

THE LAW REFORM COMMISSION OF HONG KONG

REPORT

**SEXUAL OFFENCES RECORDS CHECKS FOR
CHILD-RELATED WORK: INTERIM PROPOSALS**

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February 2010

The Law Reform Commission of Hong Kong was established by the Executive Council in January 1980. The Commission considers for reform such aspects of the law as may be referred to it by the Secretary for Justice or the Chief Justice.

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Preface

Terms of reference

1. In April 2006, the Secretary for Justice and the Chief Justice asked the Law Reform Commission to review the existing law on sexual and related offences in Hong Kong. In October 2006 the terms of reference were expanded to read as follows:

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

The Sub-committee

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

Mr Peter Duncan, SC
(Chairman)

Senior Counsel

Hon Mrs Justice Barnes

Judge of the Court of First Instance
of the High Court

Mr Eric T M Cheung

Assistant Professor
Department of Professional Legal
Education
University of Hong Kong

Dr Chu Yiu Kong
[Until December 2007]

Assistant Professor
Department of Sociology
University of Hong Kong

Mr Paul Harris, SC

Senior Counsel

Professor Karen A Joe Laidler
[From September 2008]

Head of Department of Sociology
University of Hong Kong

Mr Stephen K H Lee <i>[From January 2008]</i>	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mrs Apollonia Liu <i>[Until June 2009]</i>	Principal Assistant Secretary Security Bureau
Mr Ma Siu Yip <i>[Until January 2008]</i>	Senior Superintendent of Police (Crime Support) Hong Kong Police Force
Mrs Anna Mak Chow Suk Har	Assistant Director (Family & Child Welfare) Social Welfare Department
Mrs Millie Ng <i>[From June 2009]</i>	Principal Assistant Secretary Security Bureau
Mr Andrew Powner	Partner Haldanes, Solicitors
Ms Lisa D'Almada Remedios	Barrister
Dr Alain Sham	Senior Assistant Director of Public Prosecutions Department of Justice
Ms Cathy Wan (<i>Secretary</i>)	Senior Government Counsel Law Reform Commission

Work to date

3. Since its formation the Sub-committee has met regularly to discuss the various issues within the terms of reference. It is clear that the terms of reference are wide and cover a diverse range of sexual offences, many of which involve controversial issues requiring careful and judicious balancing of the interests at stake. As a full review would take considerable time, it was decided that the terms of reference should be dealt with in stages.

4. The Law Reform Commission is aware of the immediate pressing need to address the question of a possible sexual conviction record check for those engaged in child-related work. This need was evident from a number of judicial comments in recent years and from various media reports reflecting public anxiety that this topic should be addressed sooner rather than later.

The consultation exercise

5. In July 2008, the Sub-committee issued a consultation paper to seek views and comments from the community. About 200 written responses were received and many of these were substantial. Schools, other organisations and individuals that responded in writing are listed in the Annex. We wish to thank these individuals and organisations for their views and their contribution to this law reform project. Some of these organisations have conducted their own telephone or written surveys, and have shared with us the findings of these surveys. The information gathered is useful and has assisted the Sub-committee significantly.

6. The Sub-committee's representatives attended numerous seminars, meetings and discussion forums organised by various bodies.¹ We wish to thank the organisers and participants for their contribution and assistance to this law reform project.

Sex offender register/sexual conviction record check

7. The consultation paper issued in 2008 was entitled "*Interim Proposals on a Sex Offender Register*". The paper pointed out that a review of the literature on "sex offender registers" shows that the term is often used to refer to three different mechanisms devised to protect the public, particularly children and vulnerable persons, from sex offenders.

8. In some of the literature, the term refers to the US style Megan's Law.² The US federal Justice Department's National Sex Offender Registry, for example, maintains a database in which the names, pictures and addresses of convicted sex offenders are revealed to members of the public who conduct searches on the Registry's website. Similar registries are maintained by the individual states.

9. The term "sex offender register" also refers to the imposition of notification obligations on sex offenders after their release from prison.³ The sex offender is required to report to the local police with details of his whereabouts after serving his prison term. This obligation continues either indefinitely or for a number of years, depending on the nature of the crime committed or the length of imprisonment.

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

¹ Including a seminar organised by The Boys' and Girls' Clubs Association of HK, Conference on Offender Rehabilitation and a Sex Offender Register organised by City University, Seminar on Rehabilitation of Sex Offenders organised by Correctional Services Department (with Caritas HK), Fight Crime Committee meeting, Kowloon City District Board meeting, Discussion Forum on Offender Registration System organised by Shue Yan University.

