Time for change: No more Gender Specific and Sexual Orientation Approach under the law on sexual offences in Hong Kong

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Abstract

Sexual offences are protected in Hong Kong under the Crimes Ordinance. However, the laws governing sexual offences are discriminate on grounds of gender and sexual orientation. In a modern society, laws should not be subject of unnecessary discrimination. It should set out the rights of citizens and ensure the enjoyment of these rights. It is unjust to retain offences that are in favour of a particular gender and it is discriminating to retain offences that are targeting people with different sexual orientation. This paper examines and evaluates the use of gender specific and sexual orientation approach in sexual offences and provides suggestions for improvement. This paper concludes it is time for a change, no more gender specific and sexual orientation approaches under the law on sexual offences in Hong Kong.

Introduction

In a modern society, equality and human rights have emerged as the pre-eminent public value. The human rights acts under Basic Law and the Bill of Right Ordinance ensure all Hong Kong Residents shall be equal before the law and provide protection to everyone without discrimination. However, these constitutions have limited impact in practice especially in laws that governing sexual offences. Sexual offences are protected in Hong Kong under Part XII of the Crimes Ordinance, including rape, buggery, gross indecency, bestiality, indecent assault, abduction, incest and other unlawful sexual acts. However, these offences have been criticized for being gender specific and also involve distinction on basis of different sexual orientation. That is, only woman can be the victim in sexual offences cases; and only man can be charged with unlawful intercourse or buggery against a man. These offences are discriminatory and are inconsistent to the Bill of Right Ordinance and the Basic Law in Hong Kong. In September 2012, The Law Reform Commission in Hong Kong finally published a consultation paper for the reform of the sexual offences. One of the key recommendations is to ensure everyone to be protected regardless of their gender and sexual orientation.

The main focus of this paper is to discuss that law governing sexual offences should be made without distinction on the basis of gender or sexual orientation. The first section of this paper, I will provide an overview on Gender Specific Approach and Sexual Orientation Approach. Secondly, I will conduct a comparative study with
other jurisdictions; examine the reasons and challenges to remove sexual offences that are discriminate based on gender and sexual orientation and conduct a prediction on what are the advantages and disadvantages to the society once the changes are adopted. This paper will set out a framework on what is good public policy and discuss whether the changes fall inside a good public policy. Lastly, I will review and critically comments the recommendations provide by The Law Reform Commission and provide my own suggestions for improvement.

**An Overview on Gender Specific and Sexual Orientation approach**

According to the Black’s Law Dictionary, Gender Specific means for, characteristic of, or limited to women or to men only. When gender specific approach is used in legislation, it means only a particular gender is prohibited or allowed for certain behaviour or conduct. And the other important approach in this paper, namely, the Sexual orientation. It means a person’s predisposition or inclination toward a particular type of sexual activity or behaviour, that is, heterosexuality, homosexuality or bisexuality. In Hong Kong, Justice Cheung stated in W case that sexual orientation means the preferences for sexual relationship with a male or a female and which can be homosexual, heterosexual, asexual or bisexual1. Furthermore, sexual orientation is defined under the Code of Practice against Discrimination in Employment on the Ground of Sexual Orientation in Hong Kong. It means “heterosexuality (sexual inclination towards persons of the opposite sex), homosexuality (sexual inclination towards persons of the same sex), and bisexuality (sexual inclination towards persons of both sexes)”2.

All of us in the world are born equal and have rights to be treat equally in every aspect of our lives, no matter we are male or female, heterosexual, homosexual or bisexuality. However, when the approaches of gender specific and sexual orientation are used in the ordinances, which implies that the law is targeting a particular gender or involving distinctions based on sexual orientation and these are discriminatory. Examples including (but not limited to), the sexual offences under

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1 W v Registrar of Marriages [2010] HKEC 1518 English Judgment
Crime Ordinance, sexual harassment offences under Sex Discrimination Ordinance and the marriage law under Marriage Reform Ordinance.

Gender Specific

According to the Law Drafting Division of Department of Justice, all new and amending legislation is now drafted in gender-neutral language. In other words, legislation should not be drafted in gender specific language. However, some of the offences under Part XII of the Crimes Ordinance are still using gender specific language. Under section 118, rape means a Man who rapes a Woman, which implies that only woman can be the victim and only man can commits this act.

Furthermore, gender specific language can also be found in other area of laws. That is, the sexual harassment offences under the Sex Discrimination Ordinance (“SDO”)\(^5\). Under Part 3 and 4 of the SDO, it provides that “it is unlawful for a person to sexually harass a woman…”.\(^6\) It is again used the terms “Woman”, which implies that only woman can be the complainants in sexual harassment cases. Fortunately, SDO includes an interpretation clause that “…sexual harassment of women shall be treated as applying equally to the treatment of men…”.\(^7\) In other words, men could be equally protected if the court believed such modification is necessary. Due to the use of gender specific terms “woman” in SDO, and it is the court decision to decide whether men could be equally protected, it is remain unclear and uncertain whether there is intention to include man as a complainant. Moreover, there are cases where the complainant is a male,\(^8\) which indicated there are male sexual victimisations and they do need protection.

More recently, the Court of Final Appeal held that section 20(1)(d) of Matrimonial Causes Ordinance\(^9\) and section 40 of Marriage Ordinance\(^10\) were too restrictive and those provisions were inconsistent to the Basic Law and Bill of

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3. The Author, ‘How Legislation is Made in Hong Kong’ (Law Drafting Division of Department of Justice, June 2012)  

4. Crimes Ordinance (Cap 200), s118


6. Discrimination Ordinance (Cap 480), Part 3 and 4

7. Sex Discrimination Ordinance (Cap 480), s 2(8)

8. Chen v Tamara Rus and Another [2001] 3 HKLRD 541

9. Matrimonial Causes Ordinance (Cap 179), s20(1)(d)

10. Marriage Ordinance (Cap 181), s40
Rights. Those provisions provide that marriage is “the voluntary union for life of one “man” and one “woman” to the exclusion of all others”, which limited that marriage is about one to marry a person of the opposite sex. The explicit use of the gender specific terms “man” and “woman” expresses a clear intention to exclude same sex couples and post-operative transsexual the right to marry and which is violating their right.

Sexual Orientation

We now come to the second approach, sexual orientation. In Leung v Secretary for Justice, the court held that number of sexual offences under Crimes Ordinance were unconstitutional, namely, section 118C, 118F(2)(a), s118H and s118J(2)(a). As stated in the Crimes Ordinance, age of consent for heterosexual intercourse is 16, however, for homosexual intercourse, the age of consent is 21. The higher age of consent for the homosexual is discriminatory and inconsistent with the Basic Law and Bill of Rights. Furthermore, in Secretary for Justice v Yau Yuk Lung Zigo & Anor, the court held that section 118F(1) of Crimes Ordinance was unconstitutional under both article 25 of the Basic Law and article 22 of the Bills of Rights Ordinance. Section 118F(1) targeting the homosexual men, they shall be held guilty in committing buggery otherwise than in private.

Furthermore, the explicit use of the gender specific terms “man” and “woman” in section 20(1)(d) of Matrimonial Causes Ordinance and section 40 of Marriage Ordinance limited that marriage is about one to marry a person of the opposite sex. These provisions involved distinction based on sexual orientation. Everyone shall be equal before the law including the homosexual and bisexual, they have the right to choose who to marry.

