THE LAW REFORM COMMISSION OF HONG KONG

REPORT

SENTENCING AND RELATED MATTERS IN THE REVIEW OF SEXUAL OFFENCES

EXECUTIVE SUMMARY

(This executive summary is an outline of the Report. Copies of the full Report can be downloaded from the Commission's website at: http://www.hkreform.gov.hk or obtained from the Secretariat of the Law Reform Commission, 4th Floor, East Wing, Justice Place, 18 Lower Albert Road, Central, Hong Kong.)

Consultation process

1. In November 2020, the Law Reform Commission's Review of Sexual Offences Sub-committee ("**Sub-committee**") published the Consultation Paper on Sentencing and Related Matters in the Review of Sexual Offences ("**CP**"), pursuant to the following terms of reference:

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

2. The CP is the final part of the overall review of substantive sexual offences.[1] It covers a review of the penalties for offences proposed in the overall review of substantive sexual offences; examines ways to reform and improve treatment and rehabilitation of sex offenders in Hong Kong; and reviews the Sexual Conviction Record Check Scheme ("**SCRC Scheme**") since it came into operation in December 2011 as an administrative scheme.

---

[1] Overall review of substantive sexual offences (previous publications):
(1) Consultation Paper on Rape and Other Non-consensual Sexual Offences (September 2012).
(2) Consultation Paper on Sexual Offences Involving Children and Persons with Mental Impairment (November 2016).
(3) Consultation Paper on Miscellaneous Sexual Offences (May 2018).
(4) Report on Voyeurism and Non-consensual Upskirt-photography (April 2019).
(5) Report on Review of Substantive Sexual Offences (December 2019).

3. The Sub-committee received 75 responses from members of the public during the consultation period. We are most grateful to all those who have commented on the CP ("**Respondents**").

Structure of the Report

4. The Report consists of three chapters dealing with three sets of Final Recommendations:

(a) Chapter 1 discusses the penalties recommended for

(i) the existing offences of rape (which the LRC recommended be renamed as "sexual penetration without consent") and incest; and

(ii) the new offences proposed in the overall review which are largely modelled on relevant provisions in the English Sexual Offences Act 2003 ("**English Act**") and the Sexual Offences (Scotland) Act 2009 (Final Recommendation 1).

(b) Chapter 2 discusses the possible treatment and rehabilitation of sex offenders including (i) the judges' powers to require sex offenders to attend treatment programmes and obtain their psychological and psychiatric assessment reports, (ii) a review of the incentive schemes available to sex offenders in custody, and (iii) the provision of specialised post-release supervision to discharged sex offenders (Final Recommendation 2).

(c) Chapter 3 examines the SCRC Scheme since it came into operation in December 2011 as an administrative scheme, and discusses how the scheme could be optimised (Final Recommendation 3).

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

5. Preliminary Recommendation 1 in the CP recommends, inter alia, that for the offences recommended in the Report on Review of Substantive Sexual Offences ("**Report on Sexual Offences**"), the current penalties for the existing offences of rape (ie life imprisonment) and incest (ie 14 years' imprisonment) should continue to apply to the recommended offences of sexual penetration without consent and incest. A majority of the submissions that commented on this part of Preliminary Recommendation 1 support the recommendation and agree that the current penalties for the existing offences of rape and incest should continue to apply to the recommended offences of sexual penetration without consent and incest.

6. As regards the recommendation that penalties for the new offences proposed in the Report on Sexual Offences be set by reference to those in the corresponding overseas provisions with suitable adjustments,[2] a narrow majority of the submissions disagree with the proposed maximum penalty of two years' imprisonment for the offences of voyeurism and non-consensual upskirt

[2] CP, at para 1.9.

photography. Some of the Respondents also raise concern on the proposal to impose a maximum sentence of 14 years' imprisonment for the offences of sexual assault of a child under 13/16 and the relevant offences of causing or inciting a child under 13/16 to engage in sexual activity without regard to the two different age groups.[3] With regard to the offence of sexual activity with a person with mental impairment ("**PMI**") (i) by people involved in his or her care, or (ii) involving abuse of a position of trust or authority, or a relationship of dependency, some Respondents comment that a higher maximum sentence is justified for cases involving an offender abusing the victim's trust.[4]

7. Having analysed the arguments for and against Preliminary Recommendation 1, we agree with the majority that even with the recommended expansion in scope of the proposed offence of sexual penetration without consent and the offence of incest, the gravity of these offences is no different from that of the existing offences of rape and incest. Hence, the current penalties for the said existing offences should continue to apply to the recommended offences of sexual penetration without consent and incest.