² See the discussion below, in Chapter 3.

³ See the discussion below, in Chapter 3.

11. Although the recommendations of the consultation paper were clearly referring to the context described in the preceding paragraph, we received numerous objections which were essentially criticisms of the US style Megan's Law or the notification mechanisms in other jurisdictions. In view of the confusion and controversy regarding the term "sex offender register", we decided that the title of this report should be made more precise. Hence, the title "*Sexual Offences Records Checks for Child-Related Work: Interim Proposals*" has been adopted.

Consideration of interim measure

12. During the course of our deliberations, it became apparent to us that a comprehensive legislative scheme would take considerable time to be implemented. Pending the formulation of a comprehensive legislative scheme, the Administration may wish to consider the introduction of an interim measure which would go some way to meeting the immediate need for a system to minimise the risks in respect of which the judiciary and various members of the public have expressed concern.

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

14. Having debated the merits and possible mechanisms of such a measure, and for reasons elaborated in this paper, we recommend an interim measure for the establishment of a system whereby employers or parents may ascertain whether those who are in child-related work or employment have any previous convictions for sexual offences.

15. Given that adults who have a mental disorder or are mentally handicapped may also be easy targets for sexual exploitation, we believe they deserve similar protection. In this context, we believe it is appropriate to adopt the meaning ascribed to "mentally incapacitated person" in section 117 of the Crimes Ordinance (Cap 200); that is, "*a mentally disordered person or a mentally handicapped person (within the meaning of the Mental Health Ordinance (Cap 136))⁴ whose mental disorder or mental handicap, as the*

⁴ "Mentally disordered person" means a person suffering from mental disorder. And mental disorder is defined to mean: (a) mental illness; (b) a state of arrested or incomplete development of mind which amounts to a significant impairment of intelligence and social functioning which is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned; (c) psychopathic disorder; or (d) any other disorder or disability of mind which does not amount to mental handicap. "Mentally handicapped person" means a person who is or appears to be mentally handicapped. And mental handicap is defined to mean sub-average general intellectual functioning with deficiencies in adaptive behaviour.

case may be, is of such a nature or degree that that person is incapable of living an independent life or guarding himself against serious exploitation, or will be so incapable when of an age to do so." In this paper, unless the context suggests otherwise, references to children will include mentally incapacitated persons.

Chapter 1

The existing problem/lacuna in Hong Kong

Lacuna in our system

1.1 In most jurisdictions in well-developed communities, all who work with children or mentally incapacitated persons are subject to criminal record checks and other safeguards.¹ Whilst there are criticisms from time to time that some recent measures taken in other jurisdictions to protect children have perhaps gone too far, the problem in Hong Kong is generally thought to be that too little has been done in this regard.

1.2 The need to protect children and the vulnerable has to be balanced against other considerations, including the rehabilitation needs of ex-offenders, and the correct balance has to be worked out with care. However, consideration has to be given to whether the following scenario should be left unregulated:

- (a) In Hong Kong, Person X is released from prison after being convicted of a serious sex crime. He can still apply for a job at a school, as long as the job is not that of a registered teacher.² Person X can apply for positions like teaching assistant, technician, or caretaker. These job positions would still give Person X direct contact with children.
- (b) Apart from schools, if Person X is minded to find a job position which would give him access to children and young persons, he can still apply for positions at tutorial centres, sports centres, interest classes and family services organisations. If Person X wants to work at these organisations as a volunteer, there is no mechanism to prevent him from doing so.
- (c) Even if the school or the organisation concerned wishes to verify whether an applicant has any sexual conviction record, there is at present no mechanism that would enable it to do so. It can request an applicant to make a self-declaration about his sexual conviction record but there is no mechanism available to verify

¹ See discussion in Chapter 3.

² Or a permitted teacher. Under Part IV of the Education Ordinance (Cap 279), no person shall teach in a school unless he is a registered teacher or a permitted teacher. The Permanent Secretary may refuse to register an applicant or to issue a permit if, amongst other grounds, the applicant has been convicted of an offence punishable with imprisonment. "School" is defined as an institution, organization or establishment which provides for 20 or more persons during any one day or 8 or more persons at any one time, any nursery, kindergarten, primary, secondary or post secondary education or any other educational course by any means, including correspondence delivered by hand or through the postal services.

the accuracy of the applicant's self-declaration. This is so even if an applicant consents to a criminal record check being conducted on him.

