

**THE LAW REFORM COMMISSION OF HONG KONG**

**REPORT ON**

**REVIEW OF SUBSTANTIVE SEXUAL OFFENCES**

**EXECUTIVE SUMMARY**

**Background**

1. In April 2006, the Review of Sexual Offences Sub-committee of the Law Reform Commission of Hong Kong ("**the Sub-committee**") was appointed to review the law relating to sexual and related offences in Hong Kong (including a study on the desirability of setting up a register of sex offenders). The 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."*

2. Since its formation, the Sub-committee issued a *Consultation Paper on Interim Proposals on a Sex Offender Register* in July 2008, and the Law Reform Commission ("**the Commission**") published a *Report on Sexual Offences Records Checks for Child-related Work: Interim Proposals* in February 2010, and a *Report on The Common Law Presumption that a Boy under 14 is Incapable of Sexual Intercourse* in December 2010.

**Overall review of substantive sexual offences**

3. The overall review of substantive sexual offences is the major part of the Sub-committee's study under its terms of reference. 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 Commission published a *Report on Voyeurism and non-consensual upskirt-photography* ("**Report on Voyeurism**") in April 2019 to provide the Commission's final recommendation for a new and specific offence of voyeurism and a new and specific offence in respect of non-consensual upskirt-photography.

4. The Sub-committee received 264, 129 and 118 responses from members of the public during the consultations following the publication of the

First CP in September 2012, the Second CP in November 2016, and the Third CP in May 2018 respectively. These responses came from professional bodies, women affairs concern groups, children affairs concern groups, human rights concern groups, medical professionals, religious bodies, sexual orientation concern groups, legal professional bodies, Government departments, social welfare concern groups, other organisations and individuals (for the purposes of this Executive Summary defined as the "Respondents").

5. Set out below is a brief summary of the general responses and support received from the Respondents in relation to each of the Sub-committee's 21 recommendations contained in the First CP, 41 recommendations contained in the Second CP, and nine recommendations contained in the Third CP (referred to in the Report as the "**Preliminary Recommendations**"):

### **First CP (21 Preliminary Recommendations)**

- (1) ***Preliminary Recommendation 1*** (guiding principles for reform) was supported by an overwhelming majority of the Respondents.<sup>1</sup>
- (2) ***Preliminary Recommendation 2*** (that there should be a statutory definition of "consent") was supported by an overwhelming majority of the Respondents.<sup>2</sup>
- (3) ***Preliminary Recommendation 3*** (the adoption of a statutory definition of consent) was supported by an overwhelming majority of the Respondents.<sup>3</sup>
- (4) ***Preliminary Recommendation 4*** (the capacity to consent to sexual activity is defined) was supported by an overwhelming majority of the Respondents.<sup>4</sup>
- (5) ***Preliminary Recommendation 5*** (there can be no consent if deception as to its nature or purpose of sexual act, or impersonation) was supported by an overwhelming majority of the Respondents.<sup>5</sup>
- (6) ***Preliminary Recommendation 6*** (the scope and withdrawal of consent be defined) was supported by an overwhelming majority of the Respondents.<sup>6</sup>
- (7) ***Preliminary Recommendation 7*** (the scope of the offence of rape should cover penile penetration of the vagina, anus or mouth of another person) was supported by most of the Respondents.<sup>7</sup>

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<sup>1</sup> See paragraphs 2.2 to 2.4 of the Report.

<sup>2</sup> See paragraphs 2.9 to 2.10 of the Report.

<sup>3</sup> See paragraphs 2.15 to 2.16 of the Report.

<sup>4</sup> See paragraphs 2.26 to 2.27 of the Report.

<sup>5</sup> See paragraphs 2.34 to 2.35 of the Report.

<sup>6</sup> See paragraphs 2.41 to 2.42 of the Report.

<sup>7</sup> See paragraphs 2.45 to 2.46, and 2.48 to 2.51 of the Report.

