child offenders to ensure that only the proper cases are brought to court.

group may experiment with sex out of curiosity, the law should still be clear to accord adequate protection to them from sexual exploitation and abuse.

3.32 As regards whether in this context a distinction should be made between penetrative and non-penetrative sexual activity, the majority of those who responded opposed such a distinction. The general sentiment was that the degree of psychological harm done to the victim can be the same irrespective of whether there was penetration or not. We noted the opposition came mainly from child-related groups/workers and psychological societies.

Our views

3.33 There are two issues for consideration: (1) whether absolute liability should apply to offences involving children between 13 and 16 years; and (2) in this context, whether a distinction should be made between penetrative and non-penetrative sexual activity.

3.34 For the first issue, we noted the overwhelming support. As for the second issue, we noted that most of the responses preferred that no distinction be drawn between penetrative and non-penetrative sexual activity. We share the views and responses received from the community and the view that absolute liability should apply to offences involving children between 13 and 16 years; and that in this context a distinction should not be made between penetrative and non-penetrative sexual activity.

3.35 When the Sub-committee was deliberating on the responses received, the Court of Final Appeal delivered the judgment in the case *Choi Wai Lun v HKSAR*.⁷ In gist, the Court of Final Appeal held that the offence of indecent assault contrary to section 122(1) and (2) of the Crimes Ordinance taken together is not an offence of absolute liability when the victim concerned is below 16 years of age. Further, it was held that it was not necessary for the prosecution to prove *mens rea* as to age of the victim. Instead, it is a defence for the accused if he can prove on the balance of probabilities that he honestly and reasonably believed that the victim was 16 or over.

3.36 The ruling in *Choi Wai Lun* is restricted to the interpretation of section 122 of the Crimes Ordinance (ie the offence of indecent assault). Further, a constitutional or statutory challenge on the proposed new offence would not necessarily be successful. Hence, bearing in mind the community's demand for absolute liability for offences involving children between 13 and 16 years, we maintain the view that absolute liability should apply to offences involving children between 13 and 16 years; and that there should not be a distinction between penetrative and non-penetrative sexual activity.

3.37 Preliminary Recommendation 6 is amended by reflecting our views as set out above.

⁷ [2018] 3 HKC 265.

Final Recommendation 6

We are of the view that absolute liability should apply to offences involving children between 13 and 16 years and there should not be a distinction between penetrative and non-penetrative sexual activity.

Preliminary Recommendation 7: Marital defence to offences involving children be abolished

3.38 The Sub-committee recommended that there should not be any marital defence to offences involving children in the new legislation (and any such existing defence should be abolished).

Consultees' responses

3.39 We received overwhelming support for this recommendation.

Our views

3.40 We noted the overwhelming support.

3.41 Under Section 122(1) of the Crimes Ordinance, it is an offence to indecently assault another person. Under section 122(3), the accused is, however, not guilty of indecent assault in such a case if the accused believed on reasonable grounds that he or she was married to the victim.

3.42 The effect of section 122(3) is that a person is protected from liability for indecent assault if he or she performed an indecent act on another person under 16, provided that the act was performed with the other person's consent and they are legally married or there are reasonable grounds for believing that they are legally married.

3.43 The arguments for and against retention of the marital defence in offences involving children between 13 and 16 were set out in paragraphs 5.24 to 5.38 of the Second CP. We appreciate that the issue is highly controversial. In our view, the protective principle, which is central to any reform of the offences involving vulnerable persons such as children under 16, is the most important factor. It is generally accepted in Hong Kong that it is wrong for anyone to engage in sexual activity with a child under 16.

3.44 Preliminary Recommendation 7 is not amended.

Final Recommendation 7

We recommend that there should not be any marital defence to offences involving children in the new legislation (and any such existing defence should be abolished).

Preliminary Recommendation 8: Consensual sexual activity between persons who are between 13 and 16 be criminalised but with prosecutorial discretion to bring a charge in appropriate cases

3.45 The Sub-committee recommended that all consensual sexual activity between persons who are between 13 and 16 years of age should be criminalised but recognising that prosecutorial discretion will be exercised as to whether a case is appropriate for a charge to be brought.

Consultees' responses

3.46 We received significant majority support for this recommendation.

3.47 One Government department commented on the different treatment between a boy and a girl (ie under existing law, a girl would not be liable for consensual sexual intercourse between 13 and 16 year of age, but a boy might be). However, under Preliminary Recommendation 8, both the boy and girl would be criminally liable. The question was whether the difference in treatment might give lesser protection to girls.

Our views

3.48 It is considered absolutely wrong for anyone to engage in sexual activity with very young persons (under the age of 13). People may however have different views as to whether the criminal law should intervene in respect of consensual sexual activity between persons who are between 13 and 16 years of age such as that which takes place in puppy love situations.

3.49 There are three possible approaches to the issue:

- (i) Consensual sexual activity between persons who are between 13 and 16 years of age is criminalised but with prosecutorial discretion being exercised as to whether a charge is brought.
- (ii) Consensual sexual activity between persons who are between 13 and 16 years of age is criminalised but exemption from liability is provided for where the teenagers are close in age.

- (iii) Consensual sexual activity between persons who are between 13 and 16 years of age is not a criminal offence.

3.50 The first is the existing approach in Hong Kong. It is also the approach adopted in England and Wales.

3.51 Our view is that one cannot assume that sexual relationships between children will be fully consensual just because they are close in age.

3.52 The protective principle would also mean that children should not be encouraged to engage in sexual activity before they are emotionally and physically ready to cope with the consequences.

3.53 The fact that young people do engage in sexual activity is not a proper grounds for legalising the activity and giving them any form of encouragement to do so. The law should set parameters for young people's behaviour.

3.54 In reply to the Government department's concern (see paragraph 3.47 above), our view is that the imposition of criminal liability on a child or a young person who is sexually exploitative of another child or young person does not necessarily mean that the former would be prosecuted in all cases. Prosecutorial discretion can ensure that only appropriate cases are brought to court. Cases not involving sexual exploitation can be dealt with by cautions under the Police Superintendents' Discretion Scheme – a scheme which appears to have been operating well in Hong Kong. We therefore maintain the view that it is desirable to have guidelines for the exercise of prosecutorial discretion.

3.55 Against the aforesaid, Preliminary Recommendation 8 is not amended.

Final Recommendation 8

We recommend that all consensual sexual activity between persons who are between 13 and 16 years of age should be criminalised but recognising that prosecutorial discretion will be exercised as to whether a case is appropriate for a charge to be brought.

Preliminary Recommendation 9: Proposed new offences: Penile penetration of a child under 13 and that under 16

Preliminary Recommendation 10: Proposed new offences: Penetration of a child under 13 and that under 16

3.56 These two recommendations are considered together as very similar concerns were raised in the responses received.

3.57 Under Preliminary Recommendation 9, the Sub-committee recommended that the new legislation should include an offence of penile penetration of a child under 13, along the lines of section 5 of the English Act. The Sub-committee also recommended a similar offence of penile penetration of a child under 16.

3.58 Under Preliminary Recommendation 10, the Sub-committee made the following recommendations:-

- The new legislation should include an offence of penetration of a child under 13, along the lines of section 6 of the English Act.
- A similar offence of penetration of a child under 16.
- The adoption of a provision along the lines of section 19(2) of the Scottish Act to the effect that for the purposes of the offences of penetration of a child under 13 and penetration of a child under 16, a reference to penetration with a part of person's body is to be construed as including a reference to penetration with the person's penis.
- Schedule 1 of the Crimes Ordinance should be amended to allow a statutory alternative verdict for penetration of a child under 13, where the accused is charged with penile penetration of a child under 13; similarly, a statutory alternative verdict for penetration of a child under 16, where the accused is charged with penile penetration of a child under 16.

Consultees' responses

3.59 We received overwhelming support for these two recommendations.

Our views

3.60 As we have recommended that the proposed offence of sexual penetration without consent should cover any penetration of the anus or vagina and also penile penetration of the mouth, Preliminary Recommendations 9 and 10 call for suitable refinement.

3.61 We take the view that only one offence is required for penetrative sexual activity, and would maintain the separation of offence for the two age groups, ie one for penetration of a child under 13 and one for penetration of a child under 16.

3.62 We note that sections 5 and 6 of the English Act do not cover penile penetration of the mouth. Hence, in order to reflect that the act of penetration of a child under 13 and that under 16 would cover penile penetration of the mouth, we recommend that the new offences should include a provision along the lines of section 319 of the CCA to the effect that the scope of sexual penetration should cover penetration of the vagina or anus and also penile penetration of the mouth.

3.63 Accordingly, Preliminary Recommendation 9 is discarded and Preliminary Recommendation 10 is amended.

Final Recommendation 10

We recommend that the new legislation should include an offence of penetration of a child under 13, along the lines of sections 5 and 6 of the English Sexual Offences Act 2003.

However, we recommend that the new legislation should incorporate a provision along the lines of section 319 of the Western Australian Criminal Code Act Compilation Act 1913 to the effect that the scope of sexual penetration should cover any penetration of the vagina or anus and also penile penetration of the mouth.

We also recommend a similar offence of penetration of a child under 16.

Preliminary Recommendation 11: Proposed new offences: Sexual assault of a child under 13 and that under 16

3.64 The Sub-committee recommended that the new legislation should include an offence of sexual assault of a child under 13. The offence should be constituted by a person (A) who intentionally does any of the following acts to another person (B) and B is a child under 13:

- (a) touches B where the touching is sexual;
- (b) ejaculates semen onto B; or
- (c) emits urine or saliva onto B sexually.

The Sub-committee also recommended a similar offence of sexual assault of a child under 16.

Consultees' responses

3.65 We received significant majority support for this recommendation.

3.66 Amongst the positive responses received, some views expressed that the current recommendation covers only ejaculation of semen and emission of urine or saliva onto a child victim, but not other kinds of bodily fluid such as prostate fluid of a penis and female vaginal discharge.

Our views

3.67 We noted the majority's support for this recommendation and their views expressed.

3.68 It was proposed in the First CP that for adults, there should be three categories of sexual assaults. The first is sexual touching, ejaculating semen onto others, and emitting urine or saliva onto others sexually. The second is a sexual act which causes another person to apprehend the use or threat of use of immediate and unlawful personal violence. The third is a sexual act which would have been likely to cause another person (B) fear, degradation or harm had it been known to B, irrespective of whether it was known to B.⁸

3.69 Given that the second and third categories are concerned with non-consensual situations, we consider that it is unnecessary for this child offence to cover those categories.⁹ We maintain the view that this child offence should follow the English and Scottish offences in covering sexual touching, ejaculating semen on a child, and emitting urine or saliva onto a child sexually (ie sexual acts in the first category above).

3.70 We also maintain the view that a similar offence involving children under 16 should be created to provide protection to older children against acts of sexual assault.

3.71 That said, we note the responses gathered as regards extending the coverage to other bodily fluid. We agree with such proposed extension and would recommend no change to Preliminary Recommendation 11 except adding "or any other bodily fluid" after "saliva".

⁸ See Chapter 6 of the First CP.

⁹ Such activity, if done without consent, would nevertheless be an offence by virtue of the general provision applicable irrespective of the age of the victim.

Final Recommendation 11

We recommend that the new legislation should include an offence of sexual assault of a child under 13. The offence should be constituted by a person (A) who intentionally does any of the following acts to another person (B) and B is a child under 13:

- (a) touches B where the touching is sexual;**
- (b) ejaculates semen onto B; or**
- (c) emits urine, saliva or any other bodily fluid onto B sexually.**

We also recommend a similar offence of sexual assault of a child under 16.

Preliminary Recommendation 12: Proposed new offences: Causing or inciting a child under 13 and that under 16 to engage in sexual activity

3.72 The Sub-committee recommended that the new legislation should include an offence of causing or inciting a child under 13 to engage in sexual activity, along the lines of section 8 of the English Act. The Sub-committee also recommended a similar offence of causing or inciting a child under 16 to engage in sexual activity.

Consultees' responses

3.73 We received majority support for this recommendation.

Our views

3.74 The Sub-committee proposed in the First CP an offence of causing a person to engage in sexual activity without consent.¹⁰ We agree that a child offence mirroring that non-consensual offence should be created. We consider it culpable conduct for anyone to cause or incite a child to engage in any form of sexual activity and that a new offence should be created to cover such conduct.

3.75 Against the aforesaid and noting the support received, Preliminary Recommendation 12 is not amended.

¹⁰ See Preliminary Recommendation 21 of the First CP.

Final Recommendation 12

We recommend that the new legislation should include an offence of causing or inciting a child under 13 to engage in sexual activity, along the lines of section 8 of the English Sexual Offences Act 2003.

We also recommend a similar offence of causing or inciting a child under 16 to engage in sexual activity.

Preliminary Recommendation 13: Proposed new offences: Engaging in sexual activity in the presence of a child under 13 and that under 16

3.76 The Sub-committee recommended that the new legislation should include an offence of engaging in sexual activity in the presence of a child under 13 along the lines of section 22 of the Scottish Act. The Sub-committee also recommended a similar offence of engaging in sexual activity in the presence of a child under 16. These two offences should also be constituted by causing such a child to be present while a third person engages in a sexual activity. Moreover, 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.

Consultees' responses

3.77 We received overwhelming support for this recommendation.

3.78 However, there are a few comments which highlighted the crowded living condition in Hong Kong and that some households may live in flats without bedrooms. In light of such living condition, it is possible for a child to see his/her parents engaging in sexual activity. Under the proposed offence, these parents may be caught inadvertently.

Our views

3.79 We noted the overwhelming support and the views as regards the crowded living condition in Hong Kong.

3.80 Our view is that the typical scenario of the commission of this offence is that of a paedophile who seeks to obtain sexual pleasure knowing a child is in the room watching him masturbate or having sexual activity with another person. This offence is intended to cover the conduct of someone who engages in some form of sexual activity in the presence of a child. The child may be physically present before the perpetrator when the latter is

engaging in sexual activity, or the child may be present somewhere else and be seen via, for example, a webcam.

3.81 Under the protective principle, children should be protected against sexual exploitation by perpetrators who engage in sexual activity in the presence of the children for the purpose of obtaining sexual gratification, or causing humiliation, distress or alarm to the children. Equally, children should also be protected against sexual exploitation by perpetrators who cause the children to be present when a third party engages in sexual activity. We therefore propose that a new offence involving young children under 13 should be created to cover such criminal conduct. We also propose a similar offence involving children under 16 to provide protection to older children.

3.82 We are fully aware of the concerns raised in respect of the crowded living conditions in Hong Kong. However, we reiterate that the proposed offence is designed to catch people who engage in sexual activity in the presence of a child for the purpose of obtaining sexual gratification, humiliating, distressing or alarming the child.

Recklessness as to the effect on the child

3.83 During our further deliberations, we have considered the situation where the adult who engages in sexual activity in the presence of a child does not do so with any deliberate intent or purpose for obtaining sexual gratification, humiliating, distressing or alarming the child, but is reckless as to its harmful effect on the child. We have had further discussion as to whether the proposed new offence should cover sexual activity when the defendant is reckless as to whether such sexual activity would have the effect of humiliating, distressing or alarming the child.

3.84 We have considered the following:-

- (i) the substance of the presently recommended offence is based on the Scottish Act where one looks at the purpose of the defendant in engaging in the sexual activity. If the prescribed purpose is established, providing for recklessness would be unnecessary;
- (ii) extending the proposed offence to cover recklessness has not been the subject of any previous public consultations;
- (iii) in the consultation exercise that was conducted, some members of the public raised concerns on the appropriateness of the proposed new offence under Preliminary Recommendation 13 given the crowded living conditions that often prevail in Hong Kong. This concern may assume greater significance if an offence based on recklessness is to be introduced;
- (iv) we are not aware of any overseas legislation which creates such type of offence based on recklessness; and

- (v) notwithstanding the above factors, from the perspective of child protection there is a strong case for the introduction of an offence based on recklessness, ie where sexual activity is engaged in the presence of a child, with those engaged in such sexual activity being reckless as to whether such sexual activity would have the effect of humiliating, distressing or alarming the child.

3.85 On balance, we take the view that if we are to proceed with the suggestion of an offence based on recklessness, it would seem that the appropriate course would be to suggest the creation of an additional offence which would render it criminal for a person to engage in sexual activity in the presence of a child, and being reckless as to whether such sexual activity would have the effect of humiliating, distressing or alarming the child.

3.86 The requirement of recklessness should follow the subjective interpretation of recklessness as laid down by the Court of Final Appeal in *Sin Kam Wah & Another v HKSAR*¹¹, namely that the defendant's state of mind was culpable in that he or she was aware of the risk that his or her conduct would have the effect of humiliating, distressing or alarming the child and it was, in the circumstances known to him or her, unreasonable to take the risk. Hence, a defendant could not be regarded as culpable so as to be convicted of the offence if, due to his or her age or personal characteristics, he or she genuinely did not appreciate or foresee the risk involved. This would avoid any unjust conviction on the strength of what someone else would have apprehended, although the defendant had no such apprehension himself or herself.

3.87 However, given the lack of earlier consultation on this issue, instead of recommending this additional offence under Final Recommendation 13, we recommend that the Government considers the matter and decide whether to propose to the legislature an additional offence based on recklessness.

3.88 We do not therefore suggest any major amendment to Preliminary Recommendation 13, save as to add the recommendation that the Government considers the need for an additional offence based on recklessness.

Final Recommendation 13

We recommend that the new legislation should include an offence of engaging in sexual activity in the presence of a child under 13 along the lines of section 22 of the Sexual Offences (Scotland) Act 2009.

We also recommend a similar offence of engaging in sexual activity in the presence of a child under 16.

¹¹ (2005) 8 HKCFAR 192.

These two offences should also be constituted by causing such a child to be present while a third person is engaging in a sexual activity. Moreover, 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.

