

THE LAW REFORM COMMISSION OF HONG KONG

REPORT

**EXCEPTED OFFENCES UNDER SCHEDULE 3 OF THE
CRIMINAL PROCEDURE ORDINANCE (CAP 221)**

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February 2014

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Preface

Terms of reference

1. In January 2013, the Secretary for Justice and the Chief Justice of the Court of Final Appeal asked the Law Reform Commission of Hong Kong:

"To review the law relating to excluding the availability of suspended sentences from excepted offences as listed in Schedule 3 in the Criminal Procedure Ordinance, Chapter 221 of the Laws of Hong Kong, and to make such recommendations for reform as appropriate."

Public consultation

2. The consultation paper was published on 24 June 2013. We welcomed views, comments and suggestions on any issues discussed in the consultation paper. The consultation period ended on 23 September 2013. During the consultation exercise, we received responses from 39 respondents as listed in the Annex at the end of this report. Twenty eight of these respondents were in favour of the recommendation, while five were against it. The remaining six were neutral or chose not to express views.

Report

3. Chapter 1 of this report sets out the background to the call for reforming the law relating to excepted offences. Chapter 2 discusses the current law on excepted offences, while Chapter 3 examines the law in other jurisdictions. Chapter 4 discusses the interplay between Judiciary's sentencing discretion and the legislature's constraints on such discretion. Chapter 5 sets out arguments for and against reform, responses we received from the public and our recommendation.

Chapter 1

Background to the call for the reform of the excepted offences

Introduction

1.1 The subject matter arose from a letter of the Law Society of Hong Kong (the "Law Society") addressed to the Secretary for Justice dated 22 March 2010 suggesting the Government should review and consider abolishing the "excepted offences" as listed in Schedule 3 of the Criminal Procedure Ordinance, Chapter 221 of the Laws of Hong Kong ("Cap 221"). The Law Society was of the view that *"excluding some offences from the availability of a suspended sentence restricts the sentencing options of the court in these offences"*. It was also considered that *"there is a need to update the law and that judges should be given the full discretion to impose any sentences (including suspended sentence) appropriate to the facts before it rather than be arbitrarily restricted in 'excepted offences' cases."*

1.2 The Law Society quoted in its letter the Court of Appeal's judgment in *AG v Ng Chak Hung*.¹ In that case, the defendant was convicted of one charge of wounding with intent contrary to section 17 of the Offences Against the Person Ordinance (Cap 212). Taking into account that the defendant was provoked and the defendant was not seen as being a danger to society, the trial judge thought it appropriate and imposed the sentence of imprisonment for 6 months suspended for two years. The then Attorney General applied for a review of the sentence arguing that the trial judge had no jurisdiction to impose a suspended sentence since section 17 was an excepted offence. The Court of Appeal granted the Attorney General's application and substituted the suspended sentence with a probation order.

1.3 The Court of Appeal expressed the view that it was unfortunate that the legislature had seen it fit to remove the option of a suspended sentence from a section 17 offence which could vary greatly in its gravity by making it an excepted offence. In his judgment, Acting Chief Justice Silke said:

"The Attorney General, with leave, and under the provisions of section 81A of the Criminal Procedure Ordinance, asks this court to review that sentence as being one not permitted by law. It is not contested, nor indeed could it be, that the sentence was one which the trial judge had no jurisdiction to impose. Section 17 is an excepted offence. ..."

¹ *AG v Ng Chak Hung* [1995] 1 HKCLR 112.

We would say at the outset that it is unfortunate that the Legislature has seen fit to remove the option of a suspended sentence from a sentencing judge in relation to a S17 offence which can vary greatly in its gravity. We have no doubt that the judge had the best of intentions in taking the course she did. But, as we have indicated, the course she took was not one which was open to her. ...

As we have indicated earlier, it was clearly the judge's intention to give this respondent a chance of rehabilitating himself. We think that we should honour that intention. We accept that it is unusual where the charge is one under section 17 of the Offences Against the Person Ordinance to make a probation order but, in the light of all the circumstances of this case and in particular the nature of the offender himself, we think that the interests of justice, the interests of the offender and of society in general will be served if we were to make such an order.

*We therefore granted the Attorney General's application to review and set aside the sentence imposed by the sentencing judge as being one made without jurisdiction. We substituted for that sentence a probation order with the conditions that he work and reside at the direction of the Probation Officer; that he attends as required at the Yau Ma Tei Psychiatric Clinic and that he accepts such treatment as is advised by the professional staff of that clinic. The contents of that order, and the consequence of a breach were explained to the respondent, who was prepared to accept the order with those conditions. We therefore made the order in the terms indicated."*²

The Law Society's views

1.4 In its letter mentioned above, the Law Society considered that excluding the availability of suspended sentences from some excepted offences would restrict the court's sentencing options in respect of these offences, and pointed out:

"A charge of 'indecent assault' could be imposed on circumstances ranging from not serious to very serious cases. Many offences are anti-social and prevalent – but are not 'excepted'. The issue at hand is whether, there is justification for removing a sentencing option from the armoury of sentencing options available to a sentencing court. ...

² AG v Ng Chak Hung [1995] 1 HKCLR 112, at 113 – 115.

... judges should be given full discretion to impose any sentences, including suspended sentences, appropriate to the facts before [them] rather than [being] arbitrarily restricted in 'Excepted Offences' cases."

1.5 Subsequently, the Law Society commissioned the Centre for Comparative and Public Law of the University of Hong Kong to compile a report on whether there is a case for reforming the exceptions to the power of the Hong Kong court to impose suspended sentences under Cap 221 (the "CCPL Report"). The CCPL Report concludes that there are "*substantial reasons for eliminating the list of exceptions altogether or at least removing those offences that do not invariably cause serious physical violence to others*".³ The CCPL Report sets out arguments in favour of maintaining the list of excepted offences and arguments in favour of reform. These arguments are reproduced in Chapter 5 below.

1.6 The CCPL Report also enters a caveat in relation to section 109A of Cap 221, which provides the norm that young offenders, aged between 16 and 21 years, should not be imprisoned unless there is no other appropriate method of dealing with the offender. However, this norm does not apply to excepted offences.⁴

1.7 Upon considering the CCPL Report, the Law Society's Criminal Law and Procedure Committee concludes that the concept of "excepted offences" is outdated and Schedule 3 of Cap 221 should be abolished in its entirety. The Law Society emphasises that it is not advocating any linkage of abolition of excepted offences with the court's discretion to continue to impose suspended sentences as the CCPL Report highlights the importance of judicial discretion in relation to sentencing options.

The Bar Association's views

1.8 The Bar shares the view of the Law Society that the concept of excepted offences is "outdated" and should be abolished in its entirety.⁵ In its letter, the Bar Association further pointed out:

"The imposition of a suspended sentence is a common form of sanction available to and used by the judiciary as part of its

³ Centre for Comparative and Public Law (University of Hong Kong), *Report on Reforming Suspended Sentences in Hong Kong* (Sep 2012), at 2 and 21.

⁴ The CCPL Report has not considered the implication of repealing Schedule 3 for the purposes of section 109A and a further study of this issue in the context of a general review of youth justice in Hong Kong is called for. However, the CCPL Report notes that Schedule 3 was introduced for both suspended sentencing and the norm against youth imprisonment at the same time in 1971 as a result of the common concerns about the rise in youth violent crimes at that time.

⁵ In the letter dated 1 March 2013 from the Bar Association to the Law Reform Commission of Hong Kong.

sentencing 'armoury': although it is well established that such a sentence can be imposed only in 'exceptional circumstances' each case falls for consideration on its own facts - consistent no doubt with the manner in which the Bar would like to see judicial discretion exercised. It goes somewhat 'against the grain' that the executive should impose such a significant inhibition on the independence of the judiciary."

1.9 The Bar also supports our proposal that the matter be referred to public consultation.

Chapter 2

The current law on excepted offences

Existing provisions on excepted offences

2.1 There are two provisions relating to the "excepted offences" in the Criminal Procedure Ordinance (Cap 221). Section 109B(1) of Cap 221 provides:

"(1) A court which passes a sentence of imprisonment for a term of not more than 2 years for an offence, other than an excepted offence, may order that the sentence shall not take effect unless, during a period specified in the order, being not less than 1 year nor more than 3 years from the date of the order, the offender commits in Hong Kong another offence punishable with imprisonment and thereafter a court having power to do so orders under section 109C that the original sentence shall take effect."

2.2 Section 109A(1) and (1A) of Cap 221 provide:

"(1) No court shall sentence a person of or over 16 and under 21 years of age to imprisonment unless the court is of opinion that no other method of dealing with such person is appropriate; and for the purpose of determining whether any other method of dealing with any such person is appropriate the court shall obtain and consider information about the circumstances, and shall take into account any information before the court which is relevant to the character of such person and his physical and mental condition.

(1A) This section shall not apply to a person who has been convicted of any offence which is declared to be an excepted offence by Schedule 3."

