THE LAW REFORM COMMISSION OF HONG KONG

REVIEW OF SEXUAL OFFENCES SUB-COMMITTEE

CONSULTATION PAPER

Sentencing and related matters in the review of sexual offences

LRC

THE LAW REFORM COMMISSION OF HONG KONG

REVIEW OF SEXUAL OFFENCES SUB-COMMITTEE

CONSULTATION PAPER

SENTENCING AND RELATED MATTERS IN THE REVIEW OF SEXUAL OFFENCES

This consultation paper can be found on the Internet at:
<http://www.hkreform.gov.hk>

November 2020

This Consultation Paper has been prepared by the Review of Sexual Offences Sub-committee of the Law Reform Commission. It does not represent the final views of either the Sub-committee or the Law Reform Commission, and is circulated for comment and discussion only.

The Sub-committee would be grateful for comments on this Consultation Paper by 11 February 2021. All correspondence should be addressed to:

The Secretary
The Review of Sexual Offences Sub-committee
The Law Reform Commission
4th Floor, East Wing, Justice Place
18 Lower Albert Road
Central
Hong Kong

Telephone: (852) 3918 4097

Fax: (852) 3918 4096

E-mail: hklrc@hkreform.gov.hk

It may be helpful for the Commission and the Sub-committee, either in discussion with others or in any subsequent report, to be able to refer to and attribute comments submitted in response to this Consultation Paper. Any request to treat all or part of a response in confidence will, of course, be respected, but if no such request is made, the Commission will assume that the response is not intended to be confidential.

It is the Commission's usual practice to acknowledge by name in the final report anyone who responds to a consultation paper. If you do not wish such an acknowledgment, please say so in your response.

THE LAW REFORM COMMISSION OF HONG KONG

REVIEW OF SEXUAL OFFENCES SUB-COMMITTEE

CONSULTATION PAPER

SENTENCING AND RELATED MATTERS IN THE REVIEW OF SEXUAL OFFENCES

CONTENTS

Preface

_____

Terms of reference

1. In April 2006, the Secretary for Justice and the Chief Justice of the Court of Final Appeal requested that the Law Reform Commission ("LRC") review the law relating to sexual and related offences in Hong Kong. As a result of judicial comment in various judgments in Hong Kong as well as the public's comments on the desirability of setting up a register of sex offenders, the terms of reference were expanded in October 2006 to include a study relating to such a register. The expanded terms of reference are:

> "*To review the common and statute law governing sexual and related offences under Part XII of the Crimes Ordinance (Cap 200) and the common and statute law governing incest under Part VI of the Ordinance, including the sentences applicable to those offences, to consider whether a scheme for the registration of offenders convicted of such offences should be established, and to recommend such changes in the law as may be appropriate.*"

The Sub-committee

2. The Sub-committee on Review of Sexual Offences ("the Sub-committee") was appointed in July 2006 to consider and advise on the present state of the law and to make proposals for reform. The Sub-committee members and the Secretary to the Sub-committee are:

Mr Peter Duncan, SC *(Chairman)*	Senior Counsel
Hon Mrs Justice Barnes	Judge of the Court of First Instance of the High Court
Mr Chan Tat Ming, Neil *[From April 2020]*	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mr Eric T M Cheung	Principal Lecturer Department of Law University of Hong Kong

Dr Chu Yiu Kong *[Until December 2007]*	Assistant Professor Department of Sociology University of Hong Kong
Ms Joceline Chui *[From August 2019]*	Principal Assistant Secretary Security Bureau
Mr Fung Man-chung *[From August 2012 to April 2018]*	Assistant Director (Family & Child Welfare) Social Welfare Department
Mr Paul Harris, SC *[Until February 2012]*	Senior Counsel
Mr Ho Chun-tung *[From August 2017 to April 2020]*	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mr Paul Ho *[From May 2016]*	Deputy Director of Public Prosecutions
Professor Karen A Joe Laidler *[From September 2008]*	Director Centre for Criminology also Professor Department of Sociology University of Hong Kong
Mr Stephen K H Lee *[From January 2008 to August 2010]*	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mr Lee Wai-man, Wyman *[From July 2014 to August 2017]*	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mrs Apollonia Liu *[Until June 2009]*	Principal Assistant Secretary Security Bureau
Mr Ma Siu Yip *[Until January 2008]*	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mrs Anna Mak Chow Suk Har *[Until May 2011]*	Assistant Director (Family & Child Welfare) Social Welfare Department

Mr Man Chi-hung, Alan *[From September 2010 to May 2012]*	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mrs Millie Ng *[From June 2009 to November 2015]*	Principal Assistant Secretary Security Bureau
Ms Pang Kit-ling *[From April 2018]*	Assistant Director (Family & Child Welfare) Social Welfare Department
Ms Pang Mo-yin, Betty *[From May 2012 to June 2014]*	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mr Andrew Powner	Partner Haldanes, Solicitors
Ms Lisa D'Almada Remedios	Barrister
Mr Philip Ross *[From February 2012]*	Barrister
Dr Alain Sham *[Until May 2016]*	Deputy Director of Public Prosecutions Department of Justice
Mr Andrew YT Tsang *[From November 2015 to August 2019]*	Principal Assistant Secretary Security Bureau
Ms Caran Wong *[From June 2011 to August 2012]*	Assistant Director (Family & Child Welfare) Social Welfare Department
Mr Thomas Leung *(Secretary)* *[Until December 2017]*	Senior Government Counsel Law Reform Commission
Miss Sally Ng *(Secretary)* *[Co-Secretary from July 2016 to December 2017]*	Senior Government Counsel Law Reform Commission

Previous work of the Sub-committee

3. The terms of reference cover a diverse range of sexual offences, many of which involve controversial issues requiring careful and judicious balancing of the interests at stake. It was apparent from the outset that completion of the entire reference would take considerable time and it was

therefore decided that the terms of reference should be dealt with in stages and with separate papers being issued in respect of different parts of the reference.

Sexual Offences Records Checks for Child-Related Work

4. Because of widespread public concern, the Sub-committee considered first the question of establishing a system of sexual conviction records checks for those engaged in child-related work. In July 2008, the Sub-committee issued a *Consultation Paper on Interim Proposals on a Sex Offender Register*.

5. In February 2010, taking into account the views on consultation, the LRC published a *Report on Sexual Offences Records Checks for Child-Related Work: Interim Proposals* ("Report on Interim Proposals"). The report recommended, among other things, the establishment of an administrative scheme to enable employers of persons undertaking child-related work and work relating to mentally incapacitated persons ("MIPs") to check the criminal conviction records for sexual offences of potential employees. The proposals in the report were subsequently implemented by the establishment of an administrative scheme, viz, the Sexual Conviction Record Check Scheme ("SCRC Scheme"), with effect from 1 December 2011.

Presumption that a Boy under 14 is Incapable of Sexual Intercourse

6. The Sub-committee conducted a study into the common law presumption that a boy under 14 is incapable of sexual intercourse and made proposals to the LRC to abolish this presumption.

7. Based on these proposals, the LRC published in December 2010 a *Report on The Common Law Presumption that a Boy under 14 is Incapable of Sexual Intercourse*, recommending the abolition of this outdated common law presumption. Because the issue was considered straightforward and not expected to be controversial, the LRC proceeded straight to a final report without first issuing a consultation paper.

8. The Statute Law (Miscellaneous Provisions) Ordinance 2012 (No 26 of 2012) was enacted on 17 July 2012 to implement the LRC's recommendation on abolition of the presumption.

Overall Review of Substantive Sexual Offences

9. The overall review of substantive sexual offences is the major part of the Sub-committee's study under its terms of reference. Its scope is wide and it raises a number of sensitive and controversial issues which require careful consideration. Given that the entire review will take a considerable time to complete, it was therefore decided that the review would

be broken down into a number of discrete parts with separate consultation papers on specific aspects of the subjects being issued.

10. It was the Sub-committee's original plan to divide the review into four parts, with separate consultation papers to be issued in respect of each of them and one global final report. The four parts being:

(1) offences based on sexual autonomy (ie rape and other non-consensual sexual offences);

(2) offences based on the protective principle (ie sexual offences involving children and persons with mental impairment ("PMIs")[1] and sexual offences involving abuse of a position of trust);

(3) miscellaneous sexual offences; and

(4) sentencing.

11. During the consultation exercises on the first two parts of the overall review of the substantive sexual offences, there were demands from the public as well as the Panel on Administration of Justice and Legal Services of the Legislative Council for expediting the work on the overall review. In response to these demands, the Sub-committee decided to adjust its original work plan. It is the Sub-committee's revised plan to sever the fourth part relating to sentencing from the overall review and return to it when the overall review was completed. Severance of the fourth part (on sentencing) will not affect the integrity of the overall review as this part is intended to cover matters not having a direct bearing on the reform of the substantive sexual offences (viz, review of the SCRC Scheme, and other new sentencing orders for managing sex offenders etc).

Part 1 – Consultation Paper on Rape and Other Non-consensual Sexual Offences

12. In September 2012, the Sub-committee issued its Consultation Paper on Rape and Other Non-consensual Sexual Offences ("First CP"). The paper covers the non-consensual sexual offences which are concerned with promoting or protecting a person's sexual autonomy, namely, rape, sexual assault by penetration, sexual assault and causing a person to engage in sexual activity without consent.

Part 2 – Consultation Paper on Sexual Offences Involving Children and Persons with Mental Impairment

13. In November 2016, the Sub-committee issued its Consultation Paper on Sexual Offences Involving Children and Persons with Mental Impairment ("Second CP"). The paper covers sexual offences involving

[1] In this paper, "PMI" is used as a general term as opposed to the specific definition of a "MIP" defined in section 117(1) of the Crimes Ordinance. See also Final Recommendation 35 (re Second CP) for the recommended scope of an offence involving a PMI.

children and PMIs and sexual offences involving abuse of a position of trust. These sexual offences are largely concerned with the protective principle, that is to say, the criminal law should give protection to certain categories of vulnerable persons against sexual abuse or exploitation. These vulnerable persons include children, PMIs, and young persons over whom others hold a position of trust.

Part 3 – Consultation Paper on Miscellaneous Sexual Offences

14. In May 2018, the Sub-committee issued its Consultation Paper on Miscellaneous Sexual Offences ("Third CP"). The paper covers miscellaneous sexual offences such as incest, exposure, voyeurism, bestiality, necrophilia, acts done with intention to commit a sexual offence, together with a review of homosexual-related buggery and gross indecency offences in the Crimes Ordinance (Cap 200) ("Crimes Ordinance").

Report on Voyeurism and Non-consensual Upskirt-photography

15. In April 2019, the LRC issued its Report on Voyeurism and Non-consensual Upskirt-photography ("Report on Voyeurism") to provide its final recommendation for a specific offence of voyeurism to deal with an act of non-consensual observation or visual recording of another person for a sexual purpose; and a specific offence in respect of non-consensual upskirt-photography.

16. The report was prepared expeditiously in light of the imminent need at that time for the introduction of the recommended new offences in order to plug a loophole in the existing law following a Court of Final Appeal judgment which ruled that section 161 of the Crimes Ordinance could not be used to prosecute offences committed by a person using his or her own computer.[2] The recommendations contained in the report were extremely well-received by the community.

Report on Review of Substantive Sexual Offences

17. In December 2019, the LRC issued its Report on Review of Substantive Sexual Offences ("Report on Sexual Offences") after completion of the relevant consultation exercises and the publication of the First CP, the Second CP, the Third CP, and the Report on Voyeurism.