Proposed new offences of voyeurism and non-consensual upskirt-photography

8. At the time of preparing the Report, we were aware that the Government had already introduced the Crimes (Amendment) Bill 2021 ("**Bill**") in March 2021 seeking to introduce, amongst others, specific offences against voyeurism, non-consensual recording of intimate parts and publication of intimate images without consent, with a proposed maximum penalty of five years' imprisonment. The Bill was passed and the new law came into operation on 8 October 2021. Given this latest development, we will make no final recommendation on the proposed maximum penalties for the proposed new offences of voyeurism and non-consensual upskirt-photography.

Proposed new offences of sexual assault of a child under 13/16, and causing or inciting a child under 13/16 to engage in sexual activity

9. We take the view that the proposed maximum sentence of 14 years' imprisonment for the said offences involving a child under 16 is already a harsh penalty, considering the current maximum penalty for unlawful sexual intercourse with a girl under the age of 16 is imprisonment for five years[5] whereas the recommended maximum penalty for the proposed new offence of sexual assault (where the victim is not under 16) is imprisonment for 10 years.[6] We wish to

---

[3] The Respondents comment that the proposed penalties are not in line with the basic principle that heavier sentences should be imposed for offences involving a child under 13 for better protection of this age group which involves younger children. On the other hand, they have different views as regards whether the proposed maximum sentence of 14 years should be lowered to 10 years for sexual offences involving a child under 16; or whether that for sexual offences involving a child under 13 should be increased to above 14 years to create the differentiation.

[4] The Respondents propose that the maximum sentence for the said offence should carry the same maximum penalty as the proposed new offence of "causing a PMI to engage in or agree to engage in sexual activity by inducement, threat or deception", ie life imprisonment in cases involving penetrative sexual activity, and 14 years' imprisonment in cases involving non-penetrative sexual activity.

[5] Crimes Ordinance (Cap 200), s 124.

[6] One may also note that the maximum sentence of the existing offence of indecent assault is 10 years' imprisonment (Crimes Ordinance (Cap 200), s 122), which is the same as our proposed maximum penalty for the new offence of sexual assault which will replace it.

stress that the proposed maximum penalties are reserved for the most extreme situations, and that the sentencing court, having considered all the facts and circumstances of each individual case, would undoubtedly take into account the differentiation in the age of the victims and impose a suitable sentence.

10. We would add that in the event that our recommendation to set the same statutory maximum (ie 14 years' imprisonment) for those committing the offending acts against a child under 13 and those against a child under 16 is accepted by the Government, consideration may be given as to whether or not the implementing legislation should only create one single offence to cover both groups of underage victims to avoid creating unnecessary complications at trial.[7]

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

11. In recommending the new offence of sexual activity with a PMI to cover both situations where (i) the perpetrator is a person involved in the victim's care, and (ii) abuse of a position of trust or authority, or a relationship of dependency is otherwise involved, we took the view that the corresponding English provision (ie section 38(1) of the English Act) which only covers situation (i) should be extended to embrace the Canadian approach[8] to cover also situation (ii). Unlike the English legislation which only covers a care relationship (where a position of trust or authority, or a relationship of dependency may exist),[9] the Canadian offence is wider in the sense that it extends generally to any position of trust or authority, or any relationship of dependency. Hence, the reason for extending the English provision is for the protection of PMIs also from those who are not their carers, not because we consider the maximum penalty for the offence under the English provision insufficient to address the situation where a position of trust or authority, or a relationship of dependency exists. On this basis, it appears that there is no strong basis for differentiating the penalty level.