The "excepted offences" under Schedule 3 of Cap 221

2.3 The excepted offences under Schedule 3 of Cap 221 are:

1. Manslaughter.
2. Rape or attempted rape.

3. Affray.
4. Any offence against section 4, 5 or 6 of the Dangerous Drugs Ordinance (Cap 134).
 - s4 Trafficking in dangerous drug
 - s5 Dangerous drug not to be supplied except to person authorized or licensed to be in possession thereof
 - s6 Manufacture of dangerous drug
5. Any offence contrary to section 10, 11, 12, 13, 14, 17, 19, 20, 21, 22, 23, 28, 29, 30, 36 or 42 of the Offences Against the Person Ordinance (Cap 212).
 - s10 Administering poison or wounding with intent to murder
 - s11 Destroying or damaging building with intent to murder
 - s12 Setting fire to or casting away ship with intent to murder
 - s13 Attempting to administer poison, or shooting, or attempting to shoot or drown, etc, with intent to murder
 - s14 Attempting to commit murder by means not specified
 - s17 Shooting or attempting to shoot, or wounding or striking with intent to do grievous bodily harm
 - s19 Wounding or inflicting grievous bodily harm
 - s20 Attempting to choke, etc, in order to commit indictable offence
 - s21 Using chloroform, etc, in order to commit indictable offence
 - s22 Administering poison, etc, so as to endanger life or inflict grievous bodily harm
 - s23 Administering poison, etc, with intent to injure, etc
 - s28 Causing bodily injury by gunpower, etc
 - s29 Causing gunpowder to explode, etc, or throwing corrosive fluid, with intent to do grievous bodily harm
 - s30 Placing gunpowder near building, etc, with intent to do bodily injury
 - s36 Assault with intent to commit offence, or on police officer, etc
 - s42 Forcible taking or detention of person, with intent to sell him
6. Any offence or attempted offence against section 122 of the Crimes Ordinance (Cap 200).
 - s122 Indecent assault

7. An offence under any section in Part III of the Firearms and Ammunition Ordinance (Cap 238).
 - s13 Possession of arms or ammunition without licence
 - s14 Dealing in arms or ammunition without a licence
 - s15 Giving possession of arms or ammunition to unlicensed person and obtaining possession by false pretences
 - s16 Possession of arms or ammunition with intent to endanger life
 - s17 Resisting arrest with or committing offence while in possession of arms or ammunition or imitation firearm
 - s18 Carrying arms or ammunition or imitation firearm with criminal intent
 - s19 Trespassing with arms or ammunition or imitation firearm
 - s20 Possession of an imitation firearm
 - s21 Converting imitation firearm into a firearm
 - s22 Dangerous or reckless use of firearm, etc
 - s23 Failure to comply with terms and conditions of licence, etc
8. Any offence against section 10 or 12 of the Theft Ordinance (Cap 210).
 - s10 Robbery
 - s12 Aggravated burglary
9. Any offence against section 33 of the Public Order Ordinance (Cap 245).
 - s33 Possession of offensive weapon in public place
10. Any offence under section 4 or 10 of the Weapons Ordinance (Cap 217).
 - s4 Possession of prohibited weapons
 - s10 Offences relating to martial arts weapons

Background of the present law

2.4 The Criminal Procedure (Amendment) Bill 1971 introduced the concept of suspended sentences to Hong Kong. The Bill's provisions broadly followed those of the Criminal Justice Act 1967 in England. However, neither the Bill put forward by the Government nor the English Act incorporated any reference to "excepted offences". The creation of excepted offences was the result of strong opposition from the unofficial members of LegCo, who

expressed concern at *"the sharp increase in crime, and especially violent crime, since 1960"*.¹

2.5 In response, the then Attorney General, Denys Roberts, emphasised that a suspended sentence was *"not intended to provide a soft way of dealing with criminals."*² He went on:

"Nevertheless, the Government appreciates that it is not easy to persuade the public of this and that there is a widespread feeling among Members of this Council and among citizens generally that the increase in violent crime has been such that it is unwise, at this juncture, for legislation to be passed which might appear to be advocating leniency towards offenders who resort to violence

*Although I believe that the treatment of offenders is a field in which it is generally right for a Government to attempt to lead public opinion, I recognise that it is dangerous to attempt to do so to a degree which suggests that the Government is out of touch with reality or with the strongly held and not unreasonable views of the majority of the citizens."*³

2.6 The then Attorney General added that the Government conceded to the demand of the unofficial members but expressed that it was the Government's hope that the excepted offences could be done away with at some point:

"Taking into account the factors to which I referred, the Government concedes that, in our present circumstances, it would be appropriate to exclude from the operation of the provisions which empower the courts to impose suspended sentences those kinds of offence which are causing concern.

*I agree with the honourable Mr Wang that this could best be achieved by the addition to the principal Ordinance of a Schedule in which the excepted offences are listed. It would, I consider, be wise to provide for the amendment of this Schedule either by the order of Governor in Council or by resolution of this Council, so that the list can be quickly amended when necessary. Indeed, I hope that it might not be long before it is possible to do away with it."*⁴

¹ HK Hansard, 20 January 1971, at 350, per Mr Oswald Cheung.

² HK Hansard, cited above, at 355.

³ HK Hansard, cited above, at 355.

⁴ HK Hansard, cited above, at 356.

2.7 Moreover, the Government considered that if certain offences were to be excluded from suspended sentences, it was appropriate that the same offences should be excluded from the operation of section 109A of Cap 221, which laid down the principle that young offenders should not be sent to prison unless the court was satisfied that no other method of dealing with the offender was suitable. The then Attorney General said by excluding the excepted offences from the operation of section 109A, it would "*make it clear that the Government, and this Council, have come to the conclusion, though with considerable regret, that for the time being, where crimes involving violence are committed by persons between 16 and 21, more emphasis must be given to deterrent punishments as opposed to reformative measures.*"⁵

The problems arising from the current law

2.8 The effect of the current law is that the court's sentencing options in relation to excepted offences are constrained. If an offender is convicted of an excepted offence, the option of a suspended sentence is not available, even where the court is of the opinion that a suspended sentence is appropriate in all the circumstances of the case and for the benefit of offender's rehabilitation.

2.9 It should be noted that no similar restriction applies in respect of community service orders. Section 4(1) of the Community Service Orders Ordinance (Cap 378) empowers the court to make a community service order "*where a person of or over 14 years of age is convicted of an offence punishable with imprisonment*". There is no exclusion in respect of excepted offences.

⁵ HK Hansard, cited above, at 356.

Chapter 3

The law in other jurisdictions

The United Kingdom

3.1 The Criminal Justice Act 2003 (sections 189-194) introduced a new suspended sentence in which offenders have to complete a range of requirements imposed by the court. The suspended sentence in the UK is not subject to any "excepted offences".¹

3.2 Section 189(1) of the Criminal Justice Act 2003 provides:

"(1) A court which passes a sentence of imprisonment for a term of at least 28 weeks but not more than 51 weeks in accordance with section 181 may –

(a) order the offender to comply during a period specified for the purposes of this paragraph in the order (in this Chapter referred to as 'the supervision period') with one or more requirements falling within section 190(1) and specified in the order, and

(b) order that the sentence of imprisonment is not to take effect unless either –

(i) during the supervision period the offender fails to comply with a requirement imposed under paragraph (a), or

(ii) during a period specified in the order for the purposes of this sub-paragraph (in this Chapter referred to as 'the operational period') the offender commits in the United Kingdom another offence (whether or not punishable with imprisonment),

and (in either case) a court having power to do so subsequently orders under paragraph 8 of Schedule 12 that the original sentence is to take effect."

¹ The Criminal Justice Act 1967, on which the suspended sentence in Hong Kong was based, was also without any reference to any "excepted offence".

3.3 The requirements which may be imposed by the court under section 190(1) includes: an unpaid work requirement;² an activity requirement;³ a programme requirement;⁴ a prohibited activity requirement;⁵ a curfew requirement;⁶ an exclusion requirement;⁷ a residence requirement;⁸ a mental health treatment requirement;⁹ a drug rehabilitation requirement;¹⁰ an alcohol treatment requirement;¹¹ a supervision requirement;¹² in a case where the offender is aged under 25, an attendance centre requirement.¹³

3.4 Section 68 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012¹⁴ amended section 189. The amendments include:

- (a) Suspended sentences are now available for offences with imprisonment from 14 weeks to 2 years (previously from 28 weeks to 51 weeks);
- (b) The court may order suspended sentence without imposing any "community" requirement (previously at least one such requirement must be imposed);
- (c) More variety of "community" requirements that the court may impose, such as increases in length for curfew.

Australia (except the state of Victoria)

3.5 With the exception of Victoria, suspended sentences in different forms are available for all offences across all the jurisdictions of Australia. In other words, the Australian suspended sentence regimes, except in the state of Victoria) are not subject to any "excepted offences".

3.6 For example, section 38(1) of the Criminal Law (Sentencing) Act 1988 (South Australia) provides that:

² As defined by section 199.

³ As defined by section 201.

⁴ As defined by section 202.

⁵ As defined by section 203.

⁶ As defined by section 204.

⁷ As defined by section 205.

⁸ As defined by section 206.

⁹ As defined by section 207.

¹⁰ As defined by section 209.

¹¹ As defined by section 212.

¹² As defined by section 213.

¹³ As defined by section 214.

¹⁴ <http://www.legislation.gov.uk/ukpga/2012/10/section/68>

"Where a court has imposed a sentence of imprisonment upon a defendant, the court may, if it thinks that good reason exists for doing so, suspend the sentence on condition that the defendant enter into a bond –

(a) to be of good behaviour; and

(b) to comply with the other conditions (if any) of the bond."

3.7 A bond under the South Australian Act may include such conditions as the court thinks appropriate. These may include a condition requiring the defendant to be under the supervision of a community corrections officer for a specified period; to reside with or not to reside with a specified person or in a specified place or area; to perform a specified number of hours of community service; to undertake an intervention program; to undergo medical or psychiatric treatment; to abstain from drugs of a specified class or from alcohol; to restore misappropriated property; or to pay compensation of a specified amount to any person for injury, etc.¹⁵

3.8 In New South Wales, section 12(1) of the Criminal (Sentencing Procedure) Act provides that:

"A court that imposes a sentence of imprisonment on an offender (being a sentence for a term of not more than 2 years) may make an order:

(a) suspending execution of the whole of the sentence for such period (not exceeding the term of the sentence) as the court may specify in the order, and

(b) directing that the offender be released from custody on condition that the offender enters into a good behaviour bond for a term not exceeding the term of the sentence."

The State of Victoria in Australia

3.9 By virtue of the Sentencing Amendment Act 2010,¹⁶ the State of Victoria in Australia abolished suspended sentences for "serious offences" which were broadly defined to include murder, manslaughter, child homicide, rape and a long list of other violent and sexual offences.

¹⁵ Section 42(1).

¹⁶ Sentencing Amendment Act 2010, No 77 of 2010, section 12.

3.10 Later, the Sentencing Further Amendment Act 2011¹⁷ was enacted and abolished suspended sentences also for "significant offences".

3.11 The "significant offences" are:¹⁸

- (a) Causing serious injury recklessly (ie, an offence against Crimes Act 1958, section 17);¹⁹
- (b) Aggravated burglary (ie, an offence against Crimes Act 1958, section 77);²⁰
- (c) Destroying or damaging property by fire (arson) (ie, an offence against Crimes Act 1958, section 197(6) and (7));²¹
- (d) Arson causing death (ie, an offence against Crimes Act 1958, section 197A);²²
- (e) Trafficking in a large commercial quantity of a drug of dependence (ie, an offence against Drugs, Poisons and Controlled Substances Act 1981, section 71);²³
- (f) Trafficking in a commercial quantity of a drug of dependence (ie, an offence against Drugs, Poisons and Controlled Substances Act 1981, section 71AA).²⁴

3.12 As "serious offences" and "significant offences" are excluded from the suspended sentences, Victoria is effectively moving in the direction of an excepted offences regime.