---

[2] In *Secretary for Justice v Cheng Ka Yee & 3 Ors*, FACC 22/2018, the Court of Final Appeal unanimously dismissed the Government's appeal and held that s.161(1)(c) of the Crimes Ordinance (Cap 200) does not apply to the use by a person of his own computer, not involving access to another's computer. As such, the authorities can no longer rely on s.161 to prosecute acts of voyeurism and non-consensual upskirt-photography which involved the use of one's own computer (whether in a public or private place) unless such use involves access to another's computer.

18. The report put forward altogether 69 final recommendations[3] for the Government's consideration. These recommendations include the creation of a range of non-consensual sexual offences such as a new offence of sexual penetration without consent, a uniform age of consent of 16 years old in Hong Kong, the creation of a range of new sexual offences involving children and PMIs which are gender neutral, and the reform of a series of miscellaneous sexual offences such as incest, exposure, bestiality, necrophilia and homosexual-related offences. These final recommendations reflect a majority consensus of the community and were also extremely well-received by the public.

This consultation paper

19. This consultation paper is the fourth and final part of the overall review of substantive sexual offences. It covers a review of the penalties for offences proposed in the overall review of substantive sexual offences; examines ways to reform and improve treatment and rehabilitation of sex offenders in Hong Kong; and reviews the SCRC Scheme since it has come into operation in December 2011 as an administrative scheme.

20. As with the previous consultation papers, we have referred to the provisions and relevant practices in Hong Kong and compared them with corresponding provisions and practices in a number of overseas jurisdictions for a comprehensive examination of the elements and issues involved in the reform of sentencing and related matters.

Public views invited

21. The recommendations in this paper are the result of extensive discussions by the Sub-committee. They represent our preliminary views, presented for consideration by the community. We welcome any views, comments and suggestions on any issues discussed in this paper, which will assist the Sub-committee to reach its final conclusions in due course.

[3] The Sub-committee issued a total of 71 Preliminary Recommendations in its three previous consultation papers. The Report on Sexual Offences only covered 69 Final Recommendations because Preliminary Recommendation 8 (re First CP) and Preliminary Recommendation 9 (re Second CP) were discarded.

Chapter 1

Penalties for offences proposed in the overall review of substantive sexual offences

---

Introduction

1.1 In its Report on Sexual Offences, the LRC recommended the reform of two existing offences in the Crimes Ordinance (Cap 200)[1] and proposed a number of new offences which are modelled largely on sexual offences in various overseas jurisdictions.[2] In this chapter, we shall examine the appropriate penalties for the two existing offences which are recommended to be retained but with modifications; and for the proposed new offences.

Penalties for existing offences and proposed new offences

Penalties for existing offences (recommended to be retained but with modifications)

1.2 There are two existing offences which the LRC proposed to retain but with their scope extended and/or the name of the offence revamped.

1.3 The first one is the offence of rape which the LRC recommended be renamed as "sexual penetration without consent" in light of the responses received during the consultation exercise which opposed the use of "rape" given the stigma attached to the term.[3] Furthermore, the LRC recommended that the scope of the offence of sexual penetration without consent should be extended to cover penetration of the vagina or anus, and penile penetration of the mouth of another person.[4]

1.4 The second one is the offence of incest. The LRC recommended the retention of this offence but that it be reformed to become gender neutral; to cover all penile penetration of the vagina, anus and mouth and other forms of penetration; and be extended to cover adoptive parents, and uncles (aunts) and nieces (nephews) who are blood relatives.

---

1 Final Recommendation 7 (re First CP), and Final Recommendation 1 (re Third CP).

2 Final Recommendations 18, 19, and 21 (re First CP), Final Recommendations 10 to 15, 22 to 30 (re Second CP), and Final Recommendations 2 to 8 (re Third CP).

3 Report on Sexual Offences, paragraphs 2.48 to 2.50.

4 Report on Sexual Offences, paragraphs 2.51 to 2.61.

Our views

1.5 In respect of the recommended offence of sexual penetration without consent, our view is that even with the recommended expansion in scope to cover penetration of the anus or vagina, and penile penetration of the mouth of another person, the gravity of this offence is no different from that of the existing offence of rape. We therefore take the view that the penalty for the existing offence of rape, namely, life imprisonment on conviction on indictment, should continue to apply to the recommended offence of sexual penetration without consent.

1.6 As regards the offence of incest, our view is that even with the proposed extension in scope, the gravity of the recommended offence is no different from that of the existing incest offence. We therefore consider that the penalty for the existing offence, namely, imprisonment for 14 years on conviction on indictment, should continue to apply.

Penalties for proposed new offences

1.7 The new offences proposed in this overall review are largely modelled on sexual offences in a number of overseas jurisdictions. In particular, the vast majority are modelled on the English Sexual Offences Act 2003 ("English Act") and the Sexual Offences (Scotland) Act 2009 ("Scottish Act"). We have therefore reviewed the penalties provided for in these relevant jurisdictions.

Proposed new offences without corresponding Hong Kong legislation

1.8 Of the 30 proposed new offences, 14 of them have no corresponding Hong Kong legislation which prohibit the relevant conduct. These proposed new offences include:-

(i) Engaging in sexual activity in the presence of a child under 13;[5]

(ii) Engaging in sexual activity in the presence of a child under 16;[6]

(iii) Causing a child under 13 to look at a sexual image (including texts and audio messages);[7]

(iv) Causing a child under 16 to look at a sexual image (including texts and audio messages);[8]

(v) Arranging or facilitating the commission of a child sex offence;[9]

(vi) Sexual grooming;[10]

---

5 Final Recommendation 13 (re Second CP).
6 See footnote 5 above.
7 Final Recommendation 14 (re Second CP).
8 See footnote 7 above.
9 Final Recommendation 15 (re Second CP).
10 Final Recommendation 22 (re Second CP).

(vii) Inducement, threat or deception to procure sexual activity with a PMI;[11]

(viii) Causing a PMI to engage in or agree to engage in sexual activity by inducement, threat or deception;[12]

(ix) Engaging in sexual activity in the presence, procured by inducement, threat or deception, of a PMI;[13]

(x) Causing a PMI to watch a sexual act by inducement, threat or deception;[14]

(xi) Causing or inciting sexual activity of a PMI (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency;[15]

(xii) Sexual activity in the presence of a PMI (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency;[16]

(xiii) Causing a PMI to watch a sexual act (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency;[17] and

(xiv) Sexual activity with a dead person.[18]

Our views

1.9 Given that we have previously recommended the proposed new offences modelled on the corresponding provisions of the English Act or the Scottish Act,[19] we are of the view that the penalties for these 14 new offences should be set by reference to the penalties for the corresponding offences in the respective overseas jurisdictions as follows:-

Proposed new offence	**Corresponding overseas offence**	**Maximum penalty (of corresponding overseas offence)**
Engaging in sexual activity in the presence of a child under 13	Causing a young child to be present during a sexual activity (Scottish Act, section 22)	10 years' imprisonment (Scottish Act, section 48 and Schedule 2)

11 Final Recommendation 23 (re Second CP).
12 Final Recommendation 24 (re Second CP).
13 Final Recommendation 25 (re Second CP).
14 Final Recommendation 26 (re Second CP).
15 Final Recommendation 28 (re Second CP).
16 Final Recommendation 29 (re Second CP).
17 Final Recommendation 30 (re Second CP).
18 Final Recommendation 5 (re Third CP).
19 We note that for the penalties provision in section 48 and Schedule 2 to the Scottish Act, the maximum penalty on conviction on indictment for various offences may include imprisonment and/or a fine. However, in this context, we would focus on the maximum penalty level with respect to imprisonment.

Proposed new offence	Corresponding overseas offence	Maximum penalty (of corresponding overseas offence)
Engaging in sexual activity in the presence of a child under 16	Causing an older child to be present during a sexual activity (Scottish Act, section 32)	5 years' imprisonment (Scottish Act, section 48 and Schedule 2)
Causing a child under 13 to look at a sexual image (including texts and audio messages)	Causing a young child to look at a sexual image (Scottish Act, section 23) and Causing a young child to see or hear a sexual written communication or sexual verbal communication (Scottish Act, section 24(2))	10 years' imprisonment (Scottish Act, section 48 and Schedule 2)
Causing a child under 16 to look at a sexual image (including texts and audio messages)	Causing an older child to look at a sexual image (Scottish Act, section 33) and Causing an older child to see or hear a sexual written communication or sexual verbal communication (Scottish Act, section 34(2))	5 years' imprisonment (Scottish Act, section 48 and Schedule 2)
Arranging or facilitating the commission of a child sex offence	Arranging or facilitating the commission of a child sex offence (English Act, section 14)	14 years' imprisonment (English Act, section 14(4)(b))

Proposed new offence	Corresponding overseas offence	Maximum penalty (of corresponding overseas offence)
Sexual grooming	Sexual grooming (English Act, section 15)	10 years' imprisonment (English Act, section 15(4)(b))
Inducement, threat or deception to procure sexual activity with a PMI	Inducement, threat or deception to procure sexual activity with a person with a mental disorder (English Act, section 34(1))	*Penetrative sexual activity*: Life imprisonment (English Act, section 34(2)) *Non-penetrative sexual activity*: 14 years' imprisonment (English Act, section 34(3))
Causing a PMI to engage in or agree to engage in sexual activity by inducement, threat or deception	Causing a person with a mental disorder to engage in or agree to engage in sexual activity by inducement, threat or deception (English Act, section 35(1))	*Penetrative sexual activity*: Life imprisonment (English Act, section 35(2)) *Non-penetrative sexual activity*: 14 years' imprisonment (English Act, section 35(3)(b))
Engaging in sexual activity in the presence, procured by inducement, threat or deception, of a PMI	Engaging in sexual activity in the presence, procured by inducement, threat or deception, of a person with a mental disorder (English Act, section 36(1))	10 years' imprisonment (English Act, section 36(2)(b))
Causing a PMI to watch a sexual act by inducement, threat or deception	Causing a person with a mental disorder to watch a sexual act by inducement, threat or deception (English Act, section 37(1))	10 years' imprisonment (English Act, section 37(2)(b))

Proposed new offence	Corresponding overseas offence	Maximum penalty (of corresponding overseas offence)
Causing or inciting sexual activity of a PMI (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency	Causing or inciting sexual activity of a person with a mental disorder by care workers (English Act, section 39(1))	*Penetrative sexual activity*: 14 years' imprisonment (English Act, section 39(3)) *Non-penetrative sexual activity*: 10 years' imprisonment (English Act, section 39(4)(b))
Sexual activity in the presence of a PMI (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency	Sexual activity in the presence of a person with a mental disorder by care workers (English Act, section 40(1))	7 years' imprisonment (English Act, section 40(3)(b))
Causing a PMI to watch a sexual act (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency	Causing a person with a mental disorder to watch a sexual act by care workers (English Act, section 41(1))	7 years' imprisonment (English Act, section 41(3)(b))
Sexual activity with a dead person	Sexual penetration of a corpse (English Act, section 70)	2 years' imprisonment (English Act, section 70(2)(b))

Proposed new offences with corresponding Hong Kong legislation

1.10 For the remaining 16 proposed new offences, we note that there is corresponding existing legislation in Hong Kong. As such, we consider that the proper course to take is to compare the penalties applicable to the

local provisions with those of their corresponding overseas provisions in order to decide what recommendations might be appropriate.