12. Our view therefore is that the maximum sentence proposed would be sufficient in catering for situation involving an abuse of trust, and what the suitable sentence should be imposed for the offence of sexual activity with a PMI involving an abuse of trust in an individual case should be a matter for the sentencing court, having regard to the facts and circumstances of the case.

13. Having considered the responses received, apart from making no final recommendation on the proposed maximum penalties for the proposed new offences of voyeurism and non-consensual upskirt-photography, Preliminary Recommendation 1 in the CP is therefore maintained as **Final Recommendation 1** as follows:

---

7 As an example, for sexual assault which happened many years ago when the complainant was young, the evidence might be unclear as to whether the relevant incident occurred before or after the complainant reached 13, or there might be a series of sexual assaults one or more of which happened before with another or others after the complainant's 13th birthday.

8 Canadian Criminal Code, s 153.1(1).

9 Discussed in CP, at paras 1.33–1.36. See also consultation paper on Sexual Offences Involving Children and Persons with Mental Impairment, at paras 10.4, 10.38–10.59, 10.70–10.77 (for the relevant sections of the Canadian Criminal Code) and paras 11.15–11.18.

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

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

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

(c) *We make no final recommendation on the proposed penalties for the proposed new offences of voyeurism and non-consensual upskirt-photography."*

Chapter 2: Treatment and rehabilitation of sex offenders

The current specialised treatment and rehabilitation programmes for sex offenders available on a voluntary basis at the Correctional Services Department be maintained

14. A majority of those who responded agree that the current specialised treatment and rehabilitation programmes for sex offenders available on a voluntary basis at the Correctional Services Department ("**CSD**") should be maintained. However, a large number of the Respondents suggest that the treatment and rehabilitation programmes should also be made available to all sex offenders, in particular those who are sentenced to less than two years' imprisonment or given a non-custodial sentence (eg Probation Order ("**PO**") or Community Service Order ("**CSO**")). Amongst those who oppose, one women and children concern group suggests that more resources should be allocated to the CSD for the purpose of engaging additional manpower in order to establish a proper treatment and rehabilitation system.

15. There is no statutory provision in Hong Kong which empowers a sentencing court to require a sex offender to undertake a course of therapy or treatment, or to accept appropriate counselling. Currently, treatment and rehabilitation programmes for incarcerated sex offenders are operated and provided by the CSD. Programme participation is entirely voluntary. To be effective, we believe there should be legislation providing incentives for sex offenders to receive treatment and to demonstrate positive change. Simply mandating a sex offender to attend treatment is unlikely to serve any useful purpose.

16. The latest statistics provided by the CSD[10] show that the current treatment programmes have been operating effectively, and noting the support from the majority of the Respondents, we agree that the current specialised

[10] Report, at paras 2.7–2.8.

treatment and rehabilitation programmes for sex offenders available on a voluntary basis at the CSD should be maintained.

17. As regards such treatment and rehabilitation programmes provided by the CSD, they are available to all sex offenders who are imprisoned.[11] For sex offenders who are serving a non-custodial sentence (eg under a PO or CSO), the Social Welfare Department ("**SWD**") and a number of non-government organisations ("**NGOs**") are already providing them with various kinds of treatment and rehabilitation programmes.[12]

The general practice for judges to exercise discretion to obtain psychological and psychiatric assessment reports of sex offenders for sentencing should continue to apply

18. The result of the consultation responses is a tie. Those who support generally agree that solely asking judges to obtain pre-sentencing assessment reports for consideration of sentencing options in lack of adequate specialised treatment, reintegration support and supervision available to the sex offenders is unlikely to provide effective management of and assistance to sex offenders. Those opposing opine that psychological and psychiatric assessment reports of sex offenders are necessary as they can provide references to the court for sentencing. They also believe that more resources should be allocated by the Government to the CSD for the purpose of engaging additional manpower and establishing a proper system.

