NON-CONSENSUAL SEXUAL OFFENCES I. NON-CONSENSUAL SEXUAL OFFENCES These offences are intended to protect a person's sexual autonomy. A person should have the right to choose freely whether to participate in any sexual conduct or activity. A. INDECENT ASSAULT A. INDECENT ASSAULT Indecent assault is an offence contrary to section 122 of the Crimes Ordinance (Cap. 200). The maximum punishment is 10 years' imprisonment. An indecent assault is an assault coupled with circumstances of indecency. Some conducts are clearly indecent e.g. touching of the genitals without consent. However, other conducts such as the touching of buttocks or kissing may not always be clear-cut, and such matters as the relationship between the accused and the victim and the background and circumstances leading to the conduct may need to be considered. The prosecution must prove: (1) that the accused intentionally assaulted the victim; (2) that the assault, or the assault and the circumstances accompanying 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. 1. ON AN OVERCROWDED MTR TRAIN, ANOTHER PERSON'S PRIVATE PARTS TOUCH MY BODY. IS THAT AN INDECENT ASSAULT? 1. ON AN OVERCROWDED MTR TRAIN, ANOTHER PERSON'S PRIVATE PARTS TOUCH MY BODY. IS THAT AN INDECENT ASSAULT? It depends on whether the touching is intentional or accidental. If it is intentional and without your consent, it is an assault, and a right thinking member of the society would have regarded a touching of another's body by one's private parts indecent. If the touching is accidental and the contact is the inevitable result of the overcrowding, no assault is committed. We are all treated as consenting to the inevitable personal contact arising from daily life. If however the overcrowding is used as an opportunity to commit an assault, indecent assault is committed. The court will examine all the evidence, including any explanation given by the defendant, whether at the time or subsequently, and the circumstances in which the contact occurred. It will then decide whether the contact was accidental or deliberate. 2. CAN A WOMAN COMMIT INDECENT ASSAULT? 2. CAN A WOMAN COMMIT INDECENT ASSAULT? Yes, a woman can commit indecent assault upon another male or another female. Section 122 of the Crimes Ordinance uses the word "person". Indecent assault is not gender specific. 3. CAN A MAN INDECENTLY ASSAULT HIS WIFE? 3. CAN A MAN INDECENTLY ASSAULT HIS WIFE? Yes. If the wife does not consent to the particular sexual contact, there may be an indecent assault. The question is whether the wife consented to the action in question and, if so, whether what was done was indecent in all the circumstances of the case. Even if the wife did not consent, the husband may still have a defence if he genuinely but mistakenly believed his wife consented to the action in question. 4. WHAT IF CONSENT IS OBTAINED BY FRAUD OR DECEPTION? 4. WHAT IF CONSENT IS OBTAINED BY FRAUD OR DECEPTION? If the victim was deceived about the nature of the act and/or as to the nature of the person doing the act, the consent is not a true consent to the activity in question. An example would be where the defendant leads the victim to believe he will be demonstrating a first aid technique but in reality a sexual assault is intended and takes place. The misrepresentation about the nature of the intended activity means that the victim does not give a true and informed consent to the activity which occurs. There is an indecent assault. Similarly if a person falsely claims to be a doctor and is allowed to carry out an intimate examination which would not have been allowed had the victim known the true situation. B. RAPE B. RAPE 1. ELEMENTS OF THE OFFENCE 1. ELEMENTS OF THE OFFENCE Rape is committed by a man having non-consensual sexual intercourse with a woman. Section 118(3) of the Crimes Ordinance (Cap. 200) provides that 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." The maximum penalty is life imprisonment. In Hong Kong, rape can only be committed by a man upon a woman. 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 and at the time he knows she does not consent or is reckless whether she consents or not. A woman who helps or encourages a man to rape a woman may be charged with aiding and abetting rape. Under the common law, it was conclusively presumed that a boy under 14 years of age is incapable of sexual intercourse. However, pursuant to section 1180 of the Crimes Ordinance (Cap.200), the

presumption of law that a boy under the age of 14 is incapable of sexual intercourse, buggery or bestiality is now abolished. Therefore, a boy under 14 years of age but above 10 years' of age (the age at which criminal liability commences) will be criminally liable for offences involving sexual intercourse. For defendants between 10 years' of age and 14 years' of age, there is another legal doctrine called doli incapax , which requires the prosecution to prove beyond reasonable doubt that the defendant knew that what he was doing was seriously wrong as opposed to being merely naughty or mischievous. A. SEXUAL INTERCOURSE A. SEXUAL INTERCOURSE To amount to rape, there must be penetration of the vagina by the penis. This is why, in Hong Kong, rape can only be committed by a male upon a female. The slightest penetration is enough and completion of the intercourse by the ejaculation of semen is not required. Penetration is a question of fact in each case. Penile penetration of a part of the victim's body other than the vagina, such as the mouth or anus, does not amount to rape, nor does penetration of the vagina by an object or a part of the body other than a penis. B. CONSENT B. CONSENT The essence of rape is the absence of consent to sexual intercourse. The prosecution must prove either that the defendant knew the victim did not consent or that he was reckless whether the victim consented or not. The word "unlawful" in section 118 of the Crimes Ordinance adds nothing to the contemporary definition of rape. Unlawful sexual intercourse occurs where the victim does not consent, the man either knows there is no consent or presses ahead regardless whether she consents or not. Unlawful sexual intercourse does not exclude sexual intercourse that a man has with his wife (marital rape). I. ABSENCE OF CONSENT I. ABSENCE OF CONSENT The prosecution must prove beyond reasonable doubt that there was no consent. Absence of consent does not mean there must have been resistance from the victim. The victim might have been unconscious and so could not consent to sexual intercourse. Consent must be distinguished from submission. A woman threatened with a knife might not resist sexual intercourse out of fear. She has not, in common sense, willingly and freely consented to sexual intercourse. Consent is absent where sexual intercourse is obtained by fraud or deception as to the nature of the act. For example, if a man deceives a girl that the act of intercourse is part of the necessary medical examination, there is no consent. However, if the deception relates not to the nature of the act of intercourse but to the objectives or reasons, consent may not be vitiated. For example, in a case in the Court of First Instance (HKSAR v Chow Kam-wah), the defendant procured sexual intercourse with a superstitious female victim by falsely representing that by having sexual intercourse with him the ghost following the victim would be exorcised. He was charged and convicted not of rape but of another offence of procuring a woman to do an unlawful sexual act by false pretences contrary to section 120(1) of the Crimes Ordinance. II. DEFENDANT IS RECKLESS AS TO WHETHER THE VICTIM CONSENTED II. DEFENDANT IS RECKLESS AS TO WHETHER THE VICTIM CONSENTED A defendant is reckless as to whether the victim consented to sexual intercourse where he could not have cared less whether she consented or not. This is sometimes referred to as pressing ahead regardless of whether the victim consented or not. This is a question of fact for the jury in each case. III. GENUINE BELIEF IN CONSENT III. GENUINE BELIEF IN CONSENT As rape is sexual intercourse without consent, a man who has a genuine belief that the woman was consenting cannot be convicted of rape even where she did not in fact consent. The genuine belief in consent means that the man did not intend to have sexual intercourse without consent. Similarly a genuine belief in consent means that he was not pressing ahead regardless of whether she consented or not. The question for the jury is whether or not there was a reasonable doubt that the defendant subjectively believed there was consent. If he had that belief he must be acquitted even if the jury finds that, objectively, the belief was unreasonable. Realistically however, the more objectively unreasonable the claimed belief is, the less likely the jury will find there was a genuine belief, but the question for the jury is whether the belief was held. IV. WITHDRAWAL OF CONSENT IV. WITHDRAWAL OF CONSENT A woman can withdraw her consent during intercourse. A man who continues with sexual intercourse after the woman has told him to stop commits rape. Rape occurs once the defendant knows consent is withdrawn but nonetheless continues the sexual intercourse. 2. SENTENCE 2. SENTENCE The sentence for each case will depend upon the facts. The courts have held the