Our views

Sexual assault

1.11 We have recommended the replacement of the existing offence of indecent assault with a new offence of sexual assault which is modelled on section 3 of the English Act.[20] Section 3(4)(b) of the English Act provides for a maximum penalty of 10 years' imprisonment. As this is the same as the maximum penalty for our existing offence of indecent assault, we recommend that the new offence of sexual assault should carry the same maximum penalty of 10 years' imprisonment.

Causing a person to engage in sexual activity without consent

1.12 The proposed new offence of causing a person to engage in sexual activity without consent ("the causing offence") is modelled on section 4 of the English Act,[21] which provides for a maximum penalty of life imprisonment for a penetrative act and 10 years' imprisonment for a non-penetrative act. The relevant existing offence in Hong Kong is the offence of procurement of unlawful sexual act by threats or intimidation pursuant to section 119 of the Crimes Ordinance which carries a maximum penalty of 14 years' imprisonment.

1.13 We have already recommended the abolition of this existing procurement offence upon creation of the new causing offence because the existing procurement offence is too narrow in that it covers only unlawful sexual acts procured by threat or intimidation.[22] The causing offence on the other hand catches a wider range of compelled sexual activity, and hence would provide the necessary protection.[23]

1.14 In light of the recommended replacement of the procurement offence with the causing offence, we have to consider whether the maximum penalties under sections 4(4) and 4(5) of the English Act should be followed in Hong Kong.

1.15 Our view, as we have set out in the First CP,[24] is that it is preferable to draw a distinction in the legislation between the penalties applicable where penetrative acts are involved and those where the acts are non-penetrative. We believe the penalties applicable to the proposed offence of causing a person to engage in sexual activity without consent

---

20 Final Recommendations 17 to 19 (re First CP) are relevant. Also see discussion in paragraphs 1.25, 1.26 and 6.8 to 6.14 of the First CP.

21 Final Recommendation 21 (re First CP).

22 See footnote 21 above.

23 Report on Sexual Offences, paragraph 2.142.

24 First CP, paragraph 7.18.

should be so structured that heavier penalties should be imposed for compelled sexual activities which are penetrative in nature. In our view, the seriousness of causing the victim to engage in penetrative sexual activity without consent is the same as having sexual penetration against the victim without consent by the offender, and so merits the same maximum penalty of life imprisonment. As regards non-penetrative sexual activity, our view is that the seriousness of causing the victim to engage in non-penetrative sexual activity without consent should be the same as our proposed new sexual assault offence (ie a maximum penalty of 10 years' imprisonment).

1.16 Thus, we recommend that the new offence of causing a person to engage in sexual activity without consent should carry the same maximum penalty as the corresponding English provision, namely, a maximum penalty of life imprisonment for penetrative sexual activity and 10 years' imprisonment for non-penetrative sexual activity.

Penetration of a child under 13

1.17 We have recommended a new offence of penetration of a child under 13 which is modelled on sections 5[25] and 6[26] of the English Act.[27] Both provisions provide for a maximum penalty of life imprisonment. As this is the same as the maximum penalty for our existing offences of intercourse with a girl under 13 (section 123 of the Crimes Ordinance); buggery with a girl under 21 (section 118D of the Crimes Ordinance); and homosexual buggery with man under 13 (section 118C of the Crimes Ordinance, based on the remedial interpretation adopted by the Court of First Instance in *Yeung Chu Wing v Secretary for Justice* [2019] 3 HKLRD 238, [2019] HKCFI 1431, paragraphs 34 and 71), we recommend that the new gender neutral offence of penetration of a child under 13 should carry the same maximum penalty of life imprisonment.

Penetration of a child under 16

1.18 We have recommended a new offence of penetration of a child under 16 which is modelled on section 9 of the English Act.[28] Section 9(2) provides for a maximum penalty of 14 years' imprisonment for both penetrative and non-penetrative sexual activities. The relevant existing offences in Hong Kong include (i) intercourse with a girl under 16 which carries a maximum penalty of 5 years' imprisonment (section 124 of the Crimes Ordinance); (ii) homosexual buggery with man under 16 which carries a maximum penalty of 5 years' imprisonment (section 118C of the Crimes Ordinance, based on the remedial interpretation adopted by the Court of First Instance in *Yeung Chu Wing*, paragraphs 34 and 71); (iii) indecent conduct (gross indecency) with or towards a child under 16 (section 146 of the Crimes

---

25 The offence of rape of a child under 13.

26 The offence of assault of a child under 13 by penetration.

27 Final Recommendation 10 (re Second CP).

28 See footnote 27 above.

Ordinance) which carries a maximum penalty of 10 years' imprisonment; and (iv) indecent assault (section 122 of the Crimes Ordinance) which also carries a maximum penalty of 10 years' imprisonment.

1.19 We are inclined to recommend that this new offence carries the same maximum penalty as the corresponding English provision (ie a maximum penalty of 14 years' imprisonment) as the new offence involves penile penetration of the vagina, anus or mouth of a child under 16. We think that a heavier sentence is required to reflect the seriousness of the offence.

1.20 Furthermore, we are of the view that the current maximum penalty of the offence of intercourse with a girl under 16 and the offence of homosexual buggery with a man under 16 (as remedially interpreted in *Yeung Chu Wing*) are inadequate to reflect the seriousness of the offences. Given that we have already recommended the abolition of section 124 and section 118C of the Crimes Ordinance on the ground of gender neutrality upon enactment of the new legislation,[29] we believe that the proposed offence of penetration of a child under 16 should carry a heavier sentence for better protection of a child against sexual exploitation, in particular when it involves penile penetration.

1.21 As for the existing offences of indecent conduct and indecent assault, we have already stated our view in the Second CP that these existing offences are inadequate in reflecting the gravity of non-penile penetration of a child's vagina or anus and hence the new offence is proposed to cover these types of sexual penetration.[30]

Sexual assault of a child under 13

1.22 We have recommended a new offence of sexual assault of a child under 13 which is modelled on section 7 of the English Act and section 20 of the Scottish Act[31] in covering sexual touching, ejaculating semen on a child, and emitting urine, saliva or other bodily fluid onto a child sexually. Section 7(2)(b) of the English Act provides for a maximum penalty of 14 years' imprisonment whereas section 48 and Schedule 2 of the Scottish Act provides for a maximum penalty of life imprisonment. The relevant existing offences in Hong Kong are indecent conduct with or towards a child under 16 (section 146 of the Crimes Ordinance) and indecent assault (section 122 of the Crimes Ordinance), both of which carry a lower maximum penalty of 10 years' imprisonment.

1.23 While we agree that a child under 13 should be given better protection through the imposition of a heavier sentence, our view is that a life sentence as in the corresponding Scottish provision may be disproportionate. Moreover, we have reminded ourselves that the recommended maximum

---

29 Final Recommendations 17 and 20 (re Second CP).

30 Second CP, paragraph 7.38.

31 Final Recommendation 11 (re Second CP). Also see discussion in paragraphs 7.40 to 7.45 of the Second CP.

penalty for the proposed new offence of sexual assault is only 10 years' imprisonment.

1.24 With that in mind, it appears to be logical and consistent with our stance to impose a heavier sentence on offences involving a child under 13 by increasing the existing penalty of 10 years' imprisonment to 14 years' imprisonment following the corresponding English provision.

Sexual assault of a child under 16

1.25 We have recommended a new offence of sexual assault of a child under 16 which is modelled on section 9 of the English Act and section 20 of the Scottish Act in covering sexual touching, ejaculating semen on a child, and emitting urine, saliva or other bodily fluid onto a child sexually.[32] Sections 9(2) and 9(3)(b) of the English Act provides for a maximum penalty of 14 years' imprisonment whereas section 48 and Schedule 2 of the Scottish Act provides for a maximum penalty of life imprisonment. The relevant existing offences in Hong Kong are indecent conduct with or towards a child under 16 (section 146 of the Crimes Ordinance) and indecent assault (section 122 of the Crimes Ordinance), both of which carry a lower maximum penalty of 10 years' imprisonment.

1.26 Similar to our abovementioned views taken as regards the new offence of sexual assault of a child under 13, while we agree that the offender should be given a heavier sentence for sexually assaulting a child under 16, recommending an increase of sentence from 10 years' imprisonment to life sentence as in the corresponding Scottish provision may be disproportionate. Again, we have reminded ourselves that the recommended maximum penalty for the proposed new offence of sexual assault is only 10 years' imprisonment.

1.27 As such, we propose that the same level of maximum penalty as in the new offence of sexual assault of a child under 13 (ie 14 years' imprisonment) be imposed on the proposed new offence of sexual assault of a child under 16.

Causing or inciting a child under 13 to engage in sexual activity

1.28 We have recommended a new offence of causing or inciting a child under 13 to engage in sexual activity which is modelled on section 8 of the English Act.[33] Section 8(2) provides for a maximum penalty of life imprisonment if the activity caused or incited involved penetration of the anus or vagina, or penile penetration of the mouth; and a maximum penalty of 14 years' imprisonment if the activity caused or incited did not involve penetration. The relevant existing offence in Hong Kong is the offence of indecent conduct

[32] Final Recommendation 11 (re Second CP). Also see discussion in paragraphs 7.41 and 7.45 of the Second CP.

[33] Final Recommendation 12 (re Second CP).

with or towards a child under 16, or incites the child pursuant to section 146 of the Crimes Ordinance which carries a maximum penalty of 10 years' imprisonment.

1.29 It should be noted that the existing offence of indecent conduct with or towards a child under 16 is modelled on the English offence of indecent conduct towards a young child in section 1 of the Indecency with Children Act 1960. The whole of that Act (including the said section 1 offence) was repealed by the English Act. Thus, we are inclined to recommend that this new offence carries the same maximum penalty as the corresponding English provision (ie a maximum penalty of life imprisonment if the activity caused or incited involved penetration of the anus or vagina, and penile penetration of the mouth; and a maximum penalty of 14 years' imprisonment if the activity caused or incited did not involve penetration).

1.30 A heavier sentence is also justified to reflect the seriousness of the offence against a child under 13.

Causing or inciting a child under 16 to engage in sexual activity

1.31 We have recommended a new offence of causing or inciting a child under 16 to engage in sexual activity which is modelled on section 10 of the English Act.[34] Sections 10(2) and 10(3)(b) provide for a maximum penalty of 14 years' imprisonment. The relevant existing offence in Hong Kong is the offence of indecent conduct with or towards a child under 16, or incites the child pursuant to section 146 of the Crimes Ordinance which carries a maximum penalty of 10 year's imprisonment.

1.32 As abovementioned, given that this existing offence is modelled on the repealed English offence of indecent conduct towards a young child under section 1 of the Indecency with Children Act 1960, we are inclined to recommend that this new offence carries the same maximum penalty as the corresponding English provision (ie a maximum penalty of 14 years' imprisonment) for better protection of a child under 16 and to reflect the seriousness of the offence.

Sexual activity with a PMI (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency

1.33 We have recommended a new offence of sexual activity with a PMI (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency which is modelled on section 38(1) of the English Act.[35] Section 38(3) provides for a maximum penalty of 14 years' imprisonment for penetrative sexual acts whereas section 38(4)(b) provides for a maximum penalty of 10 years'

[34] Final Recommendation 12 (re Second CP).
[35] Final Recommendation 27 (re Second CP).

imprisonment for non-penetrative sexual acts. The relevant existing offences in Hong Kong include the offence of sexual intercourse with patients (section 65(2) of the Mental Health Ordinance, Cap 136 ("MHO")) and the offence of sexual intercourse with a woman under a man's guardianship or who is otherwise in his custody or care pursuant to section 65A of the MHO. Both offences carry a maximum penalty of five years' imprisonment.

