THE LAW REFORM COMMISSION OF HONG KONG

REVIEW OF SEXUAL OFFENCES SUB-COMMITTEE

CONSULTATION PAPER

SEXUAL OFFENCES INVOLVING CHILDREN AND PERSONS WITH MENTAL IMPAIRMENT

This consultation paper can be found on the Internet at:
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November 2016

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

The Sub-committee would be grateful for comments on this Consultation Paper by 10 February 2017. All correspondence should be addressed to:

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

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

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Preface

Terms of reference

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

> *"To review the common and statute law governing sexual and related offences under Part XII of the Crimes Ordinance (Cap 200) and the common and statute law governing incest under Part VI of the Ordinance, including the sentences applicable to those offences, to consider whether a scheme for the registration of offenders convicted of such offences should be established, and to recommend such changes in the law as may be appropriate."*

The Sub-committee

2. The Sub-committee on Review of Sexual Offences was appointed in July 2006 to consider and advise on the present state of the law and to make proposals for reform. The sub-committee members are:

Mr Peter Duncan, SC *(Chairman)*	Senior Counsel
Hon Mrs Justice Barnes	Judge of the Court of First Instance of the High Court
Mr Eric T M Cheung	Principal Lecturer Department of Law University of Hong Kong
Dr Chu Yiu Kong *[Until December 2007]*	Assistant Professor Department of Sociology University of Hong Kong

Mr Fung Man-chung *[From August 2012]*	Assistant Director (Family & Child Welfare) Social Welfare Department
Mr Paul Harris, SC *[Until February 2012]*	Senior Counsel
Mr Paul Ho *[From May 2016]*	Senior Assistant Director of Public Prosecutions
Professor Karen A Joe Laidler *[From September 2008]*	Director Centre for Criminology also Professor Department of Sociology University of Hong Kong
Mr Stephen K H Lee *[From January 2008 to August 2010]*	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mr Lee Wai-man, Wyman *[From July 2014]*	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mrs Apollonia Liu *[Until June 2009]*	Principal Assistant Secretary Security Bureau
Mr Ma Siu Yip *[Until January 2008]*	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mrs Anna Mak Chow Suk Har *[Until May 2011]*	Assistant Director (Family & Child Welfare) Social Welfare Department
Mr Man Chi-hung, Alan *[From September 2010 to May 2012]*	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mrs Millie Ng *[From June 2009 to November 2015]*	Principal Assistant Secretary Security Bureau
Ms Pang Mo-yin, Betty *[From May 2012 to June 2014]*	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 *[From February 2012]*	Barrister
Dr Alain Sham *[Until May 2016]*	Deputy Director of Public Prosecutions Department of Justice
Mr Andrew YT Tsang *[From November 2015]*	Principal Assistant Secretary Security Bureau
Ms Caran Wong *[From June 2011 to August 2012]*	Assistant Director (Family & Child Welfare) Social Welfare Department
Mr Thomas Leung *(Secretary)*	Senior Government Counsel Law Reform Commission

Miss Sally Ng, Senior Government Counsel in the Law Reform Commission Secretariat is also assisting in the Sub-committee's work.

Previous work of the Sub-committee

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

First Sub-committee Paper: Sexual Offences Records Checks for Child-Related Work

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

5. Taking into account the views on consultation, the Law Reform Commission published in February 2010 a Report on Sexual Offences Records Checks for Child-Related Work: Interim Proposals. The report recommended, among other things, the establishment of an administrative scheme to enable employers of persons undertaking child-related work and work relating to mentally incapacitated persons to check the criminal conviction records for sexual offences of employees. The proposals in the

report were subsequently implemented by the establishment of an administrative scheme with effect from 1 December 2011.

Second Sub-committee Paper: Presumption that a Boy under 14 is Incapable of Sexual Intercourse

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

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

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

Third Sub-committee Paper: Rape and other Non-consensual Sexual Offences

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

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

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

(ii) 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);

(iii) miscellaneous sexual offences; and

(iv) sentencing.

11. In September 2012, the Sub-committee issued a *Consultation Paper on Rape and Other Non-consensual Sexual Offences* ***("the Non-consensual Offences CP")***. *The Non-consensual Offences CP* represents the first of the four consultation papers issued or to be issued by the Sub-committee on the remaining topics that it has set for itself. It covered the non-consensual sexual offences which are concerned with promoting or protecting a person's sexual autonomy, namely, rape, sexual assault by penetration, sexual assault and causing a person to engage in sexual activity without consent.

This consultation paper

12. This consultation paper is the fourth paper issued by the Sub-committee under its terms of reference. It represents the second of the four consultation papers issued or to be issued by the Sub-committee in its overall review of the substantive sexual offences. It covers sexual offences involving children and persons with mental impairment and sexual offences involving abuse of a position of trust. These sexual offences are largely concerned with the protective principle, that is to say, the criminal law should give protection to certain categories of vulnerable persons against sexual abuse or exploitation. These vulnerable persons include children, persons with mental impairment, and young persons over whom others hold a position of trust.

13. There are a number of statutory sexual offences in the Crimes Ordinance (Cap 200) aimed at the protection of vulnerable persons. Many of these offences are based on similar provisions in English legislation dating back to 1956.[1] They include: intercourse with a girl under 13 (section 123),[2] intercourse with a girl under 16 (section 124),[3] intercourse with a mentally incapacitated person (section 125),[4] abduction of unmarried girl under 16 (section 126),[5] abduction of an unmarried girl under 18 for sexual intercourse (section 127),[6] and abduction of a mentally incapacitated person from parent or guardian for sexual act (section 128).[7]

14. 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

1 Sexual Offences Act 1956, c.69, UK.
2 Compared with section 5 of Sexual Offences Act 1956.
3 Compared with section 6 of Sexual Offences Act 1956.
4 Compared with section 7 of Sexual Offences Act 1956.
5 Compared with section 20 of Sexual Offences Act 1956.
6 Compared with section 19 of Sexual Offences Act 1956.
7 Compared with section 21 of Sexual Offences Act 1956.

relating to sexual offences in England and Wales in 2003.[8] The original offences, however, still remain on Hong Kong's statute book. The English Act was based on proposals made by a Home Office Review Group in the UK in its paper, *Setting the Boundaries: Reforming the Law on Sex Offences* **("the Home Office Paper")**.[9]

15. In Scotland, similar major reform efforts were made, resulting in the enactment of the Sexual Offences (Scotland) Act 2009 **("the Scottish Act")** which provides a set of new statutory sexual offences to meet the needs of modern society.[10] The Scottish Act was based on a review of the law on sexual offences by the Scottish Law Commission. The Commission consulted the public on its initial proposals in a discussion paper on *Rape and Other Sexual Offences* **("the Scottish Law Commission Discussion Paper")**.[11] The final proposals were made in the Scottish Law Commission's report on *Rape and Other Sexual Offences* **("the Scottish Law Commission Report")**.[12]

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

Public views invited

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

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

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

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

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

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

Chapter 1

Overview of existing sexual offences involving children and young persons

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Introduction

1.1 This chapter gives an overview of the major sexual offences relating specifically to children and young persons in Part XII of the Crimes Ordinance (Cap 200).[1]

Intercourse with a girl under 13 or 16

1.2 It is an offence under section 123 of the Crimes Ordinance for a man to have unlawful sexual intercourse with a girl under the age of 13. The offence carries a maximum penalty of life imprisonment. The consent of the girl to the act does not provide a defence to a charge for the offence. If the act was in fact carried out without the girl's consent, an indictment for rape will lie.[2] A mistake by the defendant as to the age of the girl will not provide a defence even if it was based on reasonable grounds.[3]

1.3 A similar offence applies by virtue of section 124(1) of the Crimes Ordinance where a man has unlawful sexual intercourse with a girl under the age of 16. The offence carries a maximum penalty of 5 years' imprisonment. Consent of the girl is immaterial and does not provide a defence. The Court of Final Appeal in *So Wai Lun v HKSAR*[4] affirmed the judgment of the Court of Appeal that the offence under section 124 is one of absolute liability.[5] The defendant's mistaken belief that the girl was 16 or more, therefore, will not provide a defence.[6] This is so even if the belief was based on reasonable grounds.

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1 There is a wide range of offences relating to prostitution or pornography in sections 129 to 159 of the Crimes Ordinance (Cap 200). These offences are not covered in the overview in this chapter since prostitution or pornography-related offences are not included in the scope of our overall review of sexual offences.

2 *Archbold Hong Kong 2015*, at para 21-52.

3 *Archbold Hong Kong 2015*, at para 21-53.

4 *So Wai Lun v HKSAR* FACC No 5 of 2005, [2006] 3 HKLRD 394 (on appeal from *HKSAR v So Wai Lun* [2005] 1 HKLRD 443).

5 An offence imposing absolute liability is one in respect of which no implied common law defence of reasonable mistaken belief or due diligence is available (see *Archbold Hong Kong 2012*, at para 18-14).

6 *Archbold Hong Kong 2015*, at para 21-66A.

1.4 A marital defence is available in respect of the section 124 offence (but not in the case of the section 123 offence). Section 124(2), which provides for the marital defence, reads as follows:

> "*Where a marriage is invalid under section 27(2) of the Marriage Ordinance (Cap 181) by reason of the wife being under the age of 16, the invalidity shall not make the husband guilty of an offence under this section because he has sexual intercourse with her, if he believes her to be his wife and has reasonable cause for the belief.*"

1.5 The marital defence protects a man from criminal liability under section 124 if he has sexual intercourse with a girl under 16, provided that he can prove on the balance of probabilities that he believes the girl to be his wife and there are reasonable grounds for him to hold that belief. Thus, for example, a husband who legally married a woman under 16 in accordance with the marriage law of an overseas jurisdiction may claim protection under the marital defence. It should be noted that all non-consensual sexual intercourse is always caught by rape. This applies even within marriage. Hence, if the sexual intercourse is without the girl's consent, a charge of rape would lie against the husband and the marital defence under section 124(2) would not be applicable.

Buggery with girl under 21

1.6 It is an offence under section 118D of the Crimes Ordinance for a man to commit buggery with a girl under the age of 21. The offence carries a maximum penalty of life imprisonment.

Homosexual buggery with or by man under 16

1.7 Section 118C of the Crimes Ordinance provides that it is an offence for a man to commit buggery with another man under the age of 16; or for a man who is under the age of 16 to commit buggery with another man. The offence carries a maximum penalty of life imprisonment.

1.8 Section 118C used to provide for an offence for a man to commit buggery with another man under 21; or for a man who is under 21 to commit buggery with another man. The Court of Appeal upheld the decision of the Court of First Instance in *Leung TC William Roy v SJ*[7] that the then section 118C was unconstitutional and invalid to the extent that it applied to a man aged 16 or over and under 21. The Statute Law (Miscellaneous Provisions) Ordinance 2014 (Ord No. 18 of 2014) was subsequently enacted on 26 November 2014 to amend the then section 118C by substituting all

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

references to "21" in that section with "16". The effect of the amendment is that it is not unlawful for a gay couple to commit buggery with one another provided that they are aged 16 or over. However, it remains an offence under section 118 C if either of them is under 16.

Gross indecency with or by man under 16

1.9 Section 118H of the Crimes Ordinance provides that it is an offence for a man to commit an act of gross indecency with another man under the age of 16; or for a man who is under the age of 16 to commit an act of gross indecency with another man. That is to say, it is unlawful for a gay couple to engage in an act of gross indecency if either of them is under the age of 16. The offence carries a maximum penalty of two years' imprisonment.

1.10 Section 118H used to provide for an offence for a man to commit an act of gross indecency with another man under 21; or for a man who is under 21 to commit an act of gross indecency with another man. The then section 118H was declared unconstitutional and invalid by the court in *Leung TC William Roy v SJ*, supra, to the extent that it applies to a man aged 16 or over and under 21. The Statute Law (Miscellaneous Provisions) Ordinance 2014 also amended the then section 118H by substituting all references to "21" in that section with "16". The effect of the amendment is that it is not unlawful for a gay couple to engage in an act of gross indecency with one another provided that they are aged 16 or over. However, it remains an offence under section 118 H if either of them is under 16.

Other provisions ruled unconstitutional and invalid

1.11 In addition to sections 118C and 118H discussed above, the court in *Leung TC William Roy v SJ*, supra also ruled that sections 118F(2)(a)[8] and 118J(2)(a)[9] are unconstitutional and invalid. On the other hand, the Court of Final Appeal declared in *SJ v Yau Yuk Lung Zigo and Another*,[10] that section 118F(1) is unconstitutional and invalid.[11] Sections 118F in its entirety and 118J(2)(a) were repealed by the Statute Law (Miscellaneous Provisions) Ordinance 2014 to give effect to the Courts' rulings. (It is worth noting that no amendment was made to the offence of buggery with a girl under 21 in section 118D of the Crimes Ordinance (discussed in paragraph 1.6 above) since the Statute Law (Miscellaneous Provisions) Ordinance 2014 dealt only with the provisions of the Crimes Ordinance that were ruled unconstitutional in

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8 The then section 118F(2)(a) prohibited a man from committing buggery with another man *"when more than 2 persons take part or are present"* even though the act is carried out in private.

9 The then section 118J(2)(a) prohibited a man from committing an act of gross indecency with another man *"when more than 2 persons take part or are present"* even though the act is carried out in private.

10 FACC 12/2006, reported in [2007] 3 HKLRD 903.

11 The then section 118F(1) prohibited a man from committing buggery with another man *"otherwise than in private"*.

Leung TC William Roy v SJ and *SJ v Yau Yuk Lung Zigo and Another,*[12] and section 118D was not challenged in those decisions.)

The term "gross indecency"

1.12 The term "*gross indecency*" is not defined in the Crimes Ordinance. Gross indecency is a term lacking in precise definition and there are a number of possible formulations of the term in the authorities. In this connection, Nazareth Acting CJ said in the Court of Appeal case of *R v Savage*, but without deciding the point:

> "*… It seems to us that what may be intended is* ***indecency that is to be regarded as more serious than mere indecency*** *(either of which might be 'plain, evident, obvious'). That would be consistent with some of the authorities to which Mr Cross drew our attention (e.g.* ***'... 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' … ."*[13] (emphasis added)

1.13 On the other hand, Hartmann J (as he then was) said in the Court of First Instance in *Leung TC William Roy*, supra 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."*[14] (emphasis added)

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12 See Legislative Council Brief on the Statute Law (Miscellaneous Provisions) Bill 2014, at paragraph 3.

13 *R v Savage* [1997] HKLRD 428, at para 11.

14 *Leung TC William Roy*, supra, at paragraph 16.

Indecent conduct towards child under 16

1.14 It is an offence under section 146 of the Crimes Ordinance for *"a person [to commit] an act of gross indecency with or towards a child under the age of 16, or [to incite] a child under the age of 16 to commit such an act with or towards him or her or another"*.[15] The offence carries a maximum penalty of 10 years' imprisonment. Section 146 creates one offence of gross indecency involving a child and the words *"with or towards a child"* is to be read as a phrase.[16]

1.15 It is not a defence to a charge for an offence under section 146 that the child consented to the act of gross indecency.[17] The marital defence is available if the defendant can prove on the balance of probabilities that he or she *"is, or believes on reasonable grounds that he or she is, married to the child"*.[18] It is necessary for the prosecution to prove that the defendant did not have a genuine belief that the child was 16 years or above. The presence or absence of reasonable grounds for the defendant's belief is only a factor in determining whether he genuinely held such belief as to the child's age.[19]

Abduction of unmarried girl under 16 or 18

1.16 It is an offence under section 126 of the Crimes Ordinance for a person *"without lawful authority or excuse, [to take] an unmarried girl under the age of 16 out of the possession of her parent or guardian against the will of the parent or guardian"*.[20] The offence carries a maximum penalty of 10 years' imprisonment.

1.17 A similar offence applies by virtue of section 127 of the Crimes Ordinance: *"A person who takes an unmarried girl under the age of 18 out of the possession of her parent or guardian against the will of the parent or guardian with the intention that she shall have unlawful sexual intercourse with men or with a particular man shall be guilty of an offence"*.[21] The offence carries a maximum penalty of seven years' imprisonment.

1.18 For the purposes of the two abduction offences, a "*guardian*" means *"any person having the lawful care or charge of the girl"*.[22] Whether the girl is in the possession of her parent or guardian is a question of fact for the jury to determine.[23] Even if a girl is away from home, she is still in the possession of her parent or guardian if she intends to return. The defendant

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15 Crimes Ordinance, section 146(1).

16 *Archbold Hong Kong 2015*, at paragraph 21-76. See also *DPP v Burgess* [1971] QB 432, DC; *R v Francis*, 88 Cr app R 127, CA.

17 Crimes Ordinance, section 146(2).

18 Crimes Ordinance, section 146(3).

19 *Archbold Hong Kong 2015*, at paragraph 21-76. See also *B (a Minor) v DPP* [2000] 2 AC 428.

20 Crimes Ordinance, sections 126(1).

21 Crimes Ordinance, sections 127(1).

22 Crimes Ordinance, sections 126(2) and 127(2).

23 *Archbold Hong Kong 2015*, at paragraph 21-173. See also *R v Mace*, 50 JP 776.

is guilty if he induces a girl to run away with him when she is out of the house but intending to return.[24]

1.19 It is immaterial whether the girl consents or not. Thus, the defendant is guilty even if the girl positively encouraged the defendant to take her away.[25]

Criticisms of the existing provisions on sexual offences against children and young persons

1.20 The existing offences against children and young persons are open to criticism for a number of reasons. In the first place, some of these offences are gender-specific. There are separate and different offences dealing with sexual crimes committed against boys and girls. The offences against boys (or young males) include homosexual buggery with or by a man under 16[26] and gross indecency with or by a man under 16.[27] The offences against girls (or young females) include intercourse with a girl under 13,[28] intercourse with a girl under 16,[29] buggery with a girl under 21,[30] abduction of an unmarried girl under 16[31] and abduction of an unmarried girl under 18 for unlawful sexual intercourse.[32] Some of these offences are inconsistent with one or more of the guiding principles discussed in *the Non-consensual Offences CP* (at Chapter 2 of that paper). The separate and different offences dealing with sexual crimes committed against boys and girls are inconsistent with the guiding principle of gender neutrality. The offence of abduction of an unmarried girl under 18 for unlawful sexual intercourse is inconsistent with the principle of sexual autonomy. In accordance with the principle of sexual autonomy, a person should be able to freely choose to have sex provided that the person is over the age of consent. However, a person who takes an unmarried girl above the age of consent (for example, a girl aged 16 to 18) from the parent or guardian with the intention of having consensual sexual intercourse with the girl could be charged with the offence of abduction of an unmarried girl under 18 for unlawful sexual intercourse.

1.21 Some of the offences against children and young persons are based on sexual orientation in that they can only be committed by the gay community. These include the offences of homosexual buggery with or by a

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24 *Archbold Hong Kong 2015*, at paragraph 21-173. See also *R v Mycock* (1871) 12 Cox 28.

25 *Archbold Hong Kong 2015*, at paragraph 21-174. See also *R v Robins* (1844) 1 C & K 456.

26 Crimes Ordinance, section 118C.

27 Crimes Ordinance, section 118H.

28 Crimes Ordinance, section 123.

29 Crimes Ordinance, section 124.

30 Crimes Ordinance, section 118D. As the Statute Law (Miscellaneous Provisions) Ordinance 2014 (Ord. No.18 of 2014) dealt only with the provisions declared unconstitutional and invalid in *Leung TC William Roy v SJ, supra and SJ v Yau Yuk Lung Zigo and Another, supra*, no amendment was made to section 118D. Section 118D therefore continues to apply to a girl under 21.

31 Crimes Ordinance, section 126.

32 Crimes Ordinance, section 127.

man under 16[33] and gross indecency with or by a man under 16.[34] They are inconsistent with the guiding principle of avoidance of distinctions based on sexual orientation.

1.22 There is difference between the age of consent for heterosexual and homosexual buggery. As seen in paragraph 1.8 above, an amendment was made by the Statute Law (Miscellaneous Provisions) Ordinance 2014 to section 118C of the Crimes Ordinance to lower the age of consent for homosexual buggery from 21 to 16. Thus, it is not unlawful for two men to commit buggery with one another provided that they are aged 16 or over. By contrast, the age of consent for heterosexual buggery remains at 21. Thus, it is an offence under section 118D for a man to commit buggery with a girl under the age of 21. In accordance with the protective principle, it is necessary for the law to set legal ages of consent for the protection of minors from sexual abuses and exploitation. However, subject to the age of consent, a person should be able to freely choose to engage in a sexual activity under the principle of sexual autonomy. A higher age of consent for heterosexual buggery would restrict the sexual autonomy of female young persons.

1.23 Some of the offences refer to an act of gross indecency. As discussed above, there are different formulations of the meaning of the term "gross indecency". It is therefore a term lacking precision. In fact, gross indecency may mean different things to different people. Prevalent customs and morals may change over time and affect people's perception of what constitutes an acceptable standard of decency. The use of imprecise terms in legislation is inconsistent with the principle of clarity of the law. By removing imprecise terms from legislation, people would have better understanding of the law and clarity of the law can be achieved.

[33] Crimes Ordinance, section 118C.

[34] Crimes Ordinance, section 118H.

Chapter 2

The age of consent

Introduction

2.1 The age of consent is an important factor in determining criminality in sexual activity involving children and young persons. This chapter considers the meaning of the expression "age of consent"; and what the uniform age of consent in Hong Kong should be.

The meaning of "age of consent"

2.2 The expression "age of consent" does not appear in legislation. In its *Report on Rape and Other Sexual Offences* ("Scottish Law Commission Report"),[1] the Scottish Law Commission defined the expression as meaning *"the age of a child below which any sexual activity is wrong and at or over which sexual activity is legally permissible".*[2]

2.3 The age of consent therefore is the threshold age below which sexual activity is unlawful. The criminal law imposes liability on anyone who engages in sexual activity with a person below the age of consent or involves such a person in sexual activity. The rationale behind this is that the law recognises that persons below of the age of consent may not be able to give informed and meaningful consent to sexual activity and understand its consequences. The danger of exploitation is real because of their young age.

2.4 It should, however, be noted that if the child or young person did not in fact consent, the accused can be charged with one or more of the non-consensual offences in which case the age of consent will not be at issue. This is because the essential ingredient of a non-consensual offence is the absence of consent rather than the age of the child.

The existing age of consent in Hong Kong

2.5 In general, the existing age of consent in Hong Kong is 16.[3] That is to say, it is generally unlawful for a person to have sexual activity with

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

2 Scottish Law Commission, *Ibid*, at para 4.18.

3 There used to be a higher age of consent at 21 for buggery (i.e. anal intercourse), which is the only form of sexual intercourse between two homosexual men. The age of consent for sexual activities short of intercourse between two homosexual men was also set at a higher age of 21.

another person who is under 16. There are hence a range of offences concerning sexual activity with a child under 16 in the Crimes Ordinance: indecent conduct towards child under 16,[4] intercourse with girl under 13,[5] and intercourse with girl under 16.[6] Moreover, a person under 16 cannot in law give any consent to what would otherwise be an offence of indecent assault.[7]

2.6 However, as mentioned in Chapter 1 (at paragraphs 1.11 and 1.23), it is still an offence under section 118D of the Crimes Ordinance for a man to commit buggery with a girl under the age of 21. Thus, the age of consent for heterosexual buggery is still set at a higher age of 21. The age of consent for homosexual buggery has been lowered to 16 by the Statute Law (Miscellaneous Provisions) Ordinance 2014. There is hence a continued disparity between the age of consent for heterosexual buggery and homosexual activity.

Should there be a difference between the age of consent for homosexual and heterosexual sexual activity?

Increasing legal challenge to the discrepancy in age of consent

2.7 Discrepancy in the age of consent is increasingly under challenge in court and declared unconstitutional. Section 159 of the Canadian Criminal Code, which sets a higher age of consent for anal intercourse at 18 (whilst the age of consent for vaginal intercourse is 16),[8] was declared unconstitutional by the court on the basis that it was discriminatory on the basis of age and sexual orientation without justification. The court found that no scientific evidence was presented with respect to more significant risks being involved with anal intercourse, which could justify special treatment in section 159 (*R v Roy* (1998), 125 C.C.C. (3d) 442). Section 159 was found to be unconstitutional and struck down in its entirely.[9] However, according to the Canadian Department of Justice, section 159 of the

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Such difference in age of consent between heterosexual and homosexual sexual activities was been declared unconstitutional and invalid by the courts in *Leung TC William Roy v SJ* , [2005] HKCFI 713; [2005] 3 HKLRD 657; [2005] 3 HKC 77; HCAL160/2004, Court of First Instance, decision upheld by Court of Appeal (CACV 317/2005). The Statute Law (Miscellaneous Provisions) Ordinance 2014 (Ord. No. 18 of 2014) was subsequently enacted on 26 November 2014 to amend, among other things, sections 118C and 118H of the Crimes Ordinance by substituting all references to "21" in those sections with "16". The effect of those amendments is to equalise the age of consent between heterosexual and homosexual sexual intercourse at 16.

4 Crimes Ordinance, section 146.

5 Crimes Ordinance, section 123.

6 Crimes Ordinance, section 124.

7 Crimes Ordinance, section 122(2).

8 In Canada, the age of consent for vaginal intercourse used to be 14 but it was raised to 16 by the Tackling Violent Crime Act in 2008. (Tackling Violent Crime Act, SC 2008, c.6, assent to 28 February 2008).

9 Section 159 of the Canadian Criminal Code was declared unconstitutional and struck down by the Courts of Appeal in Ontario (*R v CM* (1995) 98 CCC (3d) 629), Quebec (*R v Roy* (1998) 125 CCC(3d) 442), British Columbia (*R v Blake* (2002) 187 BCA 255), and Nova Scotia (*R v Farler* (2006) 212 C.C.C.(3d)134), and by the Trial Courts in Alberta (*R v Roth* (2002)306 AR 387) and the Federal Court (*Halm v Canada (Minister of Employment and Immigration),* [1995]FCJ No 303).

Criminal Code has not been repealed through legislative amendment though it has been so struck down by the court.[10]

2.8 In South Africa, the age of consent for homosexual used to be 19 and for heterosexual 16. The Constitutional Court of South Africa has ruled that the differential age of consent discriminates unfairly on the grounds of sexual orientation and is unconstitutional and therefore invalid.[11] That disparity between homosexual and heterosexual as regards the age of consent was removed by the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007,[12] which came in force on 16 December 2007. The 2007 Act replaced all existing sexual offences by offences which are gender neutral. The age of consent for a "child" (a gender neutral term which does not distinguish between homosexuals and heterosexuals) is now 16.[13]

The decision in Leung TC William Roy v SJ

2.9 In the Court of First Instance decision of *Leung TC William Roy v SJ* Hartmann J (as he then was) declared the then sections 118C,[14] 118F(2)(a),[15] 118H[16] and 118J(2)(a)[17] of the Crimes Ordinance unconstitutional as being discriminatory on the basis of sexual orientation.[18] (It should be noted that the constitutionality of section 118D may also be questioned though it was not subject matter of the proceedings.)[19] The Court of Appeal upheld the decision in the court below.[20] The Court of Final Appeal

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10 In a letter dated 23 August 2010 from Mr Donald K Piragoff of the Canadian Department of Justice (in reply to relevant enquiry from the Hong Kong Law Reform Commission in a letter dated 13 July 2010 addressed to the Deputy Minister of Justice of Canada.)

11 See *Izak Andreas Geldenhuys v National Director of Public Prosecutions and others* [2008] ZACC 21.

12 Act No 32 of 2007.

13 See Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 (South Africa), sections 1 and 15.

14 The then section 118C made it unlawful for a gay couple to commit buggery with each other if either of them was under 21.

15 The Crimes Ordinance at that time permitted homosexual buggery provided that both men were 21 (the then section 118C). Heterosexual buggery is allowed provided that the woman is 21 (section 118D). But, while a heterosexual couple may (subject to that age limit) commit buggery even though one or more other persons take part or are present, gay couples (whatever their age) were prohibited from such conduct under the then section 118F(2)(a).

16 The Crimes Ordinance permits heterosexual and lesbian couples to engage in acts of sexual intimacy provided they have reached 16. However, the then section 118H made it unlawful for a gay couple to commit the same conduct (ie an act of gross indecency) with each other if either of them was under 21.

17 While heterosexual and lesbian couples (who are over 16) may engage in acts of sexual intimacy with each other even though one or more other persons take part or are present, gay couples (whatever their age) are prohibited from such conduct (ie an act of gross indecency) under the then section 118J(2)(a).

18 HCAL 160/2004, reported in [2005] 3 HKLRD 657, at para 151. It should be noted that the administration conceded at the hearing that sections 118F(2)(a), 118H and 118J(2)(a) were unconstitutional. The effect of the concession was that section 118H must be read down so that references to 'under the age of 21' are to be read as references to 'under the age of 16'.

19 CACV 317/2005, reported in [2006] 4 HKLRD 211, at para 57.

20 CACV 317/2005, reported in [2006] 4 HKLRD 211. As the administration challenged only the decision below regarding the unconstitutionality of section 118C, the Court of Appeal dealt only with that section and not the other sections (which were conceded by the Administration).

in the subsequent decision of *SJ v Yau Yuk Lung Zigo and Another*[21] declared that the then section 118F(1) was discriminatory and unconstitutional.[22]

2.10 The disparity then existed in the age of consent between buggery (which is the only form of sexual intercourse between two homosexual men)[23] and sexual intercourse between a man and a woman was criticised by Hon Ma CJHC (now Chief Justice) in the Court of Appeal in *Leung TC William Roy v SJ*:

> *"The focus therefore shifts to the age limit of 21 that the legislature has imposed in our legislation. For my part, I fail to see on any basis the justification of this age limit. No evidence has been placed before us to explain why the minimum age requirement for buggery is 21 whereas as far as sexual intercourse between a man and a woman is concerned, the age of consent is only 16. There is, for example, no medical reason for this and none was suggested in the course of argument."*[24]

Our view on the disparity in age of consent

2.11 The issue is whether the age of consent in Hong Kong for heterosexual buggery should continue to be higher than that for homosexual buggery.

2.12 We consider that if we were to suggest a higher age of consent for heterosexual buggery, we would need strong justifications for such a disparity. It is our view that the ages of consent for homosexual and heterosexual sexual activity should be the same.

2.13 Moreover, having a higher age of consent for heterosexual buggery (say at the current level of 21) would cause problem in the scenario of a man marrying a girl who is 16 or over but under 21. The Canadian legislation approaches such a problem by providing for an exception in the

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21 FACC 12/2006, reported in [2007] 3 HKLRD 903.

22 Section 118F(1) is discriminatory in that it only criminalises homosexual buggery otherwise than in private but does not criminalises heterosexuals for the same or comparable conduct (FACC 12/2006, at para 28).

23 In the Court of Appeal, the Hon Ma CJHC (now Chief Justice) expressed support for Hartmann J's conclusion (in the court below) that buggery and sexual intercourse between a man and a woman are to be regard as being similar: *Leung TC William Roy v SJ,* CACV 317/2005, [2006] 4 HKLRD 211, at para 47. The Hon Ma CJHC pointed out, among other things, that:

> *"Many cases have treated buggery as a form of sexual intercourse, among them the decision of this court in R v Chan Chi Wa [1997] 2 HKC 549, at 551E ("anal sexual intercourse"), the decision of the English Court of Appeal in R v Kumar [2005] 1 Cr Ap R 34 566, at 569 (paragraph 11) ("intercourse per annum by a man with another man or woman of whatever age") and that of the South African Constitutional Court in NCGLE v Minister of Justice (see paragraph 29(3) above) at 141a ("sexual intercourse per annum")."* (para 47(5) of judgment).

24 *Leung TC William Roy v SJ,* CACV 317/2005, [2006] 4 HKLRD 211, at para 51(2).

case of consensual anal intercourse in private between husband and wife.[25]. A heterosexual couple would feel being discriminated against by such an exception, however. There is no good reason why it should be unlawful a man to have consensual buggery with a girl 16 or over whilst it is lawful for two gay persons aged 16 or over to do so.

2.14 On the other hand, as regards sexual activity short of intercourse (such as kissing, cuddling, touching the sexual organs), it is hard to justify a different age of consent for that carried out between two heterosexual persons, two homosexual men, or even between two lesbian women. There should not be a higher health risk if such sexual activity is carried out between two homosexuals or lesbians than that carried out between a man and a woman. Equally, there should not be a higher health risk if sexual activity is carried out between a man and a woman than that between two homosexuals or lesbians.

2.15 In view of the *William Roy Leung* and related decisions and the increasing trend of a uniform age of consent in other jurisdictions, we find it hard to find any justification for allowing the 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.

What should be the uniform age of consent?

2.16 Given that it is our view that the age of consent for homosexual and heterosexual sexual activity should be unified, the next issue is what the common age of consent should be.

2.17 The United Nations Convention on the Rights of the Child (Article 1) provides that a child means a person below 18 years of age, unless under the law applicable, the age of majority is lower. The protective principle therefore applies to a person under 18 years.

2.18 However, a balance should be struck between sexual autonomy and the protective principle. That is why jurisdictions may have come to an age of consent lower than the age of 18 years.

The age of consent in other jurisdictions

2.19 The following is a review of the age of consent in other jurisdictions. The information below refers to the general age of consent,

[25] Under sections 159(1) and (2) of the Canadian Criminal Code, it is an offence for anyone to engage in an act of anal intercourse, except consensual anal intercourse carried out in private between husband and wife, or between two persons of 18 years or more.

with no particular reference to the disparity between vaginal and anal sex that exists in some countries.[26]

Jurisdiction	Age of consent
Australian States: South Australia;[27] Tasmania.[28]	17
Australian States: Australian Capital Territory;[29] New South Wales;[30] Northern Territory;[31] Queensland;[32] Victoria;[33] Western Australia.[34]	16
Ireland[35]	17
Canada;[36] Netherland;[37] New Zealand;[38] Northern Ireland;[39] Scotland; South Africa;[40] Singapore;[41] Switzerland;[42] England and Wales.	16

26 There are a few other jurisdictions such as Queensland of Australia and Canada which have a higher age of consent for homosexual sex. In Queensland, the age of consent in general is 16 but the age of consent for anal intercourse is 18. Under section 208 of the Queensland's Criminal Code Act 1899, a person commits an offence of unlawful sodomy if the person, among other things, sodomises (i.e. has anal sex with) another person under 18 years. As anal intercourse is the sole form of intercourse between two homosexual men, it would mean a higher age of consent for homosexual than heterosexual intercourse. In Canada, the age of consent for vaginal intercourse used to be 14 but it was raised to 16 by the Tackling Violent Crime Act in 2008. (Tackling Violent Crime Act, S.C. 2008, c.6, assent to 28 February 2008) However, the Canadian law sets a higher age of consent of 18 for anal intercourse. Section 159 of the Canadian Criminal Code prohibits consensual anal intercourse unless it is carried out in private between husband and wife or between any two persons, each of whom is aged 18 or over.

27 Criminal Law Consolidation Act 1935 (South Australia), section 49.

28 Criminal Code Act 1924 (Tasmania), section 124.

29 Crimes Act 1900 (Australian Capital Territory), section 55.

30 Crimes Act 1900 (New South Wales), section 66C.

31 Criminal Code Act 1983 (Northern Territory), section 127.

32 Criminal Code Act 1899 (Queensland), section 215.

33 Crimes Act 1958 (Victoria), section 45.

34 Criminal Code Act Compilation Act 1913 (Western Australia), section 321.

35 Criminal Law (Sexual Offences) Act 2006, section 3.

36 Canadian Criminal Code 1985, section 151.

37 Dutch Penal Code, Articles 245 and 247.

38 Crimes Act 1961, section 134.

39 Sexual Offences (Northern Ireland) Order 2008, section 16.

40 Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007, sections 1, 15 and 16.

