



HONG KONG BAR ASSOCIATION

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Press Release

(For immediate release)

HKBA Supports the Introduction of a New Persistent Child Sexual Abuse Offence with Safeguards to Ensure a Fair Trial

General Comments

1. The Hong Kong Bar Association (“HKBA”) has submitted a detailed [written response](#) (the “Response Paper”) to the “Consultation Paper on Improving the Laws on Sexual Offences in Hong Kong” (“Consultation Paper”) prepared by the Security Bureau. Therein, HKBA made a number of recommendations.

2. In particular, the HKBA supports in principle the introduction of a new persistent child sexual abuse offence, subject to sufficient measures being introduced to ensure a fair trial.

3. The HKBA also supports the introduction of a statutory definition for consent as this will enhance the clarity and certainty of the law, especially when coupled with further guidance in the form of a non-exhaustive list of circumstances where the victim’s consent is to be taken as absent (which should give rise to a rebuttable evidential presumption, rather than an irrebuttable presumption of law).

4. The HKBA looks forward to reviewing the draft bill and expresses hope that it will reflect the policy direction embodied in the Consultation Paper and the HKBA’s recommendations thereon.

Overall Direction

5. The HKBA welcomes the policy direction embodied in the Consultation Paper, which represents a major leap forward in modernising this area of the law, ensuring that it keeps pace with contemporary social attitudes, principles of respect for sexual autonomy, and gender and sexual orientation neutrality etc.

6. In cases involving sexual offences, the public rightly sympathises with victims, especially when such involve vulnerable groups including children or persons with mental impairment which require special protection.

7. At the same time, under our judicial system, the “presumption of innocence” and the standard of proof of “beyond reasonable doubt” are crucial, and the basic rights of defendants, as espoused in the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap. 383), must be met.

Persistent Child Sexual Abuse Offence

8. While beyond the scope of the consultation, the HKBA, as invited, has considered Hong Kong’s development over the past two decades, as well as the development of sexual offences legislation in overseas common law jurisdictions (including Australia, New Zealand, Canada and South Africa), and broadly supports the introduction of a new persistent child sexual abuse offence. At the same time, when introducing the offence, the HKBA considers that the following safeguards are essential:

- a. Where the evidence is capable of sustaining distinct, particularised charges (e.g. rape), the prosecution should be expressly required to prefer substantive charges rather than resort to the persistent abuse offence.
- b. By analogy with the Practice Direction governing conspiracy charges, where a substantive charge is available, the indictment should not contain both a persistent abuse charge and a substantive charge covering the same conduct.

- c. The prosecution should not be allowed to, at the close of evidence, seek to amend the charge or apply for a conviction to be entered on the persistent abuse offence as a legal alternative to a substantive charge (or *vice versa*). The legislation should state clearly that the persistent abuse offence and the corresponding substantive offences are distinct offences and cannot be treated as legal alternatives or stated as alternatives to one another.
- d. The consent of the Secretary for Justice should be required to initiate a prosecution under the persistent abuse offence, and that prosecution guidelines should be issued and published to define strict thresholds for its adoption.

Consent, Absent of Consent and Non-consensual Sexual Offences

9. The HKBA takes the view that a statutory definition of consent (coupled with a list of vitiating circumstances) will enhance the clarity and certainty of the law. The list ought to be non-exhaustive, as the court must retain the ability to determine, on the facts of individual cases, whether consent was absent in circumstances not specifically enumerated in the statute.

10. The HKBA is further of the view the existence of a circumstance on the statutory list should give rise to a rebuttable evidential presumption rather than an irrebuttable presumption of law. This is necessary to preserve the defendant's right to a fair trial and the presumption of innocence as guaranteed by Article 11 of the Hong Kong Bill of Rights Ordinance.

11. The HKBA notes that one of the circumstances on the statutory list, i.e., where "the victim does not communicate consent either verbally or through actions", represents a significant shift in the law's approach. The HKBA considers it consistent with the protective principle and the principle of respect for sexual autonomy. It sends a clear message that affirmative indications of consent should be sought.

12. The HKBA generally agrees with the policy direction of expanding the scope of the offence of rape and creating three new non-consensual sexual offences as proposed, including sexual assault involving touching and sexual assault without touching.

Fair Trial

13. The HKBA stresses that the provisions should be carefully drafted to ensure that they do not inadvertently erode the presumption of innocence or the right to a fair trial.

14. In this connection, the HKBA recommends pre-conviction anonymity protection to be extended and made generally available to both the complainant and the accused in sexual offence cases due to the stigma attached.

15. HKBA notes that the public has expressed concerns about the scope of the reasonable belief defence, and recommends the legislation to make clear the factors to be considered in assessing reasonableness, including whether the defendant took any steps to ascertain consent.

Children Protection, Persons with Mental Impairment

16. The HKBA also puts forward the following additional observations:

- a. It has concerns over the imposition of absolute liability to offences involving children aged 13 or above but under 16, noting the importance of the availability of a statutory defence to avoid disproportionate outcome.
- b. It recommends a statutory defence of incidental exposure for the offence of “engaging in sexual act in the presence of a child under 16”, which may otherwise disproportionately affect underprivileged groups in cramped living conditions.

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- c. It recommends a clear definition for the term “sexual written or verbal communication” for the offence of “causing a child under the age of 16 to look at a sexual image, see or hear sexual written or verbal communication, or causing a child to send a sexual image or communication”.
- d. It invites clarification on the upper age limit for the offence of “sexual grooming of a child”.
- e. It recommends the inclusion of foster parents under the offence of incest.
- f. It invites a more precise statutory definition of “persons with mental impairment” who lack the capacity to consent to sexual acts.
- g. It expresses concerns on offences involving carers and persons in positions of trust or authority, which may effectively impose an arbitrary restriction on the choices of persons with mental impairment as their opportunity to develop intimate relationships may be confined to persons in their immediate care environment.

Please refer to the HKBA’s Response Paper regarding its other observations and recommendations.

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Photos



Mr. Hui, Martin S.T., S.C., Vice-Chairman of the HKBA, with the HKBA's Response to Consultation Paper on Improving the Laws on Sexual Offences in Hong Kong.

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The HKBA's Response to Consultation Paper on Improving the Laws on Sexual Offences in Hong Kong



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