All the provisions and decisions discussed above provides a definition of gender specific and sexual orientation and highlight the fact that some of the sexual

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11 W v Registrar of Marriages (n 1)
12 Leung v Secretary for Justice [2005] 3 HKLRD 657 English Judgment
13 Crimes Ordinance (Cap 200), s 124
14 Crimes Ordinance (Cap 200), s 118C
15 Secretary for Justice v Yau Yuk Lung Zigo & Anor [2007] 3 HKC 545
16 Under art 25 of Basic Law and art 22 of Bills of Rights, “All persons are equal before the law are entitled without any discrimination to the equal protection of the law”
17 Crimes Ordinance (Cap 200), s 118F(1)
offences in Hong Kong are gender specific and involved distinction based on sexual orientation. As the concept of human rights become more important, everyone should be treat equally regardless of their gender and sexual orientation. It is important and become necessary for Hong Kong regulators to consider amending laws on sexual offences that are based on gender and sexual orientation and conform the laws to recognised standards of human rights. Many other overseas jurisdictions have law reform on sexual offences, such as Scotland, England and Wales, New Zealand, Australia and Canada. In Scotland, there have been important reform to the criminal law on sexual offences, that is, law should not involve distinctions based on gender or sexual orientation\textsuperscript{18}. In England and Wales, there was a major overhaul of law relating to sexual offences and one of the key theme is to promote fairness, law should be made without distinctions on the basis of gender or sexual orientation\textsuperscript{19}. Interestingly, many sexual offences under the Crimes Ordinance in Hong Kong are based on similar provisions in English legislation\textsuperscript{20}. However, the original corresponding offences are still remaining in Hong Kong\textsuperscript{21}. Comparing with other jurisdictions, Hong Kong is a bit behind in developing new legal framework in this area. We should take the relevant legislations in other jurisdictions as reference to develop a comprehensive legal framework for sexual offences in Hong Kong.

**Legal framework for sexual offences in other Jurisdictions**

In considering the reason why the law for sexual offences should be made without the distinction on the basis of gender or sexual orientation, it is important to look at how other overseas jurisdiction introduced reform of law in this area and what are the factors drove those changes.

\textsuperscript{18} Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Scot Law Com No 209, 2007), at para 1.29
\textsuperscript{19} Home Office, *Setting the Boundaries: Reforming the law on sex offences* (Vol 1, July 2000), at para 1.1.10
\textsuperscript{20} The Law Reform Commission of Hong Kong, *Rape and Other Non-consensual Sexual Offences* (HKLRC Consultation Paper, 2012), at para 1.3
\textsuperscript{21} The Law Reform Commission of Hong Kong Paper, at para 1.4
England and Wales

As mentioned earlier, our existing sexual offences are based on similar provisions in English legislation, it is better for us to first look at the changes in England.

In England, the reform was introduced because some of the law is old. It reflected the society and the role of men and women in the nineteenth century, which is no longer applicable in today society. The society is evolving and with the incorporation of the European Convention of Human Rights, it became necessary to review the law and meet the needs of today's society. The review covered numbers of sexual offences with an aim to provide protection to every individual, ensure the accused to be appropriately punished and conform to recognised standard of human rights.

There are two areas in the reforms that were of particular importance to this study: the law should not discriminate on grounds of sex, nor on grounds of sexual orientation. The law needs to be gender neutral that offenders can be of either sex, and must ensure that male victims are protected too; also as long as it was a consensual activity between adults, the law should not intrude the private life of homosexual adults. There are changes on rape law and other sexual offences to ensure that everyone is protected regardless of their gender and sexual orientation.

In looking at the law of rape in England, the laws originally were gender specific. Under section 1 of the Sexual Offences Act 1956, “a man commits rape if he has unlawful sexual intercourse with a Woman…”. There have been numbers of important reforms since the 1956 legislation. The definition of rape was later extended to include anal rape, marital rape and became less gender specific. Under Sexual Offences Act 2003, rape is “a person (A) commits an offence if he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis.” The gender specific terms woman is now replaced by a neutral terms person, in other words, the law acknowledged that a man could also be a victim of rape.

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22 Home office paper, at para 1.12
23 Home office paper, at para 1.17
24 Home office paper, at para 1.18
25 Home office paper, at para 1.14
26 Home office paper, at para 0.6
27 Home office paper, at para 0.7
28 Sexual Offences Act 1956, s 1
29 Sexual Offences Act 2003, s 1
In looking at the sexual offences against children in England, the laws originally were gender specific. Under section 5 and 6(1) of Sexual Offences Act 1956, it is illegal for a man to have intercourse/sexual intercourse with a girl under the age of thirteen/sixteen\textsuperscript{30}. After the reform in 2003, this offences is now became more gender neutral. The gender specific terms girls is now replaced by person\textsuperscript{31}, in other words, the law acknowledged that boy could also be a victim in sexual offences cases.

Furthermore, the old laws discriminates against certain group of people, namely, the homosexual\textsuperscript{32}. Sexual activity for homosexual is restricted by laws but however, there is no such restriction on heterosexual. Examples included the differential age of consent and homosexual behaviour in private is prohibited (no more than two people). In \textit{Sutherland v The United Kingdom}, the complainant complained the minimum age for lawful sexual activities for homosexual is different to the heterosexual, violated his right in respect of his private life\textsuperscript{33}. Another example is under section 13 of the Sexual Offences Act 1956, it make gross indecency illegal\textsuperscript{34}, and which is a homosexual acts\textsuperscript{35}. In \textit{ADT v United Kingdom}, the complainant was convicted of gross indecency in his own home. He submits that the conviction is interference with his private life as he was engaging in sexual act with consenting adult male in the privacy of his own home only\textsuperscript{36}. It was recommended in the cases that the law should treat everyone equally. The minimum age for lawful sexual activities for homosexual should be the same for the heterosexual and consensual sexual activity between adults (including homosexual) in private should not be illegal\textsuperscript{37}. It is unjust to retain laws that only deal with homosexual behavior. Therefore, laws that are based on sexual orientation and homosexual behavior have been abolished in England.

\textsuperscript{30} Sexual Offences Act 1956, s 5 and 6(1)
\textsuperscript{31} Sexual Offences Act 2003, s 5
\textsuperscript{32} Home office paper, at para 6.1.2
\textsuperscript{33} \textit{Sutherland v The United Kingdom} (1997) 24 E.H.R.R. CD22
\textsuperscript{34} Sexual Offences Act 1956, s 13
\textsuperscript{35} Home office paper, at para 6.6.4
\textsuperscript{36} \textit{ADT v United Kingdom} (2001) 31 E.H.R.R. 33
\textsuperscript{37} Home office paper, at Recommendation 44
Scotland

Scotland is another jurisdiction introduced law reform governing sexual offences. It is useful for us to look at the changes in Scotland. The law review in Scotland also stated that the law on sexual offences should not make distinction based on gender and sexual orientation.\(^{38}\)

In looking at the law of rape in Scotland, rape consists of the “penetration of a woman’s vagina by the penis of the accused…”\(^{39}\). Which is again similar to the old law in England, that is, only man can commit rape and only a woman can be raped.\(^{40}\) In today law, Rape is defined “if a person (A), with A’s penis… penetrates, the vagina, anus or mouth of another person (B)…”\(^{41}\). The gender specific term is replaced by the word person. In other words, the law in Scotland recognized male rape victims.