19. At the moment, it is usually in cases involving relatively minor sexual offences in which the sentencing judge may consider imposing a penalty by way of a PO or a CSO that a psychological or psychiatric assessment report is requested by the sentencing judge. In practice, without the sex offender's consent to attend the treatment programme, the probation officer will not recommend to the sentencing judge that attendance of treatment programme can be one of the conditions of the PO or CSO. We agree that if sex offenders cannot be required to undergo mandatory treatment, there would be little benefit in mandating judges (as opposed to the current discretionary power) to request psychological or psychiatric reports, and hence recommend that the current practice for judges to exercise discretion to obtain the assessment reports of sex offenders for sentencing should continue to apply.

The Government reviews and considers the introduction of an incentive scheme in the prison institutions

20. We received overwhelming support for this Preliminary Recommendation. One Government department suggests that the incentive scheme should be extended to motivate sex offenders under post-release supervision, PO or CSO, to actively participate in the treatment and rehabilitation programmes.

---

[11] Sex offenders serving a term of less than two years can also participate in these programmes voluntarily.

[12] Report, at paras 2.12–2.20.

21. In view of the overwhelming support, we agree with the Respondents and therefore recommend that the Government takes the Respondents' suggestions into full consideration when it formulates its policy in this respect in the design of the actual incentive scheme.

The provision of specialised post-release supervision to discharged sex offenders under the existing statutory schemes be maintained; and the Government considers strengthening the rehabilitation services for discharged sex offenders

22. We received unanimous support for these parts of Preliminary Recommendation 2.

23. We take the view that efforts to ensure the availability of specialised rehabilitation and treatment in the community to enhance continuity of care by improving the interface between CSD and community service providers, and the engagement of needy ex-offenders after release are important for lowering the reoffending rate. In view of the unanimous support, we recommend that the Government should consider strengthening the existing specialised rehabilitation services, including psychological and psychiatric treatment for discharged sex offenders.

24. Preliminary Recommendation 2 in the CP is therefore maintained as **Final Recommendation 2** as follows:

> *"We recommend that the current specialised treatment and rehabilitation programs for sex offenders available on a voluntary basis at the Correctional Services Department be maintained.*
>
> *We recommend that the general practice for judges to exercise discretion to obtain psychological and psychiatric assessment reports of sex offenders for sentencing should continue to apply.*
>
> *We recommend that the Government reviews and considers the introduction of an incentive scheme in the prison institutions.*
>
> *We recommend that the provision of specialised post-release supervision to discharged sex offenders under the existing statutory schemes be maintained.*
>
> *We recommend that the Government considers strengthening the rehabilitation services for discharged sex offenders."*

Chapter 3: Review of Sexual Conviction Record Check Scheme

The SCRC Scheme should not become mandatory for the time being; and the Government extends the SCRC Scheme to its fullest and evaluate the need to make it a mandatory scheme at an appropriate time

25. A narrow majority of those who responded oppose these parts of the Preliminary Recommendation, commenting that the Government should already have ample time to introduce a legislative scheme given that the SCRC Scheme has come into operation since 2011. Some Respondents opine that a mandatory legislative scheme is necessary to provide sufficient protection for children and mentally incapacitated persons ("**MIP**") from sexual abuse as it can ensure that penalties are imposed for non-compliance by employers. For those who support the recommendations, they generally agree that the Government should speed up the process of optimising the existing scheme by extending it to cover all existing employees, self-employed persons and volunteers, and give a clear timeframe as to when it will introduce a mandatory checking scheme.

26. We maintain our view that as far as prospective employees are concerned, given that the current administrative scheme is being extensively utilised and is very effective, we do not see an immediate demand for the SCRC Scheme to become a comprehensive legislative scheme. Having said that, we note the responses received which show that there is indeed a demand from the community that the Government should give due consideration to optimising the current administrative scheme. We hence would urge the Government to expedite the optimising exercise and seriously consider turning the SCRC Scheme into a legislative scheme in the long run.