3.13 The Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013 provides for the full abolition of suspended sentences. This is to be achieved in stages. The first stage, which commenced on 5 June 2013, comprised the abolition of suspended sentences

¹⁷ Sentencing Further Amendment Act 2011 (Victoria), No 9 of 2011, section 4.

¹⁸ Sentencing Further Amendment Act 2011 (Victoria), section 3.

¹⁹ 15 years imprisonment maximum.

²⁰ 25 years imprisonment maximum.

²¹ 15 years imprisonment maximum.

²² 25 years imprisonment maximum.

²³ Life imprisonment.

²⁴ 25 years imprisonment maximum.

for "significant offences" transferred to the Magistrates' Court after 5 June 2013.²⁵

Canada

3.14 In Canada, a "conditional sentence of imprisonment", which is a hybrid of suspended sentences, intensive supervision and probation orders, was introduced in 1996. However, legislation was passed in May 2007 removing the possibility of its application in relation to certain serious offences.²⁶

3.15 The reason for the removal of conditional sentences of imprisonment from certain serious offences was that while allowing persons not dangerous to the community to serve their sentence in the community was widely believed to be beneficial, it was considered that sometimes the very nature of the offence require an immediate jail sentence. The Parliamentary Law and Government Division gave the background to the removal of certain serious offences from conditional sentences of imprisonment as follows:

"Conditional sentencing, introduced in September 1996, allows for sentences of imprisonment to be served in the community, rather than in a correctional facility. It is a midway point between imprisonment and sanctions such as probation or fines. The conditional sentence was not introduced in isolation, but as part of a renewal of the sentencing provisions in the Criminal Code. These provisions included the fundamental purpose and principles of sentencing. The fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The renewed sentencing provisions set out further sentencing principles, including a list of aggravating and mitigating circumstances that should guide sentences imposed.

The primary goal of conditional sentencing is to reduce the reliance upon incarceration by providing an alternative sentencing mechanism to the courts. In addition, the conditional sentence provides an opportunity to further incorporate restorative justice concepts into the sentencing process by encouraging those who have caused harm to acknowledge this fact and to make reparation.

²⁵ Judicial College of Victoria, *Victorian Sentencing Manual*: "... Finally, suspended sentences will be abolished for all offences, irrespective of which jurisdiction hears the matter. This is yet to commence, but has a default commencement date of 1 September 2014. This prohibition will apply to offences occurring after the date on which the abolition commences." <http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#46660.htm>

²⁶ Bill C-9: An Act to amend the Criminal Code (conditional sentence of imprisonment). The Bill received Royal Assent on 31 May 2007.

At the time of their introduction, conditional sentences were generally seen as an appropriate mechanism to divert minor offences and offenders away from the prison system. Overuse of incarceration was recognized by many as problematic, while restorative justice concepts were seen as beneficial. In practice, however, conditional sentences are sometimes viewed in a negative light when used in cases of very serious crime.

*Concern has been expressed that some offenders are receiving conditional sentences of imprisonment for crimes of serious violence, sexual assault and related offences, driving offences involving death or serious bodily harm, and theft committed in the context of a breach of trust. While allowing persons not dangerous to the community, who would otherwise be incarcerated, and who have not committed a serious or violent crime, to serve their sentence in the community is widely believed to be beneficial, it has also been argued that sometimes the very nature of the offence and the offender require incarceration. The fear is that to refuse to incarcerate an offender can bring the entire conditional sentence regime, and hence the criminal justice system, into disrepute. In other words, it is not the existence of conditional sentences that is problematic, but, rather, their use in cases that appear to justify incarceration."*²⁷

3.16 As a result, under section 742.1 of the Canadian Criminal Code, a "conditional sentence of imprisonment" does not apply to the following –

- (i) A serious personal injury offence (as defined in section 752) which means:
 - (a) An indictable offence, other than high treason, first degree murder, or second degree murder,²⁸ involving (i) the use or attempted use of violence against another person, or (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person, and for which the offender may be sentenced to imprisonment for ten years or more;
 - (b) Sexual assault;

²⁷ Bill C-9: An Act to amend the Criminal Code (conditional sentence of imprisonment): LS-526E.

²⁸ Murder is first degree when it is planned and deliberate (section 231(2)). All murder that is not first degree is second degree murder (section 231(7)). A person who has been convicted of high treason or first degree murder is liable to life imprisonment without eligibility for parole until the person has served 25 years of the sentence (section 745(a)). On the other hand, a person who has been convicted of second degree murder is liable to life imprisonment without eligibility for parole until the person has served at least 10 years of the sentence (section 745(c)).

- (c) Sexual assault with a weapon, threats to third party or causing bodily harm; and
 - (d) Aggravated sexual assault.
- (ii) A terrorism offence; and
 - (iii) A criminal organization offence.²⁹

3.17 This development shows that Canada has also effectively adopted an excepted offence regime in respect of certain categories of serious criminal offences which are now excluded from the conditional sentencing regime.

3.18 Section 34 of the Safe Street and Communities Act (Bill C-10) further amended section 742.1 of the Criminal Code.³⁰ The effect is that more offences are now on the list for which imprisonment sentence cannot be served in the community, such as offences that (i) result in bodily harm, (ii) involve the import, export, trafficking or production of drugs, or (iii) involve the use of a weapon; as well as offences of prison breach, criminal harassment, kidnapping, trafficking in persons, abduction of person under fourteen, motor vehicle theft, theft over \$5000, breaking and entering a place other than a dwelling-house, being unlawfully in a dwelling-house, and arson for fraudulent purpose, etc. The effect is similar to expanding the list of excepted offences.

New Zealand

3.19 In New Zealand, the option of suspending sentences of imprisonment was abolished by the Sentencing Act 2002. Previously the suspended sentence power was similar to the Criminal Justice Act 1967 in England and the current Hong Kong position, but without excepted offences. The 2002 Act introduced a statutory hierarchy of sentencing and orders, from the least restrictive (a discharge or order to come up for sentence if called on) to the most restrictive (imprisonment). In 2007, amendments were made to the 2002 Act by the Sentencing Amendment Act 2007 to enhance the number of community-based sentences available to the court when sentencing. New and more restrictive sentences of community detention and intensive supervision were introduced. Offenders can now be subject to curfews at specific addresses and electronic monitoring of curfews. Any breaches can be promptly detected. The court can also sentence offenders to home

²⁹ The term "criminal organization offence" means, among others, a serious offence committed for the benefit of, or at the direction of, or in association with a criminal organization (section 2 of the Canadian Criminal Code).

³⁰ The amendments came into force on 20 November 2012. <http://laws-lois.justice.gc.ca/eng/acts/C-46/page-421.html>

detention immediately where it would otherwise have sentenced them to a short term of imprisonment.³¹

Singapore

3.20 Court in Singapore have no power to suspend a sentence of imprisonment. Nonetheless, under section 8 of the Probation of Offenders Act (Chapter 252), the court may make an order of absolute or conditional discharge if it is of the opinion that it is inexpedient to inflict punishment and that a probation order is not appropriate, having regard to the circumstances including the nature of the offence and the character of the offender. Under a conditional discharge, an offender is discharged from the requirement to serve the sentence, provided he commits no offence for a period not exceeding 12 months from the date of the order. Only offenders convicted of offences "*not being an offence the sentence for which is fixed by law*" can avail themselves of the provisions pertaining to conditional discharges.

3.21 Where a person is convicted of an offence for which a specified minimum sentence (mandatory minimum sentence of imprisonment, fine or caning) is prescribed by law, the court may make an order discharging a person absolutely or an order for conditional discharge if the person:

- (1) has attained the age of 16 years but has not attained the age of 21 years at the time of his conviction; and
- (2) has not been previously convicted of any such offence.³²

Where a person in whose case an order for conditional discharge was made has been convicted and dealt with in respect of an offence committed during the period of conditional discharge, the court may deal with him in any manner, in respect of the offence for which the order for conditional discharge was made, as if he had just been convicted of that offence.³³

Overseas position in summary

3.22 The option of suspending an imprisonment sentence in Australia (except Victoria) and the United Kingdom where this option is available is applicable to all offences. That is to say, there are no excepted offences.

3.23 In New Zealand and Singapore, the option of suspended sentence is not available to the court.

³¹ Prior to the amendments, the decision of whether home detention would be a suitable alternative to imprisonment was left to the Parole Boards.

³² Proviso to section 8 of the Probation of Offenders Act (Chapter 252).

³³ Section 9(5) of the Probation of Offenders Act (Chapter 252).

3.24 In Victoria, the 2013 Act provides for the full abolition of suspended sentences in stages. In Canada, pursuant to Bill C-9 amending the Criminal Code (conditional sentence of imprisonment) "conditional sentences of imprisonment" was abolished in relation to certain serious offences such as serious personal injury offences (including sexual assault), a terrorism offence or a criminal organization offence. The 2012 amendment of the Criminal Code has similar effect as expanding the list of excepted offences.

Chapter 4

Interplay between Judiciary's sentencing discretion and the Legislature's constraints on such discretion

4.1 The excepted offences regime can be viewed as a legislative guideline that judges should only impose a custodial sentence for certain categories of serious crimes. The debate on excepted offences therefore underscores the intricate interplay between the Judiciary's discretion in sentencing and the Legislature's constraints on such discretion. The crux of the debate is whether or not, as a matter of public policy, it is proper for the Legislature to specify certain types of offences that should be punishable by way of custodial sentences but not a suspended sentence.

4.2 First of all, the constitutionality of legislative sentencing guidelines such as mandatory minimum sentences has increasingly come under challenge in the court of Canada.