41 Singapore Penal Code, sections 376A and 376E.

42 Swiss Criminal Code, Article 187.

Jurisdiction	Age of consent
Denmark;[43] France;[44] Sweden. [45]	15
Germany;[46] Portugal.[47]	14
Spain[48]	13
United States: Arizona;[49] Delaware;[50] Florida;[51] Idaho;[52] North Dakota;[53] Oregon;[54] Tennessee;[55] Utah;[56] Virginia;[57] Wisconsin.[58]	18
United States: Colorado;[59] Illinois;[60] Louisiana;[61] Missouri;[62] New York;[63] Texas.[64]	17
United States: Alabama; [65] Alaska;[66] Arkansas;[67] California;[68] Connecticut;[69] District of Columbia;[70] Georgia;[71]	16

43 Danish Criminal Code, section 222.
44 French Penal Code, Article 227-25.
45 Sweden Penal Code, Section 4, Chapter 6.
46 German Criminal Code, section 176.
47 Portuguese Penal Code, Article 172.
48 Spain Criminal Code, Article 183.
49 Arizona Revised Statutes, section 13-1405.
50 Delaware Code, section 770, Chapter 5-2,Title 11.
51 The Florida Statutes, section 794.05.
52 Idaho Statutes, section 18-6101.
53 North Dakota Century Code, section 12-1-20-07.
54 Oregon Revised Statutes, section 163-415.
55 Tennessee Code, section 39-13-506.
56 Utah Criminal Code, section 76-5-401.2.
57 Code of Virginia, section 18.2-371.
58 Wisconsin Criminal Code, sections 948.01, 948.02 and 948.09.
59 Colorado Revised Statutes, section 18-3-402.
60 Criminal Code 1961, Illinois Compiled Statutes, sections 11-1.50 and 11-1.60.
61 Louisiana Revised Statutes, section 14:80.
62 Missouri Revised Statutes, sections 566.034, 566.064, 566.068.
63 New York Penal Code, section130.05.
64 Texas Penal Code, sections 21.11 and 22.011.
65 The Code of Alabama 1975, section 13A-6-70.
66 Alaska Statutes 2011, section 11.41.434 to 438.
67 Arkansas Code of 1987, section 5-14-127.
68 California Penal Code, Section 261.5,
69 General Statutes of Connecticut, Section 53a-70.
70 District of Columbia Official Code, sections 22-3001and 22-3008.
71 Georgia Code, section 16-6-3.

Jurisdiction	Age of consent
Hawaii;[72] Indiana;[73] Iowa;[74] Kansas;[75] Kentucky;[76] Maine;[77] Maryland;[78] Massachusetts;[79] Michigan;[80] Minnesota;[81] Mississippi;[82] Montana;[83] Nebraska;[84] Nevada;[85] New Hampshire;[86] New Jersey;[87] New Mexico;[88] North Carolina;[89] Ohio;[90] Oklahoma;[91] Pennsylvania;[92] Rhode Island;[93] South Carolina;[94] South Dakota;[95] Vermont;[96] Washington;[97] West Virginia;[98] Wyoming.[99]	

2.20 As the information in the above table would show, 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 reviewed above is 16 years of age.

2.21 At present the general age of consent is 16 in Hong Kong. The Home Office Review Group in the UK took the view that the age of consent of 16 prevalent at the time of the review should be retained as it is well established, well understood and well supported.[100] The Review Group dismissed the idea of lowering the age of consent from 16 by saying that:

72 Hawaii Revised Statutes, sections 707-730 and 707-732.
73 Indiana Code, Section 35-42-4-9.
74 Iowa Statutes, section 709.4.
75 Kansas Statutes, section 21-5506.
76 Kentucky Revised Statutes, section 510.020.
77 Maine Revised Statutes, section 17A-254.
78 Code of Maryland, sections 3-307 and 3-308.
79 General Laws of Massachusetts, Section 22A, Chapter 265, Title I, Part IV.
80 The Michigan Penal Code, sections 750.520b to 750.520e.
81 Minnesota Statutes, sections 609.342 to 609.3451.
82 Mississippi Code 1972, section 97-3-65.
83 Montana Code 2011, sections 54-5-502 and 54-5-503.
84 Nebraska Revised Statutes, sections 28-319 and 28-319.01.
85 Nevada Revised Statutes, section 200.366.
86 New Hampshire Statutes, section 632-A:4.
87 New Jersey Statutes, section 2C:14-2.
88 New Mexico Statutes, section 30-9-11.
89 North Carolina General Statutes, section 14-27.7A.
90 Ohio Revised Code, section 2907.04.
91 Oklahoma Statutes, section 21-1111.
92 Pennsylvania Statutes, sections 3122.1, 3123 and 3125.
93 State of Rhode Island General Laws, section 11-37-6.
94 South Carolina Code of Laws, section 16-3-655.
95 South Dakota Codified Laws, sections 22-22-1 and 22-22-7.
96 Vermont Statutes, section 3252, Chapter 72, Title 13.
97 Washington Criminal Code, section 9A.44.093.
98 West Virginia Code, section 61-8B-2.
99 Wyoming Statutes, sections 6-2-314 to 6-2-317.
100 Home Office Paper, at para 3.5.7.

> *"… It is clear that children now mature physically at much earlier age [than 16], and are exposed to sexual images and pressure to engage in sexual activity by media and peer pressure when they are very young. However society has to protect children from inappropriate sexual activity at too early an age when it has the potential to cause physical, emotional and psychological harm. The risks of early pregnancy are well documented and there is evidence linking early sexual activity with increased risk of development of sexually transmitted diseases and cervical cancer … ."*[101]

2.22 We share the view of the Home Office Review Group in the UK that the uniform age of consent should be set at the current level of 16 years of age. 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 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 ground that such a suggestion fails to recognise that children mature physically and psychologically at much earlier age nowadays.

How should be the homosexual offences be dealt with?

2.23 There are no longer any homosexual offences in both the English Act and the Scottish Act and all their sexual offences are now gender neutral. This is also the approach taken in South Africa in the above-mentioned Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007. Gender neutral terms such as "person", "child", etc are used in the relevant statutes. The age of consent implicit in the relevant statutes will not involve any distinction based on sex orientation, and so, any related problems arising from the *William Roy Leung* decision will be solved.

2.24 The Scottish Law Commission explained the approach as follows:

> *"In the Discussion Paper we stated our view that here is* ***no need for any offence which deals with homosexual conduct.*** *Where homosexual conduct involves the lack of consent of one of the parties, it would fall within the scope of such offences as rape, sexual assault and sexual coercion. Offences which fall within the scope of the protective principle, such as sexual activity with children under 13 and with children under 16, or abuse of trust within family units, or sexual activity involving a position of trust, all apply to homosexual activity.*
>
> *We also considered that it is* ***wrong in principle that offences should be based on sexual orientation rather than on forms***

[101] Home Office Paper, para 3.5.5.

> ***of wrong.*** *We therefore proposed that* ***all existing offences which relate to homosexual conduct should be removed.*** *For the avoidance of doubt, this would include the abolition of any existing common law crimes … ."*[102] *(emphasis added)*

2.25 It follows that ultimate approach to the problems arising from *William Roy Leung* decision[103] should be the removal of the homosexual offences in the Crimes Ordinance and at common law and the replacement of them by a new set of gender neutral sexual offences (along the lines in the English Act and Scottish Act).

2.26 We shall adopt the approach of replacing the existing homosexual offences by a new set of gender neutral sexual offences and shall make relevant recommendations at suitable junctures of our overall review of the substantive sexual offences.

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.

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102 Scottish Law Commission Report, paras 5.8-5.9.

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

Chapter 3

General issues relating to reform of sexual offences involving children and young persons

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Introduction

3.1 This chapter considers some general issues relating to offences involving children and young persons relevant to formulating reform proposals.

Should offences involving children and young persons in the new legislation be gender neutral?

Existing offences in the Crimes Ordinance

3.2 Some existing offences are gender-specific and there are offences specifically designed for protection of girls but not boys. For example, there are offences of unlawful sexual intercourse with a girl under 13,[1] and unlawful sexual intercourse with a girl under 16.[2] Whilst there are offences specifically designed for the protection of girls, there are no specific offences for the protection of boys.

3.3 There is a gender-neutral offence, namely, indecent conduct towards a child under 16.[3]

The position in overseas jurisdictions

Australia

3.4 There is equality in treatment between boys and girls as regards their protection against sexual exploitation in Australian legislation.

3.5 In the legislation of the various Australian jurisdictions, gender-neutral terms are used when referring to the victim of an offence involving children and young persons. These include, for example: "another person";[4]

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1 Crimes Ordinance, section 123.

2 Crimes Ordinance, section 124.

3 Crimes Ordinance, section 122.

4 For example, it is an offence of sexual intercourse with a young person for a person to engage in sexual intercourse with another person under the age of 10 or 16 years (Crimes Act 1900 (Australian Capital Territory), section 55).

"a child";[5] "a person who is not an adult";[6] and "a young person".[7] The use of these gender neutral terms implies that both boys and girls are given equal protection against sexual exploitation in legislation.

Canada

3.6 Boys and girls are given equal protection in the Canadian Criminal Code.

3.7 Such gender-neutral terms as "a person"[8] and "a young person"[9] are used when referring to the victim of an offence involving children and young persons. The use of gender-neutral terms indicates that there is no differential treatment between boys and girls as regards their protection from sexual exploitation.

England and Wales

3.8 In the English Sexual Offences Act 2003, such gender-neutral terms as "the other person"[10] and "another person"[11] are used when referring to the victim of an offence involving children and young persons. The use of gender-neutral terms implies that there is equality of treatment between boys and girls as regards their protection against sexual exploitation.

Scotland

3.9 In the Sexual Offences (Scotland) Act 2009, a "child" is used when referring to the victim of an offence involving young children[12] or older

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5 For example, it is an offence of sexual intercourse or gross indecency involving a child under 16 years for a person to have sexual intercourse with or commits any act of gross indecency upon a child under the age of 16 years (Criminal Code Act (Northern Territory), section 127).

6 For example, it is an offence of procuring a young person etc for carnal knowledge for a person to procure a person who is not an adult to engage in carnal knowledge either in Queensland or elsewhere (Criminal Code (Queensland), section 217).

7 For example, it is an offence of procuring unlawful sexual intercourse with a person under 17 years for a person to procure a young person to have unlawful sexual intercourse with another person either in Tasmania or elsewhere (Criminal Code (Tasmania), section 125C). A "young person" is defined in section 125C(1) as a person under the age of 17 years.

8 For example, it is an offence of sexual interference for a person who, for a sexual purpose, touches directly or indirectly, the body of a person under the age of 16 years. (Canadian Criminal Code, section 151).

9 For example, it is an offence of sexual exploitation for a person, who is in a position of trust or authority towards a young person, touches directly or indirectly the body of the young person for a sexual purpose (Canadian Criminal Code, section 153(1)). For this offence, a "young person" means a person 16 years of age or more but under the age of 18 years (section 153(2)).

10 For example, it is an offence of rape of a child under 13 for a person to intentionally penetrates, with his penis, the vagina, anus or mouth of another person under 13 (Sexual Offences Act 2003, section 5).

11 For example, it is an offence of sexual activity with a child for a person (A) aged 18 or over 18 to intentionally touch another person (B) where such touching is sexual and B is under 16 and A does not reasonably believe that B is 16 or over; or B is under 13 (Sexual Offences Act 2003, section 9).

12 For example, it is an offence of rape of a young child for a person (A), with A's penis, penetrates intentionally or recklessly the vagina, anus or mouth of a child (B) who has not attained the age of 13 years (Sexual Offences (Scotland) Act 2009, section 18).

children.[13] The use of gender-neutral terms in the legislation indicates the equal treatment between boys and girls as regards their protection against sexual exploitation.

Should offences be gender-neutral?

3.10 There are offences in the Crimes Ordinance specifically designed for protection of girls but not boys. The issue is whether or not offences involving children and young persons should be gender-neutral in the new legislation in order to provide equal protection to boys and girls against sexual exploitation.

3.11 Gender neutrality is one of our guiding principles for reform. We do not see any good reasons why only girls but not boys are protected by law against sexual exploitation. There should be equality between both genders and the protective principle should apply to both boys and girls.

3.12 Moreover, as shown by the above review of overseas legislation, the general trend is for the equality of treatment between boys and girls as regards their protection against sexual exploitation and gender neutrality in offences involving children and young persons. We therefore take the view that offences involving children and young persons should be gender-neutral in the new legislation.

Recommendation 2

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

Should there be a single offence or a range of separate offences to cover sexual abuse of a child?

3.13 At a consultation conference held by the Home Office Review Group in the UK, there was a suggestion that there should be a single offence of adult sexual abuse of a child, to replace the existing offences of unlawful sexual intercourse and indecency with children in order to offer an increased level of protection against sexual activity between adults and children:

> *"One of the key issues to emerge from our consultation conference was the need for the law to establish beyond any doubt that adults should not have sex with children, and that this warranted a serious offence to recognise the importance of the*

[13] For example, it is an offence of having intercourse with an older child for a person (A), who has attained the age of 16 years, with A's penis, penetrates intentionally or recklessly the vagina, anus or mouth of a child (B) who has attained the age of 13 years but has not attained the age of 16 years (Sexual Offences (Scotland) Act 2009, section 28).

crime. The proposal was that there should be an offence of adult sexual abuse of a child, to replace the existing offences of unlawful sexual intercourse and indecency with children, and to offer an increased level of protection against sexual activity between adults and children. Those working with children thought that such an offence would focus attention on the activity of perpetrators, provide greater clarity in law and give a strong message to the public that sexual activity between adults and children is not acceptable. The review accepted the principle of such an offence, and thought that it would clearly define a set of behaviour that was unacceptable and enable the law to treat it with appropriate seriousness. It should also help in the risk assessment of offenders."[14]

3.14 The Home Office Review Group in the UK was not convinced that a single offence as suggested was the best approach. The Review Group considered that such a single offence covering all sexual activity against children, from the most serious to the least serious would be too broad:

"To make such an offence both simple and effective, it would need to cover a range of behaviour committed by men and women with children. We first considered whether the offence should include all types of sexual activity by adults with children. We were particularly concerned that a single offence for all such behaviour, from the most serious to the least serious, would be too broad. It risked undermining the ability of the law to deal with the worst behaviour – i.e. rape … ."[15]

3.15 The Review Group concluded that instead of a single offence covering all sexual crimes committed against children, the proper approach was to have a range of offences involving children which mirror the non-consensual offences of rape, sexual assault by penetration and sexual assault. Although the offences involving children mirrored the non-consensual offences, consent was irrelevant for the range of offences involving children since the culpability was sexual activity with a child rather than the lack of consent:

"Rape is the most serious sex offence and a reformed law would be fundamentally flawed if the rape of a child was not charged as such. The review concluded that rape, sexual assault by penetration and sexual assault, all of which deal with non-consensual behaviour, should be available for use as needed. There should be a separate offence to tackle behaviour that would not be an offence if committed between consenting adults but was wrong and inappropriate when children were involved. In general, therefore, consent was

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14 Home Office, *Setting the Boundaries*: *Reforming the law on sex offences* (July 2000), at paragraph 3.6.1.

15 *Ibid*, paragraph 3.6.2.

irrelevant – the culpability of the behaviour was because it was with a child."[16]

3.16 The issue is whether there should be a single offence involving children and young persons; or a range of offences involving children and young persons in the new legislation.

3.17 In our view, having a new single offence involving children and young persons is simple but is too broad to cover all sexual crimes against children which may be of different degrees of seriousness. We therefore take the view that there should be a range of offences involving children and young persons in the new legislation.

Grouping of the offences involving children and young persons in the new legislation

Existing law

3.18 The existing offences involving children and young persons are classified according to the age of the child in the Crimes Ordinance. The categories are set by reference to the age of consent in respect of the particular group of children and young persons. There are four categories of offences in the Crimes Ordinance depending on the age of consent for the particular group of children and young persons.

3.19 First, there is an offence involving a child under the age of 13, namely, unlawful sexual intercourse with a girl under 13 (section 123).

3.20 Second, there are offences involving a child under the age of 16, namely, indecent conduct towards a child under 16 (section 146); unlawful sexual intercourse with a girl under 16 (section 124); and abduction of an unmarried girl under 16 (section 126).

3.21 Third, there is an offence involving a child under the age of 18, namely, abduction of an unmarried girl under 18 for unlawful sexual intercourse (section 127).

3.22 Fourth, there are offences involving a young person under the age of 21, namely, a man commits buggery with a girl under 21 (section 118D).

The position in overseas jurisdictions

3.23 There are three main models of grouping of offences involving children and young persons. These three models can be identified from the relevant legislation of England and Wales, Scotland and the States in Australia.

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[16] *Ibid*, paragraph 3.6.3.

England and Wales

3.24 In the English Act, the grouping of offences involving children is according to the age of the child. There are only two categories of offences involving children, namely, (i) those involving children under 13; and (ii) those involving children under 16.

The first category: under-13 offences

3.25 The offences in the first category are absolute liability offences with no available defences.[17]

The second category: under-16 offences

3.26 For offences in the second category, a defence of reasonable mistaken belief as to the child's age is available where the child was between 13 and 16.[18] But where the child was under 13, the offences remain to be absolute liability offences with no available defences.

3.27 There is overlap between the under-13 and under-16 offences in that both categories cover a child below 13. However, as mentioned above, a defence of mistaken belief as to the child's age is available in respect of the under-16 offences (where the case involves a child between 13 and 16) but not the under-13 offences.

3.28 Notwithstanding the overlap between the two categories of offences, the intention of Parliament is that anyone engaging in sexual activity with a child under 13 should be charged with one of the under-13 offences which are specifically designed to protect such children. The purpose is to ensure the imposition of the higher maximum penalties available for the under-13 offences.[19]

Scotland

3.29 In the Scottish Act, offences are grouped into two categories, namely, (i) offences involving "young children" and (ii) offences involving "older children". Unlike the English Act, there is no overlap between the different categories of offences involving children in the Scottish Act.

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17 As to whether or not there should be a defence of mistaken belief in the age of the child, we shall deal with this issue in Chapter 4.

18 It is an element of the relevant English offences that *"either (i) B is under 16 and A does not reasonably believe that B is 16 or over, or (ii) B is under 13"* (see for example, sections 9(1)(c), 10(1)(c), 11(1)(c) and 12(1)(c) of the English Act).

19 Crown Prosecution Service Legal Guidance – Sexual Offence Legislation: Rape and Sexual Offences: Chapter 2.

The first category: under-13 offences

3.30 Offences involving "young children" are those covering *"a child (B) who has not attained the age of 13 years"*.[20] These are absolute liability offences.

The second category: between 13 and 16 offences

3.31 Offences involving "older children" are those covering *"a child (B) who (a) has attained the age of 13 years, but (b) has not attained the age of 16 years."*[21]

3.32 A reasonable mistaken belief that the child had attained the age of 16 years provides a defence to the offences involving older children.[22]

States in Australia

3.33 In Australia, offences involving children are commonly expressed in terms of the age of the child.[23] For example, there are offences involving young children under the age of 10, 12 or 13 years of age, depending on the jurisdiction.[24] There are also offences involving older children generally under the age of 16,[25] but in some cases 17,[26] or 18 years of age.[27] This gradation generally reflects the seriousness of offences involving very young children. Accordingly, the sentences attached to those offences are higher than for those against older children.

3.34 In New South Wales, there are two categories of offences involving children depending on the age groups of the childs: (i) children

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20 See, for example, section 18 of the Scottish Act.

21 See, for example, section 28 of the Scottish Act.

22 The Scottish Act, section 39(1).

23 Australian Law Reform Commission, *Family Violence – A National Legal Response* (November 2010), ALRC Report 114, at para 25.33.

24 Under the age of 10 years: *Crimes Act 1900* (New South Wales), section 66B; *Crimes Act 1958* (Victoria), section 45(2)(a); *Crimes Act 1900* (Australian Capital Territory), section 55(1). Under 12 years of age: see *Criminal Code* (Queensland), section 215(3). Under the age of 13 years: *Criminal Code* (Western Australia), section 320 (see Australian Law Reform Commission, *Family Violence – A National Legal Response* (November 2010), ALRC Report 114, footnote 60 to Chapter 25).

25 *Crimes Act 1958* (Vic), section 45(2)(b); *Criminal Code* (Queensland), section 215(1); *Crimes Act 1900* (Australian Capital Territory), section 55(2); *Criminal Code* (Northern Territory), section 127. New South Wales creates two age groups: *Crimes Act 1900* (New South Wales), section 66C(1)—victims between the ages of 10 and 14 years; *Crimes Act 1900* (New South Wales), section 66C(3)—between the ages of 14 and 16. See Australian Law Reform Commission, *Family Violence – A National Legal Response* (November 2010), ALRC Report 114, footnote 61 to Chapter 25.

26 Tasmania has sexual offences against children under the age of 17: see *Criminal Code* (Tasmania), section 124. (See Australian Law Reform Commission, *Family Violence – A National Legal Response* (November 2010), ALRC Report 114, footnote 62 to Chapter 25.)

27 In Queensland, in relation to sodomy, see *Criminal Code* (Queensland), section 208 (see Australian Law Reform Commission, *Family Violence – A National Legal Response* (November 2010), ALRC Report 114, footnote 63 to Chapter 25).

between the ages of 10 and 14 years;[28] and (ii) children between the ages of 14 and 16.[29]

3.35 In South Australia, sexual offences involving children are divided between those committed against children under the age of 14 years, and under the age of 17 years.[30]

What should be the grouping of offences involving children and young persons?

3.36 We do not favour the retention of existing approach in the Crimes Ordinance. The existing approach (13, 16, 18 and 21 years) reflects different ages of consent which are gender-specific and discriminatory on the basis of sexual orientation. We have proposed in Recommendation 1 that there should be a uniform age of consent of 16 years of age, which should be applicable irrespective of gender and sexual orientation. The existing approach in the Crimes Ordinance is inconsistent with our proposal.

Offences involving children under 16

3.37 As it is our proposal that the uniform age of consent should be 16, we take the view that offences involving children in the new legislation should be specifically designed to protect children under 16. As discussed above, this is the approach adopted in England and Wales, Scotland and some states in Australia including Australian Capital Territory, New South Wales and Northern Territory.

Offences involving young children under 13

3.38 The above review of legislation shows that in many cases there are offences specifically designed for the protection of young children, in addition to offences involving older children. This approach can be found in the legislation of England and Wales, Scotland and the Australia states. The offences involving young children carry higher maximum sentences than for those against older children to reflect the seriousness of sexual activity with young children.

3.39 The Home Office Review Group in the UK pointed out that there was considerable support for considering it absolutely wrong for anyone to involve young children in any form of sexual activity:

> *"There was also considerable support for the proposition that the law should make a distinction between an age when children ought not to engage in sex, and an age below which it was absolutely wrong to do so. It was thought that children under the age of thirteen were not physically or emotionally mature*

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28 *Crimes Act 1900* (New South Wales), section 66C(1).

29 *Crimes Act 1900* (New South Wales), section 66C(3).

30 *Criminal Law Consolidation Act 1935* (South Australia), section 49(1) and section 49(3).

enough to deal with the consequences of sexual activity and the law should recognise this. This general policy recognised that although many children under 16 did not have the maturity and competence to give informed consent, there were some who did. It seemed clear to all involved that a child of 12 or under (who may have just started at secondary school and have barely entered puberty) did not have the maturity or understanding to give true consent."[31]

3.40 We share the view that there should be a separate category of offences involving young children to make it clear that it is absolutely wrong for anyone to involve young children in any form of sexual activity.

3.41 The next issue is what the age of the young children should be. Both the English and Scottish Acts have separate offences involving young children under 13. This is also the case in the existing Crimes Ordinance.[32] Some jurisdictions have offences involving young children at a lower age. For example, there are offences involving young children under 10 in New South Wales,[33] Victoria[34] and Australian Capital Territory,[35] and against children under 12 in Queensland.[36]

3.42 We take the view the age of young children should be 13. By setting the age of young children at 13, the same level of protection which the law currently provides will be maintained. If we were to follow the example of the approach of some Australian states in setting the age at a lower threshold of 10 or 12, the protection currently given to young children would be reduced.

3.43 It is therefore our conclusion that there should be a separate category of offences involving young children under the age of 13 in addition to offences involving older children under the age of 16.

Should there be overlapping of offences?

3.44 A further issue is whether there should be overlapping of offences. As discussed above, 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 of 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).

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31 Home Office Paper, at para 3.3.6.

32 For example, intercourse with girl under 13 (section 123 of the Crimes Ordinance).

33 *Crimes Act 1900* (New South Wales), s 66B.

34 *Crimes Act 1958* (Victoria), s 45(2)(a).

35 *Crimes Act 1900* (Australian Capital Territory), s 55(1).

36 *Criminal Code* (Queensland), s 215(3).

3.45 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.

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 singe offence of child abuse.

Should the word "unlawful" be removed?

Judicial developments on meaning of the term "unlawful"

3.46 In the Crimes Ordinance, there are a number of offences relating to "unlawful sexual intercourse" or "unlawful sexual act".

3.47 The Court of Appeal in *HKSAR v Au Yeung Kwok Fu*, CACC 41/2010 reviewed the English authorities on the meaning of the term "unlawful sexual intercourse". According to the English authorities, the term "unlawful sexual intercourse" was originally taken to mean sexual activity taking place outside marriage in *Regina v Chapman* [1959] 1 QB 100 (a decision which was subsequently affirmed in Hong Kong in *HKSAR v Chan Wing Hung* [1997] 3 HKC 472.) The effect of that original common law meaning of the term was that sexual activity between a husband and wife, even if obtained by coercion or deception, would not fall within the meaning of "unlawful sexual intercourse".

3.48 Subsequently, the House of Lords in *Reg v R* [1991] 4 All ER 483 discarded the original common law meaning of the term. The House of Lords took the view that husband and wife should enjoy equal rights and so should be entitled to refuse a request for sexual activity from the other party. That was the reason why sexual activity within marriage obtained by coercion or deception was outlawed with the enactment of the Sexual Offences (Amendment) Act in 1976. Hence, the word "unlawful" in "unlawful sexual intercourse" in equivalent English legislation was mere "surplusage" and without any meaning.

Statutory developments on meaning of the term "unlawful"

3.49 The effect of the new meaning of the term taken by the House of Lords in *Reg v R* is that it is possible for a husband to be convicted of the offence of raping his wife if the wife did not consent to sexual intercourse. This new common law meaning was given statutory effect in Hong Kong. The Statute Law (Miscellaneous Provisions) Ordinance was enacted in 2002 by the Legislative Council to add a new section 117(1B) to the Crimes Ordinance, which provides that for the purposes of sections 118, 119, 120 and 121, "… *'unlawful sexual intercourse' does not exclude sexual intercourse that a man has with his wife."*

3.50 The Court of Appeal in *Au Yeung Kwok Fu*, supra, took the view that a clearer approach in the above-mentioned legislative exercise would have been to delete the word "unlawful". The Court of Appeal pointed out that the records of the Legislative Council showed that a "minimalist" approach was taken in that legislative amendment exercise.[37] Under this approach, the express scope of the clarification of the law was limited to section 118 (rape) and three other offences of which a person charged with rape may be convicted (that is, the three offences under sections 119, 120 and 121). The "minimalist" approach explained why the word "unlawful" was not deleted from all relevant sections in the Crimes Ordinance.

Overseas legislation

3.51 In both the English and Scottish Acts, the word "unlawful" is not used in relation to any sexual intercourse or acts. This is also the case in Australian legislation.[38] The same applies to the Canadian Criminal Code and the Singapore Penal Code.[39]

3.52 However, the term "unlawful sexual connection" is used in New Zealand legislation in relation the offence of sexual violation.[40] The word "unlawful" in that context has nothing to do with the issue as to whether the sexual act was carried out between husband and wife. For the purposes of the offence of sexual violation, a person (A) has "unlawful sexual connection" with another person (B) if the act was done without B's consent and without reasonable belief that B consented.[41] Hence, the word "unlawful" in this context refers to the issue of consent rather than parties' marital relationship. Apart from the offence of sexual violation, the word "unlawful" does not appear elsewhere in the New Zealand legislation.

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37 For details of the "minimalist" approach, see the Administration's response dated 16 April 2002 on possible ways to simplify Part V of the Statute Law (Miscellaneous Provisions) Bill 2001, LC Paper No. CB(2)1619/01-02(01): <http://www.legco.gov.hk/yr00-01/english/bc/bc74/papers/bc740418cb2-1619-1e.pdf>.

38 For example, Crimes Act 1900 (Australian Capital Territory), Crimes Act 1900 (New South Wales), and Criminal Code (Northern Territory).

39 Singapore Statute Chapter 224.

40 Sexual violation is the act of a person who *"(a) rapes another person; or (b) has unlawful sexual connection with another person"* (New Zealand Crimes Act 1961, section 128(1)).

41 New Zealand Crimes Act 1961, section 128(3).

Removal of the word "unlawful"

3.53 In the light of the above-mentioned judicial and legislative developments, it is difficult to see what purpose the retention of the word "unlawful" serves in any of the relevant provisions. We therefore take the view that the opportunity should be taken to do away with the anachronistic term "unlawful" still remaining in the Crimes Ordinance.[42]

Recommendation 4

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

Should the age of the accused be specified in the new legislation?

Existing law in the Crimes Ordinance

3.54 The age of the accused in the existing offences involving children and young persons in the Crimes Ordinance is not specified. In other words, the offence involving children and young persons can be committed by an accused of any age and not necessarily an adult.

Position in overseas jurisdictions

Australia

3.55 In Australia, the age of the accused in offences involving children and young persons are commonly not specified. The exception to that is the accused in child grooming offences. The accused is specified to be an adult because of the special nature of child grooming offences.[43] However, child grooming offences in some jurisdictions can be committed by a person of any age, not necessarily an adult.[44]

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42 The Sub-committee did not address the issue of the word "unlawful" in offences involving unlawful sexual intercourse or unlawful sexual act in their previous paper entitled, C*onsultation Paper on Rape and Other Non-consensual Sexual Offences.* The Sub-committee have in this consultation paper reached the conclusion that the word "unlawful" should be removed. Hence, when reading the Sub-committee's previous consultation paper, readers should assume that all references to the word "unlawful" in offences involving unlawful sexual intercourse or unlawful sexual act are removed.

43 For example, the offence of using the internet, etc to procure children under 16 years: Criminal Code Act 1899 (Queensland), section 218A.

44 For example, the offence of using the internet etc to deprave young people: Crimes Act 1900 (Australian Capital Territory), section 66.

Canada

3.56 In Canada, offences involving children and young persons can be committed by any person, not necessarily an adult. Even the accused in the offence of luring a child (which is a child grooming offence) can be a person of any age.[45]

England and Wales

3.57 In the English Act, there are a range of offences involving children under 16 which can only be committed by an accused aged 18 or over.[46] There is a separate range of offence involving a child under 16 which can be committed by an accused under 18.[47] The latter range of offence carries lighter penalties than those in the former.

3.58 However, offences involving young children under 13 may be committed by anyone and the age of the accused does not matter.

Scotland

3.59 In the Scottish Act, there are a range of offences involving older children which can only be committed by a person aged 16 or over.[48] There is a separate offence involving older children which can be committed by a child between 13 and 16.[49] The offence which can be committed by a child carries lighter penalties than those of the offences which can only be committed by adult offenders.[50]

3.60 However, there is a single range of offences involving young children under 13 which can be committed by an accused of any age.[51]

Separate sets of offences for adult and child offenders?

3.61 In the light of the foregoing review of the legislative approaches adopted in different jurisdictions, we can identify two main approaches with regard to the age of the accused:

(i) The age of the accused is not specified in the legislative provisions. The relevant offences can be committed by an adult or a child offender. The maximum penalties apply equally

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45 Canadian Criminal Code, section 172.1.

46 Offences against young children below 13 may be committed by anyone reaching the minimum age of criminal responsibility of 10 years old. The rebuttable presumption of *doli incapax* would apply to an accused aged 10 years or above but under 14 years, requiring the prosecution to prove beyond reasonable doubt that the accused knew his or her actions were seriously wrong and not merely naughty or mischievous.

47 The English Act, section 13.

48 The Scottish Act, sections 28-36.

49 The Scottish Act, section 37(2).

50 The age of majority in Scotland is 16: Age of Legal Capacity (Scotland) Act 1991.

51 The Scottish Act, sections 18-26.

to an adult or child offender. (The approach adopted in the Crimes Ordinance, Australia, and Canada).

(ii) There are two sets of offences. In the first set, the age of the accused is specified to be a person reaching the age of majority, that is to say, an adult offender. In the second set, the age of the accused is specified to be a person below the age of adulthood, that is to say, a child offender. The offences in the first set carry heavier maximum penalties than the offences in the second set. (The approach adopted in England and Wales, and Scotland).

3.62 We favour the approach of a single set of offences which can be committed by an adult or 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. If the age of the accused is specified, it would bring unnecessary complication to the prosecution process where, for example, a charge was initially laid in respect of an offence which can only be committed by an adult accused but it later turned out that the accused was not an adult.

3.63 Furthermore, a judge could use his or her sentencing discretion in imposing on the child offender lighter penalties than an adult offender, where the circumstances of the case justifying this being so.[52] It is unnecessary to follow the English and Scottish approach in having two sets of offences, one for adult offenders and the other for child offenders, predominately for ensuring lighter sentences would be imposed on child offenders.

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.

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

Chapter 4

Absolute liability in sexual offences involving children between 13 years and 16 years

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Introduction

4.1 At present, the offence of sexual intercourse with a person under 16 is of absolute liability in Hong Kong.[1] It is no defence that the accused did not know and had no reason to suspect that the child was under 16.

4.2 The constitutionality of absolute liability for this offence was upheld by the Court of Final Appeal in *So Wai Lun v HKSAR.*[2] The Court held that the offence in section 124 of the Crimes Ordinance is constitutional taking the view that having absolute liability is a choice constitutionally open to the legislature having regard to the vital importance of protecting young girls.[3]

4.3 Offences involving non-penetrative acts may or may not be of absolute liability, depending on the Court's interpretation of the legislative intent of the relevant provisions.

Whether or not an offence is of absolute liability depends on the court's determination of the legislative intent

4.4 Whether or not absolute liability applies to a particular offence depends on the court's determination of the legislative intent of the individual statutory provision concerned. Different statutory provisions are drafted in different ways, reflecting different legislative intent as to the imposition of absolute liability or otherwise. It is for the Court to determine the legislative intent of individual provisions. For example, the Court of Final Appeal in *So Wai Lun, supra* has interpreted section 124 of the Crimes Ordinance and held that the offence of sexual intercourse with a girl under 16 is of absolute liability.

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1 Strict liability and absolute liability offences are those offences which do not require the prosecution to prove *mens rea* in respect of every element of the *actus reus*: *Archbold Hong 2013*, at paragraph 18-1. There is however one main difference between these two types of offences. A strict liability offence is one where the prosecution does not have to prove *mens rea* but this does not preclude a defence based on honest or reasonable belief. An absolute liability offence is one where it is not even open to the defence to prove that he did not have the necessary intention to commit the crime with which he is charged (see the judgment of the Court of Appeal in *HKSAR v So Wai Lun*, HCMA 39/2004 (at paras 8 and 22 of judgment).

