

THE LAW REFORM COMMISSION OF HONG KONG
REVIEW OF SEXUAL OFFENCES SUB-COMMITTEE

CONSULTATION PAPER

INTERIM PROPOSALS ON A SEX OFFENDER REGISTER

EXECUTIVE SUMMARY

(This Executive Summary is an outline of the Consultation Paper. Copies of the Consultation Paper can be obtained either from the Secretariat, Law Reform Commission, 20/F, Harcourt House, 39 Gloucester Road, Hong Kong, or on the internet at <<http://www.hkreform.gov.hk>>.)

Terms of reference

1. In April 2006, the Secretary for Justice and the Chief Justice made a reference to the Law Reform Commission to review sexual and related offences in Hong Kong. The terms of reference were as follows:

"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, and to recommend such changes in the law as may be thought appropriate."

The Sub-committee

2. The Sub-committee on Review of Sexual Offences 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 are:

Mr Peter Duncan, SC
(Chairman)

Senior Counsel

Hon Mrs Justice Barnes

Judge of the Court of First Instance
of the High Court

Mr Eric T M Cheung

Assistant Professor
Department of Professional Legal
Education
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Dr Chu Yiu Kong [Until December 2007]	Assistant Professor Department of Sociology University of Hong Kong
Mr Paul Harris, SC	Senior Counsel
Mr Stephen K H Lee [From January 2008]	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mrs Apollonia Liu	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	Assistant Director (Family & Child Welfare) Social Welfare Department
Mr Andrew Powner	Partner Haldanes, Solicitors
Ms Lisa D'Almada Remedios	Barrister
Dr Alain Sham	Senior Assistant Director of Public Prosecutions Department of Justice
Ms Cathy Wan (Secretary)	Senior Government Counsel Law Reform Commission

Expansion of the Sub-committee's terms of reference

3. In October 2006 the terms of reference were expanded to read as follows:

"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."

(underlining added)

4. The part of the revised terms of reference underlined above was added 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 sex offender register.

What is a sex offender register?

5. A review of the literature on "sex offender registers" shows that the term is often used to refer to three different mechanisms devised to protect the public, particularly children and vulnerable persons, from sex offenders. Often, comments that are for or against the setting up of a "sex offender register" are referring to different concepts.

6. In some of the literature, the term refers to the US style Megan's Law. The US federal Justice Department's National Sex Offender Registry, for example, maintains a database in which the names, pictures and addresses of convicted sex offenders are revealed to members of the public who conduct searches on the Registry's website. Similar registries are maintained by the individual states.

7. The term "sex offender register" also refers to the imposition of notification obligations on sex offenders after their release from prison. The sex offender is required to report to the local police with details of his whereabouts after serving his prison term. This obligation continues either indefinitely or for a number of years, depending on the nature of the crime committed or the length of imprisonment.

8. The term "sex offender register" is also used to refer to a system by which criminal records are utilised for the purposes of screening job applicants for positions that give them access to children and mentally incapacitated persons.

Consideration of interim measure

9. After some research into the reforms implemented overseas, the Sub-committee came to the view that any registration system of sex offenders should be seen as only a part of an integrated approach for the treatment and rehabilitation of sex offenders and a network of measures and good practice to protect children and the community from those who may harm them. Hence, an integrated approach should be adopted where punishment, treatment and rehabilitation of offenders, as well as risk assessment and management should be closely linked.

10. It has occurred to the Sub-committee that pending its final conclusions on these matters, the Administration may wish to consider the introduction of an interim measure 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.

11. The Sub-committee believes that the parameters for any interim measure, pending any legislative changes that may be recommended under

our comprehensive proposals, should be that: (1) it should be plainly lawful and not infringing of any human rights; (2) the measure should be capable of being implemented quickly by way of administrative guidelines without the introduction of legislation; and (3) the measure should not run counter to or jeopardise any long-run comprehensive reforms in the treatment, rehabilitation and punishment of sex offenders.

12. Given that adults who have a mental disorder or are mentally handicapped may also be easy targets for sexual exploitation, we believe they deserve similar protection. In this context, we believe it is appropriate to adopt the meaning ascribed to "mentally incapacitated person" in section 117 of the Crimes Ordinance (Cap 200); that is, "*a mentally disordered person or a mentally handicapped person (within the meaning of the Mental Health Ordinance (Cap 136))¹ whose mental disorder or mental handicap, as the case may be, is of such a nature or degree that that person is incapable of living an independent life or guarding himself against serious exploitation, or will be so incapable when of an age to do so.*" In this paper, unless the context suggests otherwise, references to children will include mentally incapacitated persons.

The consultation paper

13. The purpose of the consultation paper is therefore to consult interested parties and the public in general on the Sub-committee's proposed interim measure that a system be established whereby criminal record checks may be conducted on people working, or about to work, with children and mentally incapacitated persons. The Sub-committee would be grateful for comments on this consultation paper by 31 October 2008.

Chapter 1

The existing problem/lacuna in Hong Kong

14. Numerous court judgments have highlighted some of the existing problems in Hong Kong. If a paedophile is minded to seek out areas of work which would provide him with continued contact with children, there is no system in place which would prevent him from using his employment or voluntary services to target and sexually abuse the children with whom he works. The lacuna lies in the lack of an effective system whereby employers or parents may ascertain whether those who are in child-related work or employment have any previous convictions for sexual offences.