Division of labour between the Judiciary and Legislature

4.3 Mr Justice Bruce DeBelle of the Supreme Court of South Australia and Chairman of Judicial Conference of Australia pointed out at a sentencing conference held in February 2008 that there is a traditional division of labour between the Judiciary and the Legislature as regards the sentencing of offenders, with Parliament to fix the maximum penalty for an offence and the court to determine the appropriate penalty:

*"The role traditionally exercised by Parliament has been to fix the maximum penalty for an offence. In that way the Parliament expresses its assessment of the community's view of the seriousness of the offending. Having expressed the maximum penalty, the Parliament has left it to the courts to determine the appropriate penalty. Judges and magistrates have a wide discretion to determine the appropriate penalty. For certain kinds of offending, especially offending arising out of the misuse of motor vehicles, Parliament has been more prescriptive as to the type and severity of penalty. One instance is penalties fixed for drink driving offences. However, as a general rule, judges and magistrates have a wide discretion as to the penalty which is appropriate."*¹

¹ Justice Bruce DeBelle, "Sentencing: Legislation or Judicial Discretion?", paper presented at the Sentencing Conference (February 2008), National Judicial College of Australia/ ANU College of Law, para 2.

4.4 The rationale for this traditional division of roles between the Legislature and the Judiciary as regards sentencing is that the Legislature is elected by the people and so must meet community expectations for punishment of crimes by setting the maximum penalties. Mr Bill Stefaniak, the Shadow Attorney General, said in the same sentencing conference:

"So, who is responsible for ensuring our justice system delivers punishments that fit the crimes and that meet community expectations? ...

The simple answer is that it should be the legislature. It is the legislature that is elected to represent the people and, by implication, community expectations. It is the legislature that is accountable to the people

*It is the legislature, then, that must take responsibility for fostering consistency in sentencing – to ensure that community expectations, as fickle as they may be, are met as far as possible – to ensure the punishment fits the crime."*²

4.5 However, while the maximum sentence is so specified by the Legislature, the Judiciary is given the discretion to determine the appropriate penalty for the particular case before it because the Legislature cannot anticipate the facts and circumstances of each and every case:

"... an important element of justice is ensuring that all of the relevant facts are considered fairly and fully when coming to a judgement and resultant sentence in criminal matters. Many issues need to be considered. For example, the forensic evidence, the forensic psychology assessment, the part played by the victim, and myriad other elements.

*The legislature simply cannot anticipate the range of facts and circumstances that surround every case. The judiciary must be allowed to judge each case on the basis of its own circumstances and its own facts."*³

4.6 This traditional division of roles between Parliament and the court has important implications for the separation of powers. Parliaments have long recognised the separate role of judges and magistrates in sentencing, and have acknowledged their discretion to tailor a punishment to fit the particular crime. However, it is also the case that Parliaments have gradually enacted legislation to limit the discretion of judges and magistrates:

² Bill Stefaniak, Shadow Attorney General, "Sentencing: Legislation or Judicial Discretion?", paper presented at the Sentencing Conference (February 2008), National Judicial College of Australia/ ANU College of Law, at page 3.

³ Bill Stefaniak, cited above, at page 3.

"However, in the last 20 years, Parliaments throughout this country have enacted legislation to curb the width of the discretion which judges and magistrates might exercise. It is not a phenomenon restricted to this country. As long ago as 1990 Lord Bingham, when considering the discretions exercised by judges in England, expressed the view that there was an 'accelerating tendency' towards narrowing judicial discretions and that was 'nowhere better illustrated than in the field of sentencing'. One manifestation of such legislation is the statutory prescription of mandatory penalties. Another is the prescription of mandatory minimum penalties. An example is the Criminal Law (Sentencing) (Dangerous Offenders) Amendment Act 2007 enacted by the South Australian Parliament which prescribes the minimum non-parole period for murder and other crimes of violence resulting in the death or permanent physical or mental incapacity of the victim" ⁴

4.7 The question is whether legislative constraints on judicial sentencing discretion by statutory mandatory minimum sentences (as against maximum sentences) are valid or not. This issue can be considered by reference to the principles of sentencing. According to Mr Justice Bruce DeBelle, the overriding principle in sentencing is proportionality:

*"The over-riding principle when determining penalty is proportionality. The sentence must be proportional to the circumstances of the crime (which includes the effect on the victim) and the circumstances of the offender. The punishment must fit the crime and the circumstance of the offender as nearly as may be. That principle is deeply rooted in the common law system. It has been referred to with approval in the House of Lords and the Privy Council. As the Privy Council noted in *Bowe*, proportionality in sentencing can be traced back to *Magna Carta*. The eighth amendment to the Constitution of the United States has been held to proscribe punishment which is by its excessive length or severity is disproportionate to the offence." ⁵*

4.8 Regard must be had to other classic principles of sentencing. According to I Grenville Cross, SC and Patrick Cheung, there are four classic principles of sentencing and retribution is the first of these principles. ⁶ Retribution is like the concept of "an eye for an eye and a tooth for a tooth" in criminal sentencing. It requires no more than a just and appropriate punishment which is proportionate to the offender's crime. ⁷

⁴ Justice Bruce DeBelle, cited above, para 4.

⁵ Justice Bruce DeBelle, cited above, para 7.

⁶ I Grenville Cross & Patrick Cheung, *Sentencing in Hong Kong*, (Sixth Edition, 2011), at 83.

⁷ *Sentencing in Hong Kong*, cited above, at 83-84.

4.9 Deterrence is the second of the classic principles of sentencing and is an important means of securing the prevention of crime. Thus, for some offences, court may be justified in treating deterrence as the most important part of the sentencing. These may include, for example, robbery with firearms and kidnapping of the rich in the hope of extorting a ransom from their relatives.⁸

4.10 Prevention is the third classic principle of sentencing. If offenders are incapacitated by removal from society, public protection can be achieved during the period of the detention.⁹

4.11 Rehabilitation is the fourth of the classic principles of sentencing and one on which more emphasis has been placed in modern times.¹⁰ If rehabilitation is considered important, imprisonment (except for a short term) will not be of relevance. Programmes such as those provided by the training centre, the rehabilitation centre and the probation service should be considered. Community service will also be an option aiming to reform offenders by requiring them to perform public service. The chance of reform is reduced, however, if the offender has persisted in the commission of crime.¹¹

4.12 Hence, there are many factors to be taken into account when sentencing a particular offender in the special circumstances of the case. As pointed out by Mr Justice Bruce DeBelle, *"Even able and experienced judges may differ as to the precise sentence which might be ordered in any one case. That is a necessary consequence of any exercise of discretion. The determination of a sentence is not a mathematical exercise but an exercise of judgment where reasonable and experienced judges may reasonably disagree as to the penalty or sentence to be ordered in respect to the circumstances of a particular offence and of a particular offender"*.¹² It is therefore doubtful if the Legislature could set meaningful sentencing guidelines for the Judiciary when the Legislature simply is not in a position to foresee the facts and circumstances in each and every case.

Challenges to mandatory minimum sentences in Canada

4.13 Those who are against the Legislature's constraints on the Judiciary's sentencing discretion (for example, by way of excepted offences) may point to the fact that the constitutionality of legislative sentencing

⁸ *Sentencing in Hong Kong*, cited above, at 85. For robbery with firearms, see *R v Wong Siu-ming* Cr App 367/1992; for kidnapping the rich, see *HKSAR v Pun Luen-pan and Another* Cr App 555/2003.

⁹ *Sentencing in Hong Kong*, cited above, at 87.

¹⁰ *Sentencing in Hong Kong*, cited above, at 88.

¹¹ *Sentencing in Hong Kong*, cited above, at 89.

¹² Justice Bruce DeBelle, cited above, para 10.

guidelines, such as statutory mandatory minimum sentences, have increasingly come under challenge in the court, though with limited success.

4.14 In Canada, statutory mandatory minimum sentences have over the years been challenged for being in violation of section 12 of the Canadian Charter of Rights and Freedoms which provides:

"Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

4.15 The Supreme Court of Canada in the leading case of *R v Smith*¹³ struck down a mandatory seven-year minimum sentence for importing narcotics. Mr Justice Lamer (as he then was), delivering the judgment for the majority, indicated that whilst the court should show deference to Parliament and not invalidate every mandatory sentence, the court could invalidate those that were grossly disproportionate. The test of review under section 12 of the Charter is whether or not the punishment is grossly disproportionate because the section aims at punishments that are more than merely excessive.¹⁴ Thus, if a punishment is merely disproportionate, no remedy can be found under section 12.

4.16 In order to consider whether or not the punishment under challenge is grossly disproportionate, the court should examine not only the gravity of the offence but also all the relevant circumstances of the case and the effect of the punishment would have on the particular offender. Mr Justice Lamer set out some of the relevant factors in assessing whether a statutory minimum sentence is grossly disproportionate as follows:

*"In assessing whether a sentence is grossly disproportionate, the court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender."*¹⁵

4.17 Mr Justice Lamer went on to say:

*"This does not mean that the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender in determining a sentence, but only that the resulting sentence must not be grossly disproportionate to what the offender deserves."*¹⁶

¹³ *R v Smith* [1987] 1 SCR 1045.

¹⁴ *R v Smith* [1987] 1 SCR 1045, para 55 (per Lamer J).

¹⁵ *R v Smith* [1987] 1 SCR 1045, para 56.

¹⁶ *R v Smith* [1987] 1 SCR 1045, para 56.

4.18 It appears that if a statutory minimum sentence is not considered grossly disproportionate for the particular offender, the court must then proceed to make inquiry as to whether it is grossly disproportionate for a reasonable hypothetical offender. The court in *Smith* therefore concluded that the minimum sentence of seven years' imprisonment should be struck down as being cruel and unusual since it could be applied to a hypothetical offender who would have the court's sympathy such as "*a young person who, while driving back into Canada from a winter break in the USA, is caught with only one, indeed, let's postulate, his or her first 'joint of grass'.*"¹⁷

4.19 The Supreme Court of Canada later, in *R v Morrisey*,¹⁸ departed from *Smith* in its treatment of a reasonable hypothetical offender. The court in *Morrisey* suggested that the adjudicator is "*to consider only those hypotheticals that could reasonably arise*".¹⁹ The facts of *Morrisey* were that whilst the 36-year-old defendant from Nova Scotia was drinking with two friends, they cut off a length of a rifle barrel. The defendant told one of his friends (the second friend) that the gun was intended for the commission of a robbery when in fact the defendant intended to kill himself with it. The defendant drove the third friend home, and when he later returned to his cabin, the second friend was sleeping on a bunk bed. The defendant leapt onto the bunk bed while holding the loaded shotgun. He then fell off the bed because he was intoxicated and the gun accidentally discharged, fatally wounding the second friend. The defendant was charged with criminal negligence causing death under section 220(a) of the Criminal Code. The offence carries a mandatory four-year sentence.