We recommend that the Government considers the need for an additional offence which would render it criminal for a person to engage in sexual activity in the presence of a child, being reckless as to whether such conduct would have the effect of humiliating, distressing or alarming the child.

Preliminary Recommendation 14: Proposed new offences: Causing a child under 13 and that under 16 to look at a sexual image

3.89 The Sub-committee recommended that the new legislation should include an offence of causing a child under 13 to look at a sexual image along the lines of section 23 of the Scottish Act. The Sub-committee also recommended a similar offence of causing a child under 16 to look at a sexual image.

3.90 The purpose of the accused's act must be for obtaining sexual gratification, humiliating, distressing or alarming the child, or any combination of these purposes. The definition of a sexual image in section 23(3) of the Scottish Act would be adopted.

Consultees' responses

3.91 We received overwhelming support for this recommendation. However, there are also comments made in respect of whether "sexting" should be included in the new offence. Similarly, some respondents suggested that the new offence should cover both text and audio messages.

Our views

3.92 We noted the overwhelming support.

3.93 At the moment, there is no existing offence to cover the act of causing a young child to look at a sexual image. The protective principle requires a new offence to protect young children from such form of sexual exploitation for one's sexual motives. We therefore maintain our view that

there should be new offences to cover such an act against young children under 13 and those under 16.

3.94 Noting that a number of responses requested the new offence to cover text and audio messages, we have looked at section 24 of the Scottish Act. Section 24 covers both sexual verbal and written communications sent to/directed at a child. Furthermore, verbal communication under section 24 included communication by means of sign language:-

"24 Communicating indecently with a young child etc.

(1) If a person ("A"), intentionally and for a purpose mentioned in subsection (3)—

(a) sends, by whatever means, a sexual written communication to, or

(b) directs, by whatever means, a sexual verbal communication at,

a child ("B") who has not attained the age of 13 years, then A commits an offence, to be known as the offence of communicating indecently with a young child.

(2) If, in circumstances other than are as mentioned in subsection (1), a person ("A"), intentionally and for a purpose mentioned in subsection (3) causes a child ("B") who has not attained the age of 13 years to see or hear, by whatever means, a sexual written communication or sexual verbal communication, then A commits an offence, to be known as the offence of causing a young child to see or hear an indecent communication.

(3) The purposes are—

(a) obtaining sexual gratification,

(b) humiliating, distressing or alarming B.

(4) In this section—

"written communication" means a communication in whatever written form, and without prejudice to that generality includes a communication which comprises writings of a person other than A (as for example a passage in a book or magazine), and

"verbal communication" means a communication in whatever verbal form, and without prejudice to that generality includes—

a communication which comprises sounds of sexual activity (whether actual or simulated), and

a communication by means of sign language."

3.95 We agree that with the advancement of technology and the common use of devices to send text and audio messages, there would be a benefit to including text and audio messages in the new offence to accord better protection to children. As such, we recommend that the new legislation should include text and audio messages along the lines of section 24 of the Scottish Act.

3.96 Against the aforesaid, Preliminary Recommendation 14 is amended accordingly by inserting the following passages to cover text and audio message:-

"The new legislation should also include text and audio messages along the lines of section 24 of the Sexual Offences (Scotland) Act 2009.

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."

Final Recommendation 14

We recommend that the new legislation should include an offence of causing a child under 13 to look at a sexual image along the lines of section 23 of the Sexual Offences (Scotland) Act 2009.

We also recommend a similar offence of causing a child under 16 to look at a sexual image.

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. The definition of a sexual image in section 23(3) of the Sexual Offences (Scotland) Act 2009 should be adopted.

The new legislation should also include text and audio messages along the lines of section 24 of the Sexual Offences (Scotland) Act 2009.

Preliminary Recommendation 15: Proposed new offence: Arranging or facilitating the commission of a child sex offence

3.97 The Sub-committee recommended that the new legislation should include an offence of arranging or facilitating the commission of a child sex offence along the lines of section 14 of the English Act.

Consultees' responses

3.98 We received vast majority support for this recommendation. The dissenting views raised general reservations to the proposed new offence, criticising that it was too wide.

Our views

3.99 The offence covers the case in which a person (A) who intentionally:

- (i) arranges or facilitates an act that A intends to do;
- (ii) arranges or facilitates an act that A intends another person (B) to do; or
- (iii) arranges or facilitates an act that A believes B will do,

in any part of the world and the act will involve commission of any child sex offence.

3.100 An example of the commission of the first two limbs of the offence is as follows: a person (A) approaches an agency and requests the agency to procure a child for the purpose of sexual activity either with himself or with a friend. The offence is committed whether or not the sexual activity takes place or not.

3.101 An example of the commission of the third limb of the offence is as follows: A intentionally drives another person (X) to meet a child and A believes X will have sexual activity with the child.

3.102 We maintain our view that a similar offence should be adopted in Hong Kong. The proposed offence would enable the authorities to take early steps to track down paedophiles who take preparatory steps to make arrangements for abusing child or facilitating others to do so. It would be a significant step towards better protection of children against sexual exploitation. It should be noted that the proposed offence would cover arranging or facilitating commission of an offence involving a child under the age of consent. In other words, it would apply in respect of both children under 13 and children under 16.

3.103 Noting the support received from the vast majority, Preliminary Recommendation 15 is not amended.

Final Recommendation 15

We recommend that the new legislation should include an offence of arranging or facilitating the commission of a child sex offence along the lines of section 14 of the English Sexual Offences Act 2003.

Preliminary Recommendation 16: Health and treatment issues as exceptions to aiding, abetting and counselling a child sex offence

3.104 The Sub-committee recommended that there should be exceptions to aiding, abetting and counselling an offence involving children along the lines of section 14 of the English Act, where a person's actions are intended to protect the child from pregnancy or sexually transmitted infection, to protect the physical safety of a child or to promote child's emotional well-being of a child by the giving of advice.

Consultees' responses

3.105 We received overwhelming support for this recommendation.

Our views

3.106 In particular, we share the view that people involved in giving help, advice, treatment and support to young people in matters of sexual health such as contraception should not be regarded as aiding and abetting a criminal offence. Otherwise, healthcare workers would be deterred from rendering assistance to young people on sex matters and youngsters would be discouraged from seeking appropriate professional help and advice on sex-related problems.

3.107 In light of the overwhelming support received, Preliminary Recommendation 16 is retained with slight textual changes.

Final Recommendation 16

We recommend there should be exceptions to aiding, abetting and counselling an offence involving children along the lines of section 14 of the English Sexual Offences Act 2003, where a person's actions are intended to protect a child from pregnancy or sexually transmitted infection, to protect the physical safety of a child or to promote a child's emotional well-being by the giving of advice.

Preliminary Recommendation 17: Sexual intercourse with a girl under 13 and that under 16 be abolished

3.108 The Sub-committee recommended that the offences of sexual intercourse with a girl under 13 (section 123 of the Crimes Ordinance) and sexual intercourse with a girl under 16 (section 124 of the Crimes Ordinance) should be abolished upon the enactment of the new legislation.

Consultees' responses

3.109 We received unanimous support for this recommendation.

Our views

3.110 The Sub-committee recommended in the Second CP a number of new offences involving children. We have thus reviewed some existing offences to consider if there is a need for their continued existence.

3.111 The two existing offences of intercourse with a girl under 13 and that under 16 (sections 123 and 124 of Crimes Ordinance) are gender-specific and provide protection to under-aged girls only but not under-aged boys. Moreover, they cover vaginal intercourse only but not sexual penetrative assault on a child's anus or mouth. As such, we agree that these offences should be abolished.

3.112 In light of the unanimous support received, Preliminary Recommendation 17 is not amended.

Final Recommendation 17

We recommend that the offences of sexual intercourse with a girl under 13 (section 123 of the Crimes Ordinance (Cap 200)) and sexual intercourse with a girl under 16 (section 124 of the Crimes Ordinance (Cap 200)) should be abolished upon the enactment of the new legislation.

Preliminary Recommendation 18: Indecent conduct towards a child under 16 be abolished

3.113 The Sub-committee recommended that the offence of indecent conduct towards a child under 16 in section 146 of the Crimes Ordinance should be abolished upon the enactment of the new legislation.

Consultees' responses

3.114 We received unanimous support for this recommendation.

Our views

3.115 The commission or the incitement of the commission of an act of gross indecency is an ingredient of this offence. Gross indecency is a term lacking in precise definition and there are a number of possible formulations of the term in the authorities.¹² In accordance with the principle of clarity of the law, we maintain our view that this offence should be abolished upon the enactment of the new legislation.

3.116 The corresponding English offence in section 1 of the Indecency with Children Act 1960 has already been repealed. We are of the view that the offence of indecent conduct towards a child under 16 (section 146 of Crimes Ordinance) should also be abolished.

3.117 In light of the unanimous support received, Preliminary Recommendation 18 is not amended.

Final Recommendation 18

We recommend that the offence of indecent conduct towards a child under 16 in section 146 of the Crimes Ordinance (Cap 200) should be abolished upon the enactment of the new legislation.

¹²

In this connection, Nazareth Acting CJ said in the Court of Appeal case of *R v Savage (No 3)* [1997] HKLRD 428, but without deciding the point:

"... It seems to us that what may be intended is **indecent** that is to be regarded as more serious than mere indecency (either of which might be 'plain, evident, and obvious'). That would be consistent with some of the authorities to which Mr Cross drew our attention (eg '**gross indecency may be defined as a marked departure from decent conduct expected of the average [person]**' *R v Quesnel* (1979) 51 CCC (2d) 270, 280; '**an act ... which, under the customs and morals of our times, would be considered grossly indecent by any right-thinking member of the public**' *R v K and H* (1957) 118 CCC 317, 319). However that may be, the applicant not being represented, this does not provide a suitable occasion for pronouncement upon such matters. We are accordingly content to say that we agree with the judge that what took place 'is grossly indecent' and that 'no right-thinking person could find otherwise'" (emphasis added).

On the other hand, Hartmann J (as he then was) said in the Court of First Instance in *Leung TC William Roy*, about the term "gross indecency" in the following terms:

"The phrase is not defined in the Ordinance but, as I see it, covers sexual conduct with or towards another person that is offensive to common propriety, **each case being judged in the context of its own time, place and circumstance**. For the purpose of this judgment, I shall describe it as 'sexual intimacy' by which I mean any act of such intimacy with or towards another person that falls short of sexual intercourse; namely, penetration." (emphasis added) (paragraphs 1.12 to 1.13 of the Second CP refers).

Preliminary Recommendation 19: A man committing buggery with a girl under 21 be abolished

3.118 The Sub-committee recommended that the offence of a man committing buggery with a girl under 21 in section 118D of the Crimes Ordinance should be abolished upon the enactment of the new legislation.

Consultees' responses

3.119 We received overwhelming support for this recommendation.

Our views

3.120 Section 118D of the Crimes Ordinance is a gender-specific offence. Further, it does not tally with the legal age of consent (of 16) for anal intercourse as held in *Leung TC William Roy v SJ*.¹³ The effect of *Leung TC William Roy* is that it is not unlawful for a gay couple to commit buggery with one another provided that they are aged 16 or over. Hence, it would be unfair to a heterosexual couple if they cannot lawfully have consensual anal intercourse with one another if the girl is aged 16 or over but under 21. As such, the offence of a man committing buggery with a girl under 21 (section 118D of Crimes Ordinance) should be abolished.

3.121 Against the aforesaid, Preliminary Recommendation 19 is not amended.

Final Recommendation 19

We recommend that the offence of a man committing buggery with a girl under 21 in section 118D of the Crimes Ordinance (Cap 200) should be abolished upon the enactment of the new legislation.

Preliminary Recommendation 20: Homosexual buggery with or by man under 16 and gross indecency with or by man under 16 be abolished

3.122 The Sub-committee recommended that the offence of homosexual buggery with or by man under 16 (section 118C of the Crimes Ordinance) and gross indecency with or by man under 16 (section 118H of the

¹³ *Leung TC William Roy v SJ*, [2005] HKCFI 713; [2005] 3 HKLRD 657; [2005] 3 HKC 77; HCAL160/2004, Court of First Instance. This decision was upheld by the Court of Appeal (CACV 317/2005).

Crimes Ordinance) should be abolished upon the enactment of the new legislation.

Consultees' responses

3.123 We received unanimous support for this recommendation.

Our views

3.124 There are two homosexual offences involving young persons, namely, homosexual buggery with or by man under 16 (section 118C of the Crimes Ordinance) and gross indecency with or by man under 16 (section 118H of the Crimes Ordinance).

3.125 We consider that the two homosexual offences should not continue to exist in our statute books. The principles of gender neutrality and avoidance of distinctions based on sexual orientation would lead to homosexual offences being removed. As such, these offences should be abolished.¹⁴

3.126 In light of the unanimous support received, Preliminary Recommendation 20 is not amended.

Final Recommendation 20

We recommend that the offence of homosexual buggery with or by man under 16 (section 118C of the Crimes Ordinance (Cap 200)) and gross indecency with or by man under 16 (section 118H of the Crimes Ordinance (Cap 200)) should be abolished upon the enactment of the new legislation.

Preliminary Recommendation 21: Abduction of an unmarried girl under 16 and abduction of an unmarried girl under 18 for sexual intercourse be abolished

3.127 The Sub-committee recommended that the offences of abduction of an unmarried girl under 16 (section 126 of the Crimes Ordinance) and abduction of an unmarried girl under 18 for sexual intercourse (section 127 of

¹⁴ We are aware that the Court of First Instance handed down its judgment in *Yeung Chu Wing v Secretary for Justice* [2019] HKCFI 1431, HCAL 753/2017 on 30 May 2019, declaring sections 118G, 118H, 118J(1) and 118K of the Crimes Ordinance to be inconsistent with Article 25 of the Basic Law and Article 22 of the Hong Kong Bill of Rights. With regard to sections 118C, 118I and 141(c) of the Crimes Ordinance, the Court ruled that it should adopt the respective remedial interpretations as set out in the judgment.

the Crimes Ordinance) should be abolished upon the enactment of the new legislation.

Consultees' responses

3.128 We received vast majority support for this recommendation.

Our views

3.129 These two abduction offences are gender-specific. There are no valid reasons why these two offences should apply to girls but not boys.

3.130 Further, the two abduction offences are anachronistic in that they draw a difference between unmarried and married girls as regards participation in sexual activity. They also imply that a guardian or parent's approval is required if an unmarried girl should choose to leave home to have sex. These two abduction offences were repealed in England and Wales in 2003.

3.131 We are not aware of any case that has come before the court, at least in the past decade, which involves a charge for any of the two abduction offences in sections 126 and 127. There appears to be no practical reason for retaining the two offences. As such, these offences should be abolished.

3.132 Preliminary Recommendation 21 is not amended.

Final Recommendation 21

We recommend that the offences of abduction of an unmarried girl under 16 (section 126 of the Crimes Ordinance (Cap 200)) and abduction of an unmarried girl under 18 for sexual intercourse (section 127 of the Crimes Ordinance (Cap 200)) should be abolished upon the enactment of the new legislation.

Preliminary Recommendation 22: Proposed new offence of sexual grooming

3.133 The Sub-committee recommended a new offence of sexual grooming, along the lines of section 15 of the English Act. In particular, it was recommended that apart from meeting the child or travelling with the intention of meeting the child, sexual grooming may also be constituted by making arrangements to travel with the intention to meet the child. Further, it should be an ingredient of the offence that the accused did not reasonably believe that the child was 16 or over at the time of the offence.

3.134 The Sub-committee also recommended that the "fictitious young person" provision in section 131B(1A) of the New Zealand Crimes Act 1961 should be adopted.

Consultees' responses

3.135 We received vast majority support for this recommendation. Most of the responses welcome this new offence and highlighted the need to protect children and young persons in light of the surging internet age, and the often grossly underreported child molestation and paedophilia cases.

Our views

3.136 Sexual grooming refers to the phenomenon of a paedophile who "grooms" a child with a view to engaging in conduct which constitutes a sexual crime against the child. A paedophile may groom a child by communicating on a number of occasions with the child in order to gain the child's trust and confidence. This is often done through electronic means and it is commonly carried out on a mobile phone or on the internet. The paedophile would eventually arrange to meet the child with the intention of sexually abusing the child victim when they meet.

3.137 The merit of legislation related to sexual grooming is that it allows police to take early action to investigate suspected cases of abuse or proposed abuse of children and young persons. It may prevent commission of the actual sexual crimes against children and young persons, serve as a deterrent to would-be sex predators and enhance protection of children and young persons against sexual exploitation.

3.138 Another issue is whether the new offence should require meeting or communication between the perpetrator and the child victim on one earlier occasion only (the New Zealand and Scottish approach) or at least two earlier occasions (the English and Singaporean approach).¹⁵ Our view is that "grooming" means an extended, planned and continuous process and it would be too draconian to require meeting or communication with the young person on one earlier occasion only.

3.139 We also maintain the view that the new offence should be constituted by a perpetrator proceeding to meet or travel to meet a child with the intention to commit a sexual offence on a child, and having met or communicated with the child on at least two earlier occasions.

3.140 The new offence should also be constituted by making arrangements to travel. By including making arrangements to travel, it would be unnecessary to prove an attempt which is difficult. We consider that the

¹⁵ See paragraphs 8.12 to 8.25 of the Second CP.

New Zealand approach should be adopted to avoid any problem relating to the law of attempt.

3.141 The new "fictitious young person" provision will enable a prosecution in a situation where the accused believes he or she is communicating with a person under 16 but is in fact communicating with a police constable operating in a covert role. In sexual grooming cases, those children being groomed by paedophiles may not co-operate with the police in investigation. In order to carry out an effective investigation, a police officer could pretend to be a child in communicating with the groomer. The police could nip the matter in the bud and catch the groomer before a child was actually sexually abused.