2 *So Wai Lun v HKSAR* (FACC 5/2005), reported in: [2006] 3 HKLRD 394; (2006) 9 HKCFAR 530.

3 See paragraph 40 of judgment.

Indecent conduct towards a child under under 16 (section 146 of Crimes Ordinance)

4.5 In *B (a Minor) v DPP*,[4] a UK Court has construed the English offence of gross indecency with a child under 14 (comparable to the Hong Kong offence of indecent conduct towards a child under 16) as not being of absolute liability. In *that case*, a boy aged 15 was charged with an offence of inciting a child under 14 to commit an act of gross indecency with him, contrary to section 1(1) of the Indecency with Children Act 1960. The House of Lords allowed the appeal by the boy and quashed his conviction, holding that it was necessary for the prosecution to prove the absence of genuine belief on the part of the boy that the child had been 14 or over. Lord Nicholls did not see a *"compelling clear implication"* that Parliament intended the presumption of *mens rea* should be displaced *"having regard to the breadth of the offence and the gravity of the stigma and penal consequences which a conviction brings".*[5]

Indecent assault (section 122 of Crimes Ordinance)

4.6 The House of Lords in *R v K*[6] has interpreted section 14 of the Sexual Offences Act 1956 (the UK equivalent of our section 122 of the Crimes Ordinance) and held that indecent assault is not of absolute liability.[7] In *R v K*, the accused was charged with an offence under section 14 of the Sexual Offences Act 1956 for indecently assaulting a 14-year-old girl. The accused alleged that the sexual activity between them was carried out with the girl's consent and that the girl had told him that she was 16 which he believed. At a preliminary hearing the judge ruled that the prosecution had to prove that at the time of the offence the accused did not genuinely believe that the girl was 16 or over. The prosecution appealed to the Court of Appeal against that ruling. The Court of Appeal allowed the prosecution's appeal and held that the prosecution was not required to prove that issue. The accused then appealed to the House of Lords. The House of Lords allowed the accused's appeal, ruling that section 14 of the 1956 Act required the prosecution to prove beyond reasonable doubt that the accused did not genuinely believe that the girl was 16 or over. According to the House of Lords, as a matter of statutory interpretation, there was an overriding presumption that *mens rea* was an essential ingredient of a statutory offence and that such presumption could only be excluded by Parliament by express words or by necessary implication. The House of Lords interpreted the relevant provision and held that there was nothing, by express words or by necessary implication, that would justify exclusion of the presumption.

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4 *B (a Minor) v DPP* [2000] 2 AC 428, House of Lords.

5 *B (a Minor) v DPP* [2000] 2 AC 428, House of Lords at p.465C.

6 R v K [2002] 1 A.C. 462.

7 The Court of First Instance accepted in a magistracy appeal in 香港特別行政區 v 陳恆立 [2010] CHKEC 922 Chinese Judgment (a judgment in Chinese) that *R v K* is applicable to HK (see para 60 of judgment).

Intermediate solution: reasonable belief that the child was not under-age

4.7 In some overseas jurisdictions sexual offences in respect of children do not carry absolute liability. The main rationale for this is that the interests of justice and fairness would require that a person who makes a genuine mistake on reasonable grounds that the child is not under-age should not be penalised.

4.8 However, instead of adopting the other extreme position in requiring the prosecution to prove beyond reasonable doubt the absence of a genuine belief on the part of the accused that the child was not under-age, the non-applicability of absolute liability is achieved by either making it necessary for the prosecution to prove that the accused did not reasonably believe that the child was over the age of consent; or by having a provision which allows the accused to raise the defence that he or she reasonably believed that the child was over the age of consent.

4.9 Some examples from overseas jurisdictions follow:

Australia

4.10 The legislation of a number of states in Australia provides for the defence that the accused believed on reasonable grounds that the child was of or above the age of 16 years (17 years in some states which have a higher age of consent).

Australian Capital Territory

4.11 It is a defence to a prosecution for the offence of sexual intercourse with young person that the accused *"believed on reasonable grounds that the person on whom the offence is alleged to have been committed was of or above the age of 16 years"* (Crimes Act 1900, section 55).

Northern Territory

4.12 If a person is charged with sexual intercourse or gross indecency involving child under 16 years, it is a defence to the charge for the accused to prove *"(a) the child was of or above the age of 14 years; and (b) the accused person believed on reasonable grounds that the child was of or above the age of 16 years"* (Criminal Code Act 1983, section 127(4)).

Queensland

4.13 If a person is charged with carnal knowledge with or of children under 16, it is a defence to the charge that the accused person *"believed, on reasonable grounds, that the child was of or above the age of 16 years".* However, the defence cannot be raised if the offence is committed in respect of a child under the age of 12 (Criminal Code Act 1899, section 215(5)).

South Australia

4.14 It is a defence to a charge of unlawful sexual intercourse with a person under 17 that the accused *"believed on reasonable grounds that the person with whom he is alleged to have had sexual intercourse was of or above the age of seventeen years"* (Criminal Law Consolidation Act 1935, section 49).

4.15 (The age of consent in Southern Australia is 17 years. The age of consent is 16 in most Australian states.)

Tasmania

4.16 It is a defence to a charge of unlawful sexual intercourse with a person under 17 that the accused *"believed on reasonable grounds that the other person was of or above the age of 17 years"* (Criminal Code Act 1924, section 124).

4.17 (The age of consent in Tasmania is 17 years.)

Victoria

4.18 Consent is not a defence to a charge for sexual penetration of a child under 16 unless at the time of the offence the child was aged 12 or older and *"the accused satisfies the court on the balance of probabilities that he or she believed on reasonable grounds that the child was aged 16 or older"* (Crimes Act 1958, section 45).

Western Australia

4.19 It is an offence for a person who sexually penetrates a child of or over the age of 13 years and under the age of 16 years. It is a defence to a charge for that offence that the accused *"(a) believed on reasonable grounds that the child was of or over the age of 16 years; and (b) was not more than 3 years older than the child"* (Criminal Code Act Compilation Act 1913, section 321(9)).

4.20 However, such a defence is not available if the child is under the care, supervision, or authority of the accused (section 321(9a)).

Canada

4.21 The position in Canada is slightly different from other common law jurisdictions under review in this part. In Canada, an accused cannot raise the defence of mistake of age of the child unless the accused took all reasonable steps to ascertain the age of the child.

4.22 Section 150.1(4) of the Canadian Criminal Code provides:

> *"It is not a defence to a charge under section 151 or 152, subsection 160(3) or 173(2), or section 271, 272 or 273 that the accused believed that the complainant was 16 years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant."*

4.23 Section 150.1(5) of the Canadian Criminal Code provides:

> *"It is not a defence to a charge under section 153, 159, 170, 171 or 172 or subsection 212(2) or (4) that the accused believed that the complainant was eighteen years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant."*

England and Wales

Offences involving children under 16

4.24 It is an ingredient of the child sex offences in sections 9, 10, 11, 12 and 15 of the English Act (which are offences involving children under 16) that the accused (A) did not reasonably believe that the child (B) was 16 or over, where B was a person under 16:

> *"… either –*
> *B is under 16 and A does not reasonably believe that B is 16 or over, or*
> *B is under 13."*[8]

4.25 As the reasonable belief provision is an ingredient of the offence, the prosecution must adduce evidence to show that the accused, at the time of the incident, did not reasonably believe the child to be 16 or over. The prosecution would need to establish beyond reasonable doubt that the accused in fact knew, or should have reasonably known that the child was under 16.

4.26 Where the B is a child under 13, the prosecution need not prove that A did not make a genuine mistaken belief in the age of the child. That is to say, where a child sex offence (in sections 9, 10, 11, 12 or 15) is committed against a child below 13, the offence is of absolute liability.

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[8] English Act, sections 9(1)(c)(i), 10(1)(c)(i), 11(1)(d)(i), 12(1)(c)(i). For the section 15 offence (namely, meeting a child following sexual grooming), the relevant ingredient refers only to *"B is under 16 and A does not reasonably believe that B is 16 or over"*.

Offences involving children under 13

4.27 Absolute liability continues to apply to offences involving children under 13 (in sections 5 to 8). The House of Lords held in *R v G* that it is the policy of the legislation to protect children and there is nothing unjust or irrational in an absolute liability offence which provided no defence to an accused who believed mistakenly that the child was over 13.[9]

4.28 The position in England and Wales is therefore that whereas absolute liability has been relaxed in respect of cases involving a child who is between 13 and 16, it continues to apply where the child is under 13. The rationale is that it is considered absolutely wrong for anyone to engage a child under 13 in any form of sexual activity.

Ireland

4.29 In Ireland, a defence of honest mistake as to age was introduced in defilement cases (i.e. engaging in a sexual act with a child under 15 or 17) with the enactment of the Criminal Law (Sexual Offences) Act 2006.[10]

4.30 With the introduction of the defence of honest mistake as to age, the absolute liability in defilement cases previously in force was removed.

4.31 The defence is that if the defendant can prove that he or she "honestly believed" that, at the time of the commission of the offence, the child had attained 15 or 17 years, as the case may be, the defendant can be acquitted. However, in determining whether or not the defendant held such an honest belief as to age of the child, the court shall *"have regard to the presence or absence of reasonable grounds for the defendant's so believing and all other relevant circumstances."*[11]

Scotland

4.32 Section 39(1)(a) of the Scottish Act provides that it is *"a defence to a charge in proceedings"* against an accused (A) under any of sections 28 to 37(1) (which are offences involving older children who have attained the age of 13 years but not the age of 16 years) *"that A reasonably believed that B [the child] had attained the age of 16 years."* [12]

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9 *R v G* [2008] UKHL 37; [2009] 1 AC 92.

10 Section 2 of the Criminal Law (Sexual Offences) Act 2006 (Ireland) ("the Irish Act") provides for an offence of "defilement of a child under 15 years of age" for any person to engage in a sexual act with a child under 15. Section 3 provides for another offence of "defilement of a child under 17 years of age" for any person to engage in a sexual act with a child under 17

11 Criminal Law (Sexual Offences) Act 2006 (Ireland), section 2(4) and section 3(6).

12 Section 39(2) of the Scottish Act provides that the accused cannot use the defence if he or she has previously been charged by the police with a relevant sexual offence (as listed in schedule 1) or there is in force in respect the accused a Risk of Sexual Harm Order.

4.33 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 child to be 16 or over. Rather, it is for the accused to raise the defence that the accused reasonably believed that the child had attained the age of 16.

4.34 Offences involving young children under 13 in the Scottish Acts continue to be of absolute liability.

Possibility of change in legislative attitude towards absolute liability not ruled out by the Court of Final Appeal

4.35 As pointed out above, the Court of Final Appeal in *So Wai Lun v HKSAR*, *supra* upheld absolute liability in for the offence of sexual intercourse with a person under 16. The Court of Final Appeal considered that because of the vital importance of protecting young girls, this was a choice constitutionally open to the legislature. However, in the joint judgment of Mr Justice Bokhary PJ and Mr Justice Chan PJ (with which the Chief Justice and all other judges concurred), it was stated that *"… The time may come when the legislature amends s.124 to provide some such defence [of reasonable belief that the complainant was 16 or over]… ."*[13] The Court of Final Appeal has therefore not ruled out the possibility of the legislature changing its attitude towards absolute liability in the light of changing circumstances and the views of the community.

4.36 We shall examine below the arguments for and against absolute liability in respect of sexual offences involving children aged over 13 but below 16.

Arguments against absolute liability

Genuine mistake made by the accused should be recognised

4.37 The Home Office Review Group in the UK justified the absence of absolute liability on the grounds that the interests of justice and fairness would require that a genuine mistake made by the accused as to the age of the child should be recognised. The Review Group recognised that there might be incidents in which the accused did not intend to have sex with an under-age child but did so because of the mature look of the child or indeed the child might claim to be older:

> *"The interests of justice and fairness require an honest mistake to be recognised. An adult may meet with a child in a situation where they expect them to be over 16, for instance a pub or club. The child may appear older than they are and indeed may claim to be older. If that meeting leads to a sexual relationship, the*

[13] So *Wai Lun v HKSAR* [2006] 3 HKLRD 394; (2006) 9 HKCFAR 530, at paragraph 37.

adult may have sex with an under-age child with no intention to do so … ."[14]

Many overseas jurisdictions have the defence

4.38 The legislation of many common law jurisdictions provide for the defence that the accused reasonably believed that the child was over the age of consent. As seen above, these include Australia (Australian Capital Territory, Northern Territory, Queensland, South Australia, Tasmania, Victoria, and Western Australia), Canada, Ireland and Scotland. In England and Wales, it is an ingredient of an offence involving children that the accused did not reasonably believe that the child was over the age of consent. Hong Kong is therefore somewhat unique among the major common law jurisdictions in not providing for a defence or requiring the lack of reasonable belief as to the age as an ingredient of the offence.

Older children may have experimental sex

4.39 Children nowadays mature physically earlier than before and many older children between 13 and 16 many try to have experimental sex out of curiosity.

4.40 Such children may entice another party to engage in sexual activity. The other party may find it hard to resist the invitation to engage in sexual activity, given that the child may look more mature than 16 or claim to be over 16.

Arguments for absolute liability

Encourage people to avoid any acts towards children that may be unlawful

4.41 The deterrent effect of absolute liability may encourage people to avoid any acts towards children which may be unlawful. As Mr Justice Bokhary PJ and Mr Justice Chan PJ (as they then were) pointed out in their joint judgment in *So Wai Lun V HKSAR*, care taken by people to avoid doing what may be unlawful and to steer away from the line between legality and illegality would add to protection of children:

> *"… The deterrent effect of the criminal law is not confined to deterring people from doing what they know is unlawful. It also encourages them to take care to avoid what may be unlawful. This idea is captured in the expression, used in the Noise Control Authority v. Step In Ltd (2005) 8 HKCFAR 113 at p.120H, "steer well away from the line between legality and illegality". In the context of s.124, care to avoid what may be unlawful and steering*

[14] Home Office Paper, at paragraph 3.6.12.

well away from the line between legality and illegality would add materially to the protection for young girls which the section provides."[15]

The Protective Principle

4.42 Under the protective principle, the law should protect children from sexual exploitation. Children are in a vulnerable position and easy victims of sexual exploitation. This is particularly so since the taking of alcoholic drinks (and even soft drugs) is not uncommon among young persons these days. Moreover, some perpetrators use the internet to look for potential targets for sexual exploitation and children are particularly vulnerable.

Wrong to have sexual activity with children

4.43 It is the sub-committee's understanding that the Hong Kong community generally accepts that it is wrong to engage a person under 16 in any form of sexual activity. Hence, any departure from the current position would be controversial.

Sending the wrong message that under-age sex is encouraged

4.44 The absence of absolute liability could send the wrong message that under-age sex is encouraged. Nowadays, young people are given more freedom by their parents. Children between 13 and 16 may not be sufficiently mature to deal with the consequences of early sex. They should not be given the wrong message that early sex is encouraged.

Successful prosecution becomes more difficult

4.45 According to the Director of Public Prosecutions of Ireland ("DPP of Ireland"), a successful prosecution in defilement cases has become more difficult with the loss of absolute liability. He made the point that with the availability of the defence of honest mistake as to age, questions about the child would become relevant at trial:

> *"The loss of absolute liability means that where honest belief as to age is in issue then other questions can become relevant, such as the sexual history of the injured party, or his or her conduct towards the accused, making a successful prosecution more difficult, particularly in the case of a stranger or a newly-met acquaintance, where the defence is far more likely to be successful. A young girl or boy going out to a bar or disco, for example, will frequently dress so as to appear older than she or he is, particularly if hoping to buy or consume alcoholic drink, or be let into an establishment with a door policy on age. Of course,*

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[15] *So Wai Lun V HKSAR* (FACC 5/2005), [2006] 3 HKLRD 394; (2006) 9 HKCFAR 530, at paragraph 39.

there is a perfectly stateable argument that some form of honest belief defence ought to be open in such cases."[16]

4.46 Though the DPP of Ireland did not mention that the defence has lowered the deterrent effect of the law on offenders, one could reasonably draw the inference that if the prosecution of cases has become materially more difficult than before, potential offenders may be tempted to commit the crime knowing of the availability of the defence.

Less protection to the child at trial

4.47 The DPP of Ireland also pointed out under the old law, the child generally did not have to give evidence and was protected from the trauma of testifying. But with the loss of absolute liability, the child is required to give evidence and this may mean less protection to the child:

> *"Before the change in the law proof of the unlawful sexual intercourse coupled with proof of age fulfilled the burden of proof on the part of the prosecution in prosecutions under the 1935 Act and in many cases the child did not have to give evidence. Since the change in the law the behaviour, demeanour and appearance of the child are all likely to be open to scrutiny and assessment in a courtroom if the child is required to give evidence.*
>
> *Under the old law, we were generally in a position to protect the child from the trauma of giving evidence. Usually now the child must give evidence. As a result, it is open to the jury to decide whether the accused made an honest mistake as to the age of the child. In a trial which unavoidably takes place some years after the commission of the offence no matter what steps may be taken the jury will see a person considerably older than at the date of the commission of the alleged offence and this may colour the jury's approach."*[17]

Should a distinction be made between penetrative and non-penetrative sexual activity as regards whether there should be absolute liability?

4.48 A related issue is whether a distinction should be made between penetrative sexual activity (such as intercourse) and non-penetrative sexual activity (for example, sexual touching and kissing) as regards whether there should be absolute liability.

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16 *"Prosecution Under the Criminal Law (Sexual Offences) Act 2006"*, Submission by Director of Public Prosecutions to the Joint Oireachtas Committee (February 2009), at page 6.

17 Submission by Director of Public Prosecutions to the Joint Oireachtas Committee, *ibid*, at page 8.

4.49 The rationale for having absolute liability in respect of penetrative sexual activity with children was well elaborated by McLachlin J in the Supreme Court of Canada decision of *R v Nguyen*.[18] McLachlin J said in that case that *"the protection of children from the evils of intercourse is multi-faceted and so obvious as not to require formal demonstration".* [19] Those remarks were referred to by Lord Hope of Craighead In the House of Lords decision of *R v G*.[20]

4.50 In *R v Nguyen*, McLachlin J said absolute liability is necessary for protecting children from the harms of premature sexual intercourse and pregnancy and protecting society from the social problems arising from sexual intercourse with children:

> *"What then is the objective of s.146(1)? It has two aspects. The first is the protection of female children from the harms which may result from premature sexual intercourse and pregnanacy. The second is the protection of society from the impact of the social problems which sexual intercourse with children may produce.*
>
> *I adhere to the view that I expressed in R v Ferguson that the protection of children from the evils of intercourse is multi-faceted and so obvious as not to require formal demonstration. Children merit this protection for three primary reasons. The first is the need to protect them from the consequences of pregnancies with which they are ill-equipped to deal from the physical, emotional and economic point of view. The second is the need to protect them from the grave physical and emotional harm which may result from sexual intercourse at such an early age. The third is the need to protect them from exploitation by those who might seek to use them for prostitution and related nefarious purposes.*
>
> *Each of these reasons to protect children against premature sexual intercourse is reflected in corresponding social problems. Juvenile pregnancies adversely affect both family and society. It is society which bears the cost of abortions, society which often pays for the care of infant and mother. The physical and emotional trauma inflicted on children through premature sexual intercourse are reflected in increased medical and social costs and decreased productivity. Finally, juvenile prostitution is a notorious problem in many of our larger cities. We must not blind ourselves to the reality of drug addiction and virtual enslavement of young girls which all too often results from their prostitution … ."*[21]

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18 *R v Nguyen* [1990] 2 SCR 906, at 948; (1990) 59 CCC (3d) 161, at 193, per McLachlin J.

19 *R v Nguyen* [1990] 2 SCR 906, at 948; (1990) 59 CCC (3d) 161, at 193, per McLachlin J.

20 *R v G* [2008] UKHL 37; [2009] 1 AC 92, at para 21, per Lord Hope of Craighead.

21 *R v Nguyen* [1990] 2 SCR 906, at 948; (1990) 59 CCC (3d) 161, at 193, per McLachlin J.

4.51 Whilst the consequences of intercourse may be multi-faceted and rather obvious, less clear-cut are the effects on children of non-penetrative acts such as sexual touching and kissing. This may provide justification for not having absolute liability in the case of offences involving non-penetrative acts.

4.52 Not having absolute liability for a non-penetrative act does not mean that a person having non-penetrative sex with a person aged between 13 and 16 will not be penalised. That person would be absolved from criminal liability only if that person made a genuine mistake on reasonable grounds that the child was 16 or over.[22]

Our views on the issue

4.53 There are arguments for and against having absolute liability in offences involving children between 13 and 16 and there are bound to be divergent views on the issue. There may also be different views as to whether or not a distinction should be made between penetrative and non-penetrative sexual activity. There were in fact divergent views during the Sub-committee's deliberations on those issues. Given this, we take the view that the issues should be the subject of public consultation.

4.54 It should be noted that consideration of the issue of absolute liability should be confined to offences involving children between 13 and 16. In the sub-committee's view offences involving children under 13 should always be of absolute liability.

Recommendation 6

We are of the view that the issues 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, we invite the community to express their views on the issue.

Approach to be adopted if the views of the community indicate that they are not in favour absolute liability

4.55 If the views of the community (yet to be ascertained during consultation) indicate that they are not in favour of absolute liability, we can identify three reform approaches from the review of overseas legislation above:

[22] See also paragraphs 4.46 to 4.51.

(a) English approach: it is an *ingredient* of the offence that "A does not reasonably believe that B is 16 or over".

(b) Scottish approach: it is a *defence* that "A reasonably believed that B had attained the age of 16 years".

(c) Canadian approach: it is a *defence* that "A believed (subjectively) that B had attained the age of [16] years provided that A took all reasonable steps to ascertain the age of B."

4.56 Moreover, there can be a fourth approach (a modified version of the Scottish approach above).

(d) It is a defence that "A reasonably believed that B had attained the age of 16 years" (as per Scotland approach), provided that one of the matters that is to be taken into account in determining whether such a belief was reasonable is the question of what steps A took to ascertain B's age.

4.57 We do not favour the English approach in (a) since it would put a very considerable onus of proof on the prosecution.

4.58 We do not favour the Canadian approach in (c) either since it looks subjectively from the perspective of the accused only, leaving little regard to the reasonableness of his or her belief.

4.59 Whilst we find the Scottish approach in (b) acceptable, we are of 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".* This approach can be found in (d) above. In our view, the approach in (d) strikes an appropriate balance between recognising a genuine mistaken belief in the child's age on the one hand and the protection of children from sexual exploitation, on the other.

4.60 We therefore favour the approach in (d) above should the views of the community indicate that they are not in favour of absolute liability.

Chapter 5

Defence of marriage to sexual offences involving children between 13 years and 16 years

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Introduction

Marital defence to sexual intercourse with a girl under 16

5.1 Under the present law, a person charged with an offence contrary to section 124(1) of the Crimes Ordinance, can raise a marital defence.[1] The defence appears currently to be applicable to consensual sexual activity but not to non-consensual. Section 124(2) provides as follows:

> *"Where a marriage is invalid under section 27(2) of the Marriage Ordinance (Cap 181) by reason of the wife being under the age of 16, the invalidity shall not make the husband guilty of an offence under this section because he has sexual intercourse with her, if he believes her to be his wife and has reasonable cause for the belief."*[2]

5.2 In order to establish the marital defence referred to above, the husband needs only to prove on a balance of probabilities that he believed the girl under 16 to be his wife and had reasonable cause for the belief. That provision is intended to provide a defence to a husband who legally married a wife under the age of 16 in accordance with the marriage law of an overseas jurisdiction. It should be noted that the marital defence is not available to an accused charged with an offence under section 123 of the Crimes Ordinance (which is an offence involving a girl under 13). The result is that the marital defence is available only if the wife is aged between 13 and 16.

5.3 It should however be noted that the current law in Hong Kong is that a husband can be charged with raping his wife if the wife did not consent

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1 Section 153P(3) of the Crimes Ordinance also provides for a marital defence where the accused was charged with a sexual offence having extra-territorial effect in respect of an act committed outside Hong Kong.

2 Section 124(2) of the Crimes Ordinance was modelled on section 6 of the English Sexual Offences Act 1956.

to sexual intercourse.[3] This position was given statutory effect in Hong Kong by the enactment 2002 of a new section 117(1B) to the Crimes Ordinance, which provides that for the purposes of sections 118, 119, 120 and 121, "… *'unlawful sexual intercourse' does not exclude sexual intercourse that a man has with his wife."*

Marital defence to indecent assault

5.4 Under Section 122(1) of the Crimes Ordinance, it is an offence to indecently assault another person. Consent negates the assault and so provides a defence to a charge of indecent assault. However, section 122(2) of the Crimes Ordinance provides that a person under the age of 16 cannot in law give any consent which would prevent an act from being an indecent assault. It is therefore not a defence to a charge of indecent assault that a person under the age of 16 has consented to the act. 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. Section 122(3) provides as follows:

> *"A person is not, by virtue of subsection (2), guilty of indecently assaulting another person, if that person is, or believes on reasonable grounds that he or she is, married to that other person."*

5.5 The effect of section 122(3) is that notwithstanding the provisions in section 122(2), 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. Thus, for example, a husband who legally married a wife under 16 in accordance with the marriage law of an overseas jurisdiction may claim protection under section 122(3) if he performs indecent acts (such as touching the private parts) on his wife with her consent. It should be noted that all non-consensual indecent acts are always caught by indecent assault. This applies even within marriage.

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[3] The term "unlawful sexual intercourse" was originally taken to mean sexual activity taking place outside marriage in *Regina v Chapman* [1959] 1 QB 100 (a decision which was subsequently affirmed in Hong Kong in *HKSAR v Chan Wing Hung* [1997] 3 HKC 472.) The effect of that original common law meaning of the term was that sexual activity between a husband and wife, even if obtained by coercion or deception, would not be fall within the meaning of "unlawful sexual intercourse". Subsequently, the House of Lords in *Reg v R* [1991] 4 All ER 483 discarded the original common law meaning of the term. The House of Lords took the view that husband and wife should enjoy equal rights and so should be entitled to refuse a request for sexual activity from the other party. The word "unlawful" in "unlawful sexual intercourse" in equivalent English legislation was mere "surplusage" and without any meaning. The effect of the new meaning of the term taken by the House of Lords in *Reg v R* is that it is possible for a husband to be charged with raping his wife if the wife did not consent to sexual intercourse. It is therefore difficult to see what purpose the retention of the word "unlawful" serves in any of the relevant provisions. Hence, we have recommended in Chapter 3 the removal of the word "unlawful" from all offences involving sexual intercourse or sexual act in the Crimes Ordinance.

5.6 The issue is whether the current position of a marital defence in respect of the offences involving children under 16 should be retained or the defence should be removed.

Position with regard to the marital defence varies in overseas jurisdictions

5.7 The legislation of a number of overseas jurisdictions retains or provides for the marital defence to offences involving children. The main rationale for the defence is that it would be anomalous if two persons who were legally married according to the law of a foreign country would commit a crime by having sexual activity in another country.

5.8 On the other hand, there is no marital defence in the legislation of a number of overseas jurisdictions. Moreover, the marital defence has been removed in a number of overseas jurisdiction where it existed. The main rationale for the non-availability of or removal of the defence is that children should be protected from premature sexual activity.

5.9 A review of the position in a number of overseas jurisdictions as regards the maritial defence to offences involving children and young persons is given below.

Position in overseas jurisdictions: Jurisdictions that have marital defence (to offences involving children)

Australia (Commonwealth of Australia)

5.10 The Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010 (Commonwealth of Australia) made various amendments to the Criminal Code (Commonwealth of Australia)[4] introducing a number of new offences in relation to paedophiles operating outside Australia.[5]

5.11 The amendments provided for a defence of valid and genuine marriage to a charge of engaging in sexual intercourse or other sexual activity with a child or young person outside Australia. The defence of valid and genuine marriage now appears in section 272.17 of the Criminal Code Act 1995 of the Commonwealth of Australia.

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4 Criminal Code Act 1995 (Commonwealth of Australia), as amended.

5 These new offences, which are aimed at combating child sex tourism included: sexual intercourse with child outside Australia (section 272.8); sexual activity (other than sexual intercourse) with child outside Australia (section 272.9); sexual intercourse with young person outside Australia- defendant in position of trust or authority (section 272.12); sexual activity (other than sexual intercourse) with young person outside Australia- defendant in position of trust or authority (section 272.13); procuring child to engage in sexual activity outside Australia (section 272.14); grooming child to engage in sexual activity outside Australia (section 272.15).

5.12 The defence of valid and genuine marriage applies where there is a valid, or recognised marriage between the accused and the child or young person under 16 according to the law of where the marriage was solemnised; or where the offence was committed; or the place of the defendant's residence or domicile and the marriage was valid when it was solemnised.[6]

Australia (South Australia)

5.13 Section 49 of the Criminal Law Consolidation Act 1935 provides:

> ***"Section 49: Unlawful sexual intercourse***
>
> *A person who has sexual intercourse with any person under the age of 14 years shall be guilty of an offence and liable to be imprisoned for life…*
>
> *(3) A person who has sexual intercourse with a person under the age of seventeen years is guilty of an offence…*
>
> *(8) This section **does not apply** to sexual intercourse between persons who are **married** to each other."*

Australia (Western Australia)

5.14 Section 321 of the Criminal Code (Criminal Code Act Compilation Act 1913) of Western Australia provides:

> ***"Section 321: Child of or over 13 and under 16, sexual offences against***
>
> *(1) In this section, child means a child of or over the age of 13 years and under the age of 16 years.*
>
> *(2) A person who **sexually penetrates** a child is guilty of a crime and is liable to the punishment in subsection (7).*

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[6] Section 272.17 of the Criminal Code Act 1995 (Commonwealth of Australia) provides:
"272.17 Defence based on valid and genuine marriage
(1) It is a defence to a prosecution for an offence against subsection 272.8(1), 272.9(1), 272.12(1) or 272.13(1) if the defendant proves that:
(a) at the time of the sexual intercourse or sexual activity, there existed between the defendant and the child or the young person a marriage that was valid, or recognised as valid, under the law of:
(i) the place where the marriage was solemnised; or
(ii) the place where the offence was committed; or
(iii) the place of the defendant's residence or domicile; and
(b) when it was solemnised, the marriage was genuine
Note: A defendant bears a legal burden in relation to the matter in this subsection, see section 13.4."

(3) A person who procures, incites, or encourages a child to engage in sexual behaviour is guilty of a crime and is liable to the punishment in subsection (7).

Alternative offence: s. 321 (4) or (5) or 322 (3), (4) or (5).

(4) A person who indecently deals with a child is guilty of a crime and is liable to the punishment in subsection (8) …

*(10) It is a **defence** to a charge under subsection (2), (3) or (4) to prove the accused person was **lawfully married** to the child."*

Canada

5.15 Section 150.1 of the Canadian Criminal Code provides:

"Section 150.1: Exception — complainant aged 14 or 15

*(2.1) When an accused is charged with an offence under section 151 or 152, subsection 173(2) or section 271 in respect of a complainant who is 14 years of age or more but under the age of 16 years, it is a **defence** that the complainant consented to the activity that forms the subject-matter of the charge if*

(a) the accused

(i) is less than five years older than the complainant; and
(ii) is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant; or

*(b) the accused is **married** to the complainant."*

Position in overseas jurisdictions: Jurisdictions that do not have marital defence (to offences involving children)

England and Wales

5.16 The marital defence to offences involving children and young persons below 16 has been abolished and there is no longer any such defence in the Sexual Offences Act 2003.

The view of Home Office Review Group in the UK on the marital defence

5.17 The Home Office Review Group in the UK did not favour the retention of the marital defence since its retention would mean that under-age sex was acceptable in the UK:

> *"The defence may apply in only a very few cases, but these could be significant. Some countries have a low legal age of marriage, in places as low as 9 to reflect the earliest onset of puberty. Those who have undertaken a valid marriage with a child would believe that they are acting quite properly in having sex with their wife. In such circumstances there is no criminal intent. Our intention is to increase the protection for children from sexual abuse, and we were reluctant to agree to a continuation of a defence that would effectively legalise what we think could be serious child abuse."*[7]

5.18 Examples of overseas jurisdictions with the age of legal marriage below 16 are: Bolivia,[8] Costa Rica,[9] Democratic Republic of Congo,[10] Equatorial Guinea,[11] India,[12] Islamic Republic of Iran,[13] Kuwait,[14] Mali,[15] Saudi Arabia,[16] Tanzania,[17] and Yemen.[18]

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7 Home Office Paper, at paras 3.6.18.

8 14 for female, 16 for male. (Article 44, Family Code; Fourth Periodic Report of Bolivia [CRC/C/BOL/4], The Convention on the Rights of the Child, 25 March 2009)

9 15 for both female and male. (Combined Fifth and Sixth Periodic Report of Costa Rica [CEDAW/C/CRI/5-6], The Convention on the Elimination of Discrimination against Women (49th Session))

10 15 for female, 18 for male. (Article 352, Volume III, Family Code; Combined Fourth and Fifth Periodic Report of Democratic Republic of Congo [CEDAW/C/COD/4-5], The Convention on the Elimination of Discrimination against Women (36th Session))

11 12 for both female and male. (Combined Second and Third Periodic Report of Equatorial Guinea [CEDAW/C/GNQ/2-3], The Convention on the Elimination of Discrimination against Women (31st Session))

12 15 for female (Muslim Marriage). (Proposal to Amend the Prohibition of Child Marriage Act, 2006 and Other Allied Laws, Chapter VI – Conclusions and Recommendations, Report No. 205, Law Commission of India, February 2008) Despite the legal age of marriage is 18 for men and 21 for women in India, the High Court, in 2012, declared that Muslim women can marry at 15.

13 13 for female, 15 for male. (Concluding Observations of Iran [CRC/C/15/Add.254], The Convention on the Rights of the Child, 31 March 2005)

14 15 for female, 17 for male. (Article 26, Personal Status Act No. 51 of 1984; Initial Report of Kuwait, The Convention on the Rights of the Child [CRC/C/8/Add.35], 9 December 1996)

15 15 for female, 18 for male. (Second Periodic Report [CRC/C/MLI/2], The Convention on the Rights of the Child, 11 April 2006)

16 There is no legislation specifying the minimum age at marriage for men and women. United Nations Statistics Division: <*http://data.un.org/DocumentData.aspx?id=286*>

17 15 for female, 18 for male. (Written Replies by the Government of the United Republic of Tanzania to the List of Issues [CRC/C/TZA/Q/2/Add.1], The Convention on the Rights of the Child, 20 April 2006)

18 15 for both female and male. (Article 15, Law of Personal Status; Fifth Periodic Report of Yemen [CEDAW/C/YEM/5], The Convention on the Elimination of Discrimination against Women (Exceptional Session 2002))

Scotland

5.19 There is no marital defence to offences involving children and young persons below 16 in the Sexual Offences (Scotland) Act 2009.