1.34 Our view is that the existing legislation in Hong Kong gives inadequate protection against exploitation that might arise from the care of PMIs inside or outside specified institutions, and abuse of a position of trust or authority, or a relationship of dependency, in respect of a PMI. The new offence, modelled on the English corresponding offence is hence proposed to address such possible exploitation.[36] Protection of the victim who is a PMI can hence be strengthened.

1.35 Another advantage of the new offence is that it provides for different maximum penalties for penetrative sexual activity and non-penetrative sexual activity. This distinction is not found in the existing legislation.

1.36 In light of the above discussion, we recommend that this new offence carries the same maximum penalty as the corresponding English provision (ie a maximum penalty of 14 years' imprisonment for penetrative sexual activity and a maximum penalty of 10 years' imprisonment for non-penetrative sexual activity) to penalise conduct of different levels of seriousness.

Sexual exposure

1.37 We have recommended a new offence of sexual exposure which is modelled on section 8 of the Scottish Act[37] which provides for a maximum penalty of five years' imprisonment (section 48 and Schedule 2). The relevant existing offence in Hong Kong is the offence of indecency in public (exposing body parts) under section 148 of the Crimes Ordinance which carries a maximum penalty of six months' imprisonment.

1.38 The existing public order offence which is designed primarily for the protection of public morals may be more relevant for indecent bodily exposure in public which does not target any victim and does not constitute any violation of another person's sexual autonomy.

1.39 The proposed offence is designed to cover exposure targeting a specific victim for sexual gratification or to threaten the victim. Our view is that such type of exposure is more aggressive and may induce a great degree of fear, shock, disgust to the victim. Given that such conduct is similar to a sexual assault, it should be covered by a new sexual offence rather than a public order offence. Furthermore, the proposed new offence covers sexual

[36] Second CP, paragraph 11.15.

[37] Final Recommendation 2 (re Third CP).

exposure in any place in order to provide wider protection to the victims. Thus, we are of the view that this sexual offence should carry a heavier sentence viz that provided for in section 48 and Schedule 2 of the Scottish Act (ie five years' imprisonment).

Voyeurism[38]

1.40 We have recommended a new offence of voyeurism which is modelled on section 67 of the English Act[39] which provides for a maximum penalty of two years' imprisonment. As this is the same as the maximum penalty for our existing offence of loitering (section 160 of the Crimes Ordinance), we recommend that the new offence of voyeurism should carry the same maximum penalty of two years' imprisonment.

1.41 That said, we are aware that if an act of voyeurism takes place in public, the offender may be prosecuted under section 17B of the Public Order Ordinance, Cap 245 ("POO") for disorderly behaviour in a public place which carries a maximum penalty of 12 months' imprisonment only. However, we take the view that this is essentially a public order offence rather than a sexual offence. The proposed new offence of voyeurism is aimed at a person who commits an act of voyeurism for a sexual purpose. In our view, such conduct which is sexual in nature should be penalised by a heavier sentence.

Non-consensual upskirt-photography[40]

1.42 We have recommended a new offence of non-consensual upskirt-photography which is modelled on section 67A of the English Act[41] which provides for a maximum penalty of two years' imprisonment. As this is the same as the maximum penalty for our existing offence of loitering (section 160 of the Crimes Ordinance), we recommend that the new offence of non-consensual upskirt-photography should carry the same maximum penalty of two years' imprisonment.

---

38 The Sub-committee is aware that the Security Bureau ("SB") published a *Consultation Paper on Proposed Introduction of Offences of Voyeurism, Intimate Prying, Non-consensual Photography of Intimate Parts, and Related Offences* ("SB's CP") on 8 July 2020 and commenced the public consultation from that date until 7 October 2020. As noted from SB's CP, the Government accepts in full LRC's recommendations in the Report on Voyeurism, and proposes to introduce new criminal offences of (a) voyeurism; and (b) non-consensual photography of intimate parts, both for the purpose of obtaining sexual gratification and irrespective of the purpose (the latter being a statutory alternative to the former). For these two proposed new offences, SB has proposed penalties that are different from those recommended by the Sub-committee in this consultation paper. Notwithstanding SB's public consultation, the Sub-committee takes the view that as its consultation paper includes proposed penalties for other sexual offences, it is useful for the Sub-committee to consider all the responses received as a whole before forming a view on the final recommendations. As such, the Sub-committee has decided to proceed with its own consultation for the public's views on the Sub-committee's proposed penalties for the offences of voyeurism and non-consensual upskirt-photography.

39 Final Recommendation 3 (re Third CP).

40 See footnote 38 above.

41 See footnote 39 above.

1.43 Similar to the proposed new offence of voyeurism, we are aware that if an act of non-consensual upskirt-photography takes place in public, the offender may be prosecuted under section 17B of the POO for disorderly behaviour in a public place which carries a maximum penalty of only 12 months. However, we repeat that since such conduct is sexual in nature rather than a violation of public order, it should be penalised by a heavier sentence.

Sexual intercourse with an animal

1.44 We have recommended a new offence of sexual intercourse with an animal which is modelled on section 69 of the English Act[42] which provides for a maximum penalty of two years' imprisonment. The relevant existing offence in Hong Kong is the offence of bestiality (section 118L of the Crimes Ordinance). However, this offence carries a much heavier maximum penalty of 10 years' imprisonment.

1.45 Prior to enactment of the English Act in 2003, the repealed offence of bestiality pursuant to section 12(1) of the Sexual Offences Act 1956 provided for a maximum penalty of life imprisonment. There was a significant reduction of the penalty level to two years' imprisonment.

1.46 However, we are unable to find any convincing reasons to recommend lowering the present maximum penalty from 10 years' to two years' imprisonment as provided for in the corresponding English provision. We propose the replacement of the existing offence of bestiality with the new offence of sexual intercourse with an animal so that the conduct would not be restricted to buggery with an animal. We also propose that be a sexual offence in order for it to be included in the SCRC Scheme currently in place.

1.47 Given that we have recommended the new offence in order to accord better protection to the public, our view is that we should maintain the current maximum penalty of 10 years' imprisonment. We do not recommend lowering it to two years as in the corresponding English provision.

Administering a substance for sexual purposes

1.48 We have recommended a new offence of administering a substance for sexual purposes which is modelled on section 11 of the Scottish Act[43] which provides for a maximum penalty of five years' imprisonment (section 48 and Schedule 2). The relevant existing offence in Hong Kong is the offence of administering drugs to obtain or facilitate unlawful sexual act (section 121 of the Crimes Ordinance) which carries a heavier maximum penalty of 14 years' imprisonment.

---

[42] Final Recommendation 4 (re Third CP). Also see discussion in paragraphs 1.25 and 1.30 of the First CP, and Chapter 4 of the Third CP.

[43] Final Recommendation 6 (re Third CP).

1.49 As we have set out in the Third CP, there are two problems with the existing offence.[44] By recommending the new offence to be modelled on the corresponding offence in the Scottish Act, the existing offence could be significantly improved by extending the scope of the conduct to cover any sexual activity; to change *"drug, matter or thing"* to *"substance"* for clarity; and to provide for the appropriate mens rea (which is an objective test) following the Scottish offence.[45]

1.50 Given that we have recommended the new offence in such a way to accord wider protection to the victims and at the same time to balance the accused's defence rights, our view is that there is no convincing reason to lower the maximum penalty significantly from 14 years' imprisonment to five years' imprisonment to match with the corresponding Scottish provision. We would therefore recommend that the current maximum penalty of 14 years' imprisonment be maintained.

Committing an offence with intent to commit a sexual offence

1.51 We have recommended a new offence of committing an offence with intent to commit a sexual offence which is modelled on section 62 of the English Act.[46] Section 62(4)(b) of the English Act provides for a maximum penalty of 10 years' imprisonment. While this is the same as the maximum penalty for our existing offence of assault with intent to commit buggery pursuant to section 118B of the Crimes Ordinance, we would suggest a higher maximum sentence of 14 years' imprisonment for the recommended new offence. An important point to note is that this recommended new offence would cover a wide range of sexual offences which the offender intended to commit, and so could cover criminal activities more serious than committing an assault with intent to commit buggery. Hence, we consider that it is not adequate to follow the current maximum penalty of 10 years' imprisonment for the offence of assault with intent to commit buggery. As we have recommended a maximum penalty of 14 years' imprisonment for the offence of administering a substance for sexual purpose, we see no good reason why this new preparatory offence should carry a lower maximum penalty of 10 years' imprisonment. Our recommendation here is also in line with our recommendation below relating to another new preparatory offence of trespass with intent to commit a sexual offence.

Trespass with intent to commit a sexual offence

1.52 We have recommended a new offence of trespass with intent to commit a sexual offence which is modelled on section 63 of the English Act[47] which provides for a maximum penalty of 10 years' imprisonment. The relevant existing offence in Hong Kong is the offence of burglary with intent to

---

44 Third CP, paragraphs 6.8 to 6.10.
45 Third CP, paragraphs 6.15 to 6.21.
46 Final Recommendation 7 (re Third CP).
47 Final Recommendation 8 (re Third CP).

rape pursuant to section 11 of the Theft Ordinance, Cap 210 ("TO"). This offence carries a heavier maximum penalty of 14 years' imprisonment.

1.53 Unlike the other two preparatory offences as abovementioned which are modelled on the respective provisions in the English Act, the existing offence of burglary with intent to rape is modelled on section 9 of the Theft Act 1968 of England and Wales ("English Theft Act"). However, the words *"or raping any woman"* in section 9(2) of the English Theft Act was repealed by the English Act in May 2004[48] resulting in the enactment of the sexual offence of trespass with intent to commit a sexual offence under section 63 of the English Act (this offence carries a lower maximum penalty of 10 years' imprisonment).

1.54 While noting that the proposed new offence of trespass with intent to commit a sexual offence is modelled on the corresponding English offence which carries a maximum penalty of 10 years' imprisonment, it would seem illogical for the maximum penalty for the new sexual offence to be lower than that for the offence of burglary (ie trespass with intent to commit a non-sexual offence). Against the aforesaid, and to be consistent with the maximum penalty recommended for the two preceding preparatory offences of administering a substance for sexual purpose, and committing an offence with intent to commit a sexual offence, we recommend the same maximum penalty of 14 years' imprisonment for this new offence.

Table of recommended penalties

1.55 The table below sets out our recommended penalties for the remaining 16 new offences which are set by reference to the penalties for the corresponding overseas offences with suitable adjustments as discussed above.

Proposed new offence	**Recommended maximum penalty**
Sexual assault	10 years' imprisonment
Causing a person to engage in sexual activity without consent	*Penetrative sexual activity:* Life imprisonment *Non-penetrative sexual activity:* 10 years' imprisonment
Penetration of a child under 13	Life imprisonment

[48] Section 140 and Schedule 7 to the English Act, <http://www.legislation.gov.uk/ukpga/1968/60/section/9#section-9-2> (last accessed in May 2020).