4.20 The court in *Morrisey* considered that there were only two hypothetical situations that could "reasonably" arise. The first was an individual who played around with a gun thinking it would not go off but it discharged and killed someone. The second hypothetical situation was a hunting trip which had gone wrong. The court considered that in both of these hypothetical situations that could reasonably arise, a four-year term of imprisonment would not be cruel and unusual punishment for such offences.²⁰ The court therefore upheld the mandatory minimum sentence of four years' imprisonment for criminal negligence causing death under section 220(a) of the Criminal Code.²¹

4.21 Kent Roach, Professor of Law and Criminology at University of Toronto, states that the concern in *R v Smith* was whether a mandatory minimum sentence was "*grossly disproportionate in light of what is necessary*

¹⁷ *R v Smith* [1987] 1 SCR 1045, paras 2 and 75.

¹⁸ *R v Morrisey* [2000] 2 SCR 90.

¹⁹ *R v Morrisey* [2000] 2 SCR 90, para 33.

²⁰ *R v Morrisey* [2000] 2 SCR 90, paras 51-53.

²¹ *R v Morrisey* [2000] 2 SCR 90, para 55.

to deter or rehabilitate particular offenders."²² He goes on to observe, however, that the "*bold statement of constitutional principles in Smith*" has been replaced by the court's deference to Parliament's decision to stress punitive purposes of sentencing over restorative purposes. In upholding the mandatory minimum sentence for criminal negligence causing death, the court in *Morrisey* suggested that "*the Court may defer to a legislative crime control agenda [set by Parliament] that used mandatory sentences to denounce and deter a broad range of crimes ...*".²³

Wider public interest and policy perspectives

4.22 As seen in Chapter 1, there has been a call from the Law Society for reform of the excepted offences regime as well as observations by the Court of Appeal as to problems in this area. The central issue of the debate on excepted offences is whether or not, as a matter of wider public policy, it is proper for the legislature to fetter the sentencing power of judges.

4.23 Excepted offences limit the flexibility of judges by taking away their discretion in considering non-custodial sentencing options which may be thought appropriate in the light of the particular circumstances of the case. As seen in *AG v Ng Chak Hung*, referred to in Chapter 1, even though the judge considered it appropriate that the defendant should be given a suspended sentence in view of the circumstances of the case and the defendant's background, the judge could not do so because the defendant was convicted of an excepted offence, namely wounding with intent contrary to section 17 of the Offences against the Person Ordinance, Cap 212.

4.24 Moreover, excepted offences sometimes make it difficult for judges to impose a sentence commensurate with the gravity of the crime committed. For example, indecent assault, which is an excepted offence, varies in its degree of gravity. An indecent assault may range from the less serious conduct of "groping" to the grave conduct of penetration of the victim's sexual organ with an object. While other sentencing options such as a fine, a probation order or a community service order may be considered to be too lenient for indecent assault, the magistrate may have no choice but to send the defendant straight to prison irrespective of the gravity of the indecent assault involved.

4.25 On the other hand, those in favour of excepted offences might argue that there is nothing wrong in principle with the Legislature fettering the sentencing power of judges. They may take the view that excepted offences are mere legislative guidelines indicating that only a custodial sentence should be imposed for certain categories of serious crimes which are of concern to the community. The merit of such legislative guidelines is that they ensure

²² K Roach, "*Searching for Smith: The Constitutionality of Mandatory Sentences*", 39 Osgoode Hall LJ (2001) 367, at 412.

²³ K Roach, cited above, at 412.

consistency in sentencing. In fact, legislative guidelines are set for various other matters, for example, maximum sentences and sometimes minimum or determinate sentences. Furthermore, the Judiciary itself has also set court-made guidelines for sentencing, such as those for drug trafficking.

4.26 However, the sentencing of offenders involves many different principles and it is difficult for the Legislature to foresee the appropriate penalty for a particular offender in the special circumstances of the case. The traditional role of the Legislature is to set the maximum penalty for an offence, thus reflecting the community's perception of the appropriate range of penalties that should be imposed for particular categories of crimes. It is for the judges or magistrates to decide the appropriate penalties for a particular offender in the light of the circumstances of the case and the offender's background.

4.27 Furthermore, the constitutionality of legislative sentencing guidelines such as mandatory minimum sentences has come increasingly under challenge in the court in Canada. The reasoning there has been that such legislative sentencing guidelines are in some cases grossly disproportionate in light of what is seen to be necessary to deter or rehabilitate offenders, and as such, may not stand constitutional challenge in court.

Community's views on law and order

4.28 Proponents of the excepted offences regime might also argue that by excluding certain serious offences from the suspended sentence option, offenders who commit these serious offences cannot effectively "walk free" with a suspended sentence. This sends a clear message to offenders that certain categories of serious crimes will not be tolerated and are to be punished by an immediate prison sentence. The Victorian Attorney General, the Hon Robert Clark, said in the second reading speech of the Sentencing Further Amendment Act 2011:

"Suspended sentences are fiction that pretends offenders are serving a term of imprisonment, when in fact they are living freely in the community. A suspended sentence does not subject an offender to any restrictions, community service obligations or reporting requirements. As a consequence, many offenders actually incur no real punishment whatsoever for the offence they have committed and make no reparation to the community. Often those released on suspended sentences go on to commit further crimes. In the last sitting week of the previous Parliament, the former government belatedly moved to adopt a small part of the coalition parties' policy on the abolition of suspended sentences, by closing the gaping loophole it had left in its 2006 legislation when it purported to abolish suspended sentences for serious offences but allowed suspended sentences to continue in undefined 'exceptional circumstances' ".

4.29 The question is, however, whether a suspended sentence really means no punishment for the offender. Cross and Cheung observe that a suspended sentence works as a strong psychological threat to the offender preventing him from committing a fresh crime:

*"The suspended sentence of imprisonment has been likened to the sword of Damocles. In HKSAR v Chan Hong MA 1255/2001, it was called 'a last chance before being sentenced to immediate imprisonment'. The offender receives a sentence of imprisonment, but does not go to prison. He is given a chance, and is subject instead to the threat of prison. Depending upon how he responds to the opportunity he has been given, the sentence may or may not be activated."*²⁴

4.30 On the other hand, those against the excepted offences regime may point to the history of their entry into the statute book in Hong Kong. It has been 40 years since the introduction of excepted offences in Schedule 3 of Cap 221, in what was hoped by the then Attorney General to be a short-term measure. As noted earlier, the Criminal Procedure (Amendment) Bill 1971 was amended in the light of the particular circumstances applying at that time (a sharp increase in violent crime) and of views to which it is unlikely many in the current Legislative Council would subscribe. For example, the following views expressed by the Hon Mr Oswald Cheung during the course of the debate on the Bill would probably find little favour today:

*"Now that the Courts have restored corporal punishment to its rightful place, I refer to it only for one reason, which is that a Working Party had recommended its abolition in the teeth of public opinion that it should be retained. Public opinion was right."*²⁵

4.31 It might also be noted that, when the Community Service Orders Ordinance (Cap 378) was enacted in 1984, there was no call at that time for the application of the excepted offences regime to that legislation. It might therefore be argued that it is difficult to see why the court should be precluded from imposing a suspended sentence of imprisonment for an excepted offence when they are at liberty, for exactly the same serious offence, to impose the arguably lesser penalty of a community service order.

²⁴ *Sentencing in Hong Kong*, cited above, at 587.

²⁵ HK Hansard, cited above, at 352.

Chapter 5

Arguments for and against reform, responses from the public and Recommendation

5.1 This Chapter first sets out the arguments in favour of maintaining the list of excepted offences and those in favour of reform as formulated in the CCPL Report. It is followed by the views of judges and judicial officers sought by the Chief Justice in mid-2012 as to whether in their experiences there was any unease or feeling of injustice arising from the statutory restriction imposed by Schedule 3 of Cap 221 (ie no suspended sentences for excepted offences). Our consideration of the responses we received from the public is also set out. At the end of this Chapter, we come to our conclusion and recommendation.

Argument in favour of maintaining the list of excepted offences¹

5.2 The main argument in favour of maintaining the list of excepted offences appears to be the concern in the early 1970s with the prevalence of violent crime in Hong Kong that required exceptions to what appeared to local legislators then as being a soft sentencing option.

Arguments in favour of reform²

5.3 The CCPL Report identifies six reasons for abolishing the list entirely or removing those offences that do not invariably cause serious physical violence to others.

- (1) The significant fall in the prevalence of violent crimes in Hong Kong since the 1970s is an important societal circumstance to consider when evaluating the need to maintain or reform the list of excepted offences.³ Hong Kong is now a much safer place than before and the prevalence of violent offences has decreased significantly since the 1970s. The original rationale

¹ *Report on Reforming Suspended Sentences in Hong Kong*, cited above, at 15.

² *Report on Reforming Suspended Sentences in Hong Kong*, cited above, at 15 to 21.

³ For example, in 1975, there were 20,912 reports of violent crime. In 2005, the number fell to 13,890. Moreover, in this 30-year period, the population grew substantially from 4,366,600 to 6,813,200, meaning that the per capita rate of reported violent crime decreased by 43 percent. See *Report on Reforming Suspended Sentences in Hong Kong*, cited above, at 16.

for having exceptions therefore no longer applies. Times have changed considerably, and the list of excepted offences has not been reviewed or updated for several decades.

- (2) In the absence of a suspended sentence option, offenders, whose circumstances could merit a suspension, will normally be imprisoned. Some of the excepted offences, such as attempted indecent assault and the weapons related offences, can occur in a wide range of circumstances, including exceptional circumstances (eg offence occurring without circumstances of aggravation, first-time remorseful offender with little risk of re-offending) which would ordinarily justify a suspended sentence. Imprisoning such offenders for the lack of a better sentencing alternative could do them injustice. That was illustrated by four real cases of indecent assault in Hong Kong committed by first-time offenders where sentences of less than 2 years imprisonment were granted in the absence of the option of suspended sentence.⁴ On the contrary, the court may have no better alternative but to order probation (or a community service order) when a suspended sentence is more appropriate. Whether the sentence is too harsh (imprisonment) or too soft (probation), there will inevitably be cases involving excepted offences that will push the court in either of these directions given the lack of a suspended sentence option. In both scenarios, injustice could result.
- (3) Another important consideration is the need to allow judges and magistrates a wide degree of discretion to achieve a just and appropriate sentence. The list of excepted offences is not only anachronistic (unanchored by its historical justification), but also applies across-the-board in a disproportionate manner to all offenders charged with certain offences irrespective of circumstances. The exceptions restrict sentencing discretion and impair the court's ability to do justice in individual cases. Removing such constraints on discretion is consistent with human rights norms against disproportionate and arbitrary imprisonment.
- (4) There is no reason to believe that repealing the exceptions will lead to either more offending or an increased risk of harm to the community. Suspension will continue to be made for only exceptional cases. Hong Kong court can be trusted to continue to imprison offenders who pose a substantial risk to the community. The current suspended sentence power allows for the imposition of conditions, which if breached during the operational period can trigger the court to order that the suspended sentence be served in its entirety.