In looking at sexual offences which are aimed to protect children. The old laws stated that it is illegal for a man to have sexual intercourse with a girl under the age of 13 years.\(^{42}\) Which is also similar to the English law, the terms girl was used in the act. It was recommended that law relating to children should not involve distinction based on gender of the child or the perpetrator of such offences.\(^{43}\) After the law reform, the word person is used to replace the terms man and child is used to replace the terms girl.\(^{44}\) In other words, either man or woman can commit this offence, and child victim can either be boy or girl.

In terms of homosexual offences, it was rendered criminal acts using the terms gross indecency since 1885, after numbers of reform, homosexual offences is still exists.\(^{46}\) Until the review in 2007, it was recommended that there is no need for any offence to deals with homosexual conduct. As long as it is a consensual sexual activity, the law should not intrude the private life of homosexual adults.

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38 Scottish Law Commission report, at para 1.29
39 Scottish Law Commission report, at para 3.2
40 Scottish Law Commission report, at para 3.23
41 Sexual Offences (Scotland) Act 2009, s 1(1)
42 Criminal Law (Consolidation) (Scotland) Act 1995, s 5(1)
43 Scottish Law Commission report, at para 4.17
44 Sexual Offences (Scotland) Act 2009, s 18 - 20
45 Scottish Law Commission report, at para 5.5
46 Scottish Law Commission report, at para 5.6
Some other overseas jurisdiction

In Australia, after number of important law reform relating to sexual offences over the last 25 years\(^{47}\), the laws move away from the use of gender specific language\(^{48}\) and have no specific same sex offences\(^{49}\).

In New Zealand, there is no specific same sex offence as long as it is a consensual sexual activity between the parties. Furthermore, laws contains gender specific language have been repealed.

Interestingly, The Canadian Criminal Code still contains acts on anal intercourse, however, there is an exception, if it engaged between husband and wife or any two persons at the age of eighteen or more\(^ {50}\). And the Canadian Criminal Code also contains a differential age of consent for homosexual act comparing to heterosexual\(^{51}\). Seems like the laws that governing sexual offences in Canada is archaic and is a bit behind.

As discussed above, many jurisdictions introduced law reform to ensure that everyone to be treat equally regardless of their gender and sexual orientation. What about the jurisdiction in Hong Kong? Does this applicable in Hong Kong? Lets look at the law on sexual offences in Hong Kong.

Sexual offences in Hong Kong

In Hong Kong, there have been reforms to the law governing sexual offences. In 2007, various media reports the public anxiety over the lack of sex offender register in Hong Kong, the Law Commission issued a consultation paper on the desirability of establishing a sex offender register and it was later implemented in 2011\(^ {52}\). In December 2010, the Law Commission has proceeded straight to a final report considers the presumption that a boy under 14 is incapable of sexual intercourse and recommending the abolition of the presumption\(^ {53}\). In September 2012,

\(^{47}\) Australian Law Reform Commission, Family Violence – A National Legal Response (ALRC Report 114, 2010), at para 25.5
\(^{48}\) Australian Law Reform Commission report, at para 25.8
\(^{49}\) Home office paper, at para 6.4.1
\(^{50}\) The Canadian Criminal Code, s 159
\(^{51}\) The Canadian Criminal Code, s 150
\(^{52}\) The Law Reform Commission of Hong Kong, Sexual Offences Records Checks for Child-related Work: Interim Proposals (HKLRC report, 2010)
\(^{53}\) The Law Reform Commission of Hong Kong, The Common Law Presumption that a Boy Under 14 is Incapable of Sexual Intercourses (HKLRC report, 2010) para 26
the Law Commission published a consultation paper on sexual offences including newly defined offence of rape and creation of other non-consensual sexual offence. The paper also points out that the existing sexual offences is gender-specific and involve distinction on sexual orientation\textsuperscript{54}. It is really a good time to review the law and to ensure that the law is not gender specific and not based on sexual orientation.

In looking at the present law of rape in Hong Kong, section 118(3) provides that “a man commits rape if he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it…”\textsuperscript{55} As reflected in the law, only man can be the offender and only woman can be the victim. Gender specific language is uses in the law, which is similar to the old laws in England. However, as discussed earlier, the meaning of rape in England was further extended to exclude gender specific language. Likewise, the meaning of rape in Scotland was also extended. Both acts replaced woman by the terms another person. Moreover, some other jurisdictions moved away from the use of gender specific language. In other words, that both men and women can be the victims in the case of rape. But one point to be noted is that rape is still defined that only man can be the offender.

In looking at law that protect children in respect of sexual matters, section 123-124, 126-127 and 132 provide that a man shall be guilty of sexual offences if he has unlawful sexual intercourse with a girl\textsuperscript{56}, takes an unmarried girl out of the possession\textsuperscript{57}, and who procures a girl to have unlawful sexual intercourse\textsuperscript{58}. Only man can be the offender for all these type of offences and only girl can be the victim. Comparing with England and Scotland, the law has been widened to include boy as victim and anyone can be the offender.

In terms of the homosexual offences, the present law in Hong Kong involved distinction based on sexual orientation. Under section 118H, a man who commits gross indecency with a man under the age of 21 shall be liable on conviction\textsuperscript{59} and also under section 118J, a man who commits an act of gross indecency with another man otherwise than in private shall be guilty (and private was defined in the law)\textsuperscript{60}. The meaning of Gross indecency is not defined in the law, but according to the Home

\textsuperscript{54} The Law Reform Commission of Hong Kong Paper, at para 1.10
\textsuperscript{55} Crimes Ordinance (Cap 200), s 118(3)
\textsuperscript{56} Crimes Ordinance (Cap 200), s 123-124
\textsuperscript{57} Crimes Ordinance (Cap 200), s 126-127
\textsuperscript{58} Crimes Ordinance (Cap 200), s 132
\textsuperscript{59} Crimes Ordinance (Cap 200), s 118H
\textsuperscript{60} Crimes Ordinance (Cap 200), s 118J
Office Paper in England, Gross indecency is a male homosexual acts, including mutual masturbation and oral sex\footnote{Home office paper, at para 6.6.4}. Therefore, gross indecency is targeting the homosexual. Comparing with the heterosexual, higher age of consent for homosexual intercourse is discriminatory and commits gross indecency otherwise than in private is also discriminatory as there is no such law for the heterosexual. Comparing with the laws in other countries, many homosexual offences e.g. buggery and anal intercourse have been removed.

After the comparison with other overseas jurisdictions above, we can conclude that the existing sexual offences in Hong Kong, in particular those that are based on gender and sexual orientation are similar to the old laws in other overseas jurisdictions. The uses of these discriminatory requirements in the definition precluded female offender and male victims and it is discriminate against people with different sexual orientation. Perhaps, we should do the same and abolish laws that are discriminate. However, what are the reasons for the reform in other overseas jurisdictions, and whether the reasons applicable in Hong Kong? Let’s look at the reasons in details.

