

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**

EXECUTIVE SUMMARY

(This executive summary is an outline of the consultation paper issued to elicit public response and comment on the Sub-committee's preliminary recommendations. Those wishing to comment should refer to the full text of the consultation paper which can be obtained from the Secretariat, Law Reform Commission of Hong Kong ("LRC"), 4th Floor, East Wing, Justice Place, 18 Lower Albert Road, Central, Hong Kong, or downloaded from the LRC's website at: <<http://www.hkreform.gov.hk>>.

Comments should be submitted to the Secretary of the Sub-committee by 11 February 2021.)

Preface

Terms of reference

1. The terms of reference of the Sub-committee 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."

Previous work of the Sub-committee

2. The following consultation papers and reports have been published since the appointment of the Sub-committee in July 2006:

- (1) Consultation Paper on Interim Proposals on a Sex Offender Register (July 2008);
- (2) Report on Sexual Offences Records Checks for Child-Related Work: Interim Proposals (February 2010) ("Report on Interim Proposals");
 - *The proposals were implemented by the establishment of the Sexual Conviction Record Check Scheme ("SCRC Scheme") which has come into operation in December 2011 as an administrative scheme.*
- (3) Report on The Common Law Presumption that a Boy under 14 is Incapable of Sexual Intercourse (December 2010);
 - *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

- (4) Consultation Paper on Rape and Other Non-consensual Sexual Offences (September 2012);
- (5) Consultation Paper on Sexual Offences Involving Children and Persons with Mental Impairment (November 2016);
- (6) Consultation Paper on Miscellaneous Sexual Offences (May 2018);
- (7) Report on Voyeurism and Non-consensual Upskirt-photography (April 2019); and
- (8) Report on Review of Substantive Sexual Offences (December 2019) (“Report on Sexual Offences”).

This consultation paper

3. 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.

Public views invited

4. 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.

Chapter 1: Penalties for offences proposed in the overall review of substantive sexual offences

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

5. The LRC proposed in its Report on Sexual Offences that two existing offences in the Crimes Ordinance (Cap 200) be retained with modifications. The first one is the offence of rape which the LRC recommended be renamed as “sexual penetration without consent”, and the second one is the offence of incest.

6. We recommend that the penalties of these two existing offences (ie life imprisonment for the offence of rape; and 14 years’ imprisonment for the offence of incest) should continue to apply to the two modified offences as their gravity is the same as that of the existing offences.¹

Penalties for proposed new offences

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”).

¹ See paragraphs 1.5 and 1.6 of the consultation paper.

8. Of the 30 proposed new offences, 14 of them have no corresponding Hong Kong legislation which prohibit the relevant conduct.² Our view is 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. (**See table at Appendix A**)

9. The remaining 16 proposed new offences have corresponding existing legislation in Hong Kong. As such, the Sub-committee has compared the penalties applicable to the local provisions with those of their corresponding overseas provisions to decide what recommendations might be appropriate.

*Sexual assault*³

10. We have recommended the replacement of the existing offence of indecent assault with this new offence (modelled on section 3 of the English Act) which provides for a maximum penalty of 10 years' imprisonment. As this is the same as the maximum penalty for the 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*⁴

11. This new offence is modelled on section 4 of the English Act, 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.

12. 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. The penalties applicable to the proposed new offence should be so structured that heavier penalties should be imposed for compelled sexual activities which are penetrative in nature.

13. We recommend that the new offence 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*⁵

14. This new offence is modelled on sections 5⁶ and 6⁷ of the English Act. Both provisions provide for a maximum penalty of life imprisonment. As this is the same as the maximum penalty for some of our existing offences,⁸ we recommend that the new gender neutral offence of penetration of a child under 13 should carry the same maximum penalty of life imprisonment.

² See paragraph 1.8 of the consultation paper.

³ See paragraph 1.11 of the consultation paper.

⁴ See paragraphs 1.12 to 1.16 of the consultation paper.

⁵ See paragraph 1.17 of the consultation paper.

⁶ The offence of rape of a child under 13.

⁷ The offence of assault of a child under 13 by penetration.

⁸ The 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).