- (d) There is also the situation of parents who hire private tutors, music teachers or coaches which requires attention. Individual parents would lack the hiring experience of organisations, and the tutors are likely to have regular and close contact with the children, sometimes in the absence of other supervising adults. If Person X applies to work as a private tutor, parents have no means of finding out about his previous conviction.

1.3 To educators and parents from jurisdictions with comprehensive mechanisms to ensure the safety of children, the above situations are unthinkable. Many local educators and parents would share the same views. It is imperative that a minimum level of protection should be afforded to local children.

The Criminal Records Bureau

1.4 The Criminal Records Bureau of the police is responsible for maintaining records of persons convicted of certain offences under the Laws of Hong Kong.³ Such records are kept primarily to assist the police in discharging their statutory duties of preventing, detecting and investigating crime. Hence the police will not generally assist ordinary employers to check whether their existing or prospective employees have any criminal record. The main exception is, if there are express statutory provisions which provide that the existence of previous convictions is a ground for refusing the registration or approval of persons working in a particular profession or field, then, apparently as a matter of administrative policy, the police will assist in carrying out the criminal records check upon the request of the approving authorities or bodies in order to help them discharge their statutory functions.

1.5 As far as child-related work is concerned, the above-mentioned exception covers school managers and teachers registered under the Education Ordinance (Cap 279),⁴ childminders under the Child Care Services Ordinance (Cap 243),⁵ and social workers registered under the Social Workers Registration Ordinance (Cap 505).⁶ However there remains a range of persons who have close contact with children during their work in respect of

³ See the paper submitted by the Hong Kong Police Force in March 2004 to the Legislative Council Panel on Security entitled "*Keeping of Records of Convictions by the Hong Kong Police Force*" (LC Paper No CB(2)1649/03-04(06)). Examples of offences the conviction of which will be recorded by the Police include those involving the use of violence (eg wounding, assault occasioning actual bodily harm); involving pecuniary loss to the public (eg theft, forgery); which are sexual in nature (eg rape, indecent assault). Examples of offences the conviction of which will not normally be recorded include minor offences such as jay walking and hawking, and regulatory offences such as those under the Residential Care Homes (Elderly Persons) Ordinance. See also the list of recordable offences in LC Paper No CB(2)2986/03-04(01).

⁴ Cap 279, sections 30 and 46.

⁵ Cap 243, sections 15A and 15D.

⁶ Cap 505, section 17.

whom a criminal records check is not available. Within the school system, these include: laboratory technicians, ushers and other support staff. Outside the school system, these include: tutors working in tutorial centres or at home, music teachers and sports coaches, staff working in children's wards in hospitals, staff and volunteer workers helping at youth centres, churches or other organisations. Hence, if a person is minded to seek out areas of work which would provide him with continued contact with children, there is no system in place which would prevent him from using his employment or voluntary services to target and sexually abuse the children with whom he works. It is evident that there is no effective system in place whereby employers or parents may ascertain whether those who are in child-related work or employment have any previous convictions for sexual offences.

Judicial comment in Hong Kong

1.6 A number of court judgments have highlighted some of the existing problems in Hong Kong. On 29 March 2006, a defendant was jailed for 33 months for molesting his stepdaughter.⁷ Deputy District Court Judge Thomas noted the benefits of England's registration system. He further commented that a range of sanctions and remedies available both to the offender and to society at large in other jurisdictions are not available in Hong Kong.⁸

1.7 On 14 July 2006, the Court of Appeal increased the sentence of a 21 year-old piano teacher for molesting two girls from 20 months to 40 months.⁹ Mr Justice Stuart-Moore VP commented that the case had highlighted a lacuna in the criminal justice system in Hong Kong:

"36. Paedophiles such as this applicant represent an ongoing danger to children whenever they are at liberty in the community. There is in Hong Kong unlike, for example, the United Kingdom, no system in place to record in any formal way those who have been convicted of offences of the kind now before us. It follows, therefore, that when, in due course, the applicant is released from prison, he will be subject to no restrictions to prevent him from once again working with children.

37. We raised with Mr David Leung [government counsel] our concerns about the absence of a formal register to record the names of paedophile offenders. In doing so, we discovered, in addition, that none of the detail which has emerged from this case could in normal circumstances be ascertained even from the applicant's own criminal record as the format makes no allowance to file such information.