3.142 Regarding whether reasonable belief in the child's age should be an ingredient or a defence, our view is that as in the majority of sexual grooming cases, there is no physical contact between an accused and the child, it may be difficult for the accused to take reasonable steps to ascertain whether the child is under 16 or not. Moreover, the harm to the children in sexual grooming cases is less than that in other cases because sexual grooming is a preventive offence and does not seek to punish the accused for actual harm done to the victims. It would be too harsh to require the accused to prove reasonable belief in the child's age. We therefore take the view that the ingredient approach should be adopted for sexual grooming. The Prosecution would have the burden of proving beyond reasonable doubt the accused did not reasonably believe that the child was 16 or over.

3.143 Preliminary Recommendation 22 is not amended.¹⁶

Final Recommendation 22

We recommend that the new legislation should include an offence of sexual grooming, along the lines of section 15 of the English Sexual Offences Act 2003.

We also recommend that apart from meeting the child or travelling with the intention of meeting the child, sexual grooming may also be constituted by making arrangements to travel with the intention to meet the child.

We also recommend that it should be an ingredient of the offence that the accused did not reasonably believe that the child was 16 or over at the time of the offence.

¹⁶ We note that the concept of sexual grooming does not include the making of child pornography. While a review of law in relation to child pornography does not fall within the Sub-committee's terms of reference as explained in paragraphs 1.8 to 1.10 of this Report, it is noted that the making of child pornography is an offence by virtue of section 3 of the Prevention of Child Pornography Ordinance (Cap 579).

We also recommend that the "fictitious young person" provision in section 131B(1A) of the New Zealand Crimes Act 1961 should be adopted.

Preliminary Recommendation 23: Proposed new offence: Inducement, threat or deception to procure sexual activity with a PMI

3.144 The Sub-committee recommended that the new legislation should include an offence of inducement, threat or deception to procure sexual activity with a PMI, along the lines of section 34(1) of the English Act. The Sub-committee also recommended that the proposed offence should cover both penetrative and non-penetrative sexual activity.

Consultees' responses

3.145 We received overwhelming support for this recommendation.

Our views

3.146 In Chapter 10 of the Second CP, the Sub-committee considered the approaches that may be adopted for reform of legislation in respect of PMIs. Consistent with that consideration, the Sub-committee has proposed a range of new offences involving PMIs. We have considered whether in the light of those recommendations some existing offences should be abolished and whether the current definition of mentally incapacitated person ("MIP") should be retained or amended in some way.

3.147 There are no existing offences to address potential exploitation of PMIs by perpetrators using exploitative means to obtain the consent of those PMIs. Nor do the existing offences take into account the sexual autonomy of those PMIs who do have the capacity to consent.

3.148 The proposed new offence in Preliminary Recommendation 23 is modelled on the offence of "*inducement, threat or deception to procure sexual activity with a person with a mental disorder*" in section 34(1) of the English Act. The proposed offence would cover a situation where a person touches a PMI sexually and the PMI's consent is obtained by means of inducement, threat or deception.

3.149 In light of the overwhelming support received, Preliminary Recommendation 23 is retained.

Final Recommendation 23

We recommend that the new legislation should include an offence of inducement, threat or deception to procure sexual activity with a person with mental impairment, along the lines of section 34(1) of the English Sexual Offences Act 2003.

We also recommend that the proposed offence should cover both penetrative and non-penetrative sexual activity.

Preliminary Recommendation 24: Proposed new offence: Causing a PMI to engage in or agree to engage in sexual activity by inducement, threat or deception

3.150 The Sub-committee recommended that the new legislation should include an offence of causing a PMI to engage in or agree to engage in sexual activity by inducement, threat or deception, along the lines of section 35(1) of the English Act.

Consultees' responses

3.151 We received overwhelming support for this recommendation.

Our views

3.152 This proposed new offence is modelled on the offence of "*causing a person with a mental disorder to engage in or agree to engage in sexual activity by inducement, threat or deception*" in section 35(1) of the English Act.

3.153 The proposed offence would cover a situation where a person causes a PMI to engage in, or to agree to engage in, a sexual activity by means of inducement, threat or deception.

3.154 In light of the overwhelming support received, Preliminary Recommendation 24 is not amended.

Final Recommendation 24

We recommend that the new legislation should include an offence of causing a person with mental impairment to engage in or agree to engage in sexual activity by inducement, threat or deception, along the lines of section 35(1) of the English Sexual Offences Act 2003.

Preliminary Recommendation 25: Proposed new offence: Engaging in sexual activity in the presence, procured by inducement, threat or deception, of a PMI

3.155 The Sub-committee recommended that the new legislation should include an offence of engaging in sexual activity in the presence, procured by inducement, threat or deception, of a PMI, along the lines of section 36(1) of the English Act. In order to constitute the offence, the accused's act should be for the purpose of obtaining sexual gratification, humiliating, distressing or alarming the PMI, or any combination of these purposes.

Consultees' responses

3.156 We received overwhelming support for this recommendation.

Our views

3.157 This proposed new offence is modelled on the offence of *"engaging in sexual activity in the presence, procured by inducement, threat or deception, of a person with a mental disorder"* in section 36(1) of the English Act.

3.158 The proposed offence would cover a situation where a person engages in sexual activity in the presence of a PMI for the purpose of obtaining sexual gratification, humiliating, distressing or alarming the PMI, or any combination of these purposes. In order to constitute the proposed offence, the PMI's "consent" to his or her presence should be obtained by inducement, threat or deception.

3.159 In light of the overwhelming support received, Preliminary Recommendation 25 is not amended.

Final Recommendation 25

We recommend that the new legislation should include an offence of engaging in sexual activity in the presence, procured by inducement, threat or deception, of a person with mental impairment, along the lines of section 36(1) of the English Sexual Offences Act 2003.

In order to constitute the offence, the accused's act should be for the purpose of obtaining sexual gratification, humiliating, distressing or alarming the person with mental impairment, or any combination of these purposes.

Preliminary Recommendation 26: Proposed new offence: Causing a PMI to watch a sexual act by inducement, threat or deception

3.160 The Sub-committee recommended that the new legislation should include an offence of causing a PMI to watch a sexual act by inducement, threat or deception, along the lines of section 37(1) of the English Act. In order to constitute the offence, the accused's act should be for the purpose of obtaining sexual gratification, humiliating, distressing or alarming the PMI, or any combination of these purposes.

Consultees' responses

3.161 We received overwhelming support for this recommendation.

Our views

3.162 This proposed new offence is modelled on the offence of "*causing a person with a mental disorder to watch a sexual act by inducement, threat or deception*" in section 37(1) of the English Act. The proposed offence would cover a situation where a person causes a PMI to watch a third person engaging in a sexual activity, or to look at an image of any person engaging in a sexual activity for the purpose of obtaining sexual gratification, humiliating, distressing or alarming the PMI, or any combination of these purposes. In order to constitute the proposed offence, the PMI's consent to watch a third person engaging in a sexual activity, or look at an image of any person engaging in a sexual activity should be obtained by inducement, threat or deception.

3.163 In light of the overwhelming support received, we do not consider that we need to amend Preliminary Recommendation 26.

Final Recommendation 26

We recommend that the new legislation should include an offence of causing a person with mental impairment to watch a sexual act by inducement, threat or deception, along the lines of section 37(1) of the English Sexual Offences Act 2003.

In order to constitute the offence, the accused's act should be for the purpose of obtaining sexual gratification, humiliating, distressing or alarming the person with mental impairment, or any combination of these purposes.

Preliminary Recommendation 27: Proposed new offence: Sexual activity with a PMI (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency

3.164 The Sub-committee recommended that the new legislation should include an offence of sexual activity with a PMI (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency. This proposed offence should cover touching or penetration which is sexual.

Consultees' responses

3.165 We received overwhelming support for this recommendation.

Our views

3.166 This proposed new offence is modelled on the offence of "*sexual activity with a person with a mental disorder by care workers*" in section 38(1) of the English Act.

3.167 The proposed offence would cover a situation where a person, who is involved in the care of a PMI or who abuses a position of trust or authority, or a relationship of dependency, in relation to the PMI, sexually touches or penetrates the PMI.

3.168 In light of the overwhelming support received, Preliminary Recommendation 27 is not amended.

Final Recommendation 27

We recommend that the new legislation should include an offence of sexual activity with a person with mental impairment (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency.

This proposed offence should cover touching or penetration which is sexual.

Preliminary Recommendation 28: Proposed new offence: Causing or inciting sexual activity of a PMI (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency

3.169 The Sub-committee recommended that the new legislation should include an offence of causing or inciting sexual activity of a PMI (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency.

Consultees' responses

3.170 We received overwhelming support for this recommendation.

Our views

3.171 This proposed new offence is modelled on the offence of "*causing or inciting sexual activity by care workers*" in section 39(1) of the English Act.

3.172 The proposed offence would cover a situation where a person who is involved in the care of a PMI or who abuses a position of trust or authority, or a relationship of dependency, in relation to the PMI, causes or incites the PMI to engage in a sexual activity.

3.173 In light of the overwhelming support received, Preliminary Recommendation 28 is not amended.

Final Recommendation 28

We recommend that the new legislation should include an offence of causing or inciting sexual activity of a person with mental impairment (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency.

Preliminary Recommendation 29: Proposed new offence: Sexual activity in the presence of a PMI (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency

3.174 The Sub-committee recommended that the new legislation should include an offence of sexual activity in the presence of a PMI (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency. In order to constitute the proposed offence, the accused's act should be for the purpose of obtaining sexual gratification, humiliating, distressing or alarming a PMI, or any combination of these purposes.

Consultees' responses

3.175 We received overwhelming support for this recommendation.

Our views

3.176 This proposed offence is modelled on the offence of "*sexual activity in the presence of a person with a mental disorder by care workers*" in section 40(1) of the English Act.

3.177 The proposed offence would cover a situation where a person who is involved in the care of a PMI or who abuses a position of trust or authority, or a relationship of dependency, in relation to a PMI, engages in sexual activity in the presence of a PMI for the purpose of obtaining sexual gratification, humiliating, distressing or alarming a PMI, or any combination of these purposes.

3.178 In light of the overwhelming support received, Preliminary Recommendation 29 is not amended.

Final Recommendation 29

We recommend that the new legislation should include an offence of sexual activity in the presence of a person with mental impairment (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency.

In order to constitute the proposed offence, the accused's act should be for the purpose of obtaining sexual gratification, humiliating, distressing or alarming a person with mental impairment, or any combination of these purposes.

Preliminary Recommendation 30: Proposed new offence: Causing a PMI to watch a sexual act (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency

3.179 The Sub-committee recommended that the new legislation should include an offence of causing a PMI to watch a sexual act (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency. In order to constitute the proposed offence, the accused's act should be for the purpose of obtaining sexual gratification, humiliating, distressing or alarming a PMI, or any combination of these purposes.

Consultees' responses

3.180 We received overwhelming support for this recommendation.

Our views

3.181 The proposed offence of causing a person with mental impairment to watch a sexual act (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency is modelled on the offence of "*causing a person with a mental disorder to watch a sexual act by care workers*" in section 41(1) of the English Act.

3.182 The proposed offence would cover a situation where a person, who is involved in the care of a PMI or who abuses a position of trust or authority, or a relationship of dependency, in relation to the PMI, causes the PMI to watch a third person engaging in sexual activity, or to look at an image of any person engaging in sexual activity, for the purpose of obtaining sexual

gratification, humiliating, distressing or alarming a PMI, or any combination of these purposes.

3.183 In light of the overwhelming support received, Preliminary Recommendation 30 is not amended.

Final Recommendation 30

We recommend that the new legislation should include an offence of causing a person with mental impairment to watch a sexual act (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency.

In order to constitute the proposed offence, the accused's act should be for the purpose of obtaining sexual gratification, humiliating, distressing or alarming a person with mental impairment, or any combination of these purposes.

Preliminary Recommendation 31: Proposed definition of situations where a relationship of care exists

3.184 The Sub-committee recommended that a relationship of care should exist if a person (A) who is involved in the care of a PMI (B) in any one of two situations:

- (1) A is any person employed or not in a specified institution and who has a function to perform or provides volunteering service in that defined institution.
- (2) A is a provider of care, assistance or services to B in connection with B's mental illness.

3.185 The Sub-committee further recommended that the meaning of specified institutions should be determined by the Administration when the new legislation is put in place.

Consultees' responses

3.186 We received overwhelming support for this recommendation.

Our views

3.187 Preliminary Recommendation 31 defined the situations where a relationship of care exists. We maintain the view that a relationship of care should exist in two situations where care is provided to PMIs.

3.188 Firstly, this category of offences should cover PMIs receiving care in specified institutions. These persons should be protected from any form of sexual activity with *"any person employed or not in a specified institution and who has function to perform or providing volunteering service in that specified institution"* (modelling on sections 42(2)(b) and 42(4)(a) of the English Act with modifications). The scope of the offences in this first situation would cover sexual exploitation of PMIs by persons who have a function to perform in the institution irrespective of whether they are employees of the institution or not. These offences would also cover sexual exploitation committed by volunteers who provide services at specified institutions. This would prevent perpetrators trying to sexually exploit PMIs under the guise of providing volunteer service. However, mere visitors to a specified institution who have no function to perform in the institution would not be covered.

3.189 As to the categories of specified institutions to be covered, our view is that it should be determined by the Government when the new legislation is put in place. The Government would be in a sound position to decide this in collaboration with relevant stakeholders.

3.190 Secondly, this category of offences should cover situations where a person is a *"provider of care, assistance or services to B in connection with B's mental disorder or mental handicap"* (modelling on section 42(4)(a) of the English Act with modifications).

3.191 This second situation would cover care providers outside specified institutions.

3.192 In light of the overwhelming support received, Preliminary Recommendation 31 is retained with some slight textual changes.

Final Recommendation 31

We recommend that a relationship of care should exist if a person (A) who is involved in the care of a person with mental impairment (B) in any one of two situations:

firstly, A is any person who has a function to perform in a specified institution (whether employed there or not) or provides volunteering service in that institution.

secondly, A is a provider of care, assistance or services to B in connection with B's mental illness.

We further recommend that the meaning of specified institutions should be determined by the Government when the new legislation is put in place.

Preliminary Recommendation 32: Exceptions where the care provider and the PMI are married or in pre-existing relationship

3.193 The Sub-committee recommended that in respect of the proposed new offences covering situations where a relationship of care exists, there should be exceptions to liability (i) where the PMI and the person who is involved in his or her care are married; or (ii) where there is a lawful sexual relationship between them which pre-dated the care relationship. The Sub-committee further recommended that the exception in respect of pre-existing sexual relationship should apply where a lawful sexual relationship existed between the parties within a reasonable period before a party became involved in the care, assistance or services of a person with mental impairment.

Consultees' responses

3.194 This recommendation received support from the majority. Those dissenting expressed that one should not presume PMIs would not be subjected to marital rape.

Our views

3.195 An exception to liability may be provided for where the care provider and the PMI are married. Under the exception in section 43(1) of the English Act, a person (A) would not have liability under any of the offences in this category if the PMI (B) is 16 or over; and A and B are married.

3.196 Under another exception in section 44(1) and (2) of the English Act, a person (A) would not have liability under any of the offences in this category if a lawful sexual relationship existed between A and the PMI (B) immediately before A became involved in B's care (ie A falling within a relationship of care as defined in section 42).

3.197 This exception would cover the situation where A and B, who are an unwed couple (such as boyfriend and girlfriend), had had a lawful sexual relationship immediately before B developed a mental illness or before B was admitted to the care of A; and A and B continue the sexual relationship. As

this exception applies to a lawful sexual relationship, it would apply to a pre-existing consensual sexual relationship between A and B only.

3.198 Our view is that there should be an exception for a sexual relationship which pre-dates the care relationship. Otherwise a person who previously had a sexual relationship with a PMI might be deterred from taking care of him/her. The offences in this category would apply to PMIs who are capable of consenting to sexual activity. The exception would give effect to their sexual autonomy by allowing a consensual sexual relationship to continue after the PMI has developed mental illness or after the PMI is admitted to the care of the other person. This will also answer the concerns raised on "marital rape" as mentioned in paragraph 3.194 above.

3.199 While we consider that there is a case for the exception, we consider that *"immediately before A became involved in B's care"* may be too restrictive. Hence, we take the view that the exception should apply where a lawful sexual relationship existed between A and B *"within a reasonable period before A became involved in B's care, assistance or services"*. There is no good reason why a boyfriend and a girlfriend who had been in a consensual sexual relationship within a reasonable period before one of them developed mental illness or was admitted to the care of the other should not be allowed to continue that relationship.

3.200 In light of the support received, Preliminary Recommendation 32 is not amended.

Final Recommendation 32

We recommend that in respect of the proposed new offences covering situations where a relationship of care exists, there should be exceptions to liability (i) where the person with mental impairment and the person who is involved in his or her care are married; or (ii) where there is a lawful sexual relationship between them which pre-dates the care relationship.

We further recommend that the exception in respect of pre-existing sexual relationship should apply where a lawful sexual relationship had existed between the parties *within a reasonable period* before a party became involved in the care, assistance or services of a person with mental impairment.

Preliminary Recommendation 33: Requirement as to knowledge of mental illness

3.201 The Sub-committee recommended that it should be a requirement of the proposed new offences involving PMIs that the accused had actual or constructive knowledge that the victim was a PMI.

Consultees' responses

3.202 We received overwhelming support for this recommendation.

Our views

3.203 It is an ingredient of the offence under the English Act that the accused must have actual or constructive knowledge that the victim was a person with a mental disorder.

3.204 We have considered whether there should be such a requirement. This category of offences provides protection for PMIs who have the capacity to consent to sexual activity. As the extent of mental impairment of these persons may not be very severe, others may not be able to know from their demeanour that they suffer from mental illness. It would only be fair to the accused that he or she should not be held liable if he or she did not have actual or constructive knowledge that the other party to the sexual activity was a PMI. We therefore take the view that there should be such a requirement.