- (8) ***Preliminary Recommendation 8*** (the term "rape" should continue to be used to describe the offence of non-consensual penile penetration; and a distinction should be made between rape and other non-consensual sexual offences which involve non-penile sexual penetrative acts) was supported by most of the Respondents. However, there were oppositions to the continuation of the term "rape" as it carries a social stigma for the victim. Some Respondents suggested replacing the term "rape" with the offence of "sexual assault by way of penetration (penile or non-penile). There were also Respondents who opposed to a distinction between rape and other forms of non-penile sexual penetrative acts stating that these other forms of sexual assault could be as serious as rape.<sup>8</sup>
- (9) ***Preliminary Recommendation 9*** (the definitions of a penis and a vagina should include surgically constructed penis and vagina) was supported by an overwhelming majority of the Respondents.<sup>9</sup>
- (10) ***Preliminary Recommendation 10*** (penetration should be defined to mean a continuing act from entry to withdrawal) was supported by an overwhelming majority of the Respondents.<sup>10</sup>
- (11) ***Preliminary Recommendation 11*** (the act of penetration in rape and the relevant acts in the other non-consensual sexual offences must be committed intentionally; and that self-intoxication is not a defence) was not supported by the majority of the Respondents. They were of the view that the offence should also cover acts of penetration committed recklessly for better protection of the victim.<sup>11</sup>
- (12) ***Preliminary Recommendation 12*** (the reform option for dealing with genuine (but mistaken) belief in consent) was supported by an overwhelming majority of the Respondents.<sup>12</sup>
- (13) ***Preliminary Recommendation 13*** (the offence of procurement by false pretences should be retained) was supported by an overwhelming majority of the Respondents.<sup>13</sup>
- (14) ***Preliminary Recommendation 14*** (sexual intercourse obtained by economic pressure should be dealt with on a case by case basis) was supported by the majority of the Respondents. 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.<sup>14</sup>

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<sup>8</sup> See paragraphs 2.45, and 2.47 to 2.51 of the Report.

<sup>9</sup> See paragraphs 2.62 to 2.63 of the Report.

<sup>10</sup> See paragraphs 2.69 to 2.70 of the Report.

<sup>11</sup> See paragraphs 2.73 to 2.74 of the Report.

<sup>12</sup> See paragraphs 2.79 to 2.80 of the Report.

<sup>13</sup> See paragraphs 2.88 to 2.89 of the Report.

<sup>14</sup> See paragraphs 2.93 to 2.94 of the Report.

- (15) **Preliminary Recommendation 15** (the proposed definition of "sexual") was supported by an overwhelming majority of the Respondents : ie 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.<sup>15</sup>
- (16) **Preliminary Recommendation 16** (adding the offence of sexual assault by penetration; and the abolition of the offence of non-consensual buggery) was supported by an overwhelming majority of the Respondents.<sup>16</sup>
- (17) **Preliminary Recommendation 17** (the proposed definition of touching) was supported by an overwhelming majority of the Respondents.<sup>17</sup>
- (18) **Preliminary Recommendation 18** (sexual assault offence (first category) – touching) was supported by an overwhelming majority of the Respondents. However, some Respondents raised concern as to whether the new provision should include other kinds of bodily fluid such as the prostate fluid of a penis and vaginal discharge.<sup>18</sup>
- (19) **Preliminary Recommendation 19** (sexual assault offence (second category) – use or threat of use of immediate and unlawful personal violence) was supported by an overwhelming majority of the Respondents.<sup>19</sup>
- (20) **Preliminary Recommendation 20** (sexual assault offence (third category) – causing fear, degradation or harm; retention of the offence of indecent exposure) was not supported by the majority of the Respondents. Most of the Respondents opposed the expanding of the scope of sexual assault to include "upskirt-photography" as it is not a form of sexual assault. They suggested a new offence of voyeurism be created to cover non-consensual upskirt-photography.<sup>20</sup>
- (21) **Preliminary Recommendation 21** (causing a person to engage in sexual activity without consent; and abolition of the offence of procurement by threats or intimidation) was supported by the majority of the Respondents. There were responses from a few women affairs concern groups which were opposed to the abolition of the offence of procurement by threats or intimidation for fear of a possible reduction of protection to the public.<sup>21</sup>

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<sup>15</sup> See paragraphs 2.97 to 2.99 of the Report.

<sup>16</sup> See paragraphs 2.104 to 2.109 of the Report.

<sup>17</sup> See paragraphs 2.116 to 2.117, and 2.120 to 2.121 of the Report.

<sup>18</sup> See paragraphs 2.116, and 2.118 to 2.121 of the Report.

<sup>19</sup> See paragraphs 2.126 to 2.127 of the Report.

<sup>20</sup> See paragraphs 2.129 to 2.131 of the Report.

<sup>21</sup> See paragraphs 2.134 to 2.138 of the Report.

