

**Response to Consultation Paper on
Improving the Laws on Sexual Offences
in Hong Kong**

Hong Kong Bar Association

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Improving the Laws on Sexual Offences in Hong Kong (“Consultation Paper”)

General Comments

1. At the outset, the Hong Kong Bar Association (“**HKBA**”) acknowledges the considerable efforts of the Law Reform Commission (“**LRC**”) and its Review of Sexual Offences Sub-committee, as well as the Security Bureau, in bringing the present Consultation Paper to fruition. The Consultation Paper represents the result of sustained review work over the years on sexual offences in Hong Kong, reflecting input by various stakeholders over two decades. We commend the thoroughness of this process.
2. HKBA welcomes the policy direction embodied in the Consultation Paper, which represents a major leap forward in modernising this area of law, ensuring it keeps pace with evolving social attitudes since many of the offences were first enacted. HKBA further looks forward to seeing the draft bill, which we hope will sufficiently and effectively reflect the policy direction and HKBA's comments and suggestions.
3. HKBA will respond to the 10 questions set out in Appendix D of the Consultation Paper, along with other observations.

Question 1: Guiding Principles

4. This Question corresponds to paragraphs 12 to 14 of Chapter 1 of the Consultation Paper, which set out the two policy objectives of the reform (strengthening protection for victims and modernising the laws) and the six guiding principles recommended by the LRC in its Final Recommendation 1 (Appendix A1).
5. HKBA agrees with the guiding principles set out in Chapter 1 of the Consultation Paper. These principles — clarity of the law, respect for sexual autonomy, the protective

principle, gender neutrality, avoidance of distinctions based on sexual orientation, and adherence to the Basic Law, the Hong Kong Bill of Rights Ordinance (Cap. 383) and the International Covenant on Civil and Political Rights — reflect sound and established tenets of law reform that we have consistently endorsed in its previous submissions on the review of sexual offences.

6. HKBA also agrees with the two policy objectives of strengthening protection for victims of sexual offences and modernising the laws to keep pace with the times, and we support the overall direction of creating new offences and aligning penalties accordingly.

7. In particular, HKBA has on multiple occasions expressed its support for gender-neutral reform of sexual offence provisions and has endorsed the LRC's recommendations in this direction.

8. In advancing the principles of gender neutrality and equality, we must not lose sight of the fundamental tenet that an accused is presumed innocent until proven guilty. While historically, defendants in sexual offence cases have overwhelmingly been men — in part due to the outdated definitions of these offences — the proposed gender-neutral reforms present an opportune moment to reassess the rights of the accused. We take this opportunity to recommend that anonymity protection be extended and made generally available to both the complainant and the accused in sexual offence cases prior to conviction.

9. This extension aligns with recent trends in sexual offence reforms across other jurisdictions. For instance, the Isle of Man introduced legislation in 2024 providing automatic anonymity to those accused of any sexual offence until conviction. Similarly, the Republic of Ireland has maintained automatic anonymity for those accused of rape prior to conviction since 1981, and the 2020 O'Malley Report (Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences) recommended expanding this scope to cover all sexual offences.

10. Recognising the unique and severe social stigma attached to sexual offences compared to other crimes, granting anonymity to both the complainant and the accused would minimise prejudice and ensure a fair, level playing field. Under the current state of affairs, an accusation alone can inflict irreparable reputational damage on an innocent defendant, risking the presumption of innocence becoming a right in name only. This risk is particularly acute in Hong Kong's highly connected society, where the proliferation of online media and prevalent concerns over doxxing mean that the digital footprint of an initial arrest often permanently outlasts news of an acquittal.

11. HKBA is of the view that offering pre-conviction protection to the accused would in no way diminish the protection afforded to the complainant. We acknowledge that this must be carefully balanced against the competing imperatives of open justice and freedom of the press. We are also mindful of the counterarguments: namely, that creating a special anonymity rule solely for sexual offences might inadvertently reinforce the unique stigma surrounding them, and that the public identification of a suspect has historically played a vital role in encouraging other unknown victims to come forward. Nevertheless, we consider pre-conviction anonymity to be a proportionate measure, imposing only a temporary restriction for a limited duration. To effectively implement this in Hong Kong, the legislature must carefully consider the appropriate legal mechanism: specifically, whether the anonymity of defendants should be left to the discretion of judges to decide on a case-by-case basis, or whether it should be clearly established as an automatic right governed by ordinance, subject to judicial discretion to lift the restriction where it serves the public interest or is necessary to encourage other victims to come forward.