3.205 In light of the overwhelming support received, Preliminary Recommendation 33 is not amended.

Final Recommendation 33

We recommend that it should be a requirement of the proposed new offences involving persons with mental impairment that the accused had actual or constructive knowledge that the victim was a person with mental impairment.

Preliminary Recommendation 34: Evidential burden as regards the accused's knowledge of the victim's mental illness

3.206 The Sub-committee recommended that in respect of the proposed new offences involving PMIs covering situations where a relationship of care exists and those involving abuse of a position of trust or authority, or a

relationship of dependency, there should be a provision imposing an evidential burden on an accused as regards the accused's knowledge of the victim's mental illness, along the lines of sections 38(2), 39(2), 40(2) and 41(2) of the English Act.

Consultees' responses

3.207 We received overwhelming support for this recommendation.

Our views

3.208 We are in favour of the English provisions.¹⁷ As persons who are involved in care of PMIs are close to the persons under their care, it is natural that they would know or reasonably be expected to know the persons under their care are mentally ill. In the vast majority of cases, it is unlikely to be an issue, and so providing for an evidential burden by legislation may help to avoid unnecessary complication in those cases.

3.209 As such, Preliminary Recommendation 34 is not amended save as to replace "illness" with "impairment" for consistency.

Final Recommendation 34

We recommend that in respect of the proposed new offences involving persons with mental impairment covering situations where a relationship of care exists and those involving abuse of a position of trust or authority, or a relationship of dependency, there should be a provision imposing an evidential burden on an accused as regards the accused's knowledge of the victim's mental impairment, along the lines of sections 38(2), 39(2), 40(2) and 41(2) of the English Sexual Offences Act 2003.

Preliminary Recommendation 35: Proposed new offences involving PMIs applicable to mentally disordered persons or mentally handicapped persons

3.210 The Sub-committee recommended that the proposed new offences involving PMIs should apply to mentally disordered persons or

¹⁷ Sections 38(2), 39(2), 40(2), and 41(2) of the English Act provide as follows:
"Where in proceedings for an offence under this section it is proved that the other person had a mental disorder, it is to be taken that the defendant knew or could reasonably have been expected to know that that person had a mental disorder unless sufficient evidence is adduced to raise an issue as to whether he knew or could reasonably have been expected to know it."

mentally handicapped persons (as defined in the Mental Health Ordinance (Cap 136) ("MHO")).¹⁸

Consultees' responses

3.211 We note there were two major groups of responses received. The first group, which also represents the majority of the responses received, was in support of Preliminary Recommendation 35. They were in favour of broadening the existing protection to cover all mentally impaired persons.

3.212 On the other hand, the second group of responses was concerned that by removing the second limb from the definition of a MIP under the MHO, the definition of a PMI would be too broad as it would catch those PMIs who suffered from a relatively minor degree of mental disorder or mental handicap or a kind of mental illness which would be unlikely to render them vulnerable to sexual exploitation (eg bipolar disorder). They believe it would go against the principle of sexual autonomy.

Our views

3.213 Section 117(1) of the Crimes Ordinance defines a MIP for the purposes of the sexual offences (in Part XII of the Crimes Ordinance).

3.214 Section 117(1) provides that a MIP means:

"a mentally disordered person or a mentally handicapped person (within the meaning of the Mental Health Ordinance (Cap 136)) whose mental disorder or mental handicap, as the case may be, is of such a nature or degree that that person is incapable of living an independent life or guarding himself against serious exploitation, or will be so incapable when of an age to do so."

¹⁸ Section 2(1) of the MHO defines a mentally disordered person and a mentally handicapped person as follows:

Mentally disordered person

- A mentally disordered person means "a person suffering from mental disorder".

- As the definition refers to "mental disorder", one must then refer to the definition of mental disorder in the interpretation section. Mental disorder is defined in section 2(1) as:

"(a) mental illness;

(b) a state of arrested or incomplete development of mind which amounts to a significant impairment of intelligence and social functioning which is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned;

(c) psychopathic disorder; or

(d) any other disorder or disability of mind which does not amount to mental handicap, and 'mentally disordered' shall be construed accordingly."

Mentally handicapped person

- A mentally handicapped person means "a person who is or appears to be mentally handicapped".

- As the definition refers to "mentally handicapped", one must then refer to the definition of mental handicap in the interpretation section. Mental handicap is defined in section 2(1) as:

"sub-average general intellectual functioning with deficiencies in adaptive behaviour, and 'mentally handicapped' shall be construed accordingly."

3.215 Hence, in order to fall within the definition of a MIP under section 117(1), two limbs must be satisfied:

- (i) a mentally disordered person or a mentally handicapped person as defined in the MHO; and
- (ii) incapability of living an independent life or guarding himself against serious exploitation, or will be so incapable when of an age to do so.

3.216 As the second limb of the current definition of a MIP requires that a mentally disordered or handicapped person be "incapable of living an independent life or guarding himself against serious exploitation, or will be so incapable when of an age to do so", it applies only to a person with a relatively significant mental impairment.

3.217 Our view is that the current definition of a MIP is unsatisfactory in that if the victim cannot satisfy the high requirements of the second limb, he or she cannot be classified as a MIP and would not be afforded adequate protection against exploitation. As the proposed new offences seek to strike a proper balance between respecting the sexual autonomy of those persons whose extent of mental impairment is not so severe as to prevent their capacity to consent and the need to protect them from sexual exploitation, the Sub-committee's earlier view was that the second limb should be removed from the definition of a PMI in the new legislation. With such a proposal, the new proposed offences involving PMIs would apply to any mentally disordered person or mentally handicapped person.

3.218 However, we noted the justifiable concern expressed by some consultees that the removal of the second limb from the definition of a MIP could result in unnecessarily restricting the sexual autonomy of a person who has suffered from a relatively minor degree of mental disorder or mental handicap or a kind of mental illness which, particularly when under proper treatment, would be unlikely to render them vulnerable to sexual exploitation.

3.219 To address such a concern, we have further reviewed some of the Australian legislation with a view to finding a constructive answer. Having examined the laws of different Australian states and territories, we find the definition of "*incapable person*" in section 330 of the CCA to be a useful reference.

3.220 Section 330 of the CCA provides for sexual offences against an incapable person:-

"330. Incapable person, sexual offences against

- (1) *In this section a reference to an incapable person is a reference to a person who is so mentally impaired as to be incapable —*

- (a) *of understanding the nature of the act the subject of the charge against the accused person; or*
- (b) *of guarding himself or herself against sexual exploitation.*
- (2) *A person who sexually penetrates a person who the offender knows or ought to know is an incapable person is guilty of a crime and is liable to the punishment in subsection (7).*

.....

- (9) *It is a defence to a charge under this section to prove the accused person was lawfully married to the incapable person."*

(emphasis added)

3.221 Section 1 of the CCA defines "*mental impairment*" and "*mental illness*" as follows:-

*"The term **mental impairment** means intellectual disability, mental illness, brain damage or senility;*

*The term **mental illness** means an underlying pathological infirmity of the mind, whether of short or long duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli;"*

(emphasis added)

3.222 For an accused to be convicted under section 330(1)(b) and 330(2) of the CCA, the Prosecution needs to prove:-

- (1) the victim is mentally impaired (ie intellectual disability, mental illness – *meaning an underlying pathological infirmity of the mind, whether of short or long duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli*, brain damage or senility);
- (2) the victim is so mentally impaired as to be incapable of guarding himself or herself against sexual exploitation; and
- (3) the accused sexually penetrates the victim who the accused knows or ought to know that the victim is an incapable person.

3.223 Unlike the position in Hong Kong, the CCA has its own definition of an "*incapable person*" for sexual offences and makes no reference to the Mental Health Act.¹⁹

¹⁹ Section 6 of the Mental Health Act 2014 defines when a person has mental illness:-

3.224 In the Western Australia case *Cox v The State of Western Australia*,²⁰ the Court was satisfied that the expression "*guarding against sexual exploitation*" in section 330(1)(b) of the CCA should be given its ordinary everyday meaning. Hence, for an incapable person to be capable of guarding himself/herself against sexual exploitation, he/she must be capable of taking the appropriate precautions against or resisting being taken advantage of by someone for his/her own sexual gratification.

3.225 Having considered the responses received and the abovementioned Western Australia provision, we have come to the view that it would be beneficial to add a similar qualification to Preliminary Recommendation 35 (ie incapable of guarding against sexual exploitation). By adding such a qualification, it will help to address the justifiable concern about the definition of the PMI being too wide.

3.226 We therefore recommend the retention of Preliminary Recommendation 35, with the addition of a qualification similar to the wording of the CCA at the end, namely "whose mental disorder or mental handicap, as the case may be, is of a nature or degree that the person is incapable of guarding himself or herself against sexual exploitation".

"6. When person has a mental illness

- (1) A person has a mental illness if the person has a condition that —
 - (a) is characterised by a disturbance of thought, mood, volition, perception, orientation or memory; and
 - (b) significantly impairs (temporarily or permanently) the person's judgment or behaviour.
- (2) A person does not have a mental illness merely because one or more of these things apply —
 - (a) the person holds, or refuses or fails to hold, a particular religious, cultural, political or philosophical belief or opinion;
 - (b) the person engages in, or refuses or fails to engage in, a particular religious, cultural or political activity;
 - (c) the person is, or is not, a member of a particular religious, cultural or racial group;
 - (d) the person has, or does not have, a particular political, economic or social status;
 - (e) the person has a particular sexual preference or orientation;
 - (f) the person is sexually promiscuous;
 - (g) the person engages in indecent, immoral or illegal conduct;
 - (h) the person has an intellectual disability;
 - (i) the person uses alcohol or other drugs;
 - (j) the person is involved in, or has been involved in, personal or professional conflict;
 - (k) the person engages in anti-social behaviour;
 - (l) the person has at any time been —
 - (i) provided with treatment; or
 - (ii) admitted by or detained at a hospital for the purpose of providing the person with treatment.
- (3) Subsection (2)(i) does not prevent the serious or permanent physiological, biochemical or psychological effects of the use of alcohol or other drugs from being regarded as an indication that a person has a mental illness.
- (4) A decision whether or not a person has a mental illness must be made in accordance with internationally accepted standards prescribed by the regulations for this subsection."

Final Recommendation 35

We recommend that the proposed new offences involving persons with mental impairment should apply to a mentally disordered person or mentally handicapped person (as defined in the Mental Health Ordinance (Cap 136)) whose mental disorder or mental handicap, as the case may be, is of a nature or degree that the person is incapable of guarding himself or herself against sexual exploitation.

Preliminary Recommendation 36: Draftsman to decide what term to describe the PMI

3.227 The Sub-committee recommended that the issue as to what term to be used to describe the PMI in the new legislation should be left to the draftsman to decide.

Consultees' responses

3.228 We received overwhelming support for this recommendation.

Our views

3.229 The main drawback of the existing term MIP is that it refers to a person who is "incapacitated" mentally. That is to say, literally speaking it refers to persons of such significant mental impairment that they have no mental capacity at all. That is also the meaning conveyed by the term MIP in Chinese (精神上無行為能力的人). However, our proposed new offences in this chapter would apply to those people with some mental impairment but who are capable of consenting to sexual activity. If the existing term continues to be used in the new legislation but without reference to the "incapability" limb, it may be confusing to the public. Furthermore, the term MIP seems to be outdated and is not used in similar legislation overseas.

3.230 Our view is that a new term should be used. However, it is perhaps best left to the draftsman to decide what term should be used in the new legislation. The draftsman would be in a better position than us to decide on the choice of appropriate terminology.

3.231 In light of the aforesaid, Preliminary Recommendation 36 is not amended.

Final Recommendation 36

We recommend that the issue as to what term is to be used to describe the person with mental impairment in the new legislation should be left to the draftsman to decide.

Preliminary Recommendation 37: A man committing buggery with a MIP, a man committing gross indecency with a male MIP, a man having intercourse with a woman MIP be abolished

3.232 The Sub-committee recommended that the offences of a man committing buggery with a MIP (section 118E of Crimes Ordinance), a man committing gross indecency with a male MIP (section 118I of Crimes Ordinance), a man having intercourse with a woman MIP (section 125 of Crimes Ordinance) should be abolished upon the enactment of the new legislation.

Consultees' responses

3.233 We received overwhelming support for this recommendation.

Our views

3.234 The offences of a man committing buggery with a MIP and a man having intercourse with a woman MIP are gender-specific. The offence of a man committing gross indecency with a male MIP is gender-specific and based on sexual orientation. These offences are inconsistent with the principles of gender neutrality and/or avoidance of distinctions based on sexual orientation and should therefore be removed. The conduct covered by these offences would be caught by the general non-consensual sexual offences and/or the offences involving PMIs which are gender neutral, recommended in this Report.

3.235 In view of the overwhelming support, Preliminary Recommendation 37 is not amended.

Final Recommendation 37

We recommend that the offences of a man committing buggery with a mentally incapacitated person (section 118E of Crimes Ordinance (Cap 200)), a man committing gross indecency with a male mentally incapacitated person (section 118I of Crimes Ordinance (Cap 200)), a man having intercourse with a woman mentally incapacitated person (section 125 of Crimes Ordinance (Cap 200)) should be abolished upon the enactment of the new legislation.²¹

Preliminary Recommendation 38: Abduction of a MIP from her or his parent or guardian for a sexual act be abolished

3.236 The Sub-committee recommended that the offence of abduction of a MIP from her or his parent or guardian for a sexual act (section 128 of the Crimes Ordinance) should be abolished upon the enactment of the new legislation.

Consultees' responses

3.237 We received overwhelming support for this recommendation.

Our views

3.238 A similar offence (in section 21 of Sexual Offences Act 1956) was repealed in England and Wales in 2003.

3.239 We are not aware of any case that has come before the court, at least in the past few decades, which involves a charge for this offence. There appears to be no practical reason for retaining it. The removal of this offence from the statute book would not derogate from the protection of PMIs given our proposals for a whole new range of offences involving PMIs.

3.240 In light of the aforesaid, Preliminary Recommendation 38 is not amended.

²¹ See footnote 14 above regarding the recent judgment in *Yeung Chu Wing v Secretary for Justice*.

Final Recommendation 38

We recommend that the offence of abduction of a mentally incapacitated person from her or his parent or guardian for a sexual act (section 128 of the Crimes Ordinance (Cap 200)) should be abolished upon the enactment of the new legislation.

Preliminary Recommendation 39: Sexual intercourse with patients be abolished

3.241 The Sub-committee recommended that the offence of sexual intercourse with patients in section 65(2) of the MHO should be abolished upon the enactment of the new legislation.

Consultees' responses

3.242 We received overwhelming support for this recommendation.

Our views

3.243 This offence covers the situation where any male officer or employee of a mental hospital or the Correctional Services Department Psychiatric Centre has unlawful sexual intercourse with a woman detained there, or a male officer or employee of a mental or general hospital has unlawful sexual intercourse with a woman receiving treatment for a mental disorder. This offence is criticised for being gender-specific and covering penetrative sexual activity only.

3.244 In view of the overwhelming support received, there is no need to amend Preliminary Recommendation 39.

Final Recommendation 39

We recommend that the offence of sexual intercourse with patients in section 65(2) of the Mental Health Ordinance (Cap 136) should be abolished upon the enactment of the new legislation.

Preliminary Recommendation 40: Whether there should be legislation for the protection of young persons aged 16 or above but under 18 be considered by the Hong Kong community

3.245 The Sub-committee took the view that the issue as to whether there should be legislation for the protection of young persons aged 16 or above but under 18 should be considered by the Hong Kong community. Accordingly, the Sub-committee invited the community to express their views on the issue.

Consultees' responses

3.246 The majority of responses were in favour of legislation for the protection of young persons aged 16 or above but under 18. Their main reason was to cast a wider net so that more people could be protected under the protective principle.

3.247 Those opposed to this approach expressed that non-consensual sexual acts should be unlawful regardless of the age of the victim. As such, they failed to see the need to protect a specific group of people. Furthermore, they believed once a person has reached the age of consent (ie 16), one should not be barred from sexual activity if there is consent.

The Sub-committee's recommendations and our views

3.248 In Chapter 12 of the Second CP (paragraphs 12.31 to 12.49), the Sub-committee stated its views in the event that the responses of the community were in favour of legislation. The Sub-committee has also given consideration to the extent of the protection to be given. We have considered the Sub-committee's recommendations and have the following views.

Should criminalisation extend to both penetrative and non-penetrative sexual activity?

3.249 We agree that all forms of sexual activity, both penetrative and non-penetrative, should be criminalised as in many cases the harm of non-penetrative sexual activity can be as serious as that of penetrative sexual activity. This is consistent with Final Recommendation 7 of the First CP.

Should criminalisation be restricted to sexual activity conducted directly between the person in a position of trust and the young person only (and not sexual activity in which the young person does not directly participate)?

3.250 The English legislation²² criminalises not only sexual activity directly between the young person and the person in a position of trust, but also any form of sexual activity (eg the person in trust having sexual activity with a third party in presence of the young person; or causing the young person to watch a sexual act). On the other hand, the legislation in New South Wales²³ criminalises only direct sexual activity between the young person and the person having special care of the young person.

3.251 We agree that the legislation should not be limited to sexual activity conducted directly between the young person and a person in a position of trust. A number of sexual offences involving children are proposed in Chapter 7 of the Second CP. These proposed offences criminalise not only sexual activity conducted directly between the perpetrator and the child but also indirect forms of sexual exploitation, viz, engaging in sexual activity in the presence of a child (Preliminary Recommendation 13) and causing a child to look at a sexual image (Preliminary Recommendation 14). We agree that under the protective principle, children should be protected against these indirect forms of sexual exploitation. As young persons of 16 and 17 years are also children, we can see the merit in extending the protection to them.