## **Second CP (41 Preliminary Recommendations)**

- (1) ***Preliminary Recommendation 1*** (a uniform age of consent of 16 years in Hong Kong) was supported by an overwhelming majority of the Respondents.<sup>22</sup>
- (2) ***Preliminary Recommendation 2*** (offences involving children and young persons be gender neutral) was supported by an overwhelming majority of the Respondents.<sup>23</sup>
- (3) ***Preliminary Recommendation 3*** (a range of offences involving children under 13 and another range of offences involving children under 16) was supported by an overwhelming majority of the Respondents.<sup>24</sup>
- (4) ***Preliminary Recommendation 4*** (the word "unlawful" be removed from all offences involving sexual intercourse or sexual act) was supported by an overwhelming majority of the Respondents.<sup>25</sup>
- (5) ***Preliminary Recommendation 5*** (offences involving children and young persons be capable of being committed by either an adult or a child offender) was supported by an overwhelming majority of the Respondents.<sup>26</sup>
- (6) ***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) was supported by an overwhelming majority of the Respondents as regards applying absolute liability to offences involving children between 13 and 16 years of age to protect this age group under the protective principle. Further, the majority of the Respondents took the view that there should not be a distinction between penetrative and non-penetrative sexual activity as the degree of psychological harm done to the victim can be the same irrespective of whether there was penetration or not.<sup>27</sup>
- (7) ***Preliminary Recommendation 7*** (marital defence to offences involving children be abolished) was supported by an overwhelming majority of the Respondents.<sup>28</sup>
- (8) ***Preliminary Recommendation 8*** (consensual sexual activity between persons who are between 13 and 16 be criminalised but with

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<sup>22</sup> See paragraphs 3.3 to 3.4 of the Report.

<sup>23</sup> See paragraphs 3.9 to 3.10 of the Report.

<sup>24</sup> See paragraphs 3.13 to 3.14 of the Report.

<sup>25</sup> See paragraphs 3.19 to 3.20 of the Report.

<sup>26</sup> See paragraphs 3.24 to 3.25 of the Report.

<sup>27</sup> See paragraphs 3.30 to 3.32 of the Report.

<sup>28</sup> See paragraphs 3.38 to 3.39 of the Report.

prosecutorial discretion to bring a charge in appropriate cases) was supported by a significant majority of the Respondents.<sup>29</sup>

- (9) ***Preliminary Recommendation 9*** (new offences of penile penetration of a child under 13 and under 16) was supported by an overwhelming majority of the Respondents.<sup>30</sup>
- (10) ***Preliminary Recommendation 10*** (new offences of penetration of a child under 13 and under 16) was supported by an overwhelming majority of the Respondents.<sup>31</sup>
- (11) ***Preliminary Recommendation 11*** (new offences of sexual assault of a child under 13 and under 16) was supported by a significant majority of the Respondents. Some Respondents expressed that the offences should cover emission of other kinds of bodily fluid such as prostate fluid of a penis and female vaginal discharge.<sup>32</sup>
- (12) ***Preliminary Recommendation 12*** (new offences of causing or inciting a child under 13 and under 16 to engage in sexual activity) was supported by the majority of the Respondents.<sup>33</sup>
- (13) ***Preliminary Recommendation 13*** (new offences of engaging in sexual activity in the presence of a child under 13 and under 16) was supported by an overwhelming majority of the Respondents. However, a few Respondents 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, and hence these parents may be caught by the new offences inadvertently.<sup>34</sup>
- (14) ***Preliminary Recommendation 14*** (new offences of causing a child under 13 and under 16 to look at a sexual image) was supported by an overwhelming majority of the Respondents. However, some Respondents suggested including "sexting" (covering both text and audio messages) in the new offences.<sup>35</sup>
- (15) ***Preliminary Recommendation 15*** (new offence of arranging or facilitating the commission of a child sex offence) was supported by the vast majority of the Respondents. The dissenting views raised general reservations to the proposed new offence, criticising that it was too wide.<sup>36</sup>

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<sup>29</sup> See paragraphs 3.45 to 3.47 of the Report.

<sup>30</sup> See paragraphs 3.56 to 3.57, and 3.59 of the Report.

<sup>31</sup> See paragraphs 3.56, and 3.58 to 3.59 of the Report.

<sup>32</sup> See paragraphs 3.64 to 3.66 of the Report.

<sup>33</sup> See paragraphs 3.72 to 3.73 of the Report.

<sup>34</sup> See paragraphs 3.76 to 3.78 of the Report.

<sup>35</sup> See paragraphs 3.89 to 3.91 of the Report.

<sup>36</sup> See paragraphs 3.97 to 3.98 of the Report.