12. The principle of clarity of the law is of especial importance in criminal legislation, where certainty is a constitutional imperative. We note that Hong Kong's existing sexual offence provisions, many of which are rooted in English legislation dating back to 1956, are outdated and no longer adequate to address contemporary realities of sexual violence. As recognised in paragraph 3 of the Consultation Paper, the inadequacies in the existing provisions give rise to a number of problems, including gender-specific provisions,

distinctions based on sexual orientation that have been declared unconstitutional, and a lack of statutory definitions for key concepts such as “consent”.

13. HKBA would, nevertheless, observe that Hong Kong has its own existing legislative structure, and it does not follow that reform must in every respect replicate the approaches adopted in other jurisdictions. The specific proposals should be assessed by reference to their suitability for Hong Kong’s own legal system and conditions.

14. HKBA would further emphasise that the application of these guiding principles must be consistent with the fundamental rights of defendants under the Basic Law and the Hong Kong Bill of Rights Ordinance. In particular, HKBA has previously expressed concern regarding the application of absolute liability in the context of sexual offences involving children (see further our response to Question 4 below), and would urge that any legislative amendments flowing from these guiding principles be carefully drafted to ensure that they do not inadvertently erode the presumption of innocence or the right to a fair trial.

15. The guiding principles themselves are sound, but their translation into specific offence provisions must strike an appropriate balance between the protective principle and defendants’ rights — a balance that should be assessed on a provision-by-provision basis as the legislative exercise proceeds.

Question 2: List of Circumstances where Consent is Absent

16. This Question corresponds to Area (1)(A)(3) of Chapter 2 (paragraph 22) of the Consultation Paper. The Consultation Paper proposes specifying in the legislation a non-exhaustive list of 11 circumstances where consent on the part of the victim is absent.

17. HKBA agrees in principle with specifying in the legislation a non-exhaustive list of circumstances where consent on the part of the victim is to be taken as absent. The existing Crimes Ordinance does not provide a statutory definition for consent, which, as recognised

at paragraph 3(a) of the Consultation Paper, represents a significant deficiency. A statutory definition and a list of vitiating circumstances will enhance the clarity and certainty of the law, an objective that HKBA has consistently supported.

18. We note that the proposed statutory definition of consent (paragraph 19 of the Consultation Paper) encompasses two elements: (a) the capacity to consent, and (b) free and voluntary agreement.

19. The proposed list of 11 circumstances (paragraph 22) draws on comparative legislation from multiple common law jurisdictions. This comparative approach is to be commended. We have reviewed the 11 proposed circumstances individually and make the following observations.

20. **First**, we consider it important that the list of circumstances be expressly stated to be non-exhaustive, as proposed. 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. We note that this is the approach adopted in the Consultation Paper and endorse it.

21. **Second**, we emphasise that the existence of a circumstance on the statutory list should give rise to a *rebuttable* evidential presumption rather than an *irrebuttable* presumption of law. Where a defendant raises evidence that, notwithstanding the presence of a listed circumstance, the complainant did in fact consent, it should remain open to the tribunal of fact to consider that evidence in assessing whether “lack of consent” is proven. 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.

22. We note, in this connection, that the Consultation Paper at footnote 25 states that “*the prosecution must prove that the defendant knows that the victim does not consent to the sexual act with him, or the defendant does not reasonably believe that the victim*

consents to the sexual act with him”. This formulation appropriately places the burden on the prosecution.

23. **Third**, regarding circumstance 1 (the victim does not communicate consent either verbally or through actions), we recognise that this provision effectively places on a person the practical obligation to ascertain that the other party consents before engaging in a sexual act. While this represents a significant shift in the law’s approach, we consider it consistent with the protective principle and the principle of respect for sexual autonomy. From an educational standpoint, it sends a clear message that affirmative indications of consent should be sought. We do not object to this provision.

24. **Fourth**, regarding circumstance 8 (intoxication by drugs or alcohol rendering the victim unable to understand the act, form a decision, or communicate a decision), HKBA recognises that this provision appropriately enhances protection for victims.

25. However, we are concerned that the wording, taken on its face, may not afford adequate safeguards for a defendant in a scenario involving mutual alcohol consumption. It is not difficult to envisage a situation in which both parties have consumed alcohol and one party, acting without malice, reasonably (but mistakenly) believes the other is consenting. In such circumstances, it is essential that the defence of genuine but mistaken belief in consent is not inadvertently excluded or ignored.

26. We would urge that the legislation make clear that intoxication is relevant to the victim’s capacity to consent, but that this does not displace the general requirement for the prosecution to prove the defendant’s knowledge of non-consent or absence of reasonable belief in consent. Consent is not the only element of these offences, and the balance with the defendant’s rights must be maintained.