following (non-exhaustive) to be aggravating features: Use of violence or weapon Acting not alone but with others Careful planning for the rape Previous convictions for rape or other serious violent or sexual offences The victim is subject to further sexual indignities or perversions Repeated rapes Young victim Physical or mental harm to the victim The offender had broken into or gained access to the place where the victim is living 3. Q&A; 3. Q&A; 1. IS IT TRUE THAT SEXUAL INTERCOURSE WITH A FEMALE UNDER THE AGE OF 16 WOULD BE RAPE EVEN IF SHE CONSENTS TO SEXUAL INTERCOURSE? 1. IS IT TRUE THAT SEXUAL INTERCOURSE WITH A FEMALE UNDER THE AGE OF 16 WOULD BE RAPE EVEN IF SHE CONSENTS TO SEXUAL INTERCOURSE? No. A female under the age of 16 may factually consent to sexual intercourse. That consent means that rape is not committed. However, she must have understood the nature of the act for the consent. This consent may amount to a defence to a charge of rape. Even if there is consent to sexual intercourse, the defendant could be convicted of unlawful sexual intercourse with a girl under 16 years of age contrary to section 124 of the Crimes Ordinance. The offence is punishable with a maximum of 5 years' imprisonment. If the girl is under 13 years of age, section 123 of the Crimes Ordinanceapplies. The maximum penalty under section 123 is life imprisonment. Both section 123 and section 124 are offences of strict liability. Provided sexual intercourse is proved and, as a fact, the girl was at the time under 13 or 16 as the case may be, the defendant will be convicted irrespective of any belief that the girl in question was older than 13 or 16 as the case may be. Alternatively if there is consent to sexual intercourse but the female is under 16 years' of age, there could be a charge of indecent assault contrary to section 122 of the Crimes Ordinance. This offence carries a maximum of 10 years' imprisonment. The consent of a girl under 16 is no defence to a charge of indecent assault as, in law, she cannot consent. It is however a defence if it can be shown that he honestly and reasonably believed that the girl was 16 or over. (see section on 'Indecent Assault'). 2. IS IT RAPE IF I HAVE SEXUAL INTERCOURSE WITH A WOMAN WHO IS ASLEEP? 2. IS IT RAPE IF I HAVE SEXUAL INTERCOURSE WITH A WOMAN WHO IS ASLEEP? Rape is sexual intercourse with a woman without her consent. The accused must be shown to have known she was not consenting or to have been reckless whether she consented or not. As a fact a woman who is sleeping is not in a position to give consent. The sexual intercourse will be rape unless there is a genuine belief in consent. It is hard to see how a defence of genuine belief can succeed in such a situation where the female and the man are strangers to each other. At the very least a man who has sexual intercourse with a woman who is sleeping is reckless whether or not she consents to that sexual intercourse. 3. WHAT IF EITHER PARTY WAS INTOXICATED AT THE TIME OF THE INTERCOURSE? 3. WHAT IF EITHER PARTY WAS INTOXICATED AT THE TIME OF THE INTERCOURSE? Self-induced intoxication whether by alcohol, drugs or a substance is no defence to a charge of rape. Rape is sexual intercourse with a woman who does not consent. The man must know she does not consent or be reckless whether she consents or not. A man who argues that because of self-induced intoxication he did not understand she was not consenting and accordingly went ahead, is at least reckless whether she consents or not. He cannot claim he honestly believed she was consenting and at the same time claim that because of his intoxication he did not understand her protestations she did not want sexual intercourse. Where the victim is intoxicated, the first question is whether or not she consented to sexual intercourse. Her intoxication may mean she was factually unable to consent. If absence of consent is proved, the next question is whether the defendant genuinely believed she was consenting. This is a question of fact in the circumstances of the particular case. A man who plies a woman with alcohol, drugs or a substance as part of a plan to have sexual intercourse with her in any event, commits rape when that sexual intercourse occurs. 4. CAN A HUSBAND RAPE HIS WIFE? 4. CAN A HUSBAND RAPE HIS WIFE? Yes. section 117(1B) of the Crimes Ordinance makes it clear that "'unlawful sexual intercourse' does not exclude sexual intercourse that a man has with his wife." There must first of all be proof of the sexual intercourse giving rise to the allegation of rape and the absence of consent from the wife. The prosecution must then prove beyond reasonable doubt either that the husband knew that the wife was not consenting to that intercourse or that he was reckless whether or not she consented. This will be a question of fact in each case. Simply because there has been consent to

sexual intercourse in the past does not inevitably mean there is consent this time. C. BUGGERY C. BUGGERY The act of buggery itself is not illegal in Hong Kong. It is now settled in law that consenting men over 21, who commit buggery, do not commit an offence under the current law. A person who commits an act of buggery is not punishable unless he or she has committed buggery in a prohibited circumstance, e.g. without the consent of the other party or buggery committed with an underage girl or boy. Since the decision in Leung TC William Roy v Secretary for Justice and on appeal, the Courts have ruled various homosexual offences as being unconstitutional (see below).). Also see the decision in Yeung Chu Wing v Secretary for Justice. In a recent decision by the Court of Appeal in HKSAR v Yeung Ho Nam, the court noted that there needs to be a proper and effective review of the laws and policies that discriminate against same-sex relationships to reflect equality between heterosexual and homosexual relationships. 1. HOMOSEXUAL BUGGERY 1. HOMOSEXUAL BUGGERY A. Homosexual buggery with or by a man under 16 The law used to be that a man who (a) commits buggery with a man under the age of 16 or (b) being under the age of 16 commits buggery with another man, shall be guilty of an offence under section 118C of the Crimes Ordinance (Cap. 200). This is no longer the case as a man who, being under the age of 16 commits buggery with another man, no longer commits an offence. The maximum penalty used to be life imprisonment. After the decision of Yeung Chu Wing v Secretary for Justice, the maximum penalty for the offence is now (1) life imprisonment if the offence committed is with a boy under 13, and (2) 5 years' imprisonment if the offence committed with a boy under 16 but above 13. B. Procuring others to commit homosexual buggery The Courts have held that this offence under section 118G of the Crimes Ordinance is unconstitutional. 2. ASSAULT WITH INTENT TO COMMIT BUGGERY 2. ASSAULT WITH INTENT TO COMMIT BUGGERY Assault with intent to commit buggery is an offence contrary to section 118B of the Crimes Ordinance (Cap. 200). The maximum penalty is 10 years' imprisonment. An assault is any act by which a person intentionally or recklessly causes another person to apprehend immediate and personal violence. Aiming a blow at a person with a fist is an assault even if the blow misses. Once assault is proved, the prosecutor has to show that the defendant has an additional intention to commit buggery with the victim in question. The intention to commit buggery must be present at the time the assault occurs. "Buggery" in section 118B is not limited to homosexual buggery. It also consists of anal intercourse by a male with a female. 3. OTHER HOMOSEXUAL SEXUAL OFFENCES 3. OTHER HOMOSEXUAL SEXUAL OFFENCES A. Gross indecency with or by man under 16 The Courts have held that this offence under section 118H of the Crimes Ordinance (Cap. 200) is unconstitutional. B. Gross indecency by man with man otherwise than in private The Courts have held that this offence under section 118J of the Crimes Ordinance (Cap. 200) is unconstitutional. C. Procuring gross indecency by man with man The Courts have held that this offence under section 118K of the Crimes Ordinance (Cap. 200) is unconstitutional. D. PROCURING AN UNLAWFUL SEXUAL ACT BY THREATS OR INTIMIDATION D. PROCURING AN UNLAWFUL SEXUAL ACT BY THREATS OR INTIMIDATION It is an offence contrary to section 119 of the Crimes Ordinance (Cap. 200) to procure another person by threats or intimidation to do an unlawful sexual act. The maximum penalty for this offence is imprisonment for 14 years. An unlawful sexual act is defined as: unlawful sexual intercourse; buggery or an act of gross indecency with a person of the opposite sex with whom that person may not have lawful sexual intercourse; or buggery or gross indecency with a person of the same sex. The offence has no age requirement, nor is it gender specific. The threats or intimidation must bring about an unlawful sexual act. For example, threatening to tell others of previous sexual acts in order to have sexual intercourse or further sexual intercourse will breach section 119. Another example would be threatening to post nude photographs if further intercourse is not consented to. Section 119 offences are often related to illegal money lending. The debtor who cannot repay what has been borrowed may be threatened or intimidated into performing sexual activity to settle the outstanding loan and interest. The borrower is literally forced into prostitution. E. VOYEURISM E. VOYEURISM Voyeurism often involves an act of non-consensual observation of another person or visual recording (such as photograph, videotape or digital image) of another person for a sexual purpose or pleasure. In Hong Kong, there is currently no specific legislation that directly deals

