關注婦女性暴力協會

Association Concerning Sexual Violence Against Women

對「強姦及其他未經同意下進行的性罪行」諮詢意見書

Commission's Consultation Paper on "Rape and Other Non-consensual Sexual Offences"

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關注婦女性暴力協會

對「強姦及其他未經同意下進行的性罪行」諮詢

意見書

關注婦女性暴力協會於 1997 年 3 月成立，是一所非牟利志願機構，一直支持兩性平等並關注女性受到性暴力的威脅及傷害，致力引起社會關注及正視性暴力問題。本會於 2000 年成立全港首間性暴力危機中心 - 「風雨蘭」，我們以「風雨蘭」作為各專業界別的協調機制，一站式提供輔導、醫療、法律及其他適切支援，以協助遭受性暴力的女性重建自尊自信。本會亦積極倡議改善現有法例及加強對性暴力受害人權益的保障。

現時香港有關性暴力的法例已沿用超過五十年，當中有不少法例已不合時宜，未能為性暴力受害人提供足夠的保障，亦對性自主有一定的限制。近年多個海外國家已重新制定及改革規管性罪行之法例。本會對香港法律改革委員會現正就香港性罪行法例之改革進行諮詢表示歡迎，希望本港能盡快修訂有關法例，使法律更清晰明確，令所有人的性自主受到尊重，亦為性暴力受害人提供更全面的保障。本會對有關建議舉行了多次諮詢大會，收集性暴力受害人、輔導員及關注性暴力問題之人士的意見。此外，本會亦出席立法會司法及法律事務委員會及多個機構的會議，討論有關建議。此外，本會亦進行了一些相關的法律研究，參考不同國家的法例，以改善現有的建議。

另一方面，本會在 4 日內收到約 250 位市民及性暴力幸存者，與及超過 20 個團體簽名，支持是次法改及提出相關建議。

本會希望藉此建議書，向委員會提出改善「強姦及其他未經同意下進行的性罪行」諮詢的意見。本會希望法改會參考本會之意見，修改相關建議，盡快向政府提交報告及促請政府盡快修定與性罪行相關的條例，令性暴力受害人獲得真正保障。

如對本會意見有任何疑問，請電 23922569 或電郵至 acsvaw@rainlily.org.hk 與王秀容小姐聯絡。

王秀容
總幹事
關注婦女性暴力協會

2013 年 3 月 4 日

Recommendations on Law Reform Commission's Consultation Paper on

"Rape and Other Non-consensual Sexual Offences"

The Association Concerning Sexual Violence Against Women (ACSVAW) was established in March, 1997. It is a non-profitable charitable organization which advocates the equality between genders and is concerned about the threats and harm which sexual violence can do to the women, and aims at raising the public's awareness on this issue. ACSVAW founded the first sexual violence crisis centre in Hong Kong, Rainlily, in 2000. Rainlily coordinates support from different professional disciplines, provides one-stop service on counseling, medical help, legal advice and other relevant assistance, to help women suffering sexual violence rebuild their confidence. ACSVAW also actively advocates relevant legal reforms and the strengthening of the rights protecting sexual violence victims.

The relevant legislation on sexual violence in Hong Kong has been in place for more than 50 years, amongst which many of them are obsolete, fail to provide sufficient protection for sexual violence victims, and restricts sexual autonomy. Recently many overseas jurisdictions have reformed or reviewed their law on sexual offences. ACSVAW welcomes the current Law Reform Commission's consultation, and hopes that the Hong Kong SAR Government can reform the law as soon as possible, to confer more legal certainty and clarity, respect the sexual autonomy of every person, and provide more protection to sexual violence victims. ACSVAW conducted a number of consultation sessions regarding the relevant recommendations, gathering the opinions from sexual violence victims, counselors, and concerned public. ACSVAW hopes to make recommendations to improve the proposals made by the Law Reform Commission regarding the part on "Rape and Other Non-consensual Sexual Offences" through this Recommendations Paper.

ACSVAW has conducted some research on different jurisdiction and made some recommendation the reform. esides, We have received the signature from more than 20 organization, 250 people and victims who support the reform within only 4 days.

Final but not least, to upheld sexual autonomy and protect sexual complainant, we sincerely hope that the Sub-Committee can reform the law accordingly in light of the opinions of the association and past complainants and urge the government to carry out the reform as soon as possible.

If you have any inquiries, please contact Miss Linda Wong at *acsvaw@rainlily.org.hk* or 23922569.

Yours Sincerely,
Linda Wong
Executive Director (Association Concerning Sexual Violence Against Women)

目錄 (Index)

Part 1. 關注婦女性暴力協會對法改會建議之整體回應

Recommendations from Association Concerning Sexual Violence Against Women on Law Reform Commission's Consultation Paper

1.1 關注婦女性暴力協會的整體回應 (中文全文)

Recommendations on Law Reform Commission's Consultation Paper (Chinese Full Report)

1.2 關注婦女性暴力協會的整體回應 (英文撮要)

Recommendations on Law Reform Commission's Consultation Paper (English Summary)

1.1 關注婦女性暴力協會的整體回應 (中文全文)

現時香港有關性暴力的法例已沿用超過五十年，當中有不少法例已不合時宜，未能為性暴力受害人提供足夠的保障，亦對性自主有一定的限制。近年多個海外國家已重新制定及改革規管性罪行之法例。本會對香港法律改革委員會現正就香港性罪行法例之改革進行諮詢表示歡迎，希望本港能盡快修訂有關法例，使法律更清晰明確，令所有人的性自主受到尊重，亦為性暴力受害人提供更全面的保障。本會對有關建議舉行了多次諮詢大會，收集性暴力受害人、輔導員及關注性暴力問題之人士的意見。此外，本會亦進行了一些相關的法律研究，參考不同國家的法例，以改善現有的建議。

本會希望藉此建議書，向委員會提出改善「強姦及其他未經同意下進行的性罪行」諮詢的意見。本會希望法改會參考本會之意見，修改相關建議，盡快向政府提交報告及促請政府盡快修定與性罪行相關的條例，令性暴力受害人獲得真正保障。

1.1.1a 性暴力現況:受害人求助困難及難以透過法律尋找公義

性暴力個案的報案率偏低是全球共同的現實（吳惠貞，2005）。根據香港警務處的統計數字顯示，由 2007 年至 2011 年五年間共接獲 551 宗強姦及超過七千宗非禮案件的舉報（香港警務處網頁）。

而風雨蘭在過往多年接獲的求助個案中，即使在輔導員的輔導及支持下，亦只有不足五成半的求助者願意報警。根據關注婦女性暴力協會的《港人對強姦問題的認知及受害人服務意見調查》（吳惠貞、王美鳳，2002）， 只有 11%的受害人願意報警求助。而在風雨蘭過去 2 年約 4000 個熱線求助中，只有約 200 宗個案，即不足半成的個案，有報警求助。

根據新婦女協進會於 2005 年進行之調查顯示，在被訪問的 250 人中， 有超過一成半的女性曾在不願意情況下與人發生性行為，四成半曾被非禮，另近六成曾被性騷擾，有被性騷擾或非禮的女性表示主要在公眾場所被陌生人侵犯。有少數女性曾經被強暴。近七成女性有告訴別人被性騷擾/非禮/強暴，可是超過九成沒有向警方舉報(新婦女協進會，2005) 。平等機會婦女聯席於 2013 年進行的婦女暴力經驗調查顯示，有 14%婦女曾被強暴，當中只有 4%受害人報案。由此可見，每年警方的舉報數字只是性暴力問題的冰山一角，大部份性暴力事件都在社會被隱藏，絕大部份性暴力受害人，未有向警方求助，由此顯示他們對現時的法律制度及法例沒有信心，拒絕尋求司法制度的協助。

1.1.1b 受害人在法律及司法制度下受到二度創傷

受害人希望透過法律制裁侵犯者，令她們能夠取回公道。可是大多數受害人在司法系統體驗到的，卻是比原本之性暴力事件傷害更深的二度創傷。有九成受害人沒有報警的原因是「怕要上庭複述被侵犯的經過或被盤問」(吳惠貞，2005)，她們在法庭上作供的過程中，不但要重覆痛苦的經歷，被辯方律師咄咄逼人地盤問，令她們感到受侮辱和污蔑。此外，她們更要面對侵犯者、傳媒及公眾的目光，在法庭內等候及作供期間，內心的恐懼不但令她們情緒難以平伏，更阻礙了她們的作供，(吳惠貞，2005）影響審訊的公平、公正。

香港浸會大學社會工作系副教授洪雪蓮博士在「性暴力幸存者的求助經驗研究：社區回應與二度創傷」研究報告(2011) 指出，受害人在審訊過程中要再面對侵犯者、接受律師的提問、再度憶述事件、在無阻擋下公開自己的樣貌、身份、背景、性經驗、其他個人資料(如電話)等，均對受害人帶來嚴重的「二度創傷」。

當受害人決定出庭指證侵犯者，將要隨之而面對的是他人的目光，這往往對受害人構成極大壓力和恐懼。據風雨蘭過往的經驗，有受害人在上庭前感到焦慮，更因持續失眠而需向精神科醫生求助；亦有受害人得知她工作的同事會到法庭旁聽，而很憂慮她的身份會向其他同事曝光。因此，不少受害人均希望申請屏風作供以減輕心理壓力。雖然受害人有權向法庭要求申請保護措施，但根據風雨蘭的經驗，有關申請往往被法庭駁回。而當受害人得悉申請屏風被拒時，往往出現緊張情緒，擔心上庭的情況，有受害人更因承受不了沉重壓力而考慮放棄出庭作供。

1.1.1c 歡迎法改會提出對性罪行作出修訂

現時的強姦及非禮罪定義乃於 1957 年訂立，其立法原則不是為了尊重性自主權，而是從違反社會道德的角度或保障貞操的觀念出發，而此觀念並不合時宜。現時法改會建議改革的原則強調尊重性自主權及保護原則，本會認為此改革較貼近現今社會的發展及市民需要，在提供保護的同時，亦尊重性自主權，本會對此表示歡迎。除此之外，本會就當中不少改革建議表示支持及認同，例如: 加入“以插入的方式進行性侵犯”及對“同意”一詞訂立法定定義等。可是，本會對於部份修訂建議仍感有不足之處，為此，本會集結性暴力受害人及關注議題的人士之意見，並歸納為以下 5 點，以供　貴委員參考，期盼　貴委員會能改善有關修訂。

1.1.2 強姦及以插入的方式進行性侵犯

根據現時之法例，強姦的定義必須為“以陽具插入陰道”式的性交，如果加害者用手指或硬物等插入陰道、肛門或逼使受害者口交，只能控以非禮，故此現時在強姦案件的審訊中，往往要求受害人要清楚指出及解釋何以得知當時是以陽具插入陰道式的性交，大大增加了受害人在審訊時作供的困難及心理創傷。本會曾經有個案受害人因未能在法庭以毫無合理疑點下証實插入陰道的乃是陽具，以致最終強姦罪名不成立；(亦有個案因為法官未有引導陪審團可考慮改判猥褻侵犯罪，而判被告強姦罪名不成立，法庭把案件發還重審，改判為猥褻侵犯罪。)；更有受害人因在第一次上庭時感到受侮辱、尊嚴受損等二度創傷，令她拒絕在重審時再次出庭。本會認為，現時法例單純以”陽具插入陰道”作為強姦定義，實在非常狹隘，一方面漠視了性侵犯作為一種暴力的嚴重性，另一方面，亦令受害人無法在司法系統中得到公義，加重受害人在作供時的心理創傷，從刑罰的角度來說，對受害者並不公平。

1.1.2a 擴大保障範圍

由於現時法例對強姦的定義為”任何男子未經女子同意而與她性交，即屬強姦。<刑事罪行條例> (第 200 章第 118(3)條)。而性交方式亦只限於“以陽具插入陰道”式的性交[1]。因此，法例本身帶有性別偏見，只有女性能夠被強姦，受相關法例的保障，男性及跨性別人士均不受到保障。就著諮詢文件的第四章及第五章修訂，本會認為無論性暴力的受害者是什麼性別，以性方式去征服、操縱及控制對方也是不能容忍的，所以歡迎法改會擴大強姦罪定義的建議，使強姦範圍由現時只限於插入陰道，更改為包括陰道(包括外陰及以手術建造的陰道)、肛門及口腔，使男性受害人和跨性別人士受害人納入保障之中。現時英國、澳洲(新南威爾斯、南澳、西澳、塔斯曼尼亞、首都領地、北領地、昆士蘭)、加拿大等國家已修改有關法例，令法例不再被性別所限，香港亦應效法，盡快修定有關法例

此外，強姦定義亦不應只是包括陽具插入，法改會亦應把強姦定義，包括以身體任何部份或物件插入陰道、肛門及以陽具插入口腔。

(詳情參閱 2.1)

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[1] Section 118(c)of Criminal Ordinance (Cap.200), “A man commits rape if he has unlawful sexual intercourse with a women who at the time of the intercourse does not consent to it:

1.1.2b 合併強姦及以插入的方式進行性侵犯

本會並不同意諮詢文件中提及「應保留強姦一詞，主要理由是…在我們的文化裡，強姦是一種特別令人髮指的惡行。」這種對強姦的演繹只會強化以「陽具為中心」的社會文化。從本會「風雨蘭」服務受害人遭受性暴力對待的經驗顯示，非陽具插入的性暴力襲擊，同樣對受害人造成嚴重和長久之身心傷害，而此創傷絕不輕於使用陽具的加害行為。加害者使用其他的工具如手指、舌頭、硬物插入受害人的陰道或肛門，這些加害行為，本質上都是一種強者向弱者支配和制服方式的展示，跟陽具插入的性暴力侵害一樣對受害人造成心理及生理的創傷。

因此對於法改會建議保留以「陽具為中心」的強姦定義，並繼續區分強姦和其他非以陽具作出的插入行為，本會並不認同。基於兩種插入行為均可對受害人造成同樣的身心傷害，本會認為無論陽具或非陽具插入均是「令人髮指」的行為，所以應合併為相同的罪行。一方面，打破傳統的強姦定義更能突顯性暴力事件對受害人的身心傷害，讓社會大眾更明白罪行的嚴重性；另一方面，合併罪行可以免卻受害人辨別及指證陽具插入的必要性，從而減輕警方搜證及律政司檢控的困難。故此，本會認為無論以陽具或非陽具插入方式進行性侵犯，都不應區分為有別的罪行。

1.1.2c 以插入式性侵犯取代強姦一詞

現時，不少海外國家已經採用「性侵犯」、「插入式性侵犯」等控罪取代「強姦」一詞，以反映性暴力為性別權力上的暴力，是對別人性自主權的侵犯，從而減少對性暴力受害人的標籤及污名。加拿大及部份澳洲省份在修改法例的過程中，亦把性罪行名稱中的「強姦」修訂為「性侵犯」或「插入式性侵犯」。「法改會就「強姦」一詞的修訂不但繼續保留大眾對陽具插入式性侵犯罪行的重視，更未能令社會關注非陽具插入式性侵犯行為的嚴重性，漠視其帶來的傷害。以海外的經驗，棄用「強姦」一詞非但不會令性暴力事件的嚴重性減低，反而減少單以陽具與非陽具插入判別性侵的嚴重性，而能更全面考慮整件事件的性質。 此外，改用新的名稱亦能減少陪審員及公眾對「強姦」一詞有不同理解而引起的問題。

因此，本會希望法改會考慮在修訂中以「插入式性侵犯」取代「強姦」一詞。

(詳情參閱 2.2)

1.1.3 同意的定義

1.1.3a 精神意念元素由純主觀改為主觀及客觀

本會同意把侵犯者的精神意念元素由純主觀改為主觀及客觀。由於現時法例中只要是被告真確相信受害人同意，即使不合理，亦不能被裁定犯強姦罪；正如法改會在報告指出，這不但「鞏固對女性和性選擇權的謬誤和成見，並鼓勵人們繼續相信關於涉及性的行為的謬誤，尤其是所有女性都喜歡被強勢的男性支配…。」。風雨蘭的個案中，受害人雖然在法庭上清楚表示，自己在被侵犯時是不同意的，然而法官對陪審員作出的指引指出「被告真誠相信事主同意性交，即使被告出於誤會，強姦罪名便會不成立」，因此案件亦被判為罪名不成立。由此可見，受害人的真正意願，縱使在法庭內明確表達，可惜在現時法例的漏洞中，最終會被忽視；故此，有關建議不但能改善現時法例的漏洞，陪審團能更明確考慮受害人的真正意願，更有利推動社會消除對性及性暴力的偏見。

(詳程參閱 2.3)

1.1.3b 罔顧可構成犯罪的精神意念元素

不過，本會並不同意建議中規定，插入行為和其他相關涉及性的行為必須是故意作出。法改會應考慮參考蘇格蘭法例，接納故意或罔顧都可構成犯罪的精神意念元素，以免侵犯者以此藉口脫罪。

1.1.3c 同意的定義加入「不可單憑事主的反應，而認為受害人沒有不同意。」

由於社會對性暴力的偏見，大眾以為受害人必定會以暴力及身體反抗作為表達自己不同意的意願，忽略了事件對受害人的恐懼及威嚇，令受害人無法抵抗或作出反應。可是現時警方及法庭，往往會以受害人身體的傷痕及作出暴力還擊的程度，以証明事主的不自願。而風雨蘭的個案顯示，受害人即使不願意，亦難以在性暴力發生時作出武力抵抗。現時澳洲不少省份(如: ACT, NT, SA 及 VIC) ，在審訊時會對陪審員作出指引:「不可單憑事主沒有講出任何說話、沒有作出任何舉動、沒有以暴力抵抗或沒有傷痕、或在過去與被告或任何人士的性行為，便認為受害人同意該性行為。」這指引大大幫助減低陪審員因偏見而作出對受害人不公平的裁決。因此，本會建議法改會效法澳洲的做法，應在同意的定義上加入「不可單憑事主沒有講出任何說話、沒有作出任何舉動、沒有以暴力抵抗或沒有傷痕、或在過去與被告或任何人士的性行為，便認為受害人同意該性行為。」讓法官對陪審員作出相關指引。

1.1.3d 列明同意的定義

由於現時對於「同意」缺乏清楚明確的定義，影響法律的確定性。此外，現時有不少受害人被禁錮、威嚇、及昏迷不省的情況下，並無法在自由自主的情況下作出同意。例如:有有一位失明的受害人被侵犯者禁錮在屋內，侵犯者要求受害人與他進行性交，否則不會讓她離開。受害人唯有被迫接受，可是這「接受」竟被視為同意該行為的發生。法改會應參考加拿大或新西蘭的法例，在強姦的定義上列明在以下情況下，即使事主容許性行為發生，亦並非代表受害人同意該性行為。

a) 事主在受到酒精或其他物質影響下，無行為能力同意該行為。
b) 事主在昏迷不醒、
c)事主沒有講出任何說話、沒有作出任何舉動、沒有以暴力抵抗、身上沒有傷痕。
d) 過去與被告或任何人士的性行為，便認為受害人同意該性行為。
e) 事主被非法禁錮、被威脅、、被威嚇或被施加暴力下之同意或接受該行為。
f) 在不限於以上情況

(詳程參閱 2.4)

1.1.3e 加入「證據推定」

本會也贊成訂立同意的法定定義，然而對於如何裁定同意，本會認為除了採用法改會提出的「不可推翻的推定」外，亦應效法英格蘭及其他國家加入「證據推定」，即在受害人被威嚇、施加暴力、非法禁錮及不省人事等情況下，而被告亦知道上述情況存在，會推定受害人並無同意，被告亦可舉證推翻，藉此避免受害人因舉證困難，而放棄舉報。

(詳程參閱 2.3)

1.1.4 偷拍/偷窺罪行，應清楚界定犯罪行為

本會歡迎法改會把某些故意作出而本質又涉及性的侵犯行為界定成「性侵犯」，如「偷拍裙底」。近年，在公眾地方發生的偷拍案件不斷上升，警方的偷拍裙底罪案數字也有不斷上升的趨勢，港鐵範圍內發生的偷拍裙底個案，由去年平均每個月 6 宗，升至今年首 8 個月平均每月 9 宗，上升超過五成。偷拍行為不但侵犯了本港的華裔婦女，在港的外籍傭工亦身受其害，例如在工作間(即其住處)的偷拍行為，確是屢見不鮮：有僱主為滿足一己私慾，在廁所、浴室、及外傭的房間等地方偷偷安裝錄影儀器，以偷拍外傭更衣、如廁或沐浴的片段，侵犯傭工的尊嚴和私隱；加上現行入境處的強制留宿條例，逼使外傭與僱主同住一屋，外傭對偷拍此舉更是防不勝防。

香港目前沒有一項針對規管偷拍行為的條例，因此警方一般會引用現有相關的條例作出檢控，例如以「遊蕩」、「公眾地方行為不檢」，以及「普通法」下的「作出有違公德的行為」罪作出檢控，可是相關條例均難以有效打擊偷拍行為。而一些在私人領域發生的偷拍行為，如親屬或工作間的偷拍行為，更無法運用現時的刑事法例保障。

法改會訂立新的性侵犯條例，把「偷拍」行為涵蓋入性侵犯的刑事條例，透過立法進行規管，讓大眾了解偷拍行為乃侵犯他人的罪行，以防止及減少這些罪行，同時把保障擴展至私人領域。但是，在選取新的性侵犯罪的構成元素上，本會認為採用加拿大或新西蘭的刑事法典所訂定的條文會較切合及完整。有關的條文能充分反映偷拍女性裙底、私處、更衣、如廁、甚至沐浴的行為不但違反私隱，更是涉及性的侵犯。本會認為法例應針對犯罪行為本身，而不應加入受害人主觀情感的原素，縱使以上偷拍或偷窺行為未必為受害人帶來恐懼或傷害，但因侵犯者偷拍的目的是侵犯別人的權利及私隱，故應進行檢控。有見及此，本會建議考慮參考加拿大或新西蘭的法例，清楚列明犯罪的行為。

1.1.5 檢討有關証據法及司法程序的修定

由於性罪行的案件在審訊過程中，經常涉及有關証據法及司法程序，而相關程序對於受害人及被告公平、對審訊是否公義及陪審員是否能作出公正的決定起著重要作用，因此，本會建議香港應效法其他國家(如:英國、蘇格蘭)，在修訂性罪行法例外，亦應修訂相關的証據法及司法程序。

1.1.5a 受害人身份被公開

雖然根據第 200 章法<刑事罪行條例>第 156 條，有關申訴人身份保密的法例對公開申訴人身分的事項有所限制，不可於香港可供公眾閱讀的書刊中發佈或在香港廣播。而法庭一般會以代號稱呼受害人，以免受害人的名字曝光，對受害人提供很重要的保障。可是，在一個公開的審訊過程中，受害人往往在作供期間被問及與事件無關的個人背景資料，確實對受害人造成嚴重心理威脅及滋擾。例如: 辯方律師以受害人的英文名或暱稱稱呼，令受害人的身份能被辨認；另外，亦曾有受害人的電話號碼及住址等私人資料在審訊時被公開，法官及檢控官亦沒有提出反對，令傳媒能夠追訪受害人，使她受到嚴重滋擾及感到受威脅。因此，本會建議修訂相關法例，加強對受害人的保障。

1.1.5b 性經驗

根據第 200 章法<刑事罪行條例>第 154 條對證據及發佈有關身份詳情的限制，除非獲得法官的許可，否則在該審訊中任何被告人或其代表不得提出有關申訴人與該被告人以外的其他人的性經驗的證據，或在盤問中提出有關此事的問題。此法例的目的是避免陪審員因受害人的性經驗產生偏見，而影響他們作出公正的裁決。在本會與浸會大學於 2007 年進行的調查顯示，法庭對於性暴力存在不少偏見與迷思。現時法官有權批准對受害人性經驗的提問，可是，法律上對於有關批准的準則並沒有作出指引。因此，香港應效法英國、加拿大等國家，明確訂明，只有在特定情況下，才可批准向受害人提出有關性經驗的証據。此外，香港亦應效法英國，對受害人與被告及被告以外的其他性經驗，均要作出限制，以免案件因對女性及性暴力的偏見而受影響。

(詳情參閱 3.1)

1.1.5c 對性暴力受害人的保障:以錄影會面作證供、視像及在屏障遮蔽下在法庭上作供等

現時受害人雖然能以第 221 章刑事訴訟程序條例（79B）向法庭申請以視像作供，而「檢控政策及常規」與「對待受害者及證人的陳述書」亦列明，受害人能提出在屏障遮蔽下在法庭上作供；可是風雨蘭 2010 – 2011 年的個案資料顯示，只有不足兩成的受害人能獲得有關保護措施，而當中大部份均是未滿 16 歲及精神無行為能力人士（原本亦獲得安排相關措施）。反之，精神行為能力正常的成年受害人要以「易受傷害証人」的理據提出申請，幾乎所有申請都不獲批准。即使受害人因未有獲得法庭保護而感到情緒受損，甚至企圖自殺，法庭亦拒絕有關申請。最後更因受害人無法出庭作証，被告獲撤銷控罪。受害外傭和少數族裔婦女面對警方和出庭作供時常遇到種種困難，包括語言障礙、傳譯困難、受侵犯後情緒不穩等，以上因素均不但對她們帶來更大的心理壓力，亦影響其供詞的準確度，並對司法程序造成負面影響。

本會認為法改會應效法英格蘭、蘇格蘭及其他地方的法例，加強對性暴力受害人在審訊時的保障，當中包括修訂法例確保性暴力受害人能以**錄影會面作證供、視像及在屏障遮蔽下在法庭上作供等**。這不但有助檢控罪行，同時亦尊重和保護證人的尊嚴，這些都是刑事司法制度的基本價值。

就被告的公平審訊權利而言，採用屏風實際上是有助於此權利的，因為屏風有助改善證詞的事實準確度，以達至公平裁決。此外，案例中也承認公平審訊的概念已發展成為包括對被告和證人雙方的公平，因此不能只為滿足被告的利益而犧牲證人的權利。香港亦有案例承認被告的權利需與證人的利益作平衡。因此，被告所享有之權利既不是絕對的，也不是獨霸的。

長遠而言，政府可效法英國有關性罪行案件的處理程序，修改法例 221 章 79B，容許性暴力受害人以**錄影會面作證供減少她們在法庭上的審問**，為性暴力受害人提供特別的法庭設施(如：屏風、視像作供)，協助她們在法庭上作供。

(詳情參閱 3.2 及 3.3)

1.1.6 以下是本會就法改會建議回應之撮要

建議 1： 改革的指導原則

本會同意委員會建議以法律清晰、明確、性自主、保護、無分性別及人權為指導原則。現時的強姦及非禮罪定義乃於 1957 年訂立，其立法原則不是為了尊重性自主權，而是從違反社會道德的角度或保障貞操的觀念出發，而此觀念並不合時宜。現時法改會建議改革的原則強調尊重性自主權及保護原則，本會認為此改革較貼近現今社會的發展及市民需要，在提供保護的同時，亦尊重性自主權，本會對此表示歡迎。可是委員會未有處理性自主與保護原則之間潛在的衝突。此外，本會認為法改會亦應加入對性暴力申訴人權利的保障，作為法律改革的原則。

建議 2： 應訂立同意一詞的法定定義

本會認同定立「同意」一詞的法定定義。但要列明同意的定義。由於現時對於「同意」缺乏清楚明確的定義，影響法律的確定性。此外，現時有不少受害人被禁錮、威嚇、及昏迷不省的情況下，並無法在自由自主的情況下作出同意。例如:有有一位失明的受害人被侵犯者禁錮在屋內，侵犯者要求受害人與他進行性交，否則不會讓她離開。受害人唯有被迫接受，可是這「接受」竟被視為同意該行為的發生。法改會應參考加拿大或新西蘭的法例，在強姦的定義上列明在以下情況下，即使事主容許性行為發生，亦並非代表受害人同意該性行為。

建議 3： 同意一詞的建議定義

本會認同有關「同意」定義的修定，並建議效法澳洲的判刑指引，在修定中加入「不可單憑事主沒有講出任何說話、沒有作出任何舉動、沒有以暴力抵抗、身上沒有傷痕、或在過去與被告或任何人士的性行為，便認為受害人同意該性行為。」減少陪審員因偏見而作出對受害人不公平的裁決。

由於社會對性暴力的偏見，大眾以為受害人必定會以暴力及身體反抗作為表達自己不同意的意願，忽略了事件對受害人的恐懼及威嚇，令受害人無法抵抗或作出反應。可是現時警方及法庭，往往會以受害人身體的傷痕及作出暴力還擊的程度，以証明事主的不自願。而風雨蘭的個案顯示，受害人即使不願意，亦難以在性暴力發生時作出武力抵抗。現時澳洲不少省份(如: ACT, NT, SA 及 VIC) ，在審訊時會對陪審員作出指引:「不可單憑事主沒有講出任何說話、沒有作出任何舉動、沒有以暴力抵抗或沒有傷痕、或在過去與被告或任何人士的性行為，便認為受害人同意該性行為。」這指引大大幫助減低陪審員因偏見而作出對受害人不公平的裁決。因此，本會建議法改會效法澳洲的做法，應在同

意的定義上加入「不可單憑事主沒有講出任何說話、沒有作出任何舉動、沒有以暴力抵抗或沒有傷痕、或在過去與被告或任何人士的性行為，便認為受害人同意該性行為。」讓法官對陪審員作出相關指引。

建議 4： 對涉及性的行為給予同意的行為能力

本會同意此修定。

建議 5： 如涉及性的行為在本質或目的方面存在欺騙又或者有冒充的情況，則無同意可言

本會同意法改會提出的「不可推翻的推定」。建議亦應效法英格蘭及其他國家加入「證據推定」，即在受害人被威嚇、施加暴力、非法禁錮及不省人士等情況下，而被告人亦知道上述情況存在，推定受害人並無同意，而被告亦可舉證推翻，藉此避免受害人因舉證困難，而放棄舉報。

建議 6： 同意的範圍和撤回

本會同意建議中同意的範圍和撤回。

建議 7： 強姦罪的範圍

本會同意強姦的範圍應包括以陽具插入另一人的陰道、肛門或口腔（包括人造器官），使男性受害人和跨性別人士受害人納入保障之中。本會更認為強姦罪應包括以陽具以外的身體部份或物件作插入的方式進行性侵犯。並應效法其他地方，以「插入式性侵犯」取代強姦罪的名稱，以反映性暴力為性別權力上的暴力，是對別人性自主權的侵犯，從而減少對性暴力受害人的標籤及污名。

根據現時之法例，強姦的定義必須為“以陽具插入陰道”式的性交，如果加害者用手指或硬物等插入陰道、肛門或逼使受害者口交，只能控以非禮，故此現時在強姦案件的審訊中，往往要求受害人要清楚指出及解釋何以得知當時是以陽具插入陰道式的性交，大大增加了受害人在審訊時作供的困難及心理創傷。本會曾經有個案受害人因未能在法庭以毫無合理疑點下証實插入陰道的乃是陽具，以致最終強姦罪名不成立；（亦有個案因為法官未有引導陪審團可考慮改判猥褻侵犯罪，而判被告強姦罪名不成立，法庭把案件發還重審，改判為猥褻侵犯罪。）本會認為，現時法例單純以”陽具插入陰道”作為強姦定義，實在非常狹隘，一方面漠視了性侵犯作為一種暴力的嚴重性，另一方面，亦令受害人無法在司法系統中得到公義，加重受害人在作供時的心理創傷，從刑罰的角度來說，對受害者並不公平。

建議 8： 區分強姦與非以陽具作出的其他方式的性插入行為

本會反對區分陽具與非以陽具作出的其他方式的性插入行為，亦反對以強姦罪一詞描述陽具插入。本會認為以上行為應視作為同一罪行，**以「插入式性侵犯」作為罪行的名稱**。

本會並不同意諮詢文件中提及「應保留強姦一詞，主要理由是…在我們的文化裡，強姦是一種特別令人髮指的惡行。」這種對強姦的演繹只會強化以「陽具為中心」的社會文化。從本會「風雨蘭」服務受害人遭受性暴力對待的經驗顯示，非陽具插入的性暴力襲擊，同樣令受害人受到造嚴重和長久之身心傷害，而此創傷絕不輕於使用陽具的加害行為。加害者使用其他的工具如手指、舌頭、硬物插入受害人的陰道或肛門，這些加害行為，本質上都是一種強者向弱者支配和制服方式的展示，跟陽具插入的性暴力侵害一樣對受害人造成心理及生理的創傷。

本會認為無論陽具或非陽具插入均是「令人髮指」的行為，所以應合併為相同的罪行，一方面，打破傳統的強姦定義更能突顯性暴力事件對受害人的身心傷害，讓社會大眾更明白罪行的嚴重性;另一方面,合併罪行可以免卻受害人辨別及指證陽具插入的必要性，從而減輕警方搜證及律政司檢控的困難。

雖然法改會指出,兩罪的判刑將會是相同。可是,兩罪可能會因判例有不同的判刑指引。因此，繼續陽具區分非陽具插入，會繼續使辨別陽具成為決定不同控罪的重要關鍵，加重受害人的壓力，亦會增加困難。既然兩罪判刑相同，因此，本會認為不應具分陽具或非陽具方式的插入，應合併為相同的罪行。以「插入式性侵犯」作為罪行名稱。

故此，本會認為無論以陽具或非陽具插入方式進行性侵犯，都**不應區分為有別的罪行**。

建議 9： 陽具和陰道的定義

本會同意對陽具和陰道的定義。

建議 10： “插入”的涵義

本會同意插入的定義應指從進入起直至退出的行為，可是為了避免社會人士及法庭因字眼有混淆不清引起爭議，建議應加入:「即使輕微及非常短時間的插入亦應被視為插入」，以免被持續一詞誤導。

建議 11： 插入行為和其他有關涉及性的行為的精神意念元素

本會並不同意建議中規定，插入行為和其他相關涉及性的行為必須是故意作出。法改會應考慮參考蘇格蘭法例，接納故意或罔顧都可構成犯罪的精神意念元素，以免侵犯者以此藉口脫罪。

建議 12： 處理真確（但錯誤）相信對方同意這個問題的改革方案

本會同意把侵犯者的精神意念元素由純主觀改為主觀及客觀。由於現時法例中只要是被告真確相信受害人同意，即使不合理，亦不能被裁定犯強姦罪；正如法改會在報告指出，這不但「鞏固對女性和性選擇權的謬誤和成見，並鼓勵人們繼續相信關於涉及性的行為的謬誤，尤其是所有女性都喜歡被強勢的男性支配…。」。風雨蘭的個案中，受害人雖然在法庭上清楚表示，自己在被侵犯時是不同意的，然而法官對陪審員作出的指引指出「被告真誠相信事主同意性交，即使被告出於誤會，強姦罪名便會不成立」，因此案件亦被判為罪名不成立。由此可見，受害人的真正意願，縱使在法庭內明確表達，可惜在現時法例的漏洞中，最終會被忽視；故此，有關建議不但能改善現時法例的漏洞，陪審團能更明確考慮受害人的真正意願，，更有利推動社會消除對性及性暴力的偏見。

建議 13： 應保留以虛假藉口促致他人作非法的性行為這項罪行

本會同意保留（第 200 章）第 120 條所訂的以虛假藉口促致他人作非法的性行為這項罪行。

建議 14： 以不涉及使用武力的威脅或恐嚇手段（如經濟威脅）獲得性交

本會不同意法改會拒絕定立以不涉及使用武力的威脅或恐嚇手段（如經濟威脅）獲得性交．在風雨蘭處理的個案中，有部份受害人被侵犯者以裸照或經濟威脅作性交。可是，由於強姦罪的舉証要求非常高，警方亦經常以威嚇不涉及暴力或受害人當時作出已作出同意為由，沒有作出檢控或未能成功作出起訴。因此，建議加入新法例，令受害人能受到保障。

建議 15： “性”的定義

本會同意法改會提出對性的定義。

建議 16： 以插入的方式進行性侵犯；廢除未經同意下作出肛交的罪行

本會同意法改會提出廢除未經同意下作出肛交的罪行，以「插入式性侵犯」取代。

建議 17： 觸摸的定義

本會同意法改會提出對觸摸的定義。

建議 18： 性侵犯（第一類）

本會同意以性侵犯取代猥褻侵犯罪，並同意對性侵犯(第一類)的定義。

建議 19： 性侵犯（第二類）

本會同意以對性侵犯(第二類)的定義

建議 20： 性侵犯（第三類）

本會雖然歡迎法改會把某些故意作出而本質又涉及性的偷拍行為界定成「性侵犯」。新的性侵犯條例，把「偷拍」行為涵蓋入性侵犯的刑事條例，透過立法進行規管，讓大眾了解偷拍行為乃侵犯他人的罪行，以防止及減少這些罪行，同時把保障擴展至私人領域。但本會不同意以對性侵犯(第三類)的定義。在選取新的性侵犯罪的構成元素上，本會認為採用加拿大或新西蘭的刑事法典所訂定的條文會較切合及完整。

近年，在公眾地方發生的偷拍案件不斷上升，警方的偷拍裙底罪案數字也有不斷上升的趨勢，港鐵範圍內發生的偷拍裙底個案，由去年平均每個月 6 宗，升至今年首 8 個月平均每月 9 宗，上升超過五成。偷拍行為不但侵犯了本港的華裔婦女，在港的外籍傭工亦身受其害，例如在工作間(即其住處)的偷拍行為，確是屢見不鮮：有僱主為滿足一己私慾，在廁所、浴室、及外傭的房間等地方偷偷安裝錄影儀器，以偷拍外傭更衣、如廁或沐浴的片段，侵犯傭工的尊嚴和私隱；加上現行入境處的強制留宿條例，逼使外傭與僱主同住一屋，外傭對偷拍此舉更是防不勝防。香港目前沒有一項針對規管偷拍行為的條例，因此警方一般會引用現有相關的條例作出檢控，例如以「遊蕩」、「公眾地方行為不檢」，以及「普通法」下的「作出有違公德的行為」罪作出檢控，可是相關條例均難以有效打擊偷拍行為。而一些在私人領域發生的偷拍行為，如親屬或工作間的偷拍行為，更無法運用現時的刑事法例保障。

本會同意針對偷拍、偷窺定立新罪行。可是，在選取新的性侵犯罪的構成元素上，本會認為採用加拿大或新西蘭的刑事法典所訂定的條文會較切合及完整。有關的條文能充分

反映偷拍女性裙底、私處、更衣、如廁、甚至沐浴的行為，不但違反私隱，更是涉及性的侵犯。本會認為法例應針對犯罪行為本身，而不應加入受害人主觀情感的原素，縱使以上偷拍或偷窺行為未必為受害人帶來恐懼或傷害，但因侵犯者偷拍的目的是侵犯別人的權利及私隱，故應進行檢控。有見及此，本會建議考慮參考加拿大或新西蘭的法例，清楚列明犯罪的行為。有見及此，建議考慮參考加拿大或新西蘭的法例，清楚列明犯罪的行為。

建議 21： 導致他人在不同意的情況下進行涉及性的行為；及廢除以威脅或恐嚇促致他人作非法性行為的罪行

本會同意加入「導致他人在不同意的情況下進行涉及性的行為」的罪行，可是有關罪行必須更清楚介定法律所包含的範圍。而本會並不同意廢除以威脅或恐嚇促致他人作非法性行為的罪行，減少對受害人的保障。

其他建議: 檢討有關証據法及司法程序的修定

由於性罪行的案件在審訊過程中，經常涉及有關証據法及司法程序，而相關程序對於受害人及被告公平、對審訊是否公義及陪審員是否能作出公正的決定起著重要作用，因此，本會建議香港應效法其他國家(如:英國、蘇格蘭)，在修訂性罪行法例外，亦應修訂相關的証據法及司法程序。

當中包括對受害人身份的保障、公開性經驗的限制及法庭的保護措施

i) 對受害人身份的保障

修訂第 200 章法<刑事罪行條例>第 156 條，有關申訴人身份保密的法例對公開申訴人身分的事項有所限制，包括限制在法庭內公開受害人的住址、電話號碼、其他証人的身份(如:其他証人身份會令受害人身份被確認)。在一個公開的審訊過程中，受害人往往在作供期間被問及重要的個人背景資料，確實對受害人造成嚴重心理威脅及滋擾。例如: 辯方律師以受害人的英文名或暱稱稱呼，令受害人的身份能被辨認；另外，亦曾有受害人的電話號碼及住址等私人資料在審訊時被公開，法官及檢控官亦沒有提出反對，令傳媒能夠追訪受害人，使她受到嚴重滋擾及感到受威脅。此外，有不少強姦或非禮的案件，因証據不足而改控傷人罪，受害人的性名因此不受法律保障，而在審訊中被公開。因此，本會建議修訂相關法例，加強對受害人的保障。

ii) 公開性經驗的限制

修訂第 200 章法<刑事罪行條例>第 154 條對證據及發佈有關身份詳情的限制。香港應效法英國、加拿大等國家，明確訂明，只有在特定情況下，才可批准向受害人提出有關性經驗的証據。此外，香港亦應效法英國，對受害人與被告及被告以外的其他性經驗，均要作出限制，以免案件因對女性及性暴力的偏見而受影響。

根據第 200 章法<刑事罪行條例>第 154 條對證據及發佈有關身份詳情的限制，除非獲得法官的許可，否則在該審訊中任何被告人或其代表不得提出有關申訴人與該被告人以外的其他人的性經驗的證據，或在盤問中提出有關此事的問題。此法例的目的是避免陪審員因受害人的性經驗產生偏見，而影響他們作出公正的裁決。在本會與浸會大學於 2007 年進行的調查顯示，法庭對於性暴力存在不少偏見與迷思。現時法官有權批准對受害人性經驗的提問，可是，法律上對於有關批准的準則並沒有作出指引。因此，香港應效法英國、加拿大等國家，明確訂明，只有在特定情況下，才可批准向受害人提出有關性經驗的証據。此外，香港亦應效法英國，對受害人與被告及被告以外的其他性經驗，均要作出限制，以免案件因對女性及性暴力的偏見而受影響。

iii) 對性暴力受害人的保障:以錄影會面作證供、視像及在屏障遮蔽下在法庭上作供等

現時受害人雖然能以第 221 章刑事訴訟程序條例（79B）向法庭申請以視像作供，而「檢控政策及常規」與「對待受害者及證人的陳述書」亦列明，受害人能提出在屏障遮蔽下在法庭上作供；可是風雨蘭 2010 – 2011 年的個案資料顯示，只有不足兩成的受害人能獲得有關保護措施，而當中大部份均是未滿 16 歲及精神無行為能力人士（原本亦獲得安排相關措施）。反之，精神行為能力正常的成年受害人要以「易受傷害証人」的理據提出申請，幾乎所有申請都不獲批准。即使受害人因未有獲得法庭保護而感到情緒受損，甚至企圖自殺，法庭亦拒絕有關申請。最後更因受害人無法出庭作証，被告獲撤銷控罪。受害外傭和少數族裔婦女面對警方和出庭作供時常遇到種種困難，包括語言障礙、傳譯困難、受侵犯後情緒不穩等，以上因素均不但對她們帶來更大的心理壓力，亦影響其供詞的準確度，並對司法程序造成負面影響。

本會認為法改會應效法英格蘭、蘇格蘭及其他地方的法例，加強對性暴力受害人在審訊時的保障，當中包括修訂法例確保性暴力受害人能以**錄影會面作證供、視像及在屏障遮蔽下在法庭上作供等**。這不但有助檢控罪行，同時亦尊重和保護證人的尊嚴，這些都是刑事司法制度的基本價值。

就被告的公平審訊權利而言，採用屏風實際上是有助於此權利的，因為屏風有助改善證詞的事實準確度，以達至公平裁決。此外，案例中也承認公平審訊的概念已發展成為包括對被告和證人雙方的公平，因此不能只為滿足被告的利益而犧牲證人的權利。香港亦有案例承認被告的權利需與證人的利益作平衡。因此，被告所享有之權利既不是絕對的，也不是獨霸的。

長遠而言，政府可效法英國有關性罪行案件的處理程序，修改法例 221 章 79B，容許性暴力受害人以**錄影會面作證供減少她們在法庭上的審問**，與及為性暴力受害人提供特別的法庭設施(如：屏風、視像作供)，協助她們在法庭上作供。（請參閱本會有關受害人保護措施之文件）

最後，本會期望　貴委員會能參考本會及受害人之意見，改善有關修訂，使法律更清晰明確、令所有人的性自主權受到尊重，亦為性暴力受害人提供適當的保障。本會希望法改會參考本會之意見，修改相關建議，盡快向政府提交報告及促請政府盡快修定與性罪行相關的條例，令性暴力受害人獲得真正保障。

1.2 Recommendations on Law Reform Commission's Consultation Paper on "Rape and Other Non-consensual Sexual Offences"

The relevant legislation on sexual violence in Hong Kong has been in place for more than 50 years, amongst which many of them are obsolete, fail to provide sufficient protection for sexual violence victims, and restricts sexual autonomy. Recently many overseas jurisdictions have reformed or reviewed their law on sexual offences. ACSVAW welcomes the current Law Reform Commission's consultation, and hopes that the Hong Kong SAR Government can reform the law as soon as possible, to confer more legal certainty and clarity, respect the sexual autonomy of every person, and provide more protection to sexual violence victims. ACSVAW conducted a number of consultation sessions regarding the relevant recommendations, gathering the opinions from sexual violence victims, counselors, and concerned public. ACSVAW hopes to make recommendations to improve the proposals made by the Law Reform Commission regarding the part on "Rape and Other Non-consensual Sexual Offences" through this Recommendations Paper. ACSVAW has conducted some research on different jurisdiction and made some recommendations regarding the reform. Final but not least, to upheld sexual autonomy and protect sexual complainant, we sincerely hope that the Sub-Committee can reform the law accordingly in light of the opinions of the association and past complainants and urge the government to carry out the reform as soon as possible.