27. **Fifth**, regarding circumstance 10 (the victim is mistaken as to the nature or purpose of the sexual act), HKBA considers that the present wording is somewhat vague. It is not immediately apparent what factual scenarios are intended to be captured by this provision,

beyond cases of outright deception as to the nature of the act itself. We recommend that this circumstance be more clearly defined and firmly anchored within the concept of consent, so as to avoid the risk of over-broad application or public misunderstanding of its scope.

28. **Sixth**, we note that the Consultation Paper (in particular footnote 23 and the discussion at paragraph 22) proposes that the prosecution must prove that the defendant did not reasonably believe that the victim consented. We support this formulation as appropriately balancing the interests of complainants and defendants. HKBA notes, nonetheless, that public concern has been expressed about the scope of the reasonable belief defence, and recommends that the legislation make clear the factors to be considered in assessing reasonableness, including whether the defendant took any steps to ascertain consent.

29. More broadly, HKBA emphasises that in any reform of this area, the burden of proof must not be lost sight of. Sexual offence allegations are, by their nature, difficult to rebut, particularly in one-on-one situations. Existing protections that support or permit the defence of mistaken belief in consent should not be disturbed or undermined by the introduction of the statutory list. The proposed legislative drafting should be closely scrutinised in this regard.

30. **Seventh**, we observe that certain of the 11 listed circumstances (for example, circumstance 9, concerning the non-use, removal or tampering with sexually protective measures such as condoms) represent a relatively novel development in sexual offence law. While we agree in principle that such stealthing conduct vitiates consent, we recommend that the drafting of this provision be given careful attention to ensure that it is sufficiently clear and precise to avoid difficulties in proof and application.

Question 3: Non-consensual Sexual Offences

31. This Question corresponds to Area (1)(B) of Chapter 2 (paragraphs 23 to 40) of the Consultation Paper, which proposes: (a) expanding the scope of rape (paragraphs 23 to 28); (b) creating a new offence of “sexual assault involving touching” (paragraphs 29 to 31); (c) creating a new offence of “sexual assault without touching” (paragraphs 32 to 34); and (d) creating a new offence of “causing a person to engage in sexual act without consent” (paragraphs 35 to 40).

32. HKBA agrees with the direction of expanding the scope of the offence of rape and creating three new non-consensual sexual offences as proposed.

33. As to the expanded offence of rape (paragraphs 23 to 28 of the Consultation Paper), we note that under the existing section 118(3) of the Crimes Ordinance, only a man can be found guilty as a principal offender and only a woman can be a victim. The limitation of rape to penile penetration of a woman’s vagina by a man is manifestly out of step with contemporary understandings of sexual violence and fails to reflect the equal gravity of other forms of non-consensual sexual penetration.

34. The expansion of the scope of rape to cover non-consensual penetration of the vagina, anus or urethra by any bodily part or object, as well as non-consensual penile penetration of the mouth, regardless of the gender of either the victim or the offender, is a necessary and overdue reform consistent with the LRC’s Final Recommendations 7 and 11 (Appendix A1). We note that this is consistent with the approach adopted in most other major common law jurisdictions, including England and Wales, Scotland, and several Australian states.

35. We note that the Government proposes to retain the term “rape” for the expanded offence, departing from the LRC’s recommended term “sexual penetration without consent”. We agree that “rape” is broadly understood by the community and connotes the gravity and severity of the offence. As the Consultation Paper observes at paragraph 25,

footnote 26, abandoning this commonly used term may risk giving the public a false impression that the expanded offence is of a less serious nature.

36. From a jurisprudential perspective, the retention of the term “rape” facilitates cross-referencing to case authorities, both domestic and in other common law jurisdictions, and may assist in the accessibility of Hong Kong’s case law for comparative purposes. HKBA does not hold a strong view on the naming issue and is content with either formulation, but notes the practical advantages of retaining the established term.

37. As to “sexual assault involving touching” (paragraphs 29 to 31), HKBA supports the creation of this offence to replace “indecent assault” under section 122 of the Crimes Ordinance.

38. As to “sexual assault without touching” (paragraphs 32 to 34), we agree with the rationale set out in the Consultation Paper that, if the new offence of “sexual assault” is confined to touching, certain currently unlawful conduct (such as the scenario described in footnote 33 of the Consultation Paper) may no longer be unlawful. We therefore support the creation of a separate non-contact offence to plug current lacunae.