Proposed new offence	Recommended maximum penalty
Penetration of a child under 16	14 years' imprisonment
Sexual assault of a child under 13	14 years' imprisonment
Sexual assault of a child under 16	14 years' imprisonment
Causing or inciting a child under 13 to engage in sexual activity	*If the activity caused or incited involved penetration of the anus or vagina; or penile penetration of the mouth:* Life imprisonment *If no penetration*: 14 years' imprisonment
Causing or inciting a child under 16 to engage in sexual activity	14 years' imprisonment
Sexual activity with a PMI (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency	*Penetrative sexual activity*: 14 years' imprisonment *Non-penetrative sexual activity:* 10 years' imprisonment
Sexual exposure	5 years' imprisonment
Voyeurism	2 years' imprisonment
Non-consensual upskirt-photography	2 years' imprisonment
Sexual intercourse with an animal	10 years' imprisonment
Administering a substance for sexual purposes	14 years' imprisonment
Committing an offence with intent to commit a sexual offence	14 years' imprisonment
Trespass with intent to commit a sexual offence	14 years' imprisonment

Recommendation 1

For the offences recommended in the Report on Review of Substantive Sexual Offences:

(a) We recommend that the current penalties for the existing offences of rape and incest should continue to apply to the recommended offences of sexual penetration without consent and incest.

(b) We further recommend that the penalties for the new offences proposed be set by reference to the penalties for the corresponding offences in the respective overseas jurisdictions with suitable adjustments.

Chapter 2

Treatment and rehabilitation of sex offenders

Introduction

2.1 When the court considers the appropriate sentence for sex offenders, apart from the actual punishment to be imposed (such as fine or imprisonment), it may also look at the treatment and rehabilitation opportunities available given that most, if not all, of the incarcerated sex offenders will be eventually discharged and return to the community. It is hence imperative to identify suitable means to reduce the risks of recidivism.

2.2 In this chapter, we shall look at the possible treatment and rehabilitation of sex offenders at three distinctive stages: (1) the judges' powers in the pre-sentencing stage to (a) require sex offenders to attend treatment and rehabilitation programmes, and (b) obtain psychological and psychiatric assessment reports of the sex offenders; (2) a review of the incentive schemes available to sex offenders in custody in the post-sentencing stage; and (3) the provision of specialised post-release supervision to discharged sex offenders.

2.3 In preparing this chapter, the Sub-committee has had the benefit of considering valuable information provided by Dr Judy Hui[1] ("Dr Hui"), and her team members. We would like to express our sincere appreciation for their generous contributions and sharing of information which have assisted us a great deal in the formulation of our preliminary recommendations.

Pre-sentencing Stage: Judges' powers to order mandatory treatment and rehabilitation of sex offenders; and to obtain psychological and psychiatric assessment reports

The present law

2.4 There is at present no statutory provision in Hong Kong which empowers a sentencing court to require a sex offender to undertake a course of therapy or treatment, or to accept appropriate counselling.

---

[1] Dr Judy Hui is the founder of the Sex Offenders Evaluation and Treatment Unit run by the Correctional Services Department ("CSD") in Hong Kong. She has conducted research on sex offenders. Currently she is the Senior Clinical Psychologist of the CSD and is also the Honorary Associate Professor of Practice of the Department of Psychology, University of Hong Kong.

2.5 There is also no statutory provision which requires judges to obtain psychological or psychiatric assessment reports pertaining to sex offenders for sentencing purposes.

2.6 Sentencing judges may, however, on their own initiative or upon the request of defence counsel order pre-sentencing reports, such as psychological or psychiatric assessment reports of sex offenders, to facilitate the court's consideration of the appropriate sentence.[2]

The position in overseas jurisdictions

Australia[3]

2.7 In Australia, there is no legislation at either the Federal or States/Territories level to empower a sentencing court to require a sex offender to undertake a course of treatment, or to accept appropriate counselling. Participation in all prison-based sex offenders treatment programmes available is voluntary (including New South Wales,[4] Queensland,[5] South Australia,[6] Tasmania,[7] Victoria,[8] Western Australia,[9] Australian Capital Territory[10] and Northern Territory).[11] The sex offender's consent to participate in the treatment programme must be obtained.[12]

England and Wales

2.8 There is no legislation which empowers a sentencing court to require a sex offender to undertake a course of treatment, or to accept

---

2 Grenville I Cross, Patrick WS Cheung, *Sentencing in Hong Kong* (LexisNexis, 2018, Eighth Edition), Chapter 2.

3 Mandatory Treatment for Sex Offenders, Research Paper No. 1, Sentencing Advisory Council (Tasmania), November 2016.

4 Sex Offender and Violent Offender Therapeutic Programs, New South Wales Department of Justice.

5 Queensland Government, "Intervention while in custody", <https://www.qld.gov.au/law/sentencing-prisons-and-probation/rehabilitation-and-community-service/intervention-while-in-custody> (last accessed in January 2020).

6 Department of Correctional Services, South Australia, <https://www.corrections.sa.gov.au/Rehabilitation-education-and-work/rehabilitation> (last accessed in January 2020).

7 Mandatory Treatment for Sex Offenders, Research Paper No. 1, Sentencing Advisory Council (Tasmania), November 2016.

8 Victoria State Government, “Justice and Regulation, Suite of Interventions for Sex Offenders in Custody”.

9 Department of Justice, Western Australia, "Rehabilitation programs", <https://www.correctiveservices.wa.gov.au/rehabilitation-services/rehab-programs.aspx> (last accessed in January 2020).

10 Department of Corrective Services, Australian Capital Territory, <http://www.cs.act.gov.au/page/view/866/title/offender-management> (last accessed in January 2020).

11 Northern Territory Government, "Prisoner treatment and rehabilitation programs", <https://nt.gov.au/law/prisons/prisoner-treatment-and-rehabilitation-programs> (last accessed in January 2020).

12 Mandatory Treatment for Sex Offenders, Research Paper No. 1, Sentencing Advisory Council (Tasmania), November 2016, Appendix A.

appropriate counselling. Participation in the Core Sex Offender Treatment Programme designed by Her Majesty's Prison and Probation Service for imprisoned male sex offenders is voluntary.[13]

Other jurisdictions

2.9 Other jurisdictions such as Canada and New Zealand also do not have any provision empowering the sentencing court to require a sex offender to undertake a course of treatment, or to accept appropriate counselling. Any treatment or programmes available to sex offenders are provided on a voluntary basis.[14]

The Hong Kong situation

Judges' power to mandate sex offenders to attend treatment and rehabilitation programme

2.10 As referred to in paragraph 2.4 above, judges in Hong Kong do not have the power to make an order to require a sex offender to attend any type of treatment or rehabilitation programme.[15]

2.11 In view of this current situation, the question for the Sub-committee is whether to recommend that judges in Hong Kong should be given the power to make a mandatory treatment order.

Sex Offenders Evaluation and Treatment Unit

2.12 Currently, treatment and rehabilitation programmes for incarcerated sex offenders are operated and provided by the CSD on a voluntary basis.

2.13 The Sex Offenders Evaluation and Treatment Unit ("ETU") which operates from the Siu Lam Psychiatric Centre was set up in 1998 to help persons in custody ("PIC") who have committed sexual offences. As stated in the website of the CSD, the ETU aims to provide participants with comprehensive and systematic psychological assessment and treatment

---

13 Ministry of Justice, *"Impact evaluation of the prison-based Core Sex Offender Treatment Programme* (2017)*"*, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/623876/sotp-report-web-.pdf> (last accessed in January 2020).

14 In Canada, both dangerous offenders and long term offenders are encouraged to attend programmes designed according to the results of assessment of an individual's risks and treatment needs. In New Zealand, two Special Treatment Units for men who have sexually offended against children are operated by the Department of Corrections.

15 However, in an appropriate case, the sentencing judge may make a probation order to require the sex offender to see a psychologist as one of the probation order conditions. It is a breach of the probation order if the offender fails to comply with the condition and this may result in imprisonment.

programmes in a therapeutic environment, so as to help prevent them from reoffending and to help them develop a positive lifestyle.[16] Programme participation is entirely voluntary.

2.14 PICs who have committed sexual offences are referred from other correctional institutions to ETU to participate in the Sex Offenders Orientation Programme ("SOOP"). Clinical psychologists will assess the reoffending risk of the individual PIC and formulate suitable treatment plans accordingly. Group activities will be organised to enhance their motivation for treatment.[17]

2.15 Upon completion of the SOOP, a PIC assessed to be of low reoffending risk will return to his original institution. Those of moderate to high risk of reoffending will be assigned to either a Moderate Intensity Programme or a High Intensity Programme, in accordance with their risk and need levels. Treatment primarily takes the form of group therapy supplemented with individual treatment. Participants are also required to complete a set of therapeutic treatment programmes.[18]

Reoffending rates of sex offenders

2.16 According to the information provided by Dr Hui, the table below shows the reoffending[19] percentage of sex offenders who committed sexual offences with regard to their respective year of discharge:[20]

Year of Discharge	Reoffending Sexual Offence
2013	5.2%
2014	6.1%
2015	4.7%
2016	6.9%

2.17 Given that sex offenders in custody have different levels of risk of reoffending, and they receive rehabilitation and psychological treatment of different levels of intensity on a voluntary basis, direct comparison of sex offenders with and without psychological treatment cannot accurately reflect the treatment effectiveness from a scientific point of view. That said, we note from the information provided by Dr Hui that out of 34 sex offenders who completed the treatment programme and discharged between 2013 to mid-2016, only one was re-admitted to the correctional institution within two

---

16 CSD, *"Sex Offenders Evaluation and Treatment Unit - The first residential treatment unit in East Asia for persons in custody who have committed sex offences"* <https://www.csd.gov.hk/psy_gym/InDesign/en/sex/sex.htm> (last assessed in January 2020).

17 See footnote 16 above.

18 See footnote 16 above.

19 Reoffending is defined as readmission of sex offenders to the correctional institution within two years after discharge from prison.

20 These are general figures which reflect the reoffending rates of sex offenders. One cannot tell from these figures whether the sex offender had received or completed any sex treatment programme.

years of his release. The reoffending percentage is just 2.94.[21]

Dr Hui's views

2.18 On the issue of whether judges in Hong Kong should be empowered to make a mandatory treatment order, Dr Hui takes the view that this may not be the most effective means to assist sex offenders. Even if the court is able to require a sex offender to attend the treatment programme, its effectiveness will be hampered by the offender's lack of motivation for treatment. Based on international experience, Dr Hui considers that to be effective, any legislation should provide incentives for sex offenders in order to encourage them to receive treatment and to demonstrate positive change.

2.19 Dr Hui also points out that if more sex offenders are to be admitted to the treatment programmes, this would require significant additional manpower including more clinical psychologists, psychiatrists, and supporting staff for the supervising treatment unit and for providing community supervision. Furthermore, depending on the scope of the legislation (ie whether it covers all sex offenders or only those who have committed serious sex offences), it may also result in a need to expand treatment facilities for the additional treatment programmes.

Our views

2.20 The Sub-committee notes that if it becomes mandatory for sex offenders to attend treatment and rehabilitation programmes, the CSD will need to engage additional manpower and to implement a proper system or scheme designed for that particular purpose.

2.21 Apart from the very significant resources implications, there is at present, insufficient information available to demonstrate accurately the extent to which sex offenders could benefit from the specialised treatment programmes available at the ETU. The statistics available as mentioned in paragraphs 2.16 and 2.17 above do not make a strong case for judges to be given the power to make mandatory treatment orders.

2.22 We also agree with Dr Hui that to be effective, there should be legislation providing incentives for sex offenders to receive treatment and to demonstrate positive change. Simply mandating a sex offender to attend treatment is unlikely to serve any useful purpose.