¹ "Mentally disordered person" means a person suffering from mental disorder. And mental disorder is defined to mean: (a) mental illness; (b) a state of arrested or incomplete development of mind which amounts to a significant impairment of intelligence and social functioning which is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned; (c) psychopathic disorder; or (d) any other disorder or disability of mind which does not amount to mental handicap. "Mentally handicapped person" means a person who is or appears to be mentally handicapped. And mental handicap is defined to mean sub-average general intellectual functioning with deficiencies in adaptive behaviour.

15. The Criminal Records Bureau of the police is responsible for maintaining records of persons convicted of certain offences under the Laws of Hong Kong. Such records are kept primarily to assist the police in discharging their statutory duties of preventing, detecting and investigating crimes. Hence the police will not generally assist ordinary employers to check whether their existing or prospective employees have any criminal record. The main exception is that if there are express statutory provisions which provide that the existence of previous convictions is a ground for refusing the registration or approval of persons working in a particular profession or field, then the police will assist in carrying out the criminal records check upon the request of the approving authorities or bodies in order to help them discharge their statutory functions.

16. As far as child-related work is concerned, the above-mentioned exception covers school managers and teachers registered under the Education Ordinance,² childminders under the Child Care Services Ordinance,³ and social workers registered under the Social Workers Registration Ordinance.⁴ However there remains a vast range of persons who have close contact with children during their work where a criminal records check is not available. Within the school system, these include: laboratory technicians, ushers and other support staff. Outside the school system, these include: tutors working in tutorial centres or at home, music teachers and sports coaches, staff working in children's wards in hospitals, staff and volunteer workers helping at youth centres, churches or other organisations.

Chapter 2

The interests at stake in the possible introduction of a sex offender register in Hong Kong

Interests at stake

17. The Sub-committee is aware that the establishment of a sex offender register or the use of police records to vet relevant job applications puts at stake conflicting interests. There is a need to strike a balance between taking reasonable steps to ensure protection is afforded to children on the one hand, and to ensure that the rights of ex-offenders are respected on the other.

Human rights considerations

18. Any application of the law must be fair, necessary, proportionate and in compliance with human rights principles. We have considered relevant provisions in the International Covenant on Civil and Political Rights ("the ICCPR"), the Basic Law and the Hong Kong Bill of Rights Ordinance.

² Cap 279, sections 30 and 46.

³ Cap 243, sections 15A and 15D.

⁴ Cap 505, section 17.

The ICCPR

19. The Hong Kong Bill of Rights Ordinance ("the HKBORO") is the local law giving effect to relevant provisions of the ICCPR, and it binds the Government and public authorities and those acting on their behalf.

Protection of privacy

20. Article 17 of the ICCPR stipulates that:

"1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks."

LRC Report on Civil Liability for Invasion of Privacy

21. The Law Reform Commission's Report on Civil Liability for Invasion of Privacy issued in December 2004 discussed the privacy of ex-offenders in relation to the publication of a person's conviction record in magazines, newspapers, television and film without any legitimate public interest. Some of the report's observations are note-worthy and are relevant to our current study:

"The Consultation Paper examined whether the law should permit the publication of forgotten criminal records in the absence of any legitimate public interest. While the Sub-committee agreed that publicising a person's criminal record for no good reason constitutes an interference with his private life, they also noted that the publication of criminal records raises issues which go beyond the privacy of ex-offenders. The Sub-committee expressed the view that the statutory right not to have a "spent conviction" divulged protected reputation rather than privacy. Judgments rendered in open court are information in the public domain; the fact that they are matters of public record prevents such convictions from being private. The Consultation Paper therefore concluded that criminal convictions are public records, and their publication should not be restrained on the ground that it is a breach of privacy."

22. For many professions, a person's past conviction record is regarded as an important consideration as to the suitability of that person. If a person has previous convictions for sexual offences, this should be a relevant consideration for deciding whether he should be employed in work which involves dealing with children. It can therefore be argued that parents, schools and similar bodies should be able to obtain such relevant information in order to make informed decisions when hiring teachers or helpers.

Freedom of choice of occupation and rehabilitation

23. We have also considered Article 33 of the Basic Law which states that "*Hong Kong residents shall have freedom of choice of occupation.*"

24. It is in the interest of society to encourage rehabilitation of sex offenders by allowing them to live down their past, make a new productive life and establish and maintain intimate and social relationships. Critics of a sex offender register might argue that the register would jeopardise the rehabilitation opportunities of the sex offender. The wider community may therefore lose the benefit of the skills and involvement of sex offenders who have rehabilitated. At its worst, exclusion from the community or gainful employment may push these offenders towards re-offending.

Rights of sex offenders not absolute

25. The Sub-committee notes that the rights and interests of sex offenders quoted above are not to be regarded as absolute, and need to be balanced against conflicting rights and interests. In particular, Article 24 of the ICCPR stipulates that "*every child has the right to be protected, regardless of the child's race, colour, sex, language, religion, national or social origin, property or birth.*" This Article imposes a positive obligation on the government to take reasonable and necessary measures to protect children from harm and exploitation by sex offenders. Any failure by the government to provide an effective system to secure children's safety may also lead to the public taking the law into their own hands by, for instance, indiscriminate posting of details of sex offenders by the media or individuals on the internet or in other forms of publication.