*Penetration of a child under 16*⁹

15. This new offence is modelled on section 9 of the English Act which provides for a maximum penalty of 14 years' imprisonment for both penetrative and non-penetrative sexual activities. The relevant existing offences in Hong Kong carry maximum penalties of five years' and 10 years' imprisonment.¹⁰

16. We recommend that this new offence should carry the same maximum penalty (ie 14 years' imprisonment) as the corresponding English provision as the new offence involves penile penetration of the vagina, anus or mouth of a child under 16. A heavier sentence is required to reflect the seriousness of the offence and for better protection of a child against sexual exploitation, in particular when it involves penile penetration.

*Sexual assault of a child under 13*¹¹

17. This new offence is modelled on section 7 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. These provisions provide for a maximum penalty of 14 years' imprisonment¹² and life imprisonment¹³ respectively. The relevant existing offences in Hong Kong carry a lower maximum penalty of 10 years' imprisonment.¹⁴

18. While 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. As such, we recommend 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*¹⁵

19. This new offence 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. These provisions provide for a maximum penalty of 14 years' imprisonment¹⁶ and life imprisonment¹⁷ respectively. The relevant existing offences in Hong Kong carry a lower maximum penalty of 10 years' imprisonment.¹⁸

⁹ See paragraphs 1.18 to 1.21 of the consultation paper.

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

¹¹ See paragraphs 1.22 to 1.24 of the consultation paper.

¹² Section 7(2)(b) of the English Act.

¹³ Section 48 and Schedule 2 of the Scottish Act.

¹⁴ The offences of indecent conduct with or towards a child under 16 (section 146 of the Crimes Ordinance) and indecent assault (section 122 of the Crimes Ordinance).

¹⁵ See paragraphs 1.25 to 1.27 of the consultation paper.

¹⁶ Sections 9(2) and 9(3)(b) of the English Act.

¹⁷ Section 48 and Schedule 2 of the Scottish Act.

¹⁸ The offences of indecent conduct with or towards a child under 16 (section 146 of the Crimes Ordinance) and indecent assault (section 122 of the Crimes Ordinance).

20. Similar to our abovementioned views taken as regards the new offence of sexual assault of a child under 13, recommending an increase of sentence from 10 years' imprisonment to life sentence as in the corresponding Scottish provision may be disproportionate. We hence recommend 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 new offence of sexual assault of a child under 16.

*Causing or inciting a child under 13 to engage in sexual activity*¹⁹

21. This new offence is modelled on section 8 of the English Act which 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 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.

22. We recommend that this new offence carries the same maximum penalty as the corresponding English provision. A heavier sentence is 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*²⁰

23. This new offence is modelled on section 10 of the English Act which provides for a maximum penalty of 14 years' imprisonment. The relevant existing offence in Hong Kong²¹ carries a maximum penalty of 10 years' imprisonment.

24. We recommend that this new offence carries the same maximum penalty as the corresponding English provision for better protection of a child under 16 and to reflect the seriousness of the offence.

*Sexual activity with a person with mental impairment ("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*²²

25. This new offence is modelled on section 38(1) of the English Act which provides for a maximum penalty of 14 years' imprisonment for penetrative sexual acts and 10 years' imprisonment for non-penetrative sexual acts. The relevant existing offences in Hong Kong carry a maximum penalty of five years' imprisonment.²³

26. 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. Such possible exploitation needs to be addressed²⁴ in order to strengthen the protection provided to PMIs.

¹⁹ See paragraphs 1.28 to 1.30 of the consultation paper.

²⁰ See paragraphs 1.31 and 1.32 of the consultation paper.

²¹ The offence of indecent conduct with or towards a child under 16, or incites the child pursuant to section 146 of the Crimes Ordinance.

²² See paragraphs 1.33 to 1.36 of the consultation paper.

²³ 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.

²⁴ See paragraph 1.34 of the consultation paper.

27. We recommend that this new offence carries 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. This distinction is not found in the existing legislation.

*Sexual exposure*²⁵

28. This new offence is modelled on section 8 of the Scottish Act which provides for a maximum penalty of five years' imprisonment.²⁶ 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.

29. This new offence is designed to cover exposure targeting a specific victim for sexual gratification or to threaten the victim. 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 which covers sexual exposure in any place rather than a public order offence.²⁷ We recommend that this sexual offence should carry a heavier sentence of five years' imprisonment in order to provide wider protection to the victims.