The SCRC Scheme be extended to cover all existing employees, self-employed persons, and volunteers

27. A majority of those who responded agree that the current checking scheme should be extended to cover all existing employees, self-employed persons and volunteers. They believe that the checking scheme can deter people with a sexual conviction record to apply as volunteers if they are aware that the check will be performed as a routine part of the application process. Some other Respondents suggest that the checking scheme should be extended to cover child sponsors (助養者) who may have physical contact with their sponsored child, and other adults living in foster homes as currently, only the primary caregiver of each foster family must undergo a Certificate of No Criminal Record check. Those Respondents who oppose this part of the recommendation do not want the checking scheme to cover volunteers, worrying that it would discourage persons from volunteering.

28. In view of the majority support of this part of the Preliminary Recommendation, we maintain our view that the SCRC Scheme should be extended to its fullest by covering all existing employees, self-employed persons, and volunteers. Noting the Respondents' concern raised in respect of volunteers, child sponsors and foster parents, we opine that in the event that a particular association or organisation is confident that their volunteers will be subject to its appropriate

supervision, or that the duration of the volunteering session is short, the association or organisation may well decide to dispense with the check. However, they should be reminded that if volunteers are excluded completely from the checking scheme, they will not have any effective means to find out the conviction records of a particular volunteer even when they see the need to be informed in some occasions of a person's sexual conviction record.

29. The relationship between the child sponsor and the sponsored child may differ considerably among different NGOs providing child sponsorship services, and not all child sponsors may have the opportunity to be in physical contact with their sponsored children alone in the absence of staff of the NGOs. We believe that the focus should be on whether the child sponsors' arrangement would usually involve, or are likely to involve, contact with the sponsored children, and so it is more appropriate to use the existing definition (ie "child-related work" be defined as work where the usual duties involve, or are likely to involve, contact with a child) to identify these groups of persons who are to be covered by the checking scheme. As regards foster parents, we wish to remind the community that the SCRC Scheme is an administrative scheme for sexual conviction record check to enable the criminal conviction records for sexual offences of persons who undertake child and MIPs related work to be checked. The checking scheme is not intended to cover persons living with children in a family setting, be it blood family or foster family. Hence, the current checking scheme is not the appropriate forum for consideration of including foster parents and adults who live with the foster child. The relevant Government department or other organisations (eg SWD or NGOs) should already have established procedures for conducting due diligence to ensure the foster child is sufficiently protected in the foster home.

Spent convictions

30. Noting that there are compelling arguments for and against covering spent convictions in the SCRC Scheme, we invited the Hong Kong community to express their views. The consultation results show that the majority of the Respondents oppose the checking scheme to be extended to include spent convictions because it goes against the spirit of the Rehabilitation of Offenders Ordinance (Cap 297) and that sex offender of minor sexual offences should be given a chance to turn over a new leaf. As for those who support including spent convictions, their general comment is that they believe the inclusion is necessary for better protection of children and vulnerable persons.

31. After balancing the arguments from both sides, and in the light of the majority view, we agree that it is important to give offenders of minor sexual offences the chance to rehabilitate and hence do not recommend that the SCRC Scheme includes spent convictions. In coming to this conclusion, we have also considered that the exclusion of spent convictions in the SCRC Scheme does not mean that children are not otherwise protected by relevant legislation such as the Child Care Services Ordinance (Cap 243)[13] and the Education Ordinance (Cap 279)[14] when the context so warrants.

---

13 Child Care Services Ordinance (Cap 243), s 15A(3).

14 Education Ordinance (Cap 279), ss 27 and 44.

32. Having considered the responses received, Preliminary Recommendation 3 in the CP is therefore maintained as **Final Recommendation 3** as follows:

> *"We do not recommend that the Sexual Conviction Record Check Scheme ("the SCRC Scheme") become mandatory for the time being.*
>
> *We recommend the Government extends the SCRC Scheme to its fullest and evaluates the need to make it a mandatory scheme at an appropriate time.*
>
> *We recommend that the current SCRC Scheme be extended to cover all existing employees, self-employed persons, and volunteers.*
>
> *We do not recommend that the SCRC Scheme be extended to include spent convictions."*