⁴ *Report on Reforming Suspended Sentences in Hong Kong*, cited above, at 17 (Table 1).

- (5) The illogicalities of the list of excepted offences are of two kinds. First, the list is not comprehensive. Other violent and serious offences have been left out. In addition, many other serious sexual offences are not on the list.⁵ This means that those convicted of such offences, in theory, can be entitled to a suspended sentence of imprisonment. The second kind of illogicality concerns the less serious offences that exist on the list.⁶ These illogicalities can give rise to a general sense of unfairness and arbitrariness.
- (6) Of the jurisdictions studied that have a similar suspended sentence power, none of them has maintained exceptions as wide and extensive as those in Hong Kong. To be an excepted offence in these jurisdictions, the offence must typically involve significant violence or an element of organized crime.⁷ New Zealand has tried new and innovative sentencing reforms that give the court a wider range of discretion to order non-custodial sentences that have sufficient safeguards to protect the public. Singapore has not adopted the suspended sentence power.

Views of Hong Kong judges and judicial officers

5.4 Views of all judges and judicial officers as to whether in their experiences there was any unease or feeling of injustice arising from the statutory restriction imposed by Schedule 3 of Cap 221 (ie no suspended sentences for excepted offences) were sought in mid-2012. Responses from judges and judicial officers at different levels who hear mainly or exclusively criminal cases are as follows:

- (1) The vast majority (80% of those who responded) of the judges and judicial officers who responded, for the following reasons, agree with or support complete removal of the statutory restriction or at least the restriction in respect of certain offences (namely, indecent assault and wounding):
 - (a) the court's discretion should not be fettered;

⁵ See Crimes Ordinance (Cap 200), such as non-consensual buggery, assault with intent to commit buggery, gross indecency, bestiality, intercourse with a girl under 13 or under 16, intercourse with mentally incapacitated person, abduction of unmarried girl under 16, trafficking in persons to or from Hong Kong.

⁶ These are the summary conviction offences for which the maximum penalty is three years imprisonment or less. Many of these offences can be committed without any actual physical violence inflicted on another person, eg the firearm and weapons offences and the inchoate offence of attempted indecent assault.

⁷ In Canada, although sexual assault is included on their exceptions list, it appears to apply only when the offence is prosecuted on indictment but not when it is prosecuted summarily.

- (b) for serious offences, the restriction is superfluous since it is unlikely to be applicable, but for less serious offences where the power to suspend sentence is needed, the restriction will tie the court's hands; and
 - (c) the court is forced to pass a sentence which is disproportionate or does not reflect the criminality of the offence.
- (2) Some of the responses specifically suggest removing the restriction on:
 - (a) both indecent assault and wounding contrary to section 19 of Offences against the Person Ordinance (Cap 212) for the reason that circumstances in which these two offences are committed are so varied (in contrast to a similar offence of assault occasioning actual bodily harm in respect of which the court can suspend a prison sentence);
 - (b) section 33 of Public Order Ordinance (Cap 245) (possession of offensive weapon in public place) which imposes a mandatory prison sentence; and
 - (c) offences with sentences of two years or less (but retaining the restriction on offences with sentences longer than two years).
- (3) A few judges and judicial officers who did not experience difficulty arising from the statutory restriction accordingly saw no need to remove such restriction.
- (4) The reasons for the minority view that the statutory restriction should be retained are as follows:
 - (a) indecent assault cases are becoming prevalent;
 - (b) the offence under section 33 of Cap 245 is serious;
 - (c) removing the restriction may send a wrong message to the public; and
 - (d) removal needs community consultation.

Responses from the public

5.5 After carefully considering the arguments for and against reform as well as the views of the two branches of the legal profession, academics and the Judiciary, we concluded and recommended in the consultation paper

that there was a strong case for repealing the excepted offences as listed in Schedule 3 of Cap 221. We invited views and comments on the recommendation. During the consultation exercise, we received 39 responses (see details at Annex). Twenty eight of these respondents were in favour of the recommendation, while five were against it. The remaining six were neutral or chose not to express views. Those in favour generally endorsed the consultation paper's rationale for repealing the entire Schedule 3.

5.6 Among those who opposed the recommendation, Association Concerning Sexual Violence Against Women, Commissioner of Police, Fan Wong & Tso and Rain Lily shared the following arguments:⁸

- (1) ***Deterrent effect of imprisonment*** Offences in Schedule 3 are serious offences. Repealing the schedule will send a wrong message to society that these offences are not serious.⁹ Custodial sentence is needed for ensuring a deterrent effect. In particular, both the Association Concerning Sexual Violence Against Women and Rain Lily take the view that the problem of rape is becoming more serious,¹⁰ and the recommendation would give the public a false impression that rape, though prevalent, is no longer a serious offence. Similarly, indecent assault is also a serious offence and an offender is liable on conviction on indictment to a maximum sentence of imprisonment for ten years. The gravity of the crime warrants custodial sentence, and suspended sentence should not be an option. Thus, removing indecent assault from the schedule will only play down its seriousness, and will undermine its deterrent effect.

In the opinion of the Commissioner of Police, such a deterrent to serious and violent crimes should not be removed without a very strong justification, which does not appear to exist at present. Removing the schedule and hence its deterrent effect may lead to an increase in serious and violent crimes and deterioration in social order. In particular, the offence of assaulting a police officer under section 36 of the Offences Against the Person Ordinance (Cap 212) is an "excepted" offence. At a time when police officers are facing confrontation during increasingly radical, disorderly and violent demonstrations, repealing the whole schedule or just deleting section 36 from it could be interpreted

⁸ The Consultation Paper has already dealt with these two arguments under the heading "Arguments in favour of reform", and this Report will deal with them again below under the heading "Conclusion and Recommendation".

⁹ Another respondent, Raymond Chiu, also expressed the same view.

¹⁰ In the first six months of 2013, the Rain Lily hotline received a total of 118 calls asking for help in rape cases, a hike of 8.3% over the same period in 2012. Rain Lily suggests that it is much higher than the statistics provided by the Police. Apart from strangers, offenders now also include persons known to the victims (including kins, friends, supervisors and colleagues).

by potential offenders as an indication that the court will sentence them more leniently than under the current law. For frontline police officers, this is an unwelcome move and an unjustified diminution in the protection in law afforded to them by the deterrent effect of an excepted offence.

- (2) **Adequate sentencing options** There is no need to repeal Schedule 3, as current legislation has already given the court adequate sentencing options (other than imprisonment) in dealing with cases of different gravity. For example, community service order is a sentencing option available for "excepted offences", if the court, having regard to all the circumstances, is of the opinion that a non-custodial sentence is called for. Compared with suspended sentence, community service order requires an offender to make amends and get punished for his transgression in a more direct way. A suspended sentence, on the contrary, will indirectly send a wrong message to the public that the offender will not be punished for his offence and gets a reprieve. Similarly, for offenders under the age of 21 years old, the Court has the option of sending them to a training centre or detention centre. Repealing the schedule will only enable offenders of serious crimes to escape immediate imprisonment by way of suspended sentence.

5.7 In addition, Fan Wong & Tso emphasises that consistency is an important factor in sentencing. Messages from judicial decisions need to be clear to society, particularly with regard to serious offences such as those in Schedule 3. The public should be able to glean from judicial decisions a clear indication that no leniency can be expected from the court upon conviction of any of such excepted offences. Repealing the Schedule might lead to conflicting and inconsistent messages because of the different tariffs imposed by the court (suspended sentences in some cases but different sentencing imposed in others).

5.8 The Commissioner of Police is of the view that Schedule 3 was introduced to combat serious and violent crimes. As such crimes are still committed in Hong Kong today, the retention of the Schedule remains justifiable. The public sentiments at the time of introducing the Schedule still ring true today, and it should not be removed without the strong support of the public.¹¹ Besides, some offences, such as manslaughter and rape, are so serious in nature and have such a huge negative impact upon victims, that it is almost impossible to imagine circumstances in which a suspended sentence

¹¹ The Consultation Paper has already dealt with this argument under the heading "Arguments in favour of reform", and this Report will deal with it again below under the heading "Conclusion and Recommendation". The Commissioner of Police said, "*When the 'excepted' offences were introduced the then Attorney General stated that it would be 'unwise ... for legislation to be passed which might appear to be advocating leniency towards offenders who resort to violence', and, 'that it is dangerous to attempt to do so to a degree which suggests that the Government is out of touch ... with the strongly held and not unreasonable views of the majority of the citizens'.*".

would be justified without causing a public outcry and decrease in respect for the law. Retaining the Schedule would prevent such an unfortunate eventuality.

5.9 Instead of repealing Schedule 3, the Association Concerning Sexual Violence Against Women, Fan Wong & Tso and Rain Lily share the view that the Schedule should be revised by adding other serious offences¹² and deleting some less serious ones. The Association Concerning Sexual Violence Against Women and Rain Lily observe that rape and indecent assault should be retained, while adding offences such as non-consensual buggery, gross indecency, sexual intercourse with a girl under 13 or under 16 years of age and sexual intercourse with mentally incapacitated person. In contrast, Fan Wong & Tso suggests deleting indecent assault from Schedule 3 in view of the nature of offence, and adding offences in the form of "cheating rent allowance" given the media coverage and the apparently widespread and habitual corruptive practices committed by some senior government officials. While the Legal Policy Division of the Department of Justice ("LPD") expresses support in-principle and the majority of counsel in the Prosecution Division of the Department ("PD") supported the recommendation, LPD and some individual counsel of PD agree with this pick-and-choose approach. LPD also suggests considering repealing only offences which merit more flexibility in sentencing because such offences involve acts of varying degrees of culpability. For instance, indecent assault may involve sexual molestation of a total stranger or intimate acts between underage lovers; wounding may involve gang fights or domestic violence. Some individual counsel of PD express that there might still be a case for retaining some of the excepted offences because of their gravity. These are serious sexual offences or offences involving serious physical violence.¹³

5.10 LPD helpfully draws to our attention the recent changes in Canada, United Kingdom and Victoria (Australia), which have been duly incorporated in Chapter 3 of this Report. LPD considers that these changes show a move in the direction of a more conservative attitude towards suspended sentence and excepted offences. In respect of the entire abolition of suspended sentences in Victoria, LPD observes:

"During debate in parliament, the main reason cited for the total abolishment of suspended sentence is that it is a 'fictitious punishment' that 'pretends offenders are serving a term of imprisonment when in fact they are living freely in the community' and 'those convicted with a jail sentence are allowed to walk free

¹² Another respondent, Raymond Chiu, also expressed the same view.