5.20 On the issue of the marital defence, the Scottish Law Commission and the Scottish Government had different views.

Scottish Law Commission

5.21 The Scottish Law Commission Report recommended that there should be a defence to an offence in respect of older children (aged 13 or above but under 16) if the accused and the child were *"married or in a civil partnership recognised as valid under Scots law"*.[19]

The Scottish government

5.22 The Scottish Government, however, rejected the recommendation of the Scottish Law Commission. The marital defence did not find its way into the Sexual Offences (Scotland) Act 2009. The Scottish Government's reasoning for rejecting the marital defence was that children under the age of 16 should be protected from premature sexual activity.

Review of the arguments for and against retention of marital defence in respect of offences involving children aged between 13 and 16

5.23 In order to decide the issue as to whether the a marital defence in respect of the offences involving children aged between 13 and 16 should be retained or removed, it is necessary to look at the rationale for and against the defence. The arguments for and against the marital defence are summarised below.

Arguments for retention of the marital defence

Hong Kong has obligations to recognise valid overseas marriages

5.24 Marriage has a special status in international law. The sovereignty of foreign countries has to be respected and Hong Kong cannot regulate the legality of marriage contracted in according to the laws of foreign countries. Hong Kong has obligations to recognise valid overseas marriages.

5.25 Such views in support of the marital defence were reflected in the Explanatory Memorandum of the Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 (Commonwealth of Australia). It was

[19] Recommendation 33. See paragraph 4.70 of the Scottish Law Commission Report.

considered that the defence based on valid and genuine marriage could be justified on the grounds that the sovereignty of foreign countries had to be respected and the Australian government could not regulate the legality of marriage solemnised in according to the laws of foreign countries:

> *"Sovereignty issues prevent the Federal Government from regulating the legality of marriage, or of cultural practice more generally, in the territory of a foreign country. If the defence were not provided for, a couple married under the laws of a particular country (which may differ to the minimum age requirements under Australian law) and who were acting lawfully under the laws of the country in which they were in, may be subject to criminal charges under the Australian child sex tourism offence regime."*

Possible that a Hong Kong resident returns to his or her home country to get married according to law or customs of that country

5.26 Hong Kong is a multicultural community. It is quite possible that a Hong Kong resident, especially those belonging to the ethnic minority, would return to his or her home country to get married according to the law of that home country which may allow marriage between persons under 16. Two persons who were legally married in accordance with the law of a foreign country would find it inconceivable that the law of Hong Kong would not allow them to have sex here. Any such legal interference with their sexual activity would be violation of their sexual autonomy.

5.27 A similar line of argument in support of the marital defence was used by the Commonwealth of Australia in its Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010. During the second reading speech of the Bill 2010, Senator Ray, the then Minister of Defence, pointed out that it was quite possible for an Australian citizen or resident who came from a foreign country, might return to his or her home country to marry according to its customs. It was not the Government's policy intent, in multicultural Australia, to subject such a person to a criminal offence:

> *"Marriages celebrated in foreign countries, where one of the parties is under 18 years, are generally not recognisable in Australia. Nevertheless, it is quite possible that an Australian citizen or resident who came to Australia from a foreign country, or whose parents did so, might return to that country to marry according to its customs. The government had no intention, in multicultural Australia, of rendering any such person vulnerable to conviction for a criminal offence on returning to Australia ... ."*[20]

[20] Law Council of Australia, *Submission on Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010* (Child Sex Tourism Bill 2010 Submission 020310), page 18.

A number of overseas jurisdictions have the defence

5.28 A number of major common law jurisdictions still have the marital defence to offences involving children and young persons in their legislation. These include Australia (Commonwealth of Australia, South Australia, and Western Australia) and Canada.

No problems have arisen in Hong Kong arising from the operation of the defence

5.29 The operation of the marital defence in section 124(2) of the Crimes Ordinance has not caused any problems in Hong Kong.[21]

5.30 A similar line of argument in support of the marital defence was adopted by the Scottish Law Commission:

> *"In the Discussion Paper we proposed that there should be a defence to the protective offences for older children that the parties were married or in a civil partnership recognised as valid under Scots law … . We are unaware of any problems arising from the operation of this defence under the present law and we consider that it would be anomalous if two people who were married or civil partners were committing a crime by having any form of sexual contact in Scotland."*[22]

The marital defence would not affect legal protection of the under-age spouse against non-consensual sexual activity

5.31 The marital defence would be useful in situations of consensual sexual activity between two married persons only. If a spouse forces the other spouse who is under-age to engage in sexual activity against the latter's will, the former is liable to prosecution for one of the non-consensual offences, in which case the marital defence would not available. The defence would hence not affect the legal protection of the under-age spouse in respect of non-consensual sexual activity by the other spouse.

Arguments against retention of the marital defence

The protective principle

5.32 Under the protective principle, children under the age of 16 should be protected from premature sexual activity. The retention of the

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[21] There has not been any case prosecuted in Hong Kong which involved the raising of the marital defence in section 142(2) of the Crimes Ordinance.

[22] Scottish Law Commission Report, at paragraph 4.67. The Scottish Government, however, rejected the recommendation of the Scottish Law Commission for the marital defence. The marital defence did not find its way into the Sexual Offences (Scotland) Act 2009.

marital defence would fail to recognise the protective principle. Moreover, the retention of the marital defence would send a wrong message that under-age sex is acceptable in Hong Kong.

5.33 Similar lines of arguments were used by the Scottish Government (in rejecting the recommendation of the Scottish Law Commission for the marital defence):

> *"The SLC proposed that it should be a defence to a charge of an offence relating to sexual activity with an older child that the accused was in a marriage or civil partnership with the victim. In so far as the defence related to marriage, that reflected the current law in Scotland. However, no such defence is provided for in England and Wales.*
>
> *A founding principle of this Bill is that children under the age of 16 should be protected from premature sexual activity. A similar principle is reflected in Scotland's laws on marriage and civil partnership, since someone under the age of 16 cannot be married or enter into a civil partnership in Scotland. The Government therefore considers that it would be inconsistent to provide an express defence of marriage or civil partnership to the offences concerning sexual activity with an older child."*[23]

Possibility that a very young child is forced to marry in some overseas countries and it is difficult for Hong Kong to verify the validity of the marriage

5.34 There is a possibility that a very young child might be forced to marry in some overseas countries. It is difficult for Hong Kong authorities to verify whether the child was indeed forced to marry at a very young age. There may also be problems with verifying the validity of marriages held overseas, for example, in verifying the authenticity of marriage certificates issued by overseas countries.

The marriage law of overseas countries may reflect different customs from Hong Kong

5.35 Overseas countries may have different customs from Hong Kong and such different customs may be reflected in their marriage laws. For example, sexual activity with an under-age spouse may be acceptable according to the customs of some overseas countries. However, it is generally accepted in Hong Kong that it is wrong for anyone to engage in sexual activity with an under-age person. There is no reason why Hong Kong should give effect to overseas customs which are contrary to generally accepted views in Hong Kong.

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[23] Sexual Offences (Scotland) Bill: Policy Memorandum, at paragraphs 136 and 137.

A number of overseas jurisdictions have an express provision that marriage is not a defence or have removed the defence

5.36 A number of overseas jurisdictions (namely, Australian Captial Territory and New South Wales in Australia) have an express provision that marriage is not a defence. Further, the marital defence in relation to offences involving children aged between 13 and 16 once available has been removed in England and Wales and Scotland.

Different treatment between heterosexuals and homosexuals

5.37 As marriage can only be legally entered into heterosexual couples, the marital defence is not available in the case of a union between two homosexuals. There is different treatment between heterosexuals and homosexuals.

5.38 At present, the law in Hong Kong is marriage can only be legally entered into between a man and a woman. The meaning of a man or woman in this context has been extended to cover a post-operative transsexual man or woman. The Court of Final Appeal held in *W v Registrar of Marriages*[24] that the appellant, a post-operative male-to-female transsexual person who had undergone sex reassignment surgery was eligible to marry a man. The position however remains that marriage can only be legally entered into by heterosexual couples but not homosexual couples, unless one of the parties has undergone sex reassignment surgery to become a person of the opposite sex.

Our views on the issue

5.39 We have set out above the arguments for and against retention of the marital defence in offences involving children between 13 and 16 and 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. Under this, children under 16 should be protected from premature sexual activity. That was the clear message sent by the legislators in the UK when the marital defence was removed in England and Wales. Hong Kong should adopt the same approach to strengthen protection of children. It is generally accepted in Hong Kong that it is wrong for anyone to engage in sexual activity with a child under 16. Anyone who comes to Hong Kong should obey our law

[24] *W v Registrar of Marriages* (FACV No. 4 of 2012 on appeal from CACV No.266 of 2010), [2013] 3 HKLRD 90. In *W v Registrar of Marriages*, the Court of Final Appeal granted a declaration that *"consistently with Article 37 of the Basic Law and Article 19(2) of the Hong Kong Bill of Rights, section 20(1)(d) of the Matrimonial Causes Ordinance and section 40 of the Marriage Ordinance must be read and given effect so as to include within the meaning of the words 'woman' and 'female' a post-operative male-to-female transsexual person whose gender has been certified by an appropriate medical authority to have changed as a result of sex reassignment surgery."*

accordingly. There is no reason why Hong Kong should give effect to overseas marriage law and customs which are contrary to the protective principle and generally accepted views in our community. We therefore consider there should not be any marital defence to offences involving children in the new legislation and any such existing defence should be abolished.

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).

Chapter 6

Consensual sexual activity between persons who are between 13 and 16 years of age

Introduction

6.1 It is generally accepted that it is wrong for adults to engage in sexual activity with children and that the law should intervene by criminalising such act.[1] 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. This chapter deals with this question: should consensual sexual activity between persons who are between 13 and 16 years of age be criminalised?[2]

6.2 The existing offences governing sexual intercourse with a person under 16 are gender-specific. Hence, under the current law, in a situation of consensual sexual intercourse between a boy and a girl who each of whom is under 16 years of age, the boy but not the girl would be charged.

6.3 We recommended in Chapter 3 (at Recommendation 2) that offences involving children and young persons should be gender-neutral in the new legislation.

6.4 Thus, offences involving children and young persons in the new legislation will be capable of being committed by a boy or a girl. Accordingly, in the case of consensual sexual activity between a boy and a girl who are between 13 and 16 years of age, both the girl and the boy involved could be charged with an offence.

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1 In its report, the Home Office Review Group in the UK pointed out that *"One of the key issues to emerge from our consultation conference was the need for the law to establish beyond any doubt that adults should not have sex with children, and that this warranted a serious offence to recognise the importance of the crime."* (Home Office, *Setting the Boundaries: Reforming the law on sex offences* (July 2000), at paragraph 3.6.1.)

2 It should be noted that any non-consensual sexual activity taking place between children and young persons is always criminalised. The child or young person who commits a sexual act on another child or young person without the latter's consent is liable to prosecution for one of the non-consensual sexual offences.

Three main approaches to the issue as to whether consensual sexual activity between persons who are between 13 and 16 years of age should be criminalised

6.5 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.

First approach: criminalised but with prosecutorial discretion to prosecute in appropriate cases only

6.6 The first is the existing approach in Hong Kong. It is also the approach adopted in England and Wales. Under this approach, all consensual sexual activity between persons who are between 13 and 16 years of age is criminalised. Prosecutorial discretion will however ensure that only appropriate cases are brought to court.

Rationale for the first approach

The law should set parameters for behaviour of young people

6.7 The Home Office Review Group in the UK pointed out that the law has a significant social role in setting parameters for behaviour and discouraging under-age sex between young people:

> *"We have to achieve a very difficult balance between ensuring that the law is appropriate, fair and effective in enabling a range of coercive activity to be dealt with, while not criminalising young people for mutually agreed behaviour. We recognised that the law also plays a significant social role in setting parameters for behaviour, and we want to discourage under-age sex."*[3]

[3] Home Office, *Setting the Boundaries*: *Reforming the law on sex offences* (July 2000), at paragraph 3.9.5.

Consensual sexual relationships between children may not be truly consensual and can be exploitative

6.8 During the parliamentary debate on the Sexual Offences Bill (which led to the enactment of the English Sexual Offences Act 2003), Lord Falconer of Thoroton, speaking for the British Government, rejected an amendment to the bill which in effect would legalise consensual sexual activity between children.

6.9 In his speech, Lord Falconer gave the rationale for not legalising consensual sexual activity between children. He pointed out that sexual relationships between children are not necessarily fully consensual just because the children are of a similar age. Children are often abused by other children. Many children are vulnerable to peer pressure and can be persuaded to engage in sexual activity when they prefer not to do so. Sexual activity in such circumstances, though not non-consensual, is exploitative. The law enforcement authorities should be given the legal backing to take appropriate steps to intervene at an early stage to try to help the child who is abusing as well as to protect children who may be abused:

> *"… The way in which the criminal law deals with under-age consensual sexual activity is a matter we debated at some length in Committee. We have considered very carefully our position in the light of all the concerns raised. However, we remain firmly of the opinion that the age of consent should apply across the board, whether a child is having sex with another child or an adult.*
>
> *I know that it is widely held that a sexual relationship is far more likely to be abusive if the age gap between the parties is significant—for example, between a 15 year-old child and a 40 year-old adult. But the truth is that adults do not have a monopoly on child abuse. We cannot assume that sexual relationships between young people will be fully consensual just because they are of a similar age. We know that children are often abused by other children. Although we earnestly hope that steps would be taken to intervene as early and as quickly as possible to try to help the child who is abusing, the law must be able to protect such children in the appropriate case … .*
>
> *We believe that the law must make provision for children to face charges relating, ostensibly, to consensual activity where there is evidence to suggest that it is exploitative or coercive, as there may not be enough evidence to support a charge for a non-consensual offence. As was said in Committee, many children are vulnerable to peer pressure and can be persuaded to engage in sexual activity when they would prefer not to do so. In such circumstances, sexual activity cannot be said to be non-consensual, but it can be exploitative. In such cases, we want to leave open the possibility of the CPS bringing charges*

under one of the child sex offences where prosecution is in the public interest."[4]

Legalising consensual sexual activity between children may encourage more children to engage in pre-mature sexual activity

6.10 Lord Falconer went on to point out that legalising consensual sexual activity between children may send the message that under-age sexual activity is acceptable and normal. More children would be encouraged to engage in sexual activity before they can cope emotionally and physically with the consequences. Lord Falconer pointed out that many children in fact welcomed the legal restriction on under-age sex because it enable the children to resist peer pressure to engage in such activity before they are ready to do so:

> *"… The testimony of many children is that they welcome the protection that is offered by the age of consent, because it enables them to withstand peer pressure to engage in sexual activity before they are ready to do so. I am not sure that we would be right to remove that protection. I simply do not accept the proposition that we should leave children without any legal grounds to help them resist coercive sex. Legalising sexual activity between minors would send the message that sexual activity below the age of consent is acceptable and normal. In my opinion, that would encourage more children to engage in sexual activity before they are emotionally and physically ready to cope with the consequences.*
>
> *Our view is that we have a duty to protect children from engaging in sexual activity at too early an age. Existing legislation, which contains offences of unlawful sexual intercourse and indecent assault, already makes it clear that it is unlawful to engage in any sexual activity with a person below the age of 16. We are content that our new legislation should make a clear statement that this continues to be the case."*[5]

Prosecution would only take place in cases of exploitation and when prosecution is in the public interest

6.11 The imposition of criminal liability on the child who is abusing does not necessarily mean that he or she would be prosecuted in all cases. Lord Falconer emphasised that consensual sexual activity between children will not be prosecuted unless there is clear evidence of exploitation and prosecution is in the public interest:

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4 Lords Hansard, 2 June 2003: Column 1107.

5 Lords Hansard, 2 June 2003: Column 1107.

"… I have already made it clear—I do so again—that we do not want or expect under-age sexual activity between young people to be prosecuted unless there is clear evidence of exploitation and prosecution is in the public interest. We suspect that it would be unwise to remove all of that protection, as proposed by the amendment, and that it would also be a matter of getting the balance wrong. Despite the law that I described, there is no evidence at present to show that that happens. As we are not making any substantive change in that respect, we do not believe that it will happen in the future … ."[6]

Discretionary Practice in Hong Kong

6.12 In Hong Kong, the current practice in respect of consensual sexual intercourse between persons who are between 13 and 16 years of age is that a young offender with a clear record would usually be dealt with by superintendent's caution under the Police Superintendents' Discretion Scheme. If however the offender has been cautioned previously, the offender might be charged.

6.13 In Hong Kong, the Police Superintendents' Discretion Scheme applies generally to a person who is a juvenile offender.[7] When a juvenile offender is arrested for an offence, a police officer of the rank of Superintendent or above, after considering all circumstances surrounding the case, can, at his or her discretion, issue a caution to the juvenile offender rather than initiating a criminal prosecution.

6.14 The following are main points of the Police's policy regarding the Police Superintendents' Discretion Scheme ("PSDS"):

"No juvenile should be discharged by way of the PSDS unless:-

(a) at the time the caution is administered, the offender is under the age of 18;

(b) the evidence available is sufficient to support a prosecution, and that a prosecution would be the only alternative course of action;

(c) the offender voluntarily and unequivocally admits the offence; and

(d) *the offender and his/her parents or guardians agree to the cautioning."*[8]

6.15 The criteria for exercise of discretion are set out in the following terms:

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6 Lords Hansard, 2 June 2003: Columns 1107-1108.

7 A juvenile offender for this purpose is someone who has attained the age of 10 but is under 18 at the time of commission of the offence.

8 Cited from a paper on the Police Superintendents' Discretion Scheme supplied by SSP Crime Support of the Police to Hong Kong Law Reform Commission's Sub-committee on Review of Sexual Offences on 21 February 2013.

> *"A Superintendent or above should decide whether or not to exercise his/her discretion after considering all the circumstances surrounding the case. Each case rests on its own merits. In general terms, however, the following points should be considered:*
> *(a) the nature, seriousness and prevalence of the offence;*
> *(b) the offender's previous record;*
> *(c) the attitude of the complainant; and*
> *(d) the attitude of the offender's parents or guardians."*[9]

6.16 We have noted the approach adopted in the UK. Under this approach, consensual sexual activity between persons who are between 13 and 16 years of age is not normally charged as a criminal offence. Prosecutorial discretion will ensure that only appropriate cases are brought to court, for example, where there is clear evidence of sexual exploitation or prosecution is in the public interest. Sexual experimentation among teenagers not involving sexual abuse or exploitation may be dealt with by means other than prosecution (such as something similar to the superintendent's caution under the PSDS).

6.17 The Explanatory Notes to the English Sexual Offences Act 2003 mention specifically that:

> *"In practice (although there is no provision about this in the Act) decisions on whether persons under 18 should be charged with child sex offences will be made by Crown Prosecutors. In deciding whether it is in the public interest to prosecute these offences, where there is enough evidence to provide a realistic prospect of conviction, prosecutors may take into consideration factors such as the ages of the parties; the emotional maturity of the parties; whether they entered into a sexual relationship willingly; any coercion or corruption by a person; and the relationship between the parties and whether there was any existence of a duty of care or breach of trust".*[10]

6.18 We consider that it is desirable to have guidelines for the exercise of prosecutorial discretion, should the first approach be adopted in the new legislation. The guidelines may be based on some or all of the factors which would be taken into account in the UK for the exercise of prosecutorial discretion.

Second approach: criminalised but with "close-in-age" defence

6.19 The second approach is that adopted by some jurisdictions such as Australia and Canada. Under this approach, there is only one set of

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9 *Ibid.*

10 Explanatory Notes to the English Sexual Offences Act 2003, at paragraph 22.

offences irrespective of whether the offences are committed by an adult or a child. However, there is a "similarity-in-age" or "close-in-age" defence in respect of consensual sexual activity between children.

6.20 In Canada, it is a defence to a charge for sexual interference, invitation to sexual touching, exposure, or sexual assault with a weapon that an accused is less than two years older than the complainant who is 12 years or more but under 14.[11] In order to raise that defence, the accused must not be in a position of trust or authority towards the complainant, or exploitative of the complainant. Neither can the accused be a person with whom the complainant is in a relationship of dependency.

6.21 Similarly, in Victoria of Australia, consent may be a defence to a charge for sexual penetration of a child where the complainant is 12 or older and the accused was not more than 2 years older than the complainant.[12] In Tasmania, consent may be a defence to a charge for sexual intercourse with a young person where the complainant was 15 or over and the accused was no more than 5 years older than the complainant; or where the complainant was 12 or over and the accused was no more than 3 years older than the complainant.[13] However, the similarity-in-age defence is not available in respect of anal sexual intercourse.[14]

Rationale for the second approach

Young persons do engage in sexual activity at an early age

6.22 The principal argument in favour of a "close-in-age" defence is to recognise the fact that young persons do engage in sexual activity at an early age. If the sexual activity was carried out with mutual consent and was not exploitative, they should not be criminalised especially when they are close in age.

6.23 When an amendment was made to the Canadian Criminal Code in 2007, an existing "close-in-age" exception was maintained.[15] The Commentary on the amendment Bill said:

> *"Aside from the law on the issue, studies of Canadian youth have found that young persons do engage in sexual activity. The 2003 report of the Council of Ministers of Education, Canada, the Canadian Youth, Sexual Health and HIV/AIDS Study, found that the average age of first sexual intercourse for its sample (students in Grades 7, 9, and 11) was 14.1 years among boys and 14.5 years among girls. Furthermore, the reasons cited by youth for*

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11 Canadian Criminal Code, section 150.1 (2).

12 Crimes Act 1958 (Vic), section 45(4)(b).

13 Criminal Code (Tas), section 124(3).

14 Criminal Code (Tas), section 124(5).

15 Bill C-22: An Act to amend the Criminal Code (age of protection) and to make consequential amendments to the Criminal Records Act.

not having sexual intercourse are most commonly that they are "not ready" or "have not had the opportunity." Negative family and peer opinions do not play major roles in the decision not to have sex".[16]

Avoid inadvertently criminalising consensual sexual activity between young people

6.24 The Canadian Bar Association pointed out that the "close-in-age" defence *"will help to avoid inadvertently criminalising consensual sexual activity between young people".*[17] Thus, such a defence will avoid criminalising consensual sexual activity between children which is not exploitative. Instead of relying on prosecutorial discretion which is not absolutely certain, the defence sets out clearly as to when such behaviour is exempted from criminal liability.

Third approach: consensual sexual activity between children is not criminalised

6.25 The third approach is a liberal approach. Under this approach, consensual activity between persons who are between 13 and 16 years of age is not criminalised.

6.26 This approach was favoured by the Scottish Law Commission. The Scottish Law Commission recommended that consensual sexual activity between older children should not constitute a criminal offence, but should be a ground for referral of the child to the Scottish Children's Reporter[18] to see if some form of social intervention is necessary.[19]

Rationale for the third approach

If prosecution of consenting sexual activity between children is largely theoretical in most cases, then the activity should not be criminal

6.27 The Scottish Law Commission pointed out that if it is only in theory that there would be prosecution and in most cases a charge would not

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16 Bill C-22, *ibid.*

17 The Canadian Bar Association's Submission on Bill C2 – Tackling Violent Crime Act (November 2007), at page 2.

18 The Scottish Children's Reporter Administration (SCRA), which was formed under the Local Government (Scotland) Act 1994, is a national body focused on children at risk. It became fully operational on 1st April 1996. The SCRA investigates each referral to decide if compulsory measures of supervision are needed to protect the child and/or address their behaviour. If these measures are necessary, the child is then referred to a Children's Hearing. (The Scottish Children's Reporter Administration website: www.scra.gov.uk).

19 Scottish Law Commission, *Report on Rape and Other Sexual Offences* (December 2007), Scot Law Com No. 209, at paragraphs 4.55-4.56.

be made because of prosecutorial discretion, the activity should not be criminalised at all. Moreover, the child might still be subject to investigation by the police, though he or she is not charged:

> *"… We are not impressed by the argument that such criminal liability would be theoretical only and in the vast majority of cases there would be no criminal prosecutions. Such an approach fails to take account of the possibility that older children might still be subject to investigation by the police, even if prosecution in the criminal courts is unlikely. More fundamentally, there is an important point of principle involved. If consenting sexual activity between young people is not to attract criminal liability, then the activity should not be criminal."*[20]

Young people may be deterred from seeking appropriate advice

6.28 The involvement of the criminal law may deter young people involved in consensual sexual activity from seeking appropriate advice and help on sexual health matters. Such view was taken by those who supported the Scottish Law Commission's proposal, including most children's groups, the Scottish Children's Reporter Administration, the Scottish Commissioner for Children and Young People and a number of Child Protection Committees.[21]

Our view as to the possible criminalisation of consensual sexual activity between persons who are between 13 and 16 years of age

6.29 We take the view that, having regard to the protective principle, there should be legislation against consensual sexual activity between persons who are between 13 and 16 years of age.

6.30 As Lord Falconer rightly pointed out, *supra*, one cannot assume that sexual relationships between children will be fully consensual just because they are close in age. Many children are under peer pressure and can be persuaded to engage in sexual activity against their will. Sexual activity in such circumstances is exploitative, though it cannot be said to be non-consensual. We consider that even if such sexual activity could be said to be conducted with "consent", the criminal law should intervene to give protection to persons under 16 years of age.

6.31 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. The absence of legislation against consensual sexual activity between children may send the

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[20] Scottish Law Commission Report, *ibid*, at paragraph 4.55.

[21] Sexual Offences (Scotland) Bill: Policy Memorandum (Session 3 (2008), SP Bill 11-PM), at paragraph 118.

wrong message that sexual activity below the age of consent is acceptable and normal and could encourage more children and young persons to engage in premature sexual activity before they are physically and emotionally ready to cope with its consequences.

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

6.33 The imposition of criminal liability on the child or young person who is sexually exploitative of another child or young person does not necessarily mean that he or she 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 PSDS - a scheme which appears to have been operating well in Hong Kong.

6.34 Thus, we are generally in favour of the first approach, namely, criminalisation of all consensual sexual activity between persons who are between 13 and 16 years of age but with prosecutorial discretion to bring a charge in appropriate cases. Moreover, we take the view that it is unnecessary to have special provisions in the new legislation for lighter sentences to be imposed on a child offender than on an adult offender. We consider that it will be a simpler and more feasible approach for the entire matter to be left to the judge's sentencing discretion. Furthermore, as mentioned in paragraph 6.18 above, guidelines for the exercise of prosecutorial discretion are desirable.

Effects of gender neutrality of offences on our present proposal

6.35 The exercise of prosecutorial discretion will be affected by the proposed gender-neutrality of offences. At present, prosecutorial discretion is confined to decide whether the boy should be prosecuted or be dealt with by some other means. With gender-neutrality of offences as proposed, prosecutorial discretion will have to be exercised as to whether (i) the boy only; or (ii) the girl only; or (iii) both of them should be prosecuted.

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.

Chapter 7

Sexual offences involving children in the new legislation

Introduction

7.1 This chapter deals with the creation of offences relating to sexual crimes committed against children.

7.2 We recommended in Chapter 3 (at Recommendation 3) that the law should reflect the protection of two categories of young persons, namely, children under 13 and 16 respectively with a range of offences for each category.

7.3 Consistent with that we propose below a range of offences involving children in the two categories. For reasons set out in Chapter 3 (paragraphs 3.44 – 3.45) there will be some overlap between the two.

The state and inadequacy of existing legislation

7.4 Although the existing legislation addresses the two categories it covers only two types of sexual activities, namely, sexual intercourse and indecent assault. We consider that the protection of children should extend to other sexual activities. In this respect, the Sub-committee has proposed in its previous consultation paper that there should be non-consensual sexual offences of rape, sexual assault by penetration, sexual assault and causing a person to engage in sexual activity without consent. [1] We consider that there should be new child offences mirroring the proposed non-consensual sexual offences. Furthermore, we take the view that there should be other provisions to protect children against specific incidents of sexual exploitation. Such an approach has been adopted in England and Wales and Scotland.

Offences involving children in the English and Scottish Acts

7.5 In the English and Scottish Acts, there is a range of offences dealing with sexual conduct involving children in the two categories.

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[1] Law Reform Commission of Hong Kong, C*onsultation Paper on Rape and Other Non-consensual Sexual Offences* (September 2012), at recommendations 7, 16, 18,19, 20 and 21.

7.6 The main differences between the two categories lie in the imposition of absolute liability and the levels of maximum penalties.

Absolute liability offences

7.7 As it is considered absolutely wrong for anyone to engage a child under 13 in any form of sexual activity, offences involving children under 13 are absolute liability offences. We have stated our position in Chapter 4 that offences involving children under 13 should always be of absolute liability and we shall proceed on that basis in our proposals with regard to these offences. This approach not only provides protection for young children against sexual exploitation but is also in line with the existing approach in the Crimes Ordinance.[2]

7.8 Offences involving children between 13 and 16 in the English and Scottish Acts are not of absolute liability. It is a defence if the accused had a reasonable but mistaken belief that the child was 16 or over.[3] In Chapter 4 we have stated our view that the issues 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 sex as regards absolute liability should be the subject of public consultation.

Offences involving children under 13 to carry heavier sentences

7.9 In both the English and Scottish Acts, offences involving children under 13 carry heavier sentences than offences involving children between 13 and 16. This is also the case in the existing Crimes Ordinance. We take the view that offences involving children under 13 should continue to carry heavier sentences than offences involving children between 13 and 16 in the new legislation.

Offences involving children under 13 in the English and Scottish Acts

(i) Offences which mirror the non-consensual offences

7.10 Sections 5 to 8 of the English Act provide for four separate offences involving children under 13. They mirror the four English non-consensual offences of rape, assault by penetration, sexual assault, and causing a person to engage in sexual activity without consent. Hence, there are the offences of rape of a child under 13 (section 5), assault of a child under 13 by penetration (section 6), sexual assault of a child under 13 (section 7), and causing or inciting a child under 13 to engage in sexual

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2 For example, intercourse with a girl under 13 (section 123 of the Crimes Ordinance) is an absolute liability offence.

3 Such a defence is not available if the child was under 13.

activity (section 8). Although these offences mirror the non-consensual offences, there is no need for the prosecution to prove lack of consent since these are offences involving very young children.

7.11 There are corresponding offences involving children under 13 in the Scottish Act: rape of a young child (section 18); sexual assault of a young child by penetration (section 19); sexual assault on a young child (section 20); and causing a young child to participate in a sexual activity (section 21).

(ii) Other offences not mirroring the non-consensual offences

7.12 There are further offences involving children in the English Act which do not mirror the non-consensual offences. This group of offences applies both to a child under 16 and a child under 13. Where an offence relates to a child under 13, the offence is one of absolute liability. But where an offence relates to a child between 13 and 16, there is a defence of reasonable belief that the child was 16 or over.

7.13 These English offences are: engaging in sexual activity in the presence of a child (section 11), causing a child to watch a sexual act (section 12), arranging or facilitating commission of a child offence (section 14), and meeting a child following sexual grooming (section 15).

7.14 Some of these English offences have corresponding Scottish offences. These are causing a young child to be present during a sexual activity (section 22) and causing a young child to look at a sexual image (section 23).

Offences involving children between 13 and 16 in the English and Scottish Acts

(i) Offences which mirror the non-consensual offences:

The English Act

7.15 The English offences mirroring the non-consensual offences are sexual activity with a child (section 9),[4] and causing or inciting a child to engage in sexual activity (section 10).

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[4] The offence in section 9 of the English Act covers penile or non-penile penetration of a child. The penalties for penile or non-penile penetration are set out in subsection (2) (see quote below).
Section 9 of the English Act provides:
"(1) A person aged 18 or over (A) commits an offence if—
(a) he intentionally touches another person (B),
(b) the touching is sexual, and
(c) either—
(i) B is under 16 and A does not reasonably believe that B is 16 or over, or
(ii) B is under 13."
(2) A person guilty of an offence under this section, if the touching involved—

The Scottish Act

7.16 The Scottish offences mirroring the non-consensual offences are having intercourse with an older child (section 28), engaging in penetrative sexual activity with or towards an older child (section 29), engaging in sexual activity with or towards an older child (section 30), and causing an older child to participate in a sexual activity (section 31).

(ii) Other offences not mirroring the non-consensual offences

The English Act

7.17 These offences are engaging in sexual activity in the presence of a child (section 11), causing a child to watch a sexual act (section 12), arranging or facilitating commission of a child offence (section 14), and meeting a child following sexual grooming (section 15).[5]

The Scottish Act

7.18 In the Scottish Act, there are corresponding offences which apply to older children aged between 13 and 16. These offences are causing an older child to be present during a sexual activity (section 32), and causing an older child to look at a sexual image (section 33).

Gender neutrality

7.19 The offences involving children in the English and Scottish Acts are gender neutral in that they can be committed against a boy or a girl. We recommended in Chapter 3 that offences involving children should be gender-neutral (Recommendation 2). We would therefore proceed on the basis of a gender neutral approach in our proposals.

7.20 We consider below the offences involving children in England and Scotland in greater detail and make recommendations accordingly.

(a) penetration of B's anus or vagina with a part of A's body or anything else,
(b) penetration of B's mouth with A's penis,
(c) penetration of A's anus or vagina with a part of B's body, or
(d) penetration of A's mouth with B's penis,
is liable, on conviction on indictment, to imprisonment for a term not exceeding 14 years.

(3) Unless subsection (2) applies, a person guilty of an offence under this section
is liable—
(a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or both;
(b) on conviction on indictment, to imprisonment for a term not exceeding 14 years."

[5] This range of offences in the English Act applies to a child under 16. Where the child is aged between 13 and 16, there is a defence of reasonable belief that the child was 16 or over. Where the child is under 13, such a defence is not available.

Penile penetration of a child

The English offence – Rape of a child under 13

7.21 In the English Act, penile penetration of the vagina, anus or mouth of a child under 13 is covered by the offence of "rape of a child under 13". Section 5(1) of the English Act provides:

> *"A person commits an offence [of rape of a child under 13] if –*
>
> *(a) he intentionally penetrates the vagina, anus or mouth of another person with his penis, and*
>
> *(b) the other person is under 13."*

The Scottish offence - Rape of a young child

7.22 In the Scottish Act, penile penetration of the vagina, anus or mouth of a child under 13 is covered by the offence of "rape of a young child". Section 18 of the Scottish Act provides:

> *"If a person ("A"), with A's penis, penetrates to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of a child ("B") who has not attained the age of 13 years, then A commits an offence, to be known as the offence of rape of a young child".*

The inadequacy of the existing offence of sexual intercourse with a girl under 13

7.23 The inadequacy of the existing offence of sexual intercourse with a girl under 13 (section 123 of the Crimes Ordinance) is two-fold. First, it covers only penile penetration of the child victim's vagina, but not the anus or mouth. Second, it does not cover any child victim who is a boy. The second aspect is illustrated by a Hong Kong case in which a former disc jockey and private tutor was convicted in November 2013 of 13 counts of indecent assault and indecent conduct towards a child.

7.24 Between February 2010 and December 2012, the accused carried out indecent acts on an eight-year-old boy and another 11-year-old boy when he provided private tuition at his home to the boys. These acts included asking the boys to perform oral sex and to masturbate the accused. The accused shot clips with an internet camera and mobile phone. The case came to light when the accused's nude photos on the internet were accidentally found by an assistant of the school of one of the boys. It was

reported in the press that the judge hearing the case had made it clear that *"a lengthy jail term is unavoidable"*.[6]

7.25 In the above case, the accused's acts were particularly grave and lasted for a long period. The acts involved penile penetration of the children's mouths (that is to say, oral sex). He deserved a lengthy jail term but he could only be prosecuted for the lesser offences of indecent assault and indecent conduct towards a child, which both carry a maximum sentence of 10 years only. The accused could not be prosecuted for the more serious offence of sexual intercourse with a girl under 13 (which carries maximum penalty of life imprisonment) because that offence applies to sexual intercourse with a girl only and does not extend to any penile penetration other than to the vagina.