*Voyeurism and Non-consensual upskirt-photography*²⁸

30. These two new offences are modelled on section 67 and section 67A of the English Act respectively. Both provisions provide for a maximum penalty of two years' imprisonment. Given that this is the same as the maximum penalty for our existing offence of loitering (section 160 of the Crimes Ordinance), we recommend that these two new offences (involving conduct which is sexual in nature) should carry the same maximum penalty of two years' imprisonment.²⁹

*Sexual intercourse with an animal*³⁰

31. This new offence is modelled on section 69 of the English Act 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) which carries a maximum penalty of 10 years' imprisonment.

32. There are no convincing reasons to recommend lowering the present maximum penalty from 10 years' to two years' imprisonment as provided for in the corresponding English provision. To accord better protection to the public, we recommend maintaining the current maximum penalty of 10 years' imprisonment for this new offence.³¹

²⁵ See paragraphs 1.37 to 1.39 of the consultation paper.

²⁶ Section 48 and Schedule 2 of the Scottish Act.

²⁷ 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.

²⁸ See paragraphs 1.40 to 1.43 of the consultation paper.

²⁹ An act of voyeurism or non-consensual upskirt-photography which takes place in public may have contravened section 17B of the Public Order Ordinance, Cap 245 for disorderly behaviour in a public place which carries a maximum penalty of 12 months' imprisonment. This is a public order offence rather than a sexual offence. The proposed new offences aim at a person who commits the offence for a sexual purpose which should be penalised by a heavier sentence (ie two years imprisonment).

³⁰ See paragraphs 1.44 to 1.47 of the consultation paper.

³¹ The replacement of the existing offence of bestiality with the new offence is recommended so that the conduct would not be restricted to buggery with an animal, and that the offence could be included in the SCRC Scheme.

*Administering a substance for sexual purposes*³²

33. This new offence is modelled on section 11 of the Scottish Act which provides for a maximum penalty of five years' imprisonment. 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.

34. By recommending the new offence to be modelled on the Scottish provision, 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). This can widen the protection to the victims and at the same time balance the accused's defence rights. 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*³³

35. This new offence is modelled on section 62 of the English Act which provides for a maximum penalty of 10 years' imprisonment which is the same as the maximum penalty for the existing offence of assault with intent to commit buggery (section 118B of the Crimes Ordinance). However, we would suggest a higher maximum sentence of 14 years' imprisonment for this new offence as it 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. We recommend that this new preparatory offence should carry the same maximum penalty as the offence of administering a substance for sexual purpose, which is also in line with our recommendation below in respect of the new preparatory offence of trespass with intent to commit a sexual offence.

*Trespass with intent to commit a sexual offence*³⁴

36. This new offence is modelled on section 63 of the English Act 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 rape pursuant to section 11 of the Theft Ordinance, Cap 210 which provides for a heavier maximum penalty of 14 years' imprisonment.

37. We take the view that 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). To be consistent with the maximum penalty recommended for the two preceding preparatory offences, we recommend the same maximum penalty of 14 years' imprisonment for this new offence.

Table of recommended penalties

38. We recommend that the penalties for the remaining 16 new offences to be set by reference to the penalties for the corresponding overseas offences with suitable adjustments as discussed above. (**See table at Appendix B**).

³² See paragraphs 1.48 to 1.50 of the consultation paper.

³³ See paragraph 1.51 of the consultation paper.

³⁴ See paragraphs 1.52 to 1.54 of the consultation paper.

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

39. In this chapter, we 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 their psychological and psychiatric assessment reports; (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.

Pre-sentencing Stage

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

40. 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. Currently, treatment and rehabilitation programmes for incarcerated sex offenders are operated and provided by the Correctional Services Department ("CSD") on a voluntary basis.³⁵

Reoffending rates of sex offenders

41. As 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. However, from the information provided by an expert in the CSD,³⁶ we note 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 years of his release. The reoffending percentage is just 2.94%.³⁷

Our views

42. We note that if it becomes mandatory for sex offenders to attend treatment

³⁵ The Sex Offenders Evaluation and Treatment Unit which operates from the Siu Lam Psychiatric Centre was set up in 1998 to help persons in custody who have committed sexual offences.

³⁶ See paragraphs 2.3 and 2.16 of the consultation paper.