39. We note that there may be a potential intersection between the proposed offence of “sexual assault without touching” and the separately proposed offence of “sexual exposure” (paragraphs 96 to 98 of the Consultation Paper). The latter appears primarily directed at situations where an offender exposes their own body, whereas the former may encompass conduct where an offender non-consensually exposes another person, including by forcibly removing that person’s clothing. In such circumstances, the conduct may involve both touching (in the act of removal) and exposure (in the result). We would invite the Government to clarify the intended boundary between these offences, in particular whether non-consensual exposure of another person is intended to fall solely within “sexual assault without touching” or whether it is also contemplated under “sexual exposure”. We do not consider this convergence of scope to be inherently problematic, as each offence contains distinct elements and the availability of more than one applicable offence may assist the

prosecution in ensuring that no gaps in coverage arise. That said, if it is intended that an offence specifically addressing the non-consensual exposure of another person should exist, it would be preferable for the legislation to articulate this expressly.

40. As to “causing a person to engage in sexual act without consent” (paragraphs 35 to 40), HKBA supports the creation of this offence to address the scenario, described at paragraphs 36 to 37, where a person compels another to perform a sexual act. The existing offence of procurement by threats under section 119 of the Crimes Ordinance is unduly narrow. We agree that the guilt should lie with the person who compelled the act, not the person being compelled, and that this embodies the principle of sexual autonomy, and we suggest that the statute expressly provides that the guilt does not lie with the person being compelled.

41. As with all new offences, we would urge that the offence elements be drafted with sufficient clarity and precision, so that defendants can know with reasonable certainty the case they have to meet.

Question 4: Age of Consent

42. This Question corresponds to Area (2)(A) of Chapter 2 (paragraphs 44 to 47) of the Consultation Paper. The Consultation Paper proposes that a uniform “age of consent” of 16 should remain applicable irrespective of gender and sexual orientation, consistent with the LRC’s Final Recommendation 1 (Appendix A2).

43. HKBA agrees that the age of 16 should apply as the uniform age of consent. We welcome and commend this proposal. This has long been HKBA’s position.

44. A uniform age of consent of 16, applicable irrespective of gender and sexual orientation, is consistent with the principles of gender neutrality and avoidance of distinctions based on sexual orientation. As noted at paragraph 47 of the Consultation Paper, this is also consistent with the approach in most other major common law

jurisdictions, including Australia, Canada, England and Wales, New Zealand, Scotland, Singapore, and South Africa. We further note the Government's view at paragraph 47, footnote 39, that persons aged above 16 are near-adults whose sexual autonomy should be respected, and that the general non-consensual sexual offences proposed under Area (1) can offer protection to all victims of non-consensual sexual acts, regardless of age. We agree with this analysis.

45. We would, however, reiterate our concern regarding the application of absolute liability to offences involving children aged 13 or above but under 16. The Consultation Paper at footnote 41 proposes that absolute liability will apply "*in most cases*" for this age group, subject to the availability of certain statutory defences (for example, whether there was in-person contact between the defendant and the victim, and whether the defendant had taken all reasonable steps to ascertain the victim's age). We consider that the availability of such a statutory defence is essential to avoid disproportionate outcomes, particularly in cases involving young defendants of similar age to the complainant.

46. HKBA has previously drawn attention to the case example of a secondary schoolboy who has sexual intercourse with a younger schoolgirl during a relationship. Under the offence of unlawful sexual intercourse with a girl under the age of 16, which pursuant to *So Wai Lun v HKSAR* (2006) 9 HKCFAR 530 is an offence of absolute liability, a defendant may honestly believe that the girl was over 16 yet still be guilty of an offence. The consequences may be disproportionate. The scope and formulation of the proposed statutory defence should therefore be closely scrutinised in the drafting of the bill.

47. We also endorse the retention of prosecutorial discretion in cases of consensual sexual activity between persons who are between 13 and 16 years of age (the LRC's Final Recommendation 8, Appendix A2), and the continuation of the Police Superintendent's Discretion Scheme for eligible young offenders. We note that this approach was discussed at the LegCo Panel meeting on 27 February 2017, where the LRC's Sub-committee acknowledged that legalising consensual sexual activity between children could make it

difficult for parents, social workers and police to deal with problems arising from premature sexual activities.

Question 5: MIPs to PMIs

48. This Question corresponds to Area (3) of Chapter 2 (paragraphs 74 to 90) of the Consultation Paper, in particular paragraphs 76 to 85 concerning the proposed reform directions and revised definitions.