2.23 In the circumstances, we do not recommend that judges be provided with power to make mandatory treatment orders. We are of the view that the current system and the ETU which appear to be operating well should continue.

---

[21] 2.94% is the reoffending rate of 1 out of 34 sex offenders (i.e. [1/34] x 100%).

Judges' power to order assessment reports

2.24 As referred to in paragraph 2.5 above, judges in Hong Kong are not required by law to obtain psychological or psychiatric assessment reports of sex offenders before sentencing. This is a decision of the sentencing judge either on his or her own initiative or upon request of the defence counsel.

Preparation of psychological and psychiatric assessment reports

2.25 The psychologists and psychiatrists of the CSD prepare pre-sentencing psychological and psychiatric assessment reports on sex offenders (particularly for child sexual abusers and those who have committed violent sexual offences such as rape and sexual murder) to ascertain their reoffending risks and potential harm to the community. These reports can often assist the court in sentencing and also the CSD in its identification of the treatment and supervision needs of the sex offenders.

Dr Hui's views

2.26 Dr Hui's view is that based on international experience, effective management of sex offenders should be governed by four fundamental principles, namely the provision of (1) specialised assessment at the pre-sentencing stage; (2) specialised treatment programmes; (3) professional support for smooth reintegration; and (4) specialised supervision tailor made for sex offenders. Solely obtaining pre-sentencing assessment reports without specialised treatment, reintegration support and supervision is unlikely to provide effective management of sex offenders.

2.27 From a practical perspective, preparation of pre-sentencing assessment reports requires significant manpower. Mandatory reports would require additional clinical psychologists and psychiatrists. Dr Hui takes the view that while specialised assessment at the pre-sentencing stage is important, this demand should not drain the existing resources for treatment as delivery of treatment to PICs under supervision is equally important.

Our views

2.28 While we acknowledge that the assessments provided in psychological and psychiatric reports may in appropriate cases assist judges in considering the appropriate sentence by taking into account the sex offenders' likelihood of reoffending, solely obtaining pre-sentencing assessment reports without specialised treatment, reintegration support and supervision is unlikely to provide effective management of sex offenders. As a result, it seems that if sex offenders are not required to undergo mandatory

treatment, there would be little benefit in mandating judges (as opposed to the current discretionary power) to request psychological or psychiatric reports.

2.29 During our discussion with Dr Hui, we became aware of the existing resources available at the CSD. While treatment programmes are considered effective for some serious sex offenders, the deployment of more resources to prepare psychological and psychiatric assessment reports for all sex offenders may drain resources from the treatment centre (and hence may affect the level of support provided to those sex offenders who have volunteered to attend the treatment programmes).

2.30 Having considered the foreseeable resources outflow and implications for the CSD; and that judges already have the discretionary power to obtain psychological and psychiatric assessment reports prior to sentencing, our view is that there is insufficient justification for the Sub-committee to recommend mandating judges to obtain pre-sentencing assessment reports of sex offenders for sentencing purposes. We consider that the current practice for judges to exercise discretion to obtain psychological and psychiatric assessment reports of sex offenders for sentencing should continue to apply.

Post-sentencing Stage: Review of the incentive schemes available to sex offenders in custody

Current position in Hong Kong

2.31 Unlike some overseas jurisdictions such as England and Wales, the CSD does not have any incentive scheme in place. In Hong Kong, the salary of a PIC provides an incentive for work. PICs are able to purchase items in the Canteen Purchase Item List by using the salary earned in custody. With regard to other benefits such as television time and recreation time, the PICs can be deprived of these privileges if they are found guilty in disciplinary hearings.

2.32 Furthermore, PICs serving a sentence of imprisonment for two years or above[22] and three years and above[23] can apply for early discharge under the Prisoners (Release under Supervision) Ordinance (Cap 325) ("P(RS)O"). Progress in rehabilitation (including the performance in the ETU for sex offenders) is one of the considerations for early discharge. The risk of reoffending is also one of the considerations.

[22] Section 7(2) of the P(RS)O.
[23] Section 7(1) of the P(RS)O.

The position in overseas jurisdictions

Australia

2.33 As set out earlier in this chapter, participation in all prison-based sex offenders treatment programmes available in different states and territories of Australia is voluntary. At the federal level, there is no standard incentive scheme designed to encourage sex offenders to attend treatment programmes. That said, pursuant to the Guiding Principles for Corrections in Australia, Australian states and territories are advised to develop practices, including remunerating prisoners who engage in work, rehabilitation programmes or full time education.[24]

Canada

2.34 In Canada, the Correctional Service of Canada offers the National Sex Offender Programs to sex offenders according to the level of risks of reoffending. The goal of these programmes is to reduce violent sex reoffending. While participation in these programmes is voluntary, the sex offender's participation can be a factor relevant to the offender's release on parole.[25] Having said that, there is no particular incentive scheme designed to encourage sex offenders to attend treatment programmes.

England and Wales

2.35 In England and Wales, rule 8 of the Prison Rules 1999 and rule 6 of the Young Offender Institution Rules 2000 ("YOIR") require every prison and young offender institution to provide a system of privileges which can be granted to prisoners or young offenders in addition to the minimum entitlements under the YOIR, subject to their reaching and maintaining specified standards of conduct and performance.

2.36 The Incentives and Earned Privileges Scheme ("IEPS") was introduced in 1995 to enable prisoners to earn additional privileges through demonstrating responsible behaviour and participation in work or other constructive activity. Following a full review of the IEPS, the Prison Service Instructions 30/2013 – Incentives and Earned Privileges ("PSI 30/2013") were promulgated in April 2013. As from 1 November 2013, in order to earn privileges, the absence of bad behaviour would no longer be enough and prisoners would have to work towards their own rehabilitation, behave well and help others.[26]

---

[24] *"Guiding Principles for Corrections in Australia (Revised 2018)"*, Government of Australia <https://www.corrections.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2019/04/7f/88fc42ada/guiding_principles_correctionsaustrevised2018.pdf> (last accessed in January 2020).

[25] Parole in Canada – Information used by Board members in parole decisions, <https://www.canada.ca/en/parole-board/services/parole/parole-decision-making.html> (last accessed in January 2020).

[26] Prison Service Instructions 30/2013 – Incentives and Earned Privileges, paragraph 1.6.

2.37 In July 2019, the Ministry of Justice published the Incentives Policy Framework[27] ("IPF") which cancelled the PSI 30/2013 with effect from 13 January 2020. The IPF aims at incentivising good behaviour, and privileges are earned by progression through incentive levels but can also be lost by moving down an incentive level for poor behaviour.[28] Under the IPF, prisoners are expected to demonstrate commitment towards their rehabilitation, engage in purposeful activity (for example, attend work and/or education), reduce their risk of reoffending, behave well and help other prisoners/staff. The IPF operates on three levels:[29] Basic,[30] Standard[31] and Enhanced.[32] Each level includes earnable privileges such as extra visits and higher rates of pay.

New Zealand

2.38 There is no incentive scheme designed to encourage sex offenders to attend treatment programmes in New Zealand. However, attendance of sex treatment is a factor relevant to the offender's parole because one of the items of information which the Parole Board may consider to make a decision on parole is a specialist's report (ie including assessment reports of psychologists on sex offenders' reoffending rate after treatment).[33]

Dr Hui's views

2.39 Dr Hui considers that the provision of incentives is important for increasing motivation for treatment and behavioural change from a rehabilitation point of view. With regard to whether CSD would consider adopting an incentive scheme similar to that existing in England and Wales, Dr Hui takes the view that as it involves policy considerations, further deliberation on its appropriateness and feasibility within the Government would be required before a view on this could be formed.

2.40 As to whether the CSD has enough clinical psychologists to handle all the cases if an incentive scheme is introduced, Dr Hui advises that while more staff would be required, she does not anticipate any major

---

27 Incentives Policy Framework (last updated on 13 March 2020) <https://www.gov.uk/government/publications/incentives-policy-framework> (last accessed in March 2020).

28 Incentives Policy Framework, paragraphs 2.1 and 4.2, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/855213/Revised_Incentives_Policy_Framework.pdf> (last accessed in January 2020).

29 Incentives Policy Framework, paragraph 5.4.

30 Basic level is for those prisoners who have not abided by the behaviour principles. To be considered suitable for progression from Basic, prisoners are expected to adequately abide by them.

31 Standard level is for those prisoners who adequately abide by the behaviour principles, demonstrating the types of behaviour required.

32 Enhanced level is for prisoners who exceed Standard level by abiding by the behaviour principles and demonstrating the required types of behaviour to a consistently high standard, including good attendance and attitude at activities and education/work and interventions.

33 New Zealand Parole Board, Parole process, <https://www.paroleboard.govt.nz/about_us/parole_process> (last accessed in January 2020).

recruitment problem as there has recently been an increase in the annual intake of students in the relevant discipline at the local universities.

Our views

2.41 We believe the IPF in England and Wales provides a good reference and starting point for Hong Kong.

2.42 Given that we are aware of the necessity for the Government to consider different issues from the policy perspective before a view can be formed on this matter, we would recommend that the Government reviews and considers whether it would be to the benefit of the sex offenders in Hong Kong for the CSD to incorporate an incentive scheme in Hong Kong.[34]

Post-release Stage: Provision of specialised post-release supervision to discharged sex offenders

Current mechanisms in place in Hong Kong

2.43 Pursuant to the Post-release Supervision of Prisoners Ordinance (Cap 475) ("PSPO"),[35] post-release supervision can be imposed at the discretion of the Post-Release Supervision Board over offenders who are (i) convicted of specified offences[36] (including rape, bestiality and indecent assault) and sentenced to imprisonment for two years or more but less than six years; or (ii) convicted of any offences and sentenced to imprisonment for six years or more.[37]

2.44 For persons who serve an indeterminate sentence, the Long-term Prison Sentences Review Ordinance (Cap 524) ("LPSRO") provides for the following schemes:-

(i) Conditional Release Scheme[38]

- Before a final recommendation to convert an indeterminate sentence [39] into a determinate one, persons with indeterminate sentences may be conditionally released under supervision for a specific period of time not more than two years.

---

34 The Sub-committee is aware that the England and Wales incentive system covered all offenders. However, notwithstanding its general application, the Sub-committee considers there is merit for a similar scheme to be introduced in Hong Kong with regard to sex offenders.

35 Section 6(1) of PSPO is the empowering provision, and section 3 defines the scope.

36 Regulation 2(b)(i) of and Schedule 1 to the Post-release Supervision of Prisoners Regulations (Cap 475A) ("PSPR").

37 Regulation 2(a) of PSPR.

38 Section 18(1) of LPSRO.

39 "Indeterminate sentence" is defined in section 4 of LPSRO as (a) a mandatory life sentence or a discretionary life sentence; or (b) detention at Executive discretion.

(ii) Supervision After Release Scheme[40]

- A post-release supervision order may also be made on persons whose indeterminate sentence has been converted to a determinate one after they have served two-thirds of the total term of their determinate sentence.

2.45 The supervisees are supervised by the Supervision Team which consists of correctional services officers and social workers. If requested by the Post-Release Supervision Board and Long-term Prison Sentences Review Board, supervisees convicted of sex offences may be required to receive psychological treatment and psychiatric treatment as part of their post-release supervision conditions.

Dr Hui's views

2.46 According to international experience, provision of adequate "specialised" post-release supervision and rehabilitation to discharged sex offenders is very important for prevention of reoffending. Sex offenders have unique problems encountered after release which may increase their risk of reoffending. For instance, frequent contact with children and exposure to child pornography may increase a child molester's risk of reoffending. "Specialised" supervision and rehabilitation with regard to these unique problems are therefore important. The following limitations of the existing practice are observed by Dr Hui.