⁷ DCCC 1051/2005.

⁸ See paras 34, and 38-41.

⁹ CACC 515/2005.

38. *In the result, if in the future the applicant chooses again to advertise his services as a teacher of music, there is no means by which parents will be forewarned of the risk to which they might be exposing their children should they decide to use him as a tutor; and if there is a repetition on the part of the applicant of such conduct in future, the court dealing with the applicant will be left unaware of what has transpired in these proceedings.*
39. *As to the last of these concerns, Mr Leung indicated that such comments as the court might make about the applicant in this case could be referred to in subsequent proceedings if a reference to the appeal number was logged in the applicant's criminal record kept on the police computer. He undertook to try to ensure that this was done, not just in this case but on a more general basis, by having an additional space set aside for the retention of potentially important information in the police file. As a stop-gap measure, we strongly recommend that the kind of information which has emerged in this case should be stored so that in future the detail can readily be accessed. In the present case, no more than the criminal appeal number needs to be recorded so that the information contained in this judgment will easily become available.*
40. *We also recommend that consideration be given to the establishment in Hong Kong of a register in which those convicted of paedophile crimes are recorded on a formal basis and prevented, so far as it is practicable to do so, from working in close proximity to children."*

1.8 On 16 August 2006, an occupational therapy assistant working at a special school for mentally retarded children was jailed for 28 months for indecently assaulting a girl of 12.¹⁰ He had five previous convictions, three of which were indecent assaults involving young girls or children. The defendant had not met the victim through work, but had intercepted the victim on her way home after school. District Judge Lok made the following remarks in his judgment:

"One disturbing feature of this case is that the defendant was, prior to arrest, working in a special school for mentally retarded children. Undoubtedly, there would be many vulnerable children in such kind of institution, and it is highly undesirable for the defendant to work in this sort of environment. For this concern, I can only echo the comment made by Stuart-Moore VP in the case of HKSAR v Kam Wing-yin, unreported, CACC No. 515 of 2005 (decision of the Court of Appeal on 14 July 2006) in setting up a special register for sexual offenders. The establishment of such a register would certainly prevent those

¹⁰

DCCC 564/2006.

*convicted of paedophile crimes from working in close proximity to children."*¹¹

1.9 On 18 August 2006, a 42 year old transport worker pleaded guilty to 12 counts of indecent assault on three girls and a boy whom he targeted in parks between October and November 2005.¹² The defendant had previously served two jail sentences of five and seven years for sex attacks on children. Deputy High Court Judge Poon called for a registration system as referred to in Mr Justice Stuart-Moore's judgment, to be put in place so that the public could have proper and effective protection against repeat sex offenders.

1.10 On 10 March 2008, a 50 year old tutorial school teacher was sentenced to four years and eight months imprisonment after pleading guilty to nine counts of indecent assault involving five female victims aged between 12 and 15. The victims were the defendant's students at his tutorial school. The defendant had three previous convictions for indecent assault between 1976 and 1997, with the last one involving two girls he molested during a tutorial, for which he was jailed for 30 months. Upon his release, he changed his name and opened a tutorial school in 2003. The media reported High Court Judge Tong having commented:

*"The defendant did not seek treatment. Instead he became a tutorial school owner so he could get close to young girls and sexually assault them ... The government should consider whether parents are entitled to know the backgrounds of tutorial school teachers."*¹³

Other cases involving teachers, tutors and persons working with children

1.11 In addition to the cases discussed above, there have been other cases of sexual abuse involving persons working with children. These are disturbing cases of sexual abuse where persons in authority have breached the position of trust. In the consultation paper issued in 2008, we set out the following two cases:

- On 1 March 2007, a 43 year old piano teacher was convicted of sexually assaulting his 14 year old male student in Guangzhou in July 2006.¹⁴ The defendant was given a sentence of six years which was reduced to four years as he had pleaded guilty. He had previously served a sentence of 30 months for sexually assaulting two of his former students.
- On 15 September 2006, a 36 year old former policeman pleaded guilty to nine charges of indecent assault involving 4 girls at the

¹¹ At para 16.

¹² HCCC 104/2006.

¹³ 11 March 2008, *The Standard* newspaper.

¹⁴ HCCC 189/2006.

primary school where he worked as a technician.¹⁵ The defendant had previously been convicted of loitering in women's lavatories.