**Reasons for abolishing unnecessary gender specific and same sex offences**

Many overseas jurisdictions introduced law reform on sexual offences include abolishing unnecessary gender specific language and unnecessary same sex offences. One of the reasons for the changes is because the law was created in the nineteenth century, which is no longer suitable in the 21\textsuperscript{st} century\footnote{Nicole Westmarland, ‘Rape Law Reform in England and Wales’ (School for Policy Studies, April 2004) \url{http://nicolewestmarland.pbworks.com/f/Rape%2BLaw%2BReform%2Bin%2BEngland%2Band%2BWales%2B-%2BWestmarland%2B2004.pdf} accessed 22 October 2013}. Also, in relation to the homosexual behaviour, many people thought that homosexuality was an illness in the old days. However, it is now accepted by the society that it is just another type of orientation\footnote{Home office paper, at para 6.6.1}. Therefore, law that criminalise same sex behaviour become unnecessary and have been removed accordingly. Furthermore and most importantly, due to the incorporation of the European Convention of Human Rights, law on sexual offences has been amended in many jurisdictions to ensure fairness to all sectors in the society. Whether these reasons applicable in Hong Kong?
The old laws in Hong Kong

The existing law in Hong Kong were originally based on the legislation in England, although there have been reforms in Hong Kong. But some of the definition is archaic e.g. rape, a man cannot be raped by law and anal and oral sex also falls outside the definition of rape. The old laws reflected the social attitudes and roles of men and women in the nineteenth century\textsuperscript{64}, which are inexplicable in the modern society. This is one of the reason why the law related to sexual offences need to be review. Once the laws had been reviewed, this will bring Hong Kong in line with other overseas jurisdiction\textsuperscript{65}.

Homosexual offences

There are number of cases that deal with homosexual offences in Hong Kong in the past. The first gay rights case was heard in Hong Kong in 2005, and was held that four provisions in the Crimes Ordinance on sexual activities between men were unconstitutional\textsuperscript{66}. The court stated that “There can be no doubt that gay men have been historically disadvantaged by being perceived to belong to a group marked by stereotyped capacities”\textsuperscript{67}. The decision suggested recognition of homosexual legal rights. Furthermore, there is increasing visibility of homosexual groups\textsuperscript{68}. Recently, approximately 5200 people marched through in Hong Kong to demand rights for the homosexual and claiming that they face discrimination at home, at work, at school and in social circles\textsuperscript{69}. As homosexuality is no longer classified as illness, and the public started to recognise it as another type of orientation, Hong Kong should move ahead to protect the group. It is a very strong reason to abolish laws that are based on sexual orientation.

\textsuperscript{64} Home office paper, at para 0.2
\textsuperscript{65} The Author, ‘Modernise Hong Kong law on sexual offences’ \textit{South China Morning Post} (Hong Kong, 22 September 2012)
\textsuperscript{66} \textit{Leung v Secretary for Justice} (n 12)
\textsuperscript{67} \textit{Leung v Secretary for Justice} (n 12)
\textsuperscript{68} Bart Rwezaura, ‘To be or Not to be: Recognition of Same-Sex Partnerships in Hong Kong’ (2004) 34 HKLJ 557
\textsuperscript{69} Christy Choi, ‘Turnout Doubles for gay pride march’ \textit{South China Morning Post} (Hong Kong, 10 November 2013)
The impact of European Convention of Human Rights

Since the incorporation of European Convention of Human Rights ("Convention"), the courts will look at it with great care and assessing whether the legislation is compatible. The Convention aims at maintenance and further realisation of human rights and fundamental freedoms. Article 8 of the Convention provides right to respect for private and family life. In Bensaid v United Kingdom, the court held that “gender identification, name and sexual orientation and sexual life should be protected under Article 8 of the Convention”. Private life should comprise the right to establish and develop relationships with other human beings. As long as it is a consensual sexual relationship, we should respect the choice of the individual. Article 14 provides that the enjoyment of the rights and freedoms shall be secured without discrimination on any ground such as sex. In other words, everyone should be treat equally regardless of their gender. In general, the Convention provides effective protection to everyone regardless of their gender and sexual orientation. Many overseas jurisdictions e.g. England and Scotland have amended their laws to ensure compliance with the Convention and which reflected human rights concern.

In Hong Kong, we should take the Hong Kong Bill of Rights Ordinance ("BORO") and Basic Law into consideration. Law on sexual offences should conform to these human rights laws. Article 1 of BORO is similar to Article 14 of the Convention, it provides that the enjoyment of right shall be enjoyed without distinction of any kind, such as sex, and it further provides that men and women shall have an equal right. Article 14 of BORO is similar to Article 8 of the Convention, it provides protection on privacy, family, home, correspondence, honour and reputation. Article 25 of the Basic Law provides that all Hong Kong residents shall be equal before the law. These human rights related acts is to maintain and further the realisation of human rights in the society, and it was agreed that the Basic Law.

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70 Home office paper, at para 1.2.2
72 European Convention on Human Rights, art 8
73 Bensaid v United Kingdom (2001) 33 EHRR 205, para 59
74 Niemietz v Germany (1993) 16 EHRR 97, para 29
75 European Convention on Human Rights, art 14
76 Hong Kong Bill of Rights Ordinance (Cap 383), Art 1
77 Hong Kong Bill of Rights Ordinance (Cap 383), Art 14
78 The Basic Law of Hong Kong, Art 25
and the BORO prohibit discrimination on the ground of sexual orientation\textsuperscript{79}. Furthermore, according to the Law Drafting Division of Department of Justice, all new and amending legislation should be drafted in gender-neutral language\textsuperscript{80}. As human rights is now an important interest, it is necessary to review laws that governing sexual offences in Hong Kong, and make sure the law is made without unnecessary distinction on the basis of gender and sexual orientation.

From the discussion above, there are very strong reasons to review the sexual offences and to make the law without discrimination in Hong Kong. However, how the public view on sexual offences and the homosexual in Hong Kong? Is the public view the same that it is necessary to remove laws that are based on gender and sexual orientation? Will there be any challenges to implement this in Hong Kong in the new future?

**The Challenges in Hong Kong**

In my personal opinion, I strongly agree with the reasons discussed above and believed that the Law Commission should introduce law reform on sexual offences, that is, removing unnecessary discrimination based on gender and sexual orientation. However, it is not a simple thing the minority can change. Laws that governing sexual offences is a controversial issues. They are crimes that deeply affect the lives of the victims and their families, and even the whole communities. Modernising and strengthening the law require careful consideration\textsuperscript{81}. Hong Kong is a multi-cultural city where people profess many different faiths. How to decide law in light of the culture and moral value is a challenge, it is hard to get a balance in between the law and the moral standard. So what is the moral standard in relation to sexual offences in Hong Kong?

**The moral standard in Hong Kong**

According to Lord Devlin, the existence of criminal law is because there are certain standards of behaviour or moral principles which society requires to be

\textsuperscript{79} Robyn Emerton, ‘Respecting Privacy and Affirming Equality: The Dual Significance of Leung v Secretary for Justice for Hong Kong’s Gay Community’ (2006) 36 HKLJ 143
\textsuperscript{80} The Author, ‘How Legislation is Made in Hong Kong’ (Law Drafting Division of Department of Justice, June 2012)
\textsuperscript{81} Home office paper, Foreword
observed. Prohibition of sexual offences is a direct reflection of the moral concern of society. When we are dealing with sexual offences that related to gender and homosexual behaviours, it always involve society’s moral standard on what is right and what is wrong. In other words, laws governing sexual offences must be made to provide fairness and reflect moral standards. Can moral standard still be reflected when the laws that are based on gender and sexual orientation are removed? Let’s address the moral standard in Hong Kong.