1.2.1a The Current Scenario Regarding Sexual Violence: Victims Face Difficulties to Seek Assistance and Justice through the Legal System

It is a general phenomenon that the reporting rate of sexual violence is low around the world (Ng Wai Ching, 2005). According to the Hong Kong Police, from 2007 to 2011, 551 cases of rape and over 7000 cases of indecent assault were reported (Hong Kong Police Website).

Amongst the cases received by Rainlily, even with the counseling and support from counselors, only less than 50% of the victims were willing to report to the police. According to ACSVAW's survey on Hong Kong People's Cognition on Rape and Assistance Provided to Victims (Ng Wai Ching, Wong Mei Fung, 2002), only 11% of the victims were willing to report to the police. Amongst the 4000 cases received by Rainlily in the past two years, only around 200 victims, that is less than 5% of them, reported to the police.

According to the survey conducted by the Association for the Advancement of Feminism in 2005, amongst the 250 interviewees, more than 15% female interviewees had non-consensual sex with another, 45% had been sexually assaulted, 60% had been sexually harassed. Some female interviewees who had been sexually assaulted or harassed revealed that they were mainly assaulted or harassed in public places by strangers. A few of them had been raped. Nearly 70% females had communicated to the others about the sexual harassment/ assault/ rape, however more than 90% of them did not report to the police (The Association for the Advancement of Feminism, 2005).

Hong Kong Women's Coalition on Equal Opportunities conducted a survey in January this year,

which revealed that amongst 402 female interviewees, 14% of them had experienced sexual violence, more than 20% of them had experienced "more than 10 times" of sexual violence. Amongst that, there are different forms of severe violence, including 44% of the females who had "non-consensual sex with another" and "threatened by the assailant by photos or videos to have non-consensual sex". Besides, the form of violence includes penile and non-penile sexual assault. More than 20% females had been "assaulted by non-penile body parts or objects"(26%) or "forced to conduct vaginal, oral or anal sex by penile penetration"(50%). 95% of the assaulted women chose not to report to the police, only 4 of them (4%) reported to the police, reflecting the invisibility of sexual violence.

As seen from the above, the reported sexual violence incidents are only the tip of the iceberg. Most of the sexual violence incidents remain invisible. Most victims did not report to the police, reflecting their lack of confidence on the current legal system and legislations, which causes their reluctance to seek help from the legal system.

1.2.1b. Victims suffer from second trauma under the legal and criminal justice system

Victims hope to criminalize assailants through the criminal justice system, to let justice be done. However, most of the victims experienced second victimization under the current legal system. The reason for 90% of the victims to refuse to report to the police is that they were afraid of "Having to repeat the details of being assaulted or being cross-examined" (Ng Wai Ching, 2005). During the trial process, they have to repeat the traumatic experience, and face the hostile cross-examination by the defence counsel, which embarrasses them and damages their integrity. Moreover, they have to face the assailant, the media and the public's scrutiny. During the trial, they cannot calm down from their fear, but impedes the quality of their testimony (Ng Wai Ching, 2005), adversely affecting the trial fairness.

Dr. Hung Suet Lin, the Associate Professor of the Social Work Department of the Baptist University of Hong Kong, in her research "The Research on the Assistance Seeking Experience of Survivors of Sexual Violence: Response from the Community and Second Victimization" (2011), pointed out that the victim has to face the assailant during the trial again, face the cross-examination from the defence counsel, recall the traumatic incident; and has to put one's face, identity, background, sexual history and other person information (e.g. phone number) under public scrutiny, all of the above could bring severe second victimization to the victim.

When the victim decides to testify against the assailant, he or she has to face the scrutiny from the others. This confers great pressure and fear to the victim. According to Rainlily's past experience, some of the victims faced anxiety before trial, and had constant insomnia, which needed medical help from psychiatrists. One of the victims was worried her colleagues would come to her trial in court, and feared the exposure of her identity amongst her colleagues. Therefore, many victims wish to apply for testifying behind a screen to lessen the psychological stress. Although the victim is

entitled to apply to the court special protective measure, according to the experience of Rainlily, the applications were always rejected. After the victims know of the rejection of application, they would be very anxious about the trial, many of them dropped the case due to the pressure to testify in court.

1.2.1c. ACSWAW Welcomes the Changes Proposed by the Law Reform Commission on Sexual Offences

The current definitions for rape and indecent assault were established in 1957, the legislative intent was not for the protection of sexual autonomy, but from the viewpoint of morality or preservation of virginity. These viewpoints are obsolete. The current proposals by the Law Reform Commission emphasizes the principles of sexual autonomy and protection, ACSWAW is in the opinion that these reforms stay closer to the development of the society and the needs of the citizens. While offering protection, it also acknowledges sexual autonomy at the same time, ACSVAW welcomes this position. Apart from that ACSVAW supports or agrees with many of the proposals, for instance, adding "sexual assault by penetration" and providing definition of "consent" in the legislation. However, ACSVAW is in the opinion that some of the proposals are still inadequate. ACSVAW summarized the opinions from sexual violence victims and concerned parties, and distilled them into the following 5 points, for the reference of the Law Reform Commission, in a hope that the Law Reform Commission can improve the relevant proposals.

1.2.2 Rape and Sexual Assault by Penetration

According to the current legislation, the definition of rape shall be "vaginal penetration by the penis", if the assailant uses finger or other objects to penetrate the vagina, anus, or force the victim to have oral sex, he or she can only be charged sexual assault. Therefore the current rape trials require the victim to clearly point out and explain how they knew it was a penile penetration at the vagina, which severely increases the traumatic impact to the victim. According to ACSVAW's record, some of the victims could not prove beyond reasonable doubt that the object penetrating the vagina was a penis, which quashed the defendant's charge for rape. There were cases where the judge failed to direct the jury to consider alternatively a charge of indecent assault, which acquitted the defendant of rape. In the end the case had to be retailed, and the defendant was convicted with indecent assault. Some victims felt that they were insulted and faced second victimization at the first trial, and refused to appear on the retrial for this reason. ACSVAW is in the opinion that the current law is very narrow in defining "vaginal penetration by a penis" as rape, on one hand it ignores that severity of other forms of sexual violence, on the other, it fails to allow victims seek justice in the legal system, increases the psychological harm done to the victim when testifying, also from the point of criminalization, it is unfair to the victim.

1.2.2a) Expand the scope of protection

We welcome the recommendations in Chapter 4 and 5. Any act which is tantamount to sexual conquest, manipulation and control of any person regardless of their gender is unacceptable and intolerable. Therefore, we welcome the recommendation that the scope of rape should be extended to cover penile penetration of the vagina, anus or mouth of another person, as opposed to that of the vagina only in the existing law. In other words, the scope of protection is extended to include the male and the transgender as well, instead of the female only. As most of the common law jurisdiction such as England, Australia, Canada etc. have the similar already, Hong Kong should also carry out the reform. The rape definition should not only include penal penetration, scope of protection should be the penetration of anal, vagina and oral by any part of body or any object.

(Refer to 2.1)

1.2.2b) Combine the offence of rape with other forms of sexual penetrative acts

We do not agree with the Commission's view that "We take the view that the term rape should be retained … The term rape is well-understood in our culture to mean a particular form of serious wrongdoing." Given the term rape under the current legal framework only means the sexual offence involving sexual penetration with a man's sexual organ, i.e. his penis, the continuous adoption of the current definition of rape would only strengthens the existing social culture being "penis-centred".

According to our observation of sexual violence victims in RainLily, sexual violence by non-penile penetrative acts bring serious and long-lasting physical and psychological harm to the victims as much as penile penetrative acts do. As opposed to penile penetrative acts, non-penile penetrative acts committed by the perpetuator include penetration of vagina and anus of the victim by using tools such as finger, tongue and hard objects. As such, penetrative acts as such signify the exploitation of the weak by the dominant.

Therefore, we do not agree that the traditional definition of rape should be retained and that distinction between penile and non-penile penetrative acts is drawn. Given the fact that both acts can bring the same physical and psychological harm to the victims, both should be regarded as serious wrongdoings. As such, redefining the term "rape" can highlight the harm brought by both, so as to promote public awareness as to the gravity of any kinds of penetrative acts. Moreover, combining two offences can obviate the need for victims to identify penile-penetration, thereby reducing the difficulties of police investigation and prosecution. Therefore, distinction should not be drawn between two categories of offences.

1.2.2c) Replace rape with penetrative sexual assault

It is not uncommon that the offence of rape is replaced by “sexual assault” and “penetrative sexual assault” in other jurisdictions such as Canada and some federal states of Australia. The replacement of term signifies the fact that violence committed by both penile and non-penile penetrative acts signifies gender inequality and undermine sexual autonomy, thereby reducing the labeling and stigmatization of sexual violence victims. Retaining the existing definition of rape according to the recommendation of LRC maintains public attention to penile penetrative sexual offences; fails to convince the society about the severity of non-penile penetrative sexual offences and ignores the harm they bring. Therefore, it is hoped that LRC can consider replacing the term “rape” with penetrative sexual assault”. According to the experiences from other countries, replacing the term “rape” will not degrading the offence, however, it could help the jury to consider the nature of the assault. Moreover, it can also avoid the confusion of the juries for the different definition of “rape”.

(Refer to 2.2)

1.2.3) Definition of mental element as to consent

1.2.3a.) Change from the subject test to the mixed test

In determining whether the perpetuator had the mental element as to consent, we favor the recommendation that the test should be changed from the subject test to the mixed test. The existing legislation stipulates that as long as the defendant genuinely believes that the victim consents, even unreasonably, the defendant shall not be guilty of rape. As LRC correctly pointed out in the consultation paper, adoption of the subject test “encourages people to adhere to myths about sexual behaviour and in particular that all women like to be overborne by a dominant male”. Take a victim helped by RainLily as an example. Even if the victim clearly articulated in the court that she did not consent to the penetration, the defendant would not be held guilty by the jury, simply because the jury guidelines given by the judge pointed out that "the defendant who held genuine belief as to victim’s consent, though unreasonable, should not be held guilty.” As such, the true preference of the victim, even clearly articulated in court, is always ignored under the existing law. Therefore, with the adoption of the mixed test, the true wishes of victims can be respected. It is conducive to the development as to elimination of prejudice towards sex and sexual violence in the community.

(Refer to 2.3)

1.2.3b) Include recklessness as mental element of offence

However, we do not agree that all sexual offences must be intentional. We hope the LRC can refer to the Scottish offence, which stipulates either intention or recklessness can constitute the mental element of offence.

1.2.3c) Defendant cannot rely on the defence that the victim does not object judging by victim's reaction

Due to the prejudices of the society concerning sexual violence, the public misunderstand that the victim must resist by violence as an expression of the objection to the penetration. Such misunderstanding in fact ignores the fear and intimidation of the victims, which hinder the victims from resisting.

Under existing practice of the police and courts, wounds of the victim's body and the extent to which the victim resists violently always serve as strong indication as to the victim's unwillingness. Cases in RainLily show that even if the victims are unwilling to the acts amounting sexual violence, it is always very difficult for them to resist violently. Currently, trials in many states in Australia (such as: ACT, NT, SA and VIC) and New Zealand, give the following direction to the jury: "the fact that the victim did not speak, make any move, violently resist or no wound was found on victim's body, or victim had any sexual history with the defendant or any other person does not implicate that the victim consented to the sexual intercourse." Such a direction greatly helps eliminate the bias of jury and hence reduces the chance where unfair verdict is given. Therefore, we suggest that LRC shall refer to the model adopted by Australia, which specifies clearly that "the fact that the victim did not speak, make any move, violently resist or no wound was found on victim's body, or victim had any sexual history with the defendant or any other person does not implicate that the victim consented to the sexual intercourse" and give jury direction accordingly.

1.2.3d) Definition of Consent

As the meaning of consent is not clear, it affects the certainty of the law. Some victims did not give her consent freely and voluntary to the sexual intercourse when she was coerced, threated or unconscious, however, her acceptance of intercourse is always being recognized as consent. For example, a blind victim who was detained by an abuser and she was not allowed to leave if she did not agree to have sexual intercourse with him. However, her "agreement" under threats" was become the "consent" .

One of the purposes of the Definition is to provide certainty and clarity to the meaning of consent. The essence of the Definition falls on the phrase "freely and voluntarily agrees". What does this phrase mean to you? No external influence on your decision or actively initiatively wanting to make

your decision? Indeed, the phrase “freely and voluntarily” helps to pinpoint the meaning of “consent”. However, the follow up question is what does “freely and voluntarily” mean? These two adjectives could be as broadly construed as the word “consent”.

To better fulfil the objective of providing certainty and clarity to the meaning of consent, and especially in the context of sexual assaults including rape, like Canada and New Zealand, our Crimes Ordinance should include a section to demonstrate what circumstances would amount to and not amount to “consent” in sexual activities.

Canada is one of the first jurisdictions that codified the meaning of “consent”. The new law should list out some of the circumstances that does not amount to consent.

Allowing sexual activity does not amount to consent in some circumstances

(1) A person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity.

(2) A person does not consent to sexual activity if he or she allows the activity because of –

  (a) force applied to him or her or some other person; or

  (b) the threat (expressed or implied) of the application of force to him or her or some other person; or

  (c) the fear of the application of force to him or her or some other person.

(3) A person does not consent to sexual activity if the activity occurs while he or she is asleep or unconscious.

(4) A person does not consent to sexual activity if the activity occurs while he or she is so affected by alcohol or some other drug that he or she cannot consent or refuse to consent to the activity.

(5) A person does not consent to sexual activity if the activity occurs while he or she is affected by an intellectual, mental, or physical condition or impairment of such a nature and degree that he or she cannot consent or refuse to consent to the activity.

(6) Nothing in this subsection shall be construed as limiting the circumstance in which no consent is obtained.

(Refer to 2.4)

1.2.3e) Evidential presumption

We welcome there should be a statutory definition of "consent" in relation to sexual intercourse or sexual activity. However, in determining whether there is consent, we suggest that apart from "conclusive presumption" proposed by the LRC, LRC can refer to England and other jurisdictions where “evidential presumption” is in place. That means if the victim is under threats, violence, unlawful detention, in unconsciousness or other circumstances, known to the defendant, the evidential presumption that presumes the victim does not consent will apply.

(Refer to 2.3)

1.2.4) Clearly define the offence of voyeuristic conducts

We welcome the recommendation that sexual assault under the third category should include intentional voyeuristic conducts with sexual nature. Recently, the trend of occurrence of voyeuristic conducts surges in public place, so does the number of police-reported cases of "under-the-skirt" photography. As far as the area of MTR is concerned, the number of "under-the-skirt" photography cases increased from averagely 6 per month last year, to averagely 9 per month (counting till the first 8 months this year.) The increase is more than 50%.

Not only do voyeuristic conducts offend local Chinese women, they also offend foreign domestic helpers. Voyeuristic behaviors in workplace of foreign domestic helpers which are usually residential premises are common. For example, some employees will secretively install cameras or other recording devices in toilets, bathroom, bedrooms of the domestic helpers and other place in their home, shooting the domestic helpers who are changing their clothes, toileting or taking bath. In this regard, voyeurism severely violates their dignity and privacy. Moreover, under the mandatory live-up employment arrangement implemented by Immigration Department, they must reside with their employers, highlighting the difficulty in avoiding voyeuristic conducts.

Under the current regime, no specific offence dealing with voyeuristic conducts is available. Therefore charges against defendants who have committed voyeuristic conducts have to be bought pursuant to general offences, either disorderly conduct in public places, loitering or the common law offence of outraging public decency. It is suggested that without specific offence, it is hard to deter the conducts. Moreover, voyeurism in private place such as voyeurism conducted by relatives and employers in domestic premises is even out of the scope of general offences in the current regime. As such, the current regime has failed to protect the public from the threat of voyeurism. Therefore, we agree that voyeuristic conducts should be covered by a specified offence.

However, in determining the elements of offence, we suggest that provisions in codified law of Canada and New Zealand which are relatively suitable to the context of Hong Kong and comprehensive should be adopted. First, the codified law can sufficiently reflect the gravity of the voyeuristic conducts, which severely violate the right of privacy and more importantly, sexually offend the victims. We suggest that the elements of offence should focus on the conduct itself, instead of the subjective feeling of complainants. The reason being, even if the aforementioned voyeuristic conducts may not necessary lead to fear of or any harm on the complainants, the nature of the voyeuristic conducts itself, which offend privacy and human dignity justifies bringing the relevant charge against the offender. Therefore, the new legislation should refer to the codified law of Canada and New Zealand, which clearly specify the nature of the act constituting the offence.

(Refer to 3.1)

1.2.5) Revising Relevant Evidence Law and Legal Procedures

Sexual offence trials often involves rules of evidence and certain legal procedures, which are fundamental to the right to fair trial for both the defendant and the victim, and essential to the achievement of justice and fair judgment by the jury. Therefore, ACSVAW recommends that the Hong Kong Government shall make reference to the relevant Evidence Law and legal procedures in the United Kingdom and Scotland, and amend the corresponding laws and procedures in Hong Kong.

1.2.5a) Disclosure of the Identity of the Victim

Section 156 of the Crimes Ordinance (Cap.200) provides for restrictions of the disclosure of the identity of the sexual offence complainant, where information leading to his/her identity shall be prohibited from being published in a written publication available to the public or be broadcast in Hong Kong. And a codename will be given to the victim for the use in court to prevent the disclosure of the victim's real name. However, in an open court, the victim will always be cross examined on personal particulars which are irrelevant to the case, posing severe mental burden and nuisance to the victim. For instance, the defence counsel calling the victim by his/her English name or nickname, leading to exposure of the victim's identity. Moreover, some victims' telephone number and address have been disclosed in the trial, but neither the judge nor the prosecutor objected to it, as a result the media were able to disturb the victim, therefore she felt severely threatened. Therefore, ACSVAW urges to amend relevant legislation to strengthen protection of the victims.

1.2.5b) Sexual experience

According to the restrictions on evidence and on publishing details regarding identity provided by section 154 of the Crimes Ordinance (Cap.200), except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, about any sexual experience of a complainant with a person other than that defendant. The purpose of this provision is to avoid the jury being biased due to the victim's sexual experience. According to the survey conducted by ACSVAW and the Hong Kong Baptist University in 2007, there exist many myths and prejudices about sexual offences. The present law allows the cross-examination regarding the victim's sexual experience with leave of the judge. However, there is no relevant guidance on the criteria to grant leave. Therefore, the Hong Kong Government shall make reference to the laws in the United Kingdom and Canada, to specify circumstances which cross-examination on sexual experience of the victim shall be allowed. Moreover, the law in the United Kingdom shall be a model for Hong Kong law to prohibit the questioning of the whole of the victim's sexual experience, whether with the defendant or a person other than the defendant, to minimize any bias to sexual violence victims.

1.2.5.c) Protections to Sexaul Violence Victims: Evidence by Live Television Link, Video Recorded Evidence, and Testifying Behind a Screen

Although sexual offence complaints can apply to give evidence by live television link in accordance with section 79B of the Criminal Procedures Ordinance (Cap.221), and "The Statement of Prosecution Policy and Practice - Code for Prosecutors" and "The Statement on the Treatment of Victims and the Witnesses (2009)" also states that sexual offence complaints can testify behind a screen, according to RainLily's case statistics in year 2010 to 2011, less than 20% of the victims were granted special protective measures, within which most of them were persons less than 16 years old or mentally incapacitated (who are already automatically entitled to such measures). However, victims not falling within the above categories have to apply as a "witness in fear", and almost all applications were rejected. Even if the victims were mentally impaired as a result, or even attempted suicide, the court nonetheless rejected the application. In the end the defendant was acquitted because the victim could not testify in court. Also, foreign domestic helpers and ethnic minority victims are often faced with obstacles when questioned by the police or when testifying in court, including the language barrier, difficulty in translation, and unstable emotions. The above factors not only pose huge mental burden to them but also affect the accuracy of their testimony, having an adverse impact on the legal procedures.

ACSVAW is in the opinion that the Law Reform Commission shall make reference to laws in the United Kingdom, Scotland, etc., and strengthen the special protective measures to sexual offence victims. For example, the Hong Kong Government shall ensure that the victims could be entitled with a right to give evidence by live television link, video recordings, or behind a screen, and limit the judges' discretion in refusing the grant. These measures not only help with the prosecution of sexual offences, but also protect the victims' integrity, which are fundamental values of the legal system.

Regarding the fair trial of the defendant, the use of screen is beneficial to the enhancement of such right, because the use of screen can improve the emotional stability of the victim and enhance the accuracy of the testimony. Besides, in c *R v DJX* (1990) 91 Cr App R 36 (at 41 per Hutchison LCJ) the concept of fair trial has been extended to both the right to a fair trial to the defendant and the witness, therefore it is inappropriate to sacrifice the witness' right for the defendant's benefits. In Hong Kong case law, *HKSAR v See Wah Lun* [2011] 2 HKLRD 957 also acknowledged that the right between the defendant and the witness shall be balanced. Therefore, the interest to the defendant is not absolute.

In the long run, the Government shall make reference to the legal procedures regarding sexual violence cases, and amend Cap. 221 section 79B, **to allow sexual violence victims to testify by video recorded evidence, to reduce the questioning at trial**, and to provide them with special protective measures (such as screen and live television link).

(Refer to 3.2 and 3.3)

1.2.6 The Association's response to the proposal of Hong Kong Law Reform Commission

Recommendation 1: Guiding principles for reform

We welcome the adoption of the following as guiding principles for reform on substantive law of sexual offences:

1. Clarity of the law;
2. Respect for sexual autonomy;
3. The protective principle;
4. Gender neutrality and human rights;
5. Avoidance of distinctions based on sexual orientation;
6. The provisions of the International Covenant on Civil and Political Rights, the Hong Kong Bill of Rights Ordinance (Cap. 383) and the Basic Law should be adhered to.

We welcome the reform of such existing sexual offences as rape and indecent assault based on the "respect for sexual autonomy" principle. The intention behind the present offences of rape and indecent assault were for the preservation of social morality and the protection of virginity. We submit that this fails to pay sufficient regard to changes of social values in Hong Kong over time and the increasing weight attached to human rights and liberties by modern society. We consider the "respect for sexual autonomy" and the protective principles better answer the the need of times (the need of society and citizens).

However, we consider that the Law Reform Commission fails to deal with the potential conflicts between the "respect for sexual autonomy" principle and the protective principle. Besides, we consider it appropriate to include as addition "protection of rights of complainants of offences of sexual violence" as one of the guiding principles.

Recommendation 2: There should be a statutory definition of "consent" in relation to sexual intercourse or sexual activity.

We agree with the recommendation that there should be a statutory definition of "consent" in relation to sexual intercourse or sexual activity.However, in order to better fulfil the objective of providing certainty and clarity to the meaning of consent, and especially in the context of sexual assaults including rape, like Canada and New Zealand, our Crimes Ordinance should include a section to demonstrate what circumstances would amount to and not amount to "consent" in sexual activities.

Recommendation 3: The recommended statutory definition of consent

We agree with the amendment of the statutory definition of consent. However, we recommend further that the amended definition should incorporate the the language of a related part of Jury Directions in the Australian jurisdiction to the effect that the fact (i) that the complainants do not verbally or by behaviour object to the sexual intercourse, (ii) that the complainant do not resist by force or violence, (iii) that the complainant suffer no injuries, (iv) that the complainant has in the past engaged in sexual intercourse with the defendant or any other persons, shall by no means indicate that the complainant has consented to the sexual intercourse under consideration by the court. We consider such incorporation is important for the reduction of jury prejudice that may result in unfair reaching of verdict.

Due to popular bias which society held towards sexual violence, the general public may think that real victims of sexual violence should have used violence or force to resist acts of sexual violence against them, or should have demonstrated some signs of resistance. People tend to overlook the effects of the intimidation of the incident on the victims, which make them fail to give any response or resistance. In reality, the police often rely on the injuries suffered by the complainants, the degree to which the complainant resist, for determining whether there has been non-consensual sexual intercourse taking place. But according to Rainlily's experience with the victims, although the victims did not consent, it is difficult for them to resist during incidents of sexual violence.

A number of provinces in Australia (ACT, NT, SA, VIC): jury directions—An inference of consent cannot be drawn from the following facts: (1) complainant did not speak anything during the taking place of the incident; (2) complainant did not react during the taking place of the incident; (3) complainant did not resist by force; (4) complainant did not suffer injuries; (5) complainant had in the past engaged in sexual intercourse with the defendant or other persons

This direction reduces the chance of jury basing their verdict on popular prejudices, in case of which unfair results are likely.We therefore recommend that the amended statutory definition of consent shall incorporate this language in the Australian jury directions, so as to make a powerful note about the rejection of the myths by appropriation of language of the substantive law.

Recommendation 4: as to capacity of consenting to sexual activity

We agree with the recommendation.

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

We agree with the recommendation on the codification of the conclusive presumptions in relation to such circumstances as intentional deception or impersonation.

However, we further recommend that the amended law should incorporate "evidential presumptions" along the line of the corresponding provisions providing for the same in the law of some other jurisdictions such as UK, namely that on the proof of existence of such circumstances that the complainant has been subject to intimidation, violence, false imprisonment or unconsciousness, and that the defendant was aware of the existence of such circumstances, it shall be presumed that the complainant did not consent to the sexual activity in question, and the defendant who wishes to challenge the facts presumed shall have the burden of rebutting that presumption by adducing sufficient evidence to the satisfaction of the court.

We consider the inclusion of these presumptions will have the effect of encouraging victims of sexual violence to report incidents of sexual violence for reason that prosecution need not be faced with the onerous task of adducing evidence that supports the only reasonable inference of there being an absence of consent.

Recommendation 6: The scope and withdrawal of consent

We agree with the recommendation on the scope and withdrawal of consent.

Recommendation 7: The scope of the offence of rape

We agree with the recommendation that the offence of rape should include penile penetration of vagina, anus or mouth of another (including surgically constructed genitals).

However, we consider that the scope of the offence of rape should cover penetration of the same with other body parts or objects. We also consider that we may follow the examples of some other jurisdictions by replacing the terminology of "rape" by "sexual assault by penetration", in view of the fact that the former more appropriately reflects that the behavior constitutes violence that finds its roots in gender power and is an violation of others' sexual autonomy, and the fact that it reduces the stigmatizing effect of the incident upon the victims of rape.

According to the present state of law, the scope of the offence of rape only covers penetration of vagina with penis. Penetration of vagina or anus with body parts such as fingers, or with foreign objects, or oral sex obtained by coercion, are not within the scope of the offence of rape but within

the governance of the offence of indecent assault. This leads to one unfavourable practical consequence for complainants of rape. In order to prove to the court that rape has taken place, prosecution is under the legal burden of proving each and every element of the offence. The element of penetration of vagina with penis inevitably requires that the complainant to give oral testimony in public trials in excruciating details of the way she is sexually violated. This gives rise to huge difficulties and trauma.

In our daily services we came across cases where victims failed the technical hurdle of proving penetration with penis, the result of which was the acquittal on the offence of rape (some others involved the same failure, but a re-trial is ordered for reason that the trial judge failed to give jury directions as to the possibility of conviction on the alternative charge of the offence of indecent assault. The re-trial, as is clearly obvious, required the complainant to testify and relive her painful experience once more.

We consider that the present offence of rape is inadequately narrow in scope. It downplays the gravity of this kind of sexual assault as a serious form of sexual violence. On the other hand, it deters victims of sexual violence from seeking justice in the criminal justice system, or, where they otherwise persevere to seek redress, it aggravates the emotional trauma already suffered during the process of trial. This leads to unfairness.

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

We do not agree with the recommendation that non-penile sexual penetrative acts should be distinguished from penile sexual penetrative acts. We also do not agree with the recommendation that "rape" should be retained for naming the offence of penile sexual penetration. We consider that the choice of terminology should be sexual assault by penetration for both penile and non-penile sexual penetrative acts.

We do not agree with the remark made in the proposal that "the term rape should be retained to refer to the offence which involves non-consensual penile penetration of the complainant. The term rape is well-understood in our culture to mean a particular form of serious wrongdoing." We take the view that the retaining of the terminology takes the wrong direction of reinforcing the "penis-centred" socio-cultural prejudice. From our experience with the victims of sexual violence, non-penile sexual penetrative acts cause bodily harm and trauma in victims to a degree no less than penile sexual penetrative acts do. The use of agents of penetration such as fingers, tongues and hard objects by perpetrators upon the body of victims is as much a form of manipulation and subduing of victims as penile penetration. We take the view that both are equally objectionable.

We consider that both penile and non-penile sexual penetrative acts are forms of serious wrongdoing and should hence be collapsed into one single offence of sexual assault by penetration. Handling the two forms of behavior in such a way will have two effects: first, this recognizes and gives appropriate weight to the physical and mental harms caused to victims in both situations, and represents to the general public that both forms of behavior were equally severe forms of wrongdoings. Secondly, collapsing the two into one single offence has implications upon the adducing of evidence in court. This is going to save complainants of the offence of rape from giving oral testimony for the proof of penetration with penis, and thus reasonably lessens the burden for the police to investigate for evidence and for the prosecution to prove its case on the criminal standard of proof.

We take notice that under the Law Reform Commission's proposal, the offence of rape and sexual assault by penetration will attract the same maximum sentence. However, we consider it possible that the two offences will be subject to different sentencing guidelines due to difference in case laws. Hence, retaining the distinction between the two would preserve the unsatisfying status quo that whether penis has been used remains the decisive factor as to which offence would be used for prosecution. This gives rise to pressure in victims and difficulties in prosecution. We consider that the distinction should be abolished, and the two kinds of prohibited behaviour should be collapsed into one single offence under the same title “sexual assault by penetration”.Therefore, we consider that no distinction should ever be drawn between penile and non-penile sexual penetrative act in the formulation of the offence of sexual assault by penetration.

Recommendation 9: Definitions of a penis and a vagina

We agree with the recommendation on the definitions of a penis and a vagina.

Recommendation 10: Meaning of “penetration”

We agree with the recommendation that “penetration” should be defined to mean a continuing act from entry to withdrawal. However, for the purpose of avoiding ambiguities and giving appropriate guidance to the general public and the court, we further recommend that the offence should incorporate wordings to the effect that any penetration however slight in degree and instantaneous in time shall also fall within the definition of “penetration’, so as to remove any doubt and mitigate the misleading potential of the word “continuing”.

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

We do not agree with the recommendation that the act of penetration and other relevant sexual acts must be committed intentionally. We recommend that the Scottish position should be followed, so that both intention and recklessness are accepted as sufficient for constituting the mental element of the offence. This will prevent offenders from using recklessness as excuse in order to escape from criminal responsibility.

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

We agree with the recommendation that the mental element of the accused should be changed from a subject test to a mixed test. Under the present law, provided that the accused genuinely believed that the complainant was consenting to have sexual intercourse, he would not be convicted of the offence of rape despite that his belief was unreasonable. As pointed out in the proposal of the Law Reform Commission, a purely subjective test "'bolsters the legitimacy of myths and stereotypes about women and sexual choice'. Moreover, 'it encourages people to adhere to myths about sexual behaviour and in particular that all women like to be overborne by a dominant male...'" In Rainlily's cases, despite the fact that victims of sexual violence had made it clear in the court that they were not consenting to the sexual act when they were being sexually assaulted by the offender, the judge in his/her directions to the jury pointed out that if the defendant sincerely believed that the complainant had consented to the sexual intercourse, he shall not be convicted of the offence of rape even though the belief was mistaken. As a result, the jury returned a verdict of not-guilty. This shows that the will of the victims could be ignored in court due to inadequacies in the present law, despite that it is articulated with clarity during their oral testimony. The recommendation addresses these inadequacies, and lead the jury to give better consideration of the genuine will of the victims. The recommendation also plays a role in eliminating popular myths about sexual violence.

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

We agree with the recommendation that the offence of procurement of an unlawful sexual act by false pretences provided by section 120 of Chapter 200 should be retained.

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

We do not agree with the recommendation that there should not be a new offence to cover sexual intercourse obtained by economic pressure. In Rainlily's daily services, we came across victims who had been coerced into having sexual intercourse by threat of nude photos, or by economic threat. However, due to the stringent requirement on the adducing of evidence with respect to the rape offence, the police often fail to charge or facilitate the prosecution of the person concerned with the offence for reason that no violence was involved in the intimidation or that the complainant had given her consent at the end (despite that the consent was in fact obtained by intimidation or threat). Hence, we recommend that a new offence prohibiting sexual intercourse obtained by threat or intimidation not involving the use of force should be created, so that victims falling under the above plights can be protected.

Recommendation 15: Definition of "sexual"

We agree with the recommendation on the definition of "sexual".

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

We agree with the recommendation that the offence of non-consensual buggery should be abolished and replaced by the offence of "sexual assault by penetration".

Recommendation 17: Definition of touching

We agree with the recommendation on the definition of touching.

Recommendation 18: sexual assault (first category)

We agree with the recommendation that the offence of sexual assault should replace the offence of indecent assault. We also agree with the recommendation on the definition of sexual assault (first category).

Recommendation 19　Sexual assault (Second category)

We agree with the new definition of sexual assault (second category).

Recommendation 20 Sexual assault (Third category)

We welcome the suggestion that sexual assault under this category should include intentional voyeuristic conducts with sexual nature. The suggestion is welcomed, because by extending the definition of sexual assault to the extent that voyeuristic conducts are included, three positive impacts can be brought. First, it raises public awareness as to the fact that voyeuristic conducts are sexually offensive. Second, it deters voyeuristic conducts. Third, it extends the protection of individuals from public sphere to private sphere.

However, in determining the elements of offence, we suggest that provisions in codified law of Canada and New Zealand which are relatively suitable to the context of Hong Kong and comprehensive should be adopted.

Recently, the trend of occurrence of voyeuristic conducts surge in public place, so does the number of police-reported cases of "under-the-skirt" photography. As far as the area of MTR is concerned, the number of "under-the-skirt" photography cases increased from averagely 6 per month last year, to averagely 9 per month (counting till the first 8 months this year.) The increase is more than 50%.

Not only do voyeuristic conducts offend local Chinese women, they also offend foreign domestic helpers. Voyeuristic behaviors in workplace of foreign domestic helpers which are usually residential premises are common. For example, some employees will secretively install cameras or other recording devices in toilets, bathroom, bedrooms of the domestic helpers and other place in their home, shooting the domestic helpers who are changing their clothes, toileting or taking bath. In this regard, voyeurism severely violates their dignity and privacy. Moreover, under the mandatory live-up employment arrangement implemented by Immigration Department, they must reside with their employers, highlighting the difficulty in avoiding voyeuristic conducts

Under the current regime, no specific offence dealing with voyeuristic conducts is available. Therefore charges against defendants who have committed voyeuristic conducts have to be bought pursuant to general offences, either disorderly conduct in public places, loitering or the common law offence of outraging public decency. It is suggested that without specific offence, it is hard to deter the conducts. Moreover, voyeurism in private place such as voyeurism conducted by relatives and employers in domestic premises is even out of the scope of general offences in the current regime. As such, the current regime has failed to protect the public from the threat of voyeurism. Therefore, we agree that voyeuristic conducts should be covered by a specified offence.

However, in determining the elements of offence, we suggest that provisions in codified law of Canada and New Zealand which are relatively suitable to the context of Hong Kong and comprehensive should be adopted. First, the codified law can sufficiently reflect the gravity of the

voyeuristic conducts, which severely violate the right of privacy and more importantly, sexually offend the victims. We suggest that the elements of offence should focus on the conduct itself, instead of the subjective feeling of complainants. The reason being, even if the aforementioned voyeuristic conducts may not necessary lead to fear of or any harm on the complainants, the nature of the voyeuristic conducts itself, which offend privacy and human dignity justifies bringing the relevant charge against the offender. Therefore, the new legislation should refer to the codified law of Canada and New Zealand, which clearly specify the nature of the act constituting the offence.

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

We agree that a new offence should be created to cover criminal conducts causing a person to engage in sexual activity without consent. The scope of the relevant offence must be clearly specified. However, to protect the public, we do not agree with the abolishment of the offence of procurements by threats.

Other recommendations: To evaluate relevant law of evidence and judicial proceedings

Trials of sexual offences always involve disputes concerning the applicable law of evidence and court proceedings. Given the specific nature of the trials, the law governing evidence and court proceedings is essential to whether the trial is just to both complainants and defendants; and whether the jury can give a just verdict. Therefore, we suggest that Hong Kong should learn from other jurisdictions such as England and Wales, Scotland, where in reforming the relevant law concerning sexual offences, the relevant law of evidence and judicial proceedings are also reformed.

Protection of complainants' identities; restriction on disclosure of sexual experience; protective measures in courts

i) Protection of complainants' identities

Amend section 156, Crimes Ordinance (Cap 200), concerning confidentiality of complainants' identities. Restriction should be imposed in the disclosure of complainants' personal information, by which disclosure of the complainants' address, telephone numbers, and identities of other prosecution witnesses (if disclosure results in identifying the complainants) in open court is prohibited.

In open court trial, complainants in giving their testimony are always asked about their important personal background information, putting severe psychological threat and disturbance on the

complainants. For example, it is not uncommon that complainants are called by their English names or nicknames which significantly reveal their identities during cross-examination. Moreover, there are occasions where even when complainants' telephone number, address and other personal information was disclosed, neither the judge nor prosecutor raise objection as to the disclosure. As such, media are able to identify and stalk the complainants during and after the trial. The complainant was severely disturbed and threatened. Final but not least, numerous cases with charge of rape and indecent assault is amended to common assault due to insufficiency of evidence, the name of complainants are therefore not protected under the law. In light of the hardship faced by the complainants, we suggest reforming the relevant law accordingly, giving further protection to complainants.

ii) Restriction on disclosure of sexual experience

Amend section 154, Crimes Ordinance (Cap 200), concerning admissibility of evidence and disclosure of relevant identity and details. Following England and Wales, Canada and other jurisdictions, the new legislation should expressly stipulate that only under specified and particular circumstances, evidence or questions as to sexual experience of complainants can be adduced or raised. Also, the new legislation should follow that of England and Wales, which imposes restriction on disclosure of sexual experience of complainants with defendants and that with persons other than defendants.

Under the current regime, pursuant to section 154, Crimes Ordinance (Cap 200), unless with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial concerning sexual experience of a complainant with a person other than the defendant. The purpose of this provision is to avoid prejudice of the judge and jury against a complainant by virtue of their sexual experience, so as to give a just verdict. According to the research conducted by the association and the Baptist University of Hong Kong in 2007, bias as to sexual violence is prevalent in courts. Under the current regime, judges are empowered to give leave so as to exempt defence counsels from the restriction imposed by section 54. However, the factors to be considered in granting the leave are equivocal with no codified list of factors. Therefore, the new legislation should follow those of England and Wales, Canada and other jurisdictions, where expressly stipulate that only under specified and particular circumstances, evidence or questions as to sexual experience of complainants can be adduced or raised..

iii) Protections for sexual complainants: Live television link; video recording; testified behind a screen etc

Pursuant to section 79B of Criminal Proceeding Ordinance, Cap 221, The Statement of Prosecution Policy and Practice and The Statement on the Treatment of Victims and Witnesses, the court may

permit vulnerable witness to evidence or be examined by way of a live television link. However, according to record of Rainlily in 2010 – 2011, only less than 20% of complainants in trial have been permitted to give evidence under the aforementioned protection; most of whom are child under 16 years old or mentally incapacitated persons. In contrast, almost none of the application advanced by adults who are mentally capacitated on the basis of being "witness in fear" is approved. Even if the complainants suffered from emotional breakdown or attempted to commit suicide due to the lack of protection, court still rejected the application. As the complainant cannot give her testimony, the charge against defendant is dismissed at the end of the trial.

Complainants who are domestic helpers and ethnic minority always face hardship in giving witness statement during police investigation and testimony during trial. The hardship includes language barriers, inconsistency of translation and emotional breakdown after being offended, etc. The hardship collectively gives complainants more psychological pressure, also affects the accuracy of their testimony, bringing adverse impact the judicial proceeding as a whole.

To further strengthen the protection of sexual complainants, we agree that the legislation of England and Wales, Scotland and other jurisdictions in the relevant areas should be followed. Legislation should be reformed to ensure that complainants can give evidence by live television link, video recording, behind screen and with other protection measures. As such, the accuracy of testimony is enhanced facilitating the prosecution process. Also rights and dignity of complainants are upheld, which lies at the heart of the criminal justice system.

Considering from the perspective of defendants, protection which allows giving testimony behind the shield in fact facilitates the right of fair trial of defendants. It is because the protection helps improving the accuracy of witness testimony, which is essential to reaching just verdict. Moreover, case law has evolved and developed, affirming right to fair trial included fairness of both complainants and defendants and that balance must be strike between the right of complainants and defendants. In this regard, the right of complainants cannot be sacrificed in exchange for that of defendants. In short, the rights of defendants are not absolute.