with acts of voyeurism. Instead, such activities are now governed by different legislations depending on the nature and circumstance of the activities. 1. UPSKIRT PHOTOGRAPHY 1. UPSKIRT PHOTOGRAPHY One of the most common forms of voyeurism is upskirting, the act of taking a photograph of underneath someone's skirt without their consent. Given that these acts often involve the use of computer (which includes any electronic devices such as mobile phones and tablets), offenders are often charged with obtaining access to a computer with a view to dishonest gain for himself or another, contrary to section 161(1)(c) of the Crimes Ordinance (Cap. 200). For an offence contrary to section 161(1)(c) of the Crimes Ordinance (Cap. 200), the maximum punishment is 5 years' imprisonment. In the recent decision by the Court of Final Appeal in HKSAR v Cheng Ka Yee & Ors, it was held that the offence of obtaining access to a computer with a view to dishonest gain for himself or another under section 161(1)(c) of the Crimes Ordinance does not apply to the use by a person of his or her own computer, not involving the access to another's computer. This in turn means that a person who uses his or her own computer (regardless of being in a public or private place) to commit acts not involving access to another's computer (i.e. through hacking) will not be liable for an offence under section 161. The implication of the decision of HKSAR v Cheng Ka Yee & Ors is that a person using his smartphone to record or take photos of a woman's skirt will not and cannot be prosecuted by the offence of section 161 because the person would be using his own device without involving access to another's computer. 2. CALL FOR REFORM 2. CALL FOR REFORM In light of the decision of HKSAR v Cheng Ka Yee & Ors, offences involving upskirting may be prosecuted for: disorderly conduct in a public place pursuant to section 17B of the Public Order Ordinance (Cap. 245); loitering pursuant to section 160 of the Crimes Ordinance (Cap. 200); or common law offence of outraging public decency (see section on Acts Outraging Public Decency). The maximum punishment for: disorderly conduct in a public place is a fine of $5000 and 12 months' imprisonment; loitering is 2 years' imprisonment; common law offence of outraging public decency is 7 years' imprisonment. However, these offences require the element of "public" and are inappropriate charges against offences that happen in a private setting. As a result, the Law Reform Commission of Hong Kong proposes that a specific offence be created to regulate upskirt photography along with an offence of voyeurism to be introduced. SEXUAL OFFENCES TO PROTECT VULNERABLE PERSONS II. SEXUAL OFFENCES TO PROTECT VULNERABLE PERSONS These offences seek to protect persons who are vulnerable to sexual exploitation or who may not adequately understand the nature or consequences of sexual activity. Vulnerable persons generally include persons under 16 years of age and mentally incapacitated persons. A. SEXUAL OFFENCES INVOLVING YOUNG PERSONS OR CHILDREN A. SEXUAL OFFENCES INVOLVING YOUNG PERSONS OR CHILDREN 1. UNLAWFUL SEXUAL INTERCOURSE WITH A GIRL UNDER 13 YEARS' OF AGE 1. UNLAWFUL SEXUAL INTERCOURSE WITH A GIRL UNDER 13 YEARS' OF AGE Unlawful sexual intercourse with a girl under 13 years' of age is an offence contrary to section 123 of the Crimes Ordinance (Cap. 200). The maximum punishment is life imprisonment. Section 123 offences are more serious than section 124 offences, which deals with girls under 16 years' of age, because of the younger age of the girl. For offences where "sexual intercourse" needs to be proved, it is not necessary to prove ejaculation. The offence is complete upon proof of penetration of the vagina by the penis. The offence is complete upon proof of sexual intercourse with a girl and proof that at the time of the sexual intercourse the girl was under 13 years of age. The fact that the girl consented and/or that the defendant believed the girl was over 13 years' of age are not defences to this charge. The offence is an absolute liability offence. The objective of the legislation is the protection of girls under 13 years of age. The emphasis is upon deterrence. Belief that the girl was over 13 and/or her consent to sexual intercourse may however be relevant to sentence, though the relevance may not be significant because of the emphasis upon the protection of extremely young girls. 2. UNLAWFUL SEXUAL INTERCOURSE WITH A GIRL UNDER 16 YEARS' OF AGE 2. UNLAWFUL SEXUAL INTERCOURSE WITH A GIRL UNDER 16 YEARS' OF AGE Unlawful sexual intercourse with a girl under 16 years' of age is an offence contrary to section 124 of the Crimes Ordinance (Cap. 200). The maximum punishment is 5 years' imprisonment. For offences where "sexual intercourse" needs to be proved, it is not

necessary to prove ejaculation. The offence is complete upon proof of penetration of the vagina by the penis. The offence is complete upon proof of sexual intercourse and proof that at the time of the sexual intercourse the girl was under 16 years' of age. The fact that the girl consented and/or that the defendant believed the girl was over 16 years' of age are not defences to this charge. The offence is an absolute liability offence. The objective of the legislation is the protection of girls under 16 years of age. These matters may however be relevant in mitigation of sentence. It is, however, a defence to a charge under section 124 where the man believes the girl to be his wife and has reasonable cause for that belief even if the "marriage" is invalid because the "wife" is under 16 years of age. This is a narrow defence. It is dependent upon there having been a marriage which is invalid under section 27 of the Marriage Ordinance (Cap. 181) because the girl is under 16 years' of age. It is not enough for the man simply to claim a belief in a marriage, there must be reasonable cause. The burden of showing reasonable cause for the claimed belief is upon the defendant. This statutory defence only applies to offences under section 124 of the Crimes Ordinance. Because the statutory defence will rarely, if ever, be established, in reality, section 124 is an offence of absolute liability. 3. BUGGERY WITH A GIRL UNDER THE AGE OF 21 3. BUGGERY WITH A GIRL UNDER THE AGE OF 21 Buggery with a girl under the age of 21 is, currently, an offence contrary to section 118D of the Crimes Ordinance(Cap. 200). The maximum penalty is life imprisonment. "Buggery" is sexual intercourse by way of the anus by a man with another man. Section 118D makes the same conduct with a girl under 21 years' of age an offence. The offence is committed where there is penetration of the anus by the penis. The slightest penetration is sufficient: ejaculation is not necessary. Whether there has been penetration is a question of fact. Whether or not there is consent to the buggery is irrelevant. Provided penetration is proved and the girl was under 21 years' of age at the time, the offence is committed. Buggery may be seen as equivalent to sexual intercourse in the traditional sense of those words. Provided there is consent, sexual intercourse between a man and a woman aged 16 is not unlawful. Arguments may, therefore, arise whether section 118D is unconstitutional insofar as it applies to a girl aged 16 or above but below 21, because it discriminates unfairly between sexual intercourse and buggery. It may be suggested that the different age limits for permissible sexual intercourse and permissible buggery with a girl infringe the right of equality contained in the Basic Law and in the Hong Kong Bill of Rights Ordinance, Cap. 383. This point was expressly left open in Leung T C William Roy v Secretary for Justice, a case involving section 118C of the Crimes Ordinance. Arguments may similarly arise about whether section 118D is an absolute liability offence in view of an appeal case in Court of Final Appeal (Hin Lin Yee v HKSAR). Sentencing considerations Each case will depend upon its own facts. Generally, the following factors will be considered upon sentence: Custodial sentences are normally imposed. The age of the girl is the most relevant aspect for sentencing purposes. The larger the age difference between the defendant and the girl, the more severe the sentence. A defendant's genuine mistaken belief as to the victim's age is relevant to sentencing. A more severe sentence will be imposed where the defendant knew the victim's age and, despite that, continued his action. 