49. HKBA agrees with the reform direction of improving the laws on sexual offences involving persons with mental impairment (“**PMIs**”). As stated at the LegCo Panel meeting on 27 February 2017, HKBA was “*in agreement with most of the recommendations*” of the LRC’s Consultation Paper on Sexual Offences Involving Children and Persons with Mental Impairment, which included the approach of distinguishing between:

- a. PMIs who lack the capacity to consent to sexual acts (“**PSMIs**”), with whom sexual activity should be absolutely prohibited; and
- b. PMIs who retain some degree of capacity to consent but may be vulnerable to sexual exploitation.

50. This approach reflects a proper balance between the protective principle and respect for sexual autonomy. The Consultation Paper recognises at paragraph 80 that PMIs with a lower degree of mental impairment “*still have the capacity to consent to sexual acts, and thus their sexual autonomy should be respected*”. We agree with this analysis. It is not appropriate to treat all PMIs as categorically incapable of consenting.

51. As to PSMIs (paragraph 79 of the Consultation Paper), we agree in principle that sexual acts with PSMIs should be strictly prohibited. However, we would invite the Government to provide a more precise statutory definition of PSMI, so as to ensure that this category can be readily identified and proved in practice. The definition must provide

a clear and easily understood foundation for the classification of a person as a PSMI. We note, in particular, the question of what safeguards exist for a defendant who did not know, and could not reasonably have known, that the other person fell within the PSMI category. Where a defendant genuinely does not know that the other person is a PSMI, the basis on which criminal liability is to be established requires careful articulation.

52. As to the revised definitions (paragraphs 82 to 85 of the Consultation Paper), we support the proposal to replace the term “mentally incapacitated person” with “person with mental impairment” and to remove the overly stringent requirement that a person be “incapable of living an independent life or guarding himself against serious exploitation”. As the Consultation Paper recognises at paragraph 82, the present definition cannot accord adequate protection to PMIs of different degrees of impairment. The revised definition, covering any mentally disordered person or mentally handicapped person within the meaning of the Mental Health Ordinance (Cap. 136), is more appropriate and more inclusive, consistent with the LRC’s Final Recommendations 35 and 36 (Appendix A2).

53. As to the proposed offences targeting PMIs who retain capacity to consent (paragraphs 86 to 88), we support the three-pronged approach targeting:

- a. sexual acts with PSMIs (paragraph 79);
- b. sexual exploitation of PMIs by perpetrators using inducement, threat or deception (paragraph 80(i)); and
- c. sexual exploitation of PMIs by persons in a relationship of care, or abusing a position of trust or authority, or a relationship of dependency (paragraph 80(ii)).

54. This is consistent with the three categories discussed at the 27 February 2017 LegCo Panel meeting, where it was explained that the reform aimed at distinguishing offences reflecting an absolute bar to sexual activity with certain types of PMIs and offences reflecting potential exploitation of PMIs who were able to consent.

55. HKBA would, nevertheless, raise a specific concern regarding the third category — offences involving carers and persons in positions of trust or authority. The Consultation Paper proposes that sexual acts between a carer and a PMI (whether inside or outside an institution) should constitute an offence, subject to certain exceptions for pre-existing marriages or relationships. While we appreciate the protective rationale for this approach, we are concerned that it may be overly tilted towards protection at the expense of the sexual autonomy of PMIs who have the capacity to consent. A PMI's opportunities to form intimate relationships may, in practice, be largely confined to persons in his or her immediate care environment. If the law prohibits all such relationships, notwithstanding the PMI's capacity to consent, it may effectively impose an arbitrary restriction on the PMI's choices, which sits uneasily with the guiding principle of respect for sexual autonomy.

56. We would invite the Government to consider whether the evidence base adequately supports a blanket prohibition in this context, and whether a more nuanced approach — for instance, one that focuses on the exploitation of the relationship rather than its mere existence — might better serve both the protective principle and the principle of sexual autonomy. That said, we recognise the difficulty of drawing this line and do not underestimate the risk of exploitation in such relationships.

57. We also emphasise the importance of providing clear statutory exceptions, for example, where the PMI and the alleged offender were married, or where there was a pre-existing lawful sexual relationship, to ensure that carers and other persons in positions of trust are not inadvertently caught by the new offences in circumstances that do not involve exploitation. We note that the Consultation Paper at footnote 71 proposes such exceptions, and we endorse this approach.

58. We further urge that the legislative drafting carefully define the *mens rea* / mental element requirements for each of the new PMI offences. The scope of the proposed 18 new offences is substantial, and it is important to ensure that the offences are not overbroad

as to create a chilling effect on the provision of legitimate care and support services to PMIs. The proposed drafting of the bill should be closely scrutinised in this regard.