Chapter 3

Overseas experience

American jurisdictions

History of sex offender registration laws

26. In October 1989, Jacob Wetterling, an eleven-year-old boy, was abducted at gun-point in Minnesota and has never been found. Investigators later learned that, unknown to local law enforcement agencies, "halfway houses" nearby housed sex offenders after their release from prison. The boy's mother, Patty Wetterling, became an advocate for missing children and was appointed to a Governor's Task Force that recommended stronger sex offender registration requirements in Minnesota. In 1994, the US Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act in Jacob's honour ("the Jacob Wetterling Act"), which required all states to enact laws to implement state sex offender registers. The Jacob Wetterling Act, however, did not require the state to allow public access to the information contained in the registers.

27. In July 1994, seven-year-old Megan Kanka accepted an invitation from a neighbour, who was a twice-convicted paedophile, to see his new puppy, but was then raped and murdered. Megan's parents started a campaign to demand public access to, or dissemination of, the information contained in the sex offender registers, and received strong public support. In 1996 Congress passed the federal so-called Megan's Law⁵ to amend the Jacob Wetterling Act by mandating all states to enact laws to allow state law enforcement agencies to "*release relevant information that is necessary to protect the public concerning a specific person required to register*" as a sex offender.

28. Also passed by Congress in 1996 was the Pam Lyncher Sexual Offender Tracking and Identification Act, which required the states to forward information contained in the state sex offender registers to the Federal Bureau of Investigation (FBI) so as to establish a national database of sex offenders to assist local law enforcement agencies in tracking sex offenders across state lines.

Community notification requirements

29. The federal Megan's Law makes it mandatory for community notification of registration information where it is relevant and necessary for public protection. As a result, all 50 states now provide for community notification in two ways, namely, direct notification to individuals and organisations within the community by local officials and indirect notification to the wider public by states making sex offender registries available on the internet.

30. As to the actual manner of notifying the community that a sex offender has moved into the neighbourhood, most state laws do not provide guidance to the police regarding who to notify or the method of notification. Some police departments hang posters in community centres and libraries, or send letters or postcards to homes within a certain distance of the registrant. Some convene local neighbourhood meetings or fund non-governmental bodies to inform the community about released registrants.

31. Every state now has a searchable state-wide website open to the public with information about individuals required to register as sex offenders. However, considerable variations exist among states with respect to the comprehensiveness of offender-related information that is made available on the internet. For example, some states confine disclosure in the internet registry to offenders who have been determined to be high-risk, while others provide for wider disclosure of offender information without reference to the risk level of specific offenders. The information provided online for each offender typically includes the crime that triggered the registration requirement, name, photograph, physical description, date of birth and current address of the registrant (although a few states provide only the zip code of the individual). Some states provide additional personal information for certain offenders, including the address of the registrant's employer and the make, model, and licence plate number of any vehicle the registrant drives.

⁵ Violent Crime and Law Enforcement Act 42 USC 13701.

32. The US federal Department of Justice has established the Dru Sjodin National Sex Offender Public Website⁶ by drawing on data from the internet registries of individual states. It allows offenders' information to be searched by the public by keying in an offender's name, city, state or postal code. However, the US federal Department of Justice does not guarantee the accuracy, completeness or timeliness of the information on the website as the information is maintained by individual states based on information mostly provided by the registrants themselves.

Consequences of broad community notification

33. The broad community notification schemes under Megan's Law in the US are regarded by many as "naming and shaming" in nature, and not particularly helpful to parents' vigilance efforts and the rehabilitation of offenders. In many instances the result has been to drive paedophiles underground. Disclosure was intended as a preventive mechanism, allowing the community to maintain surveillance or adopt specific preventive actions. However, because of stigma and fear of vigilantism or harassment, offenders often move away without registering again. Community notification or disclosure can cause anxiety in the neighbourhood, and in some cases, the anger and fear leads to vigilantism or harassment of registrants.

New requirements under SORNA

34. On 27 July 2006, Title I of the Adam Walsh Act, entitled the Sex Offender Registration and Notification Act ("SORNA"), was enacted. SORNA broadens the jurisdictions' obligation to provide for broad community notification through public websites of all registered sex offenders by all internet registries to disclose the following mandatory information:

- The name of the sex offender, including all aliases.
- The address of each residence at which the sex offender resides or will reside and, if the sex offender does not have any (present or expected) residence address, other information about where the sex offender has his or her home or habitually lives. (If current information of this type is not available because the sex offender is in violation of the requirement to register or unlocatable, the website must note this.)
- The address of any place where the sex offender is an employee or will be an employee and, if the sex offender is employed but does not have a definite employment address, other information about where the sex offender works.
- The address of any place where the sex offender is a student or will be a student.

⁶ <http://www.nsopr.gov/>.

- The licence plate number and a description of any vehicle owned or operated by the sex offender.
- A physical description of the sex offender.
- The nature of the sex offence for which the sex offender is registered and any other sex offence of which the sex offender has been convicted.
- A current photograph of the sex offender.

Some criticisms of SORNA

35. The new federal requirements on community notification under SORNA were criticised for allowing anyone anywhere to access online sex offender registries for purposes that might have nothing to do with public safety. It was pointed out that most sex crimes are not committed by registered offenders. Also, with over 600,000⁷ men and women listed on the various sex offender registries, it would be difficult for the law enforcement agencies to actively monitor all the registrants.