1.12 A few more recent cases are described below. It seems that persons who are sexually interested in children may not refrain from taking up child-related employment unless there are mechanisms in place to discourage them from doing so.

1.13 In July 2009, a 33 year old private trumpet teacher (also employed as a relief teacher at an international school) pleaded guilty to three charges of indecent assault on two of his students aged 8 and 9 during the weekly trumpet lessons taking place either at an international school or at the students' home.¹⁶ Although the judge sympathised with the teacher's emotional and physical problems, he pointed out in the judgment that the acts were deliberate, sustained, and designed to humiliate. The acts were abhorrent and may have long term psychological impact on the young children. A starting point of 2 years and 9 months' imprisonment was adopted, which was reduced to 20 months taking into account the guilty plea and relevant factors.

1.14 In April 2009, a 59 year old private piano teacher was convicted of charges of indecent assault on his 12 year old female student at the student's home.¹⁷ The indecent acts involved touching the breast, bottom and private parts, and kissing on the neck and mouth. The defendant denied the charges, but the court found the girl to be an honest and reliable witness. The court also pointed out that because the defendant denied the charges, the girl had to repeat the horrible experience in public and to go through cross-examination. This would have long term adverse effects on the girl. The court adopted a starting point of nine months, and one month was deducted for the defendant's clear record. The defendant was sentenced to eight months' imprisonment.

1.15 In April 2009, a 33 year old primary school teacher and part-time fencing instructor was convicted in the District Court of indecent conduct toward a child under 16. The defendant came to know the girl through teaching fencing at school, and then developed an intimate relationship with her. The defendant was caught in his car in acts of gross indecency with the girl. After being charged, the defendant resigned as a teacher but continued to teach fencing as a volunteer. Taking into consideration that the defendant had denied the charges but had a clear record, his sentence was reduced from 27 months to 24 months.¹⁸

1.16 In October 2009, a 51 year old office assistant of a primary school pleaded guilty to a charge of indecent assault on a male student aged 9. The incident happened at school when the boy got cramp in his leg and sought assistance from the school office. The defendant took the boy into the

¹⁵ DCCC 665/2006.

¹⁶ DCCC 422/09.

¹⁷ FLCC 307/09.

¹⁸ DCCC 1205/2008.

lavatory and indecently assaulted him. A sentence of three months' imprisonment was imposed.¹⁹

Need for restrictions on access to children

1.17 We agree that it is in society's interest for sex offenders to be rehabilitated. However, it is not conducive to the effective rehabilitation of offenders if they are allowed to have easy access to children; not to mention that society and the government have the duty to give proper and adequate protection to children.

1.18 Internationally, psychologists agree that a sex offender's risk of sexual re-offending depends on three factors:²⁰

- (a) Static risk factors: These are relatively constant over time and include the individual's relationship with his parents in childhood, and the age at which he was first convicted of a sexual offence.
- (b) Dynamic risk factors: These may change over time, depending on circumstances and setting. An example would be the individual's sexual attitude.
- (c) Very/acute dynamic risk factors: These can change rapidly, and the factors include victim access, drug abuse and hostility.

Victim access

1.19 Victim access is known to be a very dynamic risk factor. If a sex offender has relatively few static and dynamic risk factors, his risk level may be classified as low in normal circumstances. However if a sex offender is allowed easy access to victims, his overall risk level will be elevated. Under these conditions, this particular sex offender will be at greater risk of offending.²¹ We have consulted Dr Judy S H Hui²² on the issue and the above research findings coincide with Dr Hui's clinical experience in Hong Kong.

Crossover offending

1.20 Critics of the efficacy of sexual conviction record checks argue that sex offenders tend to be attracted to one type of victim; that is, if a sex offender was a rapist preferring female adult victims, he is unlikely to commit an offence involving a child victim.

¹⁹ KTCC 6153/2009.

²⁰ Dr Judy S H Hui, Senior Clinical Psychologist of Correctional Services Dept. See also Public Safety Canada, "Assessing the risk of sexual offenders on community supervision: The Dynamic Supervision Project", 2007-05.

²¹ Hanson, "Assessing the risk of sexual offenders on community supervision", 2007.

²² Senior Clinical Psychologist of Correctional Services Department.