- (16) **Preliminary Recommendation 16** (health and treatment issues as exceptions to aiding, abetting and counselling a child sex offence) was supported by an overwhelming majority of the Respondents.<sup>37</sup>
- (17) **Preliminary Recommendation 17** (sexual intercourse with a girl under 13 and under 16 be abolished) was unanimously supported by the Respondents.<sup>38</sup>
- (18) **Preliminary Recommendation 18** (indecent conduct towards a child under 16 be abolished) was unanimously supported by the Respondents.<sup>39</sup>
- (19) **Preliminary Recommendation 19** (a man committing buggery with a girl under 21 be abolished) was supported by an overwhelming majority of the Respondents.<sup>40</sup>
- (20) **Preliminary Recommendation 20** (homosexual buggery with or by man under 16 and gross indecency with or by man under 16 be abolished) was unanimously supported by the Respondents.<sup>41</sup>
- (21) **Preliminary Recommendation 21** (abduction of an unmarried girl under 16 and abduction of an unmarried girl under 18 for sexual intercourse be abolished) was supported by the vast majority of the Respondents.<sup>42</sup>
- (22) **Preliminary Recommendation 22** (new offence of sexual grooming) was supported by the vast majority of the Respondents. Most of them 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.<sup>43</sup>
- (23) **Preliminary Recommendation 23** (new offence of inducement, threat or deception to procure sexual activity with a person with mental impairment ("PMI")) was supported by an overwhelming majority of the Respondents.<sup>44</sup>
- (24) **Preliminary Recommendation 24** (new offence of causing a PMI to engage in or agree to engage in sexual activity by inducement, threat or deception) was supported by an overwhelming majority of the Respondents.<sup>45</sup>
- (25) **Preliminary Recommendation 25** (new offence of engaging in sexual activity in the presence, procured by inducement, threat or deception, of

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<sup>37</sup> See paragraphs 3.104 to 3.105 of the Report.  
<sup>38</sup> See paragraphs 3.108 to 3.109 of the Report.  
<sup>39</sup> See paragraphs 3.113 to 3.114 of the Report.  
<sup>40</sup> See paragraphs 3.118 to 3.119 of the Report.  
<sup>41</sup> See paragraphs 3.122 to 3.123 of the Report.  
<sup>42</sup> See paragraphs 3.127 to 3.128 of the Report.  
<sup>43</sup> See paragraphs 3.133 to 3.135 of the Report.  
<sup>44</sup> See paragraphs 3.144 to 3.145 of the Report.  
<sup>45</sup> See paragraphs 3.150 to 3.151 of the Report.

a PMI) was supported by an overwhelming majority of the Respondents.<sup>46</sup>

- (26) **Preliminary Recommendation 26** (new offence of causing a PMI to watch a sexual act by inducement, threat or deception) was supported by an overwhelming majority of the Respondents.<sup>47</sup>
- (27) **Preliminary Recommendation 27** (new 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) was supported by an overwhelming majority of the Respondents.<sup>48</sup>
- (28) **Preliminary Recommendation 28** (new 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) was supported by an overwhelming majority of the Respondents.<sup>49</sup>
- (29) **Preliminary Recommendation 29** (new 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) was supported by an overwhelming majority of the Respondents.<sup>50</sup>
- (30) **Preliminary Recommendation 30** (new 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) was supported by an overwhelming majority of the Respondents.<sup>51</sup>
- (31) **Preliminary Recommendation 31** (proposed definition of situations where a relationship of care exists) was supported by an overwhelming majority of the Respondents.<sup>52</sup>
- (32) **Preliminary Recommendation 32** (exceptions where the care provider and the PMI are married or in pre-existing relationship) was supported by the majority of the Respondents. Those dissenting expressed that one should not presume PMIs would not be subjected to marital rape.<sup>53</sup>
- (33) **Preliminary Recommendation 33** (requirement as to knowledge of mental illness) was supported by an overwhelming majority of the Respondents.<sup>54</sup>

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<sup>46</sup> See paragraphs 3.155 to 3.156 of the Report.  
<sup>47</sup> See paragraphs 3.160 to 3.161 of the Report.  
<sup>48</sup> See paragraphs 3.164 to 3.165 of the Report.  
<sup>49</sup> See paragraphs 3.169 to 3.170 of the Report.  
<sup>50</sup> See paragraphs 3.174 to 3.175 of the Report.  
<sup>51</sup> See paragraphs 3.179 to 3.180 of the Report.  
<sup>52</sup> See paragraphs 3.184 to 3.186 of the Report.  
<sup>53</sup> See paragraphs 3.193 to 3.194 of the Report.  
<sup>54</sup> See paragraphs 3.201 to 3.202 of the Report.