³⁷ 2.94% is the reoffending rate of 1 out of 34 sex offenders (i.e. $[1/34] \times 100\%$). See also paragraph 2.17 of the consultation paper.

and rehabilitation programmes, the CSD will need to engage additional manpower and to implement a proper system or scheme designed for that particular purpose. At present, there is insufficient information available to demonstrate accurately the extent to which sex offenders could benefit from the specialised treatment programmes.

43. We agree 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. Hence, we do not recommend that judges be provided with power to make mandatory treatment orders. The current system and the treatment provided by the CSD which appear to be operating well should continue.³⁸

(b) Judges' power to order assessment reports

44. 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

45. The psychologists and psychiatrists of the CSD prepare pre-sentencing psychological and psychiatric assessment reports on sex offenders 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.

Our views

46. Solely obtaining pre-sentencing assessment reports without specialised treatment, reintegration support and supervision is unlikely to provide effective management of sex offenders. We are aware of the limited 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 may affect the level of support provided to those sex offenders who have volunteered to attend the treatment programmes.

47. We take the view that there is insufficient justification 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

48. Unlike some overseas jurisdictions such as England and Wales, the CSD does not have any incentive schemes in place. In Hong Kong, the salary of a person in custody ("PIC") provides an incentive for work. Furthermore, PICs serving a sentence

³⁸ See paragraphs 2.20 to 2.23 of the consultation paper.

of imprisonment for two years or above³⁹ and three years and above⁴⁰ can apply for early discharge under the Prisoners (Release under Supervision) Ordinance (Cap 325) (“P(RS)O”). Progress in rehabilitation and the risk of reoffending are some of the considerations for early discharge.

The position in overseas jurisdictions

49. Amongst the overseas jurisdictions we have examined,⁴¹ we find the incentive scheme in England and Wales to be a good reference. In July 2019, the Ministry of Justice of England and Wales published the Incentives Policy Framework (“IPF”). 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. 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.

Our views

50. The IPF provides a good reference and starting point for Hong Kong. Noting the necessity for the Government to consider different issues from the policy perspective before a view can be formed on this matter, we 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.⁴²

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

Current mechanisms in place in Hong Kong

51. Post-release supervision can be imposed at the discretion of the Post-Release Supervision Board over offenders who are (i) convicted of specified offences (including rape, bestiality and indecent assault) and sentenced to imprisonment for two years or more but less than six years;⁴³ or (ii) convicted of any offences and sentenced to imprisonment for six years or more.⁴⁴

52. For persons who serve an indeterminate sentence, the Long-term Prison Sentences Review Ordinance (Cap 524) provides for (i) Conditional Release Scheme; and (ii) Supervision After Release Scheme.⁴⁵

53. 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

³⁹ Section 7(2) of the P(RS)O.

⁴⁰ Section 7(1) of the P(RS)O.

⁴¹ See paragraphs 2.33 to 2.38 of the consultation paper.

⁴² 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.

⁴³ Regulation 2(b)(i) of and Schedule 1 to the Post-release Supervision of Prisoners Regulations (Cap 475A) (“PSPR”).

⁴⁴ Regulation 2(a) of PSPR, and sections 3 and 6(1) of the Post-release Supervision of Prisoners Ordinance (Cap 475).

⁴⁵ See paragraph 2.44 of the consultation paper.

convicted of sex offences may be required to receive psychological treatment and psychiatric treatment as part of their post-release supervision conditions.

54. We note that there are certain limitations of the current mechanism (eg it covers a small group of sex offenders, and the duration of community support and supervision required may be much longer than the actual supervision period).⁴⁶

Our views

55. 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. Noting the limitations of the existing practice, 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 without specific statutory power 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

56. 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 mentally incapacitated persons (“MIPs”)⁴⁷ to check the criminal conviction records for sexual offences of employees.⁴⁸ 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.

⁴⁶ See paragraphs 2.47 to 2.49 of the consultation paper.

⁴⁷ The Government is reminded to take into account the LRC’s Final Recommendations 35 and 36 (re Consultation Paper on Sexual Offences Involving Children and Persons with Mental Impairment) in the Report on Sexual Offences for the proper term to be used to describe a person with mental impairment.

⁴⁸ Report on Interim Proposals, Recommendation 2.