Should there be an exhaustive list of positions of trust?

3.252 We consider that in adopting a statutory definition approach (as opposed to one without a statutory definition), there should be an exhaustive list specifying the relationships giving rise to a position of trust. This approach is adopted in England and Wales, New South Wales and Scotland.²⁴

3.253 We agree that the statutory definition should contain an exhaustive list specifying the relationships that would give rise to a position of trust. Such a list would make it clear to people the type of relationships covered by the legislation.

3.254 A good precedent of an exhaustive list can be found in section 73(3) of the Crimes Act 1900 of New South Wales.²⁵ The list covers five types of relationships in both public and family contexts: (1) step-parent/guardian/foster parent and child (or de facto partner of parent/guardian/foster parent and child); (2) school teacher and pupil; (3)

²² See paragraphs 12.6 to 12.8 of the Second CP.

²³ See paragraphs 12.4 to 12.5 of the Second CP.

²⁴ There is no statutory definition of a position of trust or authority, or a relationship of dependency in the Canadian approach. We do not favour the Canadian approach for lacking of a statutory definition.

²⁵ See paragraphs 12.5 of the Second CP.

provider of religious, sporting, musical or other instruction and receiver of such instruction; (4) custodial officer and inmate; or (5) health professional and patient.

Should reasonable belief as to a young person's age be an ingredient of the offence or a defence?

English approach

3.255 It is an ingredient of the English offences involving abuse of a position of trust that the accused (A) did not reasonably believe that the young person (B) was 18 or over, where B was a person under 18:

"... either –

(i) *B is under 18 and A does not reasonably believe that B is 18 or over, or*

(ii) *B is under 13.*²⁶

3.256 As the reasonable belief provision is an ingredient of the offence, the prosecution must adduce evidence to show that A, at the time of the incident, did not reasonably believe B to be 18 or over. The prosecution would need to establish beyond reasonable doubt that A in fact knew, or should have reasonably known that B was under 18.

3.257 Where B is a child under 13, the prosecution need not prove that A did not make a genuine mistaken belief in the age of B. That is to say, the offence is of absolute liability.

Scottish approach

3.258 Section 45(1)(a) of the Scottish Act provides that it is "*a defence to a charge in proceedings*" for the offence of sexual abuse of trust (under section 42) against an accused (A) "*that A reasonably believed that B [the young person] had attained the age of 18*".

3.259 As the reasonable belief provision in the Scottish Act is a defence, it is not obligatory for the prosecution to adduce evidence to show that the accused did not reasonably believe the young person to be 18 or over. Rather, it is for the accused to raise the defence that the accused reasonably believed that the young person had attained the age of 16.

3.260 We do not favour the English ingredient approach since it would put a very considerable onus of proof on the prosecution.

3.261 We favour the Scottish defence approach. If an adult is in a relationship with a young person specified by law, he or she must take care to

²⁶ The English Act, sections 16(1)(e), 17(1)(e), 18(1)(f), 19(1)(e).

ensure that the young person is 18 or over. Moreover, parties to a specified relationship are not strangers to one another, so the young person's age should not be difficult to ascertain. It would not be unduly harsh on an accused to require him to raise a defence.

3.262 We agree to the suggestion of a defence approach to reasonable belief as to age in respect of offences involving children. In adopting this approach, we took the view that it could be improved by providing that *"one of the matters that is to be taken into account in determining whether a belief was reasonable is the question of what steps A took to ascertain B's age"*. It was our view that the defence approach as modified could strike an appropriate balance between recognising a genuine mistaken belief in the child's age and the protection of children from sexual exploitation.

3.263 We consider that in adopting the defence approach in respect of offences involving abuse of a position of trust, it should likewise be improved by providing that *"one of the matters that is to be taken into account in determining whether a belief was reasonable is the question of what steps A took to ascertain B's age"*.

Age of the young person

3.264 The legislation of Canada and New South Wales specifies that the offences apply to young persons between 16 and 18. We agree with this approach since it would distinguish offences involving abuse of a position of trust from offences involving children.

Our final view on whether there should be legislation for the protection of young persons aged 16 or above but under 18

3.265 We note that the majority of those who responded were in favour of legislation to protect young persons aged 16 or above but under 18. We agree that under the protective principle, young persons should also be protected from sexual exploitation, especially when it involves a person in a position of trust. That said, we have also reminded ourselves that one should not ignore the opposing views which argue that a person's sexual autonomy should be respected once the person has reached the age of consent (ie 16).

3.266 On this final issue, instead of recommending that there be legislation for the protection of young persons aged 16 or above but below 18, we believe the proper course to take is to recommend that the Government consider the need for such legislation from the policy angle, in consultation with the legislature as and when appropriate. Our view is that, ultimately, it would be a matter for the Government to decide whether protection should be given to the young persons aged between 16 and 18.

3.267 Preliminary Recommendation 40 is hence amended accordingly.

Final Recommendation 40

We recommend the Government to consider the merits in proposing legislation for the protection of young persons aged 16 or above but under 18 from the policy angle, and in consultation with the legislature as and when appropriate.

Preliminary Recommendation 41: Proposed new offences involving children (including sexual grooming) and those involving PMIs to have extraterritorial effect

3.268 The Sub-committee recommended that the proposed new offences involving children including sexual grooming and the proposed new offences involving PMIs should have extraterritorial effect.

Consultees' responses

3.269 We received overwhelming support for this recommendation.

Our views

3.270 We maintain our view that in order to ensure that the new legislation is effective in covering paedophiles who travel abroad to commit offences involving children, the English approach should be followed in providing for extraterritorial effect of the new offences involving children, including sexual grooming proposed by us in Preliminary Recommendation 22.

3.271 By the same token, we maintain our view that the proposed new offences involving PMIs should also have extraterritorial effect. There is no reason why the PMIs should not enjoy the same protection as children against perpetrators who travel abroad to commit sexual offences on them.

3.272 In light of the overwhelming responses received, Preliminary Recommendation 41 is retained.

Final Recommendation 41

We recommend that the proposed new offences involving children including sexual grooming and the proposed new offences involving persons with mental impairment should have extraterritorial effect.

Chapter 4

Overview of the Consultation Responses and our Final Recommendations –

Consultation Paper on Miscellaneous Sexual Offences

4.1 In May 2018, the Sub-committee issued the Third CP setting out nine recommendations for comment and discussion by the public. The consultation exercise ended on 15 August 2018, but substantial responses were received as late as 10 September 2018.

4.2 We have received 118 written responses from professional bodies, women affairs concern groups, children affairs concern groups, human rights concern groups, medical professionals, legal professional bodies, Government departments, social welfare concern groups, religious bodies, sexual orientation concern groups, other organisations and individuals. The written responses have provided us with valuable information and insight into this area of reform from different perspectives. These different views and perspectives have helped us re-shape some of the recommendations in the consultation paper and will be discussed below. We wish to thank all those who responded to the consultation paper once again for their contribution to this report.

Preliminary 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

4.3 The Sub-committee recommended that the offence of incest be retained and the term incest should continue to be used. The Sub-committee also recommended 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).

The Sub-committee was 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, the Sub-committee invited the community to express their views on these issues. Lastly, the Sub-committee recommended the retention of the need for the Secretary for Justice's consent to prosecute.

Consultees' responses

4.4 The vast majority was of the view that the term "incest" should continue to be used; that the new offence of incest should be gender neutral, cover all penile penetration of the mouth, vagina and anus, and be extended to cover uncles (aunts) and nieces (nephews) who are blood relatives. However, we noted a number of responses suggested that a proper definition of blood relatives should be provided for clarity.

4.5 With regard to the two issues below on which the Sub-committee invited views, we have received considerable constructive comments.

Whether the new offence should apply to other forms of penetration or sexual activity

4.6 We received a strong message from the community for the offence to be extended to cover all other forms of penetration. However, with regard to whether the new offence should be extended to cover other sexual activity, there were views expressing that the definition of "sexual activity" could be vague and hence they were not supportive of extending the offence beyond penetration.

Whether the new offence should cover adoptive parents, adoptive grandparents and adoptive siblings

4.7 We received overwhelming support for the view that the offence of incest should be extended to cover adoptive parents. It is worth noting that the majority of the responses supporting such an extension came from adoptive parents and a few adoptive children.

4.8 It is also worth noting that some of the responses suggested that the new offence should be extended to cover adoptive siblings and adoptive grandparents. Furthermore, one Government department commented that the offence of incest should also cover a former adoptive parent-and-child relationship and suggested to the Sub-committee taking into account the

changing landscape in society so that the legislative provisions would accommodate different forms of parent-child relationship.

Whether the new offence should cover step-parents and foster parents

4.9 We also noted that some responses suggested that the new offence should cover step-parents and foster parents as step-parents and foster parents assumed roles similar to or the same as natural parents. As a result, it is only logical that all children should be protected irrespective of whether their parents are adoptive parents, step-parents or foster parents.

Our views

4.10 First of all, we noted the overwhelming support for the first part of Preliminary Recommendation 1, namely that the offence of incest should be retained and the term incest should continue to be used; the offence of incest be reformed; and the new offence should be gender neutral, cover all penile penetration of the mouth, vagina and anus, and be extended to cover uncles (aunts) and nieces (nephews) who are blood relatives.

4.11 We agree that the offence of incest should be retained as there is always a risk of coercion in the case of familial sexual activity. Incest is a serious offence which strikes at the fabric of family life. The offence of incest is a useful legal tool to deal with sexual exploitation within the family.

4.12 Further, we take the view that the term "incest" should continue to be used. We are aware that there may be stigma attached to the term "incest". However, this term is also well-understood in the community and denotes a serious offence involving sexual activity between close relatives. It is difficult to find an alternative term that can convey the same message to the community.

4.13 The existing incest offences in the Crimes Ordinance cover vaginal intercourse only. Having considered the responses received, we confirm the view that the offence should cover all forms of penile penetration of the mouth, anus or vagina; and that it should be gender neutral.

4.14 The existing incest offences in the Crimes Ordinance are confined to relations in the direct blood line (including half relations and siblings), and does not cover uncles and aunts. Pursuant to section 27(1) and Schedule 5 to the Marriage Ordinance (Cap 181) ("MO"), it is unlawful for an uncle (aunt) and the niece (nephew) who are blood relatives (eg a man and his mother's sister, including sister of the half-blood; a woman and her father's brother, including brother of the half-blood; a man and his brother/sister's daughter; and a woman and her brother's/sister's son) to marry each other.

4.15 We consider that the new offence should be extended to cover uncles (aunts) and their nieces (nephews) who are blood relatives. We

conclude that blood relationships in this context should cover the types of relationships that would render a marriage null and void under the MO.

Other forms of penetration and sexual activity

4.16 We noted the strong sentiment from the community that the offence should be extended to cover all other forms of penetration but not sexual activity. We take the view that certain forms of sexual activity (eg stroking) do not currently come under the offence of incest. If such forms of sexual activity are to be covered under an offence of incest, it would be a significant departure from the current law. We consider that such a change in law might be too drastic.

4.17 However, we agree with the majority that the new offence should be extended to cover other forms of penetration but not sexual activity.

Adoptive parents

4.18 The existing incest offences in the Crimes Ordinance do not cover parents who have a sexual relationship with their adopted children.

4.19 Pursuant to section 27(1) and Schedule 5 to the MO, marriage between an adoptive parent and an adoptive child is unlawful.

4.20 We are aware that some children who are adopted at a very young age may not know that their adoptive parents are not their natural parents. Besides, adoptive parents undertake lifelong trust and responsibility to their adopted children. We do not see any justification for a distinction to be drawn between adoptive parents and natural parents.

4.21 Besides, we have received an overwhelming message from the community that the new offence should cover adoptive parents. As such, we have no difficulty in reaching the conclusion that the new offence of incest should cover adoptive parents.¹

4.22 As regards former adoptive parents, given that marriage between adoptive parent and child (including former adoptive parent and child) is unlawful under the MO, we agree that former adoptive parents and children ought to be covered by the new offence.

¹ Furthermore, we recognise the changing landscape in society as regards different forms of adoptive relationships. We believe it is necessary for the Government to monitor such changes from time to time, and keep the law up-to-date as and when necessary.

Adoptive siblings and adoptive grandparents

4.23 The existing incest offence in the Crimes Ordinance does not cover adoptive siblings. Pursuant to section 27(1) and Schedule 5 to the MO, marriage between adopted siblings is lawful.

4.24 Our view is 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 those of natural siblings since their sibling relationship is brought about by their parents through adoption. In the circumstances, we decide that it is not necessary to create a new offence to cover adoptive siblings.

4.25 The same would apply to adoptive grandparents.

Step-parents and foster-parents

4.26 The existing incest offence in the Crimes Ordinance does not cover step-parents and foster-parents. As mentioned earlier, we have received a few responses suggesting the offence should cover step-parents and foster parents.

4.27 Our view is that the new offence should not cover step-parents and foster-parents given that they have no blood relation with the step-children and foster-children respectively. Furthermore, there is also no need to do so because (i) children are already protected under the current legislation; and (ii) underage children will also be covered by the newly proposed offences involving children. For cases where step-parents are involved, we also note that the court will usually impose a harsher sentence as punishment.

Other issues

4.28 A Government department raised a concern on whether a 16 or 17-year-old minor could be convicted for incest under section 48 of the Crimes Ordinance, and suggested that the minor should be exempted from prosecution. Our view is that with the overall reform on the offence of incest as recommended, once the recommendations are accepted by the Government, section 48 will be amended consequentially or have no effect. Furthermore, we take the view that it should be left to the prosecution to exercise its discretion on whether to prosecute the 16 or 17-year-old minor with reference to the evidence available in each case. Hence, we do not recommend any amendment to, or repeal of, section 48.

4.29 In light of the above, the first part of Preliminary Recommendation 1 is not amended. As regards the two issues on which views were invited from the community, we recommend that the new offence should (a) apply to other forms of penetration; and (b) cover adoptive parents.

Final 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 nieces (nephews) who are blood relatives.**

We are of the view that the new offence should:

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

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

Preliminary Recommendation 2: Proposed new offence of sexual exposure

4.30 The Sub-committee recommended that the new legislation should include an offence of sexual exposure along the lines of section 8 of the Scottish Act. The Sub-committee also recommended that the offence of sexual exposure should have 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 B.

Consultees' responses

4.31 We received overwhelming support for this recommendation. A number of the responses suggested that a specific offence for sexual exposure

should be created for child victims under 13 and 16 years old for better protection of this age group.

Our views

4.32 We noted the overwhelming support.

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

4.34 Our view is that a new sexual offence should be created to cover exposure targeting a specific victim for sexual gratification or in order to threaten the victim. Such type of exposure is more aggressive and may induce a great degree of fear, shock, disgust to the victim. This kind of conduct is similar to a sexual assault and as such, should be covered by a new sexual offence rather than a public order offence.

4.35 In considering the elements of the new offence, our view is that exposure "in a sexual manner" should be one of the elements. Without this element, the offence may not be a sexual offence but a public order one. By way of example, the proposed offence would not cover a situation where an artist stands naked in the street purely for artistic purposes.

4.36 Secondly, it should also be an element of the new offence that exposure should be confined to exposure of one's genitals. As to public exposure of other parts of the body than one's genitals in an indecent manner, such conduct should continue to be covered by the existing offence of indecency in public. The Sub-committee sees the value to keep this offence in the statute books.

4.37 As regards the purpose of the exposure under the proposed new offence, it is proposed that where the purpose of an 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. Adopting the Scottish approach would be consistent with this previous approach. We therefore maintain the view that 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.

4.38 The proposed new offence should cover exposure in any place. There are several reasons for this view. In the first place, the proposed new offence is in many ways similar to sexual assault. 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, covering exposure in any place would highlight the nature of this offence that it is a sexual offence rather than a public order offence. What is more, if the proposed new offence covers exposure in any place, it will also protect victims of exposure carried out in a private place. This would mean wider protection to potential victims.

4.39 Lastly, in respect of whether lack of consent should be an element of the proposed new offence, we favour the Scottish approach under which the act has to be carried out without the consent of another person ("B") and without any reasonable belief that B consents. The merit of the Scottish approach is that it reflects the nature of the proposed new offence, viz, an offence similar to sexual assault. 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, and caters for the situation where the proposed new offence is committed in a private place.

4.40 The new offence should be named sexual exposure instead of exposure as 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. The name "sexual exposure" can highlight the fact that the new offence is a sexual offence rather than a public order offence.

4.41 It should be emphasised that we are not proposing that the new offence of sexual exposure replaces the existing offence of indecent exposure under section 148 of the Crimes Ordinance. 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.

4.42 In the circumstances, Preliminary Recommendation 2 is not amended.

Final 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 B.

Preliminary Recommendation 3: Proposed new specific offence of voyeurism

4.43 The Sub-committee recommended the introduction of a new specific offence of voyeurism. The Sub-committee recommended that such an offence be along the lines of section 67 of the English Act.

Report on Voyeurism and non-consensual upskirt-photography

4.44 The Report on Voyeurism was published in April 2019 by the Commission.² The Report on Voyeurism was prepared expeditiously to provide the Commission's final recommendation on a new and specific offence of voyeurism to deal with an act of non-consensual observation or visual recording of another person for a sexual purpose; and a new and specific offence in respect of non-consensual upskirt-photography.

4.45 As we have set out in the Report on Voyeurism, the report was prepared expeditiously as we apprehended from the community a pressing need for the introduction of specific offences of voyeurism and non-consensual upskirt-photography. Our view is that the severance of these two issues from this Report will not affect the integrity of the overall review as the recommended new offences address concerns confined in a self-contained context. It is also our belief that the final recommendations on the new offences could be implemented by legislative amendments without the need to await the completion of the remaining tasks within the Sub-committee's terms of reference.

