

立法會 *Legislative Council*

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Panel on Security

Background brief prepared by the Legislative Council Secretariat for the meeting on 3 May 2011

Establishing a sexual conviction record check mechanism for child-related work

Purpose

This paper summarizes discussions of the Panel on Security ("the Panel") on the report of the Law Reform Commission ("LRC") on sexual offences records checks for child-related work ("the Report").

Background

2. In April 2006, LRC formed a Subcommittee to review the existing sexual offences under the criminal law. In October 2006, the Subcommittee's terms of reference were extended to include consideration of whether a scheme for the registration of offenders convicted of sexual offences should be established.
3. In July 2008, the Subcommittee issued a consultation paper to seek views and comments from the community including organizations such as schools, concern groups on children and mentally incapacitated persons ("MIPs"), public organizations (including Office of the Privacy Commissioner for Personal Data ("PCO") and Equal Opportunities Commission ("EOC")) and rehabilitated offender concern groups, as well as members of the public on establishing a mechanism for sexual offences records checks. About 200 written responses were received. LRC subsequently published its report on Sexual Offences Records Checks for Child-related Work: Interim Proposals on 2 February 2010.
4. For the protection of children and MIPs against sexual assault from sex offenders, the Report recommended that the Administration should establish an administrative scheme which would enable an employer to request a job applicant to apply to the relevant authority for proof as to whether the job applicant had any

criminal conviction record for sexual offences, before employing the job applicant for work relating to children and MIPs. LRC also made the following recommendations -

- (a) an administrative scheme for sexual offences records checks should be established;
- (b) the proposed scheme should only cover work relating to children and MIPs;
- (c) checks should not be made mandatory;
- (d) the proposed scheme should apply to prospective employees in the initial phase, and be extended to cover existing employees at a later stage;
- (e) the current scheme of Certificate of No Criminal Conviction could be modified and adapted to enable the type of checks proposed in the Report;
- (f) only sexual offences specified in the Report could be revealed and broad community notification was not recommended;
- (g) information other than conviction records should not be revealed; and
- (h) spent convictions should not be disclosed.

Deliberations of the Panel

5. The Panel discussed the Report at its meetings on 2 March and 8 April 2010. The deliberations are summarized in the following paragraphs.

6. Concerns were raised as to the need to balance the protection of children and the vulnerable against other considerations, including the human rights and rehabilitation needs of ex-offenders. The Administration advised that according to the Report, LRC had given full regard to the International Covenant on Civil and Political Rights ("ICCPR") and the United Nations Convention on the Rights of the Child in drawing up the proposals. In July 2008, the Subcommittee issued a consultation paper setting out its recommendations for comment and discussion by the public. The consultation exercise, which ended on 31 October 2008, had elicited some 200 written responses from schools, other organizations and

individuals. Having considered the responses received, LRC decided to recommend a scheme that would enable employers of child-related and MIP-related work to have access to necessary information in order to make an informed recruitment decision. The conclusions presented in the Report had reflected the views collected during the consultation period.

7. Concerns were raised as to the existence of a loophole with the existing system in that there was no way to prevent persons who had committed sexual offences from working in the education sector. Sex offenders whose teacher registration was suspended under the Education Ordinance (Cap. 279) could not be barred from operating tutorial schools or taking up child-related and MIP-related work in other sectors.

8. The Administration advised that to its knowledge, LRC and its Subcommittee had carefully considered all relevant considerations, including human rights, privacy and rehabilitation needs of ex-offenders and proper protection to children, in their deliberations on the feasibility of setting up a sexual offences records checks mechanism. The Administration was in the process of studying the recommendations. When considering the establishment of such a scheme, the Administration would take into account the views of relevant parties, including Legislative Council ("LegCo") Members, EOC, PCO, children concern groups, offenders' rehabilitation concern groups and professional bodies of the related sectors.

9. Members were generally in support of enacting legislation to address the problem of child sexual abuse. Queries were however raised on the appropriateness of using an administrative scheme to enable employers of child or MIP-related work to check the criminal conviction records for sexual offences of prospective employees.