England and Wales

36. In England and Wales, significant efforts have been made to protect children from sex offenders by an array of arrangements, including the creation of a sex offender register, controlled disclosure of sex offenders' information, criminal records checks for vetting job applications, and barring sex offenders from child-related work.

Community notification v controlled disclosure

37. Unlike the US Megan's Law, there is no public right of access to the registration information contained in the UK Sex Offender Register. While general uncontrolled public disclosure of sex offenders' information via websites has been rejected, an exception was created in 2006 when the Child Exploitation and Online Protection (CEOP) Centre was set up. A public website was established by CEOP (www.ceop.gov.uk) to publish details (including photographs, names and aliases, dates of birth and other identifying information) of high-risk sex offenders who have failed to comply with their notification requirements and have gone missing. The Home Office takes the view that public disclosure of non-compliant offenders' details is helpful, as it reinforces the offender's need to comply with notification requirements, and helps the police find them or take further action if they do not.

Access to criminal records for employment and related purposes

Criminal Records Bureau check

38. There are now two levels of CRB check available: standard and enhanced disclosures:

⁷ As of March 2007.

Standard Disclosure

This is for anyone involved in working with children or vulnerable adults, as well as other occupations specified in the Exceptions Order to the Rehabilitation of Offenders Act 1974 ("ROA 1974"). Both current and spent convictions, cautions, reprimands and warnings held on the Police National Computer are revealed.

Enhanced Disclosure

This level of check is for anyone involved in regularly caring for, training, supervising or being in sole charge of children or vulnerable adults. In addition to the Standard Disclosure, any relevant information (including non-conviction information) held by the local police forces is made available.

39. Currently, CRB checks can be conducted only by registered organisations which are entitled to ask exempted questions under the Exceptions Order to the ROA 1974. Some large registered organisations (called "Umbrella Bodies") may decide to offer access to CRB checks to smaller organisations. CRB checks cannot be requested by individuals and so parents who employ a nanny, *au pair*, or babysitter directly cannot apply for a CRB check. Where the nanny, *au pair* or babysitter is referred by an agency, however, the agency is entitled to carry out a CRB check.

40. As from 12 May 2006, schools are required to obtain enhanced CRB checks for all new appointments to schools and those who have not been working in a school for at least three months. Previously, CRB checks were strongly recommended. Now, the checks are mandatory for all new appointments to the schools' workforce, including caretakers, dinner ladies and administration staff. This would be in addition to the usual checks, such as previous employer references and qualifications check.

Barring certain sex offenders from child-related work and creating offences for employing certain people in child-related work

List 99

41. The Secretary of State has the power to bar an individual from working in schools and relevant educational institutions. The list of those individuals subject to the bar is known as "List 99", which has been in place for over 80 years. The vast majority of the more than 4,000 people on the list are subject to a complete prohibition from working in the listed institutions. Educational organisations are under an obligation not to allow an individual to work in contravention of the bar, and so it is mandatory for them to conduct a "List 99" check before employment. It is a criminal offence for any individual on List 99 to seek employment in the education settings covered by List 99. It is also a criminal offence for any employer to employ the listed individuals.

The Safeguarding Vulnerable Groups Act 2006

42. Before the enactment of the Safeguarding Vulnerable Groups Act 2006, sections 26-34 of the Criminal Justice and Court Services Act 2000 allowed the court to make orders disqualifying some offenders from working with children. The Safeguarding Vulnerable Groups Act 2006 provides for the creation of a new scheme of vetting and barring of people from working with children and vulnerable adults, integrating List 99, the Protection of Children Act list and the Disqualification Order regime into a single list of persons barred from working with children and vulnerable adults.

43. An independent statutory body, called the Independent Safeguarding Authority (ISA), will be created equipped with the expertise to take all discretionary decisions as to which individuals should be barred. All persons working closely with children and vulnerable adults will be requested to be centrally vetted. Employers will be required to check the status of the employees in the scheme. It is expected that the ISA scheme will be operational by October 2009.

Other European jurisdictions

44. In most EU member states, arrangements are in place enabling their nationals to obtain certificates of good conduct or other types of official confirmation that they have no criminal record. The preferred method of screening applicants for employment is by means of a Certificate of Conduct (Belgium, Germany, Greece, Luxembourg, The Netherlands, Portugal and Spain) or a Certificate of Criminal Record (Italy). Instead of disclosing the whole of a person's criminal record, the certificates declare the suitability of the applicant. However, in Denmark and France, the full record is likely to be produced.

Canada

Federal – Sex Offender Information Registration Act 2004

45. Canada also maintains a register of information about sex offenders, and imposes reporting duties on sex offenders. It seems, however, that the purpose of the register is mainly to help the police in the investigation of crimes: disclosure of information from the register is very restricted. This is to acknowledge the privacy interests of sex offenders and to facilitate their reintegration into the community.

Australian jurisdictions

Federal measures

46. At the federal level, the Australian National Child Offender Register ("ANCOR") is maintained by the "Crim Trac" agency. The state/territory governments remain responsible for monitoring movements of offenders within their jurisdictions, and the information collected is shared via Crim Trac in order to enhance surveillance of offenders who move interstate. Crim Trac would also render assistance to overseas agencies. The registration regimes would be vetted by the federal and state privacy commissioners.