1.21 The research in this area is not conclusive. Some research indicates that many sexual offenders do not exclusively offend against a preferred victim type. One research study, for example, found that although sex offenders may have a preferred victim pool, this preference can change over time and may expand when the preferred victim type is unavailable.²³ The research also found that:

"With regard to victim age, 13% of inmates disclosed molesting only child victims and 18% disclosed assaulting only adult victims. The remaining offenders (70%) admitted both adult and child victims. Similar to Abel et al. (1992b) who found 49% of rapists admitted sexually molesting children under the age of 14, this study found that 52% of inmates who were known to sexually assault only adults also admitted to sexually molesting children after treatment coupled with polygraph testing. Because the prison culture considers child sexual abuse the lowest status crime, offenders have no incentive to disclose this behaviour. Although a significant number of rapists admitted child victims, the actual number of rapists engaging in child molestation may even be higher. In fact, O'Connell (1998) found 64% of rapists admitted sexually molesting a female child. These findings suggest rapists may pose a risk to children when permitted contact ...

Unlike age crossover, there was substantially lower admitted gender crossover. After treatment coupled with polygraph testing, 61% of inmates disclosed only female victims, whereas 3% disclosed only male victims. Similar to the disclosure of child victims, the prison culture might discourage disclosure of unknown male victims. After treatment coupled with polygraph testing, 36% of inmates admitted sexually assaulting both males and females."²⁴

1.22 We consulted Dr Judy S H Hui and her local clinical experience also pointed out that many sex offenders tend to specialise in one type of sex offence for example, child molestation, or rape of adult females. However, there is also a group of sex offenders, albeit smaller in proportion, who tend to exhibit a cross-over in behaviour.

Recidivism rate

1.23 Of the written responses received which took issue with Recommendation 2,²⁵ quite a number of them quoted the recidivism rate of

²³ Heil, Ahlmeyer & Simons, "Crossover Sexual Offenses", Sexual Abuse: A Journal of Research and Treatment, Vol 15, No 4, Oct 2003.

²⁴ Cited above, at p.231-232.

²⁵ Which reads: "As an interim measure, we recommend the establishment of an administrative scheme to enable the criminal conviction records for sexual offences of persons who undertake child-related work and work relating to mentally incapacitated persons to be checked, and that proper measures should be built into the system to address human rights and rehabilitation concerns."

sex offenders collated by the Correctional Services Department as a mere 6%, and that such a low recidivism rate did not justify the proposed scheme which targets re-offending. On the other hand, psychiatrists have informed the Sub-committee that the recidivism rate of even treated paedophile offenders is high.

1.24 Recidivism rates can vary widely depending on factors including:

(a) The duration (number of years) for collecting the data:

If a short period (say three years) is adopted, the rate will be lower. If a longer period (say ten years) is adopted, naturally, a higher recidivism rate will be yielded.

(b) The definition of "re-offending":

In some studies, re-offending is defined to mean subsequent arrest by police; in others, re-offending is defined to mean subsequent conviction by court. It can also be defined to mean subsequent incarceration.

1.25 Regarding the recidivism rate of 6% published by the Correctional Services Department, we understand that an offender is taken to have re-offended if he is convicted of a second offence after discharge and is re-admitted to the Correctional Services Department within three years of discharge. We appreciate that the Correctional Services Department has specialised functions and duties, and would have valid reasons for adopting these criteria. However, according to international studies since 2007, recidivism rates ranged from 10% to 50%.²⁶ Also, the three year period would be considered short compared to other studies. Even if an offender re-offends one year after release from prison, taking into consideration the time required for the crime to be investigated by the police, for trial preparation, and for any appeal process, he might be re-admitted to the Correctional Services Department only after three years of discharge, and so the re-offending would not be regarded as a recidivism in the statistics.

1.26 We take the view that although the available statistics may not be detailed or comprehensive enough to reach any conclusion on the actual recidivism rate,²⁷ the lacuna identified earlier in this chapter cannot be ignored. Sexual offences are likely to be serious and emotionally damaging, particularly to the young and vulnerable. We believe that practicable and effective measures should be considered in order to minimise the occurrence of repeat sexual offences, in particular against children.

²⁶ Ryan CW Hall, MD, and Richard CW Hall, MD, PA, "A Profile of Paedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues", Mayo Foundation for Medical Education and Research 2007.

²⁷ Ascertaining the actual recidivism rate is difficult for a number of reasons. For example, repeated sex offenders may not be arrested or convicted, and some victims may not even report to the police. If the victim is a child, it is often difficult for the prosecution to prove the case relying on evidence given by a child.