Question 6: Offences Targeting Abuses of Vulnerable Groups

59. This Question corresponds to Area (2)(5) for “engaging in sexual act in the presence of a child under 16” and Area (2)(6) for “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” of Chapter 2 of the Consultation Paper.

60. Paragraphs 51 to 59 propose the creation of the offence of “engaging in sexual act in the presence of a child under 16.” While we welcome this new offence in principle, we are concerned that, given the living conditions in Hong Kong, privacy may be a luxury for certain families, and parents in lower-income households could be disproportionately caught by the new offence. Although paragraph 58 recognises and attempts to address this issue, we consider the proposed safeguard inadequate and is at risk of unintentionally affecting underprivileged groups rather than paedophiles. In particular, the safeguard in paragraph 58 rests entirely on proving subjective intent. In cramped living conditions, where children may inadvertently witness consensual adult activity, the line between incidental exposure and alleged deliberate conduct/intent may become confused. Further, such a safeguard, absent explicit statutory language exempting incidental exposure, undermines the principle of clarity and deprives the law of predictability. Ordinary parents cannot reasonably be expected to anticipate how “deliberate intent or purpose” will be interpreted in prosecutorial decision. Accordingly, a more robust safeguard is required, for example, in the form of a statutory defence that expressly excludes incidental exposure.

61. Paragraphs 60 to 61 propose the creation of 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”.

62. While we agree in principle that this proposed offence seeks to protect children, there are concerns regarding the definitions of “sexual image” **and** “sexual written or verbal communication”. Unlike sexual physical conduct — where the standard of the “right-minded person” is well established — the varied nature of modern media makes it difficult to draw a clear line as to when non-physical conduct becomes “sexual”.

63. For “sexual image”, the LRC recommended adopting the definition in section 23(3) of the Sexual Offences (Scotland) Act 2009, which provides:

- “(a) [A person] engaging in a sexual activity or of a third person or imaginary person so engaging;
- (b) [A person]’s genitals or the genitals of a third person or imaginary person”.

64. However, “sexual written or verbal communication” remains undefined and may be particularly challenging to delineate. Slang, innuendo, and colloquial expressions are often involved, and may be light-hearted rather than motivated by sexual intent. We are of the view that this term should be clearly defined to ensure legal certainty and avoid over-breadth in application.

Question 7: Extraterritorial Effect

65. This Question corresponds to Area (2)(C) of Chapter 2 concerning children, and Area (3)(D) of the Consultation Paper concerning PMIs.

66. Paragraphs 71 to 73 propose giving extraterritorial effect to the new sexual offences involving children, aligning with the current position under section 153P of the Crimes Ordinance.

67. Paragraph 89 also proposes introducing extraterritorial effect to the new PMI sexual offences. This represents a new development.

68. HKBA commends the proposal at paragraph 89 to extend extraterritorial effect to PMI sexual offences, mirroring the position for sexual offences involving children. We agree that PMIs should be afforded the same level of protection from perpetrators who travel abroad to commit sexual offences. In principle, we are of the view that the established operation under section 153P should be followed.

Question 8: Preparatory / Ancillary Offences

69. This Question corresponds to Area (2)(7) for “sexual grooming of a child” and Area (2)(8) for “arranging or facilitating the commission of a child sexual offence” of Chapter 2 of the Consultation Paper.

70. Paragraphs 63 to 66 propose the creation of an offence of sexual grooming of a child, which criminalises a person who, having met or communicated with a child, intentionally meets or travels to meet the child with the intention of sexually abusing the child. We agree that this is an issue requiring legislative attention. We note that, unlike other sexual offences involving children, the offence of “sexual grooming of a child” does not specify the age of the child. We would respectfully invite clarification as to whether this omission is intentional so as to protect children above the age of 16, and if so, the upper age limit that is intended.

71. It is suggested that provision be made for prosecutions involving “fictitious young persons” posed by a police officer. While we do not oppose this in principle, we consider it important to recognise the potential abuse of process concerns that may arise in its enforcement and to ensure that any such mechanism is accompanied by safeguards that fully protect an accused’s right to a fair trial.

72. Paragraphs 67 to 70 propose the creation of the offence of “arranging or facilitating the commission of a child sexual offence”. We note that the example given in paragraph 68 — driving a car as a facilitation offence — may not clearly demonstrate that such conduct falls outside the scope of existing inchoate offences, including aiding and abetting,

conspiracy, or joint enterprise. We would respectfully invite further clarification to ensure that the proposed offence is appropriately delineated and does not inadvertently extend to conduct already addressed under current law.