4. Q&A; 4. Q&A; 1. WILL I COMMIT AN OFFENCE IF I BELIEVE THE UNDERAGE GIRL IS OVER THE PRESCRIBED AGE? 1. WILL I COMMIT AN OFFENCE IF I BELIEVE THE UNDERAGE GIRL IS OVER THE PRESCRIBED AGE? Yes. Under the current law unlawful sexual intercourse contrary to sections 123 and 124 of the Crimes Ordinanceare offences of absolute liability. Once it is proved that the girl in question was under 13 years of age for a section 123 charge, or under 16 years of age for a section 124 charge, when the sexual intercourse took place, you are guilty of the offence whether or not you were aware of the girl's age. Your belief that the girl was over 13 years of age, or over 16 years of age as the case may be, is no defence. However, in relation to the offence of indecent assault contrary to section 122 of the Crimes Ordinance, while a person under the age of 16 cannot in law give any consent which would prevent an act being an assault, an honest and reasonable belief that the girl was aged 16 or over is a defence due to the Court of Final Appeal case of HKSAR v Choi Wai Lun. 2. WHAT IF THE UNDERAGE GIRL HERSELF CONSENTED TO THE SEXUAL INTERCOURSE? 2. WHAT IF THE UNDERAGE GIRL

HERSELF CONSENTED TO THE SEXUAL INTERCOURSE? You will still commit an offence. Unlawful sexual intercourse offences with underage girls are concerned with the act of sexual intercourse and the age of the girl when the act occurred, not with whether or not the girl consented. If she did not consent, you could be charged with rape contrary to section 118 of the Crimes Ordinance. 3. IF I AM DRUNK AND LOSE SELF-CONTROL, WILL I BE LIABLE? 3. IF I AM DRUNK AND LOSE SELF-CONTROL, WILL I BE LIABLE? Yes. Self-induced intoxication (such as drinking alcohol) is not a defence to unlawful sexual intercourse. The questions are whether sexual intercourse occurred and the age of the girl at that time. B. ABDUCTION OF UNMARRIED GIRL UNDER 18 FOR SEXUAL INTERCOURSE B. ABDUCTION OF UNMARRIED GIRL UNDER 18 FOR SEXUAL INTERCOURSE It is an offence contrary to section 127 of the Crimes Ordinance (Cap. 200) for a person to take an unmarried girl under the age of 18 out of the possession of her parent or guardian against the will of the parent or guardian with the intention that she shall have unlawful sexual intercourse with men or with a particular man. The word “person” in section 127 means that the offence can be committed by a man or by a woman, The offence carries a maximum sentence of 7 years imprisonment. A person will only be liable under this section if the following elements are proved beyond reasonable doubt: The girl is not married. The girl is in the possession of her parent or guardian (any person having the lawful care or charge of the girl) at the time the offence was committed. Possession is a question of fact and depends on the degree of control over the girl by her parents or guardian. “Takes out of possession” and “against the will” of the parent means some conduct by the defandant amounting to a substantial interference with the possession of a parent over his or her child. The conduct in question need not be by force and it is immaterial whether the girl consents to it or not. Inducement or persuasion by the defandant to the girl to leave her parents is sufficient. The defandant’s conduct will not amount to abduction if parents’ consent is obtained unless fraud or misrepresentation is involved. The girl is under 18 at the time the offence is committed. The defandant intends the girl to have unlawful sexual intercourse with any man. 1. WHAT AMOUNTS TO TAKING “A GIRL OUT OF THE POSSESSION OF HER PARENTS OR GUARDIAN”? 1. WHAT AMOUNTS TO TAKING “A GIRL OUT OF THE POSSESSION OF HER PARENTS OR GUARDIAN”? The ‘taking’ need not be by force, either actual or constructive. A girl leaving her parents or guardian as a result of persuasion, inducement or blandishment is sufficient. It is immaterial whether the girl consents or not. For example, where a man persuades a girl to live with him by promising to give her something, this may amount to ‘taking’ her away. 2. IF THE GIRL IS NOT UNDER THE CONTROL OF HER PARENTS OR GUARDIAN AT THE TIME THE OFFENCE IS COMMITTED, WILL I STILL BE LIABLE? 2. IF THE GIRL IS NOT UNDER THE CONTROL OF HER PARENTS OR GUARDIAN AT THE TIME THE OFFENCE IS COMMITTED, WILL I STILL BE LIABLE? This will depend upon the particular case. There must be substantial interference with the possession of a parent or guardian over his or her child. Whether a girl is in the possession of her parent or guardian is a question of fact. A girl could still be in the possession of her parent or guardian while she is away from home if she intends to return. For example, where a girl is walking in the streets and she is forced onto a car and taken away, this will amount to a substantial interference with the possession of the parent. That conduct could also amount to the common law offences of false imprisonment or kidnapping: taking a person from the place where they are by force and against their will. Kidnapping is punishable by a maximum of 7 years’ imprisonment. If there is doubt about whether the girl was in the possession of her parents and the removal is by force and without her consent, false imprisonment or kidnapping would more likely be charged. 3. WILL I BE EXCUSED IF I DO NOT HAVE ANY CORRUPT MOTIVE WHEN TAKING AN UNMARRIED GIRL UNDER 18 AGAINST THE WILL OF HER PARENTS? 3. WILL I BE EXCUSED IF I DO NOT HAVE ANY CORRUPT MOTIVE WHEN TAKING AN UNMARRIED GIRL UNDER 18 AGAINST THE WILL OF HER PARENTS? Yes. Section 127 requires the taking to be with the intention the girl shall have sexual intercourse with men or with a particular man. That is the required corrupt motive or mens rea (guilty mind). There must be the sexual intercourse motive. If the prosecution cannot prove that was the defandant’s purpose at the time of the taking, the defendant must not be found guilty. For example, persuading a girl under 18 years of age to leave her parents because of violence she has received from a parent is

not within section 127. The purpose is to remove the girl from an abusive parent and not for the purpose of her having sexual intercourse with men or a particular man. In this situation there is an evidential burden upon the defendant to raise and support the non-corrupt purpose. The prosecution will then have to negative the claimed non-corrupt purpose by proving that the removal was for purpose of the girl having sexual intercourse with men or with a particular man. 4. WHAT IF THE GIRL SUGGESTS GOING AWAY WITH ME AND I TAKE MERELY THE PASSIVE PART OF YIELDING TO HER SUGGESTION? 4. WHAT IF THE GIRL SUGGESTS GOING AWAY WITH ME AND I TAKE MERELY THE PASSIVE PART OF YIELDING TO HER SUGGESTION? It depends upon the purpose of the girl leaving her parents. If the purpose is for her to have sexual intercourse with men or a particular man, helping her leave her parents at her suggestion could bring you into section 127. In reality a boy who helps his girlfriend who is 16 years of age or over to run away from her parents' home so that they can live together, would unlikely be charged with a section 127 offence. It is not an offence to have sexual intercourse with a girl aged 16 or over. This is a relevant consideration in section 127 situations. Section 127 is an ulterior intent situation. There must be abduction. That abduction must be for the purpose of the girl having unlawful sexual intercourse with men or a particular man. C. INDECENCY WITH CHILDREN UNDER 16 C. INDECENCY WITH CHILDREN UNDER 16 It is an offence contrary to section 146 of the Crimes Ordinance (Cap. 200) for a person to commit an act of gross indecency with or towards a child under the age of 16, or to incite a child under the age of 16 to commit such an act with or towards him/her. The offence is not gender specific and can be committed both by a man and by a woman. The maximum penalty for this offence is 10 years' imprisonment. The act committed by the defendant must be grossly indecent. This means that the act or acts in question must be grossly indecent applying the standards of right thinking members of the community. "Gross indecency" is more than merely indecent. Whether the conduct is grossly indecent will depend upon the circumstances of the particular case. In a case it was held that a teacher who had kissed his student on the face and lips did not commit an offence under section 146. His act, although indecent, was not grossly indecent according to the standards of contemporary society. A section 146 offence is committed either by the defendant doing a grossly indecent act towards