In the long run, we suggest that the new legislation should reform section 79B of Criminal Proceedings Ordinance and adopt similar provisions as those in England and Wales in relation to the proceedings dealing with sexual offences. Thereby complainants are allowed to give evidence by live link television so chance of giving evidence in court directly is lessened. Also, it is essential to provide special facilities in the court. (E.g. screen, live link television) (Please refer to the document Court Protection for Sexual Offence Complainants published by us)

To upheld sexual autonomy and protect sexual complainant, we sincerely hope that the Sub-Committee can reform the law accordingly in light of the opinions of the association and past complainants. If you have any inquiries, please contact Miss Linda Wong at *acsvaw@rainlily.org.hk* or 23922569.

Part 2 就特定範疇提出的意見

Recommendation of Specific area

2.1「強姦」定義的改革

Reform of the Legal Definition of Statutory Rape in Hong Kong

2.2「插入式性侵犯」取代「強姦」

Replace “Rape” by “sexual assault by penetration”

2.3「同意」定義的改革 (I) 證據推定與 與精神意念

Reform of Consent (I) – Presumption and mens rea

2.4「同意」定義的改革 (II)

Reform of Consent (II) –Consent definition

2.1 Reform of the Legal Definition of Statutory Rape in Hong Kong

2.1.1. Introduction

Every person has the fundamental right to his or her bodily integrity, and to make decision about whether to permit anyone else to have sexual contact with himself or herself. Crimes Act 1958 of Victoria contains a provision spelling out the objectives of its sexual offence provisions. One of the objectives is "to uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity."[2] The right to one's bodily integrity is very core to dignity of person. This is central to the respect that human beings should bear towards one another.

The rape offence in law has purportedly served to protect this bodily integrity of every person, by deterring any person from making undue sexual advances against another.

However, we submit that the rape offence in Hong Kong is flawed in its formulation, and has the effect of depriving certain groups of people of its protection.

2.1.2 Common law rape's definition

The common law defined rape as "the carnal knowledge of a woman forcibly and against her will"[3]. Carnal knowledge is defined by the common law as the penetration of the female sex organ by the male sex organ.

It should be noted that the common law definition rape is gender specific, as it only accepts the offence of rape to be the penetration of the female sex organ by the male sex organ. It also only accepts the offence of rape to be committed forcibly, but it should be noted that non-consensual sexual intercourse may occur in circumstances where no force is involved. For example, non-consensual sex may take place between a man and an intoxicated woman.

[2] See s37A(a) Crimes Act 1958 (Vic).

[3] *Rape – Overview; Act and Mental State*, Wayne R. LaFave Professor of Law, University of Illinois, "Substantive Criminal Law" 752-756 (3d ed. 2000).

2.1.3 Hong Kong's statutory rape

Rape is provided for in section 118(c) of Crimes Ordinance (Cap.200), "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[4]; and at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it[5]."

2.1.4. Recommendations

2.1.4a Remove gender specificity

It should be noted from the offence provision that that the person whom a man has unlawful sexual intercourse with is a *woman* is an essential ingredient of the offence. In other words, under the current offence of rape, it is only possible to rape a *woman*, and the law does not recognize any behaviour as rape which is a non-consensual sexual intercourse between, for example, two men. We submit that this gender specificity is problematic. According to the Cambridge Advanced Learner's Dictionary, "sexual intercourse" means the act of having sex, and includes within its meanings vaginal and anal intercourse. One needs to furnish an argument against this why anal intercourse had upon a man does not count as sexual intercourse, and that non-consensual anal intercourse had upon a man does not deserve protection of a rape law.

We submit that this gender-specificity in the law should be removed. This is important for its sociological implications. It is widely recognized by political philosophers that the promulgation and the administration of law has a publicity effect, which functions to pronounce and assert morals that a community may take to accept. By incorporating this one-sided gender specific perspective into statutes, the law is exercising this assertive function that will lead to the endorsement of this biased view among community members. It should be noted that in other jurisdictions the rape offence has been formulated in language that is free of this feature of gender-specificity, so that rape can be committed by any person against any another. Jurisdictions whose rape offence is free of such gender-specificity include the UK, New South Wales, Victoria, South Australia, Australian Capital Territory, Western Australia, Northern Territory, Queensland and Tasmania. Such formulation can be the substitution of gender-specific wordings such as "man" and "woman" with "any person" and "another person". Such example can be found in the rape offence of New South Wales, provided for in section 61I of her Crimes Act 1900[6].

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[4] See 118(3)(a) Crimes Ordinance

[5] See 118(3)(b) Crimes Ordinance

[6] Which reads, "any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse is liable to imprisonment for 14 years."

2.1.4b Expand the definition of sexual intercourse to include penetration of other body parts of the victims than vagina

It should be noted that the definition of sexual intercourse or sexual penetration in the common law jurisdictions across the world has expanded over time to cover penetration of other parts of the victim's body, such as mouth and anus, apart from vagina. This change is a response to the better recognition by the global culture of the rape-akin nature of these sexual activities and the rights and suffering of rape victims. A lot of jurisdictions that have embraced this change, including the United Kingdom[7], New South Wales[8], Victoria[9], Australian Capital Territory[10], Northern Territory (civil law)[11], Queensland[12], South Australia[13], Western Australia[14] (civil law) and Tasmania[15] (civil law). However, the definition of sexual intercourse for rape in Hong Kong remains narrow, and includes only vaginal penetration.

2.1.4c Expand the definition of sexual intercourse to include penetration with other body parts of the offender and any other objects than penis

It should be noted that the definition of sexual penetration in many common law jurisdictions have expanded to include penetration with objects other than penis of a male, such as other body parts, or any other object that is manipulated by the person. This is based on the acceptance of the notion that sexual penetration is a severe affront to the bodily integrity and dignity of the victim regardless of the means by which it is done, where his/her consent is absent.

Jurisdictions that accept penetration with other body parts and penetration with any other object as within the definition of sexual penetration or sexual intercourse are numerous, including New South Wales[16], Victoria[17], South Australia[18], Australian Capital Territory[19], Northern Territory[20] (civil law),

[7] See s 1(a), Sexual Offences Act 2003 (UK).

[8] See s 61H(1), Crimes Act 1900 No. 40 (NSW).

[9] See s 35(1) Crimes Act 1958 (Victoria).

[10] See ss 50(1)(a)-(c), Crimes Act 1900 (ACT).

[11] See s 192B, Criminal Code Act 1983 (NT).

[12] See ss 349(2)(b)-(c), Criminal Code Act 1899 (Qld).

[13] See s 5(1) Criminal Law Consolidation Act 1935 (SA).

[14] See s 319(1), Criminal Code Act 1913 (WA).

[15] See ss 185, 1 and 127A, Criminal Code Act 1924 (Tas).

[16] See s 61H(1)(a), Crimes Act 1900 No. 40 (NSW).

[17] See s 35(1), Criminal Act 1958 (Vic).

[18] See s5(1), Criminal Law Consolidation Act 1935 (SA).

and Western Australia[21] (civil law).

In contrast, Hong Kong adopts a very restricted definition for sexual penetration that only encompasses penetration by penis.

2.1.4d Include any other kind of sexual activities within the meaning of rape

The definition of sexual penetration or sexual intercourse for statutory rape offences of other jurisdictions have broadened to include other kinds of sexual activities that are not within the traditional meaning of "sexual intercourse".

For example, cunnilingus can be a form of sexual penetration in the rape offence of New South Wales[22], South Australia[23], Australian Capital Territory[24], Northern Territory[25] (civil law) and Western Australia[26] (civil law).

2.1.4e expand the definition of vaginal penetration to include a "surgically constructed genitalia"

Many jurisdictions have accepted in statutes that penetration of a surgically constructed genitalia counts as sexual penetration or sexual intercourse. This has a significant implication that the law has accepted rape can be committed on a male-to-female transgender.

Examples of such jurisdictions include New South Wales[27], Victoria[28], South Australia[29], Queensland[30] (civil law), Tasmania[31] (civil law) and Northern Territory[32] (civil law).

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[19] See ss 50(1)(a)&(b), Crimes Act 1900 (ACT).

[20] See s 1, Criminal Code Act 1983 (NT)

[21] See s 319(1), Criminal Code Act Compilation Act 1913 (WA).

[22] See s 61H(1)(c), Crimes Act 1900 (NSW).

[23] See s 5(1), Criminal Law Consolidation Act 1935 (SA).

[24] See s 50(1)(d), Crimes Act 1900 (ACT).

[25] See s 1, Criminal Code 1983 (NT).

[26] See s 319(1), Criminal Code Act Compilation Act 1913 (WA).

[27] See s 61H(1)(a), Crimes Act 1900 (NSW).

[28] See s 35(1), Crimes Act 1958 (Vic).

[29] See s 5(1), Criminal Law Consolidation Act 1935 (SA).

[30] See s 1, Criminal Code Act 1899 (Qld).

[31] See s 1, Criminal Code Act 1924 (Tas).

[32] See s 1, Criminal Code Act 1983 (NT).

However, no case law or statutory provision in Hong Kong recognizes that penetration with penis of a surgically constructed vagina amounts to "sexual intercourse" in the rape offence as defined in section 118(c) of the Crimes Ordinance.

2.1.4f Enact guiding principles for rape trial

The Victorian law has incorporated in its statutes guiding principles for interpreting and applying provisions which provide for the rape offence. Section 37B of the Crimes Act 1958 provides that "…in interpreting and applying Subdivisions (8A) to (8G)[33] (where subdivisions (8A) provides for rape and indecent assault), the court must have regards to the fact that (a) there is a high incidence of sexual violence within society; and (b) sexual offences are significantly under-reported; and (c) a significant number of sexual offences are committed against women, children and other vulnerable persons including persons with a cognitive impairment; and (d) sexual offenders are commonly known to their victims; and (e) sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred."

It is submitted that these guiding principles serve as a statutory recognition of the general plight and helplessness of rape victims.

2.1.5 Conclusion

It is submitted in this note that the rape offence in Hong Kong fails to take into account gender perspective. This results in the deprivation of protection from non-consensual sexual intercourse for certain groups of people. It is argued that the law should be reformed to achieve equality and justice, and regard may be had to the statutory rape offence of other jurisdictions. It is pointed out that they generally adopted a broader definition of sexual intercourse or sexual penetration, as a response to the global recognition of the victims' rights and dignity, which Hong Kong is yet to embrace.

[33] See s 37B Crimes Act 1958 (Vic).

2.2 Replace "Rape" by "sexual assault by penetration"

Six years after a sub-committee was appointed to review the law on sexual offences, Hong Kong's Law Reform Commission released a consultation paper on "Rape and other Non-Consensual Sexual Offences" in September 2012 ("the consultation paper").[34] In their review, the Sub-Committee on Review of Sexual Offences ("the sub-committee") found the recently reformed legislation in England and Wales (the Sexual Offences Act 2003) and Scotland (the Sexual Offences (Scotland) Act 2009) to be of great relevance, and made extensive reference to the corresponding reports made by the UK Home Office and the Scottish Law Commission during their respective consultation processes.[35] Their influence can be seen, firstly, in the guiding principles suggested by the sub-committee, which includes, among others, "clarity of the law."[36] However, some of the recommendations that the sub-committee drew with influence from England and Scotland may be problematic upon closer consideration. In this paper, I will consider the recommendations made regarding terminology of offences by the sub-committee, and argue that Hong Kong should cease using the term "rape" as the name of any sexual offences. Instead, adopting the terms "sexual assault" and "sexual assault with penetration" will give greater effect to the aforementioned guiding principle of the sub-committee.

The Sub-Committee's Recommendations

In the consultation paper, the sub-committee recommends that "the new legislation should incorporate provisions…to the effect that the scope of rape should cover penile penetration of the vagina, anus, or mouth of another person,"[37] yet they "take the view that a distinction should continue to be made between rape and other non-penile penetrative acts."[38] Reasons they cite for this distinction include the idea that it is undesirable to "over-extend" the definition of rape, as its constituent elements "are of long standing and in our view are well-known to the general public in Hong Kong," citing the "preconceptions of the meaning of certain words" that the general public and juries have.[39] However, citing the Scottish Law Commission, they note that "rape is well-understood in our culture to mean a particular form of serious wrongdoing," and that the seriousness "may not be properly reflected and may be downgraded" otherwise.[40] They then

[34] Hong Kong Law Reform Commission, Consultation Paper: Rape and other Non-consensual Sexual Offences (2012).

[35] ibid, preface paras 10-11.

[36] ibid, para 2.44.

[37] ibid, para 4.09.

[38] ibid, para 4.13.

[39] ibid.

[40] ibid, para 4.15.

connect this with the guiding principle of "clarity of the law": "as the general public in Hong Kong is familiar with the meaning of the term rape, the retention of the term may enhance understanding of the law."[41] Later in the consultation paper, however, the sub-committee then goes on to consider that there should be a new offence of "sexual assault by penetration," following the Scottish approach rather than the English one (which does not include the word 'sexual') on the basis that "the key elements of an offence should be apparent from its name and it is therefore necessary to highlight in its name the sexual element of the new offence…it is vital for educational purposes to reflect in its name that the new offence is a serious crime involving sexual penetrative assaults."[42] Later, the sub-committee goes on to say, "The rationale behind the creation of the new offence is that the impact of some non-penile penetrative assaults is considered as serious as rape."[43] In making this observation, they conclude that this offence of sexual assault by penetration should not include penetration of the mouth, as they did "not consider non-penile penetrative assault of another person's mouth…should be considered akin to rape."[44]

While the sub-committee acknowledges the importance of properly naming offences in the new legislation, citing a "public perception point of view" and "educational purposes", their recommendations are problematic in several senses. Firstly, there is an inherent contradiction in acknowledging that some non-penile penetrative assaults may be as serious as rape, yet continuing to distinguish it by a different name. Beyond mere consistency, however, retaining the term "rape" serves to perpetuate the false myth that rape is the more or only traumatic act of sexual violence. In Canada, where the term "rape" has not been found in the Canadian legislation since the early 1980s, but instead "sexual assault" is sorted into three tiers based on the level of violence, this issue has been considered and debated carefully, and I would suggest that Hong Kong can and should take valuable lessons from the Canadian experience.

The Canadian Experience

While "rape" was replaced by solely "sexual assault" in the Canadian Criminal Code in 1983, the idea of restoring "rape" as a distinct and separate offence was floated by the Canada's Public Safety Minister Vic Toews in 2010. This proposal died a quick death, however, as opposition arose quickly both from the public and internally within the government.[45] Catherine Kane, senior general counsel from the governmental department in charge of proposed changes to the Criminal Code,

[41] ibid.

[42] ibid, para 5.8.

[43] ibid, para 5.24.

[44] ibid, para 5.25.

[45] The Canadian Press, "Proposal to put 'rape' back into Criminal Code dies" (*CTV News*, 1 Aug 2010)

<http://www.ctvnews.ca/proposal-to-put-rape-back-into-criminal-code-dies-1.537995> accessed 1 Nov 2012.

was quoted by the Canadian Press as saying, “The replacement of the antiquated rape offence by the current sexual assault offences reflects the reality that the sexual integrity of any and every victim can be violated by any form of non-consensual sexual activity."[46] Similarly, Nicole Pietsch, the head of the Ontario Coalition of Rape Crisis Centres, wrote in a letter to Vic Toews, “Distinguishing rape from other forms of sexual assault erroneously suggests that some forms of sexual assault are violent while some forms of sexual assault are 'minor' and non-violent.”[47] Ms Pietsch also wrote, “myths about sexual violence shape our legal and policy notions of guilt, blamelessness, and offender responsibility”, and that “[s]exual assault survivors fear that their story will be minimized, or that they will be re-victimized by the justice system”, citing a 2004 study by the Canadian Centre for Justice Statistics study that 50% of sexual assault survivors said that they did not report their victimization because they ‘felt [the offence committed against them] wasn’t important enough’ to do so.[48] The Canadian experience, both of policy makers and of organizations doing work with sexual assault survivors, shows that the use of the term “rape”, distinguished from other kinds of sexual offences, can perpetuate this false myth, and the dangerous effects this false myth can have.

Application to Hong Kong’s Current Law Reform

It can be seen, then, that the sub-committee’s recommendation can serve to perpetuate dangerous myths about sexual violence that adversely affect survivors. By suggesting that a failure to use the term “rape” will degrade its seriousness in the eyes of the public, the implication is that the public will take an offence labelled something other than “rape” less seriously than they would an offence that is labelled “rape”. Consequently, the effect then is that rape is being falsely elevated above other kinds of sexual assault, including other kinds of sexual assault by penetration which the sub-committee acknowledges may be just as serious as what is commonly known as “rape”. As Ms Pietsch has noted, this false differentiation minimizes survivors’ reactions to sexualized violence, to the point where they may feel that the offence committed against them is not serious enough to report. The sub-committee rationalizes that the public has a preconception of the meaning of the word “rape”, but it is this very preconception that perpetuates the false myth, and a misconception, no matter how well known, is still false. The sub-committee suggests that it is undesirable for the seriousness of “rape” to be downgraded, but refusing the use the terminology “rape” does not so much have the effect of downgrading the seriousness of the offence of penile penetration, so as much it fully recognizes the seriousness of non-penile penetration. Using the term “sexual assault with penetration” to cover all acts of sexual assault involving penetration would properly reflect the nature of these acts and the seriousness of both penile and non-penile penetration. Hong Kong’s

[46] ibid.

[47] ibid.

[48] A full copy of this letter was obtained from Ms Pietsch through the Ontario Coalition of Rape Crisis Centres, citing statistics from: Juristat Canadian Centre for Justice Statistics: Sexual Offenses in Canada. Statistics Canada, Vol. 23, no. 6. 2004.

legal community is not immune to the existence of these false myths. In the recent Court of Appeal judgment of *Secretary of State v Rashid Mahmood*, Yeung VP wrote, "Rape is the most serious of all sexual offences as it is the physical violation of the victim's body in an intimate way."[49] The law, then, is a good place to start in addressing the problematic and artificial myth that "rape" is substantially "worse" than other kinds of sexual assault.

It should be noted that my submission is that there should be an offence of "sexual assault", and a separate offence of "sexual assault with penetration." This is in contrast to the Canadian legislation, which does not distinguish between acts of sexual assault with or without penetration, instead classifying them based on levels of violence, and also in contrast to the sub-committee's recommendation of the offence "sexual assault *by* penetration." Strong arguments have been made that prima facie, any kind of sexual penetration requires justification, distinguishing it from "mere' sexual assault, with one of the rationales being "the physiological fact that force is required to achieve such penetration."[50] While I do not intend to do deal with the topic of whether penetration in and of itself indeed makes sexual assault "worse" in this paper, instead choosing to focus on minimizing the effect that distinguishing "rape" from other types of sexual assaults may have, I would submit that using the descriptive qualifier "with penetration" is a suitable halfway-house between the position that offence terminology needs to focus on the sexual and violent nature of the assault and the position that penetration needs to be separately justified. Using the preposition "with" instead of "by" suggests a description of the offence so that the penetration is acknowledged, but does not have the characterization effect of "by", which would shift the focus of the offence to the "penetration," instead retaining the focus on the "sexual assault."

Conclusion

In studying attitudes towards rape in South Africa, van der Bijl and Rumney have noted, "one significant influence on criminal justice decision-making is social attitudes. It is well established in the literature that many people share 'prejudicial, stereotyped and inaccurate perceptions of sexual violence.'"[51] They also observed that "the treatment of rape cases by the criminal justice system relies upon 'stereotypical beliefs about rape which contain a restrictive and inaccurate

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[49] [2012] HKLRD 1203, at [22].

[50] M. Dempsey and J. Herring, "Why Sexual Penetration Requires Justification" *Oxford Journal of Legal Studies,* Vol. 27, No. 3 (2007) 467 at 473. For discussion on the argument that sexual penetration prima facie requires justification, see also M. Dempsey and J. Herring, "Rethinking the criminal law's response to sexual penetration: on theory and context" in C. McGlynn and V. Munro (eds.), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge: Oxford, 2010) 30-43.

[51] C. van der Bijl and P. Rumney, "Attitudes, Rape and Law Reform in South Africa." *Journal of Criminal Law*, 73 (5). 414 at 425-426, citing C.A. Ward, *Attitudes toward Rape: Feminist and Social Psychological Perspectives* (Sage Publications: London, 1995)

understanding of what "real rape" is.'"[52] By addressing inaccurate and harmful social attitudes and avoid confusion from inaccurate understandings of "real rape", all of the above arguments would support the guiding principle of "clarity of the law." By refusing to perpetuate the incorrect myth that "rape" is the only or more traumatic act of sexual violence, the new legislation would properly reflect the reality of sexual offences – that a sexual offence is not only traumatic through penile penetration, and other kinds of sexual assault may be just as serious. Furthermore, "sexual assault" and "sexual assault with penetration" are purely descriptive terms. While it may or may not be true that the general public has a preconception of the term "rape," it is hard to believe that such self-explanatory language could be misconstrued by the general public (including survivors, perpetrators, and juries). At the same time, it has been said that "'uptake' of legislative change is governed by its repetitions; by the subjects engaged in the legal process, not necessarily by legislative 'intentions'."[53] The UK Home Office itself has noted that "legal changes need to be combined with public education on the sociological stereotypes and myths surrounding rape before the legal changes will have their full impact."[54] It is clear, then, that mere legislative change will not eradicate the myths at hand, and that it requires both public education and effective acknowledgment of such change by those in the legal process. However, having the legislation reflect the reality, and being a tool of education in and of itself, is a promising start towards changing public perceptions and eliminating stereotypes and myths.

[52] ibid at 426, citing J. Temkin and B. Kraché, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart: Oxford, 2007).

[53] Julia Quilter, "Re-Framing the Rape Trial: Insights from Critical Theory about the Limitations of Legislative Reform" 35 Austl. Feminist L.J. 23 2011.

[54] UK Home Office, *Sexual Offences Act 2003: A Stocktake of the Effectiveness of the Act Since Its Implementation* (2006), at para 45.

2.3 Reform of Consent (I) – Presumption and mens rea

Index

2.3.1. Introduction

The victim's lack of consent is an important element for rape and indecent assault. During a criminal trial, since the defendant is presumed innocent before proven guilt, the burden of proof is on the prosecution to prove beyond reasonable doubt that the defendant knows the victim did not give consent. Therefore, two issues are important: (1) how the court constructs "consent" or the lack of it; (2) what circumstances negates consent.
Once the prosecution has proven beyond reasonable doubt that the defendant knows the victim did not consent, the defence can rebut by adducing sufficient evidence to raise an issue that the defendant has a mistaken belief that the victim consented. Thus it brings us to another important issue: (3) whether the defendant's mistaken belief needs to be honest only or needs to be reasonable. Of course, the defence lawyer can use consent from the victim as a defence. This also relates to (1) construction of consent.

In summary, three aspects of the law concerning consent are worth looking at to review if there is any room for legal reform:
(1) Construction of consent.
(2) Circumstances that negates consent
(3) Defendant's defence of mistaken belief of lack of consent

2.3.2. The "lack of consent" element in rape and indecent assault

The HK statutory definition of rape includes the element of "lack of consent". For indecent assault, the statue does not define "indecent assault", the definition is in the common law.

2.3.2.1 Rape

CRIMES ORDINANCE - SECT 118 - Rape

(3) A man commits rape if-

(a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and

(b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it. (Added 25 of 1978 s. 3) [cf. 1976 c. 82 s. 1(1) U.K.]

2.3.2.2 Indecent assault

The statute does not define indecent assault:

CRIMES ORDINANCE - SECT 122 - Indecent assault

(1) Subject to subsection (3)[55], a person who indecently assaults another person shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 10 years.

2.3.2.2.1 The common law definition of indecent assault

- The common law definition of indecent assault requires an "assault". An "assault" involves "unlawful" force, which "unlawful" means without consent.
- The common law definition is laid down in *R v Court [1988] 2 WLR 1071* (HL):
    - The HLs by majority concluded:
        - On the charge of indecent assault the prosecution must prove:
            - (1) that the accused intentionally assaulted the victim;
            - (2) that the assault, or the assault and the circumstances accompanying by it, are capable of being considered by right-minded persons as indecent;
            - (3) that the accused intended to commit such an assault as is referred to in (2) above.
- For (1), the Actus Reus of "assault" means common assault. Common assault is defined in *Collins v Wilcock [1984] 1 WLR 1172 (QBD)*, which means assault or battery:
    - Assault: "An assault is an act which causes another person to apprehend the infliction of immediate, unlawful force on another person."
    - Battery: "A battery is the actual infliction of unlawful force on another person."
- The force is "unlawful" if it is **without consent**.

Then we move on to the 3 main issues.

[55] S.122(3) A person is not, by virtue of subsection (2), guilty of indecently assaulting another person, if that person is, or believes on reasonable grounds that he or she is, married to that other person. (Replaced 90 of 1991 s. 7)

2.3.3. Construction of consent

2.3.3.1 Common law definition of consent

The case *R v Olugboja [1982] QB 320* construed "consent" in the context of rape:

- The facts:
  - Two girls, Jayne aged 16 and Karen 17, had been offered a lift home from a disco by Mr Lawal. They accepted the lift, however, instead of taking them home he drove to his home in the opposite direction. The girls refused to go in and started walking off. He followed them in the car picked up Jayne and drove off and raped her. He then picked Karen up and took them both back to his home where the appellant was. Lawal took Karen upstairs and raped her. The appellant turned off the lights told Jayne to take off her trousers. She was crying and complied out of fear. The appellant proceeded to have sexual intercourse. Jayne did not resist, struggle or scream. The appellant was convicted of rape and appealed.
- Held:
  - Appeal dismissed conviction upheld.
- Dunn LJ:
  - In context of rape, consent might be in the form from Actual desire to Reluctant acquiescence. The question is simply "whether at the time of the intercourse the woman consented"
  - The jury should be directed that consent, or the absence of it, is to be given its **ordinary meaning** and if need be, by way of example, that there is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent."

Consent in marriage is not automatic: *R v R [1992] 1 A.C. 599*, House of Lords.

2.3.3.2 Statutory definition of consent

a) HK

"Consent" not specifically defined in the statute. Construction follows English case law *R v Olugboja.*

The statue provision is "without the complainant's consent" instead of "against the will of the complainant". That suggests some element of positive consent (to be further explained below).

For the former, lack of agreement is enough for conviction so the defendant has to actively make sure the complainant consented; for the latter, the prosecution have to show evidence of resistance like bruise to prove the lack of consent.

b) Australia

In Australia, the report "Sexual assault laws in Australia" published by the Australian Institute of Family Studies, February 2011: http://www.aifs.gov.au/acssa/pubs/sheets/rs1/ analyzed legislative trends in the construction of consent:

- The report suggests that the legislative trend is more towards the construction of **"positive consent"**, which means:
  - there is a free agreement between all parties involved, with no coercion, force or intimidation of any kind; and
  - an individual will actively display his/her willingness to participate and consent to sexual activity. Consequently:
    - submitting to sexual activity, or not actively saying "no", is not enough to demonstrate consent; and
    - the consent of the other party in a sexual encounter should never be assumed, and should be actively sought after and affirmed.
- In Appendix A of the report, the section "Non-consent" p.3: http://www.aifs.gov.au/acssa/pubs/sheets/rs1/rs1appendix.pdf compared the consent standard and jury directions in different jurisdictions within Australia. The consent construed in the various jurisdictions are of the positive consent. **This is highly useful!!**
- The construction of "consent" in Australia reflects the resistance to rape myths.

c) UK

s.74 of Sexual Offences Act 2003 defines "consent" as "a person consents if he agrees by choice, and has the freedom and capacity to make that choice."

This is an article which is useful for general the analysis of the UK statute Sexual Offences Act 2003: http://www.rapecrisis.org.uk/Definitionofrape2.php

2.3.3.3 Lack of consent does not have to be communicated to the defendant

It is established by the English case R v Malone [1998] All ER (D) 176, that:

- IT WAS not necessary, in order for an accused who had not used force, threat or deceit to be found guilty of rape, that there should be evidence that the complainant had demonstrated her lack of consent and had communicated it to the accused.
- See http://www.independent.co.uk/news/obituaries/law-report-lack-of-consent-need-not-be-demonstrated-1160899.html

2.3.3.4 The defence's construction of consent

Recent amendments have been introduced (in Victoria, for example) that aim to reduce the ability of the defence to construct the presence of a complainant's consent through:

- her past sexual behaviour and history;
- her clothing prior to the assault;
- consumption of alcohol - in many states individuals are now considered incapable of consenting if they are extremely intoxicated; and
- appealing to a jury's acceptance of **rape myths** to make it appear that the defendant had reasonable grounds for believing that the complainant was consenting.

2.3.4 Circumstances that negates consent

2.3.4.1 HK position

The HK statute only prescribes one circumstance (excluding that of age and mental incapacity) that vitiates consent: impersonating the husband. Other circumstances are established in the UK/ HK case laws:

- Violence vitiates consent
  - *R v Olugboja [1982] QB 320*
  - *R v Larter and Castleton (1998)*
- Ability of valid consent removed by alcohol or drugs or is asleep
  - *R v Camplin (1845)* - Accused plied a young woman with drink
- Impersonating
  - Husband - s. 118(2) Crimes Ordinance (HK)
    - "A man who induces a married woman to have sexual intercourse with him by impersonating her husband commits rape."
  - Boyfriend
    - *R v Elbekkay [1995] Crim LR 163*
- Consent vitiated by deception of nature
  - *R v Lau Chun Hon (HCMA1499/1994)* - Surgical operation

2.3.4.2 UK

The Sexual Offences Act 2003 includes provisions which conclusively (s.76) or rebuttably (s.75) creates a presumption that the complainant did not consent and the defendant knows he/she did not consent under several circumstances. Those circumstances are similar to those adopted in HK:

s.75 Evidential presumptions about consent

(1)If in proceedings for an offence to which this section applies it is proved—
(a)that the defendant did the relevant act,
(b)that any of the circumstances specified in subsection (2) existed, and
(c)that the defendant knew that those circumstances existed,the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented, and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.

(2)The circumstances are that—
(a)any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;
(b)any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;
(c)the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act;
(d)the complainant was asleep or otherwise unconscious at the time of the relevant act;
(e)because of the complainant's physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented;
(f)any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.
(3)In subsection (2)(a) and (b), the reference to the time immediately before the relevant act began is, in the case of an act which is one of a continuous series of sexual activities, a reference to the time immediately before the first sexual activity began.

s.76 Conclusive presumptions about consent

(1)If in proceedings for an offence to which this section applies it is proved that the defendant did the relevant act and that any of the circumstances specified in subsection (2) existed, it is to be conclusively presumed—
(a)that the complainant did not consent to the relevant act, and
(b)that the defendant did not believe that the complainant consented to the relevant act.
(2)The circumstances are that—
(a)the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;
(b)the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.

More on the analysis of statutory presumptions in UK:
http://www.google.com.hk/url?sa=t&rct=j&q=presumption+of+lack+of+consent+rape&source=web&cd=1&ved=0CE0QFjAA&url=http%3A%2F%2Fwww.booksites.net%2Fdownload%2Ffsls%2Fstudent_files%2Fjefferson%2Fupdate_May04.doc&ei=ML0ZUKfJE5GViQfAtYHoDA&usg=AFQjCNEHBO1aQ19q2prvDtrbcJbxx3Lc_g

2.3.4.3 Australia

In Appendix A of the report "Sexual assault laws in Australia" published by the Australian Institute of Family Studies, February 2011, the section "Circumstances that invalidates consent" p.3: http://www.aifs.gov.au/acssa/pubs/sheets/rs1/rs1appendix.pdf compared in table form the different jurisdictions in Australia. The circumstances include:

- force,
- threats,
- intimidation,
- alcohol, drugs, intoxication, unconciousness, sleep, helplessness,
- fraud and deceit.

2.3.4.4 New South Wales

Below is extracted from "THE LAW OF CONSENT AND SEXUAL ASSAULT DISCUSSION PAPER" (MAY 2007):
http://www.google.com.hk/url?sa=t&rct=j&q=circumstances+negating+consent+uk&source=web&cd=3&ved=0CFkQFjAC&url=http%3A%2F%2Fwww.lpclrd.lawlink.nsw.gov.au%2Fagdbasev7wr%2Flpclrd%2Fdocuments%2Fdoc%2Fconsentdp.doc&ei=zF4ZUOK7GIrBiQeB-oGQCA&usg=AFQjCNEQ52KsYscERxg6B1fwWD_QGrIRWA

Section 61R Crimes Act 1900 (NSW) provides a non-exhaustive list of the circumstances that negate consent. Section 61R(2)(c) states that a person who submits to sexual intercourse with another person as a result of threats or terror directed to that person or another person, is to be regarded as not consenting. Furthermore, a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse; s.61R(2)(d). These two circumstances were the focus of the section when it was introduced in 1981.

Section 61R(2)(a) states that without limiting the grounds on which it may be established, consent to sexual intercourse is vitiated where the victim consents:

- Under a mistaken belief as to the identity of the other person, or
- Under a mistaken belief that the other person is married to the person.

Subsection 61R(2)(a)(i) reflects the common law as stated in *R v Dee (1884) 15 Cox CC 579*. However, subsection (ii) was enacted to cure a particular deficiency in the common law identified by *R v Papadimitropoulos (1957) 98 CLR 249*. In that case the accused fraudulently convinced the complainant they were married after they signed and lodged a notice of an intention to marry with the registry office. The complainant, who did not speak English, believed they were married and

sexual intercourse took place. There was some evidence to suggest the complainant would not have consented to sexual intercourse had she known she was not married. The High Court held that the accused's fraud did not vitiate consent.

Section 61R(2)(a1) was also inserted to address a particular situation not covered by the common law. The Criminal Legislation (Amendment) Act 1992 (NSW) was passed following a decision in Victoria where the court held that a radiographer who performed vaginal examinations on patients for no real medical purpose, was not guilty of rape. Section 61R(2)(a1) therefore provides that a person who consents to sexual intercourse under a mistaken belief that it is for medical or hygienic purposes (or any other mistaken belief about the nature of the act induced by fraudulent means) is taken not to consent to the intercourse.

2.3.5 Defendant's mistaken belief of consent

The issue is, if the jury is to acquit the defendant, shall the defendant's mistaken belief that the complainant consented be honest, or also be reasonable. The difference is that if honest suffice, then a man who honestly believes "no" means "yes" must be acquitted; but if the belief has to be also reasonable, the defendant cannot be acquitted. The former is a subjective test while the latter objective.

It should be noted that, while merely requiring an honest mistaken belief is an insufficient safeguard to the complainant, even the requirement of an honest and reasonable mistaken belief might be insufficient too, because:

(1) <u>the objective assessment of how reasonable the defendant's mistaken belief is would be subjected to the jury/ the judge's personal bias and rape myths.</u>

(2) <u>The honest and reasonable mistaken belief defence is an easy escape for the defendants (as explained in 5.4).</u>

The following jurisdictions require an honest and reasonable mistaken belief:

- UK
- Australia
- Canada
- Tasmania

The following jurisdictions require an honest mistaken belief:

- HK

2.3.5.1 HK

2.3.5.1.1 Common law position in HK

HK courts still follows the famous precedent: *DPP v Morgan [1976] AC 182* which laid down that <u>a honest belief suffice</u>. This English precedent has been overruled by the English statute (as explained in 5.2).

Precedents which laid down that mistaken belief need not be reasonable: *Gladstone Williams (1983) 78 CAR 276* in the Court of Appeal and *Beckford [1988] AC 130* in the Privy Council

The below paragraph summarizes relevant case laws. This is the old English position which HK still adopts today:

DPP v Morgan [1976] AC 182, in which the House of Lords ruled that an honest, mistaken belief in the victim's consent need not be reasonable to rebut a charge of rape; *Kimber [1983] 1 WLR 1118*, in which the Court of Appeal applied Morgan to the crime of indecent assault; and, in relation to a mistaken belief in the need for self-defence, *Gladstone Williams (1983) 78 CAR 276* in the Court of Appeal and *Beckford [1988] AC 130* in the Privy Council. The ruling in *B* is thus an important one as it is the first time the House has had the opportunity to deal with honest mistake since *Morgan* itself, and there has been a lurking doubt as to whether that case applies to mistaken belief across the criminal law. From http://webjcli.ncl.ac.uk/2000/issue2/power2.html#Heading10

2.3.5.1.2 The Statute and Jury Directions in HK

Actually, s.118(4) of the Crimes Ordinance provides that the jury has to determine if there are *reasonable grounds* for finding the defendant has an honest but mistaken belief. However, this is different from requiring a reasonable mistaken belief, because even with the effect of s.118(4), the key question is still "whether the defendant's mistaken belief is honest", just that the jury has to find it on reasonable grounds. Therefore, taking the previous example of the defendant honestly believing a "no" means "yes", if the defendant really has been taught that "no" means "yes" all his life by a bad teacher, and the jury finds it on reasonable grounds such as evidence given by his education history, then he must be acquitted. But by the reasonable mistaken belief test, he must not be acquitted because the belief itself is not reasonable in the first place.

a) The HK statute

This is the relevant subsection:

CRIMES ORDINANCE - SECT 118 - Rape

(4) It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed. (Added 25 of 1978 s. 3) [cf. 1976 c. 82 s. 1(2) U.K.]

b) The HK Jury directions

These are the relevant jury directions from "SPECIMEN DIRECTIONS IN JURY TRIALS" http://legalref.judiciary.gov.hk/doc/sp_dir/pdf/eng/SDJT.pdf:

Direction 65 on rape:

Where honest belief is a live issue :
If it is or may be the case that the defendant believed that she was consenting, then he cannot be guilty of rape. It is not for the defendant to prove that he believed that she was consenting; rather, it is for the prosecution to prove, so that you are sure, that he did not believe that she was consenting to sexual intercourse. And what if he held that belief but was mistaken? Well, if it is or may be the case that he held a genuine but mistaken belief that she was consenting, then you must acquit him. In deciding whether or not he believed or may have believed that she was consenting, you should have regard to the existence or absence of reasonable grounds for such a belief, and to all the surrounding circumstances. But the question must always be whether you are sure that he himself did not hold such a belief.

Direction 17 on reckless rape:

The defendant was reckless as to whether Ms [X] consented to sexual intercourse if you are sure that he realised there was a risk that she was not consenting and carried on anyway [when in the circumstances known to him it was unreasonable to do so.]
Add where appropriate:
However, if due to his age or personal characteristics [give details] the defendant genuinely did not appreciate or foresee the risk that Ms [X] was not consenting to sexual intercourse, he was not reckless.

2.3.5.2 UK

In the Sexual Offences Act 2003, for sections 1-4 (which are "rape", "assault by penetration", "sexual assault", "Causing a person to engage in sexual activity without consent" respectively), they all require the elements that:

- B [Complainant] does not consent to the penetration, and
- A [Defendant[*does not reasonably believe* that B [Complainant] consents.

Subsection (2) of sections 1-4 provides that "Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A [Defendant]has taken to ascertain whether B [Complainant]consents."

2.3.5.3 Australia

In Appendix A of the report "Sexual assault laws in Australia" published by the Australian Institute of Family Studies, February 2011, the section "Non-consent" p.3 & "What the accused thought" p.5:
http://www.aifs.gov.au/acssa/pubs/sheets/rs1/rs1appendix.pdf illustrated that many jurisdictions in Australia requires a mistaken belief to be both honest and reasonable.

In the part "Consent and Mens Rea" of the same report "Sexual assault laws in Australia": http://www.aifs.gov.au/acssa/pubs/sheets/rs1/, the state of law on mistaken belief is further analyzed which worth a look.

2.3.5.4 Defendants getting round by claiming having an honest and reasonable mistaken belief

By far the honest and reasonable mistaken belief requirement seems good enough for protecting the victims. But it should be noted that, the honest and reasonable mistaken belief defence (e.g. s.24(1) of the Criminal Code in Queensland) could be used as an escape for the defendant.

Even with the help of construction of positive consent, and with the presence of circumstances that negates consent; the defendant can still raise a defence by claiming that he/she has an honest and reasonable mistaken belief about the complainant's consent. An example is where a girl has previous accounts of being beaten by the defendant to submit to sexual acts, who on another account of rape passively submitted to the sexual abuse, the defendant can still be acquitted if his mistaken belief could potentially be reasonable. This is the Queensland Court of Appeal case *R v Parsons [2001] 1 Qd R 655*.

Similarly, ethnic minorities would be at risk because the defendant can easily claim that the language barrier made him/her had an honest and reasonable but mistaken belief. More similar cases could be found in the article "Consent, Power And Mistake Of Fact In Queensland Rape Law" at the part "IV The defence of mistake of fact" p.13-17:
http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1411&context=blr&sei-redir=1&referer=http%3A%2F%2Fwww.google.com%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3DPositive%2BConsent%2Brape%26source%3Dweb%26cd%3D3%26ved%3D0CF4QFjAC%26url%3Dhttp%253A%252F%252Fepublications.bond.edu.au%252Fcgi%252Fviewcontent.cgi%253Farticle%253D1411%2526context%253Dblr%26ei%3DTuPzT5W6F-SsiAeNmqDlBg%26usg%3DAFQjCNFvFa9lWxt1hVSzByBqy2O4q9xfrw#search=%22Positive%20Consent%20rape%22

2.3.5.5 A proposal for reform (with reference to the model in Canada and Tasmania)

In the same article "Consent, Power And Mistake Of Fact In Queensland Rape Law" at the part "B A proposal for reform" p.17-20, the Tasmanian and Canadian model was suggested to be adopted for reform. The Tasmanian model works by statutorily re-introducing the "positive consent" and "circumstances which vitiates consent" elements as conditions to exempt the use of an honest and reasonable mistaken belief defence :
http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1411&context=blr&sei-redir=1&referer=http%3A%2F%2Fwww.google.com%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3DPositive%2BConsent%2Brape%26source%3Dweb%26cd%3D3%26ved%3D0CF4QFjAC%26url%3Dhttp%253A%252F%252Fepublications.bond.edu.au%252Fcgi%252Fviewcontent.cgi%253Farticle%253D1411%2526context%253Dblr%26ei%3DTuPzT5W6F-SsiAeNmqDlBg%26usg%3DAFQjCNFvFa9lWxt1hVSzByBqy2O4q9xfrw#search=%22Positive%20Consent%20rape%22

"A model for legislative reform in this area is provided by provisions already adopted in Tasmania and Canada. Section 14A(1) of the Tasmanian Criminal Code, as amended in 2004,63 reads as follows:

In proceedings for [rape, indecent assault or unlawful sexual intercourse], a mistaken belief by the accused as to the existence of consent is not honest or reasonable if the accused –

(a) was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated; or

(b) was reckless as to whether or not the complainant consented; or

(c) did not take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act."

2.3.6. Recommendations to legal reform

General approach is to argue the law in other jurisdictions is advanced while HK is very backward. Also point out how the law can be reformed to eliminate rape myth bias.

(1) Construction of consent: adopt positive consent approach and codify the definition of consent into the Crimes Ordinance.
(2) Circumstances that negates consent: adopts UK statutory presumption of lack of consent approach. Alternative fallback option is codification of those circumstances.
(3) Defendant's defence of mistaken belief of lack of consent: Shall not follow the DPP v Morgan precedent anymore, which was overruled by statute in UK already. Shall require the mistaken belief defence to be honest + reasonable in the statute and jury directions. The model shall resemble that of Tasmania.

