

LRC issues report on "The Common Law Presumption that a Boy Under 14 is Incapable of Sexual Intercourse"

The Law Reform Commission (LRC) announced today (December 13) the publication of the LRC's report on "The Common Law Presumption that a Boy Under 14 is Incapable of Sexual Intercourse", recommending abolition of the presumption.

The LRC's secretary, Mr Stuart Stoker, explained that the presumption that a boy under 14 is incapable of sexual intercourse cannot be rebutted, even where there is clear evidence that the boy was physically capable of, and had had, sexual intercourse. The result is that, regardless of the circumstances, a boy under 14 years of age cannot be convicted of rape, even though he had unlawful sexual intercourse with a non-consenting victim.

This common law presumption has ancient origins but it has either never applied or has been abolished in a number of jurisdictions, including England & Wales, New Zealand and a number of Australian jurisdictions.

The report argues that whatever the historical rationale for the presumption may have been, it is difficult to see what purpose the rule now serves. It is contrary to common sense that the law in Hong Kong should refuse to accept that a boy under 14 may be capable of sexual intercourse, regardless of the evidence to the contrary. The application of the presumption is at odds with reality and means that on occasion the true criminality of the defendant's conduct cannot be reflected in the charge.

The problems of the presumption were highlighted in Hong Kong in a recent case in September this year where a 13-year-old boy was arrested for allegedly having sexual intercourse with a five-year-old girl in the Pamela Youde Nethersole Eastern Hospital in Chai Wan. He was charged with indecent assault as the presumption prevented his being charged with rape.

If the presumption were to be abolished, the separate rebuttable presumption of doli incapax would continue to apply to a boy between the ages of 10 and 14. That presumption means that the prosecution must prove beyond reasonable doubt that the boy knew his actions were seriously wrong, rather than merely naughty or mischievous.

Members of the public who wish to obtain a copy of the report should contact the LRC Secretariat, 20/F, Harcourt House, 39 Gloucester Road, Wan Chai, Hong Kong. The report is also available on the LRC's home page at: www.hkreform.gov.hk

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