¹³ Such as:

- (a) non-consensual buggery
- (b) assault with intent to commit buggery
- (c) gross indecency
- (d) bestiality
- (e) intercourse with a girl under 13
- (f) robbery
- (g) aggravated burglary

without monitoring'.¹⁴ The Act is part of the state government's 'tough-on-crime' policy that emphasizes 'jail means jail'. The Act makes changes to community correction orders by giving the court the power to impose electronic monitoring of offenders subject to orders that carry a curfew or a condition regarding area exclusion. The court in those circumstances needs to consider a pre-sentence report in deciding whether it is appropriate to attach electronic monitoring."

5.11 LPD believes that the recent changes in the three jurisdictions might reflect that common law jurisdictions are going in different directions in the concept and implementation of suspended sentences, and there could be variations or add-on packages to address the needs of the community concerned.

5.12 Finally, Grenville Cross, QC, SC and Patrick Cheung say that the recommendation is "*certainly a step in the right direction*", but suggest "*a full review of the scope and purpose of the suspended sentence scheme*".¹⁵ We will address the above arguments against reform, views and suggestions point-by-point in the following paragraphs before making our recommendation.

Conclusion and Recommendations

Suspended sentence under section 109B

5.13 We have carefully considered the views and comments of the respondents for and against our recommendation, as well as their other suggestions. There are problems with the existing operation of the excepted offences regime, and thus there is an overwhelming support for the change of the *status quo*. Academics are of the view that the current regime should be reformed, as it was also cogently argued in the CCPL Report. As mentioned in the consultation paper, the Law Society had adopted the views and conclusion in the CCPL Report, and the Bar shared the view of the Law Society that the concept of excepted offences was "outdated" and should be abolished in its entirety. As set out in the above paragraphs, about 80% of the responses of the judges and judicial officers support the removal of the restriction.

¹⁴ Hansard of the Parliament of Victoria (http://tex.parliament.vic.gov.au/bin/texhtml?form=jVicHansard.dumpall&db=hansard91&dodraft=0&house=ASSEMBLY&speech=42492&activity=Second+Reading&title=SENTENCING+AMENDMENT+%28ABOLITION+OF+SUSPENDED+SENTENCES+AND+OTHER+MATTERS%29+BILL+2013&date1=8&date2=May&date3=2013&query=true%0a%09and+%28+data+contains+'sentencing'%0a%09and+data+contains+'amendment'+%29%0a%09and+%28+hdate.hdate_3+=+2013+%29)

¹⁵ Grenville Cross, QC, SC, *Room to Move* (South China Morning Post, 1 Aug 2013).

5.14 The Commissioner of Police argued that the public sentiments at the time of introducing Schedule 3 still rang true, and it should not be repealed unless there was strong public support. As pointed out in the consultation paper, the public sentiments behind the creation of the excepted offences in the Criminal Procedure (Amendment) Bill 1971, some 40 years ago, have long gone. While violent crimes were prevalent in the 1970s, Hong Kong is now recognised as one of the world's safest cities:

"This bustling, heavily populated metropolitan jewel on the south China coast today enjoys the reputation of being perhaps the safest city in the world at the dawn of the 21st century, says the Global Report for Human Settlements 2007.

*Compared to other cities in Asia and further afield, Hong Kong's crime rate is very low as shown by regular crime and victimisation surveys conducted by both the government and the United Nations. According to the Seventh United Nations Survey on Crime Trends and the Operations of Criminal Justice Systems, in 2000 the overall recorded crime rate per 100,000 population in Hong Kong was 1,185.7, lower than Singapore (1,202.6), Japan (1,924.0), Republic of South Korea (3,262.6), Italy (3,822.8), France (6,403.8), Canada (8,040.6) and England & Wales (9,766.7)."*¹⁶

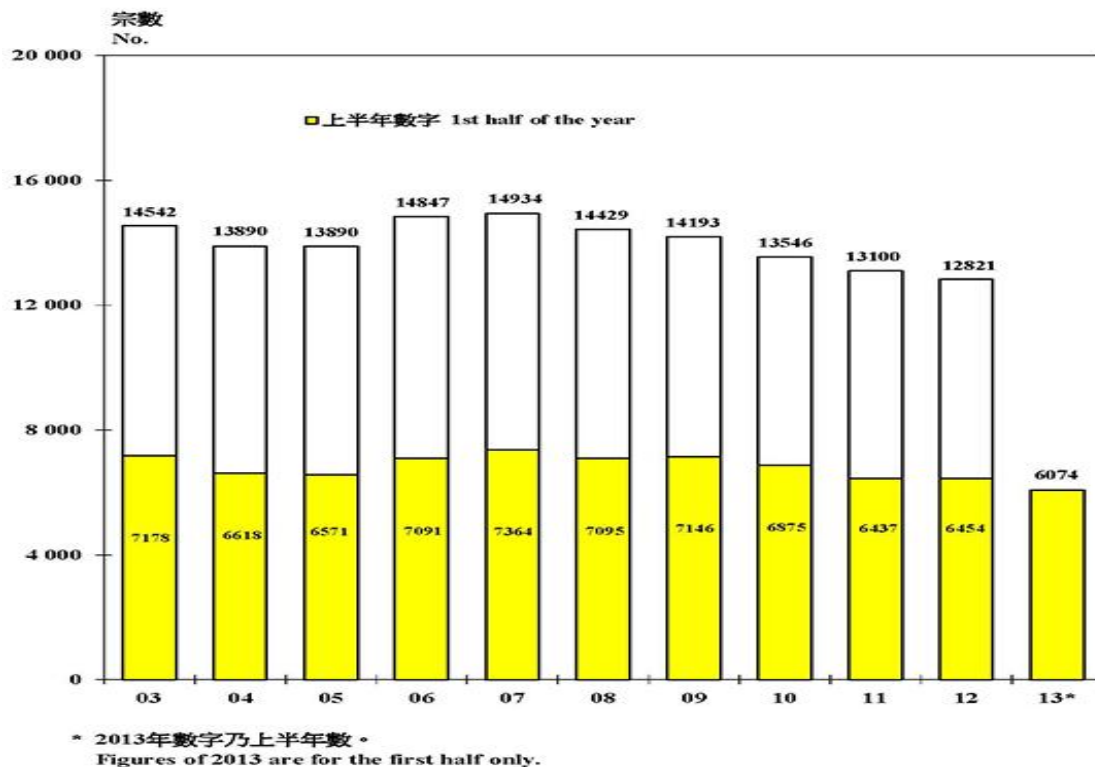
As mentioned in the above paragraphs, the per-capita rate of reported violent crimes has dropped by 43% from 1975 to 2005.¹⁷ The community nowadays has different views on whether it remains justified for some or all of the offences listed in Schedule 3 of Cap 221 to be classed as excepted offences. This is substantiated in the overwhelming support in our consultation exercise. The statistics of violent crimes from 2003 to 2013 have remained stable in Hong Kong as illustrated in the chart below:¹⁸

¹⁶ UN-Habitat, *Global Report for Human Settlements 2007 - Crime & Violence - City case studies* (2007), http://www.unhabitat.org/downloads/docs/5204_54067_Bk%209.pdf

¹⁷ *Report on Reforming Suspended Sentences in Hong Kong*, cited above, at 16.

¹⁸ Hong Kong Police Force, *Crime Statistics in Detail- Violent Crime* http://www.police.gov.hk/ppp_en/09_statistics/csd.html

2003年至2013年的暴力罪案 Violent Crime, 2003 - 2013



5.15 To some respondents, excepted offences are justified on the grounds that they ensure that offenders of serious crimes do not "walk free" with a suspended sentence, and a clear message is made to society that certain kinds of serious crimes should not be dealt with leniently by the law. They worry that the deterrent effect of imprisonment would be undermined. We agree with the CCPL Report that there is no cause to worry that repealing Schedule 3 will increase the risk of harm to the community. We have full confidence in the judges and magistrates in Hong Kong who would exercise their sentencing discretion without restrictions cautiously after taking into account all the circumstances of the case. After all, the effect of our recommendation is just that the court would have full discretion to sentence appropriately according to the facts of the case, including imprisonment, suspended sentence, etc. One respondent, Leung, Tam & Wong, point out that there are enough guidelines and case law for the court to follow on sentencing under the common law system.

5.16 Some respondents also argue that the court already has had adequate sentencing options (other than imprisonment) in dealing with cases of different gravity. In response, we reiterate what has already been set out at the beginning of this Chapter,¹ in the absence of a suspended sentence option, offenders, whose circumstances could merit a suspension, will normally be imprisoned. On the other hand, the court may have no better alternative but to order probation (or a community service order) when a suspended sentence

¹ Under the heading "Arguments in favour of reform".

is more appropriate. In other words, given the lack of a suspended sentence option, the sentence may be too harsh (imprisonment) or too soft (probation). In both scenarios, the court's hands are tied, and injustice could result, whether to the victims or defendants.

5.17 We note that some respondents emphasise the importance of consistency in sentencing, and of sending a clear message that no leniency could be expected from the court upon conviction of any excepted offence. We agree with this viewpoint, but must stress that giving the court a wide discretion to order a just and appropriate sentence depending on the circumstances of the case (with the option of suspended sentences) would not send a mixed message to society. The court has to be consistent in its sentencing in respect of the same offence under the same circumstances, but not necessarily in relation to the same offence with different factual matrix.