2.4 Reform of Consent (II) – Consent Definition

Introduction

Section 118(3)(a) of the Crimes Ordinance (Cap.200) says, "For rape, it must be proved that the accused had sexual intercourse with the complainant without her consent." Besides "sexual intercourse", the key element in this sentence clearly will be "without her consent". What does this phrase mean? You probably would not get its *full correct legal* meaning by simply looking up at the Oxford dictionary. The right direction is to plough through the complex case law. However, it is doubtful whether a layman is capable of doing so.

Thoughtfully, the Law Reform Commission of Hong Kong ("the LRC") in its Consultation Paper on Rape and Other Non-Consensual Sexual Offences published in September 2012 ("Consultation Paper") recommended codifying the definition of consent. This essay explores the adequacy and sufficiency of the proposed definition of consent by the LRC in light of the objectives (*See Part I below)* also laid down by the LRC. The conclusion would be – a more elaborative definition will better fulfil the objectives.

Part I – The LRC's Objectives

The LRC in its Consultation Paper, Recommendation 2, recommended that there should be a statutory definition of "consent" in relation to sexual intercourse or sexual activity so as to achieve mainly the following objectives:

(1) Provide some degree of certainty and clarity of the meaning of consent;
(2) Make the judge's task of giving directions to the jury easier;
(3) Make it easier for the jury to grasp the meaning of consent; and
(4) Enable the legislature "to consider and recommend what should and should not form acceptable standard of behaviours in a modern society".

Part II – The Definition and The Proposal

The LRC in its Consultation Paper, Recommendation 3, recommended the adoption of a statutory definition of consent to the effect that a person consents to sexual activity if the person freely and voluntarily agrees to the sexual activity and has the capacity to consent to such activity ("the Definition").

The author of this essay proposes to further elaborate the Definition already recommended by the LRC. The LRC should consider this issue with reference to 2 particular jurisdictions, namely, Canada and New Zealand

Canada

As creative as usual, Canada is one of the first jurisdictions that codified the meaning of "consent", no matter in the context of simple assault or sexual assault, which includes rape. Such amendment to the Criminal Code was brought about by Bill C-49 and came into force in 1992. The section is now reproduced below:

Meaning of "consent"

273.1

(1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

(2) No consent is obtained, for the purposes of sections 271,272 and 273, where

(a) the agreement is expressed by the words or conduct of a person other than the complainant;

(b) the complainant is incapable of consenting to the activity;

(c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;

(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

(3) Nothing in subsection (2) shall be construed as limiting the circumstance in which no consent is obtained.

New Zealand

Although New Zealand does not have a statutory definition of consent, it has a section in its Crimes Act 1961 listing out some of the circumstances that does not amount to consent. The section is now reproduced below:

128A Allowing sexual activity does not amount to consent in some circumstances

(7) A person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity.

(8) A person does not consent to sexual activity if he or she allows the activity because of –

(a) force applied to him or her or some other person; or

(b) the threat (expressed or implied) of the application of force to him or her or some other person; or

(c) the fear of the application of force to him or her or some other person.

(9) A person does not consent to sexual activity if the activity occurs while he or she is asleep or

unconscious.

(10) A person does not consent to sexual activity if the activity occurs while he or she is so affected by alcohol or some other drug that he or she cannot consent or refuse to consent to the activity.

(11) A person does not consent to sexual activity if the activity occurs while he or she is affected by an intellectual, mental, or physical condition or impairment of such a nature and degree that he or she cannot consent or refuse to consent to the activity.

(12) One person does not consent to sexual activity with another person if he or she allows the sexual activity because he or she is mistaken about who the other person is.

(13) A person does not consent to an act of sexual activity if he or she allows the act because he or she is mistaken about its nature and quality.

(14) This section does not limit the circumstances in which a person does not consent to sexual activity.

(15) For the purpose of this section, -

allows includes acquiesces in, submits to, participates in, and undertakes *sexual activity*, in relation to a person, means –

(a) sexual connection with the person; or

(b) the doing on the person of an indecent act that, without the person's consent, would be an indecent assault of the person.

Part III – Analysis

One of the purposes of the Definition is to provide certainty and clarity to the meaning of consent. The essence of the Definition falls on the phrase "freely and voluntarily agrees". What does this phrase mean to you? No external influence on your decision or actively initiatively wanting to make your decision? Indeed, the phrase "freely and voluntarily" helps to pinpoint the meaning of "consent". However, the follow up question is what does "freely and voluntarily" mean? These two adjectives could be as broadly construed as the word "consent".

To better fulfil the objective of providing certainty and clarity to the meaning of consent, and especially in the context of sexual assaults including rape, like Canada and New Zealand, our Crimes Ordinance should include a section to demonstrate what circumstances would amount to and not amount to "consent" in sexual activities.

These circumstances, although are non-exhaustive as stated in section 273.1(3) of the Criminal Code and section 128A(8) of the Crimes Act 1961, at least helps to clarify the concept of consent that already exists in our common law by limiting the legal meaning of consent. If the ultimate objective is to provide certainty and clarity, why not put down the circumstances that do not amount to consent which the Court has already decided? These decisions would not be overturned even if "consent" is later defined to mean "freely and voluntarily agrees". What was held to be "consent"

will clearly fit in the phrase “freely and voluntarily agrees”.

Another objective of the LRC is to make the judge’s task of giving directions to the jury easier. It has come to the stage of jury direction. The judge says, “You must be satisfied that the Prosecution must have proved with some certainty that the accused had sexual intercourse with the complainant without her consent in order to convict the accused. By consent, the law means freely and voluntarily agrees.” The jury looks puzzle. They are probably thinking, “Does not consent mean freely and voluntarily agrees? But what exactly is freely and voluntarily agree? I cannot really come up with any examples in my head.” The judge might then have to further elaborate as to what is “freely and voluntarily agrees” and provide examples.

In the above scenario, when the jury looked puzzle, the judge had to further explain the meaning of “freely and voluntarily agrees”. It does not make the judge’s task of giving directions easier, does it? What happens if the circumstances not amounting to consent are included in the statute? During jury direction, the judge would explain that “consent” means “freely and voluntarily agrees” and pick out the relevant circumstance to the case and give it as an example to the jury. There is not much that the judge could add to the direction then.

Not only would this make the judge’s task of giving directions easier, this more standard jury direction will give consistency, resulting in lower rates of appeal due to procedural irregularities.
Looking at the same scenario above, including a section explaining what does not amount to consent would make it easier for the jury to grasp the meaning of consent. The jury might go blank when they hear the judge says “consent” equals to “freely and voluntarily agrees”. However, when some examples are provided, these examples would help guide the jury to think on the right track as to what consent could have meant in the context of sexual assault. These examples could have acted as a stimulant for the jury.

The LRC also wanted the Definition to assist in shaping what should or should not be acceptable standards of behaviour in the society. I highly suspect if the Definition could do this at all. Merely stating “consent” as “freely and voluntarily agrees” does not show the public what is or is not acceptable behaviours in the society. I doubt how many laymen would stop and think, “what does “freely and voluntarily agrees” actually mean?”

If the LRC wants to enable the legislation to shape the acceptable behaviours in the society, it really should clearly list out with examples as to what is or is not acceptable behaviour. A section codifying what circumstances does not amount to consent serves best for this purpose. The public will then clearly understand that ‘consents’ obtained by force, threat, detention or during asleep, unconscious and so on are not genuine “consents”. This will help generate a better concept of acceptable behaviour for the public.

Conclusion

If the Definition is codified, it would be a great leap forward for Hong Kong criminal law. To perfect the Definition, a section on what circumstances do not amount to consent in sexual activities should be added. As analysed above, there are all these advantages in helping the LRC to achieve its objectives. So why not?

Part 3. 其他建議: 有關証據法及司法程序的修定

Other Recommendation : Reform of Evidence law and legal procedure

3.1 有關公關受害人性經驗之限制

Rape shield law in Hong Kong

3.2 性罪行受害者的法庭保障 (I) – 性暴力受害人之特別身份

Court Protection for Sexual Offence Complainants (I) – Distinctive Nature of Sexual Offence

3.3 性罪行受害者的法庭保障 (II)

Court Protection for Sexual Offence Complainants

3.4 性罪行受害者的法庭保障 (英文撮要)

Court Protection for Sexual Offence Complainants (English Summary)

3.1 Rape shield law in Hong Kong

促請法改委就《強姦及其他未經同意下進行的性罪行》諮詢文件
加入《刑事罪行條例》第154條改革建議

根據現行法例第200 章《刑事罪行條例》第154條對證據及發佈有關身份詳情的限制，除非獲得法官的許可，否則在該審訊中任何被告人或其代表不得提出有關申訴人與該被告人以外的其他人的性經驗作為證據，或在盤問中提出與此有關的問題。此法例的目的是避免陪審員因受害人過去的性經驗而產生偏見，從而影響他們對本案作出公正的裁決。

現時法官有權批准對受害人性經驗的提問，可是，法例對於有關批准的準則並沒有作出明確的指引，只有列明“法官如信納拒絕容許被告人或其代表提出該等證據或問題會*對被告人不公平*時則須給予許可，亦只有在此情況下方可給予許可” (第154條第2款)。然而，就“*對被告人不公平*”一詞，不同法官有不同的準則，案例至今亦沒有作出具體明確的指引，因此難以給予受害人確切的保障。假若法官能在不受指引下給予許可，此限制實屬虛設。

反觀其他先進國家如英國、加拿大、澳洲等，改革後的法例上均有較明確訂明，只有在特定情況下才可批准向受害人提出有關性經驗的證據。因此，本文建議法改委就《刑事罪行條例》第154條效法英國現行法例，擴展限制至受害人與被告及被告以外的其他性經驗，並加入特定例外情況或具體明確的指引，以免案件因對女性及性暴力的偏見而達至不公正的裁決。

Pursuant to section 154 of Crimes Ordinance, Cap 200, “Restrictions on evidence and on publishing details regarding identity”, except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience of a complainant with a person other than that defendant. The aim of the legislation is to avoid any bias towards the victim by the jury arising from the victim’s past sexual history. Such bias may influence their decision and render the verdict unjust.

Currently, the judge has the discretion to allow questioning about the victim’s past sexual history. However, there is no statutory guidance for the exercise of such discretion, with the provision only stating “the judge shall give leave 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” (section 154(2)). Different judges may hold different standards for *unfairness* to the defendant; therefore, such protection given to the victim is far from certain. If the court can exercise its discretion without any guidance, the restriction under section 154 only just exists in name without practical effect.

Reference is made to the reformed legislation of other common law jurisdictions, including the UK, Canada, Australia, etc, where the rape shield provisions provides a more detailed account of the exceptional circumstances where the court may grant leave to allow admission of evidence of victim's past sexual history. In light of the significance of rape shield protection in securing a just and fair trial, it is our stance that the Law Reform Commission of Hong Kong should follow the example of the UK, Canada and Australia, to recommend an extension of the scope of rape shield law to cover the victim's sexual history with persons other than that defendant and with the defendant himself. It is also recommended for an introduction of a list of exceptional conditions, only if the fulfillment of which can the judge give leave, as well as the introduction of concrete guidance for the judge to follow in exercising his discretion. Only if the abovementioned recommendations are put into place could a fair and just trial be achieved.

Paper Outline:

3.1.1 Introduction

3.1.2 What is rape shield law?

3.1.3 Aims of rape shield law

3.1.4 Scope of protection in current Hong Kong

3.1.5 Inadequacies of current Hong Kong rape shields

3.1.5a Problem as to the certainty of protection

3.1.5b Problem as to the scope of protection

3.1.6 Rape shield law of other jurisdictions

a The UK

b Canada

c Australia

- New South Wales
- Tasmania
- Australian Capital Territory (ACT)

3.1.7 Summary of the rape shield law in other jurisdictions

3.1.8 Recommendations

Recommendation 1: *Increasing the certainty of protection*

Recommendation 2: *Increasing the scope of protection*

Recommendation 3: *Requiring the judge to give reasons for his decision*

3.1.9 Conclusion

3.1.1 Introduction

This paper commences by introducing the meaning and primary aims of rape shield law, followed by an overview of the current scope of protection in Hong Kong. Against this background, the paper goes on to evaluate the inadequacies of current protection in Hong Kong. With reference to and analysis of other jurisdictions' rape shield protection, this paper ends with a number of recommendations which Hong Kong should take in order to fill up the inadequacies in the current legal framework.

3.1.2 What is rape shield law?

A rape shield law refers to a provision that prohibits or restricts the questioning or cross-examination of the sexual offence complainants about their past sexual history. Although such provision is commonly known as "rape shield", it generally covers not only cases where the offence is rape, but also indecent assault cases.[56] Therefore, to be more precise, such provisions can be known as sexual history shields.

3.1.3 Aims of rape shield law

Historically, in a sexual offence case, there is no rape shield law. At common law, there is also no limit on the admission of evidence of complainant's prior sexual history. The victim's prior sexual history was always considered relevant and admissible into evidence in rape prosecutions. This is because a victim's past sexual conduct could prove a history of unchaste behavior, and was also thought to purport dishonesty. This allowed allegations of promiscuity to be entered into evidence not only to show consent, but also to attack a victim's credibility.[57]

As society changed, attitudes towards sexual behavior became more relaxed. The traditional belief that a promiscuous victim will always consent to sex began to be viewed as biases and stereotypes which would affect the decision made by judge or jury. Such change paved the way for the introduction of rape shield law to protect a victim of a rape from being prejudiced by such unsafe biases and stereotypes.

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[56] For example, the rape shield provision in Hong Kong was set out in s.154 of Crimes Ordinance, covering both rape offence and indecent assault. See Crimes Ordinance (Cap 200) s.154(1).

[57] See Pamela J. Fisher, *State v. Alvey: Iowa's Victimization of Defendants Through the Overextension of Iowa's Rape Shield Law*, 76 Iowa L. Rev. 835, 837-38 (1991) at 715 (stating it was believed that a woman's lack of chastity was relevant to prove that she was a liar)

The introduction of rape shields aimed to protect the privacy of complainants, and to remove obstacles for some complainants in reporting crimes of sexual violence.[58] Rape shield law is also in support of the view that past sexual experience of the complainant is simply irrelevant to any issues at trial, but only based upon discriminatory beliefs about women and sexual assault[59]; on the other hand, such evidence introduces biases and stereotypes[60]. Therefore, rape shields also aimed at eliminating such biases and stereotypes. Last but not least, it is suggested that evidence of victim's prior sexual experience is more prejudicial than probative[61], therefore, even if we employ the traditional balancing test of the prejudicial effect and probative value of a piece of evidence, such evidence could also be excluded by judge exercising his residual discretion. A rape shield law thus acts as a more certain and concrete protection for sexual offence complainants to ensure that they would be free from such prejudice, thus preventing a moral trial of the person (the complainant) instead of a trial of the case.

3.1.4 Scope of protection in current Hong Kong

The rape shield provision in Hong Kong is set out in Crimes Ordinance, Cap 200, section 154, as reproduced below[62]. It was enacted in 1978 and is based on the previous old English provision that was found in s.2 of the Sexual Offences (Amendment) Act 1976 (UK).

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[58] For example, in *R. v. Darrach* [2000] 2 S.C.R. 443, 2000 SCC 46, the Supreme Court of Canada found that all the rape shield provisions in the Criminal Code are constitutional. The ruling says, forcing accuser to give evidence would invade her privacy and would "discourage the reporting of crimes of sexual violence." (See http://www.reference.com/browse/rape+shield+law)

[59] See the dissenting judgment of L'Heureux-Dube J in *Regina v Seaboyer* [1991] 2 SCR 577, "the evidence which is excluded by the provision is simply irrelevant. It is based upon discriminatory beliefs about women and sexual assault." (extract provided in p.54, Simon NM Young, *Hong Kong Evidence Casebook*, 2004 edition). But also see McLachlin J in *Regina v Seaboyer* [1991] 2 SCR 577, who offered an opposite view that evidence of complainant's prior sexual history can be of critical relevance and may be of such great importance to getting at the truth and determining whether the accused is guilty or innocent under the law, which is the ultimate aim of the trial process. *Regina v A (No.2)* [2001] UKHL 25, also provided a view in line with McLachlin J that prior sexual history between D and victim is relevant, not only because of higher probability of giving consent again, but because of the victim's specific mindset, i.e. affection, towards the defendant.

[60] See L'Heureux-Dube J in *Regina v Seaboyer* [1991] 2 SCR 577, *ibid*.

[61] Again, see L'Heureux-Dube J in *Regina v Seaboyer*, *ibid*, "…I am of the view that such exclusion is proper due to its extremely prejudicial effect on the trial of the legal issues."

[62] Crimes Ordinance, Cap 200, section 154

Crimes Ordinance (Cap 200)

s.154 Restrictions on evidence and on publishing details regarding identity

(1) If at a trial before the Court of First Instance any person is for the time being charged with a rape offence or indecent assault to which he pleads not guilty (whether or not at the trial he, or any other person, is for the time being charged with an offence which is not a rape offence or indecent assault), then, except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience of a complainant with a person other than that defendant. (Amended 32 of 1979 s. 2; 25 of 1998 s. 2)

(2) The judge shall not give leave in pursuance of subsection (1) for any evidence or question except on an application made to him in the absence of the jury by or on behalf of a defendant; and on such an application the judge shall give leave 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.

(3) In subsection (1) "complainant" (申訴人) means a woman upon whom, in a charge for a rape offence or indecent assault to which the trial in question relates, it is alleged that rape or indecent assault was committed, attempted or proposed. (Amended 32 of 1979 s. 2)

(4) Nothing in this section authorizes evidence to be adduced or a question to be asked which cannot be adduced or asked apart from this section.

In short, the Hong Kong rape shield provision can be invoked if it is a trial before the Court of First Instance, and the offence charged is a rape offence[63] or indecent assault. If this rape shield provision is invoked, the scope of protection offered to the complainant will be that no evidence and no question in cross-examination will be adduced or asked at the trial about any sexual experience of a complainant with a person other than that defendant. Such effect is important to the complainant as the traditional principle of evidence law is that evidence relevant to an issue at trial is *prima facie* admissible. Without this rape shield protection, victim's prior sexual history will be considered relevant and questions about this would be allowed in cross-examination.

[63] Rape offence is further defined in s.117 of Crimes Ordinance, Cap 200, meaning rape, attempted rape, aiding, abetting, counseling or procuring rape or attempted rape, and incitement to rape.

However, it is noted that s154(1) provides for a exceptional situation where the complainant's prior sexual history could be admitted – when the judge grants leave[64]. Together with s154(2), the only situation where such evidence is admissible is when there is an application made to judge in the absence of jury, and the judge grants leave 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. In other words, the central question for the judge to consider is whether it would be *unfair* to the defendant to refuse to allow the evidence to be adduced or the question be asked.

3.1.5 Inadequacies of current Hong Kong rape shields

Although the rape shield legislation has been clearly provided in s.154 of Crimes Ordinance for over three decades, stipulating a general prohibition on the questioning of complainant's prior sexual history and an exceptional situation where such evidence could be admitted, it is suggested that the provision is still inadequate in ensuring certainty of protection for sexual offence complainants as well as the scope of protection currently provided for. While there may be other possible problems with the current Hong Kong legal framework concerning rape shield protection, this paper will mainly focus on examining these two inadequacies in detail.

3.1.5a Problem as to the certainty of protection

Section 154 clearly stipulates under what circumstances the rape shield protection will be available, i.e. in cases of rape offence (including rape, attempted rape, aiding, abetting, counseling or procuring rape or attempted rape, and incitement to rape) and indecent assault; and the effect of invoking this protection, i.e. prohibiting questioning in cross-examination the sexual experience of a complainant with a person other than that defendant. However, what is unclear is about under what circumstances the judge can grant leave to allow questioning or admission of such evidence, thus taking away the rape shield protection.

As analyzed in part 3 of this paper, the central question for the judge to consider is whether it would be *unfair* to the defendant to refuse to allow the evidence to be adduced or the question be asked. However, "*unfair*" is a vague word which can bear a different meaning in the eyes of different person, and at the same time the legislation does not provide any further definition or guideline as to what amounts to *unfairness* to the defendant. It is believed that such drafting in the legislation deliberately aims at providing discretion for the judge to decide on the question with respect to the particular circumstances of each case on a case-by-case basis, probably using his own logic and common sense. However, here comes the problem. By granting the judge with such overriding discretion to allow admission of evidence of complainant's prior sexual history as long as he considers it would be unfair to the defendant

[64] Crimes Ordinance, Cap 200, section 154(1)

without providing any further guidelines by the legislation would actually upset the intended effect of such rape shield law. Such discretion could probably drive the judge back to the traditional balancing test of the probative value and prejudicial effect of the piece of evidence in order to determine whether to allow or refuse admission of such evidence by exercising a judge's residual discretion. The biases and stereotypes against women and sexual assaults would still exist in the judge's determination as to whether to allow admission of such evidence, and this would undermine one of the main purposes of rape shield legislation. In short, such rape shield provision fails to provide substantial and certain protection for sexual offence complainants.

The problem of lack of guidelines for judge to decide on unfairness can be seen on various Hong Kong precedents. In *Cheung Moon-Tong & Another v The Queen*[65], a rape case of two male defendants with two European female complainants. The first defendant alleged that the girls consented to have intercourse but that denied penetration due to his inadequate erection, while the second defendant also alleged consent, but admitting intercourse with the first girl but withdrew before ejaculation. The defendants denied the semen found in the girls were theirs, and sought to cross-examine the girls' prior sexual history, while the girls denied previous intercourse with another man during the previous week. The girls' prior sexual history is important, particularly to the first defendant, since he denied even penetration. If the defence counsel is able to cross-examine the girls' prior sexual history with other man, it may amount to another explanation as to the origin of the semen found, i.e. from persons other than the defendants, and thus the jury may have begun to cast doubts upon the girls. The court therefore held that a fair trial is impossible unless the defendant was allowed to challenge the girls' denial of previous intercourse[66], and that in the present case the denial of previous sexual intercourse was important[67]. However, in coming to this decision, the court actually did not spell out what are the considering factors which drove them to conclude that a fair trial is impossible. The result could be quite arbitrary, and it is quite possible for a different judge facing the same factual scenario to think that a fair trial could still be achieved even if such evidence is being excluded. Furthermore, in the process of drawing this decision, it is possible that the judges had actually been influenced by their own biases towards women and sexual assault. This would upset the aim of the rape shield provision.

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[65] *Cheung Moon-Tong & Another v The Queen* [1981] HKLR 402

[66] *Cheung Moon-Tong & Another v The Queen* [1981] HKLR 402, per Sir Alan Huggins VP (for the Court)

[67] *Ibid*

The problem of the lack of guidelines for judge to decide on unfairness is even more noticeable in *Regina v Lee Wing On*[68]. In this case, the 13-yaer-old rape complainant and the defendant together with other friends rented a villa in Cheung Chau. At a time while the complainant was sleeping, the defendant came with another friend with a knife, forcing victim to have sexual intercourse with him. The defendant denied the occurrence of sexual intercourse, but medical findings were that there were healed tears of her hymen in several positions indicating penetration and that she was not a virgin. The defendant sought to cross-examine the past sexual history of the girl in order to show that the penetration was not caused by him but by a third man. It was held that the test for whether to allow admission is relevance, i.e. if the question the defence sought to ask is relevant and of sufficient importance in that it might reasonably lead the jury to take a different view of the complainant's evidence, then it should be allowed.[69] From this, the court seemed to equate *unfairness* to the defendant with excluding *relevant* and *sufficiently important* evidence. Therefore, in this case, the court allowed the questioning of the complainant's prior sexual experience.

From the above cases, we can see that different judges may have different standard and own determination as to what amounts to "*unfairness*". The judge in *Cheung Moon-Tong* did not give clear reasons but thought that the question is important and thus should be allowed, while in *Lee Wing On* the test adopted by the judge is relevancy and sufficient importance. Over the past three decades, after the enactment of s.154, cases concerning rape shields also did not provide a uniform test or guidelines as to what amounts to *unfairness*. With a lack of guidance for the judges to follow, there is a high risk of arbitrary result, thus the rape shield protection offered to the complainant is highly uncertain. The enactment of rape shield protection may even seem useless, as seen from *Lee Wing On*, if the ultimate question is just reduced to a traditional evidence admission test of relevancy and sufficient importance. Furthermore, as observed from *Cheung Moon-Tong*, the guidance-free discretion granted to judges under s.154 may allow the biases and stereotypes about female and sexual assaults to seep back into the judge's mind in deciding whether to allow admission of such evidence, thus undermining the purpose of the rape shield provision.[70]

In light of the aforementioned problems and inadequacies, it is suggested that reform of the rape shield provision is needed in Hong Kong.

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[68] *Regina v Lee Wing On* [1994] 1 HKC 257

[69] *Regina v Lee Wing On*, *ibid*, per Wong J (for the Court)

[70] This was the reason for the English legislature to enact a more protective s.41 of the Youth Justice and Criminal Evidence Act 1999.

3.1.5b Problem as to the scope of protection

As discussed in Part 3 of this paper, the current Hong Kong rape shield provision only prohibits the questioning of the complainant's past sexual history with third parties, but not with the defendant. However, this may be a loophole in the Hong Kong rape shield protection, since such sexual experience is also part of the defendant's privacy, and that such experience with the defendant may simply be irrelevant to the issues at trial, but on the contrary, introduces unwanted biases and stereotypes against women which affect the decision of the judge and jury. Indeed, the rape shield statutes in many overseas jurisdictions, such as the UK[71] and Canada[72], have extended prohibition over questioning of the complainant's prior sexual history with *any* person, including the defendant. Failure to exclude such evidence with the defendant may also amount to an obstacle for the complainant to report the case or giving evidence in court, if the complainant does not wish such history to be publicized or examined in detail.

3.1.6 Rape shield law of other jurisdictions

Many jurisdictions have already passed legislation which deals specifically with the admission of evidence and questioning in cross-examination in criminal proceedings where someone is charged with a sexual offence. This part of the paper is going to give an introduction about the different drafting of rape shield laws in various jurisdictions, including the UK, Canada, Australia and the US.

a. The UK

The UK rape shield provision is set out in Youth Justice and Criminal Evidence Act 1999 s.41: Restriction on evidence or questions about complainant's sexual history[73].

The applicability of this provision is very wide as it can be invoked whenever the offence charged is a sexual offence[74], which bears a wide meaning defined under this Act. The scope of protection provided by this statute is also wider than that of HK, as it prohibits admission of evidence and asking of question in cross-examination about *any* sexual behavior of the complainant[75], i.e.

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[71] The UK's Youth Justice and Criminal Evidence Act 1999, s41(1) Restriction on evidence or questions about complainant's sexual history

[72] Canadian Criminal Code s276(1)

[73] The provision can be found in http://www.legislation.gov.uk/ukpga/1999/23/section/41

[74] Youth Justice and Criminal Evidence Act 1999, s.41(1). "Sexual offence" is defined under s.42 and s.62 as meaning a number of offences including rape or burglary with intent to rape, indecent assault, forcible abduction, incest, etc., and is to be taken to include a reference to an offence which consists of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, the substantive offence

[75] Youth Justice and Criminal Evidence Act 1999, s.41(1).

including sexual behavior between the complainant and the accused[76].

Same as HK rape shield statute, the UK rape shield provision also provides for exception to the general prohibition of admission of complainant's sexual behavior, i.e. with leave of court[77]. However, the UK provision provides for a more detailed account of the exceptional situations where the court may grant leave. There are mainly four exceptional situations, namely: (1) where the prosecution leads evidence about complainant's sex-life, and the defendant wishes to rebut it[78]; (2) evidence relevant to any issues other than an issue of consent[79]; (3) where the sexual behavior to which the evidence relates consists of events that allegedly occurred "at or about the same time as the event which is the subject matter of the charge against the accused"[80]; (4) where the evidence is about incidents which are so similar to the defendant's account of the alleged rape "that the similarity cannot reasonably be explained as a coincidence"[81].

However, evidence falling into the above four exceptions are not automatically admissible, but also need to satisfy certain additional requirements: s.41(6) requires such evidence to be related to a specific instance of sexual behavior; s.41(4) provides a restriction to evidence to be adduced through the gateway of s41(3) exceptions – the evidence will not be admissible if the court can reasonably assume that "the purpose (or main purpose)" is to impugn the credibility of the complainant; s.41(2)(b) further stipulates that leave to introduce the evidence will not be granted, unless a refusal of leave might have the result of rendering unsafe a conclusion of the jury on any issue.

In short, there are two main differences between the UK and HK rape shield provisions. First, the UK provision covers sexual history of the complainant with both the accused and other third parties, while the HK provision just covers sexual history with third parties. Second, the English provision provides for a greater certainty of protection for the complainant. It applies a general prohibition over the complainant's sexual behavior, subject to a number of exceptional circumstances which are clearly stipulated in the statute in detail, along with further qualifications. The UK court has very limited discretion to admit the evidence but can only follow the exceptions laid down. In contrast, the HK provision gives the judge a much wider discretion to grant leave, as long as it considers it would be "*unfair*" to the defendant.

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[76] The HK rape shield law, Crimes Ordinance s.154(1), only prohibits admission of evidence and asking of question in cross-examination about the sexual experience between the complainant and persons other than the accused.

[77] Youth Justice and Criminal Evidence Act 1999, s.41(1).

[78] *Ibid*, s.41(5)

[79] *Ibid*, s41(3)(a)

[80] *Ibid*, s41(3)(b)

[81] *Ibid*, s41(3)(c)

b. Canada

The Canadian rape shield provision is laid down under s.276 of the Canadian Criminal Code: Evidence of complainant's sexual activity[82].

Similar to the rape shield statute in the UK, the applicability of this provision is also very wide as it can be invoked in the proceedings of a wide range of sex-related offences[83]. The scope of protection is also wider than that of HK as it prohibits admission of evidence of complainant's sexual activity with both the accused and any other person. However, s.276(1) does not provide for an absolute prohibition on the admission of such evidence or asking of question, but only specifies that such evidence is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant is more likely to have consented[84], or is less worthy of belief[85]. Therefore, it seems that if the purpose of admission of such evidence is not to support these two inferences, then it may be admissible. The scope of protection offered to complainants by this provision would be narrower than that of the UK and HK statutes.

As to the exception to the general prohibition on the admission of evidence of complainant's prior sexual activities, although the Canadian rape shield provision is less rigid than the UK provision in the sense that it gives the judge a greater discretion, it still provides for a comprehensive guidance for judges to follow in order to determine whether to allow the admission of the prohibited evidence[86]. In order to allow admission, s.276(2) specifies that the judge must be satisfied that the evidence is of specific instances of sexual activity, is relevant to an issue at trial, and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. By looking at the drafting of s.276(2), it seems that the judge retains much discretion, as whether the evidence is *relevant* and whether the *probative value* is outweighed by the *prejudicial effect* can be quite subjective concepts and largely discretionary. However, s.276(3) further sets out a list of considering factors that the judge must consider in his course of determination[87], including society's interest in encouraging the reporting of sexual assault

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[82] Canadian Criminal Code, s.276

[83] S.276 Criminal Code listed out a list of offences upon which the rape shield provision is applicable, including: s151 Sexual interference (under 16), s152 Invitation to sexual touching (under 16), s153 Sexual exploitation (16-18), s153.1 Sexual exploitation of person with disability, s155 Incest, s159 Anal intercourse, s160(2) Compelling the commission of bestiality, s160(3) Bestiality in presence of or by child, s170 Parent or guardian procuring sexual activity (under 18), s171 Householder permitting sexual activity (under 18), s172 Corrupting children, s173 Indecent acts, exposure, s271 Sexual assault, s272 Sexual assault with a weapon, threats to a third party or causing bodily harm, s273 Aggravated sexual assault

[84] Canadian Criminal Code, s.276(1)(a)

[85] *Ibid*, s.276(1)(b)

[86] *Ibid*, s.276(2), (3)

[87] Canadian Criminal Code s.276(3)

offences[88], the potential prejudice to the complainant's personal dignity and right of privacy[89], and the right of the complainant and of every individual to personal security and to the full protection and benefit of the law[90]. Furthermore, s.276.2 requires the judge to provide reasons for his determination[91], including reasons for admitting evidence; and the reasons must state the factors in s.276(3) that affected the determination, and the manner in which the admitted evidence is expected to be relevant to an issue at trial.

With such a list of considering factors contained in statute that requires the judge to take into account before making a decision, together with the requirement to give reasons for his determination, the Canadian rape shield law provides a much greater certainty of protection for sexual offence complainants than those in HK.

c. Australia

There are nine legal systems in Australia - eight state and territory systems and one federal system.[92] This paper is going to give a brief introduction of the rape shield laws contained in statutes of some territories and states.

✧ ***New South Wales[93]***

The rape shield law for New South Wales is contained in the Criminal Procedure Act 1986 (NSW) s.293.

The provision is applicable in proceedings of the prescribed sexual offences[94], including sexual assault (s.61I), aggravated sexual assault (s.61J), indecent assault (s.61L), etc. It prohibits the admission of evidence relating to the sexual reputation[95] and sexual experience or any sexual activity[96] of the complainants. While the prohibition on the admission of evidence relating to sexual *reputation* is absolute, the statute specifically provides for several exceptional circumstances where the complainant's sexual *experience* or past sexual *activity* are admissible[97]:

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[88] *Ibid*, s.276(3)(b)

[89] *Ibid*, s.276(3)(f)

[90] *Ibid*, s.276(3)(g)

[91] *Ibid*, s.276.2(3)

[92] Australian Government, Department of Foreign Affairs and Trade's website, http://www.dfat.gov.au/facts/legal_system.html

[93] New South Wales is a state of Australia, located in the east of the country.

[94] *Criminal Procedure Act 1986 (NSW)*, s.293(1), see http://www.austlii.edu.au/au/legis/nsw/consol_act/cpa1986188/

[95] *Ibid*, s.293(2)

[96] *Ibid*, s.293(3)

[97] *Ibid*, s.293(4)

i.) if the sexual experience sought to be adduced took place at or about the time of the commission of the alleged prescribed sexual offence[98]; or

ii.) if it relates to a relationship between the accused person and the complainant that was existing or recent at the time of the commission of the alleged prescribed sexual offence[99]; or

iii.) if it is relevant to whether the presence of semen, pregnancy, disease or injury is attributable to the sexual intercourse alleged to have been had by the accused person[100], or

iv.) if the evidence has been given by the complainant in cross-examination by or on behalf of the accused person, being evidence given in answer to a question that may be asked; and

v.) for all the above exceptional circumstances, that the probative value of the evidence outweighs any distress, humiliation or embarrassment that the complainant might suffer as a result of its admission.[101]

Apart from the above specific exceptions set out in the legislation, the provision also grants the court a discretion to allow questioning of the complainant in cross-examination about her sexual experience or activity, if the court satisfies that (1) it has been disclosed or implied in the case for the prosecution against the accused person that the complainant has or may have had sexual experience or sexual activity of a general or specified nature, *and* that (2) the accused person might be unfairly prejudiced if the complainant could not be cross-examined by or on behalf of the accused person in relation to the disclosure or implication.[102] However, it should be noted that the scope of permission of cross-examination is only limited to the experience or activity of the nature so specified during the period so specified.

✧ ***Tasmania***[103]

Section 194M of the Evidence Act 2001 (Tas) sets out the rape shield law in Tasmania. The protection is available for proceedings of crime charged under Chapter XIV or Chapter XX of the Tasmanian Criminal Code[104] or any offence under section 35(3) of the Police Offences Act 1935[105]. These include most general sexual offences, such as indecent assault[106], aggravated

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[98] *Ibid*, s.293(4)(a)(i)

[99] *Ibid*, s.293(4)(b)

[100] *Ibid*, s.293(4)(c)

[101] *Ibid*, s.293(4)

[102] *Ibid*, s.293(6)

[103] Tasmania is an Australian island and state.

[104] Tasmanian Criminal Code Act 1924, http://www.austlii.edu.au/au/legis/tas/consol_act/cca1924115/

[105] Tasmania Police Offences Act 1935, http://www.austlii.edu.au/au/legis/tas/consol_act/poa1935140/

sexual assault[107], sexual intercourse with a young person under the age of 17 years[108], permitting unlawful sexual intercourse with a young person on premises[109], sexual intercourse with person with mental impairment[110].

Same as the rape shield law in New South Wales, the Tasmanian rape shield also provides for absolute prohibition on evidence relating to the sexual reputation[111], and general prohibition on sexual experience[112] of the complainants unless the judge gives leave. The provision further stipulates that judge can only give leave if he is satisfied that (1) the evidence sought to be adduced or elicited has direct and substantial relevance to a fact or matter in issue, *and* (2) that the probative value of that evidence outweighs any distress, humiliation or embarrassment which the person against whom the crime or offence is alleged to have been committed might suffer as a result of the admission of that evidence[113]. Only if both conditions are satisfied simultaneously could the judge allow admission.

However, the Tasmanian rape shield law goes a step further than that in New South Wales in that it provides for further limitations and guidance for judges when they exercise their discretion. For example, the provision limits judge's discretion by specifying that evidence *does not* have direct and substantial relevance to a fact or matter in issue (condition (1) as set out above) if it is relevant only to the credibility of the person against whom the crime or offence is alleged to have been committed[114]. As to condition (2), when assessing the amount of distress, humiliation and embarrassment that the complainant might suffer, the judge is required to take into account several considering factors, including the age of the complainant, the number and the nature of the questions likely to be put to that complainant.[115]

Finally, the provision requires that if the magistrate or judge admits evidence of sexual experience, he or she must give reasons addressing each of the requirements for admissibility specified in that subsection.[116]

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[106] Tasmanian Criminal Code Act 1924, s.127

[107] *Ibid*, s.127A

[108] *Ibid*, s.124

[109] *Ibid*, s.125

[110] *Ibid*, s.126

[111] Evidence Act 2001 (Tas), s.194M(1)(a)

[112] *Ibid*, s.194M(1)(b)

[113] *Ibid*, s.194M(2)

[114] *Ibid*, s.194M(3)

[115] *Ibid*, s.194M(4)

[116] *Ibid*, s.194M(5)

✧ ***Australian Capital Territory (ACT)***[117]

The rape shield law in this territory can be found under Evidence (Miscellaneous Provisions) Act 1991. It applies to sexual offence proceedings.[118]

The structure of the rape shield provision in ACT is very similar to other territories in Australia mentioned above, in that the complainant's sexual reputation is always inadmissible[119], while her sexual activities are generally prohibited unless with leave of court[120]. However, the scope of protection provided by the ACT rape shield is narrower in that it specifically provides that evidence of specific sexual activities of the complainant with the defendant is not shielded by the rape shield law, i.e. admissible as ordinary evidence.[121]

As to the court's discretion to give leave, just like other territories, the ACT rape shield provision also provides some guidance for judges to follow. Under the ACT rape shield law, the judge can give leave only if he satisfies that the evidence (1) has substantial relevance to the facts in issue, *or* (2) is a proper matter for cross-examination about credit[122]. It should be noted that only one of the conditions needs to be satisfied in order for the judge to give leave.

As to condition (1), the provision further provides guidance that the fact that the complainant was accustomed to engage in sexual activities is *not* to be regarded as having a substantial relevance to the facts in issue because of any inference it may raise about general disposition.[123] Moreover, sexual activity evidence is *not* to be regarded as being a proper matter[124] for cross-examination about credit unless the evidence, if accepted, would be likely to substantially impair confidence in the reliability of the complainant's evidence.[125] These further qualifications added to the two main conditions for the judge to give leave can provide greater legal certainty and thus reduce the risk of arbitrary decision by judges.

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[117] The Australian Capital Territory is the capital territory of the Commonwealth of Australia and is the smallest self-governing internal territory. It is enclaved within New South Wales and contains Canberra.

[118] Evidence (Miscellaneous Provisions) Act 1991, s.49

[119] *Ibid*, s.50

[120] *Ibid*, s.51(1)

[121] *Ibid*, s.51(2)

[122] *Ibid*, s.53(1)

[123] *Ibid*, s.53(2)

[124] It is further provided under s.53(5) that evidence is a *proper matter for cross-examination about credit* if the credibility rule under the Evidence Act 2011 , section 102 does not apply to the evidence because of that Act, section 103 (Exception—cross-examination as to credibility).

[125] *Ibid*, s.53(3)

Same as Tasmanian rape shield, judges are also required to give reasons for his decision if he gives leave.[126] This requirement again helps to prevent arbitrary decision as the judges are required to support their decision with reasons to show their consideration process.

3.1.7 Summary of the rape shield law in other jurisdictions

Part 5 of this paper has given an overview of the rape shield provisions in different common law jurisdictions around the world. While all of the rape shield provisions seem to take the form of a general prohibition on the admission of evidence relating to the complainant's prior sexual history, together with a discretion granted to the judge to give leave, it is suggested the rape shields in different jurisdictions can be more specifically summarized into three main categories:-

(1) A general prohibition on the admission of evidence of complainant's prior sexual history, along with some specifically stated exceptional circumstances where admission is allowed, and a discretionary power given to judge to give leave to allow admission (the approach taken in the UK and New South Wales);
(2) A general prohibition on the admission of evidence of complainant's prior sexual history, along with a discretionary power granted to judge to allow admission, subject to some explicit statutory guidance (the approach taken in Canada, Tasmania and Australian Capital Territory);
(3) A general prohibition on the admission of evidence of complainant's prior sexual history, along with a discretionary power given to judge to allow admission, but without any further guidance on the exercise of such discretion (the approach taken in Hong Kong)

Among these categories, category (1) is the most restrictive one as the court is bound by the statutory exceptions specifically stated in the statute, retaining only very limited discretion to allow admission upon satisfying the specified conditions. As a result, the protection given to sexual offence complainants would be more certain, as they would more clearly know whether the evidence they do not want to be adduced fall within the statutory exceptions, and thus being inadmissible. Category (2) is less restrictive in the sense that the court is given a wider discretion to allow admission and not subject to any statutory exceptional circumstances. However, rape shield law of category (2) is still more restrictive than category (3), as there are explicit statutory guidance, such as a list of considering factors that the judges must follow and consider before coming to their determination. It is submitted that this approach is also quite protective for the complainant, as she would be clear what factors the judge would consider in deciding whether to allow questioning of her prior sexual history or not, so as to assess the possibility of adducing evidence of her prior sexual history at trial. Category (3) is the most discretionary approach with a

[126] *Ibid*, s.53(4)

highest risk of arbitrary result, as the admission of shielded evidence is solely based on judge's discretion without statutory guidance. Biases and stereotypes may interfere judge's decision, thereby undermines the aim of rape shield law.

3.1.8 Recommendations

In light of the inadequacies of the current Hong Kong rape shield law as discussed in part 4 of this paper, it is suggested that the Hong Kong rape shield provision needs reform. The following are some recommendations based on references to the rape shields of other common law jurisdictions.

✧ ***Recommendation 1: Increasing the certainty of protection***

The main problem of the current rape shield provision that calls for reform is that it is unclear under what circumstances shall the judge exercise discretion to allow admission of evidence of complainant's prior sexual history.[127] It is submitted that this problem is mainly attributed to the simple and inadequate drafting of s.154 of Crimes Ordinance.

With reference to the rape shield provisions of other jurisdictions, it is suggested that more guidance should be provided in the statute for the court to follow when deciding whether to exercise its discretion to allow admission of evidence of complainant's prior sexual history, just like the approach taken in Canada, Tasmania and Australian Capital Territory. The statutory guidance can be in form of some pre-requisite conditions, where the judge can give leave if and only if he satisfies that the case fulfills such conditions. In addition, the statute may also provide for a list of considering factors that requires the judge to consider in making his decision.