the child or by inciting the child to commit a grossly indecent act with or towards the defendant. "Incite" means to "encourage". Persons who invite or encourage the child to commit a grossly indecent act upon them commit an offence just as if they had done a grossly indecent act towards the child. Even though the defendant might remain passive during the activity, a section 146 offence is committed if the grossly indecent activity by the child upon the defendant follows invitation or encouragement by the defendant. An example would be where the defendant exposes his or her private parts and invites the child to touch those private parts. It is immaterial whether the child consented to the acts which were done to him or her or agreed to the acts he or she was invited to do upon the defendant. Once the acts and the age of the child are proved, the defendant will be convicted. Section 146(3) provides a statutory defence if the person who commits an act of gross indecency with or towards a child or incites a child to commit such an act with or towards him or her believes on reasonable grounds that he or she is married to the child. This is a narrow defence and is similar to the defence provided by section 124 of the Crimes Ordinance for unlawful sexual intercourse with a girl under 16 years' of age (but over 13 years of age). As a result of the Court of Final Appeal case of HKSAR v Choi Wai Lun, an honest and reasonable belief that the girl was aged 16 or over may now be an arguable defence. 1. WILL I COMMIT AN OFFENCE IF THE CHILD CONSENTS TO MY INDECENT ACTS? 1. WILL I COMMIT AN OFFENCE IF THE CHILD CONSENTS TO MY INDECENT ACTS? Yes. You will still be liable. Section 146(2) specifically states that the child's consent to gross indecency is not a defence. All that is required is an act of gross indecency with or towards a person who at that time was under 16 years' of age. 2. IF MY INTENTION IS NOT WITH INDECENT MOTIVE, FOR EXAMPLE, SEXUAL GRATIFICATION, WILL MY ACTS STILL BE CONSIDERED AS INDECENT? 2. IF MY INTENTION IS NOT WITH INDECENT MOTIVE, FOR EXAMPLE, SEXUAL GRATIFICATION, WILL MY ACTS STILL BE CONSIDERED AS INDECENT? Yes. Sexual gratification is not a pre-condition for section 146 gross indecency. It does not, therefore, follow that the

absence of sexual gratification means there cannot be an act of gross indecency. The question is whether there was or was not an act of gross indecency with or towards a child under 16 years of age. For example, the Court has held that making a child change clothes, hold up her skirt, kneel on a bed and raise her buttocks in the air whilst the defendant video-recorded the process satisfied the requirements of section 146. Even though the person making the video recording claimed not to have done so for sexual gratification, the activity was grossly indecent and he had brought that about. He was convicted under section 146. The conviction was upheld on appeal. 3. I DID NOT COMMIT ANY ACT TOWARDS THE CHILD. I ONLY PASSIVELY ALLOWED A CHILD TO KEEP DOING THE INDECENT ACT IN QUESTION. AM I LIABLE? 3. I DID NOT COMMIT ANY ACT TOWARDS THE CHILD. I ONLY PASSIVELY ALLOWED A CHILD TO KEEP DOING THE INDECENT ACT IN QUESTION. AM I LIABLE? If, as a fact, you invited or encouraged the child to commit a grossly indecent act upon you, you are liable even if you remain passive during the act. The question is whether in the circumstances of the particular case your conduct amounted to an invitation to the child to do or to continue the activity in question. D. PROCURING A GIRL UNDER 21 D. PROCURING A GIRL UNDER 21 It is an offence contrary to section 132(1) of the Crimes Ordinance (Cap. 200) to procure a girl under 21 years' of age to have unlawful sexual intercourse in Hong Kong or elsewhere with a third person. The maximum penalty for this offence is 5 years' imprisonment. To "procure" is to produce or bring about by endeavour. There must be a causal link between what was done by the defendant and the unlawful sexual intercourse with a third person. There will be no "procurement" if the girl acted of her own free will. For example, there will be no procurement if a woman is already a prostitute. Unlawful sexual intercourse must be proved. As with rape, the slightest penetration of the vagina by the penis is sufficient, and ejaculation is not required. E. CAUSING OR ENCOURAGING PROSTITUTION OF GIRL OR BOY UNDER 16 E. CAUSING OR ENCOURAGING PROSTITUTION OF GIRL OR BOY UNDER 16 It is an offence contrary to section 135 of the Crimes Ordinance (Cap. 200) for a person to cause or encourage the prostitution of, or an unlawful sexual act with a girl or boy under the age of 16 for whom that person is responsible. The maximum punishment is imprisonment for 10 years. "Prostitution" means a man or a woman offering his or her body commonly for acts of lewdness in return for payment. Prostitution does not require sexual intercourse though frequently that will occur. The essence of prostitution is the offer of the body for acts of lewdness in return for payment. A person is responsible for the girl or boy if he or she is her parent or guardian, has actual possession or control of the girl or boy, or has the custody, charge or care of her/him. The ordinary meaning of "encourage" is suggesting by words and/or by actions that something should happen. The prosecution must prove that the defendant actively encouraged the prostitution or the unlawful sexual act. This is a question of fact in each case. Prostitution may be caused or encouraged by knowingly allowing the boy or girl to consort with prostitutes or enter or continue in the employment of any prostitute or person of known immoral character. Allowing a girl or boy under the age of 16 for whom the defendant is responsible to work or to continue to work in premises where the defendant knows that prostitution or unlawful sexual acts take place would likely be seen as encouragement for the purposes of section 135. F. CHILD PORNOGRAPHY F. CHILD PORNOGRAPHY 1. ELEMENTS OF THE OFFENCE 1. ELEMENTS OF THE OFFENCE "Child" means a person under the age of 16 years of age. "Child pornography" is defined as any photograph, film, computer generated image or other visual depiction that is a pornographic depiction of a person who is or is depicted as being a child. Pornographic depiction means a visual depiction: of a person as being engaged in explicit sexual conduct, whether or not the person is in fact engaged in such conduct; or that depicts in a sexual manner or context the genitals or anal region of a person or the breast of a female person, but does not include a depiction for a genuine family purpose. The pornography may be by electronic or other means, and includes data stored in a form that is capable of being converted into a photograph, film, image, such as a computer file for example. It is an offence contrary to section 3 of the Prevention of Child Pornography Ordinance (Cap. 579), for any person to: 1. (Section 3(1)) Print, make, produce, reproduce, copy, import or export any child pornography, The maximum penalty is a fine of $2,000,000 and imprisonment for 8 years

(on summary conviction a fine of $1,000,000 and imprisonment for 3 years); 2. (Section 3(2)) Publish any child pornography, The maximum punishment is a fine of $2,000,000 and imprisonment for 8 years (or on summary conviction a fine of $1,000,000 and imprisonment for 3 years); 3. (Section 3(3)) Possess any child pornography (unless he or she is the only person pornographically depicted in the child pornography), The maximum penalty is a fine of $1,000,000 and imprisonment for 5 years (or on summary conviction a fine of $500,000 and imprisonment for 2 years); 4. (Section 3(4)) Publish or cause to be published any advertisement that conveys or is likely to be understood as conveying the message that any person has published, publishes or intends to publish any child pornography, The maximum punishment is a fine of $2,000,000 and imprisonment for 8 years (or on summary conviction a fine of $1,000,000 and imprisonment for 3 years). A person “publishes” child pornography if he or she: distributes, circulates, sells, hires, gives or lends the child pornography to another person; or shows the child pornography in any manner whatsoever to another person including publicly displaying the child pornography in any public street or pier, or public garden or any public place where the public are permitted to have access. 