Chapter 2

The interests at stake in the possible introduction of a sexual conviction record check for child-related work in Hong Kong

2.1 We are aware that the establishment of a scheme to enable the sexual conviction record of job applicants for child-related work to be checked (if so wished by the parties concerned) puts at stake conflicting interests. There is a need to strike a balance between taking reasonable steps to ensure protection is afforded to children on the one hand, and to ensure that the rights of ex-offenders are respected on the other.

Human rights considerations

2.2 Any application of the law must be fair, necessary, proportionate and in compliance with human rights principles. We have considered relevant provisions in the International Covenant on Civil and Political Rights ("the ICCPR"), the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap 383) ("the HKBOR").

2.3 The HKBOR is the local law giving effect to relevant provisions of the ICCPR, and it binds the Government and public authorities and those acting on their behalf. The application of the ICCPR is also provided for in Article 39 of the Basic Law, which states:

"The provisions of the International Covenant on Civil and Political Rights ... as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

Right to privacy

2.4 One of the human rights issues raised concerns the protection of a sex offender's right to privacy guaranteed by Article 17 of the ICCPR, which

is entrenched in Article 39 of the Basic Law and implemented through Article 14 of the HKBOR. Article 14 of the HKBOR provides:

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

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

2.5 Article 8(1) of the European Convention on Human Rights contains similar protection of privacy. It reads: *"Everyone has the right to respect for his private and family life, his home and his correspondence."*

LRC Report on Civil Liability for Invasion of Privacy

2.6 The Law Reform Commission's Report on Civil Liability for Invasion of Privacy issued in December 2004 discussed the privacy of ex-offenders in relation to the publication of a person's conviction record in magazines, newspapers, television and film¹ without any legitimate public interest. Some of the report's observations are note-worthy and are relevant to our current study:

"The Consultation Paper examined whether the law should permit the publication of forgotten criminal records in the absence of any legitimate public interest. While the Sub-committee agreed that publicising a person's criminal record for no good reason constitutes an interference with his private life, they also noted that the publication of criminal records raises issues which go beyond the privacy of ex-offenders. The Sub-committee expressed the view that the statutory right not to have a "spent conviction" divulged protected reputation rather than privacy. Judgments rendered in open court are information in the public domain; the fact that they are matters of public record prevents such convictions from being private. The Consultation Paper therefore concluded that criminal convictions are public records, and their publication should not be restrained on the ground that it is a breach of privacy."²

2.7 We note that by virtue of the Rehabilitation of Offenders Ordinance (Cap 297) a conviction can become "spent".³ Apart from some

¹ See paras 8.6-8.14.

² Para 8.1.

³ According to section 2 of the Rehabilitation of Offenders Ordinance (Cap 297), the "spent conviction" scheme applies where an individual has been convicted of an offence in respect of which he was not sentenced to imprisonment exceeding 3 months or to a fine exceeding \$10,000, and he has not been convicted in Hong Kong on any earlier day of an offence; and a period of 3 years has elapsed without that individual being again convicted in Hong Kong of an offence.

limited exceptions,⁴ the "spent conviction", or any failure to disclose it, shall not be a lawful or proper ground for dismissing or excluding that individual from any office, profession, occupation or employment or for prejudicing him in any way in that office, profession, occupation or employment.⁵

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

Equality before, and equal protection of, the law

2.9 Article 26 of the ICCPR⁶ stipulates that:

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Freedom of choice of occupation and rehabilitation

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

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

⁴ For example, admission as a solicitor, barrister, accountant or authorised insurance broker: see section 4 of Cap 297.

⁵ See section 2 of Cap 297.

⁶ Replicated in Article 22 of the HKBOR.

Rights of sex offenders not absolute

Government's constitutional duty to protect children from sexual exploitation

2.12 We note that the rights and interests of sex offenders quoted above are not to be regarded as absolute, and need to be balanced against conflicting rights and interests. In particular, Article 24(1) of the ICCPR⁷ stipulates that:

"Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."

2.13 Article 24(1) imposes a positive obligation on the government to take reasonable and necessary measures to protect children from harm and exploitation by sex offenders. Any failure by the government to provide an effective system to secure children's safety may also lead to the public taking the law into their own hands by, for instance, indiscriminate posting of details of sex offenders by the media or individuals on the internet or in other forms of publication.

2.14 Article 19 of the UN Convention on the Rights of the Child provides:

"(1) States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

(2) Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement."