Regarding the statutory guidance in form of some pre-requisite conditions, reference can be made to the Tasmanian Evidence Act 2001 s.194M:

Tasmanian Evidence Act 2001
194M. Evidence relating to sexual experience

(2) A magistrate or judge must not grant leave unless satisfied that –

(a) the evidence sought to be adduced or elicited has direct and substantial relevance to a fact or matter in issue; and

(b) the probative value of that evidence outweighs any distress, humiliation or embarrassment which the person against whom the crime or offence is alleged to have been committed might suffer as a result of the admission of that evidence.

(3) For the purpose of subsection (2)(a), evidence does not have direct and substantial relevance to a fact or matter in issue if it is relevant only to the credibility of the person against whom the crime or offence is alleged to have been committed.

[127] See Part 4 of this paper, above.

(4) For the purpose of subsection (2)(b), the magistrate or judge must take into account the following matters in assessing the amount of the distress, humiliation or embarrassment which the person against whom the crime or offence is alleged to have been committed might suffer as a result of the admission of the evidence:

(a) the age of that person;

(b) the number and the nature of the questions likely to be put to that person.

It is recommended that in reforming our law, the legislature can follow the Tasmanian provision s.194M(2)-(4), listing out the conditions that the judges must satisfy before they can exercise discretion, followed by some further guidance or limitations relating to the conditions for the judges to follow. It is submitted that the clearer the statute, the more certain the protection the rape shield law can give, and thus the better the legislative intent of the rape shield law can be given effect. Moreover, including guidance into the statute would be the most effective way to encourage the judges to follow, since it would be the most convenient and comprehensive way for the judges to make reference to, and that failure to follow may result in legal consequences, such as providing a ground for appeal for the complainant.

As to the recommendation of including a list of considering factors requiring judges' consideration, reference can be made to s.276(3) of the Canadian Criminal Code:-

Criminal Code s.276(3)

…

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

(*a*) the interests of justice, including the right of the accused to make a full answer and defence;
(*b*) society's interest in encouraging the reporting of sexual assault offences;
(*c*) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
(*d*) the need to remove from the fact-finding process any discriminatory belief or bias;
(*e*) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
(*f*) the potential prejudice to the complainant's personal dignity and right of privacy;
(*g*) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
(*h*) any other factor that the judge, provincial court judge or justice considers relevant.

The Canadian rape shield provision clearly stipulated a list of factors that the judges must consider before coming to their decision. This is again effective in reducing arbitrary result as all judges are bound by the statutory guidelines in exercising discretion. Failure to consider certain relevant factors may provide a ground of appeal for the complainant.

✧ ***Recommendation 2: Increasing the scope of protection***

Another main problem in the current Hong Kong rape shield legislation is that the rape shield only covers evidence of prior sexual history of the complainant with third parties, but not those with the defendant. However, it is submitted that sexual history of the complainant with the defendant would create as much biases and stereotypes that affect judge's decision as those sexual history with third parties, since the complainant's previous consent to sex with the defendant does not necessarily mean that they would be more likely to consent in later occasions. Also, such sexual history is also part of the complainant's privacy, which the complainants may not want to be disclosed or examined at trial. A rape shield provision which does not give protection over sexual history between the complainant and defendant may simply be ineffective in protecting the complainant, and such narrow scope of protection may still be an obstacle for complainant to report the case or give evidence in court, thus undermining the legislative intent of the rape shield law.

In fact, the rape shield laws in many other jurisdictions have already gone a step further to cover any sexual history of the complainant, i.e. including sexual history with the defendant at trial. For example, in the UK, the Youth Justice and Criminal Evidence Act 1999 s.41(1) provides that "…no evidence may be adduced… about *any* sexual behavior of the complainant."[128]; in Canada, s.276 of Canadian Criminal Code provides "…evidence that the complainant has engaged in sexual activity, whether *with the accused* or with any other person, is not admissible…"[129].

It has already been over two decades since the UK adopted the current 1999 rape shield provision to introduce prohibition on complainant's sexual history with the defendant[130]. While the UK legal framework has already gone a step further in giving protection for the complainant, the Hong Kong law remains unchanged, allowing harm to be continuously and invisibly inflicting on sexual offences complainants. It is strongly recommended that the Hong Kong statute should follow its counterparts to extend the scope of rape shield law to

[128] Youth Justice and Criminal Evidence Act 1999, s.41(1)

[129] Canadian Criminal Code, s.276(1)

[130] The previous rape shield provision in the UK is contained in section 2 of Sexual Offences (Amendment) Act 1976, which forbade questions or evidence about victim's prior sexual history, but not including prior sexual history with the defendant at trial.

include prohibition on sexual history with the defendant at trial by reforming its legislation. The most direct and effective way is to amend the current s.154(1) provision[131] to become "…no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience of a complainant with *any person*.".

✧ ***Recommendation 3: Requiring the judge to give reasons for his decision***

From the overview of the rape shield laws of other jurisdictions around the world, it is noticed that there is an additional requirement for judges to give reasons if they allow admission of evidence of complainant's prior sexual history. For example, the Canadian Criminal Code s.276.2(3) provides that the judge shall provide reasons for his determination for the part of evidence being admitted[132], the factors that affected determination[133] and the manner in which that evidence is expected to be relevant to an issue at trial[134]. The requirement to give reasons for admitting such shielded evidence can also be found in the Tasmanian[135] and Australian Capital Territory (ACT)[136] provisions.

It is recommended that the current Hong Kong legislation should follow the aforementioned jurisdictions to include an additional provision to require judges to give reasons if they decide to exercise their discretion to allow admission of originally shielded evidence. The rationale behind is that by requiring the judges to give reasons for their determination, they are compelled to go through a throughout consideration process before coming up with their decisions. This can reduce the risk of arbitrary and unpredictable decisions, and can also act as a check that the judges did consider the list of considering factors as listed out in the statute, if any. Furthermore, problems with the judges' consideration in exercising his discretion would be reflected in their reasons given, which can then facilitate the complainant to challenge the decision or as a ground of appeal.

It is strongly recommended that when drafting such additional provision, the Canadian Criminal Code s.276.2(3)(a) should be followed, as it provides for the most detailed guidance as to the content of the reasons to be given, i.e. including reasons for admitting evidence[137], the

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[131] The current Hong Kong provision s.154(1) Crimes Ordinance states ""…no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience of a complainant with *a person other than that defendant*."

[132] See Canadian Criminal Code s.276.2(3)(a)

[133] *Ibid*, s.276.2(3)(b)

[134] *Ibid*, s.276.2(3)(c)

[135] Evidence Act 2001 (Tas), s.194M(5)

[136] Evidence (Miscellaneous Provisions) Act 1991 (ACT), s.53(4)

[137] See Canadian Criminal Code s.276.2(3)(a)

factors that affected determination[138] and the manner in which that evidence is expected to be relevant to an issue at trial[139]. The clearer the guidance to be included in the statute, the lower the risk of arbitrary reasons given by the judge, and the greater the certainty of protection given to the complainant.

4 Conclusion

Despite the significance of rape shields, regrettably, the current protection provided by the Hong Kong statute is still far from satisfaction. As analyzed in this paper, both the certainty and the scope of protection offered by the current legislation are inadequate and demand a reform. With reference to other common law jurisdictions, suitable recommendations are proposed to reform the law in Hong Kong. It is our stance that such recommendations can be put into practice promptly, so as to better achieve the aims pursued by rape shield laws and to remove any unwanted biases and stereotypes against sexual offences complainants.

[138] *Ibid*, s.276.2(3)(b)

[139] *Ibid*, s.276.2(3)(c)

3.2 Court Protection for Sexual Offence Complainants (I) – Distinctive Nature of Sexual Offencee

I. INTRODUCTION

It is argued in this paper that as revealed by more and more modern societal and psychological studies, sexual offences are with a distinctive nature in terms of its impact, victimization and relationship with the legal system. On that basis, it is suggested that the current protection for sexual assault victim witnesses in court is far from sufficient, and leads to aggravated adverse impact on the victims and the legal system. The fundamental principles underlying the legal system is suggested to have been infringed and undermined by the adverse impact. With reference to a comparative study of four other jurisdictions, this paper advocates a legal reform on the current law in relation to special protection. It is submitted that by adopting the recommendations in this paper, the adverse impact on the victims and the legal system can be greatly alleviated. This leads to promotion of the fundamental principles of the legal system as well as procedural and societal welfare. It is argued that opposition to the recommendations are not justified and outweighed by the public interest.

II. DISTINCTIVE NATURE OF SEXUAL OFFENCES

Serious Psychological Impact

Sexual assault, particularly rape, highly stigmatizes victims[140] and usually comes as a devastating shock[141]. It destroys victims' abilities to maintain the important illusion of invulnerability and threatens many of their assumptions and beliefs in relation to themselves and the world around them[142]. Most victims suffer from high levels of psychological distress and experience psychological symptoms including impaired memory and concentration, anxiety, and fear[143], all of which are

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[140] Myhill A. and Allen J. (2002). *Rape and sexual assault of women: the extent and nature of the problem.* Findings from the British Crime Survey. London, UK: Home Office Research, Development and Statistics Directorate

[141] Katz, B.L. (1991). The psychological impact of stranger versus nonstranger rape on victims' recover. In L. Bechhofer & A. Parrot (Eds.), Acquaintance rape: The hidden victim (pp. 251-269). New York: John Wiley and Sons; Koss, M.P., Goodman, L.A., Browne, A., Fitzgerald, L.F., Keita, G.P., & Russo, N.F. (1994). No safe haven: Male violence against women at home, at work, and in the community. Washington, DC: American Psychological Association.

[142] *Ibid.*

[143] Burgess, A.W., &Holmstrom, L.L. (1979). Adaptive strategies and recovery from rape. American Journal of Psychiatry, 136, 1278-1282; Goodman, L.A., Koss, M.P., & Russo, N.F. (1993a). Violence against women: Physical and mental health effects. Part I: Research findings. Applied and Preventive Psychology, 2, 79-89; Hanson, R.K. (1990). The psychological impact of sexual assault on women and children: A review. Annals of Sex Research, 3, 187-232; Katz, B.L. (1991). The psychological impact of stranger versus nonstranger rape on victims' recover. In L. Bechhofer & A. Parrot (Eds.), Acquaintance rape: The hidden victim (pp. 251-269). New York: John Wiley and Sons; Resick, P.A. (1993). The psychological impact of rape. Journal of Interpersonal Violence, 223-255.

typical manifestation of suffering of Post-traumatic Stress Disorder ("PTSD")[144]. Rape victims constitute the largest single group of PTSD sufferers[145].

In response to the traumatic experiences, victims undergo alternating sequences of intrusions and avoidance[146]. They relive the trauma through flashbacks, nightmares and repeated thoughts staying at their minds; meanwhile, they isolate themselves from the traumatic experiences through intellectualizing, emotional numbing, withdrawing from others and engaging in drug or alcohol use for distraction, to prevent themselves from being emotionally overwhelmed. Other common responses include dissociation, increased arousal, irritability and angry outbursts[147].

Secondary Victimization from within the Legal System

Sexual assault victims experience psychological trauma and PTSD suffering, which are factors increasing the victims' risk of secondary victimization[148]. Secondary victimization refers to behaviors and attitudes traumatizing victims and leading to feelings of re-victimization. This is negative societal reaction in consequence of the primary victimization that further violates the legitimate rights of victims[149]. In the context of sexual assault, secondary victimization replicates the violation of the original sexual assault by closely mimicking it or other similar traumatic experiences[150]. This is often described as "the second rape" or "the second assault"[151].

A study of mental health professionals has showed that 81% of study participants believed the legal

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144 Goodman, L.A., Koss, M.P., & Russo, N.F. (1993b). Violence against women: Mental health effects. Part II: Conceptualizations of posttraumatic stress. Applied and Preventive Psychology, 2, 123-130; Herman, J.L. (1992). Trauma and recovery. New York: Basic Books; American Psychiatric Association (1994). Diagnostic and statistical manual of mental disorders: DSM IV. Washington, DC: Author.

145 Foa, E.B., Steketee, G., & Olasov, B. (1989). Behavioral/cognitive conceptualization of post-traumatic stress disorder. Behavior Therapy, 20, 155-176.

146 Campbell R. (2001). Current Issues in Therapeutic Practice. Violence Against Women Online Resources. Retrieved at http://www.mincava.umn.edu/documents/commissioned/campbell/campbell.html#idp30314496.

147 *Ibid*.

148 Campbell, R., Dworkin, E., & Cabral, G. (2009). An ecological model of the impact of sexual assault on women's mental health. Trauma, Violence, & Abuse, 10(3), 225-246; Logan, T., Walker, R., Jordan, C. E., & Leukefeld, C. G. (2006). Women and victimization: Contributing factors, interventions, and implications. Washington, DC: American Psychological Association

149 Montada, L. (1994). Injustice in harm and loss. Soc. Justice Res. 7: 5–28

150 Campbell, R., & Raja, S. (1999). The secondary victimization of rape victims: Insights from mental health professionals who treat survivors of violence. Violence &Victims, 14, 261-275.

151 *Ibid*.

system's treatment of rape victims is psychologically detrimental[152]. In a study of rape victims, 52% of study participants appraised the contact with the legal system as harmful[153]. The legal system causes secondary victimization among victims by leading to psychological harm. This conclusion is consistent with other documented evidence in relation to the criminal justice system as a whole[154]. Researches have also showed that the majority of rape victims appraised their involvement with the criminal justice system hurtful because of the great likelihood of experiencing secondary victimization from within the legal system[155].

Under Part IV of this paper, the explanation for the great likelihood of experiencing secondary victimization from within the legal system is suggested and analyzed as an adverse impact of the inadequate protection for sexual assault victims established based on the traditional values and practices of the legal system.

Low Reporting Rate

As a consequence of low awareness of victimization and secondary victimization from within the legal system, the reporting rate of sexual assault is particularly low among crimes.

Statistics have showed that more than 40% of female rape victims did not classify themselves as having been raped and more than 30% of women perceiving themselves as having experienced attempted rape did not classify the incident as a crime[156]. Half of the victims of sexual assault committed by a partner did not view the experience as a crime. All these show that women under certain circumstances do not correctly perceive sexual victimization as criminal and unacceptable.

Moreover, in view of the negative societal reaction in consequence of the primary victimization and the further violation as experienced in secondary victimization, sexual assault victims are

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[152] *Ibid.*

[153] Campbell, R., Wasco, S.M., Ahrens, C.E., Sefl, T., &Barnes, H.E. (in press). Preventing the "second rape:" Rape survivors' experiences with community service providers. Journal of Interpersonal Violence.

[154] Fattah, 1997; Gutheil, Bursztajn, Brodsky, and Strasburger, 2000; Koss, 2000; Symonds, 1975/ (Erez and Belknap, 1998).

[155] Campbell, R. (1998). The Community Response to Rape: Victims' Experiences with the Legal, Medical, and Mental Health Systems. American Journal of Community Psychology, 26(3), 355-379; Campbell, R., & Raja, S. (1999). Secondary victimization of rape victims: Insights from mental health professionals who treat survivors or violence. Violence & Victims, 12, 261-275; Madigan, L., & Gamble, N. (1991). The second rape: Society's continued betrayal of the victim. New York: Lexington Books; Patterson, D., Greeson, M., & Campbell, R. (2009). Understanding rape survivors' decisions not to seek help from formal social systems. Health and Social Work, 34(2), 127-136

[156] Myhill A. and Allen J. (2002). *Rape and sexual assault of women: the extent and nature of the problem.* Findings from the British Crime Survey. London, UK: Home Office Research, Development and Statistics Directorate

discouraged from talking about the incident of assault any further[157]. This has significant impact on the legal system since many sexual assaults can only be discovered through self-reporting and sexual assault victims are usually the only prosecution witnesses in criminal proceedings concerning the corresponding charges of sexual offences.

Main Prosecution Victim Witnesses

Apart from the particular psychological impact and problems of victimization resulted from the incidents of sexual assault, sexual offences are special in nature by usually relying solely on the evidence given by victim witnesses to support the prosecution case.

III. CURRENT PROTECTION OF SEXUAL ASSAULT VICTIM WITNESSES

Special Status of Sexual Assault Victims as Witness

Special procedures for vulnerable witnesses in Hong Kong are stipulated under Part III of the Criminal Procedure Ordinance (Cap 221) ("the CPO"). Under the sections, a vulnerable witness must be a child, a mentally incapacitated person or a witness in fear.

Despite the distinctive nature of sexual offences explained under Part II of this paper, sexual assault victims are not formally recognized as a witness in fear either statutorily or at common law. Sexual violence victims are generally not covered by the special procedures under the CPO as vulnerable witnesses unless they are covered by the definition of "child" or "mentally incapacitated person" under s79A of the CPO. Sexual assault victims are not entitled to apply for the special procedures for witnesses in fear as of right. Although it is possible for the court to consider a sexual assault victim as a witness in fear and grant the special procedures accordingly upon application, it really depends on the circumstances of a particular case as

At common law, the court has an inherent jurisdiction to recognize the distinctive nature of sexual offence trials and to grant certain special procedures in court accordingly to address in-court emotional trauma resulted from the particular vulnerability of sexual assault victims. However, the current approach taken by the court is to consider the personal circumstances of sexual assault victims on a case-by-case basis. It does not consider sexual assault victims to be with special needs or special status particularly. Sexual assault victims have to go through the same procedures as other victims do to apply for special measures via the prosecution.

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[157] Ullman, S. E., & Filipas, H. H. (2001). Correlates of formal and informal support seeking in sexual assault victims. Journal of Interpersonal Violence, 16(10), 1028-1047.

Therefore, from the above, it is clear that sexual assault victims, in criminal procedures, do not enjoy any special status as witnesses either statutorily or at common law.

Special Procedures Available for Sexual Assault Victim Witnesses

Different types of vulnerable witnesses are entitled to different special procedures. Statutorily, all vulnerable witnesses are entitled to give evidence by live television link under s79B of the CPO. Measures of video recorded evidence and depositions are only available to a child or a mentally incapacitated person, but not a witness in fear, under s79C and s79E of the CPO.

At common law, the court has an inherent jurisdiction to control and grant special procedures in proceedings to ensure a fair trial. The use of screen is one of the special procedures that may be granted by discretion. Although the court is bound by judicial precedents in the exercise of its discretion, there is no authoritative precedents binding judges on this point, or giving judges clear guidance or directions in relation to the permitted use of screen.

Substantive Protection: Rape Shield Protection

Although sexual assault victims are not particularly recognized by the criminal procedural law to be entitled to special procedures in spite of the distinctive nature of sexual offences, s154 of the Crimes Ordinance (Cap 200) ("the CO") provides them with a substantive protection in criminal proceedings as of right, which is the rape shield protection[158]. By virtue of the protection, in trials concerning charges for rape offence or indecent assault, no evidence or question can be adduced or asked, by or on behalf of any defendant, about any sexual experience of a complainant with a person other than that defendant[159], unless it is with the leave of the court.

IV. UNDESIRABILITY OF THE CURRENT PROTECTION

Inadequate Protection for Sexual Assault Victims

Rare and Exceptional Approach

Sexual assault victim witnesses are not particularly recognized by the court to be with inherent needs for special procedures at present. They are not entitled to any special procedures as of right as vulnerable witnesses. Although sexual assault victims may be entitled to the special procedures of the use of screen or giving evidence by live television link as witnesses in fear, these entitlements

[158] s.154: Restrictions on evidence at trials for rape etc, *ibid.*

[159] *Ibid.*

are really determined on a case-by-case basis.

From the established case authorities, it is clear that the court generally adopts a rare and exceptional approach in allowing both the special procedures of the use of screen and giving evidence by live television link[160]. The substantive protection for sexual assault victim witnesses is very limited. Without authoritative precedents or clear guidance as to the content of "a rare and exceptional approach", the judge's exercise of discretion is highly unpredictable and uncertain. There is therefore no guaranteed protection for sexual assault victims.

Although the rape shield protection protects sexual assault victims particularly, its protection is limited by being easily displaced with the leave of the court. The inadequacy of such a measure would be examined in detail below.

Limited Number of Available Special Procedures

Apart from the difficulty for sexual assault victims to be entitled to special procedures, the special procedures to which sexual assault victims could be entitled are very limited in number. Basically, the only special procedures that the court may allow for sexual assault victims are the use of screen and testifying by live television link. Particularly, under no circumstances would a sexual assault victim not being a child or a mentally incapacitated person be entitled to the special procedures of video recorded evidence or depositions. The types of special procedure available to sexual assault victims are extremely limited.

Impracticability of the Rape Shield Protection

Particularly for the rape shield protection, in spite of the fact that sexual assault victims are automatically entitled to the protection, there is a real risk of bypassing as the protection might be easily displaced upon defendant's application. The conditions under which the protection may be displaced with the leave of the court are not clearly specified and defined in the statutes. It is therefore fundamentally unprincipled and a matter of discretion of the court.

Case authorities have showed that despite the rape shield protection statutorily provided, practically, more often than not evidence or question prohibited under s154 of the CO is still adduced or asked with the leave of the court. The protection is therefore largely artificial and fails to provide actual and substantive protection for sexual assault victims against secondary victimization caused by a trial conducted in an invasive and a victim-blaming manner.

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[160] See *HKSAR v See Wah Lun* [2011] HKEC 866 English Judgment.

The effectiveness of the rape shield protection itself is also doubtful because it does not restrict evidence or question adduced or asked about the victim's sexual experience with that specific defendant. Sexual assault victims can hardly be protected against re-traumatizing if evidence or question as such could be adduced or asked inimically or invasively without restriction. The purpose of protection of the rape shield protection would therefore be largely defeated.

Adverse Impact of the Inadequacy

It is submitted that the inadequacy of protection leads to adverse impact on the psychological health of sexual assault victims as well as on the fundamental legal rights and principles, both of which are undesirable.

Aggravated Psychological Suffering

The inadequacy of the protection provided for sexual assault victims suggests that the values and practices of the legal system at present are far from victim oriented. The psychological needs of victims are subjugated to the fundamental legal principles substantially, making the legal system insensitive or even violative of sexual assault victims[161]. Secondary victimization is therefore caused by unintentional traumatization.

Typically, the distinctive nature of sexual offences itself, as outlined in Part II of this paper, brings sexual assault victims a high risk of secondary victimization. For example, the very nature of engaging victim witnesses as the only main prosecution witnesses in most of the proceedings of sexual offences means the legal system would pressure rape victims to press charges and to appear in court to recount the incident. This may lead to re-traumatization, which may be further aggravated by testifying in an open court or cross-examination[162]. By talking about the details of the alleged sexual assault in an open court, victims strongly experience anxiety and a replicate[163]. When invasive interrogation, about the details of the sexual assault or the sexual history of the victims, is allowed to be made in court in a victim-blaming manner, victims may be further re-traumatized substantially. Both face-to-face confrontation with the offenders and the experience of retelling the incident of sexual assault may cause secondary victimization.[164] The large psychological impact of

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[161] Campbell, R., & Raja, S. (1999). The secondary victimization of rape victims: Insights from mental health professionals who treat survivors of violence. Violence &Victims, 14, 261-275.

[162] (Koss, 2000; Pitman et al., 1996)/ (Temkin, 2005)

[163] Law, L. H. D. (2004). Attitudes toward rape and sexual assault : a comparative analysis of professional groups in Hong Kong Law. *The HKU Scholars Hub*. Retrieved from http://hub.hku.hk/bitstream/10722/30446

[164] Law, L. H. D. (2004). Attitudes toward rape and sexual assault : a comparative analysis of professional groups in Hong Kong Law. *The HKU Scholars Hub*. Retrieved from http://hub.hku.hk/bitstream/10722/30446

criminal procedural and substantive law on sexual assault victims is therefore obvious.

As explained in the preceding section, due to the inadequacy of protection, the inherent needs for psychological protection of sexual assault victim witnesses may be denied discretionarily or even arbitrarily by the court. Their special status is not particularly recognized. The denial itself is traumatizing by being victim-blaming. Further, by requiring sexual assault victim witnesses to appear in a public court in person to recount the details of the traumatic experiences repeatedly without the proper and adequate special measures, the law fails to prevent the situations in the preceding paragraphs from arising and therefore easily leads to secondary victimization.

Victims' Legitimate Rights of Dignity

By not particularly recognizing the special status of sexual assault victim witnesses, the court imposes on the victims very high hurdles for successful application for special procedures. Given the rare and exceptional approach taken by the court, it is unlikely that the victims would be granted with any special procedures. Moreover, the limited number of special procedures made available for sexual assault victim witnesses statutorily or at common law indicates that the court's inherent jurisdiction to control the procedures of trials so as to ensure fairness is unproportionately restricted. It means the court may not be able to grant certain measures for sexual assault victims even if the court considers this as just and fair to do so. The unprincipled and limited application of the rape shield protection also greatly reduces the effectiveness of the protection.

Following all these inadequacies, it is obvious that sexual assault victims are exposed to a high risk to be pressured to appear in a public court in person, without the proper special protection, to recount the details of the traumatic experiences or even their personal sexual experiences repeatedly. This brings the experience of re-victimization to the victims as explained in the preceding section[165]. Apart from experiencing a replicate of the traumatic incidents, the victims are re-traumatized because of the infringement to their dignity caused by the public disclosure of the traumatic experiences and the personal sexual history. Some victims have described this experience as "being raped by the public once again". The inadequacy therefore affects not only the victims' psychological health but also their legitimate legal rights of dignity adversely. The infringement may render the trials conducted in an unfair and prejudicial manner.

Denial of Access to Justice

By exposing sexual assault victims to a high risk of adverse impact on psychological health and rights of dignity, the legal system may be perceived by the victims as hurtful. Researches have suggested

[165] Hattem, T. (2000) *Research report survey of sexual assault survivors.* Retrieved from http://www.justice.gc.ca/eng/pi/rs/rep-rap/2000/rr00_4/rr00_4.pdf

that any actual experience or anticipation of such traumatization makes the victims believe that secondary victimization is inevitable in the legal process. The court's discretion in allowing special measures with high arbitrariness also renders the law unpredictable. As a result of the uncertainty and the fear of trauma, the victims may be discouraged from seeking help from the legal system or even the criminal justice system as a whole[166]. The inadequacy of protection therefore indirectly reduces the accessibility of justice and denies the sexual assault victims' rights to access to justice by substantial discouragement.

Quality of Evidence

Same as primary victimization, secondary victimization brings psychological trauma and PTSD symptoms to victims because of resemblance to the original trauma. The feelings may even be increased or aggravated in secondary victimization. These psychological difficulties negatively influence other psychological variables including the victim's trust in the legal system and faith in justice[167]. As a result, the victims' appearances and behaviours as well as their evidence given in court may be influenced or even distorted[168].

Therefore, because of its impact on the victims' psychological health, the inadequate protection effectively influences the quality of the evidence given by the victims in court. Firstly, as a result of the aggravated psychological difficulties, the victims would be testifying in fear and anxiety without special protection. They may even suffer from impaired memory and concentration. The evidence given may therefore be of poor quality because of the victims' failure in giving it in a large volume of details and high accuracy. Furthermore, because of the impact on other psychological variables of the victims, the victims' conduct in court may be unfairly influenced by psychological factors. For example, victims may testify in court less naturally and confidently merely because of their loss of faith in justice. In this situation, not only would the quality of the evidence be affected, the victims may also be subject to unfair prejudice as to creditability as a result.

As sexual assault victim witnesses are usually the sole and only main prosecution witnesses in proceedings of sexual offences, the reduced quality of evidence may lead to a low conviction rate[169].

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166 About 40 % of the victims of sexual violence chose not to report to the police mainly because of this reason: see *Hattem, T. (2000) Research report survey of sexual assault survivors. Retrieved from http://www.justice.gc.ca/eng/pi/rs/rep-rap/2000/rr00_4/rr00_4*.pdf; Lievore, D. (2005). A study of women's help-seeking decisions and service responses to sexual assault. *A report prepared by the Australian Institute of Criminology for the Australian Government's Office for Women.* Retrieved from http://www.aic.gov.au/documents/D/0/1/%7BD01B3CD6-3C29-4B6C-B221-C8A31F6F84BB%7D2005-06-noLongerSilent.pdf

167 Orth U. (2002). Secondary Victimization of Crime Victims by Criminal Proceedings. Social Justice Research, Vol. 15, No. 4

168 Konradi, A. (1999). I don't have to be afraid of you". Rape survivors' emotion management in court. Symbolic Interact. 22: 45–77.

169 Kebbell, M.R. and Westera, N.J. (2011) Promoting pre-recorded complainant evidence in rape trials: Psychological and practice perspectives. *Crimian Law Journal, Volume 35/ Number 6*35, p377

The court would be deprived of the opportunity to consider the most quality evidence available as required under the principle of "best evidence". This renders the trials unfair, and justice can hardly be seen to be done by any reasonable bystanders.

V. SITUATIONS IN OTHER JURISDICTIONS

England

Under ss16 and 17 of the Youth Justice and Criminal Evidence Act 1999 ("the YJCE"), sexual assault victims are automatically eligible for the special measures under ss23 - 28 of the YJCE unless they choose to opt out. The special measures available include the use of screen, giving evidence by live link, giving evidence in private, removal of wigs and gowns, use of video recorded evidence in chief, and use of video recorded cross-examination or re-examination, with the last one not yet come into effect[170].

Upon an application for a specific special measure by sexual assault victim witnesses, although the court has the discretion to allow other special measures or a combination of other special measures it considers to be more likely to improve and to maximize the quality of the witness's evidence, the general position of the law is that the victims are entitled to special procedures as of rights.

Particularly, starting from June 2011, adult complainants in sexual offence trials in the Crown Court are automatically allowed to give video recorded evidence in chief upon application, unless this would not be in the interest of justice or would not maximize the quality of the complainants' evidence.[171] This affirms the general position of the Crown Court to allow the special measures as requested. Sexual assault victims in the Crown Court are now *prima facie* given the special measure of giving video recorded evidence in chief. Although there is no such a statutory rule in favour of admitting video recorded evidence in chief in the magistrates' court, the magistrates' court retains the jurisdiction to allow such a special procedure.

When video recorded evidence in chief has been admitted in court, examination-in-chief may still be conducted with leave of the the court. The rules regarding the application for such a leave are not

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[170] Achieving Best Evidence in Criminal Proceedings: Witnesses in court, Reference: 280518. 2007. (Publisher: Ministry of Justice, Crown Justice Service, Home Office: London). p12. Retrieved from http://hertsscb.proceduresonline.com/pdfs/Achieving_Best_Evidence_FINAL.pdf; Henderson, E., Hanna, K. and Davies, E. (2012) Pre-recording Children's Evidence: The Western Australia Experience. *Criminal Law Review, Issue 1*. Retrieved at http://agc-wopac.agc.gov.my/e-docs/Journal/0000026331.pdf.

[171] Youth Justice & Criminal Evidence Act 1999: Eligibility for special measures (England & Wales). Note 7. Retreved at http://www.justice.gov.uk/downloads/victims-and-witnesses/vulnerable-witnesses/17062011-special-meaures-table.pdf.

rigid and allow flexibility in achieving justice[172]. Besides, witnesses giving video recorded evidence in chief are given the opportunity to watch the video at least once before trials. This helps to refresh their memory and to alleviate their pressure of being cross-examined[173].

Apart from that, as for the evidence in relation to the sexual experiences of victims, s41 of the YJCE explicitly prohibits any evidence or question to be adduced or asked in cross-examination, by or on behalf of the defendants, about any sexual behaviour of the victim witnesses, except with the leave of the the court. The rape shield protection is therefore not restricted to cover only sexual experiences with a person other than the defendant concerned. Moreover, the subsections of the statute clearly specify the three conditions under which the leave of the court may be granted. A number of case authorities have been developed to interpret and explain such conditions since the enactment of the statute[174].

West Australia

According to ss106R and ss106RA of the Evidence Act 1906,

s106R (1) A judge of a court may make an order -

(a) declaring that a person who is giving, or is to give, evidence in any proceeding in that court is a special witness..."

s106 R (3) The grounds on which an order may be made are that if the person is not treated as a special witness he or she would, in the court's opinion -

(a) by reason of physical disability or mental impairment, be unlikely to be able to give evidence, or to give evidence satisfactorily; or

(b) be likely - (i) to suffer severe emotional trauma; or (ii) to be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily,

by reason of age, cultural background, relationship to any party to the proceeding, the nature of the subject-matter of the evidence, or any other factor that the court considers relevant.

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[172] s103 of the Coroners and Justice Act 2009

[173] Achieving Best Evidence in Criminal Proceedings: Witnesses in court, Reference: 280518. 2007. (Publisher: Ministry of Justice, Crown Justice Service, Home Office: London). p11. Retrieved from http://hertsscb.proceduresonline.com/pdfs/Achieving_Best_Evidence_FINAL.pdf

[174] *R v A (Complainant's sexual history)* [2001] 3 All ER 1, *R v T & H* [2002] Crim LR 73; *R v E* [2005] Crim LR 227, *R v Mukadi* [2004] Crim LR 373 etc.

s106R (3a) Despite subsection (3), in any proceeding for a serious sexual offence an order must be made under subsection (1) in respect of the person upon or in respect of whom it is alleged that the offence was committed, attempted or proposed unless the court is satisfied -

(a) that subsection (3) does not apply to the person; and

(b) that the person does not wish to be declared to be a special witness.

s106RA (1) Where a prosecution for an offence has commenced in a court, a judge of the court may make an order that the whole of the evidence (including any cross-examination and re-examination) of a person (the *witness*) whose evidence is or may be relevant in the prosecution be taken at a special hearing and recorded on a visual recording.

s106RA (4) The grounds on which an order may be made under subsection (1) are -

(a) that the witness has been declared to be a special witness under section 106R(1)(a);

Based on the above provisions, it could be seen that similar to the law in England, the law in West Australia recognizes the special status of sexual violence victims and automatically regards them as special witnesses eligible for special measures. Going even furtherer than the English law, the law in West Australia allows video recorded evidence taken at a special hearing to be admitted in cross-examination and re-examination.

<u>Queensland</u>

According to s21A of the Evidence Act 1977,

s21A ... (S)pecial witness means -
(a) a child under 16 years; or
(b) a person who, in the court's opinion-
(i) would, as a result of a mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness; or
(ii) would be likely to suffer severe emotional trauma; or
(iii) would be likely to be so intimidated as to be disadvantaged as a witness;
if required to give evidence in accordance with the usual rules and practice of the court.

s21A (2) Where a special witness is to give or is giving evidence in any proceeding, the court may, of its own motion or upon application made by a party to the proceeding, make or give 1

or more of the following orders or directions - ...

(e) that a video-taped recording of the evidence of the special witness or any portion of it be made under such conditions as are specified in the order and that the video-taped evidence be viewed and heard in the proceeding instead of the direct testimony of the special witness...

s21A(6) A video-taped recording under this section of evidence given by a special witness, or a lawfully edited copy of the recording -

(a) is as admissible as if the evidence were given orally in the proceeding in accordance with the usual rules and practice of the court; and

(b) is, unless the relevant court otherwise orders, admissible in -

(i) any rehearing or retrial of, or appeal from, the proceeding; or

(ii) in the case of evidence given for a criminal proceeding -

(A) another proceeding in the same court for the relevant charge or for another charge arising out of the same, or the same set of, circumstances; or

(B) a civil proceeding arising from the commission of the offence.

s21A(8) If evidence is given, or to be given, in a proceeding on indictment under an order or direction mentioned in subsection (2)(a) to (e), the judge presiding at the proceeding must instruct the jury that—

(a) they should not draw any inference as to the defendant's guilt from the order or direction; and

(b) the probative value of the evidence is not increased or decreased because of the order or direction; and

(c) the evidence is not to be given any greater or lesser weight because of the order or direction.

The law in Queensland does not recognize the special status of sexual violence victims, and they are not automatically eligible for special procedures. To be eligible for special procedures, the victims must satisfy the conditions under s21A(b) to either be intimated or emotionally traumatized witnesses.

However, the law opens the possibility for adult sexual violence victims to apply for a list of special measures including the procedure of testifying by recorded video as intimated or emotionally traumatized witnesses. The statutes in Queensland clearly outline the extent to which video recordings could be admitted as evidence. In particular, it provides that video recorded evidence is admissible not only in the criminal proceeding at the time, but also in any retrial of or appeal from the proceeding, another proceeding in the same court for the relevant charge arising out of the same set of circumstances, and a civil proceeding arising from the commission of the offence. The

statutes also set out the directions to be given by the judge to the jury when the special measure is granted to prevent prejudice against the victims arising from the use of special measures.

New Zealand

According to ss103, 105 and 106 of the Evidence Act 2006,

s103 (1)In any proceeding, the Judge may, either on the application of a party or on the Judge's own initiative, direct that a witness is to give evidence in chief and be cross-examined in the ordinary way or in an alternative way as provided in section 105.

s103(3)A direction under subsection (1) that a witness is to give evidence in an alternative way, may be made on the grounds of -

(a)the age or maturity of the witness:
(b)the physical, intellectual, psychological, or psychiatric impairment of the witness:
(c)the trauma suffered by the witness:
(d)the witness's fear of intimidation:
(e)the linguistic or cultural background or religious beliefs of the witness:
(f)the nature of the proceeding:
(g)the nature of the evidence that the witness is expected to give:
(h)the relationship of the witness to any party to the proceeding:
(i)the absence or likely absence of the witness from New Zealand:
(j)any other ground likely to promote the purpose of the Act.

s103 (4)In giving directions under subsection (1), the Judge must have regard to -

(a)the need to ensure -
(i)the fairness of the proceeding; and
(ii)in a criminal proceeding, that there is a fair trial; and
(b)the views of the witness and -
(i)the need to minimise the stress on the witness; and
(ii)in a criminal proceeding, the need to promote the recovery of a complainant from the alleged offence; and
(c)any other factor that is relevant to the just determination of the proceeding.

s105 (1)A Judge may direct, under section 103, that the evidence of a witness is to be given in an alternative way so that—

(a)the witness gives evidence - ...
(iii)by a video record made before the hearing of the proceeding...

s105 (2)If a video record of the witness's evidence is to be shown at the hearing of the proceeding, the Judge must give directions under section 103 as to the manner in which cross-examination and re-examination of the witness is to be conducted.

s106 (1)In a criminal proceeding tried on indictment, the video record evidence of a witness that is to be offered as an alternative way of giving evidence at the trial -

(a)must, if a video record of that witness's evidence was offered in evidence at the standard committal or the committal hearing, include the same video record; and

(b)may include a video record made after the standard committal or the committal hearing.

s106 (2)A video record offered as an alternative way of giving evidence must be recorded in compliance with any regulations made under this Act.

s106 (5)All parties must be given the opportunity to make submissions about the admissibility of all or any part of a video record that is to be offered as an alternative way of giving evidence.

s106 (6)If any party indicates that the party wishes to object to the admissibility of all or any part of a video record that is to be offered as an alternative way of giving evidence, that video record must be viewed by the Judge.

s106 (8)The Judge may admit a video record that is recorded and offered as evidence substantially in accordance with the terms of any direction under this subpart and the terms of regulations referred to in subsection (2), despite a failure to observe strictly all of those terms.

Similar to the position in Queensland, the New Zealand's law does not recognize the special status of sexual assault victims. However, an alternative way to give evidence may be allowed in consideration of a list of factors including the age or maturity of the witness, the physical, intellectual, psychological, or psychiatric impairment of the witness, the trauma suffered by the witness, the witness's fear of intimidation, the linguistic or cultural background or religious beliefs of the witness, the nature of the proceeding, the nature of the evidence that the witness is expected to give, the relationship of the witness to any party to the proceeding, the absence or likely absence of the witness from New Zealand and any other proper grounds.

The possible alternative ways in New Zealand include the use of video recorded evidence. The court would allow such a measure in consideration of the fairness of the proceedings and a fair trial as well as the need to minimize the stress on the witness and the promotion of the recovery of the corresponding victims. The law in New Zealand also stipulates that the court must direct the manner in which cross-examination and re-examination of the witness is to be conducted when video

recorded evidence is admitted.

Indeed, the special measure of testifying by recorded video is generally allowed in New Zealand provided that the video recording satisfies all the technological requirements specified at law[175]. However, the New Zealand's law stipulates that all parties to the proceeding must be given the opportunity to object to the admissibility of the video recorded evidence to proportionately safeguard the interest of justice and the rights of all parties in the proceedings.

VI. RECOMMENDATION

Recommendation I: Statutory Recognition of the Special Status of Sexual Assault Victims

It is submitted that Hong Kong should follow the English model to recognize the special status of sexual assault victims and to entitle them with special procedures for protection as of rights. A similar approach has been taken in many other jurisdictions, including West Australia above.

Alternatively, if the above suggestion cannot be adopted, it is submitted that Hong Kong should follow the New Zealand's model by including a list of factors to be considered by the court to determine whether a witness shall be entitled to special procedures or protection. This reduces the arbitrariness and uncertainties in the area by giving clear guidance to the court. The list of factors as stipulated in the New Zealand's law including (i) the age or maturity of the witness, (ii) the physical, intellectual, psychological, or psychiatric impairment of the witness, (iii) the trauma suffered by the witness, (iv) the witness's fear of intimidation, (v) the linguistic or cultural background or religious beliefs of the witness, (vi) the nature of the proceeding, (vii) the nature of the evidence that the witness is expected to give, and (viii) the relationship of the witness to any party to the proceeding, is recommended to be adopted by being with a wide scope.

Recommendation II: Entitlement to an Extended List of Special Procedures

It is submitted that the number of special procedures available for sexual assault victims should be increased, and particularly, include the procedures of the use of screen and the use of video recorded evidence. The comparative study under Part V of this paper has showed that sexual assault victims in many jurisdictions, including all the selected jurisdictions, are eligible for applying for a list of special procedures. Comparatively, the special procedures available for sexual assault victims in Hong Kong at present are extremely limited in types.

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[175] Tinsley, Y. and McDonald, E. (2011) Use of alternative ways of giving evidence by vulnerable witnesses: current proposals, issues and challenges. *VUW Law Review Volume 42/ Issue 4*. Retrieved from http://www.victoria.ac.nz/law/research/publications/vuwlr/prev-issues/pdf/vol-42-2011/issue-4/05-Tinsley-and-McDonald.pdf

Particularly, it is submitted that Hong Kong should adopt the English model. Sexual assault victims are automatically entitled to the use of video recorded evidence in the jurisdiction. Besides, the use of screen has also been included in the statute. By adopting the list of special procedures found in the YJCE, the special procedures available for sexual assault victims can, on the one hand, be extended, and on the other hand, be clarified and improved with certainty.

It is submitted that at the current stage, Hong Kong should follow the English model to adopt only video recorded evidence in chief, subject to the adoption of video recorded evidence in cross-examination or re-examination upon review in the future. This is recommended in view of the high level of controversies and criticisms brought by the implementation of s28 of the YJCE in England. The problems of the adoption of video recorded evidence in cross-examination and re-examination at present are discussed in detail under Part VII of this paper.

Nevertheless, it is recommended that the possibility of the adoption of video recorded evidence in cross-examination and re-examination upon review in the future should be opened given that the same has already been adopted in some other jurisdictions such as West Australia. The effectiveness of the measure in these jurisdictions should be considered and the possibility of the adoption of such a measure in Hong Kong should be reviewed from time to time.