10. The Administration explained that -

- (a) LRC had been considering whether a comprehensive legislative scheme should be introduced to enhance the regulation of sexual offences records checks for child-related work, without unjustifiably infringing the privacy and other rights of the offenders. During the course of its deliberations, LRC noted that a comprehensive legislative scheme would take some time to be implemented. LRC therefore recommended that pending its formulation of comprehensive reform proposals for any legislative changes, an interim measure could be introduced to minimize the risks of children against sexual abuse;

- (b) the scheme proposed in the Report was intended as an interim measure which could be implemented quickly by administrative means without the need for enactment of legislation in order to respond to concerns expressed by the public and comments made by judges in some court cases in recent years;
- (c) LRC had stated clearly in the Report all human rights considerations which had been taken into account in devising the proposed scheme, including Articles 33 and 39 of the Basic Law, Article 14 of the Hong Kong Bill of Rights, Article 8 of the European Convention on Human Rights, and Article 26 of ICCPR;
- (d) LRC emphasized that the rights and interests of sex offenders were not to be regarded as absolute, and they needed to be balanced against conflicting rights and interests. In particular, Article 24(1) of ICCPR stipulated that "Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."; and
- (e) LRC considered that its recommendation was a reasonable measure which was in compliance with legal requirements and human rights principles.

11. On the question of whether LRC had a definite timetable for completing its review on the existing law on sexual and related offences and finalizing the proposals with respect to the establishment of a comprehensive legislative scheme for sexual offences records checks, the Administration advised that in view of the range and complexity of the issues involved, LRC had not fixed its timetable for the formulation of a comprehensive legislative scheme. Once LRC put forward any legislative recommendations, the Administration would follow up accordingly.

12. Members were concerned about the lawfulness and feasibility of using an administrative scheme, despite its interim nature, to enable employers of persons undertaking child-related work and work relating to MIPs to check their employees' criminal conviction records for sexual offences.

13. The Administration advised that according to its understanding, LRC and the Subcommittee had carefully considered all relevant considerations, including human rights, privacy and rehabilitation needs of ex-offenders and proper protection to children, in their deliberations on the feasibility of setting up an

administrative scheme for sexual offences records checks. Every effort had been made to strike a balance between conflicting interests. There was detailed elaboration on various concerns considered or discussed in the Report.

14. Regarding the lawfulness of the proposed scheme, the Administration advised that LRC had stated clearly in the Report that the proposed interim measure must be lawful and capable of implementation without legislation. Without legislative backup, the checks could not be made mandatory. The focus of the proposed scheme was to give the employer a choice and the means to ascertain whether an employee had any previous convictions for sexual offences. Hence, the proposed scheme was a voluntary mechanism, and the check had to be initiated by the job applicant/data subject. His consent would also be necessary to allow the result to be revealed to the prospective employer.

15. Some members considered that to enhance the protection of children against sexual assault, the recommendations in the Report should be implemented without delay. They were concerned whether the Administration had any difficulties in implementing the interim proposals regarding the establishment of a sexual conviction record check mechanism.

16. The Administration advised that there were a number of issues which needed to be addressed in considering the establishment of an administrative scheme to enable employers of child-related work and work relating to MIPs to check the criminal conviction records for sexual offences of prospective employees. LRC had proposed in the Report a wide and diverse range of child-related work for the purpose of obtaining sexual conviction records information. The Administration had to critically consider the scheme's capacity to ensure that the service delivery could meet the public expectation and to take into account the seasonal factors of recruitment in these related sectors. In addition, the Police had no prior experience in operating such a scheme and needed time to devise a practicable system design.

17. Some other members considered it inappropriate to address the problems through administrative measures on the mere ground that they were controversial and required further and careful deliberations within the Administration. The Administration advised that it would give full consideration to all the views received before taking a final view on the proposals recommended by LRC.

18. Members passed a motion at the Panel meeting on 8 April 2011 requesting the Government to introduce a bill within 12 months to commence the formal process of legislating for the protection of children against sexual abuse as well as the provision of counselling services and assistance for the rehabilitation of sex offenders, and urging the Government and LegCo to complete the enactment of legislation by the end of the current term.

Relevant papers

19. A list of the relevant papers on the LegCo website is in the **Appendix**.

Council Business Division 2
Legislative Council Secretariat
27 April 2011

**Relevant papers on
establishing a sexual conviction record check mechanism
for child-related work**

Committee	Date of meeting	Paper
Panel on Security	2.3.2010 (Item VI)	Agenda Minutes
Legislative Council	10.3.2010	Official Record of Proceedings Pages 213 - 268 (Motion on establishing a sexual offences records checks for child-related work)
Panel on Security	8.4.2010 (Item I)	Agenda Minutes

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