47. The Australian government did not support the release of the offenders' details to the community because public disclosure in other countries had led to attacks on offenders and on innocent persons mistaken for offenders. Instead of unrestricted community notification, Crim Trac provides information to specific entities including:

- the Australian police forces
- national government agencies such as the Australian Customs Service, Australia Post, the Australian Taxation Office, the Australian Sports Commission, the Child Support Agency, the Department of Immigration & Multicultural Affairs and Centrelink
- state/territory agencies such as the NSW Department of Health, the NSW Ministry of Transport, the Victorian Institute of Teaching, the NSW Rural Fire Service, the Victorian Department of Justice, the NSW State Emergency Service, the Victorian Business Licensing Authority and the Teachers Registration Board of South Australia
- non-government bodies such as Anglicare SA Inc, Uniting Church in Australia SA Synod, Monash Volunteer Resource Centre (Victoria) and Victorian YMCA Inc

South African Law Commission (SALC) Report on Sexual Offences 2002

48. The Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 was enacted on 14 December 2007. Section 42 of the Act places an obligation on the Minister for Justice and Constitutional Development to establish and maintain a National Register for Sex Offenders. The register would include the names of persons convicted of a sexual offence against a child or a person who is mentally disabled. It seems, however, that convictions for sexual offences against a normal adult would not be covered by the register. On the other hand, the register is stringent in that allegations to have committed a sexual offence against a child would be covered. An employer is prohibited from employing or continue employing a person whose particulars have been included in the register. There is also a prohibition on persons who have been convicted of sexual offences against children (or persons who are mentally disabled) from working with or having access to children (or persons who are mentally disabled), whether as an employer, employee, foster parent or adoptive parent.

Brief discussion of other measures developed in overseas jurisdictions for the treatment, rehabilitation, risk assessment and management of sex offenders

Enhancing the court's sentencing powers to include indeterminate public protection sentences, post-release supervision and detention orders

49. In some Australian jurisdictions,⁸ orders can be made to allow for the continued supervision or detention of offenders who have reached the end of their custodial sentence but who are considered to pose a continued and serious danger to the community. In Victoria, for example, the extended supervision order⁹ ("ESO") allows for an offender's ongoing supervision in the community under conditions¹⁰ for a period of up to 15 years, though the continuing need for the order is reviewed at least every three years. A court needs to be satisfied, to a high degree of probability, that the offender is likely to commit a sexual offence if released unsupervised into the community after serving a custodial sentence.

50. In England, the Criminal Justice Act 2003 introduced sentences to protect the public from dangerous, violent or sex offenders. Offenders can be subject to "indeterminate public protection sentences" such that offenders will not be released until their level of risk is manageable in the community. They will then be on licence in the community for a minimum of 10 years and must apply again to the Parole Board for their licence to be removed. Another type of sentence is the "extended sentence" under which the offender will serve the usual term in prison but will have an extended licence period of up to eight years.

Giving power to the court to make preventive orders to prohibit the defendant from prescribed activities

51. In England, a Sexual Offences Prevention Order ("SOPO") can prohibit an offender from engaging in certain activities, for example, going near schools or playgrounds. A SOPO can also be used to prohibit an offender from being alone with children under 16. It is a criminal offence to breach the prohibitions, punishable by up to five years' imprisonment. The Sexual Offences Act 2003 also introduced Risk of Sexual Harm Orders and Foreign Travel Orders banning travel abroad.

Chapter 4

Recommendations

52. Views have been expressed from various sectors that Hong Kong should create a "sex offender register" to protect children from sexual

⁸ Serious Sex Offenders Monitoring Act 2005 (Vic), Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), Dangerous Sexual Offenders Act 2006 (WA), Crimes (Serious Sex Offenders) Act 2006 (NSW).

⁹ Serious Sex Offenders Monitoring Act 2005 (Vic).

¹⁰ Types of conditions under ESOs include curfews, outings only under escort, or requirement to live in a temporary centre established by Corrections Victoria.

abuse. There are others, however, who believe that a sex offender register may not deter paedophiles and, further, would infringe privacy rights and rehabilitation opportunities of ex-offenders and run the risk of encouraging vigilantism.

Broad community notification not recommended

53. For the avoidance of doubt, we should state at the outset that the Sub-committee does not favour the introduction of a US-style "Megan's Law" in Hong Kong. Although proponents of "Megan's Law" would argue that the public has the right to know the identity of an offender in order that they can take precautions, the Sub-committee is against the introduction of such a "public register" for the following reasons:

- A public register would in some cases cause the identity of the victim to be revealed.
- The offender's family may be adversely affected.
- An innocent individual whose name is similar to the offender's may be affected.
- It may cause vigilantism in the community and jeopardise rehabilitation opportunities for the offender.
- Offenders might choose to go "underground" to avoid the consequences of inclusion in a public register.
- It would be a double punishment for sex offenders and would discriminate unfairly in that other types of released offenders would not have their names on a "public register".

Recommendation 1

We recommend against the introduction in Hong Kong of the US-style "Megan's Law" whereby the names and other personal information of sex offenders are made available for inspection by the general public.

Sexual conviction records checks

54. There is a risk that those with proclivities to sexually molest or harm children may seek out areas of work which provide opportunities for contact with children. There is a clear public interest in safeguarding children from the risk of such sexual exploitation. Criminal record checks are widely considered to be one legitimate safeguard in providing the desired protection. Such checks may deter paedophiles with previous sexual conviction records from applying to work with children, or, if they are not deterred, should be able to prevent those people from gaining positions involving child-related work. On the other hand, the privacy interests of sex offenders and the public

interest in their rehabilitation and reintegration into the community require that access to the criminal record information, and its use and disclosure, should be subject to appropriate restrictions.