4.46 This part of the Report should be read in conjunction with the Report on Voyeurism.

Our final recommendation

4.47 Given the various considerations as set out in the Report on Voyeurism, we recommend that Preliminary Recommendation 3 of the Third CP be amended as follows:-

"We recommend introducing a specific offence to regulate upskirt-photography.
We recommend that such an offence be along the lines of the

² *Report on Voyeurism and non-consensual upskirt-photography* (April 2019), available online at <https://www.hkreform.gov.hk/en/publications/rvoyeurism.htm>

newly added section 67A of the English Sexual Offences Act 2003 while taking into account the following:-

- (a) the purposes stipulated in section 67A(3) will not be applicable to the new offence;
- (b) there should be a separate offence which requires proof that the act was made with the purpose of obtaining sexual gratification;
- (c) the new offence (as envisaged in (a)) should be a statutory alternative to the offence envisaged in (b); and
- (d) the offences in (a) and (b) should cover any place."

Final Recommendation 3

- (1) We recommend the introduction of an offence of voyeurism.**
- (2) We recommend that such an offence be along the lines of section 67 of the English Sexual Offences Act 2003.**
- (3) We recommend the introduction of a specific offence in respect of non-consensual upskirt-photography.**
- (4) We recommend that the offence referred to in (3) above be along the lines of the newly added section 67A of the English Sexual Offences Act 2003 while taking into account the following:-**
 - (a) there be an offence in respect of conduct the purpose of which is to obtain sexual gratification;**
 - (b) there be a separate offence irrespective of the purpose of the conduct;**
 - (c) that the offence (b) above be a statutory alternative to (a) above in addition to it being a "stand-alone" offence; and**
 - (d) the offences in (a) and (b) should cover any place.**

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

4.48 The Sub-committee recommended that the offence of bestiality in section 118L of the Crimes Ordinance should be replaced by an offence of sexual intercourse with an animal.

Consultees' responses

4.49 We received overwhelming support for this recommendation.

Our views

4.50 We noted the overwhelming support.

4.51 Our view is 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 the Sexual Conviction Record Check Scheme ("SCRC 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 a specific offence in our statute books will serve as a deterrent to potential offenders.

4.52 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. Therefore, the existing offence covers "sexual intercourse" with an animal only. We cannot identify good reasons for extension of the scope beyond "sexual intercourse" and hence maintain the view that the new offence should continue to apply to "sexual intercourse" with an animal.

4.53 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 thus cannot identify good reasons for extending its application to a dead animal.

4.54 Lastly, the name "bestiality" is a seldom used and outdated expression which does not convey the message as to what would constitute

the commission of the offence. We maintain the view that the name "bestiality" should be replaced by "sexual intercourse with an animal".

4.55 In light of the aforesaid, Preliminary Recommendation 4 is not amended.

Final 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.

Preliminary Recommendation 5: Proposed new offence of sexual activity with a dead person

4.56 The Sub-committee recommended that there should be a new offence of sexual activity with a dead person.

Consultees' responses

4.57 We received overwhelming support for this recommendation.

Our views

4.58 We noted the overwhelming support.

4.59 Our view is that a new sexual offence should be created to deal with sexual activity with a dead person. Such conduct is regarded as repulsive by society at large. 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 the family of a deceased person some assurance that there is legal protection for the dead body of their relative against sexual abuses.

4.60 The new offence should cover both penetrative and non-penetrative sexual activities. Penetration should include both penile and non-penile. Both penetrative (penile or non-penile) and non-penetrative sexual activities with a dead body are disrespectful and should be prohibited.

4.61 Since the new offence will cover all forms of sexual activity with a dead person, our view is that the offence should be called "sexual activity with a dead person".

4.62 In light of the aforesaid, Preliminary Recommendation 5 is not amended.

Final Recommendation 5

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

Preliminary Recommendation 6: Administering drugs to obtain or facilitate an unlawful sexual act be replaced by the offence of administering a substance for sexual purposes

4.63 The Sub-committee recommended that the offence of administering drugs to obtain or facilitate an unlawful sexual act in section 121 of the Crimes Ordinance be replaced by the offence of administering a substance for sexual purposes. The Sub-committee recommended that the proposed offence be along the lines of section 11 of the Scottish Act.

Consultees' responses

4.64 We received overwhelming support for this recommendation.

Our views

4.65 We noted the overwhelming support.

4.66 In Hong Kong, there is an existing offence (in section 121 of the Crimes Ordinance) of administering drugs, matter or thing to obtain or facilitate an unlawful sexual act; this covers the use of a drug, matter or thing to stupefy or overpower another person to enable anyone to have an unlawful sexual act with the victim.

4.67 In England and Wales as well as in Scotland, the 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.³ We consider that the law in Hong Kong should be revised for the reasons set out in the ensuing paragraphs as it has been revised in Scotland.

4.68 First, the existing Hong Kong offence refers to "*to do an unlawful sexual act*", whereas the English and Scottish offences refer to "*to engage in a sexual activity*". Our view is that the scope of the English and Scottish offences should be adopted. The scope of the existing offence may lead to

³ Administering a substance with intent (English Act, section 61) and administering a substance for sexual purposes (Scottish Act 2009, section 11). See paragraphs 6.12 to 6.14 of the Third CP.

difficulty in bringing a charge since the victim may be stupefied or overpowered and may therefore have difficulty in recalling whether an unlawful sexual act (as defined) or other sexual activity was committed on him/her.

4.69 Furthermore, the existing Hong Kong offence refers to any "drug, matter or thing", whereas the English and Scottish offences refer to a "substance". Our view is 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.

4.70 As regards the *mens rea* of the offence, we favour the Scottish approach because it avoids subjectivity by requiring an accused's belief in the victim's knowledge to be reasonable, but still focuses on the accused in question by determining the reasonableness of that belief, having regard to any steps that the accused has taken to ascertain whether the victim knows.

4.71 Lastly, as "sexual purpose" is a major ingredient of the proposed new offence, our view is that the new offence should be called "administering a substance for sexual purposes" following the Scottish offence.

4.72 In light of the aforesaid, Preliminary Recommendation 6 is not amended.

Final 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.

Preliminary 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

4.73 The Sub-committee recommended that the offence of assault with intent to commit buggery in section 118B of the Crimes Ordinance be replaced by a new offence of committing an offence with intent to commit a sexual offence. The Sub-committee recommended that the new offence be along the lines of section 62 of the English Act.

Consultees' responses

4.74 We received overwhelming support for this recommendation.

Our views

4.75 We noted the overwhelming support.

4.76 In Hong Kong, section 118B of the Crimes Ordinance provides for an offence of assault with intent to commit buggery. The existing offence would, for example, cover the situation where an accused assaulted the victim so that he could more easily commit buggery on the victim but was caught before actually committing the buggery.

4.77 Our view is 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 to this.

4.78 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.

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

4.80 Thirdly, although the existing offence is already covered by the 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 an offender's conviction for a sexual crime.

4.81 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 or 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.

4.82 In light of the aforesaid, Preliminary Recommendation 7 is not amended.

Final 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.

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

4.83 The Sub-committee recommended 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 recommended that the new offence be along the lines of section 63 of the English Act. The Sub-committee further recommended 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.

Consultees' responses

4.84 We received overwhelming support for this recommendation.

Our views

4.85 We noted the overwhelming support.

4.86 In Hong Kong, section 11 of the Theft Ordinance (Cap 210) provides for the offence of burglary (with intent to rape).

4.87 Section 63 of the English Act provides for an offence of trespass with intent to commit a sexual offence.

4.88 This English provision 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.

4.89 Our view is 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 of the existing offence. For instance, it would cover any premises, apply to all forms of sexual assault and be a gender neutral provision.

4.90 It is also our view that the intention to commit a sexual offence must be formed by the time an accused enters any premises as a trespasser. Entering premises as a 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.

4.91 In light of the aforesaid, Preliminary Recommendation 8 is not amended.

Final 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.

Preliminary 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

4.92 The Sub-committee recommended that the following offences be abolished:

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

Consultees' responses

4.93 We received overwhelming support for this recommendation.

4.94 We noted a few comments stating that apart from those provisions in relation to homosexuals identified by the Sub-committee, there are other provisions in the Crimes Ordinance which also concern homosexuality but have not been recommended for repeal. Some of these provisions mentioned are under Part XII of the Crimes Ordinance.

4.95 Furthermore, we also noted the concern raised by one Government department over the recommended abolition of gross indecency by man with man otherwise than in private (section 118J of the Crimes Ordinance). The Government department suggested to us considering a new offence to criminalise a person in custody committing buggery or other grossly indecent acts.

Our views

4.96 We noted the overwhelming support of the recommendation.

4.97 We previously reviewed the following homosexual sexual offences and recommended their abolition:

Crimes Ordinance	Consultation Paper	Recommendation
section 118A (non-consensual buggery)	First CP	16
section 118C (homosexual buggery with or by man under 16)	Second CP	20
section 118D (buggery with girl under 21) (note: this is strictly speaking not an homosexual offence)	Second CP	19
section 118E (buggery with mentally incapacitated person)	Second CP	37
section 118H (gross indecency with or by man under 16)	Second CP	20

Crimes Ordinance	Consultation Paper	Recommendation
section 118I (gross indecency by man with male mentally incapacitated person)	Second CP	37

4.98 Preliminary Recommendation 9 of the Third CP recommends an abolition of some more homosexual-related buggery offences. These offences were added to the Crimes Ordinance in 1991 to implement the recommendations of Commission's Report on Laws Governing Homosexual Conduct.

4.99 Our view is that these 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.⁴ Conduct amounts to an assault with intent to commit buggery would be covered by the proposed new offence of committing an offence with intent to commit a sexual offence.

4.100 There are responses asking us to review (and recommend repealing) some of the provisions which also concern homosexuality under Part XII of the Crimes Ordinance. Our view is that as offences from section 129 to section 159 of Part XII of the Crimes Ordinance cover a wide range of offences relating to prostitution or pornography, these offences are not within the scope of the review of sexual offences under the Sub-committee's terms of reference. Given that any reform of the law related to prostitution in the Hong Kong context would involve major social and policy questions, our view is that it is not appropriate for the Sub-committee to embark on a review of these aspects of the law under the current terms of reference.

4.101 That said, we acknowledge the concerns raised as regards some other provisions under the Crimes Ordinance which have not been reviewed by the Sub-committee as they fall outside the Sub-committee's terms of reference. We would suggest the Government to conduct a thorough review of the entire Crimes Ordinance as necessary to ensure that all its provisions are consistent with the Sub-committee's guiding principles, including respect for one's sexual orientation.

4.102 With regard to the view that an offence should be created to criminalise a person in custody committing buggery or other grossly indecent acts, we have come to a view that a new offence in the context as suggested is not necessary. We believe that such conduct should continue to be dealt with by way of disciplinary proceedings.

4.103 Preliminary Recommendation 9 is not amended.

⁴ See footnote 14 in Chapter 3 of this Report regarding the recent judgment in *Yeung Chu Wing v Secretary for Justice* [2019] HKCFI 1431, HCAL 753/2017 on 30 May 2019.

Final 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)).⁵**
- (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)).**

⁵ Final Recommendation 7 already recommended that the offence of 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 5

Summary of our Final Recommendations

(The Final Recommendations of this Report are made in Chapters 2 – 4, and are reproduced for easy reference in this chapter.)

Consultation Paper on Rape and Other Non-consensual Sexual Offences

5.1 The Consultation Paper prepared by the Sub-committee, entitled *Rape and other Non-consensual Sexual Offences*, was published on 17 September 2012, and put forward 21 recommendations. The Final Recommendations are set out below.

Final Recommendation 1 Guiding principles for reform

5.2 We recommend that any reform of the substantive law on sexual offences should be guided by a set of guiding principles and any departure from those principles should be justified.

We recommend that the guiding principles should include:

- (i) Clarity of the law.
- (ii) Respect for sexual autonomy.
- (iii) The protective principle.
- (iv) Gender neutrality.
- (v) Avoidance of distinctions based on sexual orientation.
- (vi) The provisions of the International Covenant on Civil and Political Rights, the Hong Kong Bill of Rights Ordinance (Cap 383) and the Basic Law should be adhered to.

Final Recommendation 2 A statutory definition of consent

5.3 We recommend that there should be a statutory definition of "consent" in relation to sexual intercourse or sexual activity.

Final Recommendation 3

The proposed definition of consent

5.4 We recommend the adoption of a statutory definition of consent to the effect that a person consents to sexual activity if the person:

- (a) freely and voluntarily agrees to the sexual activity; and
- (b) has the capacity to consent to such activity.

Final Recommendation 4

Capacity to consent to sexual activity

5.5 We recommend that the new legislation should contain a provision to the effect that a person is incapable of consenting to sexual activity where, by reason of mental condition, intoxication, or age (as the case may be), the person is unable to do one or more of the following:

- (a) understand what the conduct is;
- (b) form a decision as to whether to engage in the conduct (or as to whether the conduct should take place); or
- (c) communicate any such decision.

Final Recommendation 5

No consent if deception as to its nature or purpose of sexual act, or impersonation

5.6 We recommend that the new legislation should incorporate provisions along the lines of section 76(2)(a) and (b) of the English Sexual Offences Act 2003 to the effect that there can be no consent by the complainant, and the accused cannot have believed that the complainant consented, where the accused:

- (a) intentionally deceived the complainant as to the nature or purpose of the relevant sexual act; or
- (b) intentionally induced the complainant to consent to the relevant sexual act by impersonating a person known personally to the complainant.

Final Recommendation 6

The scope and withdrawal of consent

5.7 We recommend that the new legislation should incorporate provisions along the lines of sections 15(2), (3) and (4) of the Sexual Offences (Scotland) Act 2009 to the effect that:

- (a) consent to particular sexual conduct does not imply, of itself, consent to any other sexual conduct;
- (b) consent to sexual conduct may be withdrawn at any time before or, in the case of continuing sexual conduct, during the sexual conduct; and

- (c) if sexual conduct takes place, or continues to take place, after consent has been withdrawn, it takes place, or continues to take place, without consent.

Final Recommendation 7 **Scope of the offence of sexual penetration without consent**

5.8 We recommend that the new legislation should incorporate provisions along the lines of sections 319 and 328 of the Western Australian Criminal Code Act Compilation Act 1913 to the effect that the scope of sexual penetration without consent should cover penetration of the vagina or anus; and penile penetration of the mouth of another person.

No Final Recommendation 8

5.9 Preliminary Recommendation 8 is discarded.

Final Recommendation 9 **Definitions of a penis and a vagina**

5.10 We recommend that the new legislation should provide that for the purposes of any sexual offence a penis should include a surgically constructed penis and a vagina should include (a) the vulva and (b) a surgically constructed vagina (together with a surgically constructed vulva).

Final Recommendation 10 **Meaning of "penetration"**

5.11 We recommend that for the purposes of any sexual offence, penetration should be defined to mean a continuing act from entry to withdrawal.

 We further recommend that where penetration is initially consented to but at some point of time the consent is withdrawn, "a continuing act from entry" should mean a continuing act from that point of time at which the consent previously given is withdrawn.

Final Recommendation 11 **Mental element as to the act of penetration and other relevant sexual acts**

5.12 We recommend that the new legislation should expressly provide that the act of sexual penetration without consent and the relevant acts in the other non-consensual sexual offences (namely, the possible new offences of sexual assault, and causing a person to engage in sexual activity without consent) must be committed intentionally or recklessly.

We also recommend that the new legislation should provide that self-intoxication is not a defence to sexual penetration without consent and the other non-consensual sexual offences.

Final Recommendation 12 **Reform option for dealing with genuine (but mistaken) belief in consent**

5.13 We recommend in relation to the offence of sexual penetration without consent and other non-consensual sexual offences that the new legislation should incorporate provisions along the lines of sections 1(1)(b), 1(1)(c), 1(2), 2(1)(c), 2(1)(d), 2(2), 3(1)(c), 3(1)(d), 3(2), 4(1)(c), 4(1)(d) and 4(2) of the English Sexual Offences Act 2003 to the effect that:

- (a) it should be necessary for the prosecution to prove that (i) the complainant did not consent; (ii) the accused did not reasonably believe that the complainant consented; and
- (b) whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps the accused took to ascertain whether the complainant consented.

We further recommend that section 118(4) of the Crimes Ordinance (Cap 200) should be repealed upon the enactment of the new legislation.

Final Recommendation 13 **The offence of procurement of an unlawful sexual act by false pretences should be retained**

5.14 We recommend that the offence of procurement by false pretences under section 120 of the Crimes Ordinance (Cap 200) should be retained upon the enactment of the new legislation.

Final Recommendation 14 **Sexual intercourse obtained by threat or intimidation not involving the use of force (such as economic threat)**

5.15 We recommend that sexual intercourse obtained by economic pressure should be dealt with on a case by case basis to decide whether sexual penetration without consent was committed by reference to the concept of consent and it is not necessary to have a new offence to cover such cases.

Final Recommendation 15

Definition of "sexual"

5.16 We recommend that for the purposes of any sexual offence, the definition of "sexual" in section 78(a) and (b) of the English Sexual Offences Act 2003 should be adopted, subject to the deletion of *"because of its nature it may be sexual and"* from section 78(b). The definition of sexual will therefore be along the following lines: it is sexual if a reasonable person would consider that –

- (a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or
- (b) because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.

Final Recommendation 16

Abolition of the offence of non-consensual buggery

5.17 We recommend that the offence of non-consensual buggery under section 118A of the Crimes Ordinance (Cap 200) should be abolished upon the enactment of the new offence of sexual penetration without consent.

Final Recommendation 17

Definition of touching

5.18 We recommend the adoption of the definition of "touching" in section 79(8) of the English Sexual Offences Act 2003 to the effect that, for the purposes of any sexual offence, touching includes touching:

- (a) with any part of the body,
- (b) with anything else,
- (c) through anything,

and in particular includes touching amounting to penetration.