- (34) **Preliminary Recommendation 34** (evidential burden as regards the accused's knowledge of the victim's mental illness) was supported by an overwhelming majority of the Respondents.<sup>55</sup>
- (35) **Preliminary Recommendation 35** (new offences involving PMIs applicable to mentally disordered persons or mentally handicapped persons) was supported by the majority of the Respondents. However, the Respondents were divided into two groups: the first group was in favour of broadening the existing protection to cover all mentally impaired persons; and the second group was concerned that by removing the second limb from the definition of a mentally incapacitated person ("MIP") would make the proposed definition of PMI too wide and hence would go against the principle of sexual autonomy.<sup>56</sup>
- (36) **Preliminary Recommendation 36** (the draftsman to decide what term to describe the PMI) was supported by an overwhelming majority of the Respondents.<sup>57</sup>
- (37) **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) was supported by an overwhelming majority of the Respondents.<sup>58</sup>
- (38) **Preliminary Recommendation 38** (abduction of a MIP from her or his parent or guardian for a sexual act be abolished) was supported by an overwhelming majority of the Respondents.<sup>59</sup>
- (39) **Preliminary Recommendation 39** (sexual intercourse with patients be abolished) was supported by an overwhelming majority of the Respondents.<sup>60</sup>
- (40) **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): The majority of the Respondents were in favour of legislation to protect young persons aged 16 or above but under 18. However, some Respondents were opposed to this approach and expressed that non-consensual sexual acts should be unlawful regardless of the age of the victim. Further, some Respondents believed once a person has reached the age of consent (ie 16), one should not be barred from sexual activity if there is consent.<sup>61</sup>

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<sup>55</sup> See paragraphs 3.206 to 3.207 of the Report.

<sup>56</sup> See paragraphs 3.210 to 3.212 of the Report.

<sup>57</sup> See paragraphs 3.227 to 3.228 of the Report.

<sup>58</sup> See paragraphs 3.232 to 3.233 of the Report.

<sup>59</sup> See paragraphs 3.236 to 3.237 of the Report.

<sup>60</sup> See paragraphs 3.241 to 3.242 of the Report.

<sup>61</sup> See paragraphs 3.245 to 3.247 of the Report.

- (41) ***Preliminary Recommendation 41*** (proposed new offences involving children and those involving PMIs to have extraterritorial effect) was supported by an overwhelming majority of the Respondents.<sup>62</sup>

### **Third CP (9 Preliminary Recommendations)**

- (1) ***Preliminary Recommendation 1*** (the specific offence of incest be retained but should be reformed) was supported by the vast majority of the Respondents. 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. There are also requests for extending the incest offence to cover all other forms of penetration and adoptive parents.<sup>63</sup>
- (2) ***Preliminary Recommendation 2*** (new offence of sexual exposure) was supported by an overwhelming majority of the Respondents. 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.<sup>64</sup>
- (3) ***Preliminary Recommendation 3*** (new specific offence of voyeurism) was supported by an overwhelming majority of the Respondents.<sup>65</sup>
- (4) ***Preliminary Recommendation 4*** (the offence of bestiality be replaced by an offence of sexual intercourse with an animal) was supported by an overwhelming majority of the Respondents.<sup>66</sup>
- (5) ***Preliminary Recommendation 5*** (new offence of sexual activity with a dead person) was supported by an overwhelming majority of the Respondents.<sup>67</sup>
- (6) ***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) was supported by an overwhelming majority of the Respondents.<sup>68</sup>
- (7) ***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) was supported by an overwhelming majority of the Respondents.<sup>69</sup>

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<sup>62</sup> See paragraphs 3.268 to 3.269 of the Report.

<sup>63</sup> See paragraphs 4.3 to 4.9 of the Report.

<sup>64</sup> See paragraphs 4.30 to 4.31 of the Report.

<sup>65</sup> See paragraphs 4.43 to 4.46 of the Report; and the Report on Voyeurism (April 2019).

<sup>66</sup> See paragraphs 4.48 to 4.49 of the Report.

<sup>67</sup> See paragraphs 4.56 to 4.57 of the Report.

<sup>68</sup> See paragraphs 4.63 to 4.64 of the Report.

<sup>69</sup> See paragraphs 4.73 to 4.74 of the Report.