73. We further observe that the targeted conduct appears unduly broad, potentially covering otherwise innocent activities and conduct that are not presently criminal. For example, the provision of goods or services or even ostensible acts of goodwill could easily fall within “arranging or facilitating”. The proposed drafting of the bill should therefore be closely scrutinised to ensure that the offence is appropriately confined and does not inadvertently criminalise legitimate conduct.

Question 9: Miscellaneous Sexual Offences

74. This Question corresponds to Area (4) of Chapter 2 of the Consultation Paper. Paragraphs 91 to 113 propose reform for miscellaneous sexual offences:

- (A) Expanding the coverage of the offence of “incest”
- (B) Creating a new offence of “sexual exposure”
- (C) Creating a new offence of “sexual penetration of an animal”
- (D) Creating a new offence of “sexual act with a dead person”
- (E) Creating a new offence of “administering a substance for sexual purposes”
- (F) Creating a new offence of “trespass with intent to commit a sexual offence”
- (G) Creating a new offence of “committing an offence with intent to commit a sexual offence”

75. HKBA in principle welcomes the reform, which reflects the guiding principles of the consultation exercise, including the principle of gender neutrality and the avoidance of distinctions based on sexual orientation.

76. We have previously commented on the LRC’s Consultation Paper on Miscellaneous Sexual Offences. In relation to item (A), we suggested extending the prohibited family

relationship to step-parents and foster parents in the offence of incest. The Consultation Paper does not seek to include foster parents. We maintain the view that, as the present offence has already extended beyond blood relationships to focus on relationships of trust, foster parents should likewise be included as they share similar responsibility and position of trust as a step-parent vis-à-vis the child.

77. In relation to item (F), we previously recommended that the intent requirement for trespass with intent to commit a sexual offence should cover the period before, during, and after entry, so that the offence is not unduly limited. We do not hold a strong view on this point. However, law enforcement agencies should remain mindful that trespass itself is not a criminal offence, and that cogent evidence should be required in any prosecution under this provision.

Question 10: Strengthening Victims' Protection

78. This Question corresponds to Area (5) of Chapter 2 of the Consultation Paper.

79. Although not based on the recommendations of the LRC, paragraphs 117 to 127 of the Consultation Paper propose a series of reforms aimed at expanding existing victim protection measures:

- (1) “Anonymity of complainants”
- (2) Restricting cross-examination on the victim in court about his sexual experience with persons other than the defendant
- (3) Giving evidence by live television link
- (4) The court has the right to remove the offender from the guardianship of the victim
- (5) Special procedures in trials to protect child victims
- (6) Allowing the court to order the defendant or other persons to remove, delete or destroy intimate images concerned as appropriate to further protect the victims

- (7) The defendant's spouse being competent and compellable to give evidence for the prosecution regarding the specified offences specified in law in the case of sexual offences committed in respect of a child of the family

80. In principle, once the sexual offences have been reformed, there is no reason why the relevant measure should not follow. However, the scope of applicable offences should be closely considered.

81. For items (1) to (4), it is proposed that the category of "specified sexual offences" under section 117 of the Crimes Ordinance be expanded to cover victims in non-consensual sexual offences, sexual offences involving children, sexual offences involving PMIs, miscellaneous sexual offences, voyeurism-related offences and other related sexual offences, thereby enhancing privacy protections. This represents a marked expansion over the current scope, which covers:

"rape, non-consensual buggery, indecent assault, an attempt to commit any of those offences, aiding, abetting, counselling or procuring the commission or attempted commission of any of those offences, and incitement to commit any of those offences"

82. While it is generally agreeable that the existing protection measures should be available in the equivalent offences, any expansion of the scope should be fully discussed and considered.

83. The same applies to the remaining items. Item (5) seeks to expand "offences of sexual abuse" to cover voyeurism-related offences; Item (6) seeks to expand the scope of the disposal order for images obtained through voyeurism or unlawful recording of intimate parts, which would result in a much expanded scope of affected persons, which might be numerous; and Item (7) seeks to expand the scope of competence and compellability of spouses, which is a complex issue and itself the subject of another LRC report in 1988 "Competence and Compellability of Spouses in Criminal Proceedings". However, the

extent to which the privilege against spousal-incrimination should be abrogated must be considered with care as spousal privilege remains an important part of our laws and is widely recognised as a core component of family life in Hong Kong.

84. We also reiterate that, while the importance of victim-protective measures is recognised, it is necessary, as a matter of principle, to ensure that the defendant's fundamental right to a fair trial is not affected.

85. We wish to highlight that for item (2), the restriction on cross-examining prior sexual experience under the current section 154(1) Crimes Ordinance is not an absolute bar. The court retained a discretion to allow such questions, and under section 154(2), the judge should allow an application “*if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked*”. This discretion should remain, serving as a procedural safeguard to a fair trial.