7.26 We therefore consider that there should be a new offence involving children under 13 which is gender-neutral and covers penile penetration of the child's vagina, anus or mouth. Such an offence would give better protection to children against sexual exploitation than the existing offence of sexual intercourse with a girl under 13. With the proposed new offence in place, there would be no place for the existing offence which can then be abolished.

The name of the new offence

7.27 Both the English and Scottish offences are called "rape" of a child.

7.28 According to the Home Office Review Group in the UK, the rationale for adopting the term of "rape" in the name of the offence was that *"… Rape is the most serious sexual offence and a reformed law would be fundamentally flawed if the rape of a child was not charged as such."*[7]

7.29 We are not inclined to follow the English and Scottish approach in adopting the term "rape" in the name of the new proposed offence which involves penile penetration of a child under 13. Rape is commonly understood to mean non-consensual sexual intercourse (see the discussion in Chapter 4 of our earlier Consultation Paper on Rape and Other Non-consensual Sexual Offences). However, for such an offence involving a person under 13, consent is never at issue. The mere act of penile penetration against a person under 13 is a very serious offence. There is no need to give it the label of rape. Furthermore, some child victims may wish to avoid any possible stigma that they have been raped. This can be avoided by using a term other than “rape” for the name of the new proposed offence.

7.30 We consider that a new offence named penile penetration of a child under 16 should be created. The existing offence of sexual intercourse with a girl under 16 (section 124 of the Crimes Ordinance) is gender-specific

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[6] The Standard and Ming Pao, 27 November 2013. (Case No. HCCC286/13)

[7] Home Office, *Setting the Boundaries*: *Reforming the law on sex offences* (July 2000), at paragraph 3.6.3.

and does not cover sexual penetrative assault on a boy. Moreover, it covers vaginal intercourse only but not sexual penetration of the child's anus or mouth with a part of one's body. On the other hand, the existing offences of indecent assault (section 122 of the Crimes Ordinance) and indecent conduct towards a child (section 146 of the Crimes Ordinance) are inadequate to reflect the gravity of this type of serious criminal conduct.

Recommendation 9

We recommend 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 Sexual Offences Act 2003.

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

Penetration of a child

The English offence – Assault of a child under 13 by penetration

7.31 In the English Act, non-penile penetration of the vagina or anus of a child under 13 is covered by the offence of "assault of a child under 13 by penetration". Section 6(1) of the English Act provides:

> *"A person commits an offence [of assault of a child under 13 by penetration] if –*
>
> *(a) he intentionally penetrates the vagina or anus of another person with a part of his body or anything else,*
>
> *(b) the penetration is sexual, and*
>
> *(c) the other person is under 13".*

The Scottish offence - Sexual assault on a young child by penetration

7.32 In the Scottish Act, non-penile penetration of the vagina or anus of a child under 13 is covered by the offence of "sexual assault on a young child by penetration". Section 19 of the Scottish Act provides:

> *"(1) If a person ("A"), with any part of A's body or anything else, penetrates sexually to any extent, either intending to do so or reckless as to whether there is penetration, the vagina or anus of a child ("B") who has not attained the age of 13 years, then A commits an offence, to be known as the offence of sexual assault on a young child by penetration."*

Inadequacy of existing offences dealing with non-penile penetration of a child's vagina or anus

7.33 Non-penile penetration of a child's vagina or anus is currently covered by the offences of indecent assault (section 122 of the Crimes Ordinance) and indecent conduct towards a child (section 146 of the Crimes Ordinance).[8] Each of these offences carries a maximum sentence of imprisonment of 10 years only.

7.34 In our view, the existing offences are inadequate to reflect the gravity of non-penile penetration of a child's vagina or anus and a new offence should be created to cover this type of serious conduct. The proposed new offence would cover non-penile penetration of the vagina or anus of a child under 13.

Section 19(2) of the Scottish Act

7.35 Section 19(2) of the Scottish Act provides:

> *"(2) Without prejudice to the generality of subsection (1), the reference in that subsection to penetration with any part of A's body is to be construed as including a reference to penetration with A's penis."*

7.36 The effect of section 19(2) is that the Scottish offence includes penetration by a penis. There is no corresponding provision in the English offence.

7.37 We consider that a similar provision along the lines of section 19(2) of the Scottish Act should be adopted in respect of the proposed offence.[9] The provision would be useful in dealing with situations in which the child is unclear whether he or she was penetrated by a penis or something else. This may happen, for example, when the child was blindfolded or unconscious at the time or is a mentally incapacitated person. In those circumstances, the offender could be charged with this new offence. We are aware that the adoption of section 19(2) of the Scottish Act will result in an overlap between this new offence and the proposed offence of penile penetration of a child under 13 (above). In our view, such overlap of offences is justified on the grounds that the law should be so framed to avoid a situation in which a serious crime has clearly been committed against children but is unable to be proved.

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[8] The offence in section 146 of the Crimes Ordinance applies to a child under 16.

[9] The Sub-committee proposed similar provision with regard to the proposed non-consensual offence of sexual assault by penetration in their previous paper. See Law Reform Commission of Hong Kong, C*onsultation Paper on Rape and Other Non-consensual Sexual Offences* (September 2012) (at Recommendation 16).

Assault of a child under 16 by penetration

7.38 We consider that a similar offence involving children under 16 should be created. There are deficiencies in the existing offences in dealing with non-penile penetration of the vagina or anus of an older child. The existing offence of sexual intercourse with a girl under 16 (section 124 of the Crimes Ordinance) is gender-specific and does not cover sexual penetrative assault on a boy. Moreover, it covers vaginal intercourse only but not sexual penetration of the child's vagina or anus with a part of one's body. On the other hand, the existing offences of indecent assault (section 122 of the Crimes Ordinance) and indecent conduct towards a child (section 146 of the Crimes Ordinance) are inadequate to reflect the gravity of this type of serious criminal conduct.

Statutory alternative verdict

7.39 There may be a situation in which the child thought he or she was penetrated by a penis but the evidence at trial showed that the penetration was by something else. We take the view that in order to deal with such a situation, Schedule 1 of the Crimes Ordinance should be amended to allow a statutory alternative verdict for the proposed offence of penetration of a child under 13 or 16, where the accused is charged with the proposed offence of penile penetration a child under 13 or 16.[10]

Recommendation 10

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

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

We recommend the adoption of a provision along the lines of section 19(2) of the Sexual Offences (Scottish) Act 2009 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.

We recommend that Schedule 1 of the Crimes Ordinance should be amended to allow a statutory alternative verdict

[10] Similar proposal was made with regard to the proposed non-consensual offence of sexual assault by penetration in the Sub-committee's previous paper. See Law Reform Commission of Hong Kong, C*onsultation Paper on Rape and Other Non-consensual Sexual Offences* (September 2012) (at Recommendation 16).

for penetration of a child under 13, where the accused is charged with penile penetration a child under 13; similarly, a statutory alternative verdict for penetration of a child under 16, where the accused is charged with penile penetration a child under 16.

Sexual assault of a child under 13

The English offence - sexual assault of a child under 13

7.40 Section 7(1) of the English Act provides:

> *"A person commits an offence [of sexual assault of a child under 13] if –*
>
> *(a) he intentionally touches another person,*
>
> *(b) the touching is sexual, and*
>
> *(c) the other person is under 13".*

The Scottish offence - Sexual assault on a young child

7.41 Sections 20(1) and (2) of the Scottish Act provides:

> *"(1) If a person ("A") does any of the things mentioned in subsection (2) ("B" being in each case a child who has not attained the age of 13 years), then A commits an offence, to be known as the offence of sexual assault on a young child.*
>
> *(2) Those things are, that A—*
>
> *(a) penetrates sexually, by any means and to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B,*
>
> *(b) intentionally or recklessly touches B sexually,*
>
> *(c) engages in any other form of sexual activity in which A, intentionally or recklessly, has physical contact (whether bodily contact or contact by means of an implement and whether or not through clothing) with B,*

(d) intentionally or recklessly ejaculates semen onto B,

(e) intentionally or recklessly emits urine or saliva onto B sexually."

The scope of sexual assault

7.42 The English and Scottish offences essentially apply the non-consensual offence of sexual assault to children under 13 but with the element of consent removed. The scope of sexual assault in the English and Scottish Acts is confined to sexual touching and specific sexual acts such as ejaculating semen on a child and emitting urine or saliva onto a child sexually.

7.43 The Sub-committee has proposed in its previous consultation paper that (for adults) there should be three categories of sexual assaults.[11] The first is sexual touching, ejaculating semen on others, and emitting urine or saliva onto others sexually. The second is a sexual act which causes another person (B) 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.[12]

7.44 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. (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.) We consider 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 (i.e. sexual acts in the first category above) only.

7.45 We consider that a similar offence involving children under 16 should be created to provide protection to older children against acts of sexual assault.

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[11] The Sub-committee has proposed in its previous consultation paper three categories of sexual assault so that the scope of sexual assault would be extended to cover non-contact acts. The reason is that sexual assault is intended to replace the existing offence of indecent assault. The reason for replacing indecent assault by sexual assault is that there is a case for creation of a new offence which shifts the focus from "indecency" to "sexual" and yet provides the same level of protection as before in order to uphold the principle of sexual autonomy. Indecent assault, however, is not restricted to contact behaviour. (See Law Reform Commission of Hong Kong, C*onsultation Paper on Rape and Other Non-consensual Sexual Offences* (September 2012), at paragraphs 6.6 and 6.21.)

[12] C*onsultation Paper on Rape and Other Non-consensual Sexual Offences*, *ibid*, at Recommendations 18, 19 and 20.

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 or saliva onto B sexually.

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

Causing or inciting a child under 13 to engage in sexual activity

The English offence – Causing or inciting a child under 13 to engage in sexual activity

7.46 Section 8(1) of the English Act provides:

> *"A person commits an offence [of causing or inciting a child under 13 to engage in sexual activity] if –*
>
> *(a) he intentionally causes or incites another person (B) to engage in an activity,*
>
> *(b) the activity is sexual, and*
>
> *(c) B is under 13."*

7.47 The English offence mirrors the non-consensual offence of causing a person to engage in sexual activity without consent, but without the ingredient of consent.

The Scottish offence – Causing a young child to participate in a sexual activity

7.48 Section 21 of the Scottish Act provides:

> *"If a person ("A") intentionally causes a child ("B") who has not attained the age of 13 years to participate in a sexual activity then A commits an offence, to be known as the offence of causing a young child to participate in a sexual activity."*

7.49 The Scottish offence mirrors the non-consensual offence of sexual coercion, but without the ingredient of consent.

The two limbs of "causing" or "inciting"

7.50 Although the English child offence of "causing or inciting a child under 13 to engage in sexual activity" mirrors the non-consensual offence of "causing a person to engage in sexual activity without consent", the former can be committed by either causing or inciting the child to engage in sexual activity whilst the latter can be committed by causing only.

7.51 In addition to the limb of causing, the English child offence has a second limb of inciting. Likewise, incitement is also a limb of the existing offence of indecent conduct with or towards a child under 16 in section 146 of the Crimes Ordinance.[13] The existing offence can be committed by inciting the child to do an act of gross indecency with or towards him or herself or another person.

7.52 In our view, the merit of having a second limb of incitement in the proposed child offence is that it would provide the same level of protection as the existing offence of indecent conduct with or towards a child under 16. This would provide protection for children in situations in which the perpetrator incites the child to engage in a sexual activity but the activity fails to take place for whatever reason. We take the view that in such a situation, the mere act of inciting is culpable and should be penalised by a criminal offence.

7.53 The Sub-committee has proposed in its previous consultation paper an offence of causing a person to engage in sexual activity without consent.[14] We take the view 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 a new offence should be created to cover such conduct.

7.54 We consider that a similar offence involving children under 16 should be created to provide protection to older children.

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[13] The existing offence of indecent conduct with or towards a child under 16 (in section 146 of the Crimes Ordinance) was modelled on the English offence of indecent conduct towards a young child in section 1 of the Indecency with Children Act 1960. The whole of that Act (including the section 1 offence) was repealed by the Sexual Offences Act 2003.

[14] Law Reform Commission of Hong Kong, C*onsultation Paper on Rape and Other Non-consensual Sexual Offences* (September 2012), at Recommendation 21.

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.

Other offences not mirroring the non-consensual offences:

Engaging in sexual activity in the presence of a child / Causing a young child to be present during a sexual activity

The English Offence – Engaging in sexual activity in the presence of a child

7.55 Section 11 of the English Act provides for the offence of "engaging in sexual activity in the presence of a child":

> *"(1) A person aged 18 or over (A) commits an offence if—*
>
> *(a) he intentionally engages in an activity,*
>
> *(b) the activity is sexual,*
>
> *(c) for the purpose of obtaining sexual gratification, he engages in it—*
>
> *(i) when another person (B) is present or is in a place from which A can be observed, and*
>
> *(ii) knowing or believing that B is aware, or intending that B should be aware, that he is engaging in it, and*
>
> *(d) either—*
>
> *(i) B is under 16 and A does not reasonably believe that B is 16 or over, or*
>
> *(ii) B is under 13."*

7.56 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.[15]

7.57 In order to constitute the offence, the necessary element is "*knowing or believing that B is aware, or intending that B should be aware, that he is engaging in it".* Thus, the perpetrator must intend the child to see what he or she is doing or at least suspect or believe the child may be able to observe him or her from another room or location.[16]

The Scottish Offence – Causing a young child to be present during a sexual activity

7.58 Section 22 of the Scottish Act provides for a similar offence called "causing a young child to be present during a sexual activity". It covers the situation in which a person (A) intentionally engages in a sexual activity in the presence of a child (B) under 13; or causes B to be present while a third party engages in a sexual activity. In order to constitute the offence, A's act must be done for the purpose of obtaining sexual gratification or to humiliate, distress or alarm B.[17]

The child may be physically present or via webcam

7.59 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 he or she engages in a sexual activity, or the child may be present somewhere else and be seen via, for example, a webcam. The following two cases are examples of this.

7.60 In *R v Pedley Re Martin,*[18] the accused, a man aged 41, fantasised about little girls. He kept diaries which spoke in unpleasant terms of his sexual fascination with young girls. Over a period of about three months, he developed a habit of driving about to look for young girls to watch, outside a school or supermarket and then masturbating in his car. He would video record what he did. He also filmed some of the girls he was watching.

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15 Kim Stevenson, Anne Davies, and Michael Gunn, *Blackstone's Guide to the Sexual Offences Act 2003* (Oxford University Press, 2004), at page 66.

16 Kim Stevenson, Anne Davies, and Michael Gunn, *Blackstone's Guide to the Sexual Offences Act 2003* (Oxford University Press, 2004), at page 66.

17 Sections 22(1) and (2) of the Scottish Act provide:

"(1) If a person ("A"), either—

(a) intentionally engages in a sexual activity and for a purpose mentioned in subsection (2) does so in the presence of a child ("B") who has not attained the age of 13 years, or

(b) intentionally, and for a purpose mentioned in subsection (2) causes B to be present while a third person engages in such an activity,

then A commits an offence, to be known as the offence of causing a young child to be present during a sexual activity.

(2) The purposes are—

(a) obtaining sexual gratification,

(b) humiliating, distressing or alarming B."

18 *R v Pedley Re Martin* [2009] EWCA Crim 840; [2009] 1 WLR 2517 (CA).

On some occasions he deliberately exposed himself to the girls, and some girls clearly saw what he was doing. On one of those occasions, he even got out of the car and continued to masturbate but did not approach the girls whom he was watching. He was later arrested following two occasions. He pleaded guilty to two counts of engaging in sexual activity in the presence of a child under 13, contrary to section 11 of the Sexual Offences Act.

7.61 In *R v Abbondandolo*,[19] the accused made contact with a girl aged 12 and her cousin who was a boy aged 13 in an internet chat room. The girl and her cousin started to chat with the accused who posed himself as a 14 year old boy. The accused invited them to chat on a more private message server. The accused asked the girl to turn on the web camera and the girl asked him to do the same. The accused did so and the girl found that he was not 14 as he claimed. He told her that he was in fact 28. He got the girl's mobile number and called the girl on the number and said would call again. A few days later he made contact again. He was unaware the mother was in the room. Believing her to be the 12 year old he asked her a number of sexual questions and then exposed himself on the webcam and began to masturbate himself. The mother took photographs of the accused's face and erect penis on her mobile telephone. The police were contacted and attended promptly. The computer was able to print off some of the chat with the accused. On arrest the accused was also found to have on his computer 48 indecent images, 44 of which were at level one. He made full admissions and was convicted of engaging in sexual activity in the presence of a child.

The age of the accused

7.62 The English offence can only be committed by an adult (i.e. a person aged 18 or over) against a child under 13. If however the accused is under 18, he or she would be caught by another offence under section 13 which carries lighter maximum sentences.[20] On the other hand, the age of the accused is not specified for the Scottish offence. In other words, the Scottish offence can be committed by an adult or a child.[21]

7.63 The Scottish approach would enable a judge to use his or her sentencing discretion in imposing on the child offender lighter penalties than an adult offender, where the circumstances of the case justify this.[22] We

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19 *R v Abbondandolo* [2007] EWCA Crim 2924; [2008] 2 Cr.App.R. (S.) 21.

20 *Section 13 of the English Act provides:*

(1) A person under 18 commits an offence [of child sex offence committed by children or young persons] if he does anything which would be an offence under any of sections 9 to 12 if he were aged 18.

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

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 5 years."

21 There is a separate range of Scottish offences against older children (i.e. those who has attained the age of 13 years but not the age of 16 years) which can only be committed by a person aged 16 or over (see sections 28-36 of the Scottish Act).

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

favour this approach and consider that the age of the accused should not be specified.

Purpose of the act beyond sexual gratification

The English offence

7.64 The English offence is constituted if A's act is done for the purpose of obtaining sexual gratification. The accused's purpose may involve both short-term and long-term sexual gratification; or immediate and deferred gratification.[23]

7.65 In *Regina v Abdullahi*,[24] the defendant was charged with causing a child to watch a sexual act (section 12(1) of the Sexual Offences Act 2003). Under section 12(1), it is an offence for a person 18 or over to intentionally cause a person under the age of 16 to look at an image of any person engaging in sexual activity, for the purposes of obtaining sexual gratification. In this case, the defendant was a man in his early 30s and the child was a boy aged 13. The defendant played a pornographic film to the boy depicting men and women having sex, and played him a film depicting homosexual sexual activity.

7.66 At the trial, the judge directed the jury that before convicting the defendant they had to be satisfied that the defendant's purpose in showing the boy the films was to obtain sexual gratification either by enjoying seeing the boy looking at the images or with a view to putting the boy in the mood to provide sexual gratification to him later.

7.67 The defendant was convicted. He appealed on the ground that the judge's direction went beyond the defendant's immediate sexual gratification and incorporated an element of future gratification which was not envisaged by section 12(1) of the 2003 Act.

7.68 The appeal was dismissed. The Court of Appeal held that there was nothing in the language of section 12 of the Sexual Offences Act 2003 to suggest that the offence could only be committed if the sexual gratification and the display of the images were simultaneous, contemporaneous or synchronised. The defendant's purpose could be any form of sexual gratification and it did not matter whether it was short-term or long-term, immediate or deferred, or immediate and deferred.

7.69 A person would commit this offence, if for example, that person, for the purpose of his or her own sexual gratification, forces the child to watch two people have sex, or forces the child to watch a pornographic movie.[25]

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23 *Regina v Abdullahi, ibid,* at paragraph 17 of judgment.

24 *Regina v Abdullahi,* [2006] EWCA Crim 2060; [2007] 1 W.L.R. 225.

25 Explanatory Notes to Sexual Offences Act 2003, at paragraph 21.

The Scottish offence

7.70 The Scottish offence is constituted if A's act is done for the purpose of obtaining sexual gratification or to humiliate, distress or alarm B.[26]

7.71 We favour the Scottish approach of extending the purpose of the act to include humiliation, distress or alarm to the child. In our view, a sexual act done to humiliate, distress or alarm a child would have a potentially harmful effect on the child just like a sexual act done for sexual gratification. Such conduct is culpable and should be punished by the criminal law.

7.72 We therefore propose that 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 take the view that this element of the offence should also be applicable to other offences discussed where the purpose of the accused's act is relevant.

Should the offence be constituted where the perpetrator causes the child to be present while a third person engages in a sexual activity?

7.73 The Scottish offence is also constituted where the perpetrator *"causes B to be present whilst a third person engages in such an activity"*.[27] We take the view that this ingredient of the Scottish offence should be adopted. The harm to the child would be the same whether it is the perpetrator who engages in a sexual activity in the presence of the child or the perpetrator causes such a child to be present when a third party engages in the activity.

7.74 Under the protective principle, children should be protected against sexual exploitation by perpetrators who engage in a sexual activity in the presence of children for the purpose of obtaining sexual gratification, or causing humiliation, distress or alarming to the child. Equally, children should also be protected against sexual exploitation by perpetrators who cause children to be present when a third party engages in a sexual activity. We therefore propose 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.

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[26] The perpetrator's purpose in having the child present must be one of humiliating, distressing or alarming the older child or any combination of these purposes. A person who causes a child to be present in other circumstances will not be caught. For example, when parents engage in sexual activity in the same room as their sleeping baby would not be caught (see Scottish Law Commission, *Report on Rape and Other Sexual Offences* (December 2007), Scot Law Com No. 209, at page 157.

[27] The Scottish Act, section 22(1)(b).

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 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.

Causing a child to watch a sexual act /Causing a young child to look at a sexual image

The English Offence – Causing a child to watch a sexual act

7.75 Section 12 of the English Act provides for the offence of "causing a child to watch a sexual act" where a person (A) aged 18 or over intentionally causes a child (B) aged under 16, for the purpose of A's sexual gratification, to watch a third person engaging in a sexual activity, or to look at an image of any person engaging in a sexual activity. Where B is aged 13 or over but under 16, the prosecution must prove that A did not reasonably believe that B was 16 or over.[28]

The corrupt purpose of the act may co-exist with other proper purpose

7.76 The defendant's purpose of obtaining sexual gratification can co-exist with another proper purpose. It may on occasions be appropriate, for example, for educational or medical reasons for sexual images to be displayed

[28] Section 12(1) of the English Act provides:

"(1) A person aged 18 or over (A) commits an offence [of causing a child to watch a sexual act] if—

(a) for the purpose of obtaining sexual gratification, he intentionally causes another person (B) to watch a third person engaging in an activity, or to look at an image of any person engaging in an activity,

(b) the activity is sexual, and

(c) either—

(i) B is under 16 and A does not reasonably believe that B is 16 or over, or

(ii) B is under 13."

to children. The culpability would be founded on the corrupt purpose of obtaining sexual gratification.[29]

The Scottish Offence - Causing a young child to look at a sexual image

7.77 Section 23 of the Scottish Act provides for a similar offence called "causing a young child to look at a sexual image". The offence covers a person (A) who intentionally causes a child (B) under 13 to look at a sexual image. In order to constitute the offence, A's act must be done for the purpose of obtaining sexual gratification or to humiliate, distress or alarm B.[30]

7.78 The Scottish offence covers one act, namely, the act of causing a child to look at a sexual image. By contrast, the English offence covers two types of acts, namely, (i) causing a child to watch a third party engaging in a sexual activity; and (ii) causing a child to watch an image of any person engaging in a sexual activity.

7.79 We prefer the Scottish approach of covering the act of causing a child to look at a sexual image only. This is because we have already recommended above that the proposed offence of engaging in sexual activity in the presence of a child under 13 should also cover the situation in which the perpetrator causes a child to be present when a third person engages in a sexual activity.

7.80 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 take the view that there should be a new offence to cover such an act against young children under 13. Nor is there an existing offence to cover the act of causing an older child to look at a sexual image. We take the view that a similar offence should be created to cover such conduct.

Definition of an image

7.81 A further issue relates to the term "sexual image": this is defined in relation to the Scottish offence.

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29 *Regina v Abdullahi* [2006] EWCA Crim 2060; [2007] 1 W.L.R. 225, at paragraph 16 of judgment.

30 Sections 23(1) and (2) of the Scottish Act provides:

"(1) If a person ("A") intentionally and for a purpose mentioned in subsection (2) causes a child ("B") who has not attained the age of 13 years to look at a sexual image, then A commits an offence, to be known as the offence of causing a young child to look at a sexual image.

(2) The purposes are—

(a) obtaining sexual gratification,

(b) humiliating, distressing or alarming B."

7.82 Section 23(3) of the Scottish Act provides:

> *"For the purposes of subsection (1), a sexual image is an image (produced by whatever means and whether or not a moving image) of –*
>
> *(a) A engaging in a sexual activity or of a third person or imaginary person so engaging,*
>
> *(b) A's genitals or the genitals of a third person or imaginary person."*

7.83 We consider that the Scottish definition of a sexual image should be adopted since it provides a comprehensive definition of the possible scenarios of images of a sexual nature. In particular, it addresses the *"possible problem that images of sexual activity may not depict any actual person but rather computer-created images of people"*.[31]

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.

Ancillary matters

7.84 We consider below the offence of "arranging or facilitating commission of a child sex offence" and some ancillary matters relating to offences involving children.

7.85 It should be noted that the English offence of "arranging or facilitating commission of a child sex offence" applies to all children under 16. In other words, it applies equally to children under 13 and children between 13 and 16.

[31] Scottish Law Commission, *Report on Rape and Other Sexual Offences* (December 2007), Scot Law Com No. 209, at paragraph 3.60.

Arranging or facilitating commission of a child sex offence

7.86 Section 14(1) of the English Act provides as follows:

> *"(1) A person commits an offence of ["arranging or facilitating commission of a child sex offence"] if—*
>
> *(a) he intentionally arranges or facilitates something that he intends to do, intends another person to do, or believes that another person will do, in any part of the world, and*
>
> *(b) doing it will involve the commission of an offence under any of sections 9 to 13."*

7.87 The offence therefore 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;
(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 offence under sections 9 to 13.[32]

Examples of the commission of the offence

7.88 An example of the commission of the first two limbs of the offence: 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.[33]

7.89 An example of the commission of the third limb of the offence: A intentionally drives another person (X) to meet a child and A believes X will have sexual activity with the child.[34]

Exception to commission of the offence

7.90 Under sections 14(2) and (3), there is an exception under which a person is exempted from liability for this offence if the person's actions are

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[32] The child offences covered by the offence of "arranging or facilitating commission of a child sex offence" under section 14 are: sexual activity with a child (section 9), causing or inciting a child to engage in sexual activity (section 10); engaging in sexual activity in the presence of a child (section 11); causing a child to watch a sexual act (section 12); and child sex offences committed by children or young persons (section 13).

[33] Explanatory Notes to Sexual Offences Act 2003, at paragraph 24.

[34] Explanatory Notes to Sexual Offences Act 2003, at paragraph 24.

intended to protect the child. A person is acting to protect a child if the person acts for the purpose of protecting the child from pregnancy or sexually transmitted infection, to protect the physical safety of a child or to promote the emotional well-being of a child by the giving of advice. This exception applies only if the person is not acting for the purpose of obtaining sexual gratification or for the purpose of causing or encouraging an activity constituting a child sex offence under sections 9 to 13 or child participation in the activity.[35]

7.91 An example of the application of the defence would be where a healthcare worker provides contraceptives to a 14-year-old girl to prevent disease or pregnancy. However, as a healthcare worker should not cause, arrange, facilitate or encourage the commission of a child offence even with the provision of this defence, the healthcare worker would be expected to warn the child that she and her partner will commit an offence if they go ahead with engaging in any sexual activity.[36]

The offence is wider than attempt and is a full offence in itself

7.92 According to the Court of Appeal in *Regina v Robson*,[37] the offence of "arranging or facilitating commission of a child sex offence (s 14 of the English Act)" imposes criminal liability on preparatory steps in order to prevent children from being subjected to sexual abuse. The legislation is intended to cover an offender who is guilty of taking preparatory steps to abuse a child before the child actually suffered. Although the acts are preparatory, the offence created by section 14 is a substantive offence.

7.93 The facts in *Regina v Robson* illustrate the usefulness of the offence in catching paedophiles who take preparatory steps to abuse a child before the child is actually abused. The accused in that case was a client of a prostitute who was the main prosecution witness. In March 2007, the accused asked the prostitute if she knew of any young girl prostitutes and whether she would "go with a dog". The prostitute said she did not know any young girls. The accused persisted and sent her text messages to see if she

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35 Sections 14(2) and (3) of the English Act provides that:

"(2) A person does not commit an offence under this section if—

(a) he arranges or facilitates something that he believes another person will do, but that he does not intend to do or intend another person to do, and

(b) any offence within subsection (1)(b) would be an offence against a child for whose protection he acts.

(3) For the purposes of subsection (2), a person acts for the protection of a child if he acts for the purpose of—

(a) protecting the child from sexually transmitted infection,

(b) protecting the physical safety of the child,

(c) preventing the child from becoming pregnant, or

(d) promoting the child's emotional well-being by the giving of advice,

and not for the purpose of obtaining sexual gratification or for the purpose of causing or encouraging the activity constituting the offence within subsection (1)(b) or the child's participation in it."

36 Kim Stevenson, Anne Davies, and Michael Gunn, *Blackstone's Guide to the Sexual Offences Act 2003* (Oxford University Press, 2004), at page 70.

37 *Regina v Robson* [2008] EWCA Crim 619; [2009] 1 W.L.R.713 (16 January 2008) Court of Appeal.

could find such a young girl. The prostitute did not say that she would do so and she gave him no reason to believe that that was what she would do. She reported the matter to the police. The accused was arrested and he formally admitted to sending the two text messages recovered from the prostitute's phone. He was charged with the full offence of arranging or facilitating the commission of a child sex offence. The trial judge acquitted the accused of the charge, taking the view that the request, even made repeatedly by the accused, was no more than an act preparatory to an attempt. The prosecution appealed.

7.94 On appeal, the Court of Appeal was of the view that the request made by the accused was the final act which he needed to do before the full offence was committed. Thus, the accused could properly be charged with an attempt to commit the substantive offence. The prosecution's appeal was therefore allowed. The case was therefore sent back for a retrial.

7.95 At the retrial, the accused was convicted of an attempt to commit the full offence of "arranging or facilitating commission of a child sex offence". The accused subsequently lodged an appeal against his conviction. This was the second appeal concerning this case (the first appeal being made by the prosecution mentioned above). At the second appeal, the Court of Appeal criticised the trial judge's summing up to jury made at the retrial. The Court of Appeal considered that the summing up when read as whole appeared to have sent the jury a clear message that there was no defence to the charge of attempt for the jury to consider. The defence was therefore not fairly and properly left to the jury. The Court of Appeal therefore allowed the accused's appeal and quashed the conviction. However, the Court of Appeal considered that in the interests of justice (as the accused won the appeal purely because of the judge's misdirection and not on the merits of the case), the accused should be retried again on the charge of attempt to commit the full offence of "arranging commission of a child sex offence"[38] The accused was convicted again at the second retrial.[39]

7.96 We consider that a similar offence should be adopted in Hong Kong. The proposed offence would enable the authorities to take early steps to catch 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.

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38 *Regina v JR* [2008] EWCA Crim 2912; 2008 WL 5130228 (7 November 2008).

39 At the second retrial, the accused was sentenced to 3 years' imprisonment and a sexual offences prevention order (SOPO) of indefinite duration was imposed on him. He appealed to the Court of Appeal against the conviction and the imposition of the SOPO. This was the third time that this matter came before the Court of Appeal. The Court of Appeal upheld the conviction but reduced the duration of the SOPO to a period of 5 years. (See *Regina v John Paul Robson* [2009] EWCA Crim 1472; 2009 WL 1949616 (23 June 2009)).

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.

Health and treatment issues as exceptions to aiding, abetting and counselling a child sex offence

7.97 The Home Office Review Group in the UK took the view that people involved in giving help, advice, treatment and support to young people in matters of sexual health, such as contraception, etc. should not in normal circumstances be regarded as aiding and abetting a child sex offence:

> *"The criminal law must not be a barrier to the provision of advice, guidance or treatment on health and relationships to young people. We regard this as a vital role that is important to their future health and well being, a view that is underpinned by the Government's strategy for tackling teenage pregnancy. Those involved in trying to give help, advice, treatment and support to young people in matters of sexual health, such as contraception, etc. should not normally be regarded as aiding and abetting a criminal offence. No one wishes to deter young people from seeking such help, or professionals from offering it."*[40]

7.98 The Review Group therefore recommended that *"[t]hose recognised as giving help, advice, treatment and support to children and young people in matters of sexual health should not be regarded as aiding and abetting a criminal offence, nor should the children and young people who seek help and advice about sexual health matters, including contraception."*[41]

7.99 The recommendation of the Review Group found its way into section 73 of the English Act, which provides for exceptions to aiding, abetting and counselling[42] any of the offences involving children as listed in subsection

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40 Home Office, *Setting The Boundaries: Reforming the law on sex offences* (July 2000), at paragraph 3.8.1.

41 Home Office, *Setting The Boundaries: Reforming the law on sex offences* (July 2000), recommendation 26.

42 In Hong Kong, aiding, abetting, counseling or procuring an offence is covered by section 89 of the Criminal Procedure Ordinance (Cap. 221), which reads:

> *"Any person who aids, abets, counsels or procures the commission by another person of any offence shall be guilty of the like offence."*

(2).[43] Under the exceptions, a person is exempted from liability if the person acts for the purpose of protecting the child from sexually transmitted infection, protecting the physical safety of the child, preventing the child from becoming pregnant, or promoting the emotional well-being of the child by the giving of advice. The exceptions apply only if the person is not acting for the purpose of obtaining sexual gratification or for the purpose of causing or encouraging an activity constituting a child sex offence as listed in subsection (2) or the child participation in the activity.

7.100 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 normally 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. We consider that there should be exceptions in the new legislation which are similar to those in section 73.

7.101 The exceptions in section 73 are general ones applying to offences involving children as listed in subsection (2). As discussed above, there is a similar exception applying specifically to the offence of arranging or facilitating commission of a child sex offence under section 14 of the English Act (in relation to the offence of arranging or facilitating commission of a child sex offence). There is an apparent overlap between the general exception in section 73 and the specific exception in section 14. Accordingly, we consider that specific exception in section 14 should be subsumed under the general exceptions in section 73.

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[43] Section 73 of the English Act provides that:

"73 Exceptions to aiding, abetting and counseling

(1) A person is not guilty of aiding, abetting or counselling the commission against a child of an offence to which this section applies if he acts for the purpose of —

(a) protecting the child from sexually transmitted infection,

(b) protecting the physical safety of the child,

(c) preventing the child from becoming pregnant, or

(d) promoting the child's emotional well-being by the giving of advice,

and not for the purpose of obtaining sexual gratification or for the purpose of causing or encouraging the activity constituting the offence or the child's participation in it.

(2) This section applies to —

(a) an offence under any of sections 5 to 7 (offences against children under 13);

(b) an offence under section 9 (sexual activity with a child);

(c) an offence under section 13 which would be an offence under section 9 if the offender were aged 18;

(d) an offence under any of sections 16, 25, 30, 34 and 38 (sexual activity) against a person under 16.

(3) This section does not affect any other enactment or any rule of law restricting the circumstances in which a person is guilty of aiding, abetting or counseling an offence under this Part."