- (8) **Preliminary Recommendation 8** (burglary with intent to rape be replaced by a new offence of trespass with intent to commit a sexual offence) was supported by an overwhelming majority of the Respondents.<sup>70</sup>
- (9) **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) was supported by an overwhelming majority of the Respondents. However, some Respondents stated that apart from those provisions in relation to homosexuals identified by the Sub-committee, there are other provisions in the Crimes Ordinance (Cap 200) which also concern homosexuality but have not been recommended for repeal. There is also concern on whether a new offence should be added to criminalise a person in custody committing buggery or other grossly indecent acts.<sup>71</sup>

6. The Report discusses the responses received to the three consultation papers and sets out the Commission's analysis and final recommendations on Review of Substantive Sexual Offences ("**Final Recommendations**").

## Our Final Recommendations

7. The Commission concluded that an overall review of substantive sexual offences requires careful consideration as the scope of the review is wide and it raises a number of sensitive and controversial issues. The entire review has been broken down into four discrete parts to deal with different aspects of the overall subject matter.<sup>72</sup> The Final Recommendations in the Report cover the first three parts.<sup>73</sup>

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<sup>70</sup> See paragraphs 4.83 to 4.84 of the Report.

<sup>71</sup> See paragraphs 4.92 to 4.95 of the Report.

<sup>72</sup> 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.

<sup>73</sup> 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. The revised plan is 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 with a final report (ie this Report) compiled in respect of all the three 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).

8. The Commission is of the view that the responses received have provided valuable information and insight into the review exercise. In light of the overwhelming support received from the Respondents, the Commission can confirm most of the Sub-committee's Preliminary Recommendations as the Final Recommendations.

9. On the other hand, the Commission has re-shaped a number of Preliminary Recommendations after considering the constructive views and valuable information provided by some of the Respondents. For instance, it is the Commission's final recommendation to:

- (1) discard of the term "rape" and to name the offence "sexual penetration without consent" (referencing the Western Australian provisions); and that the scope of the offence should cover penetration of the vagina or anus; and penile penetration of the mouth of another person [First CP – Final Recommendation 7]<sup>74</sup>;
- (2) extend the mental element of "recklessness" to the act of sexual penetration without consent and the relevant acts in the other non-consensual sexual offences [First CP – Final Recommendation 11]<sup>75</sup>;
- (3) confirm 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 [Second CP – Final Recommendation 6]<sup>76</sup>;
- (4) while noting the crowded living environment in Hong Kong, to 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 [Second CP – Final Recommendation 13]<sup>77</sup>;
- (5) propose that new offences involving PMIs 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 [Second CP – Final Recommendation 35]<sup>78</sup>;
- (6) 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

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<sup>74</sup> See paragraphs 2.51 to 2.61 of the Report.

<sup>75</sup> See paragraphs 2.75 to 2.78 of the Report.

<sup>76</sup> See paragraphs 3.33 to 3.37 of the Report.

<sup>77</sup> See paragraphs 3.79 to 3.88 of the Report.

<sup>78</sup> See paragraphs 3.213 to 3.226 of the Report.

legislature as and when appropriate [Second CP – Final Recommendation 40]<sup>79</sup>; and

- (7) recommend the new offence of incest to cover adoptive parents and should apply to other forms of penetration [Third CP – Final Recommendation 1]<sup>80</sup>.

10. For the reasons set out in the Report, the Commission makes the following Final Recommendations.

### **First CP**

#### **Final Recommendation 1**<sup>81</sup>

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**<sup>82</sup>

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

#### **Final Recommendation 3**<sup>83</sup>

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

<sup>79</sup> See paragraphs 3.248 to 3.267 of the Report.

<sup>80</sup> See paragraphs 4.16 to 4.22 of the Report.

<sup>81</sup> See paragraphs 2.5 to 2.8 of the Report.

<sup>82</sup> See paragraphs 2.11 to 2.14 of the Report.

<sup>83</sup> See paragraphs 2.17 to 2.20 of the Report.

- (b) has the capacity to consent to such activity.

#### **Final Recommendation 4<sup>84</sup>**

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<sup>85</sup>**

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<sup>86</sup>**

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

<sup>84</sup> See paragraphs 2.28 to 2.33 of the Report.

<sup>85</sup> See paragraphs 2.36 to 2.40 of the Report.

<sup>86</sup> See paragraphs 2.43 to 2.44 of the Report.

- (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<sup>87</sup>**

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<sup>88</sup>**

#### **Final Recommendation 9<sup>89</sup>**

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<sup>90</sup>**

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<sup>91</sup>**

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

<sup>87</sup> See paragraphs 2.51 to 2.61 of the Report.