2.47 Firstly, the Post-Release Supervision of Prisoners Scheme[41] covers only sex offenders with sentence lengths of two years or above. This group of sex offenders constitutes less than 20%[42] of all sex offenders admitted to correctional institutions.

2.48 Secondly, for those under supervision, the length of supervision as requested by the supervision boards should be less than their remission period (ie not longer than one-third of the imprisonment sentence). The duration of community support and supervision required by some complicated high risk cases may at times be much longer than their actual supervision period.

---

40 Section 29(1) of LPSRO.

41 *"The Post-Release Supervision of Prisoners Scheme, serving certain categories of adult discharged prisoners put under supervision order in accordance with the Post-Release Supervision of Prisoners Ordinance (Chapter 475), is a joint venture of Social Welfare Department and Correctional Services Department established in 1996. This scheme provides adult discharged prisoners with guidance and counselling to help them reintegrate into society and lead a law-abiding life."* From the Social Welfare Department website: <https://www.swd.gov.hk/en/index/site_pubsvc/page_offdr/sub_communityb/id_postreleas/> (last accessed in May 2020).

42 Figure available as of June 2019.

2.49 Thirdly, some sex offenders are either not under any supervision or, following the expiry of the supervision period, may continue to have unresolved or reintegration problems that need further professional support. This is of special concern for those who carry a high risk of committing serious sex offences. Efforts to ensure availability of specialised rehabilitation and treatment in the community to enhance continuity of care by improving the interface between CSD and community service providers, and the engagement of needy ex-offenders after release are important for lowering the reoffending rate.

Our views

2.50 Post-release supervision is a matter which falls under the purview of the relevant statutory supervision boards, and it is best for the provision of specialised post-release supervision to discharged sex offenders under the existing schemes to continue their operations.

2.51 That said, noting the limitations of the existing practice observed by Dr Hui as set out above, we recommend that the Government should consider strengthening the existing specialised rehabilitation services including psychological and psychiatric treatment for discharged sex offenders.

Recommendation 2

We recommend that the current specialised treatment and rehabilitation programs for sex offenders available on a voluntary basis at the Correctional Services Department be maintained.

We recommend that the general practice for judges to exercise discretion to obtain psychological and psychiatric assessment reports of sex offenders for sentencing should continue to apply.

We recommend that the Government reviews and considers the introduction of an incentive scheme in the prison institutions.

We recommend that the provision of specialised post-release supervision to discharged sex offenders under the existing statutory schemes be maintained.

We recommend that the Government considers strengthening the rehabilitation services for discharged sex offenders.

Chapter 3

Review of Sexual Conviction Record Check Scheme

Introduction

3.1 In February 2010, the LRC published the Report on Interim Proposals and recommended, ***as an interim measure***, the establishment of an administrative scheme to enable employers of persons undertaking child-related work and work relating to MIPs[1] to check the criminal conviction records for sexual offences of employees.[2]

3.2 The LRC's proposal for an administrative scheme was intended to be an interim measure, pending the formulation of a comprehensive legislative scheme, which *"would go some way to meeting the immediate need for a system to minimise the risks in respect of which the judiciary and various members of the public have expressed concern"*. The reason was that during the course of its deliberations, it became apparent to the LRC that a comprehensive legislative scheme would take considerable time to be implemented.[3]

3.3 The LRC's recommendation was subsequently implemented by the establishment of an administrative scheme known as the SCRC Scheme, which has been operated by the Hong Kong Police Force ("the Police"), with effect from 1 December 2011.[4]

3.4 As the SCRC Scheme has been operating for some time and it was intended by the LRC to be an interim measure pending the formulation of a comprehensive legislative scheme, it is timely to review the SCRC Scheme to consider a number of issues, including whether it should continue to be an administrative scheme (under which checks are voluntary) or whether it should be a comprehensive legislative scheme (under which checks are mandatory); and whether the SCRC Scheme (be it voluntary or mandatory) should cover all employees, self-employed persons, volunteers, and include disclosure of "spent convictions".

---

1 The Government is reminded to take into account the LRC's Final Recommendations 35 and 36 (re Second CP) in the Report on Sexual Offences for the proper term to be used to describe a PMI. In this Chapter, "MIPs" is used if it is quoted from previous publication or the current SCRC Scheme.

2 Report on Interim Proposals, Recommendation 2.

3 Report on Interim Proposals, paragraph 12 of the Preface.

4 Security Bureau/Hong Kong Police Force, *Sexual Conviction Record Check Scheme Protocol* (October 2019), <https://www.police.gov.hk/info/doc/scrc/SCRC_Protocol_en.pdf> (last accessed in March 2020).

3.5 In preparing this chapter, the Sub-committee has had the benefit of considering useful information provided by the SB and the Police. The information provided includes an overview on the effectiveness of the SCRC Scheme, and feedback and suggestions for improvements gathered since the operation of the SCRC Scheme in 2011. We have taken into account this information in the formulation of our preliminary recommendations.

Comprehensive legislative scheme vs administrative scheme

3.6 In the Report on Interim Proposals, while the LRC recommended a voluntary administrative scheme as an interim measure, it did not rule out the possibility of a mandatory scheme in the long run if there was legislative backup.[5]

3.7 Since the SCRC Scheme came into operation, a number of its pros and cons have been identified. In fact, most of these pros and cons were identified in the Report on Interim Proposals.

3.8 The arguments for a comprehensive legislative scheme are:

- Compliance is better ensured than in an administrative scheme since penalties for non-compliance can be provided by legislation.
- A non-mandatory scheme is too weak.[6]
- Flexibility of a non-mandatory scheme cannot ensure safety and protection for children[7] and PMIs.
- A voluntary scheme can easily fall into disuse[8] and abuse.
- Enactment of legislation requires the scrutiny by many stakeholders, the Legislative Council in particular. This would ensure that details of proposed scheme would be well thought out and different views well canvassed.
- Although mandatory checks would not be appropriate in all situations, appropriate exceptions could be built in to provide for those situations not suitable for mandatory checks.

3.9 The arguments against a comprehensive legislative scheme are:

- Legislation would involve a lengthy process.
- Legislation is too rigid. Any changes require further legislation.
- Mandatory checks would not be appropriate in all

5 Report on Interim Proposals, paragraph 4.48.
6 Report on Interim Proposals, paragraph 4.43.
7 See footnote 6 above.
8 Report on Interim Proposals, paragraph 4.44.

situations.[9]

- The existing administrative scheme has been operating smoothly.[10]
- It may give rise to significant resources implications for the Government.

The present SCRC Scheme

3.10 In considering whether the SCRC Scheme should continue to be an administrative scheme (under which checks are voluntary) or be changed to a comprehensive legislative scheme (under which checks are mandatory), we take the view that we should first consider whether it has already been fully operated in accordance with the LRC's previous recommendations. If that has not been done, it seems that the Sub-committee does not have the foundation to form a view on whether the SCRC Scheme should become mandatory.

3.11 We have reviewed the Sexual Conviction Record Check Scheme Protocol 2019 of the SB/the Police[11] and learnt that notwithstanding the LRC's recommendations made in the Report on Interim Proposals, the SCRC Scheme currently in operation does not yet cover all existing employees, self-employed persons, volunteers; nor does it include disclosure of spent convictions. We shall examine these matters in more detail, and set out our views and observations in the later parts of this chapter.

Prospective and existing employees

3.12 The LRC recommended in the Report on Interim Proposals that the SCRC Scheme should apply to both existing and prospective employees.[12]

3.13 The SCRC Scheme initially applied to prospective employees seeking child or MIP-related work in an organisation or enterprise (including staff assigned by outsourced service providers to those organisations or enterprises). Employers of these organisations or enterprises may request prospective employees to undergo checks under the SCRC Scheme. With

---

9 The LRC gave an example where mandatory checks would not be appropriate: *"An example would be a mother seeking to hire a private tutor to provide part-time tuition to her child at home. If the tutor is known by another parent to have worked reliably for a considerable period of time, and if the mother has decided that she would be present at all times, it may properly be considered that a check is not necessary."* (See Report on Interim Proposals, paragraph 4.42).

10 Up to 31 March 2020, the Sexual Conviction Record Check Office has processed over 371,700 new applications and 54,000 renewal applications. Out of all the successful employee applicants, 16 of them were found to have sexual conviction records and they agreed to have the positive result uploaded to the Auto-Telephone Answering System ("ATAS"). A total of over 428,900 successful calls were made to the ATAS for result checking. [Information obtained from the Security Bureau in August 2020.]

11 See *Sexual Conviction Record Check Scheme Protocol*, cited at footnote 4 above.

12 Report on Interim Proposals, Recommendation 5.

effect from 1 April 2015, the administrative scheme was expanded to cover contract renewal staff of private tutorial centres and private interest/activity institutions (eg swimming clubs, ball games clubs or piano/music centres). Existing employees who are engaged in child or MIP-related work in these private tutorial centres and private interest/activity institutions can undergo checks under the administrative scheme when they seek contract renewal.[13]

3.14 In other words, the existing scheme covers prospective employees and contract renewal of existing employees of specified organisations (namely, private tutorial centres and private interest/activity institutions). However, the SCRC Scheme does not cover all existing employees, as existing employees of those specified organisations not due for contract renewal are not covered.

3.15 The arguments for the SCRC Scheme to cover all existing employees are:

- The vast majority of people being consulted by the LRC favoured the application of the SCRC Scheme to both existing and prospective employees.[14]
- Sex offenders who have already gained employment may escape the net of the sexual conviction record check if it applies to prospective employees only.[15]
- There would be less protection to children and PMIs if the SCRC Scheme applies to prospective employees only.
- Any employment issues[16] that may arise from the SCRC Scheme being applicable also to existing employee can be tackled by having the SCRC Scheme implemented in phases.[17]
- As the SCRC Scheme has been implemented since 1 December 2011 (ie nine years ago), its extension to cover existing employees is long overdue.

3.16 The arguments against the SCRC Scheme to cover also all existing employees are:

---

13 Security Bureau/Hong Kong Police Force, *Sexual Conviction Record Check Scheme*, Paper No. CRF 2/2015 (March 2015), paragraphs 7 and 8. <https://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/the_rights_of_the_individuals/human/Paper_CRF_2_2015_e.pdf> (last accessed January 2020).

14 Report on Interim Proposals, paragraph 4.50.

15 Report on Interim Proposals, paragraph 4.55.

16 For example, employment issues may arise if an existing employee refuses to give consent to the employer to conduct the check or if it is found out that he/she has a sexual conviction record. A major question is whether the employer can lawfully terminate the employment in such scenarios (Report on Interim Proposals, paragraph 4.52).

17 The LRC pointed out that *"Victoria's Working with Children Check under the Working with Children Act 2005 was phased in over five years. The phased approach can also give enough time to sex offenders who are affected by the scheme either to make alternative arrangements with their existing employer, or to find a new employer."* (Report on Interim Proposals, paragraph 4.56).

- There may be resources difficulties arising from a rush by many employers to check the sexual conviction records of existing employees when the scheme is extended to cover existing employees.
- A scheme covering also existing employees may raise a number of employment issues, which would have to be resolved between the employers and employees, or by the courts.[18]

Our views

3.17 As we have mentioned earlier in this chapter, the LRC previously recommended that the SCRC Scheme should apply to both existing and prospective employees. This remains the view of the Sub-committee.