Recommendation 2

As an interim measure, we recommend the establishment of an administrative scheme to enable the criminal conviction records for sexual offences of persons who undertake child-related work and work relating to mentally incapacitated persons to be checked, and that proper measures should be built into the system to address human rights and rehabilitation concerns.

Child-related work and work relating to mentally incapacitated persons

55. We believe any proposed protection should cover all children under 18 years of age. We propose that "child-related work" should cover work where the usual duties involve, or are likely to involve, contact with a child. There are many work situations where there is occasional contact with children or where the customers may be children; for example, the general retail industry, eateries or the cinema. It is not the Sub-committee's intention that persons in those work situations should be required to undergo sexual offences records checks. Similarly, "MIP-related work" should cover work where the usual duties involve, or are likely to involve, contact with a mentally incapacitated person. Unless the context suggests otherwise, reference to child-related work in the discussion below includes MIP-related work.

56. To facilitate the public's understanding of the proposed scheme, we believe that it would be helpful to set out a non-exhaustive list of common examples of work which fall within the scope of child-related work. These examples would include work in relation to:

- (a) educational institutions including secondary schools, primary schools, kindergartens, nursery schools and special schools for mentally incapacitated persons;
- (b) community services, remand centres, detention centres, youth centres, training centres or probation services;
- (c) day centres, or refuges or other residential, boarding or camping facilities used by children and mentally incapacitated persons;
- (d) paediatric wards of public and private hospitals;
- (e) special wards for mentally incapacitated persons of public and private hospitals;

- (f) clubs, associations or movements (including of a cultural, recreational or sporting nature) that provide services or conduct activities for children or mentally incapacitated persons;
- (g) activities organised by religious organisations for children or mentally incapacitated persons;
- (h) baby sitting or child minding services;
- (i) coaching or private tuition services of any kind for children or mentally incapacitated persons including sports, music, language, and vocational;
- (j) counselling or other support services for children or mentally incapacitated persons;
- (k) providing transportation service specifically for children or mentally incapacitated persons; and
- (l) providing play facilities specifically for children or mentally incapacitated persons.

Definition of "work"

57. We believe that the word "work" should be given a wide meaning, and should include work carried out by an individual:

- (a) under a contract of employment or apprenticeship;
- (b) on a voluntary basis;
- (c) as training undertaken as part of an educational or vocational course;
- (d) on a self-employed basis.

58. In the discussion below, the reference to "employers" should accordingly be construed in a wide sense to cover also supervisors of volunteers and parents engaging the service of self-employed tutors.

Recommendation 3

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, and "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.

Checks should not be mandatory

59. We are aware that in some overseas jurisdictions, criminal record checks are made mandatory by legislation in respect of child-related work. The focus of our proposed scheme is to give the employer a choice and the means to ascertain whether a prospective employee has any sexual conviction records.

Recommendation 4

We recommend that employers of persons engaged in child-related work or MIP-related work, voluntary or paid, full-time or otherwise, should be able to check whether a prospective employee has any previous convictions for sexual offences. We recommend, however, that for the purpose of the interim measure such employers should not be required to conduct such a check.

Whether the proposed scheme should apply to both existing and prospective employees

60. An issue which has to be considered is whether the proposed scheme should apply to prospective employees only, or whether it should apply also to existing employees. Should the proposed scheme apply only to prospective employees, some may find the scope of the proposed scheme to be too restrictive, and the intended protection rendered to children to be inadequate. On the other hand, the advantage of a more modest start would enable the scheme to develop and to expand by stages if appropriate. In particular, we recognise that making the proposed scheme available to existing employers may have certain disadvantages: first, there may be a rush by many employers to check the sexual conviction records of existing employees when the scheme is first launched thereby leading to resource implications; second, it may raise a number of employment issues, which would have to be resolved between the employers and employees, or by the court.

61. The employment issues may arise if an existing employee refuses to give consent to the sexual conviction records check, or if it is found out that he or she has a relevant sexual conviction. A major question that will arise in either scenario is whether the employer can lawfully terminate the employment, either summarily or by giving notice (or by payment in lieu of notice).

62. We would like to point out that, given the wide variety of different circumstances which could arise, there is no simple answer to the question as to whether summary dismissal is justified unless the full facts and

circumstances of the case in question are examined. Relevant facts and circumstances might include:

- (a) Whether before the employment the employee has been asked to declare whether he has any previous conviction.
- (b) The terms of the employment agreement.
- (c) The nature of the employee's job.
- (d) The nature and circumstances of the sexual conviction in question.

63. Instead of summary dismissal, the employer may lawfully terminate an employee's contract by giving the requisite notice under section 6 of the Employment Ordinance (or payment in lieu of notice under section 7). The employer is normally not under any obligation to disclose the reasons for the termination to the employee.