<sup>88</sup> See paragraphs 2.51 to 2.61 of the Report.

<sup>89</sup> See paragraphs 2.64 to 2.68 of the Report.

<sup>90</sup> See paragraphs 2.71 to 2.72 of the Report.

<sup>91</sup> See paragraphs 2.75 to 2.78 of the Report.

(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<sup>92</sup>**

We recommend that 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 enactment of the new legislation.

### **Final Recommendation 13<sup>93</sup>**

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

### **Final Recommendation 14<sup>94</sup>**

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.

<sup>92</sup> See paragraphs 2.81 to 2.87 of the Report.

<sup>93</sup> See paragraphs 2.90 to 2.92 of the Report.

<sup>94</sup> See paragraphs 2.95 to 2.96 of the Report.

### **Final Recommendation 15<sup>95</sup>**

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<sup>96</sup>**

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

### **Final Recommendation 17<sup>97</sup>**

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.

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<sup>95</sup> See paragraphs 2.100 to 2.103 of the Report.

<sup>96</sup> See paragraphs 2.110 to 2.115 of the Report.

<sup>97</sup> See paragraphs 2.122 to 2.125 of the Report.

### **Final Recommendation 18<sup>98</sup>**

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 enactment of the new legislation.

### **Final Recommendation 19<sup>99</sup>**

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<sup>100</sup>**

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

### **Final Recommendation 21<sup>101</sup>**

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

<sup>98</sup> See paragraphs 2.122 to 2.125 of the Report.

<sup>99</sup> See paragraph 2.128 of the Report.

<sup>100</sup> See paragraphs 2.132 to 2.133 of the Report.

<sup>101</sup> See paragraphs 2.139 to 2.145 of the Report.

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 enactment of the new legislation.

## **Second CP**

### **Final Recommendation 1<sup>102</sup>**

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<sup>103</sup>**

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

### **Final Recommendation 3<sup>104</sup>**

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<sup>105</sup>**

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

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<sup>102</sup> See paragraphs 3.5 to 3.8 of the Report.

<sup>103</sup> See paragraphs 3.11 to 3.12 of the Report.

<sup>104</sup> See paragraphs 3.15 to 3.18 of the Report.

<sup>105</sup> See paragraphs 3.21 to 3.23 of the Report.

**Final Recommendation 5<sup>106</sup>**

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<sup>107</sup>**

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<sup>108</sup>**

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<sup>109</sup>**

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<sup>110</sup>**

**Final Recommendation 10<sup>111</sup>**

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

<sup>106</sup> See paragraphs 3.26 to 3.29 of the Report.

<sup>107</sup> See paragraphs 3.33 to 3.37 of the Report.

<sup>108</sup> See paragraphs 3.40 to 3.44 of the Report.

<sup>109</sup> See paragraphs 3.48 to 3.55 of the Report.

<sup>110</sup> See paragraphs 3.60 to 3.63 of the Report.

<sup>111</sup> See paragraphs 3.60 to 3.63 of the Report.

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<sup>112</sup>**

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<sup>113</sup>**

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<sup>114</sup>**

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.

<sup>112</sup> See paragraphs 3.67 to 3.71 of the Report.

<sup>113</sup> See paragraphs 3.74 to 3.75 of the Report.

<sup>114</sup> See paragraphs 3.79 to 3.88 of the Report.

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<sup>115</sup>**

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<sup>116</sup>**

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.

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<sup>115</sup> See paragraphs 3.92 to 3.96 of the Report.

<sup>116</sup> See paragraphs 3.99 to 3.103 of the Report.

**Final Recommendation 16<sup>117</sup>**

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<sup>118</sup>**

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 enactment of the new legislation.

**Final Recommendation 18<sup>119</sup>**

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 enactment of the new legislation.

**Final Recommendation 19<sup>120</sup>**

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 enactment of the new legislation.

**Final Recommendation 20<sup>121</sup>**

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 enactment of the new legislation.

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<sup>117</sup> See paragraphs 3.106 to 3.107 of the Report.

<sup>118</sup> See paragraphs 3.110 to 3.112 of the Report.

<sup>119</sup> See paragraphs 3.115 to 3.117 of the Report.

<sup>120</sup> See paragraphs 3.120 to 3.121 of the Report.

<sup>121</sup> See paragraphs 3.124 to 3.126 of the Report.

### **Final Recommendation 21<sup>122</sup>**

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 enactment of the new legislation.