Recommendation 16

We recommend there should be exceptions to aiding, abetting and counseling 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 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.

Review of some existing offences involving children

7.102 As we have recommended above a number of new offences involving children, we shall review below some existing offences to consider if there is a need for their continued existence.[44]

Intercourse with a girl under 13/16 (sections 123 and 124 of Crimes Ordinance)

7.103 These two existing offences 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.

7.104 We take the view that these two existing offences should be abolished upon the enactment of the new legislation. The criminal conduct currently caught by this offence would be covered by the proposed offences of sexual assault of a child under 13 by penetration and sexual assault of a child between 13 and 16 by penetration. The proposed offences are gender neutral and cover sexual penetrative assault on a child beyond vaginal intercourse.

Recommendation 17

We recommend 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.

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[44] In the Sub-committee's previous consultation paper, the draftsman's attention was drawn to the need to have some transitional arrangements in place to deal with any new offences designed to replace an existing offence. See Law Reform Commission of Hong Kong, C*onsultation Paper on Rape and Other Non-consensual Sexual Offences* (September 2012), at paragraph 2.45.

Indecent conduct towards a child under 16 (section 146 of Crimes Ordinance)

7.105 This offence covers *"a person who commits an act of gross indecency with or towards a child under the age of 16, or who incites a child under the age of 16 to commit such an act with or towards him or her or another"*.

7.106 One important objective of any reform of the sexual offences is to achieve clarity of the law. Persons contemplating a particular form of sexual conduct should be able to know, or find out without difficulty, whether what they are intending to do is legal or not.[45] The commission or the incitement of the commission of an act of gross indecency is an ingredient of this offence. As discussed in Chapter 1, gross indecency is a term lacking in precise definition and there are a number of possible formulations of the term in the authorities. In accordance with the principle of clarity of the law, we consider this offence should be abolished upon the enactment of the new legislation.

7.107 The corresponding English offence in section 1 of the Indecency with Children Act 1960 has already been repealed.

7.108 The criminal conduct currently covered by this offence would be covered by several new offences proposed by us, but with greater clarity. These offences include: sexual assault of a child under 13/16; causing or inciting a child under 13/16 to engage in sexual activity; engaging in sexual activity in the presence of a child under 13/ 16; causing a child under 13/16 to look at a sexual image.

Recommendation 18

We recommend 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.

A man commits buggery with a girl under 21 (section 118D of Crimes Ordinance)

7.109 We consider that the offence of a man committing buggery with a girl under 21 should be abolished upon the enactment of the new legislation. This offence can be criticised for a number of reasons. Firstly, it is gender-specific in that it covers anal intercourse with a girl only. Secondly, it does not tally with the legal age of consent (of 16) for anal intercourse as held

[45] Scottish Law Commission, *Report on Rape and Other Sexual Offences* (December 2007), Scot Law Com No 209, at paragraph 2.5.

in *Leung TC William Roy v SJ*.[46] 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.

7.110 The conduct covered by this offence would be partly included in the proposed offences of penile penetration of a child under 13/16 and penetration of a child under 13/16, which are gender-neutral.

Recommendation 19

We recommend 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.

Homosexual offences involving young persons

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

7.112 Section 118C provides that it is an offence for a man to commit buggery with another man under the age of 16; or for a man who is under the age of 16 to commit buggery with another man. Section 118H provides that it is an offence for a man to commit an act of gross indecency with another man under the age of 16; or for a man who is under the age of 16 to commit an act of gross indecency with another man. (Section 118C used to provide for an offence for a man to commit buggery with another man under 21; or for a man who is under 21 to commit buggery with another man. Section 118H used to provide for an offence for a man to commit an act of gross indecency with another man under 21; or for a man who is under 21 to commit an act of gross indecency with another man. As discussed in Chapter 2, the Court of Appeal upheld the decision of the Court of First Instance in *Leung TC William Roy v SJ*[47] that the then sections 118C and 118H were unconstitutional and invalid to the extent that they applied to a man aged 16 or over and under 21. The Statute Law (Miscellaneous Provisions) Ordinance 2014 (Ord. No. 18 of 2014) was subsequently enacted on 26 November 2014 to amend the then sections

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

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

118C and 118H by substituting all references to “21” in those sections with “16”.)

7.113 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. The conduct covered by the two offences will be partly included in the proposed gender-neutral offences of penile penetration of a child under 13/16, penetration of a child under 13/16, sexual assault of a child under 13/16, and causing or inciting a child under 13/16 to engage in sexual activity.

7.114 In the UK, the offences of buggery and indecency between men (sections 12 and 13 of the Sexual Offences Act 1956) were abolished upon the enactment of the Sexual Offences Act 2003.

Recommendation 20

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

Abduction offences

7.115 Section 126 of the Crimes Ordinance provides that it is an offence to take an unmarried girl under 16 out of the possession of her parent or guardian against the will of the parent or guardian. Section 127 of the Crimes Ordinance provides that it is an offence to take an unmarried girl under 18 out of the possession of her parent or guardian against the will of the parent of guardian for unlawful sexual intercourse with men or with a particular man.

7.116 These two abduction offences can be criticised for being gender-specific. There are no valid reasons why these two offences should apply to girls but not boys.

7.117 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.

7.118 The two abduction offences, which were modelled on similar provisions in the English Sexual Offences Act 1956, were repealed in England and Wales in 2003.[48]

7.119 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. The removal of the two offences from the statute book would not derogate from the protection of young girls since we have proposed a whole new range of gender-neutral offences involving children and young persons.

Recommendation 21

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

[48] See Sexual Offences Act 2003, Schedule 7.

Chapter 8

Sexual grooming

Introduction

8.1 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. The paedophile may groom the child by communicating on a number of occasions with a 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 to sexually abuse the child victim when they meet.

8.2 England and Wales was the forerunner in creating a specific offence in 2003 to target sexual grooming. Other jurisdictions enacted legislation creating a similar offence, including New Zealand and Scotland in 2005, New South Wales (Australia) and Singapore in 2007.

Background to the creation of the new offence of sexual grooming in England and Wales

8.3 In the UK, there were a number of sensational cases of sexual grooming, of which the Michael Wheeler case in October 2003 was one. In that case, Wheeler pleaded guilty to 11 sexual offences against young girls. The way he "groomed" one of the girls showed how a dangerous paedophile who initially made contact with a vulnerable girl through the internet chat rooms, gained her trust and then sexually abused her. Wheeler had contacted the girl through the internet when she was 11, and then "groomed" her for two years. The way he "groomed" her was by buying her presents and taking her to the cinema. He spotted that the girl presented a loveless character which he exploited to make her emotionally dependent upon him. He manipulated the girl to such an extent that she was prepared to lie to her parents. The girl's mother was quoted as saying her daughter had been brain-washed by Wheeler.[1] He deliberately waited until the girl reached 13 to have sex with her in order to avoid the higher sentence that could be imposed for sexual intercourse with a girl under 13.[2]

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1 "Chat room paedophile jailed", BBC News, Saturday, 7 June 2003 <http://news.bbc.co.uk/2/hi/uk_news/england/2969020.stm> (downloaded on 9 September 2012).

2 Kim Stevenson, et al, *Blackstone's Guide to the Sexual Offences Act 2003* (Oxford University Press, 2004), at page 71.

8.4 As a result of the widespread and increasing public concern about sexual grooming, a Task Force on Child Protection on the Internet was set up by the Home Office in the UK. Following the recommendations of the Task Force, the UK Government proposed a new offence to tackle the grooming of children both on-line and off-line. The new offence was finally enacted in section 15 of the English Sexual Offences Act 2003.

The need for legislation on sexual grooming

Surging internet usage by children and young persons

8.5 Legislation on sexual grooming is considered necessary because surging internet usage has created an increased need for protection of children and young persons against sexual exploitation by paedophiles looking for preys under the guise of making friends. In this connection, the Senior Minister of State of Singapore said:

> *"Even whilst we protect minors in the physical realm, we are mindful that surging Internet usage has created a new phenomenon- that of sex predators prowling the online landscape for prey under the guise of making friends. On 17 July [2007], I informed the House that there has not been any significant increase in the number of Internet-related sexual crimes, but that this remained an area of concern as it involved young victims. I also informed the House that MHA was considering introducing a new offence of sexual grooming, taking into account feedback from both in and outside this House, and recognising that this tide will gather momentum rather than recede. Thus, we have decided to introduce a new section 376E on sexual grooming of a minor under 16."*[3]

Child molestation and paedophilia is serious but often grossly under-reported

8.6 In New Zealand, it was considered that the rate of child molestation and paedophilia was grossly under-reported with the seriousness of the problem being understated. In this connection, Mr Marc Alexander of the New Zealand United Future Party said:

> *"The bill deals with a lot of sexual offending, rape, and so on, and I will talk about that a little later in relation to grooming legislation. It addresses paedophilia in a number of respects as well. It is clear that the rate of offending, particularly for child molestation and paedophilia, is grossly under-reported. We hear bandied about regularly that rehabilitation is so wonderfully successful for*

[3] Second Reading Speech of The Penal Code (Amendment) Bill, by Senior Minister of State A/P Ho Peng Kee on 22 October 2007, at paragraph 38.

those individuals that the reoffending rates are comparatively low in relation to other crimes. But that is actually not true. A study has shown that reoffending rates for sex crimes, particularly for paedophilia, can rise as much as over 70 percent, over a 22-year period. What that seems to suggest is that a lot of the people who commit those crimes are smart. They learn from their mistakes and they do not get caught again in a hurry. So anything we can do proactively is, I think, a positive move, because it is such an insidious crime and leaves its mark for decades on the victims."[4]

Preventive measures should be taken before commission of actual sexual crimes against children

8.7 The merit of legislation related to sexual grooming is that it allows Police to take early action to investigate suggested cases of the 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.

8.8 In some cases if, for example, a child's parents or older friends know about the fact that the child is being groomed, they could report the case to the Police. The Police could then take early action to check on the internet to investigate and prevent the commission of a sexual offence against the child. Action by the Police to investigate cases of grooming would have deterrent effects on offenders even if there is not enough evidence to bring a charge.

8.9 The Senior Minister of State of Singapore pointed out that legislation on sexual grooming *"allow[s] law enforcement authorities to step in when for example, a child receives sexually suggestive communications over the Internet, or a child is seen being met by a stranger in suspicious circumstances. That law enforcement authorities can now intervene at an earlier stage would be sufficient to send a chilling effect on would-be sex predators. Besides being a deterrent, those who persist will be apprehended more easily."* [5]

8.10 Mr Marc Alexander of the New Zealand United Future Party said:

"… this legislation actually starts to redress some of the imbalance that we have always had in the past. We have had to wait for the ultimate crime to be committed before we could do something about it. This measure is proactive. It gets people and criminalises the activity that leads to crime. It is a huge step forward on behalf of potential victims, and a huge step forward on behalf of the law-abiding people in this country who

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[4] New Zealand Parliamentary Debates (Hansard), *Crimes Amendment Bill (No. 2)* – In Committee, Second Reading (12 April 2005), Mr Marc Alexander (United Future Party).

[5] Second Reading Speech of The Penal Code (Amendment) Bill, *ibid*, at paragraph 42.

demand to be protected from crimes before they happen. The change enabling the police to arrest a person before any sexual activity has taken place would cover situations whereby an adult establishes contact with a child under 16—for example, through meetings, phone conversations, text messages, and chat rooms—gains a child's trust, and arranges a meeting with the intention of committing a sexual offence … ."[6]

8.11 In summary, we consider that there is a need for a new offence to cover sexual grooming in order to enhance protection of children against sexual exploitation by paedophiles who establish contact with children in order to seduce them, particularly by taking advantage of online and other technologies. The new offence may protect children from sexual abuse before the commission of sexual activity and may deter potential offenders who intend to sexually exploit children from doing so.

Legislation on sexual grooming in overseas jurisdictions

8.12 A review of the legislation on sexual grooming in a number of overseas jurisdictions is given below.

England and Wales

8.13 Section 15 of the English Act provides:

> ***"15 Meeting a child following sexual grooming etc***
>
> *(1) A person aged 18 or over (A) commits an offence if –*
>
> *(a) having met or communicated with another person (B) on at least two earlier occasions, he –*
> *(i) intentionally meets B, or*
> *(ii) travels with the intention of meeting B in any part of the world,*
> *(b) at the time, he intends to do anything to or in respect of B, during or after the meeting and in any part of the world, which if done will involve the commission by A of a relevant offence,*
> *(c) B is under 16, and*
> *(d) A does not reasonably believe that B is 16 or over.*
>
> *(2) In subsection (1) –*
>
> *(a) the reference to A having met or communicated with B is a reference to A having met B in any part of the*

[6] New Zealand Parliamentary Debates (Hansard), *Crimes Amendment Bill (No. 2)* – In Committee, Third Reading (12 April 2005), Mr Marc Alexander (United Future Party).

world or having communicated with B by any means from, to or in any part of the world;

(b) "relevant offence" means –

(i) an offence under this Part [ie Part 1],[7]

(ii) an offence within any of paragraphs 61 to 92 of Schedule 3, or

(iii) anything done outside England and Wales and Northern Ireland which is not an offence within sub-paragraph (i) or (ii) but would be an offence within sub-paragraph (i) if done in England and Wales.

(3) In this section as it applies to Northern Ireland –

(a) subsection (1) has effect with the substitution of "17" for "16" in both places;

(b) subsection (2)(b)(iii) has effect with the substitution of "sub-paragraph (ii) if done in Northern Ireland" for "sub-paragraph (i) if done in England and Wales".

(4) A person guilty of an offence under this section is liable –

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding10 years."

Elements of the English offence

8.14 The essential elements of the English sexual grooming offence are as follows:

- A person (A) aged 18 or over intentionally meets a child (B) aged under 16 or travels with the intention of meeting B;

- A has met or communicated with B on at least two earlier occasions;

[7] The Sexual Offences Act 2003 is divided into three parts. Part 1 covers all statutory sexual offences. Part 2 covers notification requirements relating to sexual offenders. Part 3 covers miscellaneous matters including commencement and short title of the date. As section 15 is in Part 1 of the Act, "*an offence under this Part"* in section 15(2)(b)(i) means any one of the sexual offences mentioned in the Act.

- A intends to commit a sexual offence against B during the meeting or when A travels to meet B;

- A does not reasonably believe that B is 16 or over.

Situations covered by the English offence

8.15 The English offence is intended to cover situations in which an adult establishes contact with a child in order to gain the child's trust and confidence so that he or she can arrange to meet the child for the purpose of committing a sexual offence against the child. The previous contact can take place through, for example, meetings, telephone conversations or communications on the Internet.[8]

8.16 The course of conduct prior to the meeting that triggers the offence may have an explicitly sexual content. This may take the form of the adult entering into conversation with the child about the sexual acts the adult wants to engage the child in when they meet, or sending images of adult pornography.[9]

8.17 However, in order to trigger the offence, the prior meetings or communication need not have an explicitly sexual content. They could, for example, simply be the adult giving the child swimming lessons or meeting the child incidentally through a friend.[10]

8.18 Although the prior meetings or communication need not have an explicitly sexual content, it must be established that the adult meets the child or travels to meet the child with the intention to commit a sexual offence against the child. The evidence of the adult's intention may be drawn from communications between the adult and the child before the meeting or from other circumstances, for example, if the adult travels to the meeting with sexual aids such as condoms or lubricants.[11]

8.19 The offence is a preventive offence and the intended sexual offence does not have to take place in order to trigger the offence. For example, in the case of Wheeler referred to above, the "groomer", by arranging to meet the two girls, would have committed this offence either when the "groomer" actually met them, or if the police caught the "groomer" en route when the "groomer" was making his or her way to the appointed time and place.[12] The requirement of communication on at least two previous occasions is to demonstrate a persistent and continued course of conduct.[13]

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8 Explanatory Notes to the Sexual Offences Act 2003, para 27.
9 Explanatory Notes, *ibid*, para 27.
10 Explanatory Notes, *ibid*, para 27.
11 Explanatory Notes, *ibid*, paras 28-29.
12 *Kim Stevenson*, ibid, page 72.
13 *Kim Stevenson*, ibid, page 72.

New Zealand

8.20 According to Mr Marc Alexander of the New Zealand United Future Party, the English model was chosen by New Zealand because UK was thought to be *"the forerunner of the legislation [on sexual grooming]".*[14]

8.21 The Crimes Act 1961 of New Zealand was amended in 2005 to provide for a new section 131B which created a new offence of meeting a young person following sexual grooming, etc.[15] Section 131B provides as follows:

> ***"131B Meeting young person following sexual grooming, etc***
>
> *(1) Every person is liable to imprisonment for a term not exceeding 7 years if, –*
>
> *(a) having met or communicated with a person under the age of 16 years (the young person) on an earlier occasion, he or she takes one of the following actions:*
> *(i) intentionally meets the young person;*
> *(ii) travels with the intention of meeting the young person;*
> *(iii) arranges for or persuades the young person to travel with the intention of meeting him or her; and*
>
> *(b) at the time of taking the action, he or she intends –*
> *(i) to take in respect of the young person an action that, if taken in New Zealand, would be an offence against this Part, or against any of paragraphs (a)(i), (d)(i), (e)(i), (f)(i), of section 98AA(1); or*
> *(ii) that the young person should do on him or her an act the doing of which would, if he or she permitted it to be done in New Zealand, be an offence against this Part on his or her part.*
>
> *(1A) A reference in this section to a young person under the age of 16 years or the young person includes a reference to a constable who pretends to be a young person under the age of 16 years (the fictitious young person) if the offender, when taking any of the actions described in*

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14 New Zealand Parliamentary Debates (Hansard), *Crimes Amendment Bill (No. 2)* – In Committee, Third Reading (12 April 2005), Mr Marc Alexander (United Future Party).

15 Section 131 B was inserted on 20 May 2005 by section 7 of the Crimes Amendment Act 2005 (2005 No 41) (New Zealand).

subsection (1), believed that the fictitious young person was a young person under the age of 16 years.[16]

(2) It is a defence to a charge under subsection (1) if the person charged proves that, –

(a) before the time he or she took the action concerned, he or she had taken reasonable steps to find out whether the young person was of or over the age of 16 years; and

(b) at the time he or she took the action concerned, he or she believed on reasonable grounds that the young person was of or over the age of 16 years."

8.22 The New Zealand offence of sexual grooming was largely modeled on the corresponding English offence but differs from the English offences in four important aspects. Firstly, the New Zealand offence requires the accused to have met or communicated with the child on just one previous occasion, whereas the English offences requires at least two previous occasions. Secondly, the New Zealand offence is also constituted by making arrangements to travel with the intention to meet the child. Thirdly, the New Zealand legislation contains a fictitious young person provision to facilitate police undercover action (this provision would be discussed below). Fourthly, the accused's reasonable belief in the child's age is an ingredient of the English offence, whereas it is a defence in the New Zealand offence.

Singapore

8.23 The Penal Code of Singapore was amended in 2007 to provide for a new offence of sexual grooming of minor under 16 in section 376E. Section 376E(1) provides as follows:

"Sexual grooming of minor under 16

***376E** – (1) Any person of or above the age of 21 years (A) shall be guilty of an offence if having met or communicated with another person (B) on 2 or more previous occasions –*

(a) A intentionally meets B or travels with the intention of meeting B; and

*(b) at the time of the acts referred to in paragraph (*a*) –*

(i) A intends to do anything to or in respect of B, during or after the meeting, which if done will involve the commission by A of a relevant offence;

[16] Section 131B(1A) was added to the legislation by the Crimes Amendment Act (No 3) 2011, which came into force in New Zealand on 19 March 2012.

(ii) B is under 16 years of age; and
(iii) A does not reasonably believe that B is of or above the age of 16 years."

8.24 The Singaporean offence was modelled on the English offence. The elements of the Singaporean and English offences are broadly the same. In particular, the Singaporean legislation also requires the accused to have met or communicated with the child on at least two previous occasions.

Scotland

8.25 Section 1(1) of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 provides for an offence of meeting a child following certain preliminary contact.[17] Section (1) provides as follows:

"1 Meeting a child following certain preliminary contact
(1) A person ("A") commits an offence if—
(a) having met or communicated with another person ("B") on at least one earlier occasion, A—
(i) intentionally meets B;
(ii) travels, in any part of the world, with the intention of meeting B in any part of the world; or
(iii) makes arrangements, in any part of the world, with the intention of meeting B in any part of the world, for B to travel in any part of the world;
(b) at the time, A intends to engage in unlawful sexual activity involving B or in the presence of B—
(i) during or after the meeting; and
(ii) in any part of the world;
(c) B is—
(i) aged under 16; or
(ii) a constable;
(d) A does not reasonably believe that B is 16 or over; and
(e) at least one of the following is the case—
(i) the meeting or communication on an earlier occasion referred to in paragraph (a) (or, if there is more than one, one of them) has a relevant Scottish connection;
(ii) the meeting referred to in sub-paragraph (i) of that paragraph or, as the case may be, the travelling referred to in sub-paragraph (ii) of that paragraph or the making of arrangements referred to in sub-paragraph

[17] The Scottish grooming offence is retained notwithstanding the subsequent enactment of the Sexual Offences (Scotland) Act 2009.

(iii) of that paragraph, has a relevant Scottish connection;

(iii) A is a British citizen or resident in the United Kingdom … ."

Australia

8.26 Most states within Australia have legislation which criminalises child grooming for the purposes of sexual contact.[18] In particular, a new offence of meeting a child following grooming was added to the New South Wales Crimes Act 1900 in 2007.[19] Section 66EB(2A) of the Crimes Act 1900 (New South Wales) provides as follows:

"(2A) Meeting child following grooming

An adult person:

(a) who intentionally meets a child, or travels with the intention of meeting a child, whom the adult person has groomed for sexual purposes,[20] *and*

(b) who does so with the intention of procuring the child for unlawful sexual activity with that adult person or any other person,

is guilty of an offence … ."

Should the new offence require meeting or communication on one earlier occasion only or at least two earlier occasions?

8.27 The offence of sexual grooming in the New Zealand legislation is constituted if the perpetrator meets or travels to meet a child under 16 (with the intention to commit a sexual offence on that person), having met or communicated with that person on one earlier occasion. Likewise, the Scottish offence of meeting a child following certain preliminary contact requires meeting or communication between the perpetrator and the victim on one earlier occasion only.

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18 Commonwealth (Criminal Code Act 1995, sections 474.26, 474.27), Australian Capital Territory (Crimes Act 1900, section 66), Queensland (Criminal Code Act 1899, section 218A), Northern Territory (Criminal Code Act, sections 131 and 132), South Australia (Criminal Law Consolidation Act 1935, section 63B), Tasmania (Criminal Code Act 1924, section 125D) and Western Australia (Criminal Code, section 204B). (Source: Australian Government: Australian Institute of Criminology, *"Online child grooming laws"*, High Tech Crime Brief (No.17 of 2008)

19 Introduced by the Crimes Amendment (Sexual Procurement or Grooming of Children) Bill 2007. The Bill was enacted by Act 2007 No.74, which was assented to on 7 December 2007.

20 An adult person has groomed a child for sexual purposes "*if, on one or more previous occasions, the adult person has engaged in conduct that exposed the child to indecent material."* (Crimes Act 1900 (New South Wales, section 66EB(2B))

8.28 The legislation in New South Wales adopts a slightly different approach. The New South Wales offence is triggered when an adult meets or travels to meet a child *"whom the adult person has groomed for sexual purposes"*. A child is *"groomed for sexual purposes"* if the adult person has engaged in conduct on one or more previous occasions that exposed the child to indecent material.[21] That is to say, the New South Wales offence requires exposure of the child to indecent material on at least one earlier occasion (instead of simply meeting or communication on earlier occasion(s) as in the legislation of all other jurisdictions under review).

8.29 The English and Singaporean legislation, by contrast, require the perpetrator to have met or communicated with a child under 16 on at least two earlier occasions.

8.30 The first issue is whether the new offence should require exposure of the child to indecent material on earlier occasion(s) (the New South Wales approach) or meeting or communication on earlier occasion(s) (the approach in England and Wales, New Zealand, Singapore and Scotland). We do not favour the approach adopted in the New South Wales legislation. A paedophile grooming a child for sexual activity may not necessarily expose the child to indecent material. Grooming a child can take a lot of different forms. The paedophile may for example groom the child by buying the child presents or taking the child to his or her favourite entertainment.

8.31 The next 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). We consider 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. We therefore do not favour the New Zealand and Scottish approach.

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

Should the new offence be also constituted by making arrangements to travel?

8.33 The New Zealand offence of sexual grooming is also constituted by making arrangements to travel with the intention to meet the child.

8.34 We are of the view that there is merit in the New Zealand approach. By including making arrangements to travel, it would be unnecessary to prove attempt which is difficult. We consider that the New

[21] Section 66EB(2B), *ibid*.

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

Fictitious young persons provision in New Zealand sexual grooming legislation

8.35 Reform was introduced in 2011 to the New Zealand sexual grooming legislation to facilitate police undercover operations to catch offenders, particularly those grooming children over the internet. It is comprised in section 5 of the Crimes Amendment Act (No 3) 2011, which came into force in New Zealand on 19 March 2012.

8.36 The new *fictitious young person* provision is now contained in section 131B(1A) of the Crimes Act 1961 which provides:

> *"(1A) A reference in this section to a young person under the age of 16 years or the young person includes a reference to a constable who pretends to be a young person under the age of 16 years (the fictitious young person) if the offender, when taking any of the actions described in subsection (1), believed that the fictitious young person was a young person under the age of 16 years."*

Purpose of the fictitious young person provision

8.37 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.[22]

Merit of the fictitious young person provision

8.38 We take the view that there is merit in the New Zealand *fictitious young person* provision. In sexual grooming cases, the child being groomed by paedophiles may not co-operate with the police in investigation. In order to carry out an effective investigation, the 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 the child was actually sexually abused.

8.39 We therefore consider that the New Zealand *fictitious young person* provision should be adopted.

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[22] Report of the Ministry of Justice (New Zealand): Crimes Amendment Bill (No.2), (July 2011), at page 5.

Should reasonable belief in the child's age be an ingredient or a defence?

8.40 In the English provision, it is 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 (the ingredient approach). In the New Zealand provision, by contrast, it is a defence that the accused reasonably believed that the child was 16 or over at the time of the offence (the defence approach).

8.41 As there is, in the majority of cases, no physical contact between the accused and the child in sexual grooming cases, it may be difficult for the accused to take reasonable steps to ascertain whether the child was under 16 or not. Moreover, the harm to the child 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 victim. 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. Thus, the Prosecution would have the burden of proving beyond reasonable doubt the accused did not reasonably believe that the child was 16 or over.

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.[23]

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.

[23] We recommended (in Recommendation 5 at Chapter 3) 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"*. Hence, in adopting the offence of sexual grooming along the lines of section 15 of the English Sexual Offences Act 2003, we would not follow the approach in that section of specifying the accused to be a person aged 18 or over. In other words, the offence of sexual grooming would be capable of being committed by a person of any age under our proposal.

Chapter 9

Overview of existing offences in respect of Mentally Incapacitated Persons and Issues that arise

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Current Offences

9.1 Currently, specific offences in respect of Mentally Incapacitated Persons ("MIPs") are to be found in sections 118E, 118I, 125 and 128 of the Crimes Ordinance, together with section 65 (2) of the Mental Health Ordinance.

Buggery by a man with an MIP

9.2 It is an offence under section 118E of the Crimes Ordinance for a man to commit buggery with an MIP. However, the man is not guilty of this offence if he does not know and has no reason to suspect the other to be an MIP.[1] Where the buggery is committed with a female MIP, he is not guilty *"if he is, or believes on reasonable grounds that he is, married to that woman"*.[2]

Gross indecency by man with male MIP

9.3 It is an offence under section 118I of the Crimes Ordinance for a man to commit an act of gross indecency with another man who is an MIP.

9.4 However, the man is not guilty of this offence if he does not know and has no reason to suspect the other to be a MIP.[3]

A man having intercourse with a woman MIP

9.5 It is an offence under section 125 of the Crimes Ordinance for a man to have unlawful sexual intercourse with a woman MIP.

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1 Crimes Ordinance, section 118E(2).
2 Crimes Ordinance, section 118E(3).
3 Crimes Ordinance, section 118I(2).

9.6 However, the man is not guilty of this offence if he does not know and has no reason to suspect the woman to be an MIP.[4]

Abduction of MIP from parent or guardian for sexual act

9.7 It is an offence under section 128 of the Crimes Ordinance for a person to take an MIP out of the possession of her or his parent or guardian against the will of the parent or guardian, intending that the MIP to do an unlawful sexual act.

9.8 However, the person is not guilty of this offence if he or she does not know and has no reason to suspect the other to be an MIP.[5]

Sexual intercourse with patients

9.9 Section 65(2) of the Mental Health Ordinance (Cap. 136) provides for an offence of "sexual intercourse with patients". The offence covers the situation where any male officer or employee of mental hospital, Correctional Services Department Psychiatric Centre, or general hospital has unlawful sexual intercourse with a woman patient. The offence can only be committed by a male person and covers penetrative sexual activity only.

Section 65(2) provides:

> *"(2) Without prejudice to section 125 of the Crimes Ordinance (Cap 200), any man who is an officer on the staff of, or is otherwise employed in-*
>
> *(a) a mental hospital, and has unlawful sexual intercourse with a woman who is detained in that hospital;*
>
> *(b) the Correctional Services Department Psychiatric Centre and has unlawful sexual intercourse with a woman who is detained in that Centre; or*
>
> *(c) a mental hospital or general hospital, and has unlawful sexual intercourse with a woman who is receiving treatment for a mental disorder in the mental hospital or the psychiatric unit of the general hospital, where such intercourse takes place on the premises of the mental hospital or psychiatric unit or on premises of which the mental hospital or psychiatric unit forms part,*
>
> *commits an offence and shall on conviction on indictment be liable to imprisonment for 5 years."*

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4 Crimes Ordinance, section 125(2).

5 Crimes Ordinance, section 128(2).

Definition of MIP

9.10 Under section 117(1) of the Crimes Ordinance, MIP is defined as:

> *"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."*

9.11 The above definition of an MIP has two limbs:

(i) a mentally disordered person or a mentally handicapped person as defined in the Mental Health Ordinance; 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.

The first limb - A mentally disordered person or a mentally handicapped person

9.12 As the definition refers to *"a mentally disordered person or a mentally handicapped person within the meaning of the Mental Health Ordinance"*, one must make reference to the Mental Health Ordinance to ascertain the meaning of a mentally disordered person or a mentally handicapped person.

9.13 Section 2(1) (the interpretation section) of the Mental Health Ordinance defines a mentally disordered person and a mentally handicapped person as follows:

Mentally disordered person

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

9.15 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 'mental disordered' shall be construed accordingly."

Mentally handicapped person

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

9.17 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* [6] *with deficiencies in adaptive behaviour, and 'mentally handicapped' shall be construed accordingly."*

The second limb - Incapability of living an independent life or guarding against serious exploitation

9.18 Section 117(1) of the Crimes Ordinance refers also to "*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*".

9.19 Hence, in order to fall within the definition of an MIP in section 117(1), not only must the person be a mentally disordered person or a mentally handicapped person (within the definition of the Mental Health Ordinance), but the person must also, because of his or her mental disorder or mental handicap, be incapable of living an independent life or guarding him or herself against serious exploitation of a sexual nature.[7]

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6 "Sub-average general intellectual functioning" means *"an IQ of 70 or below according to the Wechsler Intelligence Scales for Children or an equivalent scale in a standardised intelligence test."* (Mental Health Ordinance, section 2(1))

7 *HKSAR v Cheng Chi Ho*, CACC 57/2006 (reported in [2008] 5 HKLRD 557), at paragraphs 61 and 66.

Deficiencies that may exist in the current legislation

9.20 Several aspects of the current legislation call for consideration:

(i) Some of the present offences are gender-specific.

(ii) Is the protection given to MIP's against sexual exploitation and abuse by people involved in their care and supervision sufficient or adequate?

(iii) Is the protection far too limited in that it is confined to persons of severe mental impairment?

(iv) Is the sexual autonomy of MIP's who have the capacity to consent to sexual activity unduly restricted?

9.21 The definition of MIP may also need to be reconsidered in the light of the above issues and developments in overseas jurisdictions.

9.22 In the next chapters, we shall review the major categories of offences in respect of persons with mental impairment in Hong Kong and overseas jurisdictions and consider what approach might be adopted for reform.[8]

[8] In Hong Kong, the current offences refer to mentally incapacitated persons as defined in section 117(1) of the Crimes Ordinance. A number of overseas jurisdictions address this issue in respect of "persons with mental impairment" but define such differently from that of "mentally incapacitated persons" in Hong Kong. See Chapters 10 to 12 in this respect.

Chapter 10

Consideration of approaches that may be adopted for reform of legislation in respect of persons with mental impairment ("PMIs")

Introduction

10.1 In this chapter, we consider what approaches might be adopted for reform of legislation in respect of PMIs.[1]

10.2 A review of current legislation in Hong Kong and overseas reveals that the types of offences provided for in respect of sexual activity with PMIs fall into two broad categories:

(1) Those which reflect an absolute bar to sexual activity with certain types of PMIs (whether the PMI has the capacity to consent is of no consequence: the protective principle applies in an absolute manner); and

(2) Those which respect the capacity of some PMIs to consent (and therefore their sexual autonomy) but address exploitation of their condition; such exploitation might arise from:

   (a) particular means used by the perpetrator to obtain the PMIs consent;

   (b) the care of PMIs inside or outside specified institutions; and

   (c) abuse of a position of trust or authority, or a relationship of dependency, in respect of a PMI.

First category - offences reflecting an absolute bar to sexual activity with certain types of PMIs

10.3 This approach is exemplified in Hong Kong where, if a PMI fits the definition of a mentally incapacitated person ("MIP")[2] certain defined types

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1 In this paper persons with mental impairment ("PMIs") is used as a general term as opposed to the specific definition of a mentally incapacitated person as defined in section 117(1) of the Crimes Ordinance, Cap 200.

2 Section 117(1) of the Crimes Ordinance, Cap 200 provides:

of sexual activity with such a person are outlawed, e.g. buggery by a man with a mentally incapacitated person,[3] gross indecency by a man with a male mentally incapacitated person,[4] a man having intercourse with a female mentally incapacitated person,[5] and abduction of mentally incapacitated person from parent or guardian for sexual act.[6]

10.4 Further examples of this approach can be found in the legislation of some Australian states (South Australia, Western Australia and Queensland).

Second category – offences reflecting potential exploitation of PMIs

(a) Particular means being used by perpetrator to obtain the PMI's consent

10.5 Examples of this can be found in the legislation of England and Wales where the exploitative means addressed consist of an inducement, threat or deception.

(b) Exploitation involved in the care of PMIs

(i) in specified institutions
(ii) outside specified institutions

10.6 Both (b)(i) and (b)(ii) are again exemplified by the legislation of England and Wales.

(c) Exploitation arising from abuse of a position of trust or authority, or a relationship of dependency, in respect of a PMI

10.7 This is exemplified in the legislation in Canada where specific offences are provided for where the perpetrator abuses his/her position of trust or authority or dependency relationship with regard to the affected PMI.

"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."

3 Crimes Ordinance, section 118E.
4 Crimes Ordinance, section 118I.
5 Crimes Ordinance, section 125.
6 Crimes Ordinance, section 128.

