

Law Reform Commission's Consultation Paper Rape and other Non-consensual Sexual Offences

Submissions of the Law Society of Hong Kong

The Law Society's Criminal Law and Procedure Committee has reviewed the Law Reform Commission's Consultation Paper *Rape and other Non-consensual Sexual Offences* and makes the following submissions on the recommendations:

Recommendation 1: Guiding principles for reform

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

We recommend that the guiding principles should include:

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

Law Society's response

We agree with the recommendation.

Recommendation 2: A statutory definition of consent

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

Law Society's response

We agree with the recommendation.

Recommendation 3: The proposed definition of consent

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

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

Law Society's response

We agree with the recommendation.

Recommendation 4: Capacity to consent to sexual activity

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

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

Law Society's response

We agree with the recommendation.

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

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

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

Law Society's response

We agree with the recommendation.

Recommendation 6: The scope and withdrawal of consent

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

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

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

Law Society's response

We do not agree with recommendations (b) and (c) as we do not consider a case has been made out to justify codification.

Recommendation 7: Scope of the offence of rape

We recommend that the new legislation should incorporate provisions along the lines of section 1(1)(a) of the English Sexual Offences Act 2003 to the effect that the scope of rape should cover penile penetration of the vagina, anus or mouth of another person.

Law Society's response

We agree with the proposal in Recommendation 7, subject to the deletion of the word "*or mouth of another person*". The expansion of the offence of rape to include forcible oral sex is unnecessary and derogates from the traditional understanding of rape.

We recommend a new separate offence to be created of indecent assault which should carry the same sentence as for rape.

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

We recommend that the term rape should continue to be used to describe the offence of non-consensual penile penetration.

We further recommend that a distinction should be made between rape and other non-consensual sexual offences which involve non-penile sexual penetrative acts.

Law Society's response

We agree with the recommendation subject to our comments on Recommendation 7 above.

Recommendation 9: Definitions of a penis and a vagina

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

Law Society's response

We agree with the recommendation.

Recommendation 10: Meaning of "penetration"

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

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

Law Society's response

The proposal is unnecessary as the concept of "consent" is clear and does not require the additional codification as proposed.

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

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

We also recommend that the new legislation should provide that self-intoxication is not a defence to rape and the other non-consensual sexual offences.

Law Society's response

We agree with the proposal in the 1st paragraph of Recommendation 11.

We consider the proposal of whether self-intoxication can be raised as a defence should be a matter left to the trial Judge's discretion. .

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

We recommend in relation to the offence of rape and other non-consensual sexual offences that the new legislation should incorporate provisions along the lines of sections 1(1)(b), 1(1)(c), 1(2), 2(1)(c), 2(1)(d), 2(2), 3(1)(c), 3(1)(d), 3(2) and 4(1)(c), 4(1)(d) and 4(2) of the English Sexual Offences Act 2003 to the effect that:

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

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

Law Society's response

We agree with the Recommendations in paragraphs (a) and (b) above.

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

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

Law Society's response

We agree with the recommendation.

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

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

Law Society's response

We agree with the recommendation.

Recommendation 15: Definition of "sexual"

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

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

Law Society's response

We agree with the recommendation.

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

We recommend that in the new legislation there should be an offence of sexual assault by penetration, which would be constituted by a person (A) who, without the consent of another

person (B) and without a reasonable belief that B consents, intentionally penetrate the vagina or anus of B with a part of A's body or anything else.

We recommend the adoption of a provision along the lines of section 2(4) of the Sexual Offences (Scottish) Act 2009 to the effect that for the purposes of the offence of sexual assault by penetration, a reference to penetration with a person's body is to be construed as including a reference to penetration with the person's penis.

We recommend that Schedule 1 to the Crimes Ordinance (Cap. 200) should be amended to allow a statutory alternative verdict for sexual assault by penetration where the accused is charged with rape.

We further recommend that the offence of non-consensual buggery under 118A of the Crimes Ordinance (Cap. 200) should be abolished upon enactment of the new legislation.

Law Society's response

We agree with the recommendation.

Recommendation 17: Definition of touching

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

- (a) with any part of the body,
 - (b) with anything else,
 - (c) through anything,
- and in particular includes touching amounting to penetration.

Law Society's response

We do not consider a case has been made out to codify the concept of "touching".

Recommendation 18: Sexual assault (first category)

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

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

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

Recommendation 19: Sexual assault (second category)

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

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

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

We further recommend that the offence of indecent exposure under section 148 of the Crimes Ordinance (Cap. 200) should be retained upon the enactment of the new legislation.

Recommendations 18, 19 and 20

Law Society's response:

We do not accept a case has been made out in relation to Recommendations 18, 19 and 20 and recommend the existing offence of "indecent assault" be retained.

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

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

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

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

Law Society's response:

We agree to the recommendation.

The Law Society of Hong Kong
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