In looking at the laws that are gender specific, the old law were created in nineteenth century and reflected the role of men and women during that time. Morally, a man should not have non-consensual sexual intercourse with a woman and this moral concern is reflected in the Crimes Ordinance. Sexual offences are normally committed by men against women, it is uncommon to have male sexual victimisation. There have been studied on men cannot be rape and men can defend themselves in sexual offences but there aren’t many studies confirming the existence of male victims. There were no male or boy victims in the past. Male victims do not receive the same respect or protect as the female victims. However, this is no longer the case. Report shows that male sexual victimisation have been increasing, there is empirical evidence of sexual victimisation of men by men and men by women. Male victims deserve same respect as female victims. In other words, the laws relating to sexual offences are archaic and confusing, it is discriminatory based on gender. Beside, we also morally think that a man should not have non-consensual sexual intercourse with a man or a woman. Then how come the law is not protecting the male victims? There is a need to bring the legislation into the 21st century and reflecting the moral concern

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83 Norbani Mohamed Nazeri and Siti Zubaidah Ismail, ‘Contesting Jurisdiction in respect of Incest: With Particular Reference to Malaysia’ (2010) LR 247, 258
of the society. I believed everyone would agree to the use of gender-neutral language in sexual offences and it is nothing immoral.

In looking at laws that are based on sexual orientation, this is a controversial issue. As defined earlier, sexual orientation means heterosexuality, homosexuality and bisexuality. When we come to the topic of homosexuality, this generally involves the discussion of moral issue and religious aspect. Morally, only heterosexual couples are accepted and traditionally, only heterosexual married couples or heterosexual sexual behaviour are protected in law. Homosexuality has been debate among academics over the decade. John Finnis, a philosopher published an article strongly against the homosexual behaviour and stated “homosexual conduct is never a valid, humanly acceptable choice and form of life”, and many other philosophers considered homosexual is unacceptable, shameful and immoral. This group of philosophers believed the homosexual individuals do not deserve the same protection as the heterosexual because they are immoral. Some would possibility argue that if protection is provided to the homosexual, the homosexual would think they are accepted by the public and recognised by law and which may cause undesirable impact on family, religion and education. However, homosexual is no longer immoral. According to the newspapers and opinion polls, the attitude toward homosexual started to change. Some overseas jurisdictions even allowed same sex marriage. These indicate greater openness towards and acceptance of homosexual.

Same sex couples is entitle to enjoy the rights protected by Article 8 of the Convention. As equality and human rights are considered to be important in today society, homosexual and heterosexual should be treated the same, difference in

88 Anna Wu Hung Yuk, ‘Equal Opportunity in Hong Kong’ (2003) 5 HKL
92 Home office paper, at para 6.3.2
93 Isaac Davision, ‘Same-sex marriage law passed’ New Zealand Herald (New Zealand 17 Apr 2013)
94 Home office paper, at para 6.3.1
95 Jens M. Scherpe (n 89)
treatment is discriminatory\(^96\). In Hong Kong, a post-operative male to female transsexual has won the right to marry her boyfriend\(^97\). Even though the case is nothing to do with legal recognition of same sex relationship, but it shows that the court is willing to give protection to W regardless of her gender and sexual orientation. If the society has greater openness towards homosexuality, it is not an immoral behaviour anymore. The law should reflect the same and remove law that is based on sexual orientation and sexual behaviour. Furthermore, someone has a particular sexual orientation do pay tax in the same way as the ordinary people. It is inappropriate to deprive their basic needs and basic access to activities\(^98\). Nonetheless, I admitted there are still many people against homosexual behaviour and relationship. They considered homosexual to be immoral and shameful. Therefore how the law and society adapt to such attitudes in relation to sexual orientation remain a challenge to Hong Kong.

**Prediction on abolishing unnecessary discrimination sexual offences**

In relation to the reasons and challenges discussed above, I can conclude that there is a necessity to remove sexual offences that are based on gender and sexual orientation and we should follow the lead taken by England. The reasons are strong enough for the support of introducing law reform on sexual offences. Also, as more people considered human rights an important issue, our moral standard should also be widen to include the acceptance of homosexuality and homosexual behaviour. Based on that, laws that governing sexual offences would be made without unnecessary distinction on the basis of gender and sexual orientation in the near future, once adopted, this would bring advantages and disadvantage to the society.

**Advantages of abolishing unnecessary discrimination in sexual offences**

When the court dealing with cases that related to sexual offences, they might need to refer to case law as well as statue, it is because the law governing sexual offences has become cumbersome and confusing and in some cases either inconsistent or archaic\(^99\). Modernising the law improves not only the protection to the citizens, it also bring clarity and increased certainty to the laws. It is good for Hong Kong to

\(^{96}\) *Dudgeon v United Kingdom* (1982) 4 EHRR 149

\(^{97}\) *W v Registrar of Marriage* (n 1)

\(^{98}\) Anna Wu Hung Yuk (n 88)

\(^{99}\) Robyn Emerton (n 87)
follow the lead taken by the United Kingdom, Scotland and some other overseas jurisdictions. Following other overseas jurisdictions provide an added advantage, that is, we can have benefit of their case precedents for reference.

In looking at the law of rape and any other sexual offences that related to the protection of children, both widen to include men and boys sexual victimisation. In looking at laws that are based on sexual orientation, it widens to include protection for the homosexuals. Also, laws that are related to homosexual behaviour are removed to avoid discrimination. Therefore, removing unnecessary discrimination language in sexual offences offers greater protection and advantage for victims regardless of their gender and sexual orientation.

Most importantly, the changes ensured the law to be conform to a recognised standard of human rights act, that is, the BORO and Basic Law in Hong Kong and bring the laws in line with other overseas jurisdiction.

As can be seen, there are lot of advantages for Hong Kong to remove sexual offences that are based on gender or sexual orientation. Modernising law always involve careful consideration. However, no matter how careful the law is made, there are people against it and argue the changes would create negative impacts to the society.

Disadvantages of abolishing unnecessary discrimination in sexual offences

In general, there shouldn’t be any disadvantage to the society after the changes, because changing law generally attached with an aim of providing fairness and protection to everyone in the society and always involve careful considerations. However, some might argue that the changes create negative consequences and create undesirable impact on family, religion and education. Let’s address the disadvantages of the change.

In looking at the laws using gender-neutral language, some scholars argue that gender neutrality might create negative consequences for female victim especially in the law of rape. The scholars recognised that it is important that female rape

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100 Robyn Emerton (n 87)
victimisation can be name or label appropriately because the female victim feel
themselves completely different and they are the only one isolated in the world\textsuperscript{102},
they cannot be labelled the same as the male victims. Traditionally, men hold doors
for women, men help with heavy luggage, men initiate date and men initiate sexual
activity. It is a common sense that men always want to have sex. Even in situation
where the man is intoxicated or drunk, they are the winners if sexual intercourse
occurs\textsuperscript{103}. It sounds a bit strange to label them as male rape victims. If the law is now
widen to include male victims, the female victims’ isolation of feeling could not stand
out. As a result, seems like the gender neutral law means everybody gets to be
masculine, and depriving the protection of female victims.