2. DEFENCES 2. DEFENCES It is a defence to the offences under section 4 of the Prevention of Child Pornography Ordinance (Cap. 579) if it is established by the Defendant on a balance of probabilities that: the depiction has artistic merit; or the thing alleged to constitute child pornography is or was at the time the alleged offence was committed classified as a Class I or a Class II article under the Control of Obscene and Indecent Articles Ordinance (Cap. 390). Except for an offence of possession of child pornography under section 3(3), it is established by the defendant on a balance of probabilities that: the act done was for a genuine educational, scientific purpose; the act subject to the charge otherwise served the public good and did not extend beyond what served the public good; that he or she had not seen the child pornography and did not know or have any reasonable cause to suspect it to be child pornography; or that he or she had: taken all such steps as were reasonable and practical in the circumstances of the case to ascertain the age of the person pornographically depicted in the child pornography when originally depicted; if able to influence in any way how the person was depicted, had taken all such steps as were reasonable and practicable in the circumstance of the case to ensure that the person was not depicted as a child; and believed on reasonable grounds that the person depicted was not a child when originally depicted and that the person was not depicted as a child. For the offence of possession of child pornography (section 3(3)), it is also a defence for the defendant to establish on a balance of probabilities that: possession of the child pornography was for a genuine educational, scientific or medical purpose; possession of the child pornography otherwise served the public good and did not extend beyond what served the public good; he or she had not seen the child pornography and did not know, nor suspect, it to be child pornography; he or she had not asked for any child pornography and, within a reasonable time after it came into possession endeavoured to destroy it; or he or she believed that the person pornographically depicted in the child pornography was not a child when originally depicted and that the person was not depicted as a child. The defences to possession of child pornography (section 3(3)) are separate from the other child pornography defences provided by section 4. The defence to possession of child pornography provided by section 4(3)applies only to section 3(3) offences. The defence under section 4(3) is only established if the defendant adduces sufficient evidence to raise an issue of the truth of the facts relied upon and the contrary is not proved by the prosecution beyond reasonable doubt. The other defences in section 4 place a burden upon the defendant to prove the facts relied upon on the balance of probabilities. 3. Q&A; 3. Q&A; 1. MY FRIEND GAVE ME A COMPUTER DISC WITHOUT TELLING ME WHAT IT CONTAINED. WHEN I OPENED THE FILES ON THE DISC ON MY COMPUTER I REALIZED THEY CONTAINED NAKED CHILDREN. HAVE I COMMITTED AN OFFENCE? 1. MY FRIEND GAVE ME A COMPUTER DISC WITHOUT TELLING ME WHAT IT CONTAINED. WHEN I OPENED THE FILES ON THE DISC ON MY COMPUTER I REALIZED THEY CONTAINED NAKED CHILDREN. HAVE I COMMITTED AN OFFENCE? Assuming the computer CD contains child pornography, you are in possession of child pornography, contrary to section 3(3) of the Prevention of Child Pornography Ordinance (Cap. 579) . As you have viewed the computer

disc you cannot argue that you had not seen the child pornography and you did not know or suspect the computer disc contained child pornography. However section 4(3) of the Ordinance provides a possible defence. The first thing you have to establish is that you had not asked your friend to provide you with child pornography. Assuming the computer disc was a gift from a friend and he did not tell you what it contained, the first requirement of the defence will likely be established. The defence under section 4(3) requires that within a reasonable time of you realising the computer disc contained child pornography you endeavoured to destroy it. Whether you endeavoured to destroy the child pornography, for example by deleting the files or destroying the disc is a question of fact. Whether you did that within a reasonable time is also a question of fact. If you watched the disc until its end, you would not have endeavoured to destroy the child pornography within a reasonable time. 2. ARE THE POLICE ALLOWED TO SEARCH MY PREMISES FOR CHILD PORNOGRAPHY? 2. ARE THE POLICE ALLOWED TO SEARCH MY PREMISES FOR CHILD PORNOGRAPHY? Yes, the police or the Customs and Excise may apply to a magistrate under section 5 of the Prevention of Child Pornography Ordinance (Cap. 579) for a warrant to enter your premises to search and seize anything in respect of which an offence under section 3 of the Ordinance has been or is being or is about to be committed. Anything which contains evidence of the commission of offences under section 3 of the Ordinance may also be seized. 3. CAN I HAVE PHOTOGRAPHS OR ARTICLES CLASSIFIED TO DETERMINE WHETHER OR NOT THEY ARE LIABLE TO AN OFFENCE RELATING TO CHILD PORNOGRAPHY? 3. CAN I HAVE PHOTOGRAPHS OR ARTICLES CLASSIFIED TO DETERMINE WHETHER OR NOT THEY ARE LIABLE TO AN OFFENCE RELATING TO CHILD PORNOGRAPHY? Yes. Photographs or articles may be submitted to the Obscene Articles Tribunal (“OAT”) for classification in accordance with section 13 of the Control of Obscene and Indecent Articles Ordinance (Cap. 390). If the OAT classifies the photographs or articles as Class I (meaning it is neither obscene nor indecent) or Class II (meaning it is indecent), this is a defence to charges under section 3 of the Prevention of Child Pornography Ordinance(Cap. 579). The OAT may impose conditions or restrictions relating to the publication of a Class II articles, for example to how they may be sold. Photographs or articles classified as Class III by the OAT cannot be published. 4. IS IT AN OFFENCE TO WATCH A LIVE PORNOGRAPHIC PERFORMANCE BY A CHILD? 4. IS IT AN OFFENCE TO WATCH A LIVE PORNOGRAPHIC PERFORMANCE BY A CHILD? It is an offence under section 138A of the Crimes Ordinance (Cap. 200) to use, procure or offer another person who is under the age of 18 for making pornography, or for a live pornographic performance, in which that other person is or is to be pornographically depicted. If the offence is committed in relation to a person under the age of 16, the maximum penalty is a fine of $3,000,000 and imprisonment for 10 years. If the person pornographically depicted is aged 16 or above but under 18, the maximum penalty of a fine of $1,000,000 and imprisonment for 5 years. It is a defence to a charge under section 138A if the person pornographically depicted is above the age of 16 but under 18, that person consented to being so depicted and the pornography was made or performed solely for the personal use of the Defendant and the person depicted. Though the prohibited activities within section 138A do not cover watching a live pornographic performance by a child, depending on the extent of involvement, one who participates in watching the live performance may be guilty of the offence of aiding and abetting the commission of the section 138A offence. SEXUAL OFFENCES TO PROTECT PUBLIC MORALITY III. SEXUAL OFFENCES TO PROTECT PUBLIC MORALITY These offences seek to promote a social or moral goal by restricting sexual activities which clearly violate the generally accepted moral standards of society. A. INDECENCY A. INDECENCY 1. GROSS INDECENCY 1. GROSS INDECENCY A. It was an offence contrary to section 118H of the Crimes Ordinance (Cap. 200) for a man to commit an act of gross indecent with a man under the age of 21, or being under the age of 21 to commit an act of gross indecency with another man. B. It was an offence contrary to section 118J of the Crimes Ordinance (Cap. 200) for a man to commit an act of gross indecency with another man other than in private. Both offences have been held unconstitutional and will not be further discussed. 2. GROSS INDECENCY BY A PERSON WITH A MENTALLY INCAPACITATED PERSON 2. GROSS INDECENCY BY A PERSON WITH A MENTALLY INCAPACITATED PERSON It used to be an offence contrary to section 118I of the Crimes Ordinance (Cap. 200) for a man to commit an act of gross indecency with another