Final Recommendation 18

Sexual assault (first category)

5.19 We recommend that the offence of sexual assault in the new legislation should be constituted by a person (A) who, without the consent of another person (B) and without a reasonable belief that B consents, intentionally does any of the following things:

- (a) touches B where the touching is sexual;
- (b) ejaculates semen onto B;
- (c) emits urine, saliva or any other bodily fluid onto B sexually.

We further recommend that the offence of indecent assault in section 122 of the Crimes Ordinance (Cap 200) should be abolished upon the enactment of the new legislation.

Final Recommendation 19**Sexual assault (second category)**

5.20 We recommend that the offence of sexual assault in the new legislation should also be constituted by a person (A) who, without the consent of another person (B) and without a reasonable belief that B consents, intentionally does an act of a sexual nature which causes B to apprehend the use or threat of use of immediate and unlawful personal violence.

Final Recommendation 20**Sexual assault (third category); retention of the offence of indecent exposure**

5.21 We recommend that the offence of indecent exposure under section 148 of the Crimes Ordinance (Cap 200) should be retained upon the enactment of the new legislation in respect of non-consensual upskirt-photography.

Final Recommendation 21**Causing a person to engage in sexual activity without consent; and abolition of the offence of procurement by threats or intimidation**

5.22 We recommend that the new legislation should include an offence of causing a person to engage in sexual activity without consent, along the lines of section 4 of the English Sexual Offences Act 2003 with necessary modifications.

We also recommend that the words "*in Hong Kong or elsewhere*" should be added to the ingredients of the proposed offence of causing a person to engage in sexual activity without consent so that the sexual activity can take place inside or outside Hong Kong, though the act of causing must take place inside Hong Kong.

We also recommend that the offence of procurement by threats or intimidation in section 119 of the Crimes Ordinance (Cap 200) should be abolished upon the enactment of the new legislation.

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

5.23 The Consultation Paper prepared by the Sub-committee, entitled *Sexual Offences Involving Children and Persons with Mental Impairment*, was published on 1 November 2016, and put forward 41 recommendations. The Final Recommendations are set out below.

Final Recommendation 1 **A uniform age of consent of 16 years in Hong Kong**

5.24 We recommend that there should be a uniform age of consent in Hong Kong of 16 years of age, which should be applicable irrespective of gender and sexual orientation.

Final Recommendation 2 **Offences involving children and young persons be gender neutral**

5.25 We recommend that offences involving children and young persons should be gender neutral in the new legislation.

Final Recommendation 3 **A range of offences involving children under 13 and another range of offences involving children under 16**

5.26 We recommend that the law reflects the protection of two categories of young persons, namely, children under 13 and children under 16 respectively with a range of offences for each category rather than one single offence of child abuse.

Final Recommendation 4 **The word "unlawful" be removed from all offences involving sexual intercourse or sexual act**

5.27 We recommend that the word "unlawful" should be removed from all offences involving sexual intercourse or sexual act in the Crimes Ordinance (Cap 200).

Final Recommendation 5 **Offences involving children and young persons be capable of being committed by either an adult or a child offender**

5.28 We recommend that the proposed offences involving children and young persons be capable of being committed by either an adult or a child offender thus rendering it unnecessary to specify the age of the offender in the relevant legislation.

Final Recommendation 6 **Absolute liability should apply to offences involving children between 13 and 16 years and there should not be a distinction between penetrative and non-penetrative sexual activity**

5.29 We are of the view that absolute liability should apply to offences involving children between 13 and 16 years and there should not be a distinction between penetrative and non-penetrative sexual activity.

Final Recommendation 7 **Marital defence to offences involving children be abolished**

5.30 We recommend that there should not be any marital defence to offences involving children in the new legislation (and any such existing defence should be abolished).

Final Recommendation 8 **Consensual sexual activity between persons who are between 13 and 16 be criminalised but with prosecutorial discretion to bring a charge in appropriate cases**

5.31 We recommend that all consensual sexual activity between persons who are between 13 and 16 years of age should be criminalised but recognising that prosecutorial discretion will be exercised as to whether a case is appropriate for a charge to be brought.

No Final Recommendation 9

5.32 Preliminary Recommendation 9 is discarded.

Final Recommendation 10 **Proposed new offences: Penetration of a child under 13 and that under 16**

5.33 We recommend that the new legislation should include an offence of penetration of a child under 13, along the lines of sections 5 and 6 of the English Sexual Offences Act 2003.

However, we recommend that the new legislation should incorporate a provision along the lines of section 319 of the Western Australian Criminal Code Act Compilation Act 1913 to the effect that the scope of sexual penetration should cover any penetration of the vagina or anus and also penile penetration of the mouth.

We also recommend a similar offence of penetration of a child under 16.

Final Recommendation 11**Proposed new offences: Sexual assault of a child under 13 and that under 16**

5.34 We recommend that the new legislation should include an offence of sexual assault of a child under 13. The offence should be constituted by a person (A) who intentionally does any of the following acts to another person (B) and B is a child under 13:

- (a) touches B where the touching is sexual;
- (b) ejaculates semen onto B; or
- (c) emits urine, saliva or any other bodily fluid onto B sexually.

We also recommend a similar offence of sexual assault of a child under 16.

Final Recommendation 12**Proposed new offences: Causing or inciting a child under 13 and that under 16 to engage in sexual activity**

5.35 We recommend that the new legislation should include an offence of causing or inciting a child under 13 to engage in sexual activity, along the lines of section 8 of the English Sexual Offences Act 2003.

We also recommend a similar offence of causing or inciting a child under 16 to engage in sexual activity.

Final Recommendation 13**Proposed new offences: Engaging in sexual activity in the presence of a child under 13 and that under 16**

5.36 We recommend that the new legislation should include an offence of engaging in sexual activity in the presence of a child under 13 along the lines of section 22 of the Sexual Offences (Scotland) Act 2009.

We also recommend a similar offence of engaging in sexual activity in the presence of a child under 16.

These two offences should also be constituted by causing such a child to be present while a third person is engaging in a sexual activity. Moreover, 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.

We recommend that the Government considers the need for an additional offence which would render it criminal for a person to engage in sexual activity in the presence of a child, being reckless as to whether such conduct would have the effect of humiliating, distressing or alarming the child.

Final Recommendation 14

Proposed new offences: Causing a child under 13 and that under 16 to look at a sexual image

5.37 We recommend that the new legislation should include an offence of causing a child under 13 to look at a sexual image along the lines of section 23 of the Sexual Offences (Scotland) Act 2009.

We also recommend a similar offence of causing a child under 16 to look at a sexual image.

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. The definition of a sexual image in section 23(3) of the Sexual Offences (Scotland) Act 2009 should be adopted.

The new legislation should also include text and audio messages along the lines of section 24 of the Sexual Offences (Scotland) Act 2009.

Final Recommendation 15

Proposed new offence: Arranging or facilitating the commission of a child sex offence

5.38 We recommend that the new legislation should include an offence of arranging or facilitating the commission of a child sex offence along the lines of section 14 of the English Sexual Offences Act 2003.

Final Recommendation 16

Health and treatment issues as exceptions to aiding, abetting and counselling a child sex offence

5.39 We recommend there should be exceptions to aiding, abetting and counselling an offence involving children along the lines of section 14 of the English Sexual Offences Act 2003, where a person's actions are intended to protect a child from pregnancy or sexually transmitted infection, to protect the physical safety of a child or to promote a child's emotional well-being by the giving of advice.

Final Recommendation 17

Sexual intercourse with a girl under 13 and that under 16 be abolished

5.40 We recommend that the offences of sexual intercourse with a girl under 13 (section 123 of the Crimes Ordinance (Cap 200)) and sexual intercourse with a girl under 16 (section 124 of the Crimes Ordinance (Cap 200)) should be abolished upon the enactment of the new legislation.

Final Recommendation 18

Indecent conduct towards a child under 16 be abolished

5.41 We recommend that the offence of indecent conduct towards a child under 16 in section 146 of the Crimes Ordinance (Cap 200) should be abolished upon the enactment of the new legislation.

Final Recommendation 19

A man committing buggery with a girl under 21 be abolished

5.42 We recommend that the offence of a man committing buggery with a girl under 21 in section 118D of the Crimes Ordinance (Cap 200) should be abolished upon the enactment of the new legislation.

Final Recommendation 20

Homosexual buggery with or by man under 16 and gross indecency with or by man under 16 be abolished

5.43 We recommend that the offence of homosexual buggery with or by man under 16 (section 118C of the Crimes Ordinance (Cap 200)) and gross indecency with or by man under 16 (section 118H of the Crimes Ordinance (Cap 200)) should be abolished upon the enactment of the new legislation.

Final Recommendation 21

Abduction of an unmarried girl under 16 and abduction of an unmarried girl under 18 for sexual intercourse be abolished

5.44 We recommend that the offences of abduction of an unmarried girl under 16 (section 126 of the Crimes Ordinance (Cap 200)) and abduction of an unmarried girl under 18 for sexual intercourse (section 127 of the Crimes Ordinance (Cap 200)) should be abolished upon the enactment of the new legislation.

Final Recommendation 22

Proposed new offence of sexual grooming

5.45 We recommend that the new legislation should include an offence of sexual grooming, along the lines of section 15 of the English Sexual Offences Act 2003.

We also recommend that apart from meeting the child or travelling with the intention of meeting the child, sexual grooming may also be constituted by making arrangements to travel with the intention to meet the child.

We also recommend that it should be an ingredient of the offence that the accused did not reasonably believe that the child was 16 or over at the time of the offence.

We also recommend that the "fictitious young person" provision in section 131B(1A) of the New Zealand Crimes Act 1961 should be adopted.

Final Recommendation 23

Proposed new offence: Inducement, threat or deception to procure sexual activity with a person with mental impairment

5.46 We recommend that the new legislation should include an offence of inducement, threat or deception to procure sexual activity with a person with mental impairment, along the lines of section 34(1) of the English Sexual Offences Act 2003.

We also recommend that the proposed offence should cover both penetrative and non-penetrative sexual activity.

Final Recommendation 24

Proposed new offence: Causing a person with mental impairment to engage in or agree to engage in sexual activity by inducement, threat or deception

5.47 We recommend that the new legislation should include an offence of causing a person with mental impairment to engage in or agree to engage in sexual activity by inducement, threat or deception, along the lines of section 35(1) of the English Sexual Offences Act 2003.

Final Recommendation 25

Proposed new offence: Engaging in sexual activity in the presence, procured by inducement, threat or deception, of a person with mental impairment

5.48 We recommend that the new legislation should include an offence of engaging in sexual activity in the presence, procured by inducement, threat or deception, of a person with mental impairment, along the lines of section 36(1) of the English Sexual Offences Act 2003.

In order to constitute the offence, the accused's act should be for the purpose of obtaining sexual gratification, humiliating, distressing or alarming the person with mental impairment, or any combination of these purposes.

Final Recommendation 26

Proposed new offence: Causing a person with mental impairment to watch a sexual act by inducement, threat or deception

5.49 We recommend that the new legislation should include an offence of causing a person with mental impairment to watch a sexual act by inducement, threat or deception, along the lines of section 37(1) of the English Sexual Offences Act 2003.

In order to constitute the offence, the accused's act should be for the purpose of obtaining sexual gratification, humiliating, distressing or alarming the person with mental impairment, or any combination of these purposes.

Final Recommendation 27

Proposed new offence: Sexual activity with a person with mental impairment (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency

5.50 We recommend that the new legislation should include an offence of sexual activity with a person with mental impairment (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency.

This proposed offence should cover touching or penetration which is sexual.

Final Recommendation 28

Proposed new offence: Causing or inciting sexual activity of a person with mental impairment (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency

5.51 We recommend that the new legislation should include an offence of causing or inciting sexual activity of a person with mental impairment (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency.

Final Recommendation 29

Proposed new offence: Sexual activity in the presence of a person with mental impairment (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency

5.52 We recommend that the new legislation should include an offence of sexual activity in the presence of a person with mental impairment (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency.

In order to constitute the proposed offence, the accused's act should be for the purpose of obtaining sexual gratification, humiliating, distressing or alarming a person with mental impairment, or any combination of these purposes.

Final Recommendation 30

Proposed new offence: Causing a person with mental impairment to watch a sexual act (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency

5.53 We recommend that the new legislation should include an offence of causing a person with mental impairment to watch a sexual act (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency.

In order to constitute the proposed offence, the accused's act should be for the purpose of obtaining sexual gratification, humiliating, distressing or alarming a person with mental impairment, or any combination of these purposes.

Final Recommendation 31

Proposed definition of situations where a relationship of care exists

5.54 We recommend that a relationship of care should exist if a person (A) who is involved in the care of a person with mental impairment (B) in any one of two situations:

firstly, A is any person who has a function to perform in a specified institution (whether employed there or not) or provides volunteering service in that institution.

secondly, A is a provider of care, assistance or services to B in connection with B's mental illness.

We further recommend that the meaning of specified institutions should be determined by the Government when the new legislation is put in place.

Final Recommendation 32

Exceptions where care provider and person with mental impairment are married or in pre-existing relationship

5.55 We recommend that in respect of the proposed new offences covering situations where a relationship of care exists, there should be exceptions to liability (i) where the person with mental impairment and the person who is involved in his or her care are married; or (ii) where there is a lawful sexual relationship between them which pre-dates the care relationship.

We further recommend that the exception in respect of pre-existing sexual relationship should apply where a lawful sexual relationship had existed between the parties *within a reasonable period* before a party became involved in the care, assistance or services of a person with mental impairment.

Final Recommendation 33

Requirement as to knowledge of mental illness

5.56 We recommend that it should be a requirement of the proposed new offences involving persons with mental impairment that the accused had actual or constructive knowledge that the victim was a person with mental impairment.

Final Recommendation 34

Evidential burden as regards the accused's knowledge of the victim's mental illness

5.57 We recommend that in respect of the proposed new offences involving persons with mental impairment covering situations where a relationship of care exists and those involving abuse of a position of trust or authority, or a relationship of dependency, there should be a provision imposing an evidential burden on an accused as regards the accused's knowledge of the victim's mental impairment, along the lines of sections 38(2), 39(2), 40(2) and 41(2) of the English Sexual Offences Act 2003.

Final Recommendation 35

Proposed new offences involving persons with mental impairment applicable to mentally disordered persons or mentally handicapped persons

5.58 We recommend that the proposed new offences involving persons with mental impairment should apply to a mentally disordered person or mentally handicapped person (as defined in the Mental Health Ordinance (Cap 136)) whose mental disorder or mental handicap, as the case may be, is of a nature or degree that the person is incapable of guarding himself or herself against sexual exploitation.

Final Recommendation 36

Draftsman to decide what term to describe the person with mental impairment

5.59 We recommend that the issue as to what term is to be used to describe the person with mental impairment in the new legislation should be left to the draftsman to decide.

Final Recommendation 37

A man committing buggery with a mentally incapacitated person, a man committing gross indecency with a male mentally incapacitated person, a man having intercourse with a woman mentally incapacitated person be abolished

5.60 We recommend that the offences of a man committing buggery with a mentally incapacitated person (section 118E of Crimes Ordinance (Cap 200)), a man committing gross indecency with a male mentally incapacitated person (section 118I of Crimes Ordinance (Cap 200)), a man having intercourse with a woman mentally incapacitated person (section 125 of Crimes Ordinance (Cap 200)) should be abolished upon the enactment of the new legislation.

Final Recommendation 38

Abduction of a mentally incapacitated person from her or his parent or guardian for a sexual act be abolished

5.61 We recommend that the offence of abduction of a mentally incapacitated person from her or his parent or guardian for a sexual act (section 128 of the Crimes Ordinance (Cap 200)) should be abolished upon the enactment of the new legislation.

Final Recommendation 39

Sexual intercourse with patients be abolished

5.62 We recommend that the offence of sexual intercourse with patients in section 65(2) of the Mental Health Ordinance (Cap 136) should be abolished upon the enactment of the new legislation.

Final Recommendation 40

The Government to consider whether there should be legislation for the protection of young persons aged 16 or above but under 18

5.63 We recommend the Government to consider the merits in proposing legislation for the protection of young persons aged 16 or above but under 18 from the policy angle, and in consultation with the legislature as and when appropriate.

Final Recommendation 41

Proposed new offences involving children (including sexual grooming) and those involving persons with mental impairment to have extraterritorial effect

5.64 We recommend that the proposed new offences involving children including sexual grooming and the proposed new offences involving persons with mental impairment should have extraterritorial effect.

Consultation Paper on Miscellaneous Sexual Offences

5.65 The Consultation Paper prepared by the Sub-committee, entitled *Miscellaneous Sexual Offences*, was published on 16 May 2018, and put forward 9 recommendations. The Final Recommendations are set out below.

Final Recommendation 1

The specific offence of incest be retained but should be reformed. It should apply to other forms of penetration or sexual activity and cover adoptive parents

5.66 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 nieces (nephews) who are blood relatives.

We are of the view that the new offence should:

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

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

Final Recommendation 2 Proposed new offence of sexual exposure

5.67 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 B.

Final Recommendation 3 Proposed new specific offence of voyeurism and non-consensual upskirt-photography

5.68 (1) We recommend the introduction of an offence of voyeurism.

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

(3) We recommend the introduction of a specific offence in respect of non-consensual upskirt-photography.

(4) We recommend that the offence referred to in (3) above be along the lines of the newly added section 67A of the English Sexual Offences Act 2003 while taking into account the following:-

- (a) there be an offence in respect of conduct the purpose of which is to obtain sexual gratification;
- (b) there be a separate offence irrespective of the purpose of the conduct;
- (c) that the offence (b) above be a statutory alternative to (a)

- above in addition to it being a “stand-alone” offence; and
- (d) the offences in (a) and (b) should cover any place.