In looking at laws that is based on sexual orientation and homosexual
behaviour, some scholars would argue if those laws were removed and greater
protection provided to the homosexual, it basically means the law giving recognition
to them and which might create negative impact on family, education and religion. In
terms of family, traditionally family should consist of a male husband, a female wife
and one or more children. Family is about procreation, that is, producing children.
There wasn’t any evidence or any new contemporary meaning showing the change
towards this attitude\textsuperscript{104}. Likewise, this creates negative impact on education.
Traditionally the school teach our children that a family consists members of a father
and a mother, which is based on a heterosexual relationship. If homosexuality and
homosexual activity is allowed, the children would possibly perceive that it is
something right to do. As can seen, if certain recognition is given to the homosexual,
this will create negative impact on family and education and changing the traditional
meaning of family. In terms of religion, for people who attend religious services once
a week, they view homosexuality negatively and assert that all religions condemn
homosexuality\textsuperscript{105}. They argue that any homosexual sexual activity is sinful, and it

\textsuperscript{102} Patricia Novotny, ‘Rape Victims in the (Gender) Neutral Zone: The Assimilation
\url{http://digitalcommons.law.seattleu.edu/sjsj/vol1/iss3/62/} accessed 26 October 2013
\textsuperscript{103} Patricia Novotny (n 102)
\textsuperscript{104} W v Registrar of Marriage (n 1)
\textsuperscript{105} Michael Bronski, Ann Pellegrini and Michael Amico, ‘Does Religion Condemn
Homosexuality?’ (Religion Dispatches, 1 October 2013)
\url{http://www.religiondispatches.org/books/sexandgender/7311/does_religion_condemn_homosexuality/}
accessed 1 November 2013
cannot be recognised as a sexual orientation\textsuperscript{106}. As discussed earlier, prohibition of sexual offences is a direct reflection of the moral concern of society\textsuperscript{107}. Some religions view homosexual behaviour immoral, and therefore it was prohibited under the old law. If the law is now extended to protect the homosexual, some religions would probably fight against it as it would be a disadvantage to them.

As discussed, there are strong reasons to support the changes and according to my prediction, there would be advantages and disadvantage once the changes are adopted. I will take this discussion as reference and provide recommendations for the reform of sexual offences in Hong Kong.

**Recommendations for the reform of sexual offences**

Before I go further to my own recommendations for the reform of sexual offences, it is useful to review the above discussion on gender specific and sexual orientation and also look at what is a good public policy. As a result of that, a framework can be formed as a reference to determine the best recommendations for the reform of sexual offences. Furthermore, as mentioned earlier, The Law Reform Commission of Hong Kong has published a consultation paper for the reform of the sexual offences in September 2012. It is worthwhile to also take that into consideration.

As discussed above, there are strong reasons and number of advantages supporting the removal of sexual offences that are based on gender and sexual orientation. Modernising the law improves the protection to everyone regardless of their gender and sexual orientation, it also bring clarity and increased certainty to the laws. Furthermore, the changes ensured the law complied with the human rights acts under BORO and Basic Law in Hong Kong. However, there are arguments against the changes. Some argue the changes fall outside the moral standard, deprive the protection of female victims and create negative impact on religion. As can seen, no matter how careful the law is made, there are people stand for it or against it. To see if it is appropriate to abolish sexual offences that are based on gender and sexual orientation, we shall also look at what is good public policy.

\textsuperscript{106} The Author, ‘Religion and homosexuality’ (Princeton University) http://www.princeton.edu/~achaney/tmve/wiki100k/docs/Religion_and_homosexuality.html accessed 1 November 2013

\textsuperscript{107} Norbani Mohamed Nazeri and Siti Zubaidah Ismail (n 83)
The structure of public policy

Public policy can be defined as a system of laws concerning a given topic promulgated by the government\textsuperscript{108}. It is important for a liberal society to have a good public policy system, a system governing the social co-existence of people with different preferences, desires and beliefs, serves justice and solves public problems effectively and efficiently. According to John Rawls’s public reasonableness theory, a good public policy means a citizens viewing one another as free and equal in the system\textsuperscript{109}, the law must serves some laudable policy without denigrating other equally laudable policy. When we give reasons for the new policy, “we also reasonably think that other citizens might also reasonably accept those reasons”\textsuperscript{110}. However, this doesn’t mean it is compulsory for everyone to agree before a law can be change, but at least they should agree to a certain degree\textsuperscript{111} and viewing each other equally. Therefore, I can conclude that a good public policy must be a proposal that is fair, provide greater protection but not denigrating other protection and meet the needs of different groups equally in the society.

According to the definition of good public policy and numbers of reasons and advantages for the removal of sexual offences that are based on gender and sexual orientation, I believed the disadvantages discussed earlier is no longer an issue for the reform.

Hybrid of good public policy and advantages to tackle the disadvantages

Removing sexual offences that are based on gender and sexual orientation is a good public policy as it is more suitable to the modern society; it also provides fairness and greater protection to everyone regardless of their gender and sexual orientation. Some might argue this changes is not a laudable policy as it is denigrating other equally laudable policy, e.g. depriving the protection of female victims and

\textsuperscript{108} Dean G. Kilpatrick, ‘Definitions of Public Policy and the Law’ (Medical University of South Carolina) \url{http://www.musc.edu/vawprevention/policy/definition.shtml/} accessed 5 November 2013


\textsuperscript{110} John Rawls (n 109)

\textsuperscript{111} Jolene Chow, ‘Evaluating the arguments against homosexual relationships’ (2003) UCL Juris. Rev. 235
create negative impact on religion. However, according to John Rawls’s theory, when we give reasons for a new policy, we must reasonably think the other will reasonably accept those reasons. And we got a very strong reason to tackle the issue of denigrating others, and we reasonably believe the others will reasonably accept it. That is, the human rights acts under BORO and Basic Law. Article 1 of BORO provides that the enjoyment of right shall be enjoyed without distinction of any kind, such as sex, and it further provides that men and women shall have an equal rights and Art 14 provides protection on privacy, family, home, correspondence, honour and reputation. Article 25 of the Basic Law provides that all Hong Kong residents shall be equal before the law. The human rights acts provide equal rights to everyone no matter they are woman or man, heterosexual or homosexual.

In tackling the issue of depriving protection of female victim, everyone should be treat equally. A man can also be a victim, we never know the psychological impact of rape or sexual assault on male victims and it could be very serious. It is impossible and unfair to just take care of the feeling of female victim and ignoring the right of the male victims. I believed the people against it should accept the reason of human rights.

In tackling the issue of creating negative impact on religion, again they should accept the reason of human rights acts under BORO and Basic Law. Everyone shall have their own choice, they can choose their own sexual orientation. According to Article 15, everyone shall have the right to freedom of thought, conscience and religion, including freedom to have or to adopt a religion or belief of his choice. We can’t force anyone to adapt a religion. Likewise, the homosexual would never force other people to change their sexual orientation. I am not a homosexual, and I don’t adapt to any religion, however, I do respect these parties as I believed everyone should have their own freedom of choice. We should view each other as free and equally in a society. After tackled all the issues, there shouldn’t be any challenge or disadvantage against the removal of sexual offences that are based on gender and sexual orientation. Therefore, I believed the suggested change is a good public policy.