man who is a mentally incapacitated person. However, pursuant to Yeung Chu Wing v Secretary for Justice, the offence under section 118I is now gender-neutral and applies to both man and woman. In other words, it is an offence contrary to section 118I for a person to commit an act of gross indecency with another person who is a mentally incapacitated person. The maximum penalty for the offence is 2 years imprisonment. A mentally incapacitated person is a mentally handicapped or disordered person whose disorder or handicap makes that person incapable of living an independent life or guarding against serious exploitation. A person who does not know and has no reason to suspect that the other person is mentally handicapped does not commit an offence under section 118I. Knowledge is a question of fact. The court will look at all the circumstances of the case, including anything the defendant says and the relationship between the parties, when considering whether knowledge is proved. Gross indecency is not defined in the Crimes Ordinance (Cap. 200). It will be for the court to decide in each case whether there is gross indecency applying the standard of right thinking persons in contemporary society. This means the definition of gross indecency is flexible and reflects changing standards within society. 3. PROCURING GROSS INDECENCY BY MAN WITH MAN 3. PROCURING GROSS INDECENCY BY MAN WITH MAN It was an offence contrary to section 118K of the Crimes Ordinance (Cap. 200) to procure a man to commit an act of gross indecency with another man. This offence has now been held to be unconstitutional. B. ACTS OUTRAGING PUBLIC DECENCY B. ACTS OUTRAGING PUBLIC DECENCY It is an offence at common law for a person to do an act or acts which outrage public decency. The maximum punishment for the offence is 7 years imprisonment. As the offence is a common law offence, there is no specified punishment in any Ordinance in Hong Kong. The maximum punishment of 7 years imprisonment is provided by section 101I of the Criminal Procedure Ordinance (Cap. 221) which sets out the maximum penalty for offences which are not created by a Hong Kong Ordinance. The offence is intended to prevent the corruption of the mind and the destruction or erosion of values of decency, morality and good order. The focus is upon the defendant’s action and its affect upon members of the public. In considering the affect upon members of the public, the courts apply the standards of right thinking members of the community. In general, the offence applies to all grossly scandalous behaviour or behaviour that openly outrages indecency or is offensive and disgusting, or is injurious to public morals by tending to corrupt them. The prosecution must prove that the activity complained of was committed in public. That means the offence must be committed in circumstances where there is a real possibility of members of the public witnessing the act. What is done must be sufficiently lewd, obscene or disgusting to be an outrage to public decency. It is not necessary for the prosecution to prove that persons who witnessed the act were outraged. Though the prosecution can call evidence from persons who witnessed the act, ultimately the question of wheter the act outrages public decency is for the court trying the case. It is not necessary to prove that the defendant intended to outrage public decency or was reckless whether or not the public would be outraged. It is sufficient for the prosecution to prove the defendant intended to do the act which gives rise to the allegation of outraging pubic decency. Example of this offence includes indecent exposure in public. C. OFFENCES RELATING TO PROSTITUTION C. OFFENCES RELATING TO PROSTITUTION The word “prostitute” is defined by section 117(1) of the Crimes Ordinance (Cap. 200) as referring to a person of either sex. A prostitute is a man or a woman who offers his or her body commonly for acts of lewdness in return for payment. Sexual intercourse is not a pre-condition for prostitution. 1. LIVING ON EARNINGS OF PROSTITUTION 1. LIVING ON EARNINGS OF PROSTITUTION It is an offence contrary to section 137 of the Crimes Ordinance (Cap. 200) to knowingly live wholly or in part on the earnings of prostitution of another. The maximum penalty is imprisonment for 10 years. The essence of the offence is knowingly receiving money from the acts of prostitution or knowingly being supported by the prostitute from the proceeds of that prostitution. The offence is sometimes referred to simply as “living on” which aptly describes the parasitic nature of the offence. The word “person” in section 137 confirms that the offence may be committed by a man or by a woman. Simply receiving money from a prostitute, for example as payment for food or accommodation supplied, is insufficient for a conviction under section 137. The

circumstances of the defendant’ s relationship with the prostitute and the circumstances in which the payment was received from the prostitute must be considered. The prosecution must prove the defendant knew that he or she was living wholly or partly on the earnings of prostitution. There are 3 distinct situations which the prosecution can rely upon when trying to prove an offence under section 137. These are: proof that the defendant was living with the prostitute; proof that the defendant was habitually in the prostitute’ s company; proof that the defendant exercised control, direction or influence over the prostitute’ s movements in a way that showed he or she was aiding and abetting or compelling that prostitution. In either or those circumstances the defendant is presumed to be knowingly living on the earnings of prostitution. 1. I DID NOT KNOW THE PERSON I WAS LIVING WITH WAS A PROSTITUTE. HAVE I COMMITTED THIS OFFENCE? 1. I DID NOT KNOW THE PERSON I WAS LIVING WITH WAS A PROSTITUTE. HAVE I COMMITTED THIS OFFENCE? The prosecution must prove that you knew that the person you were living with was a prostitute and that you knew his or her contributions to your living expenses came from what was earned as a prostitute. If in all the circumstances there is a reasonable doubt about whether you knew you were living upon the earnings of prostitution, you will not commit an offence under section 137. In practice if you are living with a working prostitute or are habitually in the company of a working prostitute the prosecution may have a strong case against you for knowingly living on the earnings of prostitution. Even so, depending on the actual circumstances of the case, there may still be a reasonable doubt about your knowledge. 2. AM I LIABLE IF I NEVER RECEIVED ANY MONEY DIRECTLY FROM THE PROSTITUTE? 2. AM I LIABLE IF I NEVER RECEIVED ANY MONEY DIRECTLY FROM THE PROSTITUTE? Proof that you actually received money from the prostitution is not necessary. The question is whether you were knowingly living off the earnings of prostitution, not whether you received money from the prostitute. Evidence that the prostitute paid the rent for where you were living, paid for your food or a holiday is sufficient to establish living on the earnings of prostitution. 2. KEEPING A VICE ESTABLISHMENT 2. KEEPING A VICE ESTABLISHMENT It is an offence contrary to section 139 of the Crimes Ordinance (Cap. 200) to keep any premises, vessel or place as a vice establishment, or to manage or assist in the management, or be in control or in charge of any premises, vessel or place, kept as a vice establishment. The maximum penalty for this offence is 3 years imprisonment upon summary conviction and 10 years imprisonment upon conviction on indictment. A vice establishment is defined in section 117(3) of the Ordinance as a place, premises or vessel used wholly or mainly by 2 or more persons for the purposes of prostitution or used wholly or mainly in connection with the organizing or arranging of prostitution. Whether that definition is satisfied in the particular case is a question of fact. The prosecution must prove the defendant knew the premises were a vice establishment and that, as a fact, what the defendant did in fact amounted to keeping, managing, assisting in the management or being in charge or control of the operation of the premises as a vice establishment. 1. THE PREMISES I OPERATE OFFERS ACCOMMODATION FOR LEGITIMATE PURPOSES. IF THERE ARE PROSTITUTION ACTIVITIES GOING ON IN THE PREMISES, AM I LIABLE? 1. THE PREMISES I OPERATE OFFERS ACCOMMODATION FOR LEGITIMATE PURPOSES. IF THERE ARE PROSTITUTION ACTIVITIES GOING ON IN THE PREMISES, AM I LIABLE? If the premises is not “wholly or mainly” used for prostitution, then you will not be liable under this offence. There is no mathematical formula to determine whether the premises was “wholly or mainly” used for prostitution and will depend upon the surrounding circumstances of each case. Furthermore, it will depend upon whether the prostitution activity is an “isolated incident” or whether it is continuing in nature, and also your involvement in the control of the premises in light of your knowledge of the prostitution activity taking place. For example, where premises were used for prostitution only at night, the Court held the premises were “wholly or mainly” used for prostitution. There was the necessary continuity or pattern of use for prostitution. However, where a hotel lets rooms for a proper purpose but the occupants are in fact prostitutes who arrange their activities from their rooms, this does not automatically mean the hotel is a vice establishment or that those managing the hotel know of the prostitution. 2. HOW MANY TIMES DOES THE PROSTITUTION ACTIVITY HAVE TO TAKE PLACE AT THE PREMISES BEFORE IT IS CONSIDERED AS A “VICE ESTABLISHMENT”? 2. HOW MANY TIMES DOES THE