64. On the other hand, should the proposed scheme apply only to prospective employees, paedophiles who have already obtained employment in child-related work before the implementation of the proposed interim measure may escape the net of the sexual conviction records check. It may be argued that as a matter of principle no distinction should be drawn between existing and prospective employees if the check is considered a reasonable measure to protect children from sexual abuse. Indeed, an employer may be held vicariously liable in tort action for any sexual abuse committed by its employee, and so the existing employer may also wish to invoke the proposed scheme to reduce the risk. Distinguishing between existing and prospective employees may also lead to complications in implementation – for example, whether a private tutor employed by a tutorial centre should be treated as an existing employee if he is tutoring different children from time to time, and whether an employee who intends to change his work nature from one that does not involve usual contact with children to one that does should be regarded as an existing employee for the purpose of the proposed scheme.

65. If it is decided to apply the proposed scheme to existing employees, both employers and employees may consider other less drastic arrangements if the employee is found to have a relevant conviction or refuses to give consent to checking the employee's sexual conviction record. The employee might be re-deployed to undertake job duties which are not child-related, or measures could be taken to ensure that the employee's contact with children is supervised by another staff.

Recommendation 5

We recommend that the proposed scheme should apply to prospective employees. As to whether existing employees should be covered by the proposed scheme, the

Sub-committee would welcome views from the public before finalising our recommendation.

Method of application

Data access requests for criminal conviction data

66. A person may make a personal data access request under the Personal Data (Privacy) Ordinance (Cap 486) in respect of his own criminal records held by the police. At present, any such application can be made to the police's Criminal Conviction Data Office ("CCDO") upon payment of a fee of \$50. If a person has previous convictions, he will be provided with a written record listing out all the conviction records kept by the police. However, if the person has a clear record, he will only be advised of such a fact verbally and will not be given any certificate or written confirmation.

Certificates of No Criminal Conviction ("CNCC")

67. A person may apply for a Certificate of No Criminal Conviction ("CNCC") to the police's Certificate of No Criminal Conviction Office for immigration and adoption purposes, upon payment of a fee of \$180. In order to ensure that the certificate will be used only for the stated purpose, the CNCC will not be issued to the data subject, but will be issued directly to the foreign consulates or the duly recognised adoption approving authorities concerned.

The proposed method of application

68. The proposed system of sexual conviction record checks should satisfy several criteria:

- (a) In the absence of any legislative basis, a sexual conviction record check should not be conducted without the data subject's consent, and should comply with the Personal Data (Privacy) Ordinance (Cap 486) and the relevant Data Protection Principles.
 - Hence, the application should be initiated only by the data subject who should be informed by the employer whether it is obligatory or voluntary for him to supply the data.
 - Also, the employer should be aware that the sexual conviction records information obtained under the proposed scheme should not be used for any other purpose.
- (b) It should ensure, as far as practicable, that only bona fide employers involved in child-related work will have access to the information.

- We are concerned as to the possibility that the introduction of the scheme might encourage employers not involved in child-related work to require a check to be done as well. Such a development would be undesirable because it would undermine the rehabilitation of sex offenders.
 - As a practical matter we believe that the structure of the system is unlikely to attract the interest of employers other than those involved in child-related work. Unlike the criminal record checks in other jurisdictions which reveal a broad spectrum of convictions, our proposed system would reveal only sexual offences, and should not have repercussions outside child-related work. Any employer not involving child-related work who seeks to abuse the system may also be liable under the Personal Data (Privacy) Ordinance (Cap 486) for violation of Data Protection Principle 1.
- (c) It should avoid creating a situation in which there is a sub-class of people in society who are unable to produce a no-conviction certificate for general employment purposes.
- Hence, like the CCDO scheme, the results of a "clean" sexual conviction records check would not be recorded in writing; instead, it would be communicated to the employer or the data subject verbally.
 - If the applicant has a previous sexual conviction record, he will be provided with a written record listing out all those convictions, as in the CCDO scheme. If the applicant so consents, such a written record may be given to his employer so that the employer may make an informed decision as to whether the applicant should still be employed notwithstanding the previous sexual conviction(s).
- (d) It should be user-friendly.
- As the sexual conviction records check will not be mandatory, it is important that the proposed scheme is user-friendly so that employers would not be discouraged from using the proposed scheme, hence, defeating the purpose of setting up the scheme in the first place.
- (e) It should be convenient for job applicants who need to make multiple job applications within a short time.
- (f) It should be cost-effective.
- Since most conviction information is already stored in the police's database, and the existing CCDO and CNCC

schemes have been successfully administered by the police for many years, we believe it would be most cost-effective and reliable for the police to handle the sexual conviction records checks.

- With the additional workload of the proposed system, there would inevitably be substantial staffing and resource implications for the police to take on this new commitment. It is envisaged that an administrative fee would be charged for each application in order to cover the operating costs of this new service.

Recommendation 6

We recommend that the current schemes of Certificate of No Criminal Conviction ("CNCC") and data access requests for criminal conviction data be modified and adapted to enable the type of checks proposed in these recommendations to be conducted. The checks should be initiated by the job applicant/data subject. A "clean" check result would not be recorded in writing but would be communicated verbally to the applicant or his employer(s).

Types of offences to be covered by the scheme

69. As our proposed scheme aims to protect children from the risk of sexual exploitation, the records check should cover only sexual offences or offences that may reasonably be associated with an increased risk of sexual exploitation of children (for example, child pornography offences and some prostitution-related offences). It will also be necessary to specify clearly the offences covered by the scheme so that employers understand the meaning and limitation of a "clean" record check.