Constitutional angle of proposals

10.8 In the Sub-committee's previous consultation paper, we stated that any reform of the substantive law on sexual offences should be guided by a set of guiding principles which should include, *inter alia*, adherence to the provisions of the International Covenant on Civil and Political Rights (the ICCPR"), the Hong Kong Bill of Rights Ordinance (Cap. 383) ("the HKBORO") and the Basic Law.[7] Hence, in formulating our reform proposals, we have borne in mind the need to assess their acceptability from the constitutional angle. We are satisfied that no constitutional issues would arise from our reform proposals.

10.9 In fact, some of our reform proposals are formulated in such a way to avoid any potential constitutional issues. For example, in recommendation 34 (in Chapter 11) we propose an *evidential burden* on the accused with regard to 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 Sexual Offences Act 2003. We make it clear that it would be only an evidential burden, which can easily be discharged by the accused by raising an issue as to whether he or she knew or could reasonably have been expected to know the victim had a mental illness. The Prosecution would retain the legal burden of proving every essential ingredient of the offence including the fact that the accused had actual or constructive knowledge of the victim's mental illness. As the legal burden remains with the prosecution, the presumption of innocence which is enshrined in Article 87 of the Basic Law and Article 11 of HKBORO would not be not infringed.

10.10 Likewise, in recommendation 22 (in Chapter 8) we recommend that the *fictitious young person* provision in section 131B(1A) of the New Zealand Crimes Act 1961 be adopted in the proposed new offence of sexual grooming. The purpose of that provision is to 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. We make it clear in recommendation 22 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. Thus, the Prosecution would retain the legal burden of proving beyond reasonable doubt that the accused did not reasonably believe that the child was 16 or over.

Consideration of the first category of offences

10.11 As referred to above (paras 10.2 and 10.4), in many jurisdictions (including Hong Kong) certain offences are based on the mere fact of the mental impairment. A problem with this approach however is that it does not pay due regard to the sexual autonomy of the PMI. In Hong Kong, for

[7] Law Reform Commission of Hong Kong, *Consultation Paper on Rape and Other Non-consensual Sexual Offence*s (September 2012), at Recommendation 1.

example, the MIP definition is not based on the absence of capacity or ability to consent.

10.12 On the other hand, the legislation of Scotland is based on whether the PMI has the capacity to consent and so does recognise sexual autonomy.

10.13 There, sexual conduct with a PMI is covered by the general non-consensual (i.e. necessity to prove lack of consent) offences (such as rape, sexual assault by penetration, sexual assault). In deciding whether a non-consensual offence applies to a particular case, the question to ask is whether the PMI has the capacity to consent to the act.

10.14 Section 17(2) of the Sexual Offences (Scotland) Act 2009 sets out the method by which a mentally disordered person's capacity to consent is to be determined. Section 17(2) provides:

> *"(2) A mentally disordered person is incapable of consenting to conduct where, by reason of mental disorder, 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),*
>
> *(c) communicate any such decision."*

10.15 In other words, in Scotland, rather than having specific offences the PMI is protected by the general non-consensual offences. If a person has sexual activity with a PMI who does not have the capacity to consent to the activity, that person is guilty of the non-consensual offence he /she is charged with. Whether or not a PMI has the capacity to consent to the activity is determined by the method as set out in section 17(2) referred to above.

10.16 We are attracted by the Scottish method of dealing with the protection of PMIs given our previous comments on the issue of consent in sexual offences. In the Sub-committee's previous consultation paper, we stated as follows:[8]

> *"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;*

[8] Law Reform Commission of Hong Kong, *Consultation Paper on Rape and Other Non-consensual Sexual Offences* (September 2012), at Recommendation 4.

(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." (emphasis added)

10.17 We consider that the first category of offences can be subsumed under the general lack of consent model previously recommended by the sub-committee. By choosing this option, there would not be any need for specific offences based purely on impairment. Reliance could be placed on the general non-consensual sexual offences recommended in our previous consultation paper.

Consideration of the second category of offences

Offences addressing exploitation of PMIs by perpetrators using particular means to obtain PMI's consent (Sub-category (a) of the second category of offences)

10.18 These offences apply to PMIs whose extent of mental impairment is not so severe that they lack the capacity to consent to sexual activity. Although they are capable of giving consent, their "consent" is improperly obtained by perpetrators using exploitative means.

10.19 This category of offences would cover, by way of example, a situation where a perpetrator (A) is a regular customer of a fast food shop and B is a PMI who is employed by the fast food shop. A knows that B suffers from mental illness from his regular dealing with B. A provides B gifts to induce her to consent to sexual activity (such as letting him sexually touch her, or agreeing to engage in a sexual activity with him). As B is a PMI, she should be protected from sexual exploitation by A using particular exploitative means to obtain her "consent".

How should exploitative means be described?

10.20 The main concern of this category of offences is the use of exploitative means to obtain PMIs' consent. The issue is how such means should be defined.

10.21 In the English Act, the description of exploitative means is *"an inducement offered or given, a threat made or a deception practised"*[9] by the perpetrator for the purpose of obtaining the vulnerable person's "consent" to sexual activity.

[9] See sections 34(1)(c), 35(1)(a), 36(1)(d) and 37(1)(c) of the English Act.

10.22 Different terms are used to describe exploitative means in the legislation of some other countries: New Zealand (*"by taking advantage of the impairment"*),[10] Singapore (*"by means of an inducement offered or given, a threat made or a deception practised by A for that purpose"*),[11] and New South Wales of Australia (*"taking advantage of that person's cognitive impairment"*).[12]

10.23 We consider that the descriptions in the New Zealand and the New South Wales legislation are too vague. We favour the descriptions in the English and the Singaporean legislation which are similar to each other. They describe in clear terms the three types of means to obtain consent which are considered as exploitative, namely, (i) an inducement offered or given, (ii) a threat made, or (iii) a deception practised.

10.24 Having decided that the description of exploitative means in the English and the Singaporean legislation should be adopted, the next issue is whether relevant English or Singaporean offences should be adopted in our reform.

10.25 There is only one Singaporean offence which covers use of exploitative means to obtain PMI's consent, namely, procurement of sexual activity with a person with mental disability in section 376F of the Singapore Penal Code.

10.26 By contrast, there is a range of English offences which cover exploitative means being used by the perpetrator to obtain consent of a PMI. The English offences are of much wider scope of coverage than the single Singaporean offence. There are offences covering different forms of sexual abuse and exploitation of a PMI, including: sexual touching, causing another to engage in sexual activity, engaging in sexual activity in another's presence, causing another to watch a sexual act.

10.27 We favour the adoption of the range of English offences given their wider scope of coverage may give greater protection to PMIs.

English offences: exploitative means used by the perpetrator

10.28 Having decided that the English offences in this category should be adopted, we consider them in some detail below. They are in sections 34 to 37 of the English Act:

Inducement, threat or deception to procure sexual activity with a person with a mental disorder

10.29 It is an offence under section 34(1) of the English Act for a person (A) to intentionally touch a mentally disordered person (B) where the

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10 New Zealand Crimes Act 1961, section 138.

11 Singaporean Penal Code, section 376F.

12 New South Wales Crimes Act 1900, section 66F(3).

touching is sexual and B's agreement to the touching is obtained by means of inducement, threat or deception. It should be noted that this offence covers both penetrative and non-penetrative sexual activity since "touching" includes penetration under the general interpretation section (section 79).[13]

Causing a person with a mental disorder to engage in or agree to engage in sexual activity by inducement, threat or deception

10.30 It is an offence under section 35(1) of the English Act for a person (A) to intentionally cause a mentally disordered person (B) to engage in, or to agree to engage in, a sexual activity by means of inducement, threat or deception.[14]

Engaging in sexual activity in the presence, procured by inducement, threat or deception, of a person with a mental disorder

10.31 It is an offence under section 36(1) of the English Act for a person (A) to intentionally engage in sexual activity in the presence of a mentally disordered person (B) for the purpose of sexual gratification, and B agrees to be present because of inducement, threat or deception.[15]

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13 Section 34(1) provides:

"(1) A person (A) commits an offence if —
(a) with the agreement of another person (B) he intentionally touches that person,
(b) the touching is sexual,
(c) A obtains B's agreement by means of an inducement offered or given, a threat made or a deception practised by A for that purpose,
(d) B has a mental disorder, and
(e) A knows or could reasonably be expected to know that B has a mental disorder."

14 Section 35(1) provides:

"(1) A person (A) commits an offence if—
(a) by means of an inducement offered or given, a threat made or a deception practised by him for this purpose, he intentionally causes another person (B) to engage in, or to agree to engage in, an activity,
(b) the activity is sexual,
(c) B has a mental disorder, and
(d) A knows or could reasonably be expected to know that B has a mental disorder."

15 Section 36(1) provides:

"(1) A person (A) commits an offence if—

(a) he intentionally engages in an activity,
(b) the activity is sexual,
(c) for the purpose of obtaining sexual gratification, he engages in it—
(i) when another person (B) is present or is in a place from which A can be observed, and
(ii) knowing or believing that B is aware, or intending that B should be aware, that he is engaging in it,
(d) B agrees to be present or in the place referred to in paragraph (c)(i) because of an inducement offered or given, a threat made or a deception practised by A for the purpose of obtaining that agreement,
(e) B has a mental disorder, and

Causing a person with a mental disorder to watch a sexual act by inducement, threat or deception

10.32 It is an offence under section 37(1) of the English Act for a person (A) to intentionally cause a mentally disordered person (B) 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 and where B agrees to watch or look because of an inducement, a threat or deception.[16]

Actual or constructive knowledge of mental disorder

10.33 It is an ingredient of the offences in this category that the accused must have actual or constructive knowledge that the victim was a person with a mental disorder:

> *"A knows or could reasonably be expected to know that B has a mental disorder"*[17]

10.34 An issue is 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 mentally ill. We therefore consider that there should be such a requirement.

Should the purpose of the act be confined to sexual gratification?

10.35 In the English legislation, there are two offences which require an additional element, namely, the accused must act *"for the purpose of obtaining*

(f) A knows or could reasonably be expected to know that B has a mental disorder."

16 Section 37(1) provides:

"(1) A person (A) commits an offence if—
(a) for the purpose of obtaining sexual gratification, he intentionally causes another person (B) to watch a third person engaging in an activity, or to look at an image of any person engaging in an activity,
(b) the activity is sexual,
(c) B agrees to watch or look because of an inducement offered or given, a threat made or a deception practised by A for the purpose of obtaining that agreement,
(d) B has a mental disorder, and
(e) A knows or could reasonably be expected to know that B has a mental disorder."

17 The English Act, sections 34(1)(d), 35(1)(d), 36(1)(f), and 37(1)(d).

sexual gratification".[18] They are (i) engaging in sexual activity in the presence, procured by inducement, threat or deception, of a person with a mental disorder (section 36) and (ii) causing a person with a mental disorder to watch a sexual act by inducement, threat or deception (section 37).

10.36 We recommended in Chapter 7 (at Recommendations 13 and 14) that in respect of those proposed new offences against children where the purpose of the act is relevant, the purpose of the accused's act should go beyond sexual gratification and should cover sexual gratification, humiliating, distressing or alarming the child, or any combination of these purposes. It was our view that a sexual act done to humiliate, distress or alarm a child would have a potentially harmful effect on the child similar to a sexual act committed for sexual gratification.

10.37 We therefore consider that in respect of these types of offences the purpose of the act should extend to sexual gratification, humiliating, distressing or alarming the PMI, or any combination of these purposes. There is no good reason why PMIs should enjoy less protection than that given to children.

Offences addressing exploitation involved in the care of PMIs inside or outside specified institutions (Sub-category (b) of the second category of offences)

10.38 This category of offences covers sexual behaviour of persons who are involved in the care of PMIs. These offences are concerned with a situation where a person, who is engaged in the care of a PMI, engages the latter in some form of sexual activity. The PMI concerned could be receiving care inside or outside a specified institution.

10.39 This category of offences would cover, for example, a situation in which a person (A) is an employee or a volunteer taking care of PMIs at a centre for PMIs and A sexually exploits B who is a PMI receiving care at that centre. Another example is where a person (C), who takes care of a PMI (D) in domestic premises, sexually abuses D. In these examples, B and D being PMIs, may not be able to make rational choices about sexual relationships and are likely to succumb to pressure from the person providing care to them (A or C in these examples, as the case may be).

10.40 A deficiency of the existing legislation in Hong Kong is that it gives inadequate protection to PMIs against sexual exploitation by people involved in their care. The offences in this category would address that deficiency. We therefore favour the adoption of this category of offences.

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[18] The English Act, sections 36(1)(c) and 37(1)(a).

Situations where a relationship of care exists

10.41 This category of offences applies when a relationship of care exists and so it is necessary to define situations where such a relationship would exist. There are at least two ways in which this might arise:

(1) The legislation in England and Wales

10.42 The existence of a relationship of care is defined in section 42 of the English Act. Under this section, such a relationship of care can arise where a care provider is an employee of and has functions to perform in a specified institution in which a PMI is accommodated (for example, a care home, community home, voluntary home, or children's home) or receiving medical care through a National Health Service body or an independent medical agency or hospital. A relationship of care can also arise where a person provides voluntary care to a PMI outside specified institutions. This would mean that a relationship of care could arise in the case of non-paid care providers, such as volunteers. In all cases, in order for a relationship of care to exist, the care provider must have, or be likely to have regular face to face contact with the PMI.[19]

10.43 Section 42 of the English Act provides:

> "***42 Care workers: interpretation***
>
> *(1) For the purposes of sections 38 to 41, a person (A) is involved in the care of another person (B) in a way that falls within this section if any of subsections (2) to (4) applies.*
>
> *(2) This subsection applies if—*
>
> *(a) B is accommodated and cared for in a care home, community home, voluntary home or children's home, and*
>
> *(b) A has functions to perform in the home in the course of employment which have brought him or are likely to bring him into regular face to face contact with B.*
>
> *(3) This subsection applies if B is a patient for whom services are provided—*
>
> *(a) by a National Health Service body or an independent medical agency;*

[19] As to this requirement see paragraph 10.55 below.

(b) in an independent hospital; or
(c) in Wales, in an independent clinic,

and A has functions to perform for the body or agency or in the hospital or clinic in the course of employment which have brought A or are likely to bring A into regular face to face contact with B.

(4) This subsection applies if A—

(a) is, whether or not in the course of employment, a provider of care, assistance or services to B in connection with B's mental disorder, and

(b) as such, has had or is likely to have regular face to face contact with B…"

(2) The legislation in Victoria (Australia)

10.44 The existence of a relationship of care is defined by reference to the nature of services provided to PMIs, namely, medical or therapeutic services. It is an offence under section 51 the Crimes Act 1958 (Victoria) for a provider of medical or therapeutic services to a person with a cognitive impairment to sexually penetrate or commit an indecent act on the latter unless the provider is the latter's spouse or domestic partner.

Section 51 of the Crimes Act 1958 (Victoria) provides:

"(1) A person who provides medical or therapeutic services to a person with a cognitive impairment who is not his or her spouse or domestic partner must not take part in an act of sexual penetration with that person.

Penalty: Level 5 imprisonment (10 years maximum).

(2) A person who provides medical or therapeutic services to a person with a cognitive impairment who is not his or her spouse or domestic partner must not commit, or be in any way a party to the commission of, an indecent act with that person.

Penalty: Level 6 imprisonment (5 years maximum)."

Proposed definitions of situations where a relationship of care exists

10.45 We consider that there would be merit in adopting the English legislation in determining situations where a relationship of care exists. The English legislation covers a wide variety of situations in which PMIs are potentially vulnerable to sexual exploitation by persons involved in their care.

We do not favour the Victorian legislation which covers only medical or therapeutic services provided to a PMI. It is too narrow in its scope and does not provide adequate protection to PMIs.

10.46 ` In our view, a relationship of care should exist in two situations where care is provided to PMIs:

Care of PMIs in specified institutions

10.47 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 committed on PMIs by persons who have function to perform in the institutions irrespective of whether they are employees of the institutions or not. These offences 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 defined institution who have no function to perform in the institution would not be covered.

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

Care of PMIs outside specified institutions

10.49 Secondly, this category of offences should cover situations where a person (A) 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).

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

The offences in the English Act

10.51 As we favour adoption of the English legislation in our reform, the English offences in this category are considered below. These offences are found in section 38 to 41 of the English Act:

Sexual activity with a person with a mental disorder by care workers

10.52 It is an offence under section 38(1) of the English Act for a person (A) who is involved in the care of a PMI (B) (in a manner as defined in section 42) to intentionally touch B where the touching is sexual.[20] This offence covers both penetrative and non-penetrative sexual activity since "touching" includes penetration under the general interpretation section (section 79).

Causing or inciting sexual activity by care workers

10.53 It is an offence under section 39(1) of the English Act for a person (A) who is involved in the care of a PMI (B) (in a manner as defined in section 42) to intentionally cause or incite B to engage in a sexual activity.[21]

Sexual activity in the presence of a person with a mental disorder by care workers

10.54 It is an offence under section 40(1) of the English Act for a person (A) who is involved in the care of an PMI (B) (in a manner as defined in section 42) to intentionally engage in sexual activity in the presence of B for the purpose of sexual gratification.[22]

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[20] Section 38(1) provides:

"(1) A person (A) commits an offence if—
- *(a) he intentionally touches another person (B),*
- *(b) the touching is sexual,*
- *(c) B has a mental disorder,*
- *(d) A knows or could reasonably be expected to know that B has a mental disorder, and*
- *(e) A is involved in B's care in a way that falls within section 42"*

[21] Section 39(1) provides:

"(1) A person (A) commits an offence if—
- *(a) he intentionally causes or incites another person (B) to engage in an activity,*
- *(b) the activity is sexual,*
- *(c) B has a mental disorder,*
- *(d) A knows or could reasonably be expected to know that B has a mental disorder, and*
- *(e) A is involved in B's care in a way that falls within section 42."*

[22] Section 40(1) provides:

"(1) A person (A) commits an offence if—
- *(a) he intentionally engages in an activity,*
- *(b) the activity is sexual,*
- *(c) for the purpose of obtaining sexual gratification, he engages in it—*
  - *(i) when another person (B) is present or is in a place from which A can be observed, and*
  - *(ii) knowing or believing that B is aware, or intending that B should be aware, that he is engaging in it,*
- *(d) B has a mental disorder,*
- *(e) A knows or could reasonably be expected to know that B has a mental disorder, and*
- *(f) A is involved in B's care in a way that falls within section 42."*

Causing a person with a mental disorder to watch a sexual act by care workers

10.55 It is an offence under section 41(1) of the English Act for a person (A) who is involved in the care of a PMI (B) (in a manner as defined in section 42) to intentionally cause B 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.[23]

Should this category of offences be confined to penetrative sexual activity?

10.56 The relevant existing offence, namely, "sexual intercourse with patients" (Mental Health Ordinance (Cap. 136) section 65(2)) covers penetrative sexual activity only. It covers the situation where any male officer or employee of mental hospital, Correctional Services Department Psychiatric Centre, or a general hospital has unlawful sexual intercourse with a woman patient.

10.57 The issue is whether this category of offences should be confined to penetrative activity. The offences in sections 38 to 41 of the English Act cover both penetrative and non-penetrative activity. We agree with the English approach and consider that offences in this category should cover both penetrative and non-penetrative sexual activity. There is no good reason why PMIs should not be protected against non-penetrative sexual activity. The harmful effects of non-penetrative sexual activity are in many cases equal to that of penetrative activity.

Likely to have regular face to face contact

10.58 In the English Act, in order for a relationship of care to exist, the care provider must have, or be likely to have regular face to face contact with the PMI.[24] We consider this requirement to be unnecessary. If PMIs are placed in specified institutions, they should be protected from any form of sexual exploitation. People who have a function to perform or who provide

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23 Section 41(1) provides:

"(1) A person (A) commits an offence if—
- *(a) for the purpose of obtaining sexual gratification, he intentionally causes another person (B) to watch a third person engaging in an activity, or to look at an image of any person engaging in an activity,*
- *(b) the activity is sexual,*
- *(c) B has a mental disorder,*
- *(d) A knows or could reasonably be expected to know that B has a mental disorder, and*
- *(e) A is involved in B's care in a way that falls within section 42."*

24 The English Act, sections 42(2)(b) and 42(4)(b).

volunteering service in specified institutions should know that persons receiving care in those institutions are PMIs even if there is no regular face to face contact between them. Care providers should not engage in any form of sexual activity with PMIs in specified institutions, irrespective of whether there is regular face to face contact between them.

10.59 On the other hand, in the vast majority of cases, people taking care of PMIs outside specified institutions will have regular face to face contact with the PMIs. However, there could be cases where there is no *regular* face to face contact, (for example, a PMI is sent for a one off consultation with a doctor or other professional). Even in such cases, we are of the view that the law should prohibit a sexual relationship from taking place between the parties because of the imbalance of relationship between them.

Exception where care provider and PMI are married or in pre-existing relationship

10.60 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.

10.61 The Home Office Review Group in the UK pointed out the rationale for the exception as follows:

> *"One area of potential difficulty is that where care is given by husband or wife within the family or by partners in long-standing relationships. These relationships were sexual long before illness, accident or dementia intervened. In circumstances where individuals retained some capacity to consent it would be wrong and unreasonable to intrude into the private life of such couples. It is important therefore that there should not be an offence where the carer and patient were married or in an existing sexual relationship."*[25]

10.62 We share the view of the Review Group and consider that there should be such an exception.

10.63 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 (in a way A falls within a relationship of care as defined in section 42).

10.64 This exception would cover the situation where A and B, who are an unwed couple (such as boyfriend and girlfriend), had a lawful sexual

[25] Home Office, Setting The Boundaries: Reforming the law on sex offences (July 2000), at paragraph 4.8.17.

relationship immediately before B developed a mental illness or before B is 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.

10.65 We consider that there should be an exception for a sexual relationship which pre-dated the care relationship. Otherwise a person who has 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.

10.66 Whilst 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. We consider 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 were in a consensual sexual relationship within a reasonable period before one of them developed mental illness or is admitted to the care of the other should not be allowed to continue that relationship.

Knowledge of mental illness

10.67 The same requirement as mentioned in paragraphs 10.33 and 10.34 should apply here.

Provision as to knowledge of mental illness

10.68 In respect of the English offences in this category, the following provision exists:

> *"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."*[26]

10.69 We are in favour of such a provision. As persons who are involved in care of PMIs are close to the persons under their care, it is natural

[26] The English Act, sections 38(2), 39(2), 40(2), and 41(2).

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.[27]

The legislation in Canada: exploitation that might arise from abuse of a position of trust or authority, or a relationship of dependency, in respect of a PMI (Sub-category (c) of the second category of offences)

10.70 There may be cases of exploitation where no "care relationship" exists but where the perpetrator is abusing his/her position of trust or authority or dependency relationship in respect of a PMI. The legislation in Canada provides for an offence to address these cases.

Sexual exploitation of a person with disability

10.71 In Canada, section 153.1(1) of the Canadian Criminal Code creates an offence of sexual exploitation of a person with mental or physical disability arising from a position of trust or authority, or a relationship of dependency with regard to such person.[28]

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[27] In order to discharge an evidential burden, the accused is only required to adduce or point to sufficient evidence to raise an issue fit for the Jury to consider. The persuasive burden (or the legal burden) always lies with the prosecution to prove beyond all reasonable doubt all the elements of the offence. In the Court of Final Appeal case in HKSAR v Ng Po On and Another, [2008] 4 HKLRD 176; (2008) 11 HKCFAR 91, Mr Justice Ribeiro PJ said (at para 27 of judgment):

> *"[An evidential burden] does not require the accused to establish anything as a matter of proof. An* evidential burden *arises where the defendant wishes to put in issue some matter that is potentially exculpatory while the prosecution continues to bear the persuasive burden throughout. In such cases, there must be evidence supporting such exculpatory matter which is sufficiently substantial that it raises a reasonable doubt as to the defendant's guilt. Unless such reasonable doubt is removed, the prosecution fails to prove its case. If, on the other hand, the accused fails to adduce or point to any evidence on the relevant issue or if the evidence adduced is rejected or is not sufficiently substantial to raise a reasonable doubt, the potentially exculpatory matter places no obstacle in the way of the prosecution proving its case beyond reasonable doubt…"*

[28] Section 153.1(1) to (3) of the Canadian Criminal Code provides:

> *"153.1 (1) Every person who is in a position of trust or authority towards a person with a mental or physical disability or who is a person with whom a person with a mental or physical disability is in a relationship of dependency and who, for a sexual purpose, counsels or incites that person to touch, without that person's consent, his or her own body, the body of the person who so counsels or incites, or the body of any other person, directly or indirectly, with a part of the body or with an object, is guilty of*
>
> *(a) an indictable offence and liable to imprisonment for a term not exceeding five years; or*

Meaning of a position of trust or authority, or a relationship of dependency

10.72 There is no statutory definition of a position of trust or authority, or a relationship of dependency in the Canadian legislation. The Supreme Court of Canada interpreted the meaning of these terms in *R v Audet.*[29] In the absence of a statutory definition, the Supreme Court held that these terms should be interpreted in accordance with their ordinary meaning. The Supreme Court took the view that a position of trust or authority exists where the victim is vulnerable because of the imbalance in the nature of the relationship between the perpetrator and the victim. The key factor is the nature of the relationship between them rather than their status in relation to each other. The Supreme Court also held that it will be up to the trial judge to consider all factual circumstances relevant to the determination of the relationship between the parties in order to determine whether the accused was in a position of trust towards the victim, or whether the victim was in a relationship of dependency with the accused.

The Canadian offence applies only to situations where the perpetrator actually abused his or her position or relationship

10.73 In addition to the requirement of the existence of the specified position or relationship between the perpetrator and a person with a mental disability, there must be actual abuse of that position or relationship by the perpetrator in order to constitute the Canadian offence.

(b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months." (Emphasis added)

(2) Subject to subsection (3), "consent" means, for the purposes of this section, the voluntary agreement of the complainant to engage in the sexual activity in question.

(3) No consent is obtained, for the purposes of this section, if

(a) the agreement is expressed by the words or conduct of a person other than the complainant;

(b) the complainant is incapable of consenting to the activity;

(c) the accused counsels or incites the complainant to engage in the activity by abusing a position of trust, power or authority;

(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity."

[29] The Supreme Court of Canada in *R v Audet* [1996] 2 S.C.R.171 interpreted the meaning of these terms in relation to the offence of sexual exploitation of a young person in section 153.1 of the Canadian Criminal Code.

10.74 The sexual activity must be carried out *"without that person's consent"* in order for the Canadian offence to apply (see section 153.1 (1)). Section 153.1(3)(c) provides that, for the purposes of section 153.1 (1), there is no consent if *"the accused counsels or incites the complainant to engage in the activity by abusing a position of trust, power or authority"*. In other words, the Canadian offence does not prevent sexual activity taking place where the specified position or relationship exists. But when there is actual abuse of that position or relationship, the sexual activity is deemed to be carried out without consent (pursuant to 153.1(3)(c)) and the offence will be constituted. That is to say, the Canadian offence has two elements: (i) a position of trust or authority or a relationship of dependency; and (ii) actual abuse of that position or relationship.

Should the Canadian approach also be adopted?

10.75 We have taken the view above that the English legislation should be adopted to cover exploitation that might arise from the care of PMIs both in specified institutions and outside specified institutions. The question is whether on top of those offences in the English legislation, the Canadian approach should also be adopted.

10.76 The Canadian offence is wider than those offences in the English legislation. It extends to a position of trust or authority, or a relationship of dependency whilst the English legislation covers a care relationship only. The Canadian approach covers, for example, cases in which guardians, teachers or other professionals abuse their position or relationship with PMIs. We consider it desirable that legislation caters for this abuse and therefore propose that the English offences be extended to cover it.

10.77 The English offences, as extended, would cover exploitation that might arise from (i) care of PMIs inside or outside specified institutions; and (ii) abuse of a position of trust or authority, or a relationship of dependency, in respect of a PMI. The ingredients of (ii) would be: (a) a position of trust or authority, or a relationship of dependency between the perpetrator and PMI; (b) abuse of such a position or relationship by the perpetrator; and (c) the perpetrator's actual or constructive knowledge that the other person is a PMI.

Conclusions with regard to Second Category Offences

10.78 Having regard to the matters above set out, we favour the adoption of offences in the second category. They strike an appropriate 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 by perpetrators using exploitative means or having imbalanced relationship with them.

10.79 In the next chapter, in the light of our above considerations, we shall set out our recommendations for new sexual offences and suggestions for abolition of some of the existing offences. We shall also consider whether in the light of our recommendations the current definition of mentally incapacitated person ("MIP") should be retained or amended in some way.

Chapter 11

Sexual offences involving persons with mental impairment ("PMIs") in the new legislation

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Introduction

11.1 In Chapter 10, we considered the approaches that may be adopted for reform of legislation in respect of PMIs.

11.2 Consistent with that consideration, we propose below a range of new offences involving PMIs. We shall also consider whether in the light of our recommendations some existing offences should be abolished and whether the current definition of mentally incapacitated person should be retained or amended in some way.

(A) Offences addressing exploitation of PMIs by perpetrators using particular means to obtain PMIs' consent:

11.3 We propose a range of new offences to address potential exploitation of PMIs by perpetrators using exploitative means to obtain the consent of those PMIs who have some capacity to consent.

11.4 There are no existing offences to address such exploitation. Nor do the existing offences take into account the sexual autonomy of those PMIs who do have the capacity to consent. The proposed new offences endeavour to strike a proper balance between respecting the sexual autonomy of those PMIs whose extent of mental impairment is not so severe as to prevent their capacity to consent on the one hand and to protect them against perpetrators who use exploitative means to obtain their "consent", on the other.

Inducement, threat or deception to procure sexual activity with a person with mental impairment

11.5 This proposed new offence 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 Sexual Offences Act 2003. Section 34(1) provides:

"(1) A person (A) commits an offence if —

(a) with the agreement of another person (B) he intentionally touches that person,

(b) the touching is sexual,

(c) A obtains B's agreement by means of an inducement offered or given, a threat made or a deception practised by A for that purpose,

(d) B has a mental disorder, and

(e) A knows or could reasonably be expected to know that B has a mental disorder."

11.6 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.

11.7 The English offence covers both penetrative and non-penetrative sexual activity since "touching" includes penetration under the general interpretation section (section 79). We consider that the proposed offence should likewise cover both penetrative and non-penetrative sexual activity. This would give greater protection to PMIs.

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.

Causing a person with mental impairment to engage in or agree to engage in sexual activity by inducement, threat or deception

11.8 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 Sexual Offences Act 2003. Section 35(1) provides:

"(1) A person (A) commits an offence if—

(a) by means of an inducement offered or given, a threat made or a deception practised by him for this purpose, he intentionally causes another person (B) to engage in, or to agree to engage in, an activity,

(b) the activity is sexual,

(c) B has a mental disorder, and

(d) A knows or could reasonably be expected to know that B has a mental disorder."

11.9 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.

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.

Engaging in sexual activity in the presence, procured by inducement, threat or deception, of a person with mental impairment

11.10 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 Sexual Offences Act 2003. Section 36(1) provides:

"(1) A person (A) commits an offence if—

(a) he intentionally engages in an activity,

(b) the activity is sexual,

(c) for the purpose of obtaining sexual gratification, he engages in it—

(i) when another person (B) is present or is in a place from which A can be observed, and

(ii) knowing or believing that B is aware, or intending that B should be aware, that he is engaging in it,

(d) B agrees to be present or in the place referred to in paragraph (c)(i) because of an inducement offered or given, a threat made or a deception practised by A for the purpose of obtaining that agreement,

(e) B has a mental disorder, and

(f) A knows or could reasonably be expected to know that B has a mental disorder."

11.11 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.

11.12 It is an ingredient of this English offence that the accused's act should be for the purpose of obtaining sexual gratification. We took the view in Chapter 10 (paras 10.32-10.34) that in respect of those offences where the purpose of the act is relevant, the purpose of the act should go beyond sexual gratification and should cover sexual gratification, humiliating, distressing or alarming the PMI, or any combination of these purposes. This would apply to all the proposed new offences in this chapter where the purpose of the act is relevant.

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 PMI, or any combination of these purposes.

Causing a person with mental impairment to watch a sexual act by inducement, threat or deception

11.13 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 Sexual Offences Act 2003. Section 37(1) provides:

> *"(1) A person (A) commits an offence if—*
>
> *(a) for the purpose of obtaining sexual gratification, he intentionally causes another person (B) to watch a third person engaging in an activity, or to look at an image of any person engaging in an activity,*
>
> *(b) the activity is sexual,*
>
> *(c) B agrees to watch or look because of an inducement offered or given, a threat made or a deception practised by A for the purpose of obtaining that agreement,*
>
> *(d) B has a mental disorder, and*
>
> *(e) A knows or could reasonably be expected to know that B has a mental disorder."*

11.14 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.

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 PMI, or any combination of these purposes.

(B) Offences addressing exploitation involved in the care of PMIs inside or outside specified institutions, and abuse of a position of trust or authority, or a relationship of dependency, in respect of a PMI:

11.15 The existing legislation in Hong Kong gives inadequate protection against exploitation that might arise from the care of PMIs inside or outside specified institutions, and abuse of a position of trust or authority, or a relationship of dependency, in respect of a PMI. We therefore propose a range of new offences to address such possible exploitation. The proposed new offences would be modelled on the English offences. For reasons discussed in Chapter 10 (paragraphs 10.72-10.74), we propose that in adopting the English offences, their scope be extended to cover abuse of a position of trust or authority, or a relationship of dependency, in respect of a PMI.

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

11.16 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 Sexual Offences Act 2003. Section 38(1) provides:

> *"(1) A person (A) commits an offence if—*
>
> *(a) he intentionally touches another person (B),*
>
> *(b) the touching is sexual,*
>
> *(c) B has a mental disorder,*
>
> *(d) A knows or could reasonably be expected to know that B has a mental disorder, and*
>
> *(e) A is involved in B's care in a way that falls within section 42"*

11.17 The English offence covers both penetrative and non-penetrative activity since "touching" includes penetration under section 79 of the English Act. We propose that the new offence should cover both penetrative and non-penetrative sexual activity.

11.18 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.

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.[1]

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

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

11.19 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 Sexual Offences Act 2003**.** Section 39(1) provides:

> *"(1) A person (A) commits an offence if—*
>
> *(a) he intentionally causes or incites another person (B) to engage in an activity,*
>
> *(b) the activity is sexual,*
>
> *(c) B has a mental disorder,*
>
> *(d) A knows or could reasonably be expected to know that B has a mental disorder, and*
>
> *(e) A is involved in B's care in a way that falls within section 42."*

11.20 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.

Recommendation 28

We recommend that the new legislation should include an offence of causing or inciting sexual activity of a person

[1] This proposal is intended to reflect paragraphs 10.72 to 10.74 in Chapter 10.

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.[2]

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

11.21 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 Sexual Offences Act 2003. Section 40(1) provides:

> *"(1) A person (A) commits an offence if—*
>
> *(a) he intentionally engages in an activity,*
>
> *(b) the activity is sexual,*
>
> *(c) for the purpose of obtaining sexual gratification, he engages in it—*
>
> *(i) when another person (B) is present or is in a place from which A can be observed, and*
> *(ii) knowing or believing that B is aware, or intending that B should be aware, that he is engaging in it,*
>
> *(d) B has a mental disorder,*
>
> *(e) A knows or could reasonably be expected to know that B has a mental disorder, and*
>
> *(f) A is involved in B's care in a way that falls within section 42."*

11.22 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, engages in sexual activity in the presence of the PMI for the purpose of obtaining sexual gratification, humiliating, distressing or alarming the PMI, or any combination of these purposes.