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112 John Rawls (n 109)
113 Hong Kong Bill of Rights Ordinance (Cap 383), Art 1
114 Hong Kong Bill of Rights Ordinance (Cap 383), Art 14
115 The Basic Law of Hong Kong, Art 25
116 Hong Kong Bill of Rights Ordinance (Cap 383), Art 15
117 John Rawls (n 109)
because it is more suitable to the modern society provides fairness and greater protection to everyone and complied with the human rights acts under BORO and Basic Law. But how the law should be drafted, we shall now take a look at the recommendations published by The Law Reform Commission and I will critically comment on the paper and provide further recommendations.

Consultation paper on Rape and Other Non-consensual Sexual offences

The Law Reform Commission (the “Commission”) published a consultation paper for the reform of the sexual offences in the Crimes Ordinance in 2012. The consultation paper addressed the issue of non-consensual offences of rape, sexual assault by penetration, sexual assault and causing a person to engage in sexual activity without consent\(^\text{118}\). A guiding principles was developed to evaluate different reform options, namely: clarity of the law; respect for sexual autonomy; the protective principle; gender neutrality; avoidance of distinction based on sexual orientation; and adherence to the Human Rights laws and practices guaranteed under the Basic Law\(^\text{119}\). The Commission provided 21 recommendations in the consultation paper. As mentioned, the main focus of the consultation paper is the issue of non-consensual offences. I am not going to go through all the recommendations and the discussion on non-consensual offences, but I will point out the recommendations and discussion that related to this study, they are, law of rape, law that protect children in respect of sexual matters and law related to homosexual and homosexual behaviour, gender neutrality and the avoidance of distinction based on sexual orientation.

In looking at the law of rape, the Commission see no reason why the law treat men and women victims differently. As a result of that, under recommendation 7, the definition of rape is extended to include penile penetration of the vagina, anus or mouth or another person\(^\text{120}\). As the terms another person replaces the gender specific terms woman, that’s mean both men and women can be victims of rape. It is good to see the law acknowledge male rape victims. However, this offence could only committed by man remain unchanged. The Commission see the terms rape should be retained to refer to offence of non-consensual penile penetration only\(^\text{121}\). To include

\(^{118}\) The Law Reform Commission of Hong Kong paper, at para 1.25-1.35
\(^{119}\) The Law Reform Commission of Hong Kong paper, at para 2.44
\(^{120}\) The Law Reform Commission of Hong Kong paper, at para 4.9
\(^{121}\) The Law Reform Commission of Hong Kong paper, at para 4.15
woman offender\textsuperscript{122}, the Commission recommended a new offence of sexual assault by penetration to include woman offender and to reflect the gravity of non-penile penetrative assaults. The new offence cover situation where the penetration is not by penis. It would be constituted by penetration of the victim’s vagina or anus by an object or a part of the offender’s body other than a penis\textsuperscript{123}. It is good to see the law acknowledge woman offender, and provide protection to both female and male in situation of non-penile penetrative assaults. But I don’t see the reason why they need to create a new offence even the Commission have mentioned that they consider the physical and psychological impact of non-penile penetrative assault could be as serious as rape\textsuperscript{124}, and I don’t see a reason why the term rape retained to refer penetration by penis only. In my opinion, the new terms is somehow downgrading the seriousness of the offence of non-penile penetrative assaults.

In looking at the law that protect children in respect of sexual matters, this consultation paper only discussed their capacity to consent\textsuperscript{125} and did not discuss the gender specific terms used in the provisions. It remains unclear whether the gender specific terms girls would be replaced. However, one of the guiding principles is gender neutrality. Therefore, I suggested we should incorporate provisions in line with the one in England, that is, replaces the gender specific terms girl by children, so both boys and girls can be the victims of sexual offences.

In looking at the law that related to homosexual and homosexual behaviour, the consultation paper did not discuss in details about the differential age of consent between homosexual and heterosexual, but the consultant paper did talk about that the law should not intrude on consensual sexual behaviour between those over the age of consent without good cause\textsuperscript{126}. However, the Commission also recommended the age of consent must not be lower than 16\textsuperscript{127}. They have uses the phrase “Must not be lower than 16”, is that mean the age of consent for homosexual behaviour could be higher than 16? This remains unclear but fortunately, the court in \textit{Leung v Secretary for Justice} ruled earlier that the differential age of consent between homosexual and heterosexual is unconstitutional to the human rights acts.

\textsuperscript{122} The Law Reform Commission of Hong Kong paper, at para 5.3
\textsuperscript{123} The Law Reform Commission of Hong Kong paper, at para 5.1
\textsuperscript{124} The Law Reform Commission of Hong Kong paper, at para 5.2
\textsuperscript{125} The Law Reform Commission of Hong Kong paper, at para 3.22
\textsuperscript{126} The Law Reform Commission of Hong Kong paper, at para 2.37
\textsuperscript{127} The Law Reform Commission of Hong Kong paper, at para 2.40
Also, in terms of the homosexual behaviour, the consultation paper did not talk about gross indecency in details but however, it was recommended non-consensual buggery should be abolished\textsuperscript{128}. What about the gross indecency, it remains unclear whether the law related to gross indecency would be abolished.

Interestingly, as modern surgical techniques could provide artificial organ, the Commission recommended better protection for the transsexuals. Under recommendation 9, the definition of penis and vagina is now extended to include a surgically constructed penis and surgically constructed vagina\textsuperscript{129}. As a result of that, transsexuals who have surgically constructed vagina should be protected. It is good to see the law is modernised to cover the need of different group of people in the society.

Further suggestions for improvement

I personally think the Commission produced greatest change in the law by avoiding distinction based on sexual orientation and at the same time adherence to the human rights acts guaranteed under the Basic Law and BORO. That is, providing protection to everyone regardless of the gender and sexual orientation and surprisingly, they have even provided protection to the transsexuals. As mentioned in the consultation paper, gender neutrality is one of the guiding principles to evaluate different reform options. However, there has been little effort on avoiding the use of gender specific language and, in particularly regarding female rape offender or even lesbian rape offender. I will provide further suggestion for improvement in this area.

In looking at the law of rape, the Commission recommended the definition of rape should incorporate provisions along the lines of section 1(1)(a) of the English Sexual Offences Act 2003\textsuperscript{130}. Section 1(1)(a) provides that “A person (A) commits rape if he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis”\textsuperscript{131}. Even though the gender specific terms woman and man were removed, but the offence is still remain as a gender specific offence\textsuperscript{132}, because the offence uses phrase “with his penis”. Under the new definition of rape, only man can be convicted of rape. The Commission argues that other non-penile penetrative

\textsuperscript{128} The Law Reform Commission of Hong Kong paper, at para 5.37
\textsuperscript{129} The Law Reform Commission of Hong Kong paper, at para 4.16 – 4.21
\textsuperscript{130} The Law Reform Commission of Hong Kong paper, at para 4.9
\textsuperscript{131} Sexual Offence Act 2003, s 1(1)(a)
\textsuperscript{132} Paul Powlesland, ‘Male rape and the quest for gender-neutrality in the Sexual Offences Act 2003’ (2005) 1 C.S.L.R 1, 11
offences should be distinguished from rape, because the terms rape has long been used in the Crimes Ordinance to describe penetration by penis. In my personal opinion, “has long been used” is not a substantive reason. The definition of a penis and a vagina “has long been” used to describe a “born with” organs only, but now the law is extended to include surgically constructed penis and vagina, this is because the society is changing, the law need to be modernised to meet the need of the society today. Then why can’t we modernise the law of rape to meet the need of male victims and criminalise the female offender? In addition, the definition of rape in England has adapted successfully to include non-consensual oral penetration by penis in the past. Then why can’t we adapt that female can also commit rape?