5.18 As to LPD's observation that there have been recent changes in three jurisdictions moving towards a more conservative attitude towards suspended sentence and excepted offences, that might, perhaps, be true in relation to Canada and Victoria only. Regarding the United Kingdom, as pointed out by LPD, *"As a consequence of these changes, ... there are more cases in which suspended sentence can be ordered by the court"*. This should be regarded as expanding the scope of suspended sentence.

5.19 In relation to the suggestion of revising Schedule 3 in lieu of repealing it in its entirety, we believe that the "pick and choose" process may be regarded as arbitrary. As set out in the above paragraphs, different respondents have made different suggestions. In addition, it is not easy to figure out all the eventualities in which whether or not suspended sentence is warranted in respect of a given offence. It is therefore neater to allow the court full discretion in respect of all such offences in Schedule 3. As to the suggestion by Grenville Cross, QC, SC and Patrick Cheung of a full review of the suspended sentence scheme, we consider that that should be dealt with in another exercise. Finally, LPD suggested amending Cap 221 giving the court power to impose conditions when suspending sentences along the line of supervision period in the United Kingdom. We believe that under section 109B(3) of Cap 221, the court may impose such conditions as it thinks fit on passing a suspended sentence.

5.20 We therefore maintain our recommendation on repealing the excepted offences as listed in Schedule 3 of Cap 221 in relation to section 109B.

Recommendation 1

We recommend repealing the excepted offences as listed in Schedule 3 of the Criminal Procedure Ordinance, Chapter 221 of the Laws of Hong Kong in relation to section 109B.

Restriction on imprisonment of persons between 16 and 21 years of age under section 109A

5.21 In the CCPL Report, it is mentioned that a further study of the restriction on imprisonment of persons between 16 and 21 years of age under section 109A under a general review of youth justice would be called for.² LPD suggests clarifying whether the recommendation on repealing excepted offences in Schedule 3 is also applicable to section 109A(1) and (1A) of Cap 221. Two other respondents, Kelvin Ng & Co and Icarus Chan Ho Shing, nonetheless, suggest repealing section 109A in its entirety.

5.22 Section 109A(1) provides that young offenders, aged between 16 and 21 years, should not be imprisoned unless there is no other appropriate method of dealing with them. However, this provision does not apply to excepted offences in Schedule 3 according to section 109A(1A)). It appears that there are three options available:

- (1) repealing section 109A in its entirety;
- (2) repealing section 109A(1A) only;
- (3) repealing Schedule 3 only in relation to section 109B (in other words, Schedule 3 will continue to apply by virtue of section 109A(1A)).

5.23 **Option 1** — This option would totally undo the current provision that offenders between 16 and 21 should not be imprisoned unless there is no other appropriate method of dealing with them. The result is that offenders of this age group will be treated in the same way as adult offenders, meaning that the court would have full discretion to impose any sentence, including imprisonment and suspended sentence. We also note the purpose for introducing section 109A(1) in 1967:³

"The new provision ... its simple purpose is to secure, without unduly fettering the discretion of the court, that imprisonment is used in relation to such young persons only where it is absolutely necessary to do so. ... we believe — and our belief is backed by experience — that it is true for Hong Kong that young offenders, involved even in serious crime, may be more effectively rescued from embarking upon a lifetime of crime if contact with hardened criminals through imprisonment is avoided, and if, in association with such curtailment of their liberty as is necessary, constructive measures are taken to help them to adjust to the requirements of society. Whether the young person is sent to a training centre or to a reformatory school, or is placed under the supervision of a probation officer his liberty is in

² Report on Reforming Suspended Sentences in Hong Kong, cited above, at 21.

³ Young Offenders (Miscellaneous Provisions) Ordinance 1967, No 66 of 1967 Schedule.

a greater or lesser degree curtailed and it is on this basis of discipline that the constructive element of rehabilitation through training, counselling and education is founded.

*... The Bill does not fetter the discretion of the court to deal with the offender in whatever manner the information provided for it and the circumstances seem to require. Presumably if imprisonment is indicated as the only appropriate course this will be resorted to; if another course of action is decided upon it will be because it seems to offer the best prospect of being effective."*⁴

5.24 **Option 2** — The effect of this option is that section 109A(1) would apply without being subject to excepted offences, ie back to the position before section 109A(1A) was added in 1971. Section 109A(1A) was introduced because of the rise in youth violent crimes at that time. Hon Mr Wilson Wang, a member of the Legislative Council at the time, said:

"... it has also been suggested that one of the reasons for the increase in juvenile crimes of violence — or at any rate one of the obstacles to preventing that increase — has been the addition of section 109A ... Whilst this section does in fact leave it open to the Court to send such a young person to prison, it has been often taken for granted that such a sentence would be a rare and unusual one, and young people can always escape punishment for crimes of any kind as long as they are under 21 years of age.

*... this section was introduced at a time when we could afford to be optimistic in view of the low rate of crimes of violence by young persons. In the light of the present crime-wave ... I suggest we should modify this section by excluding from its operation those same crimes of violence to be listed in the Schedule to which I have already referred and to which suspended sentences could not be applied."*⁵

The then Attorney General agreed to the suggestion of disapplying section 109A to offences in Schedule 3 by adding a new sub-section (109A(1A)):

"... I agree that it is appropriate that the [excepted] offences should also be excluded from the operation of section 109A ... The effect of excluding some offences from the operation of this section would be to restore imprisonment as a punishment, on parity with other ways of dealing with offenders. This amendment will, I hope, make it clear that the Government, and this Council, have come to the conclusion, though with considerable regret, that for the time being, where crimes

⁴ Hong Kong Hansard, Session 67/68, 448 (1 Nov 67).

⁵ Hong Kong Hansard, Session 70/71, 349 (20 Jan 71).

*involving violence are committed by persons between 16 and 21, more emphasis must be given to deterrent punishments as opposed to reformative measures."*⁶

5.25 **Option 3** — The effect of this option is that the status quo in relation to offenders between 16 and 21 years in section 109A is maintained: the "no-imprisonment" (unless no other appropriate method) provision would remain subject to excepted offences in Schedule 3.

5.26 **Conclusion** — Section 109A(1), introduced in 1967, has been a long-standing rule which should not be tampered with unless there is a strong reason to do so. We consider that Option 1 is not appropriate, as we see no reason to upset this long-standing general rule. The rationale for introducing it in 1967 was that young offenders, involved even in serious crime, might be more effectively rescued from embarking upon a lifetime of crime if contact with hardened criminals through imprisonment was avoided. This rationale should still apply today unless otherwise decided in a general review of the youth justice regime.

5.27 The reason for enacting section 109A(1A) was because of the rise in youth violent crimes at that time. An argument for adopting Option 2 is that the number of prisoners under 21 has dropped from 1,420 (12.74% of total prison population (11,147)) in 1991 to 372 (3.14% of a total prison population (11,851)) in 2012.⁷ In addition, as mentioned in the above paragraphs, violent crime in general is no longer a real concern as in the 70's. Furthermore, there is no reason to believe that disapplying Schedule 3 to section 109A(1) will lead to either more young offenders or an increased risk of harm to the community. Hong Kong court can be trusted to continue to imprison young offenders if no other method of dealing with them is appropriate. Finally, the criticism, discussed at the beginning of this Chapter, against the illogicalities of the list of offences in Schedule 3 equally applies to young offenders. Nevertheless, an argument against adopting Option 2 is that this will be against the spirit of the present reform (ie giving more discretion to the court) as this option allows the court's discretion to be fettered under section 109A(1).

5.28 An argument for adopting Option 3, as set out in the CCPL Report, is that a further study of this issue in the context of a general review of youth justice in Hong Kong is called for before changing the status quo. Nevertheless, Option 3 would lead to a rather odd consequence: excepted offences are repealed in relation to adult offenders, but would still apply to offenders between 16 and 21 years by virtue of section 109A(1A) introduced in 1971.

5.29 We must point out that the present reform is to remove the restriction on court because of the list of excepted offences in Schedule 3 in respect of suspended sentences under section 109B, as well as young

⁶ *Hong Kong Hansard*, Session 70/71, 356 (20 Jan 71).

⁷ Correctional Services Department, *Annual Review 2012* at 76, and *Annual Review 2000* at 84.

offenders by virtue of section 109A(1A). As explained in the above paragraphs, we concluded that the long-standing rule in section 109A(1) should not be tampered with unless there is a strong reason to do so.

5.30 We therefore adopt Option 2: repealing section 109A(1A) only. Section 109A(1) would continue to apply without being subject to excepted offences, ie back to the position before section 109A(1A) was added in 1971.

Recommendation 2

We recommend repealing section 109A(1A) of the Criminal Procedure Ordinance, Chapter 221 of the Laws of Hong Kong.

RESPONDENTS TO CONSULTATION PAPER ON EXCEPTED OFFENCES

Supporting

1. Arthur Au & Co (a law firm)
2. Icarus Chan Ho Shing (LLB yr 1)
3. Benjamin Chain (a barrister)
4. Grenville Cross, QC, SC, and Patrick Cheung (a barrister)
5. Customs and Excise Department
6. Clive Grossman, QC, SC
7. Alan Hoo, QC, SC
8. Robert G Kotewall, QC, SC
9. David Lai (a barrister)
10. K M Lai & Li (a law firm)
11. The Law Society of Hong Kong
12. Legal Aid Department
13. Legal Policy Division, Department of Justice
14. Leung Tam & Wong (a law firm)
15. Liu, Choi & Chan (a law firm)
16. Dr Gerard McCoy, QC, SC (and majority of Gilt Chambers)
17. George Y C Mok & Co (a law firm)
18. Kevin Ng & Co (a law firm)
19. Prosecutions Division, Department of Justice
20. Dr Alain Sham, Deputy Director of Public Prosecutions
21. Society for Community Organization
22. Stevenson, Wong & Co (a law firm)
23. W S Szeto & Lee (a law firm)
24. Tang and So (a law firm)
25. Tang, Wong & Cheung (a law firm)
26. Vidler & Co (a law firm)
27. Elaine Yan (Sing Tao Daily, foreign correspondent)
28. Edmond Yeung & Co (a law firm)

Opposing

1. Association Concerning Sexual Violence Against Women
2. Hong Kong Police Force
3. Fan Wong & Tso (a law firm)
4. Rain Lily
5. Raymond Chiu

Expressing neutral stance or no comment

1. Duty Lawyer Service
2. Independent Commission Against Corruption
3. Immigration Department
4. Thomas Lai (a barrister)
5. Security Bureau
6. Wilkinson & Grist (a law firm)