### **Final Recommendation 22<sup>123</sup>**

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<sup>124</sup>**

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<sup>125</sup>**

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

<sup>122</sup> See paragraphs 3.129 to 3.132 of the Report.

<sup>123</sup> See paragraphs 3.136 to 3.143 of the Report.

<sup>124</sup> See paragraphs 3.146 to 3.149 of the Report.

<sup>125</sup> See paragraphs 3.152 to 3.154 of the Report.

deception, along the lines of section 35(1) of the English Sexual Offences Act 2003.

#### **Final Recommendation 25<sup>126</sup>**

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<sup>127</sup>**

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<sup>128</sup>**

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<sup>129</sup>**

We recommend that the new legislation should include an

<sup>126</sup> See paragraphs 3.157 to 3.159 of the Report.

<sup>127</sup> See paragraphs 3.162 to 3.163 of the Report.

<sup>128</sup> See paragraphs 3.166 to 3.168 of the Report.

<sup>129</sup> See paragraphs 3.171 to 3.173 of the Report.

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<sup>130</sup>**

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<sup>131</sup>**

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<sup>132</sup>**

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) is 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.

<sup>130</sup> See paragraphs 3.176 to 3.178 of the Report.

<sup>131</sup> See paragraphs 3.181 to 3.183 of the Report.

<sup>132</sup> See paragraphs 3.187 to 3.192 of the Report.

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<sup>133</sup>**

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<sup>134</sup>**

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<sup>135</sup>**

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<sup>136</sup>**

We recommend that the proposed new offences involving persons with mental impairment should apply to a mentally

<sup>133</sup> See paragraphs 3.195 to 3.200 of the Report.

<sup>134</sup> See paragraphs 3.203 to 3.205 of the Report.

<sup>135</sup> See paragraphs 3.208 to 3.209 of the Report.

<sup>136</sup> See paragraphs 3.213 to 3.226 of the Report.

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<sup>137</sup>**

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<sup>138</sup>**

We recommend that the offences of a man committing buggery with a mentally incapacitated person (section 118E of the Crimes Ordinance (Cap 200)), a man committing gross indecency with a male mentally incapacitated person (section 118I of the Crimes Ordinance (Cap 200)), a man having intercourse with a female mentally incapacitated person (section 125 of the Crimes Ordinance (Cap 200)) should be abolished upon enactment of the new legislation.<sup>139</sup>

**Final Recommendation 38<sup>140</sup>**

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 enactment of the new legislation.

**Final Recommendation 39<sup>141</sup>**

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 enactment of the new legislation.

<sup>137</sup> See paragraphs 3.229 to 3.231 of the Report.

<sup>138</sup> See paragraphs 3.234 to 3.235 of the Report.

<sup>139</sup> 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.

<sup>140</sup> See paragraphs 3.238 to 3.240 of the Report.

<sup>141</sup> See paragraphs 3.243 to 3.244 of the Report.

#### **Final Recommendation 40<sup>142</sup>**

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<sup>143</sup>**

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.

### **Third CP**

#### **Final Recommendation 1<sup>144</sup>**

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<sup>145</sup>**

We recommend that the new legislation should include an

<sup>142</sup> See paragraphs 3.248 to 3.267 of the Report.

<sup>143</sup> See paragraphs 3.270 to 3.272 of the Report.

<sup>144</sup> See paragraphs 4.10 to 4.29 of the Report.

<sup>145</sup> See paragraphs 4.32 to 4.42 of the Report.

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<sup>146</sup>**

- (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.

<sup>146</sup> See paragraphs 4.44 to 4.47 of the Report. The Final Recommendation 3 was also published in the Report on Voyeurism.

**Final Recommendation 4<sup>147</sup>**

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

**Final Recommendation 5<sup>148</sup>**

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

**Final Recommendation 6<sup>149</sup>**

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<sup>150</sup>**

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<sup>151</sup>**

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 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.

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<sup>147</sup> See paragraphs 4.50 to 4.55 of the Report.

<sup>148</sup> See paragraphs 4.58 to 4.62 of the Report.

<sup>149</sup> See paragraphs 4.65 to 4.72 of the Report.

<sup>150</sup> See paragraphs 4.75 to 4.82 of the Report.

<sup>151</sup> See paragraphs 4.85 to 4.91 of the Report.

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<sup>152</sup>**

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)).

**Secretariat  
Law Reform Commission of Hong Kong  
December 2019**

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<sup>152</sup> See paragraphs 4.96 to 4.103 and footnote 139 above.