Apart from the English model, it is submitted that Hong Kong should follow the Queensland's model in the inclusion of statutory clarification with regard to the admissibility of video recorded evidence in any retrial of or appeal from the relevant criminal proceedings. It is recommended that such evidence shall be admissible in any relevant retrials or appeals. Without such an admission, the protection provided for the victims would be merely apparent and contingent.

<u>Recommendation III: Statutory Reinforcement of the Rape Shield Law</u>

It is submitted that the current law in Hong Kong which follows s2(1) of the Sexual Offences (Amendment) Act 1976 in England should be replaced by a new law following s41 of the YJCE. The former law has already been replaced by the latter law in England for more than a decade. It is submitted that the Hong Kong law at present is extremely outdated and offers insufficient protection for sexual assault victims by not providing clear guidance as to the granting of the leave of the court and unreasonably restricting the coverage of the protection. The rape shield protection should be extended to cover any sexual behaviour of the victims, and the leave of the court should only be granted based on conditions specifically stipulated in statutes.

VII. Justifications and Responses to Oppositions

Justifications

As a matter of comparative study, the current special protection for sexual assault victims in Hong Kong is extremely limited or even out-to-date. This is consistent with the fact that despite the current law has been established based on the English's model at the time, there has been no legal review done in Hong Kong following the English reform on the law. The Hong Kong's law therefore remains the old law. It is obviously in ignorance of the changing societal values with more emphasis on being victim oriented. It also fails to recognize the particular nature of sexual offences as revealed more and more clearly by modern psychological studies. It is justifiable for Hong Kong to review its law by taking reference from other jurisdictions, particularly the English jurisdiction, in view of its current insufficiency.

Substantively, by adopting the recommendations in this paper, the adverse impact brought by the inadequacy of the current system is expected to be largely reduced. Firstly, by recognizing the special status of sexual assault victims, the victims are much more likely to be granted with special procedures upon application. This alters the strict general position of the law at present, and prevents the current arbitrariness and uncertainty in determining whether a particular sexual assault victim is a witness in fear. The recognition of the victims itself is encouraging and positive reaction following the primary victimization. The availability of special procedures such as the use of screen or testifying by live television link further reduces potential psychological suffering resulted from secondary victimization. The dignity of the victims is more likely to be protected, and the quality of evidence is less likely to be influenced by undesired psychological variables of the victims. Therefore, both the well being of victims and the fairness of trials can be promoted as a result.

Moreover, the extension of the list of special procedures available for sexual assault victims ensures that the court's inherent jurisdiction to control the procedures in trials for fairness would not be unreasonably restricted or hindered. In view of the extremely limited types of measures available for sexual assault victims at the time, it is highly likely that the victims would not be able to be given the most appropriate protective measures even if they have proved to be witnesses in fear or witnesses eligible for special measures.

Particularly, studies have showed that the use of video recorded evidence in court reduces the anxiety and fear experienced by the victims significantly[176]. One of the major advantages of the special measure of testifying by video recording is that victims do not have to retell the sexual violence incidents once again in trials. By allowing the video recording of relevant interviews to be given in evidence, the risk of bringing the experience of re-victimization to the victims in trials can

[176] Interviews with a number of sexual assault victims have been conducted by the Association Concerning Sexual Violence Against Women in Hong Kong.

be reduced. The removal of their fear of testifying and re-victimizing experience in court protects their dignity and rights to be heard by justice.

The quality of evidence is also likely to be higher in video recorded evidence as the video recordings are usually made by victims in a less stressed condition and more closely in time to the occurrence of the incident of sexual assault[177]. There will be no need for victims to confront their offenders instantly in court. The quality of evidence is therefore less likely to be affected undesirably by fear, anxiety or any other psychological variables[178]. Moreover, the memory of victims at the time of the recording is usually fresher in time and more accurate. The video recorded evidence will not be biased by the subjection adoption of other law enforcement agencies either, as the "adopted" statements made by the police are[179]. This increases the accuracy and volume of details of evidence admitted by court and leads to a fairer trial with the best evidence.

Besides, the statutory inclusion of the special protection of the use of screen also helps to solve the problem of arbitrariness and uncertainty involved in the current practice and ensures the protection of the victims' dignity.

Furthermore, the statutory reinforcement of the rape shield law helps to reinforce the purpose of the protection by specifying the correct application of the protection and extending its scope of coverage. The victims would be less likely to be traumatized by inimical interrogation in relation to their personal sexual experiences in the past. The interrogation is less likely to be able to made in a victim-blaming manner either. This reduces the psychological suffering experienced by the victims and protects the victims' dignity.

After all, as a general legal principle, the recommendations are essential to the current system by being able to increase the certainty and predictability of the law. This is a fundamental value in our legal system. By formulating and codifying the unclear statutes as well as common law at present as suggested, sexual assault victims and any other parties to the trials would be able to anticipate and predict the decisions on procedural and evidential matters with high certainty. This does not only encourage the victims to seek help from the legal system, but also protects the fundamental value of the law and ensures that justice is readily accessible by everyone.

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[177] Read, J. and Connolly, A. (2007). The Effects of Delay on Long-term Memory for Witnessed Events. *Toglia M, Read J, Ross D, and Lindsay R, Handbook of Eyewitness Psychology: Memory for Events* (Publisher: Lawerence Erlbaum Associates), pp 117-155

[178] Kebbell, M.R. and Westera, N.J. (2011) Promoting pre-recorded complainant evidence in rape trials: Psychological and practice perspectives. *Crimian Law Journal, Volume 35/ Number 6*35, p379

[179] Kebbell, M.R. and Westera, N.J. (2011) Promoting pre-recorded complainant evidence in rape trials: Psychological and practice perspectives. *Crimian Law Journal, Volume 35/ Number 6*35, p379

It is lastly submitted that the recommendations also promotes procedural justice and societal welfare. Firstly, it is not uncommon for a defendant to get acquittal in a retrial of or appeal from the criminal proceedings of sexual assault merely because the victim have failed to re-testify out of fear of the enormous pressure throughout the proceedings. By admitting video recorded evidence in such retrials or appeals, injustice resulted from such a situation can be avoided. Besides, the admission of video recorded evidence may lead to early guilty plea in proceedings with strong evidence, without incurring the costs of a full trial, as there would be no room for defendants to speculate whether the main prosecution witnesses, i.e. the victims, would appear and testify in court at the end[180].

From the social perspective, if video recorded evidence is accepted at court, victims' recovery could be facilitated since they no longer have to remember every single detail of the incidents until the end of trials. They could start their recovery and move on with their life earlier without forfeiting their rights to be heard by justice. Besides, it removes defendants' motive to commit illegal intimidation against the victim witnesses since evidence will have already been available as video recordings long before the trial, independent of the victim's appearance in court[181].

Responses to Oppositions

Fundamental Right to a Fair Trial

The defendant has a constitutional right to a fair trial at common law. This right encompasses many other rights, including the right to cross-examination and right to confrontation. For example, according to Article 11(2)(e) of the Hong Kong Bill of Rights, a defendant enjoys the right to examine the witness against him, and to challenge the accuracy and reliability of the evidence lie against him. This right has been interpreted as a component of the constitutional right to a fair trial[182]. The infringement to an encompassed right itself is not decisive in determining if the defendant's right to a fair trial has been infringed. The whole circumstances must be looked at in answering this question.

It is alleged that by allowing the victim witnesses to testify by video recordings, the defendant's right to a fair trial would be infringed since the defendant's right to cross-examination and right to confrontation would be deprived of. The same opposition applies to the extension of the rape shield protection that is alleged to have rigidly restricted the defendant's right to a fair trial and the

[180] Kebbell, M.R. and Westera, N.J. (2011) Promoting pre-recorded complainant evidence in rape trials: Psychological and practice perspectives. *Crimian Law Journal, Volume 35/ Number 6*35, p379

[181] Kebbell, M.R. and Westera, N.J. (2011) Promoting pre-recorded complainant evidence in rape trials: Psychological and practice perspectives. *Crimian Law Journal, Volume 35/ Number 6*35, p379

[182] *Regina v A* [2001] UKHL 25

encompassed right to cross-examination.

In *HKSAR v See Wah Lun* [2011] 2 HKLRD 957, Cheung JA expressly stated that the defendant's right to confrontation is not absolute. In making the decision on allowing the special procedure as requested, he said that "the court must balance the interests of the accused and the significant public interest of witnesses giving evidence without occasioning danger to themselves or to members of the community. The fact that an accused may suffer some forensic disadvantage does not mean such an order should be refused".

Obviously, the court's position is that while the defendant's fundamental right to a fair trial and to confrontation ought to be protected, it must be balanced against the public interest to enable a witness in fear to testify in a way without danger to themselves or their family. Indeed, despite the rare and exceptional approach traditionally adopted by the court, the common law courts are beginning to accept that the right to a fair trial includes the defendant's as well as the witness's right to a fair trial[183].

Under the recommendations in this paper, only the use of video recorded evidence in chief is suggested. Without adopting such a measure in cross-examination and re-examination, it is hard to say that the adoption of video recorded evidence in chief would infringe the defendant's right to cross-examination or confrontation in any extent. The defendant's right to cross-examine the victims has not bee affected by the imposition of such a measure by any degree.

Contrarily, it is submitted that given the high accuracy and quality of video recorded evidence, there is no reason to consider video recorded evidence in chief as hearsay evidence at all. All differences to be found here are the technologies involved.[184] It presents no infringement to the defendant's right to cross-examine or even the fundamental right to a fair trial, if the latter is not promoted by the credibility, reliability and trustworthiness of video recorded evidence. This perspective has been taken by the Canadian court in *Regina v KGB*[185],

> "All of these indicia of credibility, and therefore reliability, are available to the trier of fact when the witness' prior statement is videotaped. ... The audio-visual medium captures other elements of the statement lost in a transcript, such as actions or distinctive motions which the witness demonstrates (as in this case), or answers given by nodding or shaking the head. In other words, the experience of being in the room with the witness and the interviewing officer is recreated as fully as possible for the viewer. Not only does the

[183] *R v DJX* [1990] 91 Cr. App. R. 36

[184] The evidence of children and other vulnerable witnesses, NZLC PP26. October 1996. (Publisher: Law Commission: Wellington), p. 19

[185] *Regina v KGB* [1993] 1 S.C.R 740

> trier of fact have access to the full range of non-verbal indicia of credibility, but there is also a reproduction of the statement which is fully accurate, eliminating the danger of inaccurate recounting which motivates the rule against hearsay evidence. In a very real sense, the evidence ceases to be hearsay in this important respect, since the hearsay declarant is brought before the trier of fact."
>
> "Again, we must remember that the question is not whether it would have been preferable to have had the benefit of contemporaneous cross-examination, but whether the absence of such cross-examination is a sufficient reason to keep the statement from the jury as substantive evidence. Given the other guarantees of trustworthiness, I do not think that it should be allowed to be a barrier to substantive admissibility. All of these indicia of credibility, and therefore reliability, are available to the trier of fact when the witness' prior statement is videotaped."

In any event, given the increasing emphasis on witnesses' interests in the fundamental right to a fair trial, the special procedure of the use of video recorded evidence must be considered in the promotion of a fair trial by preventing witnesses to be subject to prejudice with regard to credibility because of their psychological suffering, or be denied access to justice indirectly.

Alternatively, it is submitted that even if there would be situations in which the admission of video recorded evidence may cause infringement to the defendant's rights or lead to an unfair trial, this would not necessarily be the cases in all situations. Therefore, there is no reason for not extending the limited types of special procedures available at present to allow higher flexibility exercised by the court. It could hardly be explained that how the eligibility of sexual violence victims to apply for the special procedure itself, without any automatic right to be granted for it, could cause any infringement to the defendant's rights.

Reduced Value of a Live Trial

The value of a live trial is often related to the truthfulness of evidence given by witnesses. There is a traditional belief that witnesses are more likely to tell truth in court because of the positive intimidation given by cross-examination and the pressure experienced in court. Moreover, it is said that the demeanor of witnesses allows the jury to more accurately assess their trustworthiness.

By allowing witnesses to give evidence outside the courtroom before the actual trial, the special procedure of the use of video recorded evidence is allegedly to have reduced the credibility of witnesses who are not physically present in court and the reliability of the witnesses' evidence not given in real time. The jury may be more difficult to assess the trustworthiness of witnesses by detailed observation of their demeanor and it is believed that there is a possibility that the jury

would perceive witnesses giving evidence by video recordings to be less trustworthy[186].

Besides, it has been alleged that video recorded evidence reduces the quality of evidence as the victims may be deprived of the right to be examined in chief even if the video recorded evidence admitted is not of high quality[187]. The victims may also be cross-examined by the defence lawyer without firstly being led by the prosecutor to go through the facts. This may put the victims in a more stressed condition and lead to evidence of poor quality[188].

There is no concrete evidence supporting the assertion that positive intimidation or physical presence in court would make witnesses more likely to tell truths when compared with testifying through alternative ways. Contrarily, it is submitted that by using video recorded evidence, the jury may be allowed to have more detailed observation of the demeanor of witnesses with a closer and clearer image. Moreover, the demeanor shown by witnesses in video recorded evidence is more likely to be accurately reflecting the truth as the video recordings are usually made by the victims naturally and genuinely[189], without undesirable or aggravated psychological difficulties. They are also usually made closer in time to the occurrence of the alleged sexual assault.

Besides, the potentially prejudicial perception of the jury is a circulative argument. There is no evidence that a defendant in a proceeding in which video recorded evidence is admitted is less likely to be convicted[190]. It is submitted that by officially recognizing the special status of sexual assault victims and entitling them to special procedures as of rights, the jury's prejudicial perception, if has ever existed, can be avoided and corrected effectively.

The oppositions in relation to the deprivation of the right to be examined in chief and the problem of going into cross-examination cold are rebutted based on the fact that the recommendations in this paper have sufficiently address the above questions. By adopting the English model, the victims

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[186]Kebbell, M.R. and Westera, N.J. (2011) Promoting pre-recorded complainant evidence in rape trials: Psychological and practice perspectives. *Crimian Law Journal, Volume 35/ Number 6*35, p379; Burton, M., Evans, R. and Sanders, A. Are special measures for vulnerable and intimidated witnesses working? *Evidence from the criminal justice agencies, Home Office Online Report 01/ 06*, p 54. Retrieved from http://library.npia.police.uk/docs/hordsolr/rdsolr0106.pdf

[187] Burton, M., Evans, R. and Sanders, A. Are special measures for vulnerable and intimidated witnesses working? *Evidence from the criminal justice agencies, Home Office Online Report 01/ 06*, p 54. Retrieved from http://library.npia.police.uk/docs/hordsolr/rdsolr0106.pdf

[188] Burton, M., Evans, R. and Sanders, A. Are special measures for vulnerable and intimidated witnesses working? *Evidence from the criminal justice agencies, Home Office Online Report 01/ 06*, p 54. Retrieved from http://library.npia.police.uk/docs/hordsolr/rdsolr0106.pdf

[189] Burton, M., Evans, R. and Sanders, A. Are special measures for vulnerable and intimidated witnesses working? *Evidence from the criminal justice agencies, Home Office Online Report 01/ 06*, p 54. Retrieved from http://library.npia.police.uk/docs/hordsolr/rdsolr0106.pdf

[190] Burton, M., Evans, R. and Sanders, A. Are special measures for vulnerable and intimidated witnesses working? *Evidence from the criminal justice agencies, Home Office Online Report 01/ 06*, p 55. Retrieved from http://library.npia.police.uk/docs/hordsolr/rdsolr0106.pdf

would be allowed to opt out the special measures to be examined in chief, or to apply for examination in chief in addition to the video recorded evidence. They would also not go into cross-examination cold as they would be allowed to review the video recorded evidence at least once prior to the trials.

VIII. CONCLUSION

The current special protection available for sexual assault victims is extremely limited and inadequate. It may be explained by the traditional values and practices of the legal system, and the continuous ignorance of the distinctive nature of sexual offences. However, supported by increasing number of researches and studies, it is submitted that there is an urgent need to reform the current available protection so as to tackle the fundamental and inherent needs of sexual assault victims. The psychological impact of the inadequacy of the current protection on sexual assault victims must not be underestimated or ignored. This leads to adverse impact on the legal system as a whole directly by infringing the fundamental right of dignity, denying substantive access to justice and rejecting best evidence to be considered in a fair trial.

This paper has submitted three recommendations: (I) statutorily recognizing the special status of sexual assault victims to be with automatic eligibility for special procedures, (II) extending the list of special procedures available for sexual assault victims, particularly including the use of screen and adoption of video recorded evidence, and (III) reinforcing the rape shield law with clearer guidance and extended scope of coverage. The English model has been recommended to be adopted, subject to minor adoption of particular principles in the jurisdiction of West Australia. It is submitted that by doing so, the adequacy of the current protection will be largely increased. The adverse impact on both the well being of the victims and the legal system itself will be alleviated as a result. This ultimate achievement of a just and fair trial must outweigh any possible opposition made to the recommendations as suggested in this paper.

3.3 Court Protection for Sexual Offence Complainants

1. **Introduction**
2. **The distinctive nature of sexual offences**
   - 2.1. The role of consent
   - 2.2. The sexual nature of the offences
   - 2.3. The intimate nature of evidence given
   - 2.4. More lengthy and hostile cross examination
   - 2.5. The relationship between the complainant and the defendant
3. **The importance of responding to the distinctive nature of sexual offence trials**
   - 3.1. Essential to the function of the criminal justice system
   - 3.2. Protecting victims' rights and dignity
4. **Existing court protections for sexual offences complainants**
   - 4.1. Sources of protection
   - 4.2. Measures for protecting victims or witnesses during trial
     - 4.2.1. Live television link
     - 4.2.2. Video recording
     - 4.2.3. Closed court proceedings
     - 4.2.4. Anonymity of the complainant
     - 4.2.5. Rape shield protection
     - 4.2.6. Gag order
     - 4.2.7. Other special measures provided by The Statement of Prosecution Policy and Practice – Code for Prosecutors
   - 4.3. Rights of victims
     - 4.3.1. Victims of Crime Charter
     - 4.3.2. Statement of Prosecution Policy and Practice – Code for Prosecutors
     - 4.3.3. Statement on the Treatment of Victims and Witnesses
5. **Testifying behind a screen as a protective measure for sexual offences complainants**
   - 5.1. The role of screen for the protection of sexual violence victims
   - 5.2. The framework of law governing the granting of screen in Hong Kong
   - 5.3. The unsatisfactory aspects of the present state of law
   - 5.4. Different principles that operate against the granting of screen
     - 5.4.1. Defendant's right to fair trial
     - 5.4.2. Right to public trial
     - 5.4.3. Right to confront the accusers physically
     - 5.4.4. Right to cross examination
     - 5.4.5. Right to know the identity of the accuser

1. Introduction

It is argued in this paper that the sexual offences trials have a distinctive nature that is different to other kinds of offences. On that basis, it is further argued that our present court system fails to respond to this distinctive nature, the result of which is the exposure of complainants as witnesses to severe trauma which impedes the fundamental function of our criminal justice and court system, and the deprivation of the complainants of dignity which they are entitled to as citizens. All these offend the underlying spirit of our criminal justice system, and warrant legal reform that addresses the needs of sexual offence complainants more. This paper advocates more extensive use of special measures in court to assist their testifying in court, including the use of screen and live television link; and also the codification of more comprehensive special measures in the Criminal Procedure Ordinance.

2. The distinctive nature of sexual offences

2.1 The role of consent

The role of consent in sexual offences makes the trials of this kind of offences different from most other criminal proceedings. Unlike most other non-sexual offences, in cases of sexual offences, whether the defendant will be convicted often hinges on the question whether the behaviour (namely, sexual intercourse) is performed in the absence of consent. This is a question most often turning on the credibility of the complainant[191]. Research findings have shown that this gives sexual offence trials a distinctive dynamic, and virtually put the character of the victim on trial[192]. Victims face excessive stress because they feel they have to prove their innocence[193].

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[191] This is also observed by New South Wales Law Reform Commission in their Report 101 "*Questioning of complainants by unrepresented accused in sexual offence trials*" (2003) at para 2.6-2.7.

[192] See New South Wales Sexual Assault Committee, "*Sexual Assault PhoneIn Report*" (1993) at 39.

[193] See, for example, Parliament of NSW, Legislative Council, Standing Committee on Social Issues, "*Sexual violence, the hidden crime: inquiry into the incidence of sexual offences in NSW: part 1*" (Report 6, 1993) at para 1.1.9

2.2 The sexual nature of the offences

It has been suggested by studies that the sexual nature of the act which constitutes sexual offence adds complexity to the offence itself and to the complainants[194].

An abundance of research has shown that a victim of sexual offence is likely to respond differently to, for example, a victim of other kinds of offences, such as a property offence or a non-sexual assault[195]. Complainants of sexual offences usually suffered from emotional trauma that is incomparable to other kinds of offences. This ranges from shame, guilt, embarrassment, confusion, feeling dirty and used. Feelings of self-blame and self-recrimination are particularly common among sexual violence victims[196]. The New South Wales Legislative Council Standing Committee on Social Issues wrote, "The sexual violence victim is often confronted with a range of additional feelings resulting from the social stigma and physical invasiveness of the incident."

Whilst sexual offence victim may recover from physical harm, the psychological harm they suffer could be grave, is ongoing, and may well last forever. The New South Wales Sexual Assault Committee found that 97% of complainants of sexual assaults who participated in a PhoneIn in 1992 reported ongoing emotional harm as a result of the assault[197]. Others reported that physical harm, ongoing problems in their interpersonal relationships, disruption to their normal daily life, disruption to their education or employment and financial harm[198]. Research has powerfully illustrated that "sexual assault is not just another form of physical assault. It is an assault on a person's body, senses, emotions and whole self"[199].

2.3 The intimate nature of evidence given

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[194] See, for example, *ibid* at para 1.1.1-1.1.2.

[195] See New South Wales Law Reform Commission, Report 101 "*Questioning of complainants by unrepresented accused in sexual offence trials*" (2003), at para 2.3.

[196] See Parliament of NSW, Legislative Council, Standing Committee on Social Issues (Report 6, 1993), "*Sexual violence, the hidden crime: inquiry into the incidence of sexual offences in NSW: part 1*" at para 1.1.1-1.1.2.

[197] See New South Wales Sexual Assault Committee, "*Sexual Assault PhoneIn Report*" (1993).

[198] See *supra*, fn 7, at paras 23-25.

[199] See *supra*, fn 7, at para 25.

The intimate nature of evidence imposes an immense burden upon a testifying complainant. To take the offence of rape in Hong Kong as an example, it requires the prosecution to establish the elements of vaginal penetration and penetration by penis. It should be noted that the presumption of innocence requires that the burden of proof is on the prosecution, who is required to prove each and every element of the offence "beyond reasonable doubt", namely, with certainty. Hence, it is inevitable necessity that the prosecutor requires the complainant to recount the process of the alleged victimization in excruciating and embarrassing details in the examination-in-chief. This makes the examination detail-picking and humiliating to the complainant as witness. It is supported by recent studies that sexual offence complaints experience confusion and helplessness during the process[200]. This distress is aggravated where the complainant is a woman who is from cultural backgrounds in which such matters are not conventionally discussed among men[201].

In a study where barristers, judges and magistrates were interviewed on the topic of court experience of rape complainants, almost all respondents agreed that rape complainants go through a significantly different experience as witnesses than victims of other forms of personal violence[202]. From the perspectives of the legal professionals interviewed, the intimate character of the evidence rape complainants give in front of strangers make the complainant's experience of the trial process different from other kinds of trials.

2.4 More lengthy and hostile cross examination

Because of the important role of consent for conviction under this offence and the resultant focus on the complainant's credibility, defense counsel usually adopts the tactic of attacking rape complainants on their motives for lying. Hence testifying complainants are subject to more "savage" or "thorough" treatment than other kinds of witnesses. On that account, cross examination is usually more lengthy and hostile[203].

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[200] See Hung, Suet-lin (2011) "*A Study on Help Seeking Experiences of Sexual Violence in Hong Kong: Community Response and Second Victimization*". See also New South Wales Sexual Assault Committee, "*Sexual Assault PhoneIn Report*" (1993) at 39.

[201] Australian Law Reform Commission (1994, Report 69, Part II), "*Equality before the law: justice for women*" at para 7.28.

[202] M Heenan and H McKelvie (1996 Rape Law Reform Evaluation Project, Report 2, Victorian Attorney General's Department, Legislation and Policy, Department of Justice, 1996), "*The Crimes (Rape) Act 1991: an evaluation report*" at 244.

[203] See New South Wales Law Reform Commission, Report 101 "*Questioning of complainants by unrepresented accused in sexual offence trials*" (2003) at para 2.2.

The rape shield law, although designed to protect testifying complainants from aggressive and intrusive questions about private sexual life, is not usually effective in shielding out aggressive and penetrative questions, since a number of exceptions are allowed, and a Hong Kong study reveal that the prosecution often does not contend where such questions are raised against witnesses[204]. Hence court experience is made a significantly more intrusive, dignity-stripping, private life-offending and hence highly traumatic for sexual offence complainants.

2.5 The relationship between the complainant and the defendant

It is not uncommon that the commission of sexual offences involves the exercise of power by one person over another[205], and this power relationship extends to the moment of trials, thus giving rise to trauma experienced by the less powerful. To take Hong Kong as an example, case law's recognition of this power relationship is shown in the creation of an irrebuttable presumption that sexual intercourse procured by physical coercion constitutes rape[206].

It is submitted that the power relationship between the alleged perpetrator and victim in sexual offences is distinct from that in other offences, such as theft, where such power relationship contributing to the commission of the offence is absent. This power relationship is found to be creating severe trauma in the complainant when they faced the defendant again in the court. Research findings have shown that a vast majority of complainants identify seeing the accused as one of the worst features of having to attend the court[207]. Physical proximity to the accused can be very distressing, especially where the courtroom itself is small[208]. Complainants have commented

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Please see also Hung, Suet-lin (2011) "*A Study on Help Seeking Experiences of Sexual Violence in Hong Kong: Community Response and Second Victimization*".

[204] See Hung, Suet-lin (2011) "*A Study on Help Seeking Experiences of Sexual Violence in Hong Kong: Community Response and Second Victimization*".

[205] The notion that sexual offences distinctively involved the exercise of power by one person over another is expressed, for example, in Westmead Sexual Assault Service, "*Submission*" at 1.

[206] *R v Olugboja* [1982] QB 320

[207] See, for example, Hung, Suet-lin (2011) "*A Study on Help Seeking Experiences of Sexual Violence in Hong Kong: Community Response and Second Victimization*".

[208] See NSW Attorney General's Department Regional Violence Against Women Specialist Unit (Southern region), "*Submission*".

that "we should not have to face the accused in court"[209].

Besides, unlike some other kinds of offences, research findings have shown that the complainant and the defendant usually know each other prior to the alleged commission of the offence. This is said to be complicating the emotional responses of the complainants when testifying. Research has found that this gives rise to repeat victimization[210]. This is because the complainant has to bear "the additional burden of having been betrayed by someone once trusted"[211]. This problem is aggravated where the unrepresented accused cross examines the complainant in person[212].

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[209] See NSW Bureau of Crime Statistics and Research (1996, General Report Series), "*The criminal justice response to sexual assault victims*" at 44.

[210] See *ibid* at iii.

[211] See Parliament of NSW, Legislative Council, Standing Committee on Social Issues (1993, Report 6), "*Sexual violence, the hidden crime: inquiry into the incidence of sexual offences in NSW: part 1*" at para 1.1.7.

[212] See New South Wales Law Reform Commission, Report 101 "*Questioning of complainants by unrepresented accused in sexual offence trials*" (2003) at para 2.10-2.11.

3. The importance of responding to the distinctive nature of sexual offence trials

Protecting witnesses from in-court emotional trauma is not merely a matter of soothing witnesses' grievances or pacifying hard feelings. It is submitted that such protection has important bearing on the achievement the fundamental values of our criminal justice and court system below—

3.1 Essential to the function of the criminal justice system

It should be noted that the fundamental operation of the criminal justice system depends on prosecution of offenders. If we accept this, we will agree that for the healthy functioning of the system, prosecution should effectively be made to bring alleged perpetrators to justice. This, however, is not free goods, and further relies on the attainment of the following—

(1) Relevant or important witnesses such as the complainants are willing to be summoned to court to help the prosecution to establish its case; and
(2) The complainants summoned as such are able to give evidence that is of competent quality, so that their evidence is reliable and have probative value for reaching a verdict.

It should be noted that the establishment of prosecution's case in sexual crimes such as rape predominantly depends on the facts-recounting testimony of the complainants. However, on the account of the distinctive nature of sexual offences, their victims usually face emotional trauma when giving evidence in court. This trauma has the effect of confusing them. In distress, they are not able to give oral evidence that is of competent quality. Since a feature of sexual offence is that the prosecution's case relies predominantly on the narration of incident by the complainant, this gravely compromised the prosecution's case, and contributing to failure of the prosecution which may otherwise have succeeded. More dramatically, this emotional trauma may lead sexual violence victims to withdraw from testifying in court, thus aborting prosecution that otherwise upon the evidence available to the prosecution may have succeeded.

3.2 Protecting victims' rights and dignity

It is also submitted that refusal to protect witness's interest is inconsistent with the fundamental value underlying our criminal justice system, which not only protect the interest of the defendants, but *all* citizens, from the oppression or harm of the state. It is submitted that whilst the present court system gives recognition to the personal liberties and dignity of the defendants as citizens, this is done at the expense of the interest of other civilian participators such as the testifying complainant

witnesses.

It is a hard argument to make indeed to say that whilst both the defendants and the complainants are citizens entitling to freedom from oppression by reason of the constitutional relationship between the state and the citizens, defendants should be particularly favoured, and complainant witnesses' interest should thereby be compromised. This is especially so where such witnesses is vulnerable due to the fact that they are victims of the defendant's behaviour. It should also be noted that the defendants are given recourse to appeal mechanisms when injustice has been done to them whilst the witnesses are not.

4. Existing court protections for sexual offences complainants

4.1 Sources of protection

Protection for sexual violence victims can be found in both statutory provisions and non-statutory prosecution policies and guidelines in Hong Kong.

Statutory protection is mainly provided by:

- Part IIIA of the Criminal Procedure Ordinance, Cap. 221,
- Special Procedures for Vulnerable Witnesses, and
- Part XII of the Crimes Ordinance, Cap 200, Sexual and Related Offences.

The Department of Justice published:

- *The Statement of Prosecution Policy and Practice – Code for Prosecutors*,
- *District Court Advisory*,
- *The Victims of Crime Charter*, as well as
- *The Statement on the Treatment of Victims and Witnesses*,

despite their non-statutory status, also play an important role in providing guidelines for protecting sexual violence victims.

4.2 Measures for protecting victims or witnesses during trial

Various measures are provided by the aforementioned legislation and policies to offer protection for victims or witnesses during trial.

4.2.1 Live television link

Witnesses may give evidence by live television link[213]. The court may, on application or on its own motion, permit the "vulnerable witness" (i.e. witness in fear[214], child and mentally incapacitated person)[215] to give evidence or be examined by way of a live television link.

4.2.2 Video recording

Witnesses may give evidence by video recording[216]. Vulnerable witnesses, with the leave of court, may give evidence by video recording. Where a video recording is given in evidence, any statement made by the child or mentally incapacitated person which is disclosed by the recording shall be treated as if given by that witness in direct oral testimony. However, it should be noted that, different from giving evidence by live television link, this protection is only available to child and mentally incapacitated person[217], but not for "witness in fear".

4.2.3 Closed court proceedings

Criminal proceedings may be held in a closed court[218]. If it appears to a court that it is necessary so to do in the interests of justice or public order or security, the court may order that the whole of the proceedings before it in respect of any offence or, having regard to the reason for making such an order, any appropriate part of such proceedings shall take place in a closed court[219].

4.2.4 Anonymity of the complainant

Anonymity of the complainant may be kept from the public. Section 156 of Crimes Ordinance,

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[213] Criminal Procedure Ordinance, Cap. 221, s.79B: Evidence by live television link

[214] "Witness in fear" is defined under Criminal Procedure Ordinance s.79B(1) as a witness whom the court hearing the evidence is satisfied, on reasonable grounds, is apprehensive as to the safety of himself or any member of his family if he gives evidence.

[215] The provisions allowing these three categories of vulnerable witnesses to give evidence by live television link are separately set out in Criminal Procedure Ordinance s.79B(2), (3) and (4)

[216] Criminal Procedure Ordinance, Cap. 221, s.79C: Video-recorded evidence

[217] s.79C(2), (3), *ibid.*

[218] s.123(1), *ibid.*

[219] *Ibid.*

Cap. 200, provides that after an allegation is made that a specified sexual offence has been committed no matter likely to lead members of the public to identify any person as the complainant in relation to that allegation shall either be published in Hong Kong in a written publication available to the public or be broadcast in Hong Kong except as authorized by a direction given in pursuance of this section.[220]

4.2.5 Rape shield protection

Apart from the above procedural protections for the complainants, there is also substantive protection for them during the trial of the accused. The most commonly known protection is the rape shield protection, which is contained in s.154 of Crimes Ordinance[221]. In a charge for a rape offence or indecent assault to which the trial in question relates, except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience of a complainant with a person other than that defendant.[222]

Additional protections are also provided by non-statutory guidelines and policies.

4.2.6 Gag order

For example, the District Court Advisory provides that in cases involving vulnerable witness of serious sexual offences and victims of blackmail whose identities needed to be protected, additional measures would be undertaken in order to give those victims confidence to testify, such as applying for a gag order and for the use of screen to prevent victims from being seen by the public during their testimonies. To reveal the identities of such victims to the public might understandably generate extreme fear, distress and embarrassment in their mind.

4.2.7 Other special measures provided by *The Statement of Prosecution Policy and Practice – Code for Prosecutors*

Also, section 22 of *The Statement of Prosecution Policy and Practice – Code for Prosecutors* also requires prosecutors, upon application, to assist vulnerable witnesses to give evidence in court with appropriate measures. Such measures may include:

i.) evidence by live television link,

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[220] Crimes Ordinance, Cap.200, s.156: Anonymity of complainants

[221] s.154: Restrictions on evidence at trials for rape etc, *ibid.*

[222] *Ibid.*

ii.) evidence by video recorded evidence,
iii.) priority listing,
iv.) no postponement of trial,
v.) avoidance of delay,
vi.) arrangement of support persons,
vii.) removal of gowns and wigs,
viii.) and appropriate security for witnesses in fear,

there will also be cases where the interests of justice require a screen to be made available to shield a witness from the accused or the public, or for the public gallery to be cleared.

4.3 Rights of victims

Apart from the above specific measures provided for sexual offence victims, victims also possess a wide range of rights. These rights are recognized in the Victims of Crime Charter and Statements issued by the Department of Justice.

4.3.1 *Victims of Crime Charter*

The *Victims of Crime Charter* provides for a comprehensive account of victims' rights. For instances, victims have a right to information about the progress of investigation and prosecution[223]. If a decision is made not to prosecute, victims shall be told of that decision. Where prosecution is proceeding, victims shall be told about the steps which follow in the prosecution process, the progress of the investigation, the role of victims as witnesses in the prosecution of the offence, the date and place of the hearing of the proceedings, and the final disposal of the case, including the outcome of any appeal. Victims shall have the right to ask to be notified of the offender's pending release, or escape, from penal custody.

Victims also have a right to proper facilities at court[224]. Victims who have to give evidence in court shall not be made to feel intimidated by the experience. There shall be clear signposting in every court premises, and a clearly marked reception or information point. There shall be adequate accommodation and facilities for victims and other witnesses while they are waiting at the court premises.

Other rights provided for victims under the Victims of Crime Charter include the victim's right to be

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[223] Victims of Crime Charter, Rights and Duties of a victim, 5.The victim's right to information - investigation and prosecution

[224] 6.The victim's right to proper facilities at court, *ibid*.

heard[225], right to seek protection[226], right to privacy and confidentiality[227], right to support and after-care[228] and right to seek compensation[229], etc.

4.3.2 *Statement of Prosecution Policy and Practice – Code for Prosecutors*

The Statement of Prosecution Policy and Practice – Code for Prosecutors also recognized a series of victims' rights. Specifically, s.22.4 provides that the prosecutor must respect the rights of the victim. These include the rights to be treated with courtesy and respect; be kept informed of the progress of cases; have their views considered by prosecutors and investigators; be provided with proper facilities at court; have their circumstances and views brought to the attention of the court whenever appropriate; and respect for privacy and confidentiality.[230] Section 22.6 also provides that if a case concerns a vulnerable witness, the prosecutor is under a duty to remind the court that the Practice Direction requires it to be given priority for listing purposes, whilst section 22.7 provides that the prosecutor should take steps to ascertain if the victim wishes to claim compensation and/or restitution for the harm or loss that has been sustained.

4.3.3 *Statement on the Treatment of Victims and Witnesses*

The rights of sexual offence victims are reiterated in *The Statement on the Treatment of Victims and Witnesses*. Prosecutors have a responsibility, in an appropriate case, to advise the relevant agency as to the need for and the importance of particular witnesses in the conduct of a prosecution. If appropriate, steps should be taken to ensure that those responsible have done all that is necessary to protect victims and witnesses[231]. Prosecutors are also requested to seek to assist victims and witnesses at court by providing appropriate guidance and useful information.[232] Prior to trial, prosecutors will also need to consider whether witness protection is required and determine, if

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[225] 7.The victim's right to be heard, *ibid*.

[226] 8.The victim's right to seek protection, *ibid*.

[227] 9.The victim's right to privacy and confidentiality, *ibid*.

[228] 11.The victim's right to support and after-care, *ibid*.

[229] 12.The victim's right to seek compensation, *ibid*.

[230] *The Statement of Prosecution Policy and Practice – Code for Prosecutors* section 22.4

[231] s.2.8, *ibid*.

[232] s.2.9, *ibid*.

practicable, whether what is being/is to be provided is adequate.[233] Several guidelines are provided for prosecutors: to seek early identification of cases where protection might be necessary; to consult, if appropriate, with the case officer as to the nature of the protection required and its duration; to monitor, if appropriate, the situation of the witness subject to protection; to inform the court during the accused's application for bail of any risk of interference with witnesses and any need for witness protection; to notify the witnesses as soon as possible of any special bail conditions which may affect them or their families should the accused be released on bail by the court, etc.[234]

5. Testifying behind a screen as a protective measure to sexual offences complainants

5.1 The role of screen for the protection of sexual violence victims

It is submitted that for the healthy operation of the criminal justice system and for respecting the dignity and rights of sexual violence offence victims, it is desirable that our court process have measures or arrangements in place, e.g. screen, live television link, that curbs negative emotional responses in testifying complainants.

It is supported by judicial opinions and research findings that the use of screen helps complainants to calm down at the court venue, and creates a mental state that is conducive to the giving of oral testimony of better quality[235]. In England, the courts once demonstrated some reluctance to allow adult witnesses to use screens[236] However, as the court increasingly recognized the effect of court process on the emotion of the complainants, the tide has recently been turned over and the use of screen has been approved by the Court of Appeal in *R v Foster*[237] and by the European

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[233] s.3.4, *ibid.*

[234] *Ibid.*

[235] See, for example, *R v West* [1992] 1 Qd R 227 at 231 (WilliamsJ); *R v Sparkes* (Tasmania, Supreme Court, No 47 of 1996; A58/1996, UnderwoodJ, 1 October 1996, unreported); *R v DJX*(1990) 91 Cr App R 36 at 40. For academic studies, please see also Hung, Suet-lin (2011) "*A Study on Help Seeking Experiences of Sexual Violence in Hong Kong: Community Response and Second Victimization*"; Association Concerning Sexual Violence against Women (2010) "*反擊*", Issue 30, July, 2010.

[236] See *R v Cooper* [1994] *Criminal Law Review* 531.

[237] [1995] *Criminal Law Review* 333

Commission of Human Rights in *X v United Kingdom*[238].

5.2 The framework of law governing the granting of screen in Hong Kong

In Hong Kong, statutes do not provide for special procedures or alternative arrangements in court that caters specifically to the distinctive nature of sexual offence trials. There is no provision providing for special procedures, special measures or alternative arrangements in court that specifically addresses the particular vulnerability to in-court emotional trauma of alleged adult victims of sexual offences. As such, the present law treats these alleged victims in a manner that is not different to other kinds of non-vulnerable adult witnesses. They have to go through the same procedures to apply for special measures via the prosecution. They also need to persuade to the satisfaction of the court that their personal circumstances qualify for special measures. For example, in order to persuade the court to allow them to testify via live television link, an adult witness would need to satisfy the court that he/she is within the category of "witnesses in fear" [239]. The fact that the complainant is an alleged sexual violence victim does not give him/her special advantage to bypass the test. It should be noted that since the court adopts a rare and exceptional approach in allowing this measure[240], sexual offence complainants face big difficulties in seeking assistance from it.

It should be noted that, whilst the granting of special measure in the form of live television link is provided for in the Criminal Procedure Ordinance, there is no statute which stipulates or provides for the ordering of the use of screen. In such situation, a common law principle that the court has an inherent jurisdiction to control the procedures of the proceedings to ensure that the trial is fair governs. As such, the judge or magistrate concerned decides on the question as a matter of discretion whether it shall order the use of screen. Whilst the court is bound by judicial precedents which expound on the issue when considering whether or how to exercise its inherent jurisdiction, there is sadly no authoritative case law at present which binds the judges or gives guidance regarding ordering the use of screen.

5.3 The unsatisfactory aspects of the present state of law

It is submitted that this state of the law is not satisfactory. This state of law gives rise to four problems. Firstly, the inherent jurisdiction to order the use of screen of the court unfettered by statutory or common law standards can render the granting of screen protection an arbitrary exercise of judges' discretion, susceptible to the influence of any biased preference or hunch of the

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[238] (1993) 15 ECHR 113

[239] See s79B(4), *Criminal Procedure Ordinance* (Cap. 221)

[240] See *HKSAR v See Wah Lun* [2011] HKEC 866 English Judgment.

magistrate or judge concerned. According to the Association Concerning Sexual Violence Against Women[241], judges and magistrates in the past have given wide range of reasons for the granting or refusals of screen. These reasons are varying and are not intended to form a consistent system of rules. For example, some magistrates have refused applications because they were of the view that the sexual violence victims, being adults, were not vulnerable like children and hence were not entitled to screen protection as children might well have been. In some other failure of applications cases, judges or magistrates refused applications because they were of the view that the granting of the screen would potentially form a ground for appeal which overthrew their ruling. Some cases seem to recognize that screen protection can be granted even to people who are not emotionally vulnerable. For example, there were cases where judges thought that screen protection should be granted since the judges were of the view that the persons were celebrities whose anonymity should be preserved for the protection of reputation. The above may reflect that there has been no certain or consistent standard to follow in the exercise of discretion. This may leave the matter to the whim of the individual judge or magistrate.

It should be noted that the above reasons given are flawed and unsatisfactory. The fact that the witnesses are adults cannot lead immediately to the conclusion that they are not vulnerable and hence do not deserve special protection. In fact, the results of recent studies have shown that the exercise of discretion in regard to the ordering of protective measures by magistrates and judges is plagued by influence from the normative patriarchal bias they hold towards female victims of rape and other sexual offences[242]. These patriarchal beliefs tend to downplay the degree of hardship the sexual offence complainants suffer, reduce the sensitivity of the magistrate or the judge to the gender issues underlying the commission of these offences, prevent them from understanding the distinct nature of sexual offence trials, and bias their exercise of discretion[243]. It is argued in this paper above that sexual violence victims have a distinct emotional response that is different to other kinds of witnesses. They usually suffer severe trauma after the sexual assault, and this trauma is aggravated by court experience since they have to confront their perpetrator and to recount their suffering in excruciating details in face with the beholding public[244]. The reason that the granting of screen would furnish ground for appeal almost amounts to a begging of question, since screen, if

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[241] See Association Concerning Sexual Violence against Women (2012) "反擊", Issue 34, January, 2012 at p.1.