An interesting example was found to shows the problem of not using gender-neutrality language in the offence of rape. In a situation where two victims are intoxicated and they have sexual intercourse with two different offenders without consent respectively, the first victim is a woman and the offender is a man, there could be liability for rape, whereas the second victim is a man and the offender is a woman, even the man might feel forced to engage in the sexual intercourse, there could not be any liability for rape. Also, what happen in a situation where a woman compels a man to penetrate her? Furthermore, what happen in a situation where the offender is a lesbian (a tomboy), and the victim is a female and the object the lesbian is manipulating is full of virus or she uses her dirty fingers with a deep wound that is still breeding, there could be no liability for rape. In all the examples above, even the victims’ physical and psychological impact could be as serious as rape and the penetrative associated with a risk of HIV/AIDS, the offender cannot be convicted of rape. This is because the discriminatory requirement in the definition precluded her action as rape (as she does not has a penis). But rather, she can be convicted under the new offence of sexual assault by penetration. Even though the maximum sentence for this offence is the same as rape (imprisonment for life), but in my opinion, the seriousness is somehow downgraded. In my earlier discussion, it is unfair to just take care of the feeling of female rape victim and ignoring the right of the male rape.

133 The Law Reform Commission of Hong Kong paper, at para 4.10 and 4.13
134 Paul Powlesland (n 132)
135 Paul Powlesland (n 132)
136 Paul Powlesland (n 132)
137 Paul Powlesland (n 132)
138 Sexual offences Acts 2003, s (1)(4)
victims. Furthermore, to retain the definition of rape, it seems discriminatory against women as it is stereotyping that women are weaker.\textsuperscript{139} Beside, according to my definition on good public policy and one of the guiding principles in the consultation paper, the reform is to provide greater protection to everyone regardless of the gender and sexual orientation and complied with the human rights acts under BORO and Basic Law. If only female rape victim can be protected, it is contradicting to the definition of good public policy and the guiding principles on human rights.

I am not here targeting female rape offender, but I consider human rights more important and law shouldn’t be draft using gender specific language. One way to solve all the problems discussed above is to remove the gender specific terms “with his penis” and do not distinguish rape with other non-penile penetration offences. We should shift our focus back to sexual intercourse without consent, because consent is the essential concept in any sexual offences. Perhaps, we could take the law in Australia as reference\textsuperscript{140} and define rape as follow to solve the problem of not being gender neutrality and at the same time not downgrading the seriousness of non-penile penetration offences:

“Any person who has sexual intercourse with another person without the consent of the other person is liable to the offence of rape.”

And the definition of sexual intercourse is:

“sexual connection by the penetration to any extent of genitalia (including a surgically constructed vagina) of a female person or the anus of any person by (i) any part of the body of another person, or (ii) any object manipulated by another person”.

The suggested definition of rape above can now be classified as a good public policy and meet the guiding principles in the consultation paper, because it provides greater protection to everyone regardless of the gender and sexual orientation and complied with the human rights acts that guaranteed under BORO and Basic Law.

Lastly, in terms of the homosexual behaviour, although the Commission produced greatest change in the law by avoiding distinction based on sexual orientation, I would however like to suggest that they should make it clear that the law related to the differential age of consent between homosexual and heterosexual and gross indecency should be abolished.

\textsuperscript{139} Paul Powlesland (n 132)
\textsuperscript{140} Crimes Act 1900 (NSW), s 61H and s 61I
**Conclusion**

The conclusion must be that it is time to change: gender specific and sexual orientation approach should no longer be used in sexual offences. Throughout the paper, I have discussed the reasons and advantages of removing laws that are discriminatory based on gender and sexual orientation. Although there are powerful reasons and arguments against the changes, but I have tackled the challenges from the discussion of good public policy. Based on the discussion and the review of the consultation paper published by the Commission, I have provided further suggestions to solve the problem of not being gender neutral and discriminating based on sexual orientation.

According to the discussion, law that governing sexual offences should not be made with distinction on the basis of gender and sexual orientation, because it is important to modernising the law to cover needs of different group of people in the society and provides greater protection to everyone regardless of the gender and sexual orientation and complied with the human rights acts guaranteed under BORO and Basic Law. Therefore, it is time for change: no more gender specific and sexual orientation approach should be used in sexual offences in Hong Kong.
Bibliography

Primary Sources
Cases
Chen v Tamara Rus and Another [2001] 3 HKLRD 541
Leung v Secretary for Justice [2005] 3 HKLRD 657 English Judgment
Secretary for Justice v Yau Yuk Lung Zigo & Anor [2007] 3 HKC 545
W v Registrar of Marriages [2010] HKEC 1518 English Judgment

Statutes and statutory instruments
Criminal Law (Consolidation) (Scotland) Act 1995
Crimes Ordinance (Cap 200)
Crimes Act 1900 (NSW)
European Convention on Human Rights
Hong Kong Bill of Rights Ordinance (Cap 383)
Matrimonial Causes Ordinance (Cap 179)
Marriage Ordinance (Cap 181)
Sex Discrimination Ordinance (Cap 480)
Sexual Offences Act 1956
Sexual Offences Act 2003
Sexual Offences (Scotland) Act 2009
The Canadian Criminal Code
The Basic Law of Hong Kong

European Court of Human Rights
ADT v United Kingdom (2001) 31 E.H.R.R. 33
Bensaid v United Kingdom (2001) 33 EHRR 205
Dudgeon v United Kingdom (1982) 4 EHRR 149
Niemietz v Germany (1993) 16 EHRR 97
Sutherland v The United Kingdom (1997) 24 E.H.R.R. CD22

Secondary Sources
Book

Journal articles


Rwezaura B, ‘To be or Not to be: Recognition of Same-Sex Partnerships in Hong Kong’ (2004) 34 HKLJ 557


Yuk A W H, ‘Equal Opportunity in Hong Kong’ (2003) 5 HKL

Online Journals


Command papers and Law Commission reports

Home Office, *Setting the Boundaries: Reforming the law on sex offences* (Vol 1, July 2000)


The Law Reform Commission of Hong Kong, *Rape and Other Non-consensual Sexual Offences* (HKLRC Consultation Paper, 2012)

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

Website and blogs


Newspaper articles
Choi Ch, ‘Turnout Doubles for gay pride march’ South China Morning Post (Hong Kong, 10 November 2013)

Davision I, ‘Same-sex marriage law passed’ New Zealand Herald (New Zealand 17 Apr 2013)

The Author, ‘Modernise Hong Kong law on sexual offences’ South China Morning Post (Hong Kong, 22 September 2012)