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[2] This proposal is intended to reflect paragraphs 10.72 to 10.74 in Chapter 10.

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.[3]

In order to constitute the proposed 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.

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

11.23 This proposed offence 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 Sexual Offences Act 2003. Section 41(1) provides:

> *"(1) A person (A) commits an offence if—*
>
> *(a) for the purpose of obtaining sexual gratification, he intentionally causes another person (B) to watch a third person engaging in an activity, or to look at an image of any person engaging in an activity,*
>
> *(b) the activity is sexual,*
>
> *(c) B has a mental disorder,*
>
> *(d) A knows or could reasonably be expected to know that B has a mental disorder, and*
>
> *(e) A is involved in B's care in a way that falls within section 42."*

11.24 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 a sexual activity, or to look at an image of any person engaging in a sexual activity, for the purpose of obtaining

[3] This proposal is intended to reflect paragraphs 10.72 to 10.74 in Chapter 10.

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

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.[4]

In order to constitute the proposed 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.

Proposed definition of situations where a relationship of care exists

11.25 We discussed in Chapter 10 (paragraphs 10.43-10.47) the situations where a relationship of care should exist. Based on that discussion, we propose a relationship of care should exist in two situations.

11.26 Firstly, such a relationship would exist between a person and a PMI if the former is *"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). This would cover persons, whether employed by a specified institution or not, who have a function to perform in that institution. It would also cover volunteers providing service at these institutions. However, mere visitors to a specified institution would not be covered.

11.27 Secondly, we propose that such a relationship would exist where a person (A) 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). This would cover situations where care is provided to PMIs outside specified institutions in connection with their mental illness.

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:

[4] This proposal is intended to reflect paragraphs 10.72 to 10.74 in Chapter 10.

firstly, 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.

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 Administration when the new legislation is put in place.

Exceptions where care provider and PMI are married or in pre-existing relationship

11.28 For reasons discussed in Chapter 10 (paras 10.57 to 10.63), we propose that there should be two exceptions to liability. The first would apply where the PMI and the person who is involved in his or her care are married. This exception is modelled on section 43 of the English Act. Section 43 provides:

> *"(1) Conduct by a person (A) which would otherwise be an offence under any of sections 38 to 41 against another person (B) is not an offence under that section if at the time—*
>
> *(a) B is 16 or over, and*
>
> *(b) A and B are lawfully married or civil partners of each other.*
>
> *(2) In proceedings for such an offence it is for the defendant to prove that A and B were at the time lawfully married or civil partners of each other."*

11.29 By virtue of the proposed first exception, a person would not have liability in respect of the proposed new offences covering situations where a relationship of care exists, if that person and the PMI are married and the PMI is 16 or over.

11.30 The second exception would apply where there is a lawful sexual relationship between the PMI and the person who is involved in his or her care which pre-dated the care relationship. This is modelled on section 44 of the English Act which provides:

"(1) Conduct by a person (A) which would otherwise be an offence under any of sections 38 to 41 against another person (B) is not an offence under that section if, immediately before A became involved in B's care in a way that falls within section 42, a sexual relationship existed between A and B.

(2) Subsection (1) does not apply if at that time sexual intercourse between A and B would have been unlawful.

(3) In proceedings for an offence under any of sections 38 to 41 it is for the defendant to prove that such a relationship existed at that time."

11.31 For the reasons stated in Chapter 10 (para 10.63), we propose 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"*.

11.32 By virtue of the proposed second exception, a person (A) would not be liable in respect of the proposed new offences covering situations where a relationship of care exists, if A and another person (B) were in a lawful sexual relationship within a reasonable period before B developed mental illness or before A started caring for B. This exception applies to unwed couples such as boyfriend and girlfriend.

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-dated the care relationship.

We further recommend 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.

Requirement as to knowledge of mental illness

11.33 For reasons discussed in Chapter 10 (paras 10.30-10.31 and 10.64), we propose that it should be a requirement of all the proposed new offences that the accused had actual or constructive knowledge that the victim was a PMI.

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.

11.34 However, for reasons discussed in Chapter 10 (paragraph 10.66), we propose that in respect of the proposed new offences 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 along the lines of sections 38(2), 39(2), 40(2) and 41(2) of the English Sexual Offences Act 2003, 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."*

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 illness, along the lines of sections 38(2), 39(2), 40(2) and 41(2) of the English Sexual Offences Act 2003.

Definition of a Mentally Incapacitated Person ("MIP")

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

11.36 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."*

11.37 The above definition of an MIP thus has two limbs:

(i) a mentally disordered person or a mentally handicapped person as defined in the Mental Health Ordinance (Cap 136); 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.

The first limb - A mentally disordered person or a mentally handicapped person

11.38 As the definition refers to *"a mentally disordered person or a mentally handicapped person within the meaning of the Mental Health Ordinance"*, one must make reference to the Mental Health Ordinance (Cap 136) to ascertain the meaning of a mentally disordered person or a mentally handicapped person.

11.39 Section 2(1) (the interpretation section) of the Mental Health Ordinance defines a mentally disordered person and a mentally handicapped person as follows:

Mentally disordered person

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

11.41 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 'mental disordered' shall be construed accordingly."

Mentally handicapped person

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

11.43 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* [5] *with deficiencies in adaptive behaviour, and 'mentally handicapped' shall be construed accordingly."*

The second limb - Incapability of living an independent life or guarding against serious exploitation

11.44 Section 117(1) of the Crimes Ordinance refers also to "*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*".

11.45 Hence, in order to fall within the definition of an MIP in section 117(1), not only must the person be a mentally disordered person or a mentally handicapped person (within the definition of the Mental Health Ordinance), but the person must also, because of his or her mental disorder or mental handicap, be incapable of living an independent life or guarding him or herself against serious exploitation of a sexual nature.[6]

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5 "Sub-average general intellectual functioning" means *"an IQ of 70 or below according to the Wechsler Intelligence Scales for Children or an equivalent scale in a standardised intelligence test."* (Mental Health Ordinance, section 2(1))

6 *HKSAR v Cheng Chi Ho*, CACC 57/2006 (reported in [2008] 5 HKLRD 557), at paragraphs 61 and 66.

Conferring protection on those with relatively significant mental impairment only

11.46 As the second limb of the current definition of an 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 relatively significant mental impairment only.

11.47 The current definition of an MIP is unsatisfactory in that if the victim cannot satisfy the high requirements of the second limb, he or she cannot be classified as an MIP and would not be afforded adequate protection against exploitation. As our 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, we propose that the second limb should be removed from the definition of a PMI in the new legislation. With our proposal, the new proposed offences involving persons with mental impairment would apply to any mentally disordered person or mentally handicapped person.

Recommendation 35

We recommend that the proposed new offences involving persons with mental impairment should apply to mentally disordered persons or mentally handicapped persons (as defined in the Mental Health Ordinance).

Should the existing term "mentally incapacitated person" continue to be used to describe a person with mental impairment?

11.48 As seen above, we have proposed a range of new offences involving persons with mental impairment. The issue is whether the existing term MIP should continue to be used to describe a person with mental illness for the purposes of the sexual offences.

11.49 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 a person of such significant mental impairment that he or she has 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 not used in similar legislation overseas. [7]

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[7] Different terms are used in the legislation of overseas countries to refer to persons with mental illness.

Australia

A variety of terms are used in the legislation of the different states in Australia to refer to a person with mental illness.

The terms used include: a person with cognitive impairment (Crimes Act 1900 (New South Wales), section 66F, and Crimes Act 1958 (Victoria), sections 51-52); a person with an impairment of the mind (Criminal Code (Queensland), section 216); a mentally ill or handicapped person (Criminal Code (Northern Territory), section 130); a person with intellectual disability (Criminal Law Consolidation Act 1935 (South Australia), section 49(6)); an incapable person (Criminal Code (Western Australia), section 330). (A "mentally ill or handicapped person" is defined in the legislation of Northern Territory as *"a person who, because of abnormality of mind, is unable to manage himself or herself or to exercise responsible behavior"*.(Criminal Code (Northern Territory), section 126). An "incapable person" is defined in the legislation of Western Australia as *"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."* (Criminal Code (Western Australia), section 330(1)) The terms used in the other legislation are not defined.)

The legislation in Tasmania adopts the term a person with mental impairment. (Criminal Code (Tasmania), section 126.) The term "mental impairment" is defined as *"senility, intellectual disability, mental illness or brain damage"*. (Criminal Code (Tasmania), section 126(3))

Canada

In the Canadian Criminal Code, a person with a mental disability is the term used to describe a person with mental illness. (Canadian Criminal Code, section 153.1 - sexual exploitation of a person with disability) The offence is committed if a person, who is in a position of trust or authority towards a person with a mental or physical disability or with whom such a person is in a relationship of dependency, touches that person for a sexual purpose without consent.

The term "mental disorder" is defined as *"a disease of the mind"*. (Canadian Criminal Code, section 2.)

England and Wales

In the English Sexual Offences Act 2003, there is a range of offences involving a person with a mental disorder. (English Sexual Offences Act 2003, sections 30 to 44) In the English Act, "mental disorder" is simply defined as *"any disorder or disability of the mind."* Under section 79(6) of the English Sexual Offences Act 2003, "mental disorder" has the same meaning given by section 1 of the Mental Health Act 1983.

New Zealand

In section 138 of the New Zealand Crimes Act 1961, a person with a significant impairment is the term used to describe a person with mental illness. "Significant impairment" is defined as *"an intellectual, mental, or physical condition or impairment (or a combination of 2 or more intellectual, mental, or physical conditions or impairments) that affects a person to such an extent that it significantly impairs the person's capacity-*

(a) to understand the nature of sexual conduct; or
(b) to understand the nature of decisions about sexual conduct; or
(c) to foresee the consequences of decisions about sexual conduct; or
(d) to communicate decisions about sexual conduct." (New Zealand Crimes Act, section 138(6))

11.50 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.

Recommendation 36

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

Review of some existing offences involving of persons with mental impairment

11.51 As we have proposed above a number of new offences involving persons with mental impairment, we shall review below some existing offences to consider if there is a need for their continued existence.

Scotland

In the Sexual Offences (Scotland) Act 2009, a person with mental illness is referred to as a mentally disordered person.(Sexual Offences (Scotland) Act 2009, section 17.) A "mental disorder" has the same meaning as that in section 328 of the Mental Health (Care and Treatment)(Scotland) Act 2003. (Sexual Offences (Scotland) Act 2009, section 17(3)) Section 328 defines "mental disorder" as:

"(a) mental illness;
(b) personality disorder; or
(c) learning disability,
however caused or manifested; and cognate expressions shall be construed accordingly".

Singapore

In the Penal Code of Singapore, the term "a person with a mental disability" is used. There is an offence of procurement of sexual activity with a person with mental disability. (Penal Code of Singapore, section 376F). The term "mental disability" is defined as *"an impairment of or a disturbance in the functioning of the mind or brain resulting from any disability or disorder of the mind or brain which impairs the ability to make a proper judgement in the giving of consent to sexual touching"*. (Penal Code of Singapore, section 376F(5))

A man commits buggery with a mentally incapacitated person (Crimes Ordinance, section 118E), a man committing gross indecency with a male mentally incapacitated person (Crimes Ordinance, section 118I), a man having intercourse with a woman mentally incapacitated person (Crimes Ordinance, section 125)

11.52 We consider that the offences of a man committing buggery with an MIP, a man committing gross indecency with a male MIP, and a man having intercourse with a woman MIP should be abolished upon the enactment of the new legislation.

11.53 The offences of a man committing buggery with an 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 included in the general non-consensual sexual offences recommended in our previous consultation paper and/or the above proposed offences involving PMIs which are gender-neutral.

Recommendation 37

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

Abduction of a mentally incapacitated person from her or his parent or guardian for a sexual act

11.54 It is an offence under section 128 of the Crimes Ordinance for a person to take an MIP out of the possession of her or his parent or guardian against the will of the parent or guardian, intending that the MIP to do an unlawful sexual act.

11.55 A similar offence (in section 21 of Sexual Offences Act 1956) was repealed in England and Wales in 2003.[8]

[8] See Sexual Offences Act 2003, Schedule 7.

11.56 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.

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

Sexual intercourse with patients (section 65(2) of the Mental Health Ordinance (Cap 136))

11.57 This offence covers the situation where any male officer or employee of mental hospital, 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 can be criticised for being gender-specific and covering penetrative sexual activity only. We consider that this offence should be abolished upon the enactment of the new legislation. The conduct covered by this offence would be included in the proposed new offences to protect PMIs and the general non-consensual sexual offences proposed in our previous consultation paper.

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.

Chapter 12

Consideration of approaches that may be adopted for reform of sexual offences involving abuse of a position of trust

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Introduction

12.1 The Sub-committee have already recommended in Chapter 7 a range of offences for the protection of children under 16. These offences protect children below the age of consent. A further issue relates to the protection of young persons aged 16 or above but under 18 (that is to say, 16 and 17 year-olds). These young persons are above the age of consent but are not yet adults. As they are above the age of consent, they are not protected.

12.2 Several overseas countries have introduced legislation for the protection of 16 and 17 year-olds arising out of positions of trust. In these countries, two different approaches are adopted:

(1) New South Wales (Australia), England and Wales, and Scotland - positions of trust defined by an exhaustive list

(2) Canada – positions of trust position not defined

First approach - positions of trust defined by an exhaustive list

12.3 This approach is exemplified by the legislation of New South Wales (Australia), England and Wales, and Scotland. Under this approach, the relationships giving rise to a position of trust are specified in the legislation by an exhaustive list.

New South Wales (Australia)

12.4 There is an offence of sexual intercourse with a child between 16 and 18 under special care in section 73 of the Crimes Act 1900 (New South Wales). It covers sexual intercourse between an alleged perpetrator and a young person between 16 and 18 who is under the special care of the alleged perpetrator.

12.5 The meaning of special care is defined in section 73(3) as follows:

> *"For the purposes of this section, a person (the victim) is under the special care of another person (the offender) if, and only if:*
>
> *(a) the offender is the step-parent, guardian or foster parent of the victim or the de facto partner of a parent, guardian or foster parent of the victim, or*
>
> *(b) the offender is a school teacher and the victim is a pupil of the offender, or*
>
> *(c) the offender has an established personal relationship with the victim in connection with the provision of religious, sporting, musical or other instruction to the victim, or*
>
> *(d) the offender is a custodial officer of an institution of which the victim is an inmate, or*
>
> *(e) the offender is a health professional and the victim is a patient of the health professional."*

England and Wales

12.6 In the English Act, there is a range of offences concerning the abuse of a position of trust:

- Abuse of position of trust: sexual activity with a child (section 16)
- Abuse of position of trust: causing or inciting a child to engage in sexual activity (section 17)
- Abuse of position of trust: sexual activity in the presence of a child (section 18)
- Abuse of position of trust: causing a child to watch a sexual act (section 19)

12.7 This range of offences covers situations where a person aged 18 or over (A), who is in a position of trust in relation to another person (B) under 18, involves B in types of specified sexual activity.[1]

12.8 The circumstances where a position of trust exists are listed in section 21 of the English Act. The list is fairly long and principally covers situations where an adult person is in a position of authority over the young

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

person; eg where A looks after persons under 18[2] who are detained in an institution by virtue of a court order or under an enactment; [3] or accommodated and cared for in a hospital or independent clinic;[4] or receiving education at an education institution;[5] and B is detained, resident, cared for or receiving education there. Other examples are: where A looks after B on an individual basis[6] and B is subject to a care order, a supervision order or an education supervision order;[7] or where B is subject to requirements of release from detention for a criminal offence.[8]

Scotland

12.9 There is an offence of sexual abuse of trust in section 42 of the Scottish Act. It covers the situation where a person aged 18 or above (A),

> *"(a) intentionally engages in a sexual activity with or directed towards another person (B) who is under 18, and*
>
> *(b) is in a position of trust in relation to B".*

12.10 Section 43 lists five circumstances where a position of trust exists as follows:

> *"43 **Positions of trust***
> *…….*
>
> *(2) The first condition is that B is detained by virtue of an order of court or under an enactment in an institution and A looks after persons under 18 in that institution.*
>
> *(3) The second condition is that B is resident in a home or other place in which accommodation is provided by a local authority under section 26(1) of the Children (Scotland) Act 1995 (c. 36) and A looks after persons under 18 in that place.*
>
> *(4) The third condition is that B is accommodated and cared for in—*
> *(a) a hospital,*

---

2 A person is considered to be looking after persons under 18 *"if he is regularly involved in caring for, training, supervising or being in sole charge of such persons*". (The English Act, section 22(2))

3 The English Act, section 21(2).

4 The English Act, section 21(4).

5 The English Act, section 21(5).

6 A person (A) is considered to be looking after another person (B) on an individual basis if *"(a) A is regularly involved in caring for, training or supervising B, and (b) in the course of his involvement, A regularly has unsupervised contact with B (whether face to face or by any other means)."* (The English Act, section 22(3))

7 The English Act, section 21(11).

8 The English Act, section 21(13).

(b) accommodation provided by an independent health care service,
(c) accommodation provided by a care home service,
(d) a residential establishment, or
(e) accommodation provided by a school care accommodation service or a secure accommodation service,
and A looks after persons under 18 in that place.

(5) The fourth condition is that B is receiving education at—
(a) a school and A looks after persons under 18 in that school, or
(b) a further or higher education institution and A looks after B in that institution.

(6) The fifth condition is that A—
(a) has any parental responsibilities or parental rights in respect of B,
(b) fulfils any such responsibilities or exercises any such rights under arrangement with a person who has such responsibilities or rights,
(c) had any such responsibilities or rights but no longer has such responsibilities or rights, or
(d) treats B as a child of A's family,
and B is a member of the same household as A.

(7) A looks after a person for the purposes of this section if A regularly cares for, teaches, trains, supervises, or is in sole charge of the person.

(8) The Scottish Ministers may by order modify this section (other than this subsection) and section 44 so as to add, delete or amend a condition."

12.11 A "looks after a person" if A *"regularly cares for, teaches, trains, supervises, or is in sole charge of the person"*. (section 43(7))

Second approach - positions of trust position not defined

12.12 In Canada, section 153(1) of the Canadian Criminal Code creates an offence of sexual exploitation. It covers sexual exploitation of a young person by a person who is (i) in a position of trust or authority towards a young person, (ii) a person with whom the young person is in a relationship of dependency or (iii) in a relationship with a young person that is exploitative of the young person.

12.13 Section 153(1) provides:

> *"153(1) who is in a position of trust or authority towards a young person, who is a person with whom the young person is in a relationship of dependency or who is in a relationship with a young person that is exploitative of the young person, and who*
>
> > *(a) for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person; or*
> >
> > *(b) for a sexual purpose, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person."*

12.14 A young person is a person aged 16 years or more but under 18 years. (section 153(2))

12.15 Neither the position of trust or authority, nor the relationship of dependency is defined in the Canadian legislation. The Supreme Court of Canada held in *R v Audet*[9] that in the absence of a statutory definition, these terms should be interpreted in accordance with their ordinary meaning.

12.16 Notwithstanding the lack of a statutory definition, La Farest J, pointed out in *R v Audet* that certain persons, by reason of their roles as entrusted by society, will in fact, and in the vast majority of cases, be within the meaning of these terms. These relationships are those in which the person can "dominate and influence" the young persons. "Consent" to a sexual relationship in these cases is inherently suspect. Included in these relationships are: student-teacher, parent-child, psychotherapist-patient, physician-patient, clergy-penitent, professor-student, attorney-client, and employer-employee.[10]

Considerations with regard to reform

12.17 The Sub-committee has considered a number of matters with regard to reform of the legislation for the protection of 16 and 17 year-olds.

12.18 The first and foremost question is: should there be legislation for the protection of 16 and 17 year-olds?

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[9] The Supreme Court of Canada in *R v Audet* [1996] 2 S.C.R.171 interpreted the meaning of these terms in relation to the offence of sexual exploitation of a young person in section 153.1 of the Canadian Criminal Code.

[10] In *R v Audet* [1996] 2 S.C.R.171(at para 40), La Farest J referred to his earlier decision in *Norberg v Wynrib* [1992] 2 SCR 226 at 255 in which he had made reference to the article of Professor Coleman entitled "Sex in Power Dependency Relationships: Taking Unfair Advantage of the 'Fair' Sex" (1988), 53 Alb L Rev 95. These examples of "power dependency" relationships were cited by Professor Coleman in that article.

12.19 If legislation is considered necessary, a further question will be: what should be the extent of the protection?

12.20 We shall firstly examine the arguments for and against legislation.

Arguments in favour of legislation for the protection of 16 and 17 year-olds

The protective principle

12.21 The United Nations Convention on the Rights of the Child (Article 1) provides that a child is a person below 18 years of age, unless under the law applicable, the age of majority is lower. Therefore, a young person aged 16 or above but under 18 is a child under that definition. Countries have the obligation to take legal and other measures to protect a child within that definition from all forms of sexual exploitation and abuse:

> Article 19 (para 1) provides:
>
> *"States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."*
>
> Article 34 provides:
>
> *"States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: (a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) The exploitative use of children in prostitution or other unlawful sexual practices; (c) The exploitative use of children in pornographic performances and materials."*

Good practice and professional codes do not provide adequate protection

12.22 As the Home Office Review Group in the UK points out, good practice and professional codes are not adequate to provide protection. Not all professions have defined codes and disciplinary procedures preventing vulnerable young persons from being unduly influenced into a sexual

relationship involving an imbalance of power and authority between the parties.

12.23 The Review Group also points out that legislation would not preclude a genuine relationship from developing between the parties. Ending the relationship would remove the legal prohibition. If, for example, a genuine relationship develops between a doctor and a patient, the patient can move to another doctor (which is in fact the appropriate ethical response):

> *"We were not convinced that the present regime of good practice and professional codes was adequate to provide protection. Whilst some professions have defined codes and disciplinary procedures, others do not. Some therapies are not regulated at all. Other countries have increasingly sought to define in law certain relationships which include such an imbalance of power and authority that where there is a sexual relationship it is so wrong as to be criminal. There is a strong case for the law to prohibit sexual relationships between vulnerable people (possibly those who cannot choose or can be unduly influenced into entering a sexual relationship) and those who provide medical, therapeutic or intimate care services to them, whether those services are provided in an institution or in the community. The law would reflect the serious abuse of the relationship of trust that is implicit in the relationship. It would not exclude a genuine relationship: breaking the caring relationship would remove the legal prohibition. (Just as now if a relationship develops between a doctor and a patient, the appropriate ethical response is for the patient to move to the care of another doctor.)"*[11]

The consent given by the young person may not be regarded as genuine

12.24 As 16 and 17-year olds are not adults, they are potentially vulnerable to sexual abuse and exploitation from adults in a position of trust over them. As the Scottish Law Commission points out, even though these young persons are capable of giving consent, their "consent" may not be regarded as genuine given the imbalance of position arising from the trust relationship.

12.25 The Scottish Law Commission further points out that a person who holds a position of trust over a young person would be abusing his or her position by engaging in sexual activity with that person:

> *"… Even if some instances of sexual contact with a person are wrong because of some characteristic of that person (such as age or mental condition), there is a separate and additional type of wrong where the perpetrator holds a position of trust over the*

[11] Home Office, *Setting The Boundaries: Reforming the law on sex offences* (July 2000), at paragraph 4.8.12.

victim. The existence of the trust relationship renders highly problematic any consent which the vulnerable person may give to sexual activity. But over and above the issue of the validity of consent, a person who holds a position of trust over another is acting inconsistently with the duties imposed by that position if he engages in sexual activity with that person... ."[12]

Overseas jurisdictions have legislation

12.26 The legislation of a number of common law jurisdictions has addressed the protection of 16 and 17 year-olds, including Canada, England and Wales, New South Wales (Australia) and Scotland. Although the legislation of these countries adopts different approaches as outlined above, it highlights the need for legislation to protect young persons from sexual exploitation by adults who are in a position of trust. Hong Kong would be lagging behind the major common law jurisdictions in not having similar legislation.

Legislation does not exclude all sexual activity

12.27 Legislation in this area precludes sexual activity only in specified situations where young persons are vulnerable because of an imbalance of relationship between the parties, for example, where there is a special care relationship, a position of trust, or an exploitative relationship over the young person. The legislation does not intervene in sexual activity involving 16 or 17 year-olds outside the relationships specified in the legislation.

Arguments against legislation for the protection of 16 and 17 year-olds

Genuine relationship should be recognised

12.28 One cannot rule out that a genuine relationship may develop between a young person and an adult in a position of trust over him or her, such as a teacher, a doctor, or a custodial officer. Unlike a child below the age of consent, a 16 or 17-year old person should have the sexual autonomy to choose to engage in consensual sexual activity with someone with whom he or she is in a genuine relationship.

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[12] Scottish Law Commission, *Report on Rape and Other Sexual Offences* (December 2007), Scot Law com No 209, at paragraph 4.107.

16 and 17 year-olds are mature enough to choose

12.29 Young persons nowadays mature physically earlier than before and many 16 and 17 year-olds are mature enough to choose whether to participate in consensual sexual activity.

Our views on the issue

12.30 There are arguments for and against the enacting of legislation for the protection of young persons aged 16 or above but under 18 and there are bound to be divergent views on the issue. There were in fact divergent views during the Sub-committee's deliberations on this issue. Given this, we take the view that the issue should be the subject of public consultation.

Recommendation 40

We are of 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, we invite the community to express their views on the issue.

Considerations in the event the community indicate that they are in favour of legislation

12.31 If the views of the community (yet to be ascertained during consultation) indicate that it is in favour of legislation, consideration will then have to be given to the extent of the protection to be given.

12.32 We shall discuss below some of these considerations.

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

12.33 The issue is whether the legislation should criminalise both penetrative and non-penetrative sexual activity. As seen above, legislation in some overseas countries such as England and Wales, and Scotland criminalises all forms of sexual activity but the legislation of other countries such as New South Wales criminalises sexual intercourse only.

12.34 We consider 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.

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)?

12.35 As seen above, the English legislation 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 (e.g. 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 Wales criminalises only direct sexual activity between the young person and the person having special care of the young person.

12.36 We consider that the legislation should not be limited to sexual activity conducted directly between the young person and a person in a position of trust. We have proposed in Chapter 7 a number of sexual offences involving children. 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 (Recommendation 13) and causing a child to look at a sexual image (Recommendation 14). We took the view 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 (see paragraph 12.22 above), they should likewise be protected.

Should there be an exhaustive list of positions of trust?

12.37 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 New South Wales (Australia), England and Wales, and Scotland.[13]

12.38 It is our view that the statutory definition should contain an exhaustive list specifying the relationships that would give rise to a position of trust. Such a list can make it clear to people the type of relationships covered by the legislation.

12.39 A good precedent of an exhaustive list can be found in section 73(3) of the Crimes Act 1900 of New South Wales (see para 12.5 above). 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) provider of religious, sporting, musical or other instruction and receiver of such instruction; (4) custodial officer and inmate; or (5) health professional and patient.

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[13] 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 of lacking a statutory definition.

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

English approach

12.40 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."*[14]

12.41 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.

12.42 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

12.43 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."*

12.44 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.

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

12.46 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 ensure that the young person is 18 or over. Moreover, parties to a specified relationship are not strangers to one another and 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.

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[14] The English Act, sections 16(1)(e), 17(1)(e), 18(1)(f), 19(1)(e).

12.47 We suggested a defence approach to reasonable belief as to age in respect offences involving children (see paras 4.59 in Chapter 4). 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.

12.48 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

12.49 The legislation of New South Wales and Canada specify 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.

Extraterritorial effect of offences involving children and persons with mental impairment

12.50 Section 72 of the English Act provides for extraterritorial effect of a wide range of sexual offences. They are listed in Schedule 2 of the English Act. The objective of the provision is to catch paedophiles who travel abroad to commit offences against children. Section 72 did not change the existing law with regard to sexual offences committed outside the UK by British citizens or residents but simply updated the law by applying extraterritoriality to the new offences in the English Act.[15]

12.51 In Hong Kong, section 153P of the Crimes Ordinance provides for extraterritorial effect of certain sexual offences specified in Schedule 2. Under section 153P, a Hong Kong permanent resident or ordinary resident, a body corporate incorporated or registered in Hong Kong, or a body of persons that has a place of business in Hong Kong who, commits an act outside Hong Kong; in relation to a child under 16 (or, in the case of an offence under section 123 or 140, a child under 13)[16]; and the act would have been a sexual offence specified in Schedule 2 had it been committed in Hong Kong, can be prosecuted in Hong Kong.

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[15] Kim Stevenson, Anne Davies, and Michael Gunn, *Blackstone's Guide to the Sexual Offences Act 2003* (Oxford University Press, 2004), at page 73.

[16] Intercourse with a girl under 13 (section 123 of Crimes Ordinance), permitting a girl or boy under 13 to resort to or be on premises or vessel for intercourse (section 140 of Crimes Ordinance).

12.52 We consider that in order to ensure that the new legislation is effective in covering paedophiles who travel abroad to commit offences involving children, we should follow the English approach in providing for extraterritorial effect of the new offences involving children, including sexual grooming proposed by us in this paper.

12.53 Furthermore, we consider that the proposed new offences involving persons with mental impairment should also have extraterritorial effect. Persons with mental impairment should enjoy the same protection as children against perpetrators who travel abroad to commit sexual offences on these persons.

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 13

Summary of recommendations

Recommendation 1: A uniform age of consent of 16 years in Hong Kong (see near paragraph 2.26)

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.

Recommendation 2: Offences involving children and young persons be gender-neutral (see near paragraph 3.12)

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

Recommendation 3: A range of offences involving children under 13 and another range of offences involving children under 16 (see near paragraph 3.45)

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 singe offence of child abuse.

Recommendation 4: The word "unlawful" be removed from all offences involving sexual intercourse or sexual act (see near paragraph 3.53)

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

Recommendation 5: Offences involving children and young persons be capable of being committed by either an adult or a child offender (see near paragraph 3.63)

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.

Recommendation 6: Whether absolute liability should apply to offences involving children between 13 and 16 years be considered by the Hong Kong community (see near paragraph 4.54)

We are of the view that the issues 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, we invite the community to express their views on the issue.

Recommendation 7: Marital defence to offences involving children be abolished (see near paragraph 5.39)

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).

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 (see near paragraph 6.35)

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.

Recommendation 9: Proposed new offence: Penile penetration of a child under 13/16 (see near paragraph 7.30)

We recommend 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 Sexual Offences Act 2003.

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

<u>Recommendation 10</u>: Proposed new offence: Penetration of a child under 13/16 (see near paragraph 7.39)

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

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

We recommend the adoption of a provision along the lines of section 19(2) of the Sexual Offences (Scottish) Act 2009 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.

We recommend that 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 a child under 13; similarly, a statutory alternative verdict for penetration of a child under 16, where the accused is charged with penile penetration a child under 16.

<u>Recommendation 11</u>: Proposed new offence: Sexual assault of a child under 13/16 (see near paragraph 7.45)

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 or saliva onto B sexually.

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

<u>Recommendation 12</u>: Proposed new offence: Causing or inciting a child under 13/16 to engage in sexual activity (see near paragraph 7.54)

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.

Recommendation 13: **Proposed new offence: Engaging in sexual activity in the presence of a child under 13/16 (see near paragraph 7.74)**

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 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.

Recommendation 14: **Proposed new offence: Causing a child under 13/16 to look at a sexual image (see near paragraph 7.83)**

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.

Recommendation 15: **Proposed new offence: Arranging or facilitating the commission of a child sex offence (see near paragraph 7.96)**

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.

Recommendation 16: **Health and treatment issues as exceptions to aiding, abetting and counselling a child sex offence (see near paragraph 7.101)**

We recommend there should be exceptions to aiding, abetting and counseling 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 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.

Recommendation 17: Sexual intercourse with a girl under 13/16 be abolished (see near paragraph 7.104)

We recommend 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.

Recommendation 18: Indecent conduct towards a child under 16 be abolished (see near paragraph 7.108)

We recommend 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.

Recommendation 19: A man committing buggery with a girl under 21 be abolished (see near paragraph 7.110)

We recommend 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.

Recommendation 20: Homosexual buggery with or by man under 16 and gross indecency with or by man under 16 be abolished (see near paragraph 7.114)

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

Recommendation 21: Abduction of an unmarried girl under 16 and abduction of an unmarried girl under 18 for sexual intercourse be abolished (see near paragraph 7.119)

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

Recommendation 22: Proposed new offence: Sexual grooming (see near paragraph 8.41)

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.

Recommendation 23: Proposed new offence: Inducement, threat or deception to procure sexual activity with a person with mental impairment (see near paragraph 11.7)

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.

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 (see near paragraph 11.9)

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.

Recommendation 25: **Proposed new offence: Engaging in sexual activity in the presence, procured by inducement, threat or deception, of a person with mental impairment (see near paragraph 11.12)**

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 PMI, or any combination of these purposes.

Recommendation 26: **Proposed new offence: Causing a person with mental impairment to watch a sexual act by inducement, threat or deception (see near paragraph 11.14)**

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 PMI, or any combination of these purposes.

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 (see near paragraph 11.18)**

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.

<u>Recommendation 28</u>: 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 (see near paragraph 11.20)

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.

<u>Recommendation 29</u>: 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 (see near paragraph 11.22)

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 the PMI, or any combination of these purposes.

<u>Recommendation 30</u>: 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 (see near paragraph 11.24)

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 the PMI, or any combination of these purposes.

Recommendation 31: Proposed definition of situations where a relationship of care exists (see near paragraph 11.27)

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 employed or not in a specified institution and who has a function to perform or provides volunteering service in that defined 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 Administration when the new legislation is put in place.

Recommendation 32: Exceptions where care provider and person with mental impairment are married or in pre-existing relationship (see near paragraph 11.32)

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-dated the care relationship.

We further recommend 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.

Recommendation 33: Requirement as to knowledge of mental illness (see near paragraph 11.33)

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.

Recommendation 34: Evidential burden as regards the accused's knowledge of the victim's mental illness (see near paragraph 11.34)

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 illness, along the lines of sections 38(2), 39(2), 40(2) and 41(2) of the English Sexual Offences Act 2003.

Recommendation 35: Proposed new offences involving persons with mental impairment applicable to mentally disordered persons or mentally handicapped persons (see near paragraph 11.47)

We recommend that the proposed new offences involving persons with mental impairment should apply to mentally disordered persons or mentally handicapped persons (as defined in the Mental Health Ordinance).

Recommendation 36: Draftsman to decide what term to describe the person with mental impairment (see near paragraph 11.50)

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

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 (see near paragraph 11.53)

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

Recommendation 38: Abduction of a mentally incapacitated person from her or his parent or guardian for a sexual act be abolished (see near paragraph 11.56)

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

<u>Recommendation 39</u>: Sexual intercourse with patients be abolished (see near paragraph 11.57)

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.

<u>Recommendation 40</u>: 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 (see near paragraph 12.30)

We are of 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, we invite the community to express their views on the issue.

<u>Recommendation 41</u>: Proposed new offences involving children (including sexual grooming) and those involving persons with mental impairment to have extraterritorial effect (see near paragraph 12.53)

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.

Annex

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

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

The English Sexual Offences Act 2003:

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

The Sexual Offences (Scotland) Act 2009:

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