70. The Sub-committee believes that the proposed sexual conviction records check should cover the following offences:

Crimes Ordinance (Cap 200)

- section 47 Incest by men
- section 48 Incest by women of or over 16
- section 118 Rape
- section 118A Non-consensual buggery
- section 118B Assault with intent to commit buggery
- section 118C Homosexual buggery with or by a man under 21
- section 118D Buggery with a girl under 21
- section 118E Buggery with a mentally incapacitated person
- section 118F Homosexual buggery committed otherwise than in private

- section 118G Procuring others to commit homosexual buggery
- section 118H Gross indecency with or by a man under 21
- section 118I Gross indecency by a man with a male mentally incapacitated person
- section 118J Gross indecency by a man with another man otherwise than in private
- section 118K Procuring gross indecency by a man with another man
- section 118L Bestiality
- section 119 Procurement of an unlawful sexual act by threats or intimidation
- section 120 Procurement of an unlawful sexual act by false pretences
- section 121 Administering drugs to obtain or facilitate unlawful sexual act
- section 122 Indecent assault
- section 123 Sexual intercourse with a girl under 13
- section 124 Sexual intercourse with a girl under 16
- section 125 Sexual intercourse with mentally incapacitated person
- section 126 Abduction of an unmarried girl under 16
- section 127 Abduction of an unmarried girl under 18 for sexual intercourse
- section 128 Abduction of a mentally incapacitated person from parent or guardian for sexual act
- section 133 Procurement of mentally incapacitated person to have unlawful sexual intercourse
- section 135 Causing or encouraging prostitution of, intercourse with, or indecent assault on, girl or boy under 16
- section 136 Causing or encouraging prostitution of mentally incapacitated person
- section 138A Use, procurement or offer of persons under 18 for making pornography or for live pornographic performances
- section 140 Permitting girl or boy under 13 to resort to or be on premises or vessel for intercourse
- section 141 Permitting young person to resort to or be on premises or vessel for intercourse, prostitution, buggery or homosexual act
- section 142 Permitting mentally incapacitated person to resort to or be on premises or vessel for intercourse, prostitution or homosexual act
- section 146 Indecent conduct towards child under 16
- section 147 Soliciting for an immoral purpose
- section 148 Indecency in public

Prevention of Child Pornography Ordinance (Cap 579)

- section 3 Offences relating to child pornography

Common law offence

- Common law offence of outraging public decency

Related Inchoate Offences

- Inciting another to commit any of the above offences.
- Aiding, abetting, counselling or procuring the commission of any of the above offences.
- Conspiracy to commit any of the above offences.
- Attempting to commit any of the above offences.

Recommendation 7

We recommend that the proposed sexual conviction records check should reveal only a specified list of sexual offences, and the employer should be made aware of the list of specified sexual offences and the limitations of the check.

Information other than records of conviction

71. One issue which must be considered is whether the proposed sexual conviction records check should cover only convictions or should extend, as in the United Kingdom, to allegations of the commission of sexual offences where the accused was either not charged, or charged but subsequently acquitted, in circumstances where suspicion of involvement in such offences remains.

Recommendation 8

We recommend that information other than conviction records should not be revealed in the proposed system of sexual conviction records check. If the applicant has been arrested or charged with a sexual offence, but not yet convicted or acquitted, the check will not be further processed until the conclusion of the matter or, with the specific consent of the applicant, it will be processed with the disclosure to the employer of the fact of the applicant's arrest or charge.

Spent convictions

72. According to section 2 of the Rehabilitation of Offenders Ordinance (Cap 297), where an individual has been convicted of an offence in respect of which he was not sentenced to imprisonment exceeding three months or to a fine exceeding \$10,000, and he has not been convicted in Hong

Kong on any earlier day of an offence; and a period of three years has elapsed without that individual being again convicted in Hong Kong of an offence, then subject to some exceptions no evidence shall be admissible in any proceedings which tends to show that that individual was so convicted in Hong Kong. Also, that conviction, or any failure to disclose it shall not be a lawful or proper ground for dismissing or excluding that individual from any office, profession, occupation or employment or for prejudicing him in any way in that office, profession, occupation or employment.

73. We note, however, that the Child Care Services Ordinance (Cap 243) provides that (notwithstanding section 2 of the Rehabilitation of Offenders Ordinance (Cap 297)) a person shall not act as a childminder if he has been convicted of certain specified offences.¹¹ In respect of the interim measure at least, however, the Sub-committee is of the view that spent convictions should not be revealed under the proposed scheme. We do not want any risk to be run that the scheme might breach the provisions or the spirit of Cap 297.

Recommendation 9

As an interim measure, we recommend that convictions of sexual offences that are regarded as "spent" under section 2 of the Rehabilitation of Offenders Ordinance (Cap 297) should not be disclosed under the proposed sexual conviction records check.

Conclusion

74. The interim measure we propose is extremely modest compared to the measures already adopted in the jurisdictions we have considered. We are confident that it would not lead to any human rights and privacy problems.

75. Ensuring that people who work with children and the mentally incapacitated are fit to do so requires a range of practices including sound staff selection, adequate supervision systems and prudent checking of referees and qualifications. A relevant criminal records check is a key component of these practices. Hong Kong has lagged behind overseas jurisdictions in devising a suitable mechanism for checking the sexual conviction records of persons working with children and mentally incapacitated persons. The Sub-committee therefore invites members of the public to express their views on the proposed interim measure, so that the Administration can act on these recommendations without delay.

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¹¹ Section 15A(3).