PROSTITUTION ACTIVITY HAVE TO TAKE PLACE AT THE PREMISES BEFORE IT IS CONSIDERED AS A "VICE ESTABLISHMENT"? There is no mathematical formula. There needs to be evidence to show a degree of continuity in the prostitution activity. Whether this is so will depend upon the circumstances of the particular case. 3. IS THERE A DIFFERENCE IF THE PREMISES INVOLVED THE USE OF CHILDREN UNDER 13 YEARS OF AGE FOR THE PURPOSE OF PROSTITUTION OR UNLAWFUL SEXUAL ACTS? 3. IS THERE A DIFFERENCE IF THE PREMISES INVOLVED THE USE OF CHILDREN UNDER 13 YEARS OF AGE FOR THE PURPOSE OF PROSTITUTION OR UNLAWFUL SEXUAL ACTS? Yes. The more serious offence contrary to section 140 of the Crimes Ordinance (Cap. 200) of inducing or knowingly allowing a girl or boy under 13 to resort to or be on the premises or vessel for the purposes of an unlawful sexual act or for prostitution may be charged. The maximum penalty for that offence is life imprisonment. 3. DETENTION OF PERSON IN VICE ESTABLISHMENT 3. DETENTION OF PERSON IN VICE ESTABLISHMENT It is an offence contrary to section 134 of the Crimes Ordinance (Cap. 200) to detain another person against his/her will in a vice establishment with the intention that he or she shall do an unlawful sexual act. The maximum penalty for this offence is 14 years imprisonment. An example of this offence would be forcing a prostitute who has left the vice establishment where she worked to return to the establishment to continue working there as a prostitute. Detention is also committed where a prostitute's clothes or possessions are kept from him or her to prevent them leaving the premises. The questions are whether the premises are a vice establishment, whether the prostitute was detained in those premises, whether the detention was against the prostitute's will and whether the detention was intended to make the prostitute do an unlawful sexual act. 4. SOLICITING FOR AN IMMORAL PURPOSE 4. SOLICITING FOR AN IMMORAL PURPOSE It is an offence contrary to section 147 of the Crimes Ordinance (Cap. 200) to solicit in a public place or in the view of the public for an immoral purpose or to loiter in a public place for the purposes of soliciting for an immoral purpose. The maximum penalty for this offence is a fine of $10,000 and imprisonment for 6 months. A "public place" is: (a) any place to which for the time being the public or a section of the public are entitled or permitted to have access, whether on payment or otherwise; and (b) a common part of any premises notwithstanding that the public or section of the public are not entitled or permitted to have access to that common part or those premises. The most straightforward example of soliciting for an immoral purpose in a public place is the prostitute who approaches persons in the street and offers sexual services in return for payment. Other, more sophisticated soliciting may involve advertisement on the internet. The common factor is the active offering of sexual services in return for payment, giving the word "solicit" its usual meaning of asking for something. What is asked for is money, what is offered in return is sexual activity. The standard for "immoral purpose" is the contemporary standard of morality. Soliciting for prostitution in a public place is soliciting for an immoral purpose. The words "immoral purpose" cover such acts as buggery and acts of gross indecency as well as sexual intercourse, all of which have already been discussed. 1. IF I DISPLAY A SIGN IN PUBLIC ADVERTISING THE SERVICES OF A PROSTITUTE, HAVE I COMMITTED ANY OFFENCE? 1. IF I DISPLAY A SIGN IN PUBLIC ADVERTISING THE SERVICES OF A PROSTITUTE, HAVE I COMMITTED ANY OFFENCE? If you put a sign in the window of your home advertising your services as a prostitute where it can be seen by persons outside your home, you have solicited for an immoral purpose. Your sign is directed towards members of the public. If you put up a sign in a public place advertising the services of a prostitute or a person who organizes or arranges prostitution, you may have committed an offence contrary to section 147A of the Crimes Ordinance(Cap. 200) which prohibits the display of signs advertising prostitution. The maximum penalty for that offence is 12 months imprisonment. D. BESTIALITY D. BESTIALITY It is an offence contrary to section 118L of the Crimes Ordinance (Cap. 200) to commit buggery with an animal. The maximum penalty is a fine of $50,000 and imprisonment for 10 years. "Buggery" with an animal is sexual intercourse by a man or a woman with an animal. Penetration is required but ejaculation is not. The slightest penetration is sufficient. Where or not there is penetration is a question of fact in each case. If penetration is not achieved there may be a conviction for attempted bestiality. The offence of bestiality depends upon the commission of sexual intercourse with an animal.

The defendant is liable once sexual intercourse occurs unless he or she acted under duress. E. INCEST E. INCEST 1. INCEST BY MAN 1. INCEST BY MAN It is an offence contrary to section 47 of the Crimes Ordinance (Cap. 200) for a man to have sexual intercourse with a woman who is to his knowledge his granddaughter, daughter, sister or mother. The consent of the Secretary of Justice is required for a prosecution for this offence. The maximum penalties are: a) life imprisonment for the substantive offence where the girl is under 13 years of age; b) 20 years' imprisonment where the girl is between 13 years of age and under 16 years of age; c) 14 years' imprisonment in all other cases. An attempt to commit incest carries a maximum penalty of 10 years' imprisonment. The same sentence applies where a man incites a girl aged under 16 years' of age and whom he knows to be granddaughter, daughter or sister to have sexual intercourse with him. Sexual intercourse is complete upon the proof of penetration. Ejaculation is not required. The words "granddaughter", "daughter", "sister" and "mother" are to be given their ordinary meaning. "Sister" includes "half-sister". This is so whether the relationship between the Defendant and the person with whom the offence is committed is or is not traced through lawful wedlock. Section 49 of the Crimes Ordinance states that the word "man" includes "boy" and the word "woman" includes "girl". It is irrelevant that the sexual intercourse was with the consent of the woman. The woman's willingness may be relevant to sentence but not to criminal liability. The prosecution must prove that the defendant knew the female was his granddaughter, daughter, sister or mother at the time of the sexual intercourse. It is a defence if the Defendant is honestly mistaken about the identity of the woman with whom he had sexual intercourse. 2. INCEST BY A WOMAN OF OR OVER 16 2. INCEST BY A WOMAN OF OR OVER 16 It is an offence contrary to section 48 of the Crimes Ordinance (Cap. 200) for a woman of or over 16 to consent to her grandfather, father, brother or son having sexual intercourse with her knowing of that relationship. The consent of the Secretary of Justice is required for a prosecution for this offence. The maximum penalty for the offence is 14 years' imprisonment. Sexual intercourse is complete upon the proof of penetration. Ejaculation is not required. The words "grandfather", "father", "brother" and "son" are to be given their ordinary meaning. The word "woman" includes "girl". For this offence, "brother" includes "half-brother". This is so regardless of whether the relationship between the person charged with the offence and the person with whom the offence is alleged to have been committed is or is not traced through lawful wedlock. The prosecution must prove that the defendant knew that the man she had sexual with was her grandfather, father, brother or son at the time of the sexual intercourse. It is a defence if the woman was honestly mistaken about the identity of the person with whom she had sexual intercourse. 3. Q&A; 3. Q&A; 1. DO I COMMIT INCEST IF I GENUINELY BELIEVE THAT THE VICTIM IS NOT MY DAUGHTER/ GRANDDAUGHTER/DAUGHTER/SISTER/MOTHER/GRANDFATHER/FATHER/BROTHER/SON? 1. DO I COMMIT INCEST IF I GENUINELY BELIEVE THAT THE VICTIM IS NOT MY DAUGHTER/ GRANDDAUGHTER/DAUGHTER/SISTER/MOTHER/GRANDFATHER/FATHER/BROTHER/SON? Sections 47 and 48 of the Crimes Ordinance (Cap. 200) both require knowledge of the incestuous relationship at the time of the sexual intercourse. Unless the prosecution can prove beyond reasonable doubt that you knew of the relationship at the time of the sexual intercourse you will not be guilty. Each case will depend upon its own facts. In deciding whether you knew of the relationship, the court will look at all relevant circumstances. The relevant circumstances include how the sexual intercourse occurred, what contact you had with each other before the sexual intercourse and what, if anything, you had been told about that person before the sexual intercourse occurred. If, on the totality of the evidence, there is a reasonable doubt about your knowledge of the relationship you will be acquitted of the offence of incest. 2. DO I STILL COMMIT THE OFFENCE IF THERE IS CONSENT TO SEXUAL INTERCOURSE? 2. DO I STILL COMMIT THE OFFENCE IF THERE IS CONSENT TO SEXUAL INTERCOURSE? Yes. Consent is irrelevant. Once sexual intercourse and knowledge of the relationship is proved, incest is proved. Section 47 of the Crimes Ordinance (incest by men) expressly states that the woman's consent to sexual intercourse is no defence. Section 48 of the Crimes Ordinance (incest by a woman of or over 16) also clearly states that the woman's consent to sexual intercourse is not a defence.