57. 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 or whether it should be a comprehensive legislative scheme; and whether the SCRC Scheme should cover all employees, self-employed persons, volunteers, and include disclosure of “spent convictions”.

Comprehensive legislative scheme vs administrative scheme

58. 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.⁴⁹ We note there are arguments for and against a comprehensive legislative scheme.⁵⁰

The present SCRC Scheme

59. 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.

60. We have reviewed the Sexual Conviction Record Check Scheme Protocol 2019 of the Security Bureau/the Police and learnt that 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.

Prospective and existing employees

61. The LRC previously recommended that the SCRC Scheme should apply to both existing and prospective employees. This remains to be our view.

Self-employed persons

62. We recommend that the administrative SCRC Scheme should be extended to cover self-employed persons undertaking child-related work or PMI-related work in order to strike a balance between the possibility of a potential abuse of the scheme and the need to safeguard the vulnerable from sexual abuse. We believe it is ultimately a matter for the Government to consider whether and how to take the matter forward.

Volunteers

63. The LRC earlier recommended that the SCRC Scheme should cover volunteers.⁵¹ Some non-government organisations expressed that if the scheme was to cover volunteers, it might deter people from volunteering. We note that the LRC had already considered and taken into account that concern before making its

⁴⁹ Report on Interim Proposals, paragraph 4.48.

⁵⁰ See paragraphs 3.8 and 3.9 of the consultation paper.

⁵¹ Report on Interim Proposals, Recommendation 3.

recommendation. We do not think we need to revisit those issues.⁵² We recommend that the administrative SCRC Scheme should be extended to cover volunteers.

Conclusion

64. We do not recommend the SCRC Scheme to be a mandatory one for the time being. Notwithstanding the resources implications, we recommend that the Government should extend 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

65. The LRC recommended that, *as an interim measure*, the SCRC Scheme should not cover spent convictions⁵³ and 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.⁵⁴

66. We note there are compelling arguments for and against covering spent convictions in the SCRC Scheme.⁵⁵ Given that there are divergent views within the Sub-committee on this matter,⁵⁶ 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.

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.

⁵² See paragraph 3.27 of the consultation paper.

⁵³ Report on Interim Proposals, Recommendation 9.

⁵⁴ *“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).

⁵⁵ See paragraphs 3.34 and 3.35 of the consultation paper.

⁵⁶ See paragraphs 3.37 and 3.38 of the consultation paper.

Appendix A

Table of Penalties

(proposed new offences without corresponding Hong Kong legislation)

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)
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)

Proposed new offence	Corresponding overseas offence	Maximum penalty (of corresponding overseas offence)
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))
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))	<p><u>Penetrative sexual activity:</u> Life imprisonment (English Act, section 34(2))</p> <p><u>Non-penetrative sexual activity:</u> 14 years' imprisonment (English Act, section 34(3))</p>
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))	<p><u>Penetrative sexual activity:</u> Life imprisonment (English Act, section 35(2))</p> <p><u>Non-penetrative sexual activity:</u> 14 years' imprisonment (English Act, section 35(3)(b))</p>
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))

Proposed new offence	Corresponding overseas offence	Maximum penalty (of corresponding overseas offence)
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))
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))	<p><u>Penetrative sexual activity:</u> 14 years' imprisonment (English Act, section 39(3))</p> <p><u>Non-penetrative sexual activity:</u> 10 years' imprisonment (English Act, section 39(4)(b))</p>
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))

Appendix B

Table of Penalties (proposed new offences with corresponding Hong Kong legislation)

Proposed new offence	Recommended maximum penalty
Sexual assault	10 years' imprisonment
Causing a person to engage in sexual activity without consent	<i><u>Penetrative sexual activity:</u></i> Life imprisonment <i><u>Non-penetrative sexual activity:</u></i> 10 years' imprisonment
Penetration of a child under 13	Life imprisonment
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	<i><u>If the activity caused or incited involved penetration of the anus or vagina; or penile penetration of the mouth:</u></i> Life imprisonment <i><u>If no penetration:</u></i> 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	<i><u>Penetrative sexual activity:</u></i> 14 years' imprisonment <i><u>Non-penetrative sexual activity:</u></i> 10 years' imprisonment
Sexual exposure	5 years' imprisonment
Voyeurism	2 years' imprisonment

Proposed new offence	Recommended maximum penalty
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