Final Recommendation 4

Bestiality be replaced by an offence of sexual intercourse with an animal

5.69 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.

Final Recommendation 5

Proposed new offence of sexual activity with a dead person

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

Final Recommendation 6

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

5.71 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.

Final 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

5.72 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.

Final Recommendation 8

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

5.73 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.

Final 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

5.74 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)).

List of Respondents to the Consultation Paper on Rape and Other Non-consensual Sexual Offences

Responses were received from the following Respondents (listed in no particular order):

1. Against Child Abuse Limited
2. Agency for Volunteer Service
3. Andy Chan
4. Angel
5. Arnie Lee
6. Association Concerning Sexual Violence Against Women
7. Association for Concern for Legal Rights of Victims of Domestic Violence
8. The Association for the Advancement of Feminism
9. Association for the Survivor of Women Abuse (Kwan Fook)
10. Association of Women with Disabilities Hong Kong
11. Bill Siu
12. Candice Liu
13. Caritas – Hong Kong Family Service
14. Caritas Project for Adult Survivors of Childhood Trauma
15. Catholic Diocese of Hong Kong
16. Chan Chung-yau
17. Cheung Wang Hon
18. The Chinese University of HK, Faculty members of Department of Social Work
19. Chong Yiu Kwong
20. Christopher Fung
21. Civil Human Rights Front
22. Correctional Services Department
23. Daniel Yip Wai Hon
24. The Democratic Alliance for the Betterment of Hong Kong, Women's Affairs Committee
25. Department of Justice, Legal Policy Division
26. Edwella
27. Elaine Lam
28. End Child Sexual Abuse Foundation
29. Equal Opportunities Commission
30. The Federation of Medical Societies of Hong Kong
31. Fly Stone
32. Fong Fu Yun
33. Gloria Ho
34. Gloria Ng
35. Home Affairs Department
36. Hong Kong Bar Association

37. Hong Kong Chinese Civil Servants' Association, Social Work Officer Grade Branch
38. Hong Kong Christian Council
39. The Hong Kong College of Family Physicians
40. Hong Kong Community Development Network
41. Hong Kong Council of Social Service
42. Hong Kong Doctors Union
43. Hong Kong Federation of Women Lawyers Limited
44. Hong Kong Federation of Women's Centres
45. Hong Kong Human Rights Monitor
46. Hong Kong Men's Association
47. Hong Kong Police Force
48. Hong Kong Social Workers Association
49. The Hong Kong University of Science and Technology, Dean of Humanities and Social Science
50. Hong Kong Women Development Association Limited
51. Hong Kong Young Women's Christian Association, Women Affairs Department
52. Hospital Authority
53. Immigration Department
54. Independent Commission Against Corruption
55. Ip Shing Ho Jonathan
56. Ir Edgar C P Kwan, JP (Member of Fight Crime Committee)
57. Jason Chan
58. Jenny Yiu
59. Jimmy Lai
60. John Fu Chi Yung
61. Kowloon Federation of Associations, Women Affairs Committee
62. The Law Society of Hong Kong
63. Legal Aid Department
64. Li Jerry
65. Libertarian.HK
66. Lily Wong
67. The Medical Council of Hong Kong
68. Miu Wong
69. Natalie Kung
70. New Life Psychiatric Rehabilitation Association
71. New People's Party
72. Office of the Privacy Commissioner for Personal Data, Hong Kong
73. Po Leung Kuk
74. RainLily
75. Sherman S. Wong
76. Social Welfare Department – Committee on Child Abuse & Working Group on Combating Violence
77. Tung Wun Hoi
78. VOICES - Survivors' Rights Concern Group
79. William Lee
80. The Women Coalition of HKSAR
81. Women Friendly Environment Group
82. Women's Commission

83. Zonta Club of Hong Kong East
84. Zonta Club of Victoria
85. 一名香港市民
86. 市民
87. 伍先生
88. 刘先
89. 李家暉
90. 李健音
91. 兩性作家
92. 屈生
93. 倫志偉
94. 張永明，劉子君
95. 陳嘉偉
96. 楊先生

Joint Declaration by Signatories initiated by Association Concerning Sexual Violence Against Women (Nos. 97 – 245) individual signatories dated 28.2.2013

97. Angel, Rainbow Transgender Group
98. Au Ka Wing
99. Au Lai Fong
100. Chan Kwok
101. Chan Po Yi
102. Chan Sze Ting
103. Chan Yuet Sum
104. Chi Ngai Kwok
105. Cho Lok Tim, Timothy
106. Chow Kwan Nga
107. Chow Wing Heng, Zoé
108. Chu Wai Cheung Ian
109. Chun
110. CKY
111. Doris Fok
112. Dr Phoebe Ching Ying Man
113. Esther Yu
114. Grace Bok
115. Hazel Man
116. Ho Hoi Yin
117. Hui Lai Kwan
118. Hung Sing Nam
119. Irene CC Lam
120. Iu Wai Hang
121. Jeffrey Chick
122. Jennifer Chan
123. Joie Yiu
124. Joseph Cheung
125. Keung

- 126. Keung Wai Kit
- 127. Kwan Yuen Tung
- 128. Lai Sim
- 129. Lam Pak Shing
- 130. Lam Siu Pan
- 131. Lam Yee Ling Elene
- 132. Leung Chun Ho
- 133. Leung Lai Yan
- 134. Leung Lam Fat
- 135. Leung Tung Tung
- 136. Li So Han
- 137. Ma Pik Kwan
- 138. Ma Yuen Nei Karin
- 139. Mandy
- 140. Marcel Ng
- 141. Mavis Chan Chow Wah
- 142. Ng Wai Tat
- 143. Ng Wan Ching
- 144. Or Po King
- 145. Pao Nok Hei
- 146. Pearl Wong
- 147. Perry Yu
- 148. Phoebe Lo
- 149. Pun Kwong Sing
- 150. Rose Wu
- 151. Siu Wing Sze
- 152. Suen Lai Ming
- 153. Sung Wan Yee
- 154. Tracy
- 155. Tung Wun Hoi
- 156. Vera
- 157. Vincent Wai
- 158. Wan
- 159. Wong Bo Kay Bonnie
- 160. Wong Lai Shan
- 161. Wong Mei Kam
- 162. Wong Miu
- 163. Wong Tin Yau
- 164. Wong Wing Yu
- 165. Wu Yat Nam
- 166. Young
- 167. 王秀容
- 168. 伍穎琳
- 169. 朱慧儀
- 170. 吳文詩
- 171. 吳如花
- 172. 吳嘉怡
- 173. 李柏璣
- 174. 李倩鈴

- 175. 李慧君
- 176. 谷淑美，香港科技大學
- 177. 周曉彤
- 178. 周覬堃
- 179. 周豁然
- 180. 威毛
- 181. 洪俊毅
- 182. 徐俊禧
- 183. 高詩慧
- 184. 張晉銘
- 185. 張凱惠
- 186. 梁葉漢
- 187. 莊耀光
- 188. 許佩琳
- 189. 陳巧盈
- 190. 陳宛翎
- 191. 陳俊裕
- 192. 陳效能
- 193. 陳婉珊
- 194. 陳梓言
- 195. 陳雪儀
- 196. 陳嘉莉
- 197. 陳銛霖
- 198. 陳劍琴
- 199. 陳穎彤
- 200. 麥業成，元朗區議員
- 201. 傅應年
- 202. 曾安芙
- 203. 黃永俊
- 204. 黃美美
- 205. 黃卿蘋
- 206. 黃莉鈞
- 207. 黃雯慧
- 208. 楊長詩
- 209. 葉麗珊
- 210. 廖珮珊
- 211. 廖錦綉
- 212. 熊子傑
- 213. 劉麗婷
- 214. 劉藹琳
- 215. 蔣昭儀
- 216. 鄭偉謙
- 217. 鄭健樂
- 218. 鄭量之

- 219. 黎曉彤
- 220. 蕭婉婷
- 221. 簡熙桐
- 222. 羅小萍
- 223. 羅思賢
- 224. 羅穎妍
- 225. 蘇嘉雯
- 226. 蘇慧德
- 227-245. Name illegible (Total 19 persons)

Joint Declaration by Signatories initiated by Association Concerning Sexual Violence Against Women (Nos. 246 – 264) Organisation signatories dated 28.2.2013

- 246. Hong Kong Association of Women Social Workers
- 247. Tin Shui Wai Community Development Network
- 248. Transgender Resource Center
- 249. 一群性暴力幸存者
- 250. 工黨
- 251. 中大性別研究同學會
- 252. 平等機會婦女聯席
- 253. 姐姐仔會
- 254. 性神研究組
- 255. 青鳥
- 256. 青躍
- 257. 香港女同盟會
- 258. 香港女障協進會
- 259. 香港婦女基督徒協會
- 260. 香港彩虹跨性別互助小組
- 261. 香港職工會聯盟婦女事務委員會
- 262. 眾樂教會
- 263. 新婦女協進會
- 264. 群福婦女權益會

List of Respondents to the Consultation Paper on Sexual Offences involving Children and Persons with Mental Impairment

Responses were received from the following Respondents (listed in no particular order):

1. Aberdeen Kai-fong Welfare Association
2. Against Child Abuse Limited
3. Aids Concern
4. Amnesty International Hong Kong
5. Anti-480 反性暴力資源中心
6. Association Concerning Sexual Violence Against Women
7. The Association for the Advancement of Feminism
8. Association of Women with Disabilities Hong Kong
9. AWA of HK
10. Catholic Diocese of Hong Kong Chancery Office
11. The Chinese Muslim Cultural & Fraternal Association
12. Ching Yee Man
13. Chong Yiu Kwong
14. Chosen Power (People First Hong Kong)
15. The Christian New Being Fellowship Ltd
16. The Civic Party
17. Claire Lam
18. Cleo Chui
19. Constitutional and Mainland Affairs Bureau
20. Correctional Services Department
21. Customs and Excise Department
22. Department of Health
23. Department of Justice, Legal Policy Division
24. Department of Justice, Prosecutions Division
25. Dick Lau
26. Duty Lawyer Service
27. Ebenezer School and Home for the Visually Impaired
28. Education Bureau
29. End Child Sexual Abuse Foundation
30. Equal Opportunities Commission
31. The Federation of Medical Societies of Hong Kong
32. Fong Fu Yun
33. Food and Health Bureau
34. Gary Man Kwun Hang
35. Harmony House Hong Kong
36. Home Affairs Bureau

37. Hong Kong Academy of Medicine
38. Hong Kong Association of Women Social Workers
39. Hong Kong Bar Association
40. Hong Kong Children & Youth Services
41. Hong Kong Christian Service
42. Hong Kong College of Physicians
43. Hong Kong College of Psychiatrists
44. The Hong Kong Committee on Children's Rights
45. The Hong Kong Council of Social Service
46. Hong Kong Doctors Union
47. Hong Kong Family Welfare Society
48. Hong Kong Federation of Women Lawyers Limited
49. The Hong Kong Federation of Youth Groups, Youth Crime Prevent Centre
50. The Hong Kong Girl Guides Association
51. The Hong Kong Joint Council of Parents of the Mentally Handicapped
52. Hong Kong Parents Association Limited
53. Hong Kong Police Force
54. The Hong Kong Psychological Society Ltd, Division of Clinical Psychology
55. Hong Kong Sex Culture Society Ltd
56. Hong Kong Sex Education Association
57. Hong Kong Social Workers and Welfare Employees Union
58. The Hong Kong Student Aid Society Ltd
59. The Hong Kong Taoist Association
60. Hong Kong Women's Coalition on Equal Opportunities
61. Hong Kong Women Development Association Limited
62. Hong Kong Women Doctors Association
63. Hong Kong Women Professionals and Entrepreneurs Association
64. Hong Kong Young Women's Christian Association
65. Hospital Authority
66. Immigration Department
67. Jo be
68. Judiciary
69. Kwai Ho Cheung
70. Kwai Tsing District Fight Crime Committee
71. Labour Department
72. The Law Society of Hong Kong
73. Lee Lok Lam
74. Legal Aid Department
75. Liberal Party
76. Louis
77. Lucas Wong
78. The Medical Council of Hong Kong
79. Ming Wong
80. Mother's Choice
81. Ms Wan Ka Ki
82. The Nesbitt Centre
83. Network for Women in Politics
84. Nick Lee
85. Po Leung Kuk

86. Privacy Commissioner for Personal Data, HK
87. Rainbow Action Hong Kong
88. RainLily
89. Rebecca Lam
90. Rehabilitation Alliance Hong Kong
91. Robinson, dundas
92. SAHK
93. The Salvation Army Hong Kong & Macau Command
94. Save the Children Hong Kong Ltd
95. Scout Association of Hong Kong
96. Social Welfare Department
97. Society for Community Organization
98. The Society for Truth and Light
99. St. Vincent De Paul Nursery School
100. Stone Fly
101. Tracy's Yahoo
102. Transport and Housing Bureau
103. Tung Wah Group of Hospitals
104. VOICES - Survivors' Rights Concern Group
105. Watchdog Early Education Centre
106. Yuha Tang
107. 王小姐
108. 何銀菊
109. 余啟明
110. 李小姐
111. 李雯珊、 郭巧玲
112. 周德雄
113. 青少年問卷 男, 15 歲
114. 青少年問卷 男, 15 歲
115. 青少年問卷 男, 16 歲
116. 青少年問卷 男, 17 歲
117. 青少年問卷 男, 19 歲
118. 倫智偉
119. 馬麗華
120. 區艷芳
121. 曾憲民
122. 程健祖
123. 楊偉富
124. 劉泳寧、 嚴祉琦
125. 鄭俊鴻
- 126 – Name illegible (Total 4 persons)
- 129.

List of Respondents to the Consultation Paper on Miscellaneous Sexual Offences

Responses were received from the following Respondents (listed in no particular order):

1. Adoptive Families of Hong Kong
2. Against Child Abuse Limited
3. Agency for Volunteer Service
4. Aids Concern
5. Alison Louise Kade
6. Allison L. Wong
7. Amnesty International Hong Kong
8. Anne S Mason
9. Anti-480 反性暴力資源中心
10. Asian Academy of Family Therapy
11. Association Concerning Sexual Violence Against Women
12. The Association for the Advancement of Feminism
13. Association of Women with Disabilities Hong Kong
14. Au Yim Fong
15. Audrey Tang
16. Caritas - Hong Kong
17. Catholic Diocese of Hong Kong Chancery Office
18. Chan Chi Chuen, Legislative Councillor
19. Chong Yiu Kwong
20. Chosen Power (People First Hong Kong)
21. Chris & Dahn walker
22. Christian Action
23. The Christian New Being Fellowship Limited
24. The Civic Party
25. Clare Bloomfield (Mrs)
26. Constitutional and Mainland Affairs Bureau
27. Correctional Services Department
28. Daniel Herres
29. David Stevens
30. The Democratic Alliance for the Betterment and Progress of Hong Kong
31. Democratic Party
32. Department of Health
33. Department of Justice, Legal Policy Division
34. Department of Justice, Prosecutions Division
35. Dfsa Dfsa
36. Dr. Simone Blaney (PhD)
37. Duty Lawyer Service
38. Education Bureau

39. End Child Sexual Abuse Foundation
40. Estelle Ramsay (South Island School)
41. Evangelical Lutheran Church Social Service - Hong Kong
42. The Family Planning Association of Hong Kong
43. Family Value Foundation of Hong Kong Limited
44. The Federation of Medical Societies of Hong Kong
45. Fg Fg
46. Fong Fu Yun
47. Francis Ho
48. Georgina Hill
49. Ghislaine Armistead
50. Hannah Hayward
51. Hidde Bart de Vries
52. Holly Dauncey
53. Home Affairs Bureau
54. Hong Kong Bar Association
55. The Hong Kong Council of Social Service
56. Hong Kong Family Welfare Society
57. Hong Kong Federation of Women Lawyers Limited
58. Hong Kong Federation of Women Limited
59. The Hong Kong Federation of Youth Groups, Youth Crime Prevention Centre
60. Hong Kong Police Force
61. The Hong Kong Psychological Society Ltd, Division of Clinical Psychology
62. Hong Kong Sex Culture Society Limited
63. Hong Kong Sex Education Association
64. The Hong Kong Taoist Association
65. Hong Kong Women Development Association Limited
66. Hong Kong Women Doctors' Association
67. Hong Kong Women's Coalition on Equal Opportunities
68. Hospital Authority
69. Immigration Department
70. Jeffrey Fong
71. John Davison
72. Judiciary
73. Karl Siu
74. Kowloon City District Fight Crime Committee
75. Lau Chi Chung
76. The Law Society of Hong Kong
77. Legal Aid Department
78. Leung Hoi Fu
79. Liana Johnson
80. Liberal Party
81. Lisette Schouten
82. Lucinda Hill
83. M. Jenny Edwards
84. Margaret M Lo and John K. Jones
85. The Medical Council of Hong Kong
86. Miss LaToya Elliott

87. Mother's Choice
88. Mr Hugh Chiverton & Ms Helen Rigby
89. Natalie Webster
90. Network for Women in Politics
91. New Life Psychiatric Rehabilitation Association
92. New People's Party
93. Parents for the Family Association
94. Pi Car
95. Po Leung Kuk
96. Privacy Commissioner for Personal Data, Hong Kong
97. Protecting Child and Family Association
98. RainLily
99. Rebecca Holdaway
100. Sarah Powell
101. Scout Association of Hong Kong
102. Siu Ling Cheung
103. Social Welfare Department
104. Society for Community Organization
105. The Society for Truth and Light
106. Steven Yip
107. Todd Wong
108. VOICES - Survivors' Rights Concern Group
109. WET
110. The Women's Foundation Limited
111. Zoe Hu (South Island School)
112. 方小姐
113. 林倩雯
114. 金毛貓王
115. 彩虹行動 TOMMY 仔
116. 陳先生
117. 普通市民
118. 鄭俊鴻