Proposed Offence of “Persistent Child Sexual Abuse”

86. By an email and Information Paper received on 28 July 2026, the Department of Justice asked HKBA to also consider the proposal of creating a persistent child sexual abuse offence. It is noted that HKBA opposed such proposal in 2001/2002. Having considered the Information Paper and the developments set out therein, HKBA has reconsidered the matter, and now broadly agrees with the proposal to introduce an offence of persistent child sexual abuse, subject to the qualifications and safeguards set out below and an examination of the actual wording of the relevant provision(s).

87. HKBA acknowledges that the concerns it expressed in the 2001 Joint Views and the 2002 Joint Response have been substantially addressed by the developments set out in the Information Paper. In particular, HKBA notes that post-*Chim Hon Man* case law has demonstrated that the “on an occasion other than” approach, whilst a useful procedural tool, does not fully overcome the evidential difficulties inherent in cases of persistent child sexual abuse, especially where a child has suffered continuous abuse over several years

and naturally remembers the trauma as an undifferentiated whole. HKBA further notes that six Australian states and two territories, the United Kingdom, New Zealand, Canada and South Africa have all addressed this difficulty through legislative reform.

88. HKBA considers, however, that the following safeguards are essential to ensure that the proposed offence operates fairly and does not prejudice defendants' rights:

- a. **First**, where the evidence is capable of sustaining distinct, particularised charges, the prosecution should be expressly required, not merely encouraged, to prefer substantive charges rather than resort to the persistent abuse offence. This remedial measure should be stated on the face of the legislation or, at a minimum, in formal prosecution guidelines issued by the Secretary for Justice. The persistent abuse offence should operate as a remedy of last resort, available only where the nature of the abuse is such that the child victim's evidence cannot reasonably be particularised into individual counts. The Information Paper acknowledges this principle at paragraph 23, where it states that “[s]pecific individual charges remain preferred whenever distinct details are available”. HKBA considers that this principle should be given legislative force, not merely stated as a matter of prosecutorial policy.
- b. **Second**, by analogy with the Practice Direction governing conspiracy charges, where a substantive count is available, the indictment should not contain both a persistent abuse charge and a substantive count covering the same conduct. The prosecution should be required to elect between the two. If the evidence permits the offences to be divided and charged individually, the prosecution should not resort to the persistent abuse offence. HKBA notes that section 4 of the Model Provisions set out in the Information Paper (at paragraph 24) does contemplate the possibility of charging both an unlawful sexual relationship offence and individual sexual offences on a single indictment. HKBA has reservations about this approach and would

urge that the Hong Kong legislation instead adopts a requirement for election, so that the prosecution proceeds either on the persistent abuse charge or on individual substantive counts, but not both.

- c. **Third**, a specific concern arises as to whether the prosecution may, 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). In this regard, it would be fairer to the defendant if the legislation stated clearly that the persistent abuse offence and the corresponding substantive offences are distinct offences and cannot be treated as legal alternatives or stated alternatives to one another. Without such clarity, a defendant who has prepared his defence on the basis of a substantive charge may find, at the close of evidence, that the prosecution seeks a conviction on the persistent abuse offence instead, or the reverse. Such shifting of ground would cause considerable difficulty for a defendant in knowing and meeting the case against him, and would be inconsistent with the principle of fairness articulated in HKBA's previous submissions.
- d. **Fourth**, HKBA notes that the Information Paper proposes that the consent of the Secretary for Justice should be required to initiate a prosecution under the persistent abuse offence, and that prosecution guidelines will be issued to define strict thresholds for its adoption. HKBA supports both of these institutional safeguards. We would further recommend that the prosecution guidelines be published and that they specify, with reasonable particularity, the circumstances in which resort to the persistent abuse offence is appropriate, including, at a minimum, the requirement that the prosecution has first considered and rejected the possibility of preferring substantive charges.

Conclusion

89. HKBA supports the overall direction of the Consultation Paper in modernising Hong Kong's sexual offence laws, strengthening protection for victims, and aligning the statutory framework with contemporary principles of clarity of the law, sexual autonomy, gender neutrality, and avoidance of distinctions based on sexual orientation.

90. We take this opportunity to commend the Administration and all stakeholders for advancing this substantial and long-awaited law reform initiative. The breadth of engagement reflected in the policy direction embodied in the Consultation Paper is appreciated. We look forward to receiving further updates and to being engaged in the continued progress of the drafting and legislative exercise.

Hong Kong Bar Association

5 August 2026