[242] See, for example, Association Concerning Sexual Violence against Women (2007) "反擊", Issue 21, July 2007 at p.1; Association Concerning Sexual Violence against Women (2010) "反擊", Issue 30, July 2010 at p.1.

[243] See *ibid*.

[244] See above section on "distinctive nature of sexual offence trials".

properly granted, would not be a ground for any successful appeal. Whether the witness in question is a "celebrity" is subjective to the individual judge or magistrate concerned. The judges also have not given an explanation why the reputation of the celebrities is more worthy of protection than the interest trauma-haunted sexual violence victims.

Secondly, the present law fails to achieve legal certainty in procedures in criminal trials. Legal certainty protects the expectation of the participators of the legal system. Knowing and being sure that their rights and interest will be respected by the system in certain circumstances, they may plan their affairs accordingly. Legal certainty achieved by clearly stipulated law also helps check abuses of power. It is well recognized that legal certainty is a core value of our common law system, and has been accepted as one of the very prerequisites for a good legal system[245]. However, since the law on the granting of screen protection is uncertain and subject to arbitrary exercise of discretion, citizens are incapable to predict when their interest and privacy as witnesses would be protected in the running of procedures in court trial. This causes confusion and fear in sexual offence complainants, giving rise to trauma, and having the effect of discouraging them from testifying in court.

Thirdly, the present law as such being not friendly to witness's interest, gravely compromises the effective operation of the prosecution function of our criminal justice system. The purpose of the criminal law is to allow people to go about their daily life without harms to their persons and property. It is in the interest of everyone that serious crimes should be investigated and effectively prosecuted. Witness participation is important for the investigation and the prosecution of crimes. Giving proper care to witnesses encourages the report of crimes. On the other hand, confusion and fear aroused by uncertainty of protective measures discourage complainants from participating in prosecution.

Fourthly, it is argued that the present procedural rules governing the use of screen discretion tend to discourage judges from treating these applications seriously. It should be noted that the issue of applications for the use of screen is raised by the prosecution before or during the trial. These matters are often intended by the judges and the parties to the proceedings to be dispensed with expediently, so that the prosecution may start to make its case subsequently. A prosecutor has minimal interest in arguing with the judge about the granting of the measure. Judges may also give only simple reasons with a few sentences in refusing the application. Besides, although the use of

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[245] See, for example, Maxeiner, James R. (2008) "*Some realism about legal certainty in globalization of the rule of law*", Houston Journal of International law; The legal philosopher Gustav Radbruch regarded legal certainty, together with justice and policy, as the fundamental pillars of law.

screen may be important to the interest of the witness, it should also be noted that in such failure of application situations even no appeal mechanism is open to complainants whose application is denied. Simply stated, their applications are at the mercy of the prosecution and the judge concerned.

5.4 Different principles that operate against the granting of screen

It is submitted that the use of screens is not something that is dispensible or can be trifled with by our judicial professionals. Whilst we argue for more extensive use of screen in court for the protection of sexual offence complainants, we accept that the defendants at the same time are entitled to a bundle of rights in court that *prima facie* operate against the extensive use of screen. However, It is submitted that these are surmountable hurdles in face with the substantial need to protect sexual offence complainants from suffering from emotional trauma and the interest in achieving justice in court by enhancing the quality of evidence.

5.4.1 Defendant's right to fair trial

It has been a long-established principle in common law that the accused's right to a fair trial is absolute, and cannot be compromised or restricted. Failure to observe this would lead to a judicial decision being quashed[246]. Common law- recognized elements of fair trial may encompass the accused's right to public trial, the right to cross examine witnesses against him, the right to know the identity of the witnesses against him, etc.

However, it should be noted that the common law does not offer a rigid model of fair trial to the operation of the court system. Judicial and academic opinions tend to suggest that the fairness of any trial is necessarily judged on a case by case basis[247]. The common law vests the trial judge with the inherent power to control proceedings to ensure that fair trial is achieved. This power includes the power to make alternative arrangements for a witness to give evidence[248]. In exercising its

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[246] The right to fair trial in common law finds its origin in the *Magna Carta* (1215). In the UK it was recognized in the 1689 Bill of Rights. In Hong Kong the most pertinent authority today is Article 86 and 87 of the *Hong Kong Basic Law* and Article 10, s8 of the *Hong Kong Bill of Rights Ordinance*.

[247] See NSW Law Reform Commission (2003, Report 101) "*Questioning of complainants by unrepresented accused in sexual offence trials*" at paras 6.23-6.24.

[248] See, for example, *R v Smellie* (1919) 14 Cr App R 128; *R v DJX* (1990) 91 Cr App R 36 at 41 (Hutchison LCJ).

discretion, the court will assess whether such an arrangement advances the course of justice[249].

The requirement of fair trial requires that evidence is given accurately at court for the determination of the accused's case. This may not be possible where the complainant is so traumatized by the court experience that he or she is incapable of giving accurate or clear evidence. The requirement of free trial therefore requires that complainant's emotion is well taken care of by the court so that they may give oral testimony competently. In circumstances where the complainant's apprehension of giving evidence in front of the alleged attacker compromises the reliability of the evidence, special or alternative arrangements such as screen protection are tenable instrument that reduces this apprehension. This role of screen to the common law has been recognized by the UK House of Lords. In *R v DJX*[250], a screen was placed to obscure the complainants of a sexual assault case from seeing or being seen by the accused. Lord Hutchison, the Chief Justice, described the use of the screen as "a perfectly proper, and indeed a laudable attempt to see that this was a fair trial: fair to all, the defendants, the Crown and indeed the witnesses". Hutchison LCJ continued, "The learned judge has the duty on this and on all other occasions of endeavouring to see that justice is done. Those are high sounding words. What it really means is, he has got to see that the system operates fairly… In the circumstances the necessity of trying to ensure that these children would be able to give evidence outweighed any possible prejudice to the defendants by the erection of the screen"[251]. After balancing the interest of justice in allowing the infant witness in that case to be able to give evidence with the possible prejudice to the defendant, screen protection was considered to be a measure that is conducive to a fair trial and was granted.

Besides, it should also be noted that modern common law jurisprudence points to a triangulation of the interest of the defendant, witnesses, and the community at large. This is expressed by Lord Hutchison the Chief Justice in *R v DJX*, where he stated, "[the learned judge] has got to see that the system operates fairly… fairly not only to the defendants but also to the prosecution and also to the witnesses. Sometimes he has to make decisions as to where the balance of fairness lies…"[252] Fairness to witnesses is increasingly accepted as a condition for a fair trial also in other common law jurisdictions. The issue has been discussed in *R v TA*[253], a New South Wales case. In that case, Spigelman CJ stated, in sexual assault matters, it is appropriate for the court to consider the effect of

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[249] See, as an example in other common law jurisdictions, *Park v Citibank Savings Ltd* (1993) 31 NSWLR 219 at 225 (Powell J).

[250] (1990) 91 Cr App R 36 at 41, per Hutchison LCJ

[251] See *ibid*, at 40.

[252] *Ibid*.

[253] (2003) 57 NSWLR 444

cross-examination and the trial experience upon a complainant when deciding whether s 41 of the Evidence Act 1995[254] should be invoked. Spigelman CJ acknowledged that the difficulties encountered by complainants in sexual assault cases in the criminal justice system had been a focus of concern for several decades. Judges play an important role in protecting complainants from unnecessary, inappropriate and irrelevant questioning by or on behalf of an accused. That role is perfectly consistent with the requirements of a fair trial, which requirements do not involve treating the criminal justice system as if it were a forensic game in which every accused is entitled to some kind of sporting chance[255]

The above aside, it is also submitted that the criminal justice system expresses the relationship between the state and the citizens, being operated for the state's prosecution of any commission of criminal offences by civilians. If the accused have a right against the arbitrary sanction and oppression by the state in the form of an unfair trial, it is hard to argue why other civilian participants in the same system should not be entitled to the same right.

5.4.2 Right to Public Trial

It is provided by Article 14 of the *International Covenant on Civil and Political Rights* (*ICCPR*) that everyone is entitled to a fair and public hearing. The Covenant applies to Hong Kong pursuant to Article 39 of the *Basic Law*. The right originates in the *Raleigh's case*[256], and has been recognized as an important tool for preventing abuse of the court system by the state for the oppression of citizens. It is said that "the glare of contemporaneous publicity ensures that trials are properly conducted"[257]. Jeremy Bentham, the utilitarian jurist, also spoke about the values of the right, "Publicity is the very soul of justice. It is the keenest spirit to exertion and the surest of all guards against improbity." R. Friedman expressed in his article[258] that openness of procedure ensures amongst other benefits that, "the witness's testimony is not the product of torturer of milder forms of coercion and intimidation".

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[254] S41 of the *Evidence Act* 1995 provides for when the court has the power and duty to disallow a question put to a witness in cross-examination, or to inform the witness that it need not be answered: see s41(1).

[255] *Supra*, fn 51, at 446.

[256] 2 How. St. Tr. 1, 15-16, 24 (1603)

[257] See *S (A Child) (Identification: Restrictions on Publication), Re* [2004] 4 All E.R. 683 at 696, per Lord Steyn.

[258] See Richard Friedman, "*'Face to Face': Rediscovering the right to confront prosecution witnesses*" (2004) 8 E. & P. 1, 15.

The spirit of this right is to ensure that evidence obtained from witness is factually accurate, and is not distorted by illegitimate means of extraction such as torture. This notion is also expressed by Ian Dennis in his article, in which he accepts that factual accuracy is a fundamental condition of the legitimacy of a criminal verdict, and publicity helps achieve this spirit by serving as procedural tool for maximizing the factual accuracy of adjudication. Dennis said that a defendant's interest in publicity as a means of potentially increasing the factual accuracy of adjudication can provide a foundation for this right.

If we accept that the fundamental spirit of this right is for the achievement of the factual accuracy of evidence, a query could be made as to whether this right could be legitimately curtailed where insisting on it would in certain situations have the inevitable effect of compromising the factual accuracy of evidence. In the case of defendant of sexual violence offence being on trial, insisting on the public trial requirement that testifying complainants must physically confront the defendant would create immense emotional burden to an extent that would seriously affect complainant's ability to give evidence with quality.

Although the right to public trial has been known in the common law as a right that defendant enjoys during his trial, human rights instruments such as the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (*ICCPR*) have recognized that the right is by no means absolute, and could be curtailed for the achievement of certain aims that the instruments themselves regard as legitimate. The *ICCPR*, of which Hong Kong has become a state party since 1976, has provided for the exclusion of the press and public from the trial on various grounds in Article 14(1), including (1) reasons of morals, (2) public order (ordre public) or national security in a democratic society, and (3) when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. After the Handover, this article continues to apply to Hong Kong pursuant to Article 39 of the *Basic Law*. This means that the right to public trial should not be treated as a ground that has the effect of leading to the absolute foreclosure of any inquiry as to whether a screen is a legitimate means to be used in the court, especially where the interest of the private lives of the witnesses (who, although not strictly a party to a proceeding, are participants in the court procedures) are arguably concerned. Many common law jurisdictions have also recognized that the granting of screen as special measures or alternative arrangement for the protection of vulnerable witnesses can be a legitimate form of curtailment of the right to public trial[259], at least where it is required for enhancing the quality of evidence. The Youth Justice and Criminal Evidence Act 1999 of UK, for example, codified screen as among the

[259] Examples include the UK, New South Wales, Victoria, South Australia.

range of special measures that could be chosen at the discretion of the court where it is satisfied that the defendant is a "vulnerable witness"[260].

5.4.3 Right to confront the accusers physically

Another dimension of the right to fair trial that has been recognized by the common law world is the right to confront the accusers physically. The purpose of this right, according to Ian Dennis, is for the testing of "the witness's sincerity by seeing whether the witness is prepared to make the accusation to the defendant's face rather than behind his back in private"[261]. This, however, is derived from the United States jurisprudence expressed in the authoritative ruling in *Coy v Iowa*[262]. Another purpose mentioned by Ian Dennis, is to "give effect to a principle of respect for the defendant's dignity and autonomy by symbolically placing him on a footing of equality with the witness"[263], so as to "emphasize his entitlement to play a full role in the adjudicative process rather than being dealt with as an object for the application of the criminal law". However, this right is absent in English Law[264]:

In Hong Kong, the right to see and confront the witnesses against the defendant has been discussed in *HKSAR v See Wah Lun and others*[265]. Whilst accepting that the in the context of the *Basic Law* and *Bill of Rights* of Hong Kong, Hong Kong needs not follow the European Convention of Human Rights in refusing the right to the defendant, it has nevertheless been accepted as possible that the court can grant orders that leads to its curtailment if after

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[260] S23(1), *Youth Justice and Criminal Evidence Act* 1999

[261] See Ian Dennis, "*The right to confront witnesses: meanings, myths and human rights*" (2010) Crim L.R. 255 at 263.

[262] 487 U.S. 1012 (1988)

[263] Ian Dennis arguably derived this from a number of articles, including T. Massaro, "*The Dignity Value of Face-to-Face Confrontations*" (1988) 40 Florida L.R. 863; E. Scallen, "*Constitutional Dimensions of Hearsay Reform: Toward a Three Dimensional Confrontation Clause*" (1992) 76 Minn. L.R. 623.

[264] Statements in the House of Lords indicated that art.6 in the *European Convention on Human Rights* (ECHR) provides no right of physical confrontation of a witness, and the Strasbourg jurisprudence provides no support for the same: See *Camberwell Green Youth Court* [2005] UKHL 4; [2005] 1 All E.R. 999; Also see Emmerson, Ashworth and Macdonald, *Human Rights and Criminal Justice*, 2007 fn.409, paras 14-161et seq.; *Lee Kun* [1916] 1 K.B. 337; *Jones (Anthony William)* [2002] UKHL 5; [2003] 1 A.C. 1.

[265] CACC 370/2009

balancing the interest of the accused and the significant public interest of witness giving evidence without occasioning danger to themselves or members of the community the court the court is in the view that it is appropriate to grant such an order[266].

5.4.4 The Right to Cross Examination

In Hong Kong, Article 14(3) of the *ICCPR* provides for the right to cross examine a witness against the defendant[267].

Right to cross examination is a feature of the adversarial process, designed to expose deficiencies in a witness' testimony[268]. It is expressed by Ian Dennis that the purpose of a right to cross examine witnesses against the defendant is to help to avoid a miscarriage of justice in the form of wrongful conviction by bringing out material favourable to the defendant which has been previously suppressed, exposing lies and mistakes in the adverse testimony, discrediting the witness completely or in an important respect[269]. The factual accuracy of evidence is also the object that this right aims at achieving[270]. The right is also intended to acknowledge the defendant's autonomy and dignity by allowing his voice to be heard to the maximum extent[271].

But in many common law jurisdictions, the right to cross examine witnesses has been recognized as non-absolute. For example, in UK, this right of the defendant can be significantly curtailed where the witnesses are the complainants of sexual offences and certain categories of child witness[272]. Where the quality of the witness's evidence is likely to be diminished by personal cross-examination by the defendant, the court has the power to prohibit

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[266] See para 29, *ibid*.

[267] "In the determination of a criminal charge against him, everyone shall be entitled to a minimum guarantee… (d) Right to examine witnesses against him and to obtain the attendance and examination of witnesses on his behalf …"

[268] Such notion could be seen, for example, in Australian Government and Australian Law Reform Commission, "*Uniform Evidence Report*" at p. 141, 5.70

[269] See *supra*, fn 39 at 266.

[270] *Ibid*.

[271] *Ibid*.

[272] See s34 (concerning adult complainants) and s35 (concerning child witnesses) in *Youth Justice and Criminal Evidence Act 1999* (UK).

a defendant from cross-examining in person any other witness[273]. The statutes and the common law have imposed prohibition against the asking of sexual history of complainants in rape cases, and the bad character and previous convictions of victims and witnesses generally. This operates against the right to cross-examination[274]. According to Ian Dennis, modern legislation aiming at protecting witnesses from unjustified distress and humiliation has cut back on the freedom defendants enjoyed at common law to attack the credibility of witnesses by questions and evidence of these types[275].

It is submitted that even the use of screen does not necessarily prevent a defendant's legal representative from cross-examining witnesses. A screen has the logistical advantage that its physical position may be adjusted to enable the witness to be visible by any participant or any group of participants of the trial or the public. The UK law requires that the use of screen must not prevent the witness from being able to see, or being seen by the judge or justices (or both) and the jury (if there is one)[276], and legal representatives acting in the proceedings[277]. This model for its use does not prevent the defense counsel from cross-examining a witness or prevent the judge or jury from beholding the response of the witness, with the full advantage of observing the witness's demeanour, whilst at the same time removing visual contact between the witness and the defendant.

5.4.5 Right to know the identity of the accuser

The right to know the identity of the accuser is important for effective cross-examination, since cross-examination as to credibility may become much more difficult if the defendant cannot

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[273] See s36, *ibid*.

[274] See, respectively, ss41-43 of *Youth Justice and Criminal Evidence Act 1999* (UK) (concerning the evidence of the sexual history of complainants); s100 of *Criminal Justice Act 2003* (UK) (concerning the evidence of the bad character of non-defendants).

[275] See *supra*, fn 36 at 267.

[276] See s23(2)(a), *Youth Justice and Criminal Evidence Act 1999* (UK)

[277] See s23(2)(b), *ibid*.

investigate the witness's background and reputation[278]. In *Smith v Illinois*[279], the Supreme Court of US declared: "The witness's name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself."

However, it should be noted that the use of screen does not in conflict with the right of the defendant to know the identity of the witness.

5.5 Application of screen in other jurisdictions

In many common law jurisdictions, modern evidence jurisprudence has evolved to cope with the recognition of the complainants' plight. For example, statutes are enacted in these jurisdictions to stipulate the circumstances which warrant special measures or alternative arrangements being granted for sexual offence complainants testifying in court. In some jurisdictions, adult sexual offence victim are entitled to statutory rights of using special measures, including a wide range of protection such as the use of screen, closed-circuit television or video-recorded testimony. Other jurisdictions have legislated to provide for the use of screen, thus giving a statutory recognition to the legitimacy of the use of screen to enhance the quality of evidence.

Unlike the situation in Hong Kong, where the granting of screen remains a matter of discretion for the magistrate or the judge concerned which is to be dispensed with expediently at the court, these jurisdictions have provided for it in their statutes. Putting such witness protection measures in statutes mean that the law is willing to treat these measures and victim protection seriously. This section offers an overview of the law of these jurisdictions regarding the granting of screen protection for sexual offence complainants, which may serve as reference for Hong Kong if Hong Kong needs to revise its legislation.

Amongst these jurisdictions, Victoria, the United Kingdom, New South Wales and Northern Territory (5.5.1 – 5.5.4) provide more protection by specifically entitling adult sexual offence complainants with a special witness/ vulnerable witness status in the statute, which means the complainants are entitled to a statutory *right* to the enjoyment of special measures. For Western Australia, South Australia, Queensland and Canada (5.5.5 – 5.5.8), adult sexual offence complainants are not specifically entitled to a special witness status in the statute.

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[278] See *Alford v United States* (1931) 282 U.S. 687; Lord Diplock, *Report of the Commission to Consider Legal Procedures to deal with Terrorist Activities in Northern Ireland* (Diplock Report) (HMSO, 1972), Cmnd.5185, para.20

[279] (1967) 390 U.S. 129 at 131

5.5.1 Victoria

The Victoria Criminal Procedure Act 2009 No. 7 recognizes the special status of complainants of a sexual offence by giving them the legal status of a "protected witness"[280].

The court is given a power to direct that alternative arrangements be made for the giving of evidence by these witnesses. These arrangements include the use of closed-circuit television, the use of screens, allowing support persons chosen by the witness to be his/her company when giving evidence, etc.[281]

Where the witness is a complainant relating to a charge of a sexual offence, the court must direct the arrangement of closed-circuit television facilities for him/her to give evidence, unless he/she makes the informed choice that he/she does not wish to use it[282]. Where the witness does not wish to give evidence out of the courtroom (thus relinquishing the right to use closed-circuit television facilities) and applies for giving evidence in the courtroom, the court must direct that he/she testifies with the use of screens, unless he/she makes the informed choice that he/she does not wish to use it[283]. It should also be noted that where sexual offence complainants are to give evidence either in or out of the courtroom, the judge or magistrate must direct presence of a support person at his/her choice[284].

The Victorian law gives fullest protection to sexual offence complainants since it creates a statutory presumption that these witnesses must testify through closed circuit television or behind the screen at their choice. The enjoyment of these measures is neither a matter at nor subject to the discretion of the judge.

It should also be noted that the legislation recognizes with certainty a wide range of special arrangements for protected witnesses. These include permitting only those specified by the court to

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[280] See s359, *Criminal Procedure Act 2009* (Victoria).

[281] See s360, *ibid*.

[282] See s363, *ibid*.

[283] See s364, *ibid*.

[284] See s365, *ibid*.

present while the witness is giving evidence[285], requiring legal practitioners not to robe[286], requiring legal practitioners to be seated while examining or cross-examining witnesses[287].

5.5.2 The United Kingdom

The law in the United Kingdom provides that a complainant in respect of a sexual offence is to be treated as a "vulnerable witness", who is eligible to assistance by special measures unless he/she does not wish to be so eligible[288]. But the question whether and which specific special measure(s) the complainant will be granted remain a matter to be decided by the court[289]. In the determination of these questions, the law provides that the court shall consider whether granting special measures will improve the quality of evidence[290], and that the measure or combination of measures granted shall maximize so far as practicable the quality of evidence given by the witness[291]. Hence, the witness is only entitled to a "special status" that must attract the consideration of granting special measures, but is not entitled to an absolute right to special measures or to choose specifically which special measure that is going to be used in court.

5.5.3 New South Wales

New South Wales Law Reform Commission recognized there are at least 4 factors that make sexual offence trials particularly distressing for sexual offence complainants: the nature of the crime; the role of consent with its focus on the credibility of the complainant; and the likelihood that the complainant and the accused knew each other before the alleged assault

The NSWLRC found that the treatment of such matters in cross-examination is a particular concern, with complainants likely to be cross-examined for a longer period of time than victims of other types of assaults. Complainants have appealed for greater control of cross-examination to make the process less stressful: New South Wales Law Reform Commission, *Questioning of Complainants by unrepresented Accused in Sexual Offence Trials*, Report 101 (2003), [2.2]

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[285] See s360(d), *ibid*.

[286] See s360(e), *ibid*.

[287] See s360(f), *ibid*.

[288] See s17(4), *Youth Justice and Criminal Evidence Act 1999* (UK).

[289] See s19(2), *ibid*.

[290] See s19(3)(a), *ibid*.

[291] See s19(3)(b)(i), *ibid*.

New South Wales has special criminal procedural rules in its legislation which is tailor-made for the distinctive nature of sexual offences trials. The New South Wales Criminal Procedure Act 1989 No. 209 has a carved-out section which contains provisions that deal specifically with the giving of evidence by complainants in sexual offence trials[292].

The New South Wales law gives powerful protection for sexual offence complainants testifying in court. Its Criminal Procedure Act 1989 No. 209 provides that complainants of prescribed sexual offences are entitled to (1) giving evidence via closed-circuit television facilities, or (2) giving evidence by use of alternative arrangements such as (a) the use of screen or (b) planned seating arrangements[293]. Complainants are also entitled to choosing support persons when giving evidence[294].

It should be noted that New South Wales' law did not rule out the inherent jurisdiction of the judge or the magistrate to control the proceedings outright. The aforementioned entitlement to alternative measures is subject to an order of refusal from the court in the interest of justice[295].

5.5.4 Northern Territory

The Northern Territory law also recognizes the special status of alleged sexual violence victims. It provides that alleged victims of a sexual offence are "vulnerable witnesses"[296] who are entitled to giving evidence by use of special arrangements at their choice, such as the use of the closed-circuit television facilities[297] and screens, partition or one-way glass[298], the company of another as support person[299] and closed court proceedings[300].

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[292] See Part 5 of the *New South Wales Criminal Procedure Act 1989 No. 209*, from s290-s306L.

[293] See s294B(3) of the *New South Wales Criminal Procedure Act 1989 No. 209*.

[294] See s294C(1), *ibid*.

[295] See s294B(6), *ibid*.

[296] See s21A(1), *Evidence Act* (Northern Territory).

[297] See s21A(2)(a), *ibid*.

[298] See s21A(2)(b), *ibid*.

[299] See s21A(2)(c), *ibid*.

[300] See s21A(2)(d), *ibid*.

Like the position in New South Wales, the judge or magistrate is given the power to refuse special arrangements. He/she may do so where he/she is of the view that (1) it is not in the interests of justice for the witness's evidence to be given using that arrangement[301]; or (2) the urgency of the proceeding makes the use of that arrangement inappropriate[302]. A laudable aspect of this area of law of the Northern Territory is that it extends the spirit of legal certainty to the delineation of what amounts or does not amount to being "in the interests of justice" to use the arrangements[303]. This guides the exercise of discretion by judge or magistrate in refusing special arrangements. Besides, one important consideration concerning whether to refuse the arrangements is the need to minimize harm that is caused to the vulnerable witness[304]. It is submitted that this is symbolically important since it reflects the underlying values of the Northern Territory law in recognizing the mandate of the law to take care of the need and interest of victims of crimes.

Another notable feature of the Northern Territory law is that after application for special arrangements is made and pending determination of the application, the witness applying for the arrangements is to be treated as if he/she is a vulnerable witness[305]. This takes care of the witness's interest further.

5.5.5 Western Australia

A judge or a magistrate has the power to make an order to grant a special witness status on the application by the prosecutor on the victim's behalf[306]. However, a sexual offence complainant is not specifically recognized as a special witness, hence not automatically entitled to the special measures.

The law provides for grounds which guide the power to grant a special witness status or the use of special measures: (1) where by reason of physical disability or mental impairment, the witness is unlikely to be able to give evidence, or to give evidence satisfactorily; or where (2) the witness is (a) likely to suffer severe emotional trauma by reason of age, cultural background, relationship to any party to the proceeding, the nature of the subject matter of the evidence, or any other factor that the court considers relevant; or where (b) the witness is so intimidated or distressed as to be unable to

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[301] See s21A(2A)(a), *ibid*.

[302] See s21A(2A)(b), *ibid*.

[303] See s21A(2B), *ibid*.

[304] See s21A(2B)(a), *ibid*.

[305] See s21A(6), *ibid*.

[306] See s106R(3)(a), *Evidence Act 1906* (Western Australia).

give evidence or to give evidence satisfactorily by reason of age, cultural background, relationship to any party to the proceeding, the nature of the subject matter of the evidence, or any other factor that the court considers relevant[307]. A healthy sexual offence complainant is not automatically regarded as a special witness. He/she has to satisfy the aforementioned requirements (2)(a) or (b) before the court may make an order of declaring him/her as a special witness or directing special arrangements such as video links or screens.

Nonetheless the law recognizes the special status of victims of *serious* sexual offence. There is a presumption of special witness status for serious sexual offence victims which obligates the judge or magistrate to grant such status to this group of witnesses on application. This is so unless the witness relinquishes his/her right to be treated as so, or the judge or magistrate is not satisfied that the witness be so[308].

Special witness may apply for (1) a support person approved by the court; (2) a communicator while he/she is giving evidence; (3) giving evidence via video link or for a screen arrangement as described in S106N[309].

5.5.6 South Australia

The South Australian law does not automatically treat an adult complainant of sexual offence with mental disabilities as a "vulnerable witness". Such complainants have to satisfy the court that they meet the one of the conditions provided for in s4 of Evidence Act 1929 in order to obtain the status granted by the court. These conditions include (1) that the complainant is an alleged victim of a serious offence against the person[310], (2) the circumstances of the witness or the circumstances of the case would make the witness be specially disadvantaged if not treated as vulnerable witnesses[311], *inter alias*. The court also retains the discretion to order the specific kind of special measure(s) to any vulnerable witnesses.

Nevertheless, South Australia law has codified special measures which the judge or magistrate may grant to "vulnerable witnesses"[312].

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[307] See s106R(3), *ibid*.

[308] See s106R(3a), *ibid*.

[309] See s106R(4), *ibid*.

[310] See s4, *Evidence Act 1929* (South Australia)

[311] *Ibid*.

[312] See s13A(2), *ibid*.

The judge or magistrate may also on his/her own initiative and at his/her discretion orders that special measures be granted to protect witness from embarrassment or distress, or to protect witness from being intimidated by the atmosphere of the courtroom or for any other proper reason[313].

5.5.7 Queensland

Queensland's law does not confer any special status upon alleged victims of sexual offences. Nevertheless, it provides for criteria for determination when a witness will be classified as a "special witness". Alleged victims of sexual offences will have to satisfy the court that, *inter alias*, he/she is likely to suffer from emotional trauma[314], or to be so intimidated as to be disadvantaged as a witness, if he/she is required to give evidence in accordance to the usual rules and practice of the court[315].

Complainants of sexual assaults are not presumed to be special witness under the current law. The use of screen is not listed as special measures, but complainants of sexual assaults are qualified as protected witness under section 21M of the Evidence Act 1977. Special procedures are provided in regards to cross-examination

5.5.8 Canada

The Canadian law does not specifically legislate for healthy adult sexual offence complainants. It provides that a judge or justice shall grant the use of screens for (1) witness under 18 or (2) who may have difficulty in communicating evidence due to physical or mental disability[316]. Adult sexual offence complainants might be granted the use of screen if a judge or justice is of the opinion that keeping the complainant from seeing the accused is necessary "to obtain a full and candid account of the acts complained of from the complainant"[317]. The judge shall take into account the age of the witness, whether the witness has a mental or physical disability, the nature of the offence, the nature of any relationship between the witness and the accused, and any other circumstance that the judge or justice considers relevant[318].

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[313] See s13(1)(a), *ibid*.

[314] S21A(b)(ii), *Queensland Evidence Act 1977*

[315] S21A(b)(iii), *ibid*.

[316] S486.2(1), *Criminal Code*, RSC 1985, c C-46 (Canada)

[317] S486.2(2), *ibid*.

[318] See ss486.2(3) and 486.1(3), *ibid*.

5.6 Recommendation to legal reform

It is submitted that the present law regarding the ordering of the use of screen leaves too much room for the exercise of discretion by judges or magistrates. To recap, studies have shown that magistrates and judges are often influenced by patriarchal norms which make them insensitive to the emotional distress and need of sexual offence complainants. Discretion makes room for these hunches to intervene, leading to the result that complainants are not adequately protected whilst they ought to be. Complainants are required to give evidence in distress. The quality of the evidence they give is also compromised

It is submitted that a statutory presumption for entitlement to the use of screen in favour of sexual offence complainants (resembling the model in Victoria) should be created. This model gives the strongest protection by creating a presumption to use of screen rebuttable only at the complainant's will. The purpose of this proposal is four-folded. First, it removes rooms for influence of bias in the exercise of discretion by magistrates and judges. This has special meaning in the context of Hong Kong where patriarchal norms may still exercise some influence even among our senior judicial members in a predominantly Chinese society. Secondly, such a presumption amounts to instituting a *right* to the use of screen to sexual offence complainants. This creates a reciprocal *obligation* of the court to order its use. As such complainants' enjoyment is no longer precarious, and will no longer form any ground for appeal. The third purpose is to create legal certainty in the granting of orders regarding protective measures. Research has found that distress to complainants is reduced where they know that protective measures for giving evidence will be available as a matter of course[319]. The fourth purpose is sociological. It is that our law, by incorporation in statutes, is able to exercise its expressive function to give recognition to the distinctive nature of sexual offence trials and special circumstances faced by alleged victims of sexual violence which are distinct to those of other kinds of complainants.

As an alternative position, perhaps pending to the ultimate achievement of the above submission, It is submitted that a statutory entitlement to special measures in favour of sexual offence complainants subject to the judge's discretion of refusal (resembling the model in the United Kingdom, New South Wales, Northern Territory) should be created. More precisely, the Northern Territory position is the most preferable, where sexual offence complainants being "special witness" or "protected witness" are entitled to a list of special measures, but the judge

[319] See New South Wales Law Reform Commission, Report 101 "*Questioning of complainants by unrepresented accused in sexual offence trials*" (2003), at para 6.21.

or magistrate shall only exercise principled discretion to refuse. This position of law gives recognition to the distinctive nature of sexual offence trials and the special circumstances faced by sexual offence complainants, but allow judges and magistrates to retain discretion.

Our further fallback position is to ask for a list of considerations which the judge should visit when exercising his discretion on whether to order the use of screen to any witness who applies for its use. This is to ensure legal certainty and prevent the exercising of discretion from being affected by personal hunches.

5.7 Conclusion

It has been support by modern studies on court procedures that sexual offence trial possesses distinctive nature that distinguishes it from trials of other kinds of offences. This paper takes the view that the court in Hong Kong fails to respond adequately to this distinctive nature of sexual offences, resulting in excessive emotional trauma and harm suffered by testifying complainants during the court procedures. This not only causes re-victimization in sexual offence victims, but also compromises the operation of the criminal justice system, since the emotional trauma suffered by complainants affects the quality of evidence given, and even discourages complainants from testifying in court, thus impeding the work of prosecution.

This paper argues that screen has the effect of protecting testifying complainants from being exposed to this emotional trauma, and hence preserving the quality of evidence given by testifying witnesses. The stance of the writer is that this important role of screen should not be overlooked by the court, and should be considered in administration of justice in court.

At the same time, we acknowledge that the granting of screen protection *prima facie* operates against some common law principles on criminal procedures and the right of the defendants. We argue that these hurdles can be overcome. It is also submitted that the court's mandate to uphold a fair trial shall require the court to consider the fairness both to the defendant and to the complainant.

Finally, we offer an overview of the law of other common law jurisdictions and give recommendations for the betterment of law. It is submitted that the other common law jurisdictions are more progressive than Hong Kong in giving recognition to the distinctive nature of sexual offences trials, and have reformed their law regarding the granting of special procedures accordingly to accommodate this nature.

6. Testifying through live television link as a protective measure for sexual offences complainants

Testifying in court by live television link is the only statutory special protective procedure which a healthy adult sexual violence victim could be eligible to under Part IIIA of Criminal Procedure Ordinance (Cap. 221) ("CPO"). Sexual violence victims are faced with multiple hurdles when applying for testifying in court by live television link due to inadequacies of the existing law in Hong Kong. First, sexual offence complainants are not specifically entitled to use of live television link by reason of their special status as a sexual offences victim, and have to satisfy the "witness in fear" requirement provided by s.79B(1) CPO in order to be so eligible. Secondly, in Hong Kong case law, the reasonable grounds of finding a witness as a "witness in fear" are only limited to severe circumstances which fail to respond to the reality. Thirdly, the judicial attitude is also towards rare and exceptional use of live television link. Fourthly, there is inadequate statutory guidance as to the determination of a "witness in fear".

6.1 Justifications of testifying through live television link

Sexual violence victims are usually also the witness, in most of the cases the only witness of the crime and have to testify in court. In sexual offences trials the issue of consent and credibility of the witness are essential to the ruling, leading to long, hostile and embarrassing cross-examinations. Therefore, in many jurisdictions, sexual offence complainants are entitled to protective measures like testifying behind a screen or through live television link to prevent them from emotional harm and second victimization. By the use of live television link, the victim can give evidence in a room separate from the court room and avoid being in the same space with the defendant abuser, so that his/her emotions would be less affected, enhancing the quality of the testimony.

The intention of giving such protection to the witness (in the judgment extract quoted below, Pang J is referring to a "witness in fear" defined at s.79B(1)) is explained in *R v Wong Kwai Nam* [1997] HKLY 362 per HH Judge Pang,

> *"The intention of the new provisions under s.79B was to allow a witness who was in reasonable fear to give evidence via a televised link in a safe and protected environment. The legislation recognised the fact that the proximity of the defendant might itself be such a threat or interference that the witness would not be able to give his evidence freely and without any perceived pressure."*

6.2 Eligibility for testifying by live television link

In order to be eligible to testifying by live television link, the witness, if not a child or a mentally incapacitated person, has to satisfy the "witness in fear" requirement prescribed in s.79B(1) CPO. According to the provision, "witness in fear" means "a witness whom the court… is satisfied, on reasonable grounds, is apprehensive as to the safety of himself or any member of his family if he gives evidence".

Regarding the determination of "witness in fear", in *HKSAR v See Wah Lun* [2011] 2 HKLRD 957 para.29, Cheung JA summarized 3 principles:

> *"(5) An adult witness can still be a witness in fear. In deciding whether he is a witness in fear, the court is to have regard to the circumstances of the case and the nature and circumstances of the witness. Factors such as the witness being an accomplice and has been under a witness protection scheme may be taken into account.*
>
> *(6) A witness in fear may not be in any actual danger and that his fear may only be that of meeting the assailant face-to-face.*
>
> *(7) The critical issue in determining whether a witness can be characterised as a "witness in fear" is the state of mind of the witness. It is not necessary that their fears be objectively justified or that those fears are directly attributed to conduct on the part of the accused."*

In summary, in order to determine whether a witness is a "witness in fear", the critical test used by the court is a subjective test, that is, whether it is the state of mind of the witness that he/she is apprehensive as to the safety of himself or any member of his family if he/she gives evidence in court (point (7)). The apprehension need not be limited to the safety of himself or any member of his family, but can also be about meeting the assailant face-to-face (point (6)). The apprehension need not be objective. Also, the court is to have regard to the circumstances of the case and the nature and circumstances of the witness. Factors such as the witness being an accomplice and has been under a witness protection scheme may be taken into account in consideration of determination of a "witness in fear" (point (5)).

It should be noted that although the court employs a subjective test to access the witness' state of mind, objective elements also come into play. The statutory provision s.79B(1) provides that *the court has to satisfy on reasonable grounds* the witness is apprehensive as to the safety of himself or any member of his family. In this way the reasonable grounds element introduces objectivity into the determination of "witness in fear". This means the subjective state of mind of the witness is enough to establish apprehension, but only if the court is satisfied that such apprehension is found

on objectively reasonable grounds could a witness be determined as a "witness in fear".

Since Criminal Procedure Ordinance (Cap. 221) does not prescribe factors or criteria which help the court determine if there are reasonable grounds, one has to look at the case law to seek guidance. Looking at the Hong Kong case law, it is contended that the circumstances to find reasonable grounds of apprehension are too limited to protect vulnerable witnesses. In *HKSAR v See Wah Lun* [2011] 2 HKLRD 957 para.29, Cheung JA mentioned at paragraph 29 in point (5) that in deciding whether he is a "witness in fear", the court is to have regard to the circumstances of the case and the nature and circumstances of the witness. The Hong Kong courts tend to find reasonable grounds based on severe circumstances of the case, such as gang rape (*HKSAR v Chan Ka Chun* [2000] HKEC 25); and more vulnerable witness, such as age, suffering from post-traumatic stress disorder (*HKSAR v Leung Kam Ting* [2009] 3 HKLRD 476), triad member acting as a police informer (*HKSAR v See Wah Lun* [2011] 2 HKLRD 957), or the witness being an accomplice and has been under a witness protection scheme (*R v Wong Kwai Nam*[1996] HKLY 362).

The statutory requirement of "witness in fear" and the limited construction of reasonable grounds to find apprehension diminish the victim's chance for eligibility for the use of live television link. First, the requirement of "witness in fear" limits the use of live television link only to (1) circumstances which the complainant witness would be apprehensive to the safety of himself or his family if he gives evidence in court; or (2) he would be fearful to meet the assailant face-to-face. Such requirement would diminish the strength of justification to grant the use of live television link when the defendant abuser is an acquaintance of the complainant. This would be an ignorance to the fact that in severe sexual offence cases like rape, the abuser is usually an acquaintance, and the threat and emotional trauma posed to the victim when meeting the abuser again in the court room could be as traumatizing as when the abuser is a stranger. Secondly, a complainant only qualifies as a "witness in fear" in one of the two circumstances mentioned above, which is very incomprehensive, ignoring the wider range of circumstances such as that the complainant might feel intimidated not because of actual danger or having to face his assailant, but because of the stressful and embarrassing cross-examination process.

Thirdly, the limited construction of reasonable grounds to find apprehension confines use of live television link to only severe circumstances or very vulnerable witness. This ignores the fact that sexual offences exist in many forms in reality, those circumstances which are less severe in the eyes of the law such as indecent assault could be as emotionally devastating to the complainant as "severer" circumstances such as rape. Also, a teenager as well as a mature adult at the time of the crime could feel equally helpless and devastated when their body integrity has been infringed, regardless of their age. More importantly, the limited principles established by our case law on determination of "witness in fear" and the lack of comprehensive guidance in the statute failed to take into consideration factors pointing to a vulnerable witness in a wider context, such as the

complainant witness' religious, employment, ethnic background, etc.

It is argued that the current law on the determination of eligibility for "witness in fear" fails to recognize the distinctive nature of sexual offences and ignores the needs of the victims. It is proposed that legal reforms shall be in place to improve the situation, which will be discussed later in this paper.

6.3 Justifications of rare and exceptional use of live television link

Use of live television link has been rare and exceptional in Hong Kong. Regarding the balancing principles between the defendant and the witness on the granting of live television link, in *HKSAR v See Wah Lun* [2011] 2 HKLRD 957 para.29, Cheung JA summarized 4 principles which are quoted below:

> *"(1) An accused is entitled to the fundamental right of a fair trial. The accused is also entitled to confront his accuser and see him in the eye. It is not necessary to decide whether the right to a fair trial includes the right to confront and look the accuser in the eye. It appears that the common law right of a face-to-face confrontation is not guaranteed by the European Convention on Human Rights (see R (D) v Camberwell Green Youth Court [2005] 1 WLR 393). This view may probably be explained by the fact that, apart from England, many European countries do not have the requirement of seeing the witness in court. In the context of the Basic Law and Bill of Rights in Hong Kong, such a rationale may not necessarily be applicable. In any event, even under common law, the right to confront and see the witness can be curtailed. As Lord Coleridge J stated in R v Smellie (George) (1920) 14 Cr App R 128 , 130:*
> *If the judge considers that the presence of the prisoner will intimidate a witness there is nothing to prevent him from securing the ends of justice by removing the former from the presence of the latter.*
>
> *(2) These rights, however, are now subject to statutory intervention by allowing a witness in fear to give evidence by way of live television link.*
>
> *(3) It is rare and exceptional to adopt the live television link approach. The court must consider the interests of the accused.*
>
> *(4) At the same time the court must balance the interests of the accused and the significant public interest of witnesses giving evidence without occasioning danger to themselves or to members of the community. The fact that an accused may suffer some forensic disadvantage does not mean such an order should be refused."*

In summary, the court's position is that different interests shall be balanced on the two sides of the scale, on one side the defendants' fundamental right to a fair trial and right to confrontation, and on the other, the need to enable a "witness in fear" to testify in a way without danger to themselves or their family (points (1)-(4)). The court justifies the rare and exceptional use of live television link by considering the interests of the accused (point (3)). It is contended that the tilt of the balance to the defendant's side is simply because the defendant's right to a fair trial and right to confrontation are traditionally recognized common law rights, which originates from common law and criminal justice values such as presumption of innocence. The reason for greater protection to the defendant in the criminal court lies in that criminal offences are severe accusations which would deprive the defendant of his liberty, so the proof of guilt must be careful and compelling beyond reasonable doubt.