Self-employed persons

3.18 The SCRC Scheme currently does not extend to self-employed persons.[19] The LRC however recommended in the Report on Interim Proposals that the SCRC Scheme should cover self-employed persons, including private tutors and coaches.[20]

3.19 The arguments for the SCRC Scheme to cover self-employed persons are:

- There is no good reason why teachers employed by education institutions are covered but private tutors are not.
- Private tutors or coaches often conduct lessons in one-to-one or small group manner. The inherent risk of sexual abuse of students is higher than that in the case of classes conducted at education institutions.
- Parents often rely on words of advice from other parents as to the reliability of a particular private tutor. Such advice may not necessarily be reliable and could be subjective. Moreover, other parents may not know the private tutor's

---

18 Report on Interim Proposals, paragraph 4.49.

19 See *Sexual Conviction Record Check Scheme Protocol*, cited at footnote 4 above.

20 Recommendation 3 of Report on Interim Proposals reads:
"*We recommend that for the purposes of these recommendations "child-related work" be defined as work where the usual duties involve, or are likely to involve, contact with a child (ie a person aged under 18). Further, "work relating to mentally incapacitated persons" (or "MIP-related work") should include work where the usual duties involve, or are likely to involve, contact with a mentally incapacitated person. Employees, volunteers, trainees and* ***self-employed persons*** *undertaking child-related work or MIP-related work should be covered by the proposed system."* (emphasis added)
An example of "child-related work" is *"coaching or private tuition services of any kind for children or mentally incapacitated persons including sports, music, language, and vocational."* (Report on Interim Proposals, paragraph 4.33(i)).

background well.

- Covering self-employed persons undertaking child-related work or PMI-related work would enhance protection for children and PMIs.
- Appropriate exceptions could be built in to provide for situations which do not require checks to be conducted.

3.20 The arguments against the SCRC Scheme to cover self-employed persons are:

- Checks may not be necessary in some cases, for example, where the parent would be present at all times.
- It would make the hiring process of private tutors or coaches more complicated.
- The checking scheme may be abused as it is difficult to verify whether a genuine employer-private tutor relationship exists.[21]

Our views

3.21 The LRC earlier recommended that the SCRC Scheme should apply to self-employed persons.[22] While we note one of the potential shortcomings of the SCRC Scheme is possible abuse, we also comprehend the importance of the need to strike a balance between that possibility and the need to safeguard the vulnerable from sexual abuse.

3.22 In fact, in the Report on Interim Proposals, the LRC had already discussed and considered this issue, and had then made its recommendation on the basis of an administrative scheme which did not require legislative backup. We believe it is ultimately a matter for the Government to consider whether and how to take the matter forward.

3.23 On this basis, we recommend that the administrative SCRC Scheme should be extended to cover self-employed persons undertaking child-related work or PMI-related work.

Volunteers

3.24 The existing SCRC Scheme is not extended to volunteers.[23] The LRC earlier recommended that the SCRC Scheme should cover volunteers.[24]

---

21 For example, A and B do not have any employer-private tutor relationship. However, with a view to obtaining B's record under the checking scheme for other purposes, A may pretend to be the employer and asks B to apply for a record as a private tutor.

22 Report on Interim Proposals, Recommendation 3.

23 See *Sexual Conviction Record Check Scheme Protocol*, cited at footnote 4 above.

24 See footnote 22 above.

3.25 The arguments for the SCRC Scheme to cover also volunteers are:

- Volunteers, like employees, have opportunities to come into contact with children and PMIs. They should be regarded as equal to employees.[25]
- To afford adequate protection volunteers should be included.[26]
- Perpetrators may abuse children and PMIs under the disguise of being volunteers.

3.26 The argument against the SCRC Scheme to cover also volunteers are:

- Checks may not be necessary in some cases, for example, where the volunteers are already monitored by the staff or social workers who are present at all times.
- Due to limited resources, volunteers play an important role in the delivery of services by many non-government organisations ("NGOs"). The check and the required fees would dampen their enthusiasm to take up volunteer work.[27]
- Given the significantly large number of volunteers in Hong Kong, the Government (in particular the Police) may not have sufficient resources to handle all the applications.

Our views

3.27 In respect of some earlier responses received from NGOs which had mentioned that if the SCRC Scheme was to cover volunteers, it might deter people from volunteering, the LRC had already considered and taken into account the said concerns before recommending that the SCRC Scheme should cover volunteers.[28] On that basis, we do not think that is an issue which the Sub-committee needs to revisit.

3.28 We recommend that the administrative SCRC Scheme should be extended to cover volunteers.

Conclusion

3.29 As we have mentioned in paragraph 3.5 above, the Sub-committee has had the benefit of considering useful information provided by the SB and the Police on the operation of the SCRC Scheme since 2011. The Sub-committee's conclusion is that as far as prospective employees are

---

25 Report on Interim Proposals, paragraph 4.35.
26 See footnote 25 above.
27 See footnote 25 above.
28 See footnote 25 above.

concerned, the current administrative scheme is being extensively utilised and is very effective. While the Sub-committee does not see an immediate demand for the SCRC Scheme to become a comprehensive legislative scheme, it considers that there is a demand from the community that the Government should give consideration to the current administrative scheme being extended beyond prospective employees, so that it applies to existing employees, self-employed persons, and volunteers.

3.30 To conclude, we do not recommend the SCRC Scheme to be a mandatory one for the time being. Notwithstanding the resources implications, we recommend the Government extends the SCRC Scheme to its fullest by implementing all of the LRC's recommendations made in the Report on Interim Proposals, and to evaluate the need to make it a mandatory scheme at an appropriate time.

Spent Convictions

3.31 The LRC recommended in the Report on Interim Proposals that, *as an interim measure*, the SCRC Scheme should not cover spent convictions.[29]

3.32 The LRC was however aware that there was a sizeable demand for spent convictions to be disclosed.[30] The LRC pointed out that "*The schools, school principals and related associations that responded in writing were all of the view that spent convictions should be disclosed even though the incident might have happened many years ago and was of a minor nature. Some religious organisations, and professional bodies also held the same view.*".[31]

3.33 The LRC therefore made it clear that the views in favour of disclosure of spent convictions should be taken into account when a comprehensive scheme is formulated in future.[32]

3.34 The arguments for the SCRC Scheme to cover also spent convictions are:

- There is sizeable demand from the community for spent convictions to be disclosed.
- There would be better protection for children and PMIs.

---

29 Report on Interim Proposals, Recommendation 9.

30 Report on Interim Proposals, paragraph 4.87.

31 Report on Interim Proposals, paragraph 4.85.

32 "*In respect of the present proposed interim measure at least, however, we are of the view that spent convictions should not be revealed. We do not want the scheme to breach the provisions or the spirit of the Rehabilitation of Offenders Ordinance (Cap 297). However, the views to the contrary gathered in the consultation exercise should be taken into consideration in future when the comprehensive scheme is under discussion.*" (Report on Interim Proposals, paragraph 4.88).

3.35 The most significant argument against the SCRC Scheme to cover spent convictions is that revealing spent convictions would affect the rehabilitation of offenders.

Our views

3.36 We are aware of some opposing views which expressed that disclosure of spent convictions may affect the rehabilitation of offenders. Nonetheless, we have also reminded ourselves of the need to protect children and PMIs.

3.37 During our deliberations, some members were of the view that for better protection of children and PMIs, the employer (be it prospective or existing) should be informed of the spent conviction of the employee in any event and it would then be a decision of the employer to employ the person or not. Furthermore, as a spent conviction would usually involve a relatively minor offence,[33] it appears that the employee should not be hesitant in disclosing such record to the employer. Some members also took the view that the Government should perhaps explore whether spent convictions should be covered by asking the employee to give consent under the SCRC Scheme for disclosure.

3.38 On the other hand, some members do not want to breach the provisions or the spirit of the Rehabilitation of Offenders Ordinance (Cap 297); they have particular concern as to the effect that disclosure of spent convictions might have on an offender's rehabilitation.

3.39 There are compelling arguments for and against covering spent convictions in the SCRC Scheme. Given that there are divergent views within the Sub-committee on this matter, we would like to consider the responses of the public before forming a view as to whether the SCRC Scheme should be extended to include spent convictions.

Recommendation 3

We do not recommend that the Sexual Conviction Record Check Scheme ("the SCRC Scheme") become mandatory for the time being.

We recommend the Government extends the SCRC Scheme to its fullest and evaluate the need to make it a mandatory scheme at an appropriate time.

[33] Usually an offence in respect of which the person was not sentenced to imprisonment exceeding 3 months or to a fine exceeding $10,000 (Section 2(1) of the Rehabilitation of Offenders Ordinance (Cap 297)).

We recommend that the current SCRC Scheme be extended to cover all existing employees, self-employed persons, and volunteers.

We are of the view that the issue as to whether the SCRC Scheme should be extended to include spent convictions should be considered by the Hong Kong community. Accordingly, we invite the community to express their views on the issue.

Chapter 4

Summary of recommendations

Recommendation 1: **Current penalties for the offences of rape and incest should continue to apply; penalties for the proposed new offences should be set by reference to the corresponding offences in the respective overseas jurisdictions with suitable adjustments. (see near paragraph 1.55)**

For the offences recommended in the Report on Review of Substantive Sexual Offences:

(a) We recommend that the current penalties for the existing offences of rape and incest should continue to apply to the recommended offences of sexual penetration without consent and incest.

(b) We further recommend that the penalties for the new offences proposed be set by reference to the penalties for the corresponding offences in the respective overseas jurisdictions with suitable adjustments.

Recommendation 2: **Current specialised treatment and rehabilitation programs for sex offenders and the provision of specialised post-release supervision to discharged sex offenders be maintained; the general practice for judges to obtain assessment reports of sex offenders continue to apply; the Government to review and consider the introduction of an incentive scheme in the prison institutions, and to consider strengthening the rehabilitation services. (see near paragraph 2.51)**

We recommend that the current specialised treatment and rehabilitation programs for sex offenders available on a voluntary basis at the Correctional Services Department be maintained.

We recommend that the general practice for judges to exercise discretion to obtain psychological and psychiatric assessment reports of sex offenders for sentencing should continue to apply.

We recommend that the Government reviews and considers the introduction of an incentive scheme in the prison institutions.

We recommend that the provision of specialised post-release supervision to discharged sex offenders under the existing statutory schemes be maintained.

We recommend that the Government considers strengthening the rehabilitation services for discharged sex offenders.

Recommendation 3: **The Government to extend the SCRC Scheme to its fullest and evaluate the need to make it a mandatory scheme at an appropriate time; the Scheme be extended to cover all existing employees, self-employed persons, and volunteers; whether the SCRC Scheme should be extended to include spent convictions should be considered by the Hong Kong community. (see near paragraph 3.39)**

We do not recommend that the Sexual Conviction Record Check Scheme ("the SCRC Scheme") become mandatory for the time being.

We recommend the Government extends the SCRC Scheme to its fullest and evaluate the need to make it a mandatory scheme at an appropriate time.

We recommend that the current SCRC Scheme be extended to cover all existing employees, self-employed persons, and volunteers.

We are of the view that the issue as to whether the SCRC Scheme should be extended to include spent convictions should be considered by the Hong Kong community. Accordingly, we invite the community to express their views on the issue.

Designed by the Information Services Department
Printed by the Government Logistics Department
Hong Kong Special Administrative Region Government