However, the practice of rendering rare and exceptional use of special measures shall be reviewed in light of that the common law courts are beginning to accept that the right to a fair trial includes the defendant as well s the witness' right to a fair trial[320]. In fact, while special measures like live television link or screen could pacify the witness and enhance the quality of the testimony, it enables better quest of truth on court and would eventually lead to a fairer trial to both the defendant and the witness. The rare and exceptional use of special measures in Hong Kong shall also be viewed in the light of the trend of statutory reform in other jurisdictions (as discussed below at 6.5).

6.4 Are the reasons for rare and exceptional use of live television link justified?

The use of live television link is often faced with two major oppositions: the defendant's right to confrontation and the value of a live trial. Below this paper would evaluate whether the oppositions are justified.

6.4.1 Right to confrontation

For live television link, it is true that the defendant can still see the witness victim when he/she is testifying, but the major difference between live television link testimony and a live trial is that the witness is out of the courtroom. This brings us to the question of whether the accused has the right to confront his accuser directly face-to-face, that is, physical confrontation (the defendant seeing the

[320] *R v DJX* [1990] 91 Cr. App. R. 36

witness directly face-to-face in the same space). An accused's right to face his or her accuser predates to *Magna Carta*. In the US the "Confrontation clause" is prescribed in the Sixth Amendment of the US Constitution. In the leading judgment of the US Supreme Court decision *Maryland v Craig*[321], it is held that the "Confrontation Clause" meant direct face-to-face confrontation. Therefore although live television link testimony is permissible, it is not preferable. The dissenting judge Justice Antonin Scalia even went further to say that live television link testimony always contravened a defendant's right to a fair trial.

In contrast, the common law right of a face-to-face confrontation is not guaranteed by the European Convention on Human Rights (see *R (D) v Camberwell Green Youth Court* [2005] 1 WLR 393). In the English law, the House of Lords ruled that in common law there exists no right to physical confrontation: *Lee Kun* [1916] 1 K.B. 337, *Jones (Anthony William)* [2002] UKHL 5, *Camberwell Green Youth Court* [2005] UKHL 4, so that the defendant is not entitled to a common law right to physically see and confront the witness.

In Hong Kong, *HKSAR v See Wah Lun*[322] recognized the witness defendant's right to confrontation and right to fair trial shall be balanced with the need to ensure the witness give evidence without fear of safety of self and his/her family, and the common law right of confrontation could even be curtailed when the presence of the prisoner will intimidate a witness[323]. The judge found that there would only be curtailment in rare and exceptional circumstances due to the defendant's interests[324]. Thus the judicial attitude is more tilted to the defendant's favour. It is contended that where the court in *HKSAR v See Wah Lun* recognized that the determination is a balance of rights, it is strange why the court on the other hand justify the rare and exceptional use solely by the defendant's rights. It is no more than a simple assertion, which is also in conflict with the balance of rights.

6.4.2 The value of a live trial

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[321] 497 U.S. 836 (1990)

[322] [2011] 2 HKLRD 957 at para 29

[323] As Lord Coleridge J stated in *R v Smellie (George)* (1920) 14 Cr App R 128 , 130: If the judge considers that the presence of the prisoner will intimidate a witness there is nothing to prevent him from securing the ends of justice by removing the former from the presence of the latter.

[324] *HKSAR v See Wah Lun* [2011] 2 HKLRD 957 para.29

Many academics relate a live trial process with the ability to seek truth in the testimony[325]. Peter Auslander put forth that criminal trial procedure is rooted in an unexamined belief that live confrontation somehow gives rise to truth-telling[326]. Ellis Magner, an Australian legal academic specializing in Evidence Law, also advocated that effective cross-examination is the key to a fair trial, and spontaneity of a witness' immediate response is considered a more reliable indicator of the truth[327]. The two major relations of live trial with truth-finding is first, positive intimidation by cross-examination and secondly, demeanor assessment. This paper argues that they could hardly justify the rare and exceptional use of live television link.

6.4.2.1 Positive intimidation

It is suggested that some degree of intimidation conferred by cross-examination in court will have a positive effect on reliability and function as a safeguard of truth-telling. Cross-examination is specifically designed to challenge and discomfort a witness, and in this way it serves as a primary means of evidence-testing in the mechanism of the adversarial trial. With the use of live television link, positive intimidation might be weakened by the lost of physical proximity and direct face-to-face confrontation between the legal representative (defence lawyer or prosecutor) and the witness.

However, it should be noted that through live television link, the legal representative and the witness can still see and interact with each other through the television screen, it is hard to see how this could impede the legal representation from cross-examination and challenging the witness' testimony. In the time of technological advancement, the loss of physical proximity would not weaken the positive intimidation provided that the image is transferred smoothly and clearly.

6.4.2.2 Demeanor assessment

Demeanor assessment is where the jury assesses the credibility of a witness through his/her appearance and manner as well as the content of the testimony. Research findings revealed that jurors found the credibility of a witness reduced through using CCTV (live television link) testimony as compared with that of a live trial[328] because testifying by live television link might

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[325] Leader, K. (2010). Closed-Circuit Television Testimony: Liveness and Truth-telling. *Law Text Culture*, Vol. 14(1), 312-336.

[326] *Ibid.*

[327] *Ibid.*

[328] *Ibid.*

make demeanor assessment for the jury more difficult and lessen the power of the witness' testimony. On the other hand, the use of special protective measures is alleged to give a false impression to the jury that the witness is very vulnerable and thus prejudices and presumes guilt to the defendant, contrary to his right to be presumed innocent.

However, it is not clear from any available study whether witness or jurors believe confrontation does make witness more truthful, or whether they are simply more likely to be believed because the jury thinks confrontation makes witnesses more truthful. Therefore it is contended that this is only a circular belief. The duty is on the judiciary to eliminate the bias conferred to the jury that live television link testimony is less truthful by proper jury directions. Also, the Supreme Court of Canada in *R. v. Levogiannis*, [1993] 4 S.C.R. 475 rejected that the use of special measures would presume guilt to the defendant as long as the jury is properly directed. Moreover, demeanor assessment is highly controversial, with legal practitioners, scholars and judges arguing that it is obsolete. For instance, Underwood argues that, 'the idea that it is possible to sift the accurate oral account from the inaccurate oral account from the demeanor of the witness has long been discredited'[329]. Since demeanor assessment is a process prone to subjective bias, it is doubtful whether the jury can really assess whether the witness is telling the truth simply through their demeanor in the court room. Even so, there is no way why demeanor assessment could be impeded as long as the jury can observe the witness through the television screen.

6.5 Comparison with other jurisdictions

6.5.1 Inherent jurisdiction

Generally, a court has the inherent power to control its proceedings, including the power to arrange alternative arrangements for a witness to give evidence. Such power is established in many common law jurisdictions by various case laws. For the United Kingdom, the inherent jurisdiction is recognized by *R. (on the application of S) v Waltham Forest Youth Court*[330]. It established that the court has the discretion to apply special measures to protect the witness in order to achieve a fair trial. The discretionary power enables the court to grant special measures to witnesses based on flexible grounds. Based on the inherent jurisdiction, the court can still decide a witness eligible for reasons other than listed in the statute[331] because the inherent power predates the YJCEA and is

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[329] Underwood, C. J. (2006). 'The Trial Process: Does One Size Fit All?'. *Journal of Judicial Administration,* 15/3

[330] *R. (on the application of S) v Waltham Forest Youth Court* [2004] 2 Cr App R 21

[331] S.17 Youth Justice and Criminal Evidence Act 1999

untouched by it[332].

In the English case of *R v Smellie (George)*[333], the decision to order the accused to sit on the stairs going out of the dock, obscuring him from the complainant's sight while she gave evidence was affirmed on appeal in the interests of justice where the judge considers that the presence of the accused would intimidate the witness. In *R v West*[334], the Supreme Court of Queensland affirmed the power at common law to direct that an accused be obscured from the view of a witness. In *R v Ngo*[335], the New South Wales Supreme Court confirmed that special arrangements can be made to ensure that the accused cannot see the witnesses or vice versa. In that case, the court ordered that the television be visible to the jury but not to the accused to prevent the accused from identifying the witness[336]. The New South Wales court also has inherent jurisdiction to exercise such discretion if such arrangement advances the course of justice[337]. In Hong Kong, the court is also empowered with the inherent jurisdiction to control its proceedings.

Of course, such inherent jurisdiction is subjected to the inherent jurisdiction of the court to make such steps as necessary to ensure that a defendant has a fair trial[338].

6.5.2 Statute

In some jurisdictions, the statute recognizes sexual offence complainants' special witness status with specific entitlement to protective measures. This in effect gives more protection and more lenient treatment to sexual offence complainants because to be eligible to special measures they do not have to satisfy prerequisites similar to the "witness in fear" requirement in Hong Kong. The relevant provisions are mentioned below:

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[332] The Crown Prosecution Office. *Special Measures*. Retrieved July 6, 2012, from http://www.cps.gov.uk/legal/s_to_u/special_measures/

[333] *R v Smellie* (1919) 14 Cr App R 128

[334] *R v West* [1992] 1 Qd R 227 at 230 (Thomas J)

[335] *R v Ngo* [2001] NSWSC 339 at para 20 (Dunford J)

[336] Law Reform Commission New South Wales. *Report 101 (2003) Questioning of complainants by unrepresented accused in sexual offence trials*. Retrieved July 6, 2012, from http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r101chp6

[337] *Park v Citibank Savings Ltd* [1993] 31 NSWLR 219

[338] *R(P) v West London Youth Court* [2006] 1 WLR 1219

6.5.2.1 The United Kingdom

S.17(4) of Youth Justice and Criminal Evidence Act 1999 provides that complainants of sexual offences are eligible for special measures (including live television link) unless the witness does not wish to be so eligible. Once it is satisfied the witness is so eligible, s.19(2) retains the court with discretion to determine whether and which special measure is to be granted.

> *s.17(4) Where the complainant in respect of a sexual offence is a witness in proceedings relating to that offence (or to that offence and any other offences), the witness is eligible for assistance in relation to those proceedings by virtue of this subsection unless the witness has informed the court of the witness' wish not to be so eligible by virtue of this subsection.*
>
> *s.19(2)Where the court determines that the witness is eligible for assistance by virtue of section 16 or 17, the court must then—*
>
> *(a) determine whether any of the special measures available in relation to the witness (or any combination of them) would, in its opinion, be likely to improve the quality of evidence given by the witness; and*
>
> *(b)if so—*
>
> *(i) determine which of those measures (or combination of them) would, in its opinion, be likely to maximise so far as practicable the quality of such evidence; and*
>
> *(ii) give a direction under this section providing for the measure or measures so determined to apply to evidence given by the witness.*

6.5.2.2 Victoria

S.363 of The Criminal Procedure Act 2009 provides that the court must grant the use of CCTV to a complainant who relates wholly or partly to a sexual offence unless the complainant does not wish to. This in effect provides fullest protection by creating a statutory presumption of use of CCTV which could only be rebuttable at the complainant's own will, free of any intervention from the court's discretion.

> *s.363. If the witness is a complainant in a criminal proceeding that relates (wholly or partly) to a charge for a sexual offence, the court must direct that an arrangement*

referred to in section 360(a) [339] *be made unless-*

(a) the prosecution applies for the complainant to give evidence in the courtroom; and

(b) the court is satisfied that the complainant-

(i) is aware of the right of the complainant to give evidence in another place by closed-circuit television or other facilities; and

(ii) is able and wishes to give evidence in the courtroom.

6.5.2.4 New South Wales

S.294B(3)(a) of Criminal Procedure Act 1986 No. 209 provides that a sexual offence complainant is entitled to testifying by means of CCTV, subject to the court's refusal prescribed by s.294B(6).

s.294B (3) A complainant who gives evidence to which this section applies is entitled (but may choose not):

(a) to give that evidence from a place other than the courtroom by means of closed-circuit television facilities or other technology that enables communication between that place and the courtroom,

s.294B (5) Despite subsection (3) (a), a complainant must not give evidence as referred to in that paragraph if a court, on its own initiative or on application by a party to the proceeding, orders that such means not be used.

s.294B (6) A court may make an order under subsection (5) only if it is satisfied that there are special reasons, in the interests of justice, for the complainant's evidence not to be given by such means.

6.5.2.3 Northern Territory

[339] Section 360(a) provides for the use of CCTV.

S.21A(2) of Northern Territory Evidence Act provides that a sexual offence complainant is treated as a vulnerable witness and be entitled to use alternative measures (including live television link) to give evidence in court, subject to the court's refusal prescribed by s.21A(2A).

> *s.21A(2) Subject to subsection (2A) and section 21B, a vulnerable witness is entitled to give evidence using one or more of the following arrangements as chosen by the witness:*
>
> > *(a) that the evidence of the vulnerable witness be given at a place outside the courtroom and transmitted to the courtroom by means of closed circuit television where that facility is available;*
>
> *s.21A (2A) The Court may make an order that the vulnerable witness is not to give evidence using an arrangement under subsection (2) if satisfied that:*
>
> > *(a) it is not in the interests of justice for the witness's evidence to be given using that arrangement; or*
> >
> > *(b) the urgency of the proceeding makes the use of that arrangement inappropriate.*

6.7 Recommendations to legal reform

It should be noted that the practical situation is that despite the statute provisions, use of live television link might be still rarely granted, because mere entitlement to use (as in the United Kingdom, New South Wales, Northern Territory) is still subject to the court's discretion, e.g. where the court under certain circumstances does not satisfy it is in the interest of justice to grant the special measure, and such discretion is eventually influenced by the judge's personal bias. In New South Wales, despite the above statutorily entitlement, successful application of CCTV is still low[340]. The complainant's right would easily be compromised unless the statute explicitly establishes a rebuttable presumption of use of special measures free of the court's discretion (as in Victoria). That means the sexual offence complainant starts out with the special measure for sure, unless the complainant does not wish to exercise the use and rebut the presumption.

This paper recommends that the rebuttable presumption approach enforced in Victoria shall be adopted in Hong Kong for the best protection to sexual offence complainants. Even if the rebuttable

[340] See n146.

presumption approach cannot be endorsed in Hong Kong, it is hoped that the statute could recognize sexual offence complainants' special witness status with specific entitlement to protective measures (as in the United Kingdom, New South Wales, Northern Territory). If this suggestion is adopted, with such approach of creating specific entitlement of special measures to sexual offence complainants, it is in effect doing way the "witness in fear" requirement prescribed by s.79B CPO.

If this suggestion is not accepted, this paper recommends that Hong Kong shall review the definition of "witness in fear", to codify in the CPO a more comprehensive range of factors to be considered by the court for the determination of whether "witness in fear" is satisfied, in order to allow use of live television link in more circumstances. The purpose is to remedy the limited circumstances which live television link could be granted and the narrow "witness in fear" definition as discussed in 6.2. The statutory provision of the United Kingdom is a good example for reference:

For witnesses applying for special measures other than age or mental incapacity, the statute Youth Justice and Criminal Evidence Act 1999 prescribed the aforementioned provision specific to sexual violence complainants (s. 17(4)). For witnesses otherwise eligible, s. 17(2) listed a number of factors which the court must take into account when considering whether a witness is intimidated and hence eligible for the special measures. The factors include the nature and alleged circumstances of the offence, the age of the witness; and, if considered relevant, the social, cultural, ethnic origin, domestic and employment circumstances, religious beliefs or political opinions of the witness; and any behavior of the accused or related persons towards the witness.

It is hoped that by creating a statutory provision equivalent or similar provision to s.17(2) Youth Justice and Criminal Evidence Act 1999 of the UK, it would remedy the limited circumstances established by the Hong Kong case law which live television link would be granted (as illustrated above by the cases *HKSAR v See Wah Lun* [2011] 2 HKLRD 957, *HKSAR v Leung Kam Ting* [2009] 3 HKLRD 476, *HKSAR v Chan Ka Chun* [2000] HKEC 25, *R v Wong Kwai Nam*[1996] HKLY 362).

The least preferable option would be to expand the construction of "witness in fear" by case laws. This would be less preferable because review could only be done when such case comes to the court, and such decision might not bind higher courts.

6.7 Conclusion

The use of live television link is important for testifying in court because it enables the witness to give evidence in a less emotionally affected way to allow better quality of the evidence. Yet the courts in many case laws often justify the rare and exceptional use of live television link by the

rights of the defendant, such as right to confrontation, right to fair trial, etc. However, it should be noted that in the light of the reform trend of many common law jurisdictions, while the United Kingdom, New South Wales, Northern Territory, Victoria, etc. have legislated provisions to grant sexual violence complainants specific statutory entitlements to use special measures like live television link, the previous practice of rare and exceptional use shall be reviewed to go in line with the statutory reform to enable use in more circumstances. Moreover, while the court recognized that the determination of granting of live television link rests on a balance between rights of the defendant and need of the witness[341], this also suggests its use in more circumstances.

Apart from the right to confrontation, the value of a live trial is often a justification for refusing the use of testifying by live television link. It is suggested that the intimidation by direct face-to-face confrontation can result in more truthfulness in the testimony; and the jury could better assess the demeanor of the witness by a live trial. However, there is no existing report verifying the belief that a face-to-face testimony is more reliable and truthful than that given by live television link. Therefore, whether this ground can be a solid justification for direct face-to-face testimony is doubtful. Instead, it shall be the court's duty to eliminate the subjective bias towards live television link testimony if such measure is necessary.

In Hong Kong, sexual violence complainants are only eligible to use of live television link in very limited and severe circumstances like gang rape, or that the victim is suffering from psychological trauma, due to the narrow construction of "witness in fear". This surely does not confer enough protection for sexual violence complainants. It is proposed that Hong Kong shall: (1) do away the "witness in fear" requirement regarding the grant of live television link for sexual offence complainants, and legislate specific entitlement to use of live television link for sexual violence complainants, just like the United Kingdom, New South Wales, Northern Territory, Victoria, etc, with the Victorian model of rebuttable presumption of use of live television link as the most preferable approach; (2) another option is to legislate more comprehensive range of factors in determination of "witness in fear", similar to s.17(2) Youth Justice and Criminal Evidence Act 1999, or less preferably, (3) expand the construction of "witness in fear" in case laws.

[341] *HKSAR v See Wah Lun* [2011] 2 HKLRD 957 para.29

7. Proposed codification of special measures in the Statement for Prosecution Policy and Practice

7.1 Background

The Statement of Prosecution Policy and Practice[342] ("the Statement") was released in Hong Kong in 2008 by the Department of Justice ("DOJ"). The statement offers guidelines on prosecution process and policy, and on prosecutorial ethics and responsibility. With the statement established, the standards, policies and practices of the public prosecutors are reasonably defined, so that prosecutors at all levels may properly discharge of their functions. It was prepared with respect to contributing the openness and transparency, which the common law dealings shall uphold in the community. Mr. Grenville Cross, the Director of Public Prosecutions of the DOJ, once called the statement "a modern code which emphasizes our common law traditions"[343], it should have been "a significant criminal justice initiative" made.

Section 22.5 of the statement concerns with the special protections granted to vulnerable witnesses. It provides that:

> *"The prosecutor must safeguard the position of vulnerable witnesses, namely, a child, a mentally incapacitated person or a witness in fear, as defined in the Criminal Procedure Ordinance, Chapter 221. Applications should be made to assist vulnerable witnesses to give evidence in court. Such measures may include evidence by live television link, video recorded evidence, priority listing, no postponement of trial, avoidance of delay, arrangement of support persons, removal of gowns and wigs, and appropriate security for witnesses in fear. There will also be cases where the interests of justice require a screen to be made available to shield a witness from the accused or the public, or for the public gallery to be cleared."*

Sections 22.5 prescribes a wide range of special measures to vulnerable witnesses. In contrast, the

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[342] The Department of Justice. (2008). *The Statement of Prosecution Policy and Practice - Code for Prosecution*. Retrieved July 10, 2012, from http://www.doj.gov.hk/eng/public/pubsoppaptoc.htm

[343] HKSAR Government Press Release. (2008). *Statement of Prosecution Policy and Practice released* . Retrieved July 10, 2012, from http://www.info.gov.hk/gia/general/200812/23/P200812230154.htm

Criminal Procedure Ordinance ("CPO") only prescribes one special measure available to healthy adult sexual offence complainants, which is testifying through live television link[344], provided that the complainant satisfies the "witness in fear" requirement[345]. The CPO is clearly inadequate to respond to the need of the sexual offence victims. This paper argues that while the Statement provides a practical guide to the prosecutors, it is also important to codify the special measures prescribed in section 22.5 such as granting of screen and arrangement of support persons, etc. into the CPO to confer higher legal status, legal certainty, and enforceability to these measures.

7.2 Differences between the CPO and the Statement and their significance

While it is recognized that the Statement, as a practical guide to the prosecutors, is an important reference which directs them to apply for special measures to assist sexual offence complainants, it is advocated that the special measures prescribed in section 22.5 of the Statement shall also be codified into the CPO to provide for a statutory reference for such application. Codification in the CPO confers legal significance over prescription in the Statement, as illustrated as follows:

The CPO enjoys a higher legal status and legal certainty than the Statement. The formal aspect of legal certainty intertwines with the concept of predictability. It concerns of whether the legislation is clear, coherent, stable and transparent, and protects citizens against adverse side effects of legal instruments. In this respect, the CPO is a primary legislation that was formally introduced and passed by the Legislative Council. The Statement exists in the form of guidelines as published by the DOJ. The Statement was not enacted nor approved by the legislative branch of the government.

A statutory backup is important because it provides the legal ground for possible judicial challenge wherever injustice occurs. For example, under section 79B, IIIA of the Criminal Procedures Ordinance, the court may permit giving of evidence by live television link to child, mentally incapacitated person and "witness in fear". If the application for live television link itself is valid and reasonable but is rejected by the court, the plaintiff may judicially challenge on constitutional grounds, making reference to article 87 of HK basic law, concerning the right to fair trial. Arguably, the right of fair trial shall not only apply to defendants. It should also be expanded to cover the witnesses who give testimony in court. It was agreed by the Lord Chief Justice in the case of *R v DJX* 91 Cr. App. R. 36 that fairness of trial depends on the three parties of defendants, prosecution as well as witnesses. Therefore, this adds strength to the basis for legal remedy.

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[344] s.79B, Criminal Procedure Ordinance (Cap. 221)

[345] s.79B(1), *ibid*.

As so, the nature of the CPO and the Statement are of significant differences from legal perspective. The Statement sincerely serves as a set of guidelines and has restricted legal binding power. Protective measures for vulnerable witnesses shall not be merely listed as in this set of "guidelines". They should be offered more concrete support. Eventually it arrives at the deduction of more special court protections to vulnerable witnesses ought to be included in the CPO.

7.3 Recommendations to legal reform

The only special court protection measure currently covered in the CPO, applicable to adult and mentally capacitated victims of sexual crimes, is the provision of evidence through live television link. This is neither comprehensive nor effective in enforcement. It is proposed that more special court protection measures promised to vulnerable witnesses for assisting to give evidence in court, e.g. screen, video-recorded evidence, priority listing as under section 22.5 of the Statement of Prosecution Policy and Practice, to be covered in the section 79, Part IIIA of the Criminal Procedures Ordinance. Incorporating these measures into the CPO (as statutory law) may enhance, as a whole, the measures' legal status, certainty and enforceability. In this way, the victims of sexual crimes are statutorily entitled to these court measures. If there is any unfair trial resulting from the denial of application for special court protections, a judicial review shall be available. On that account, vulnerable victims' and witnesses' rights for a fair trial are better protected and safeguarded.

8. Conclusion

It is submitted that better recognition of the distinctive nature of sexual offence trials and victims' plight by our law will have the effect of facilitating the prosecution of harmful crimes while respecting the dignity and protecting the well-being of vulnerable crime victims. All of these are the fundamental values of our criminal justice system. It is submitted in this paper that many other common law jurisdictions have achieved this recognition by statutory reforms, but Hong Kong up to the present is still yet to catch up. This paper has given recommendations on how Hong Kong should reform its law to take care of the issues, to the effect that the court shall be more willing to grant to sexual offence complainants special protective measures such as screen and live television link. Besides, it is suggested the special protective measures for witnesses stated in the Statement for Prosecution Policy and Practice should be codified.

3.4 性罪行受害者的法庭保障 (撮要)

甲、 引言

本文認為性罪行審訊的性質跟其他刑事罪行審訊截然不同。然而，我們現行的法例卻不足以回應其差別，尤其是在保護證人的法律上，因而為性罪行受害人帶來嚴重創傷的危機，剝奪受害人作為公民在作證時應有的尊嚴，以及阻礙刑事司法制度和法庭的基本運作。本文會就如何改善香港現有的兩項主要保護措施〔屏風及電視直播聯繫〕作出建議，並提議將現有《檢控政策及常規》內的特別措施編纂為法例。

乙、 瞭解性罪行審訊的獨特性質

性罪行審訊的性質有別於一般的刑事審訊。性罪行的定罪與否，經常取決於受害人在事件發生時是否同意性交的議題上，因此受害者的誠信有著決定性的影響。因此，受害人的品格實際上也備受審判。然而，一些關乎性的證詞和受害人與被告的關係經常會為受害人帶來壓力，加上辯方律師採用進取而懷敵意的盤問，受害者的作證質素很容易備受影響，甚至因此而拒絕上庭，以至阻礙起訴及刑事司法制度的運作。

縱使法官和裁判官具備固有的司法權（inherent jurisdiction）以監督審訊過程，他們卻經常不願運用該權力來授予採用屏風等特別保護措施。

丙、 以屏風作為對受害者的保護措施

本文主張採用屏風為一項有效保護受害人的措施。屏風能避免受害者在法庭程序中受到二度傷害，有助提高受害人的證詞質素以協助檢控，並提升證詞的事實準確度，對被告亦有利。

本文承認被告擁有公平、公開審訊及盤問證人的權利。這些權利表面上都反對在法庭上使用屏風，但本文認為這些障礙是可以克服的。

就被告的公平審訊權利而言，本文認為採用屏風實際上是有助於此權利的，因為屏風有助改善證詞的事實準確度，以達至公平裁決。此外，案例中也承認公平審訊的概念已發展成為包括對被告和證人雙方的公平，因此不能只為滿足被告的利益而犧牲證人的權利[346]。香港亦有案例承認被告的權利需與證人的利益作平衡[347]。因此，被告所享有之權利既不是絕對的，也不是獨霸的。

就被告公開審訊及盤問證人的權利而言，本文認為採用屏風事實上跟它們為達致事實準

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[346] 見 *R v DJX* [1990] 91 Cr. App. R. 36

[347] 見 *HKSAR v See Wah Lun* 2 HKLRD 957.

確的背後精神是一致的。屏風的採用不會導致對這些權利的否定，因為被告的代表律師不一定被遮擋，而且仍可在觀察證人的行為舉止的情況下盤問證人。同時，採用屏風並不會阻礙核實證人的身份，因此被告瞭解證人身份的權利也不會被剝削。

香港法例在認同證人權益的層面上一直比其他司法區域落後。不少普通法司法區域已就採用屏風給予法定地位，但在香港，是否准許採用屏風的問題仍在法官的酌情權之內。香港並沒有任何明文法或具權威性的案件判決闡述屏風應在何時准予採用。

在其他普通法司法區域，現行保護受害人的法律主要可分為三個類別：(1) 假定法庭必須指示性罪行受害人採用特殊措施，除非性罪行受害人自行推翻此假定[348]；(2) 授予性罪行受害人一個特定的法定權利享用特殊措施，但法庭保留拒絕特殊措施的酌情權[349]；和 (3) 為法官在決定是否批准採用特殊措施時提供一些考慮因素[350]。

本文建議香港法律應採用類別(1)，如不能被採納則應採用類別(2)，以對性罪行審訊的獨特性質作出認同，並尊重受害人從法庭獲得保障的權利。這樣更能避免受害人在申請過程中承受情緒上的壓力。

作為一個替代的方案，本文認為法律上應提供一系列的考慮因素，給予法官在決定行使酌情權准予採用屏風時作參考，與類別(3)類近。此舉能確保法律的確定性及避免法官在行使酌情權時受到個人偏見所影響。

丁、 以電視直播聯繫作為對受害者的保護措施

在香港，根據第 221 章《刑事訴訟程序條例》第 79B 條，易受傷害證人，包括屬兒童、精神上無行為能力人士及「恐懼中的證人」，均有權以電視直播聯繫作供。換句話說，身心健全的成年性罪行受害人只能夠符合「恐懼中的證人」的類別。

香港現行關於以電視直播聯繫作供的法律的確存在不足之處。第一，性罪行受害人並不會因為其身份而自動享有以電視直播聯繫作供的權利。他們必須符合界定為「恐懼中的證人」的要求才可[351]，但此要求卻為他們帶來下列的困難。第二，在香港的案例中，證人多只在有限和嚴重的情況下才會被界定為「恐懼中的證人」[352]。第三，法庭所持的態

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[348] 例子包括維多利亞

[349] 例子包括英國、新南威爾斯、北澳洲

[350] 例子可參考南澳洲

[351] 《刑事訴訟程序條例》第 79B(1)條

[352] 例如輪姦(*HKSAR v Chan Ka Chun* [2000] HKEC 25)；年齡、創傷後壓力心理障礙症(*HKSAR v Leung Kam Ting* [2009] 3 HKLRD 476)，三合會成員作為警方線人(*HKSAR v*

度多都是只限於在罕有而例外的情況下才批准證人以電視直播聯繫作供[353]。第四，現時並沒有足夠的明文法指引協助法庭界定證人是否屬於「恐懼中的證人」。

本文建議，第一，法例上應特別地授予性罪行受害人透過電視直播聯繫作供的權利，與英國[354]、新南威爾斯[355]、北澳洲[356]、維多利亞[357]等地的法律相似，以免除需界定為「恐懼中的證人」的要求。維多利亞的做法保障最全面，建議本港效法。該處法例假定法庭必須指示性罪行受害人以電視直播聯繫作供，除非性罪行受害人自行推翻此假定，而法庭不能行使酌情權推翻此假定[358]。第二，即使不能免除「恐懼中的證人」的要求，《刑事訴訟程序條例》亦應增加一系列全面的考慮因素供法官參考，以決定是否將證人界定為「恐懼中的證人」，情況可參考英國的法例[359]，如考慮罪行的性質、證人的宗教、就業及民族背景等因素，以提升法律的確定性。第三，如第二點建議不能被採納，則被界定為「恐懼中的證人」的合理理由應在案例中加以擴大。

提倡增加對性罪行受害人在法庭作證時的保障，是基於性罪行審訊對受害人尤其沉重和恫嚇的獨特性質，法庭確保證人作證時不受恐懼和危險的責任[360]，以及證人與被告均擁有公平審訊權利的學說[361]。再者，電視直播聯繫的採用不應以被告的公平審訊權利作為唯一考慮的法律根據，因為被告的公平審訊權利應與保護證人的需要作平衡[362]。因此，電視直播聯繫應在更多的情況下批准採用。此外，假若電視直播聯繫不被採用，現場審訊也只會降低證人在情緒不穩的情況下所作證詞的真確性，而不會提升。

本文建議香港法例應授予性罪行受害人享用特殊措施的權利，以對性罪行審訊的獨特性質作出法定認同。本文建議假定法庭必須指示性罪行受害人以特殊措施作供為最可取的

See Wah Lun [2011] 2 HKLRD 957), 證人作為同謀、受保護證人 (*R v Wong Kwai Nam*[1996] HKLY 362).

353 見 *HKSAR v See Wah Lun* [2011] 2 HKLRD 957 第 29 段.

354 見 s.17(4) Youth Justice and Criminal Evidence Act 1999

355 見 s.294B(3)(a) Criminal Procedure Act 1986 No. 209

356 見 s.21A(2) Northern Territory Evidence Act

357 見 s.363 The Criminal Procedure Act 2009

358 同上

359 見 s.17(2) Youth Justice and Criminal Evidence Act 1999

360 見註 6

361 可參考案例 *R v DJX* [1990] 91 Cr. App. R. 36

362 見註 2

法定保障形式，與維多利亞[363]的法例類似。這是因為享用特殊措施的權利如受制於法官拒絕的酌情權，在實際執行上，法官和裁判官有可能在行使酌情權時受個人偏見所影響。

戊、 建議將《檢控政策及常規》內的特別措施彙編為法例

《刑事訴訟程序條例》內唯一適用於身心健全的成年性罪行受害人的法庭保障是透過電視直播聯繫作供〔第 79B 條〕。本文認為此唯一措施既不全面，亦未能為受害人提供有效的保障。因此本文建議將《檢控政策及常規》第 22.5 條內所提及更多的特別措施彙編入《刑事訴訟程序條例》成為法例，以協助易受傷害證人在庭上作供。這些特別措施包括設置屏障遮蔽證人、以錄影紀錄方式提供證據、安排支援者等。在《刑事訴訟程序條例》中加入這些措施能夠提升該措施的法律地位、確定性和可執行性。因此，對易受傷害證人的公平審訊權利保障亦更進一步。

己、 總結

本文的立場是，加強對性罪行審訊和受害人苦境的認同能有助罪行的檢控，同時尊重和保護易受傷害證人的尊嚴。這些都是刑事司法制度的基本價值。本文指出不少其他普通法司法區域已透過法律改革達至此認同，但香港至今仍未追上。本文提供了對香港法律改革的建議，以面對這些議題，使法庭更願意准予性罪行受害人享用如屏風、電視直播聯繫等特別保護措施。此外，本文亦建議將《檢控政策及常規》內所提及的特別措施彙編為法例。

[363] 見註 12

3.5 Court Protection for Sexual Offence Complainants (Summary)

1 **Introduction:** This paper argues that the nature of sexual offence trials is distinct from that of other trials. However, it is submitted that our present law fails to respond adequately to this distinction, especially in the area of witness protection, thus exposing testifying sexual offence complainants to the risk of suffering from severe trauma. Moreover, the complainants' deserved dignity as citizens will be deprived of during the process of testifying as witnesses. As a result, the fundamental operation of our criminal justice and court system would be impeded. This paper is going to give recommendations to improve the two main current protective measures available to witnesses in Hong Kong, i.e. testifying behind a screen and through live television link, as well as to suggest a codification for the present proclaimed protection for witnesses stated in the Statement for Prosecution Policy and Practice.

2 **Appreciating the distinctive nature of sexual offence trials:** It is submitted that sexual offence trials have their own distinctive nature. The issue of consent is usually the most contended issue upon which the question of conviction or acquittal hinges. Consequently, the credibility of a complainant would be decisive and important to successful conviction. As such, the alleged victims' character is virtually on trial. The sexual nature of the evidence and the relationship between the defendant and the victim create further stress. Together with the hostile style of cross-examination taken by defense counsel, it is likely to affect the quality of evidence they give or even discourage them from attending the court, thereby hindering prosecution and the operation of criminal justice system. Judges and magistrates have the inherent jurisdiction to control the process of the proceedings. However, they are reluctant to exercise the inherent jurisdiction to grant special protective measures such as testifying behind the screen.

3 **Testifying behind a screen as a protective measure for sexual offences complainants:** The use of screen is an effective measure for protecting witnesses. It protects complainants from suffering from second victimization in the court process, helps complainants give evidence of better quality thus facilitating prosecution work, and betters defendants' interest by enhancing the factual accuracy of evidence given by the witnesses.

Whilst we recognize the defendant have right to fair trial, right to public trial and cross-examination that, *prima facie*, operate against the use of screen in court, we submit that these are surmountable hurdles.

Regarding defendant's right to fair trial, we submit that the use of screen is conducive to this right since it improves the factual accuracy of evidence which is necessary for the reaching of a just verdict. It should also be noted that case law has recognized that the concept of fair trial has evolved to embrace fairness to both the defendants and witnesses, so that it requires that defendant's interest should not be served exclusively at the expense of the witnesses[364]. Hong Kong case law also recognizes that the realization of defendants' right needs to be balanced against the interest of the witnesses[365]. Hence, defendant's enjoyment of the right is neither absolute nor hegemonic.

Regarding the right to public trial and cross-examination, we submit that the use of screen actually conforms to their underlying spirit of attaining factual accuracy. Its use also does not lead to the total denial of these rights, since defendant's legal representative is not necessarily shielded but can still cross-examine the witness with the full advantage of observing her demeanor. Equally, the use of screen does not prevent the verification of the identity of the witness, so the right to know the identity of the witness is preserved.

Hong Kong has been far behind other jurisdictions in giving recognition to witnesses' rights, as many common law jurisdictions have given statutory status to the use of screen, while it remains a matter of judge's discretion in Hong Kong. There exist no statutes or authoritative common law decisions that expound on when screen protection shall be granted.

The existing law in other common law jurisdictions in protecting victims can be divided into several main models: (1) creating a statutory presumption that the court must direct use of special measures to sexual offence complainants rebuttable only at the complainant's own will[366], (2) making sexual offence complainants specifically entitled to special measures subject to the court's discretion to refuse[367], and (3) providing considerations which the judge

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[364] See *R v DJX* [1990] 91 Cr. App. R. 36.

[365] See *HKSAR v See Wah Lun* [2011] 2 HKLRD 957

[366] These includes Victoria.

[367] These jurisdictions include the UK, New South Wales and the Northern Territory.

should visit when deciding whether to grant special measures[368].

It is recommended that Hong Kong law should most preferably adopt the (1) model, or as a fallback position, the (2) model. The purpose is to give recognition to the distinctive nature of sexual offence trials and to respect victims' rights to obtain protection from court. This helps victims to avoid emotional stress during the application process.

As an alternative ground, it is argued that the law should provide for a list of considerations which the judge should visit when exercising his discretion on whether to grant screen protection, similar to model (3). This is to ensure legal certainty and prevent the exercising of discretion from being affected by personal bias.

4 **Testifying through live TV link as a protective measure to sexual offence complainants:** In Hong Kong, vulnerable witnesses falling within the categories of children, mentally incapacitated person and "witness in fear" are entitled to testifying through live television link, provided by s.79B of the Criminal Procedure Ordinance (Cap. 221) ("CPO"). A healthy adult sexual offence complainant could only fit into the "witness in fear" category.

There are inadequacies in the existing law in Hong Kong concerning testifying through live TV link. First, sexual offence complainants are not automatically entitled to using live TV link by reason of their status as a sexual offences victim. They are required to satisfy the "witness in fear" requirement[369], which gives them the following hardships. Secondly, under Hong Kong case law a witness only qualifies as "witness in fear" in limited and severe circumstances[370]. Thirdly, the judicial attitude is that the granting of live TV link is only in rare and exceptional circumstances[371]. Fourthly, the statutory guidance as to the determination of a "witness in fear" is inadequate.

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[368] Examples of this category include South Australia.

[369] s.79B(1), Criminal Procedure Ordinance.

[370] The Hong Kong courts tend to find reasonable grounds based on severe circumstances of the case, such as gang rape (*HKSAR v Chan Ka Chun* [2000] HKEC 25); and more vulnerable witness, such as age, suffering from post-traumatic stress disorder (*HKSAR v Leung Kam Ting* [2009] 3 HKLRD 476), triad member acting as a police informer (*HKSAR v See Wah Lun* [2011] 2 HKLRD 957), or the witness being an accomplice and has been under a witness protection scheme (*R v Wong Kwai Nam*[1996] HKLY 362).

[371] See *HKSAR v See Wah Lun* [2011] 2 HKLRD 957 para. 29.

It is proposed that, first, sexual offence complainants shall be specifically entitled to testifying through live TV link in the statute, similar to the law in the United Kingdom[372], New South Wales[373], Northern Territory[374], Victoria[375], etc. Amongst which the Victorian model of creating a presumption that the court must direct use of live TV link rebuttable only by the complainant's own will free of the court's discretion[376] shall be most preferable and protective to be adopted in Hong Kong. This is to do away the "witness in fear" requirement. Secondly, even if such requirement cannot be done away, there shall be comprehensive factors listed in the CPO to guide judges to determine whether a person is a "witness in fear", similar to those listed in s.17(2) of Youth Justice and Criminal Evidence Act 1999, such as nature of the offence, the witness' religious, employment, ethnic background, etc., to confer more legal certainty. Thirdly, an alternative fall back option would be to widely construct the reasonable grounds to find a witness as a "witness in fear" in the case law with reference to the UK legislation[377].

The need for advocating more protection for sexual offences complainants when testifying in court is due to the distinctive nature of sexual offences which makes the trial process particularly burdensome and intimidating for the victims, the court's duty to ensure the witness give evidence without fear or danger[378], and the notion that a witness as well as the defendant shall be entitled to the right to fair trial[379]. Moreover, the defendant's right to a fair trial shall not be the sole consideration to justify the rare and exceptional use of live TV link, instead, since the defendant's right to a fair trial shall be balanced with the need for witness protection, live TV link should be used in a wider range of circumstances[380]. Moreover, if the use of live TV link is denied, a live trial will only reduce, rather than enhance, factual accuracy of the evidence given by a witness where the witness is emotionally unstable.

It is suggested that making sexual offence complainants specifically entitled to special

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[372] S. 17(4) Youth Justice and Criminal Evidence Act 1999.

[373] s.294B(3)(a) of Criminal Procedure Act 1986 No. 209

[374] S. 21A(2) Northern Territory Evidence Act.

[375] S. 363 The Criminal Procedure Act 2009

[376] *Ibid.*

[377] s.17(2) of the Youth Justice and Criminal Evidence Act 1999.

[378] See n6.

[379] *R v DJX* [1990] 91 Cr. App. R. 36.

[380] See n2.

measures would serve as a statutory recognition of the distinctive nature of sexual offences. It is proposed that the most preferable form of statutory protection would be a presumption that the court must direct special measures, similar to the Victoria[381] legislation. This is because mere entitlement of special measures at the discretion of the court might in reality face the threat of bias from judges or magistrates when exercising their discretion to refuse use.

5 **Proposed codification of special measures in the Statement for Prosecution Policy and Practice:** The only special court protection measure in the CPO applicable to healthy adult victims of sexual crimes is to give evidence through live television link (s.79B). We submit that this measure alone is neither comprehensive nor giving effective protection to the victims. It is proposed that more special measures listed under section 22.5 of the Statement of Prosecution Policy and Practice, such as screen, video-recorded evidence, arrangement of support persons, etc., shall be codified into the CPO for assisting vulnerable witnesses to give evidence in court. Incorporating these measures into the CPO as statutory law enhances the measures' legal status, certainty and enforceability. On that account, vulnerable witnesses' rights to a fair trial are better protected.

6 **Conclusion:** It is our stance that better recognition of the distinctive nature of sexual offence trials and victims' plight by our law will have the effect of facilitating the prosecution of harmful crimes while respecting the dignity and protecting the well-being of vulnerable crime victims. All of these are the fundamental values of our criminal justice system. It is submitted in this paper that many other common law jurisdictions have achieved this recognition by statutory reforms, but Hong Kong up to the present is still yet to catch up. This paper has given recommendations on how Hong Kong should reform its law to take care of the issues, to the effect that the court shall be more willing to grant to sexual offence complainants special protective measures such as screen and live television link. Besides, it is suggested the special protective measures for witnesses stated in the Statement for Prosecution Policy and Practice should be codified.

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[381] See n12.

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