2.15 The UN Committee on the Rights of the Child considers that it is the obligation of States Parties to enact and enforce laws to prohibit all forms of sexual exploitation to create a safe and supportive environment for adolescents, including within their family, in schools, in all types of institutions in which they may live, within their workplace and/or in society at large.⁸

⁷ Replicated in Article 20 of the HKBOR.

⁸ General Comment No. 4 (2003) issued by the Committee on the Rights of the Child, Thirty-third session, 19 May – 6 June 2003, at paragraphs 37 and 39(a).

2.16 Children with disabilities should enjoy equal protection under the Interim Measure and should not be discriminated against on the ground of their disabilities.⁹ Children with disabilities are more vulnerable to all forms of abuse (be it mental, physical or sexual) in all settings, including the family, schools, private and public institutions, alternative care, the work environment and the community at large. States Parties are urged to take all necessary measures for the prevention of abuse of, and violence against, children with disabilities, such as, for instance, ensuring that parents are vigilant about choosing caregivers and facilities for their children and improving their ability to detect abuse.¹⁰ A Summary Report entitled "*Violence against Disabled Children UN Secretary General's Report on Violence against Children Thematic Group on Violence against Disabled Children Findings and Recommendations Convened by UNICEF at the United Nations, New York, July 28, 2005*", recommended, *inter alia*, that government should play a role in oversight of administrators, professionals, staff, volunteers and all others who work with disabled children, including in "background checks" of all individuals who work with disabled children and adolescents.

2.17 The HKSAR Government is therefore under a positive obligation to take appropriate measures to prevent children (including children with disabilities) from being exposed to sexual exploitation and/or sexual abuse by workers in child-related work.

Government's constitutional duty to protect mentally incapacitated persons and the Convention on the Rights of Persons with Disabilities

2.18 The UN Convention on the Rights of Persons with Disabilities ("CRPD") came into force for the People's Republic of China (including the HKSAR) on 31 August 2008. Article 16 of the CRPD provides:

"(1) States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.

(2) States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive.

⁹ Article 2 of the CRC and General Comment No. 9 (2006) issued by the Committee on the Rights of the Child, Forty-third session, 11 – 29 September 2006, at paragraph 8.

¹⁰ General Comment No. 9 (2006) issued by the Committee on the Rights of the Child, Forty-third session, 11 – 29 September 2006, at paragraphs 42 and 43(b).

(3) *In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.*

(4) *States Parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs.*

(5) *States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted."*

2.19 The phrase "*all forms of exploitation, ... and abuse*" is wide enough to cover sexual exploitation and sexual abuse. The term "*persons with disabilities*" is defined in Article 1 of the CRPD to include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

2.20 A mentally incapacitated person covered by the recommendations in this report would fall within the definition of "*persons with disabilities*" in Article 1 of the CRPD and is therefore entitled to the protection guaranteed by the CRPD, particularly Article 16 of the CRPD.

English case law

2.21 The English courts have developed some jurisprudence governing the disclosure of conviction records and other information by public authorities to third parties in the context of affording protection to children. The right to privacy of the ex-offender has been considered together with other competing rights.

2.22 In *R v Chief Constable of North Wales Police, ex p Thorpe*,¹¹ the police's decision to disclose to the owner of a caravan site the identities and serious sex offending history of a married couple residing at the site was held to be lawful, as it was necessary to protect children and other vulnerable people from the couple. The judgment was made before the enactment of the Human Rights Act 1998; the English Court of Appeal nonetheless embarked

¹¹ [1999] QB 396, [1998] 3 All ER 310.

upon an analysis of the couple's right to respect for privacy under the European Convention on Human Rights ("ECHR") and found that disclosure by the police was justifiable under Article 8(2) of the ECHR for it was a necessary step required for the prevention of crime and for the protection of the rights and freedoms of others. Lord Woolf MR stated:

"The fact that the convictions of the applicants had been in the public domain did not mean that the police as a public authority were free to publish information about their previous offending absent any public interest in this being done. As Lord Bingham C.J. stated, before this happens it must at least be a situation where in all the circumstances it is desirable to make disclosure. Both under the Convention and as a matter of English administrative law, the police are entitled to use information when they reasonably conclude this is what is required (after taking into account the interests of the applicants), in order to protect the public and in particular children."

Lord Woolf MR further explained the competing interests at stake:

"[A]... problem ... arises when offenders who have committed serious sexual offences against children are released from prison after serving long prison sentences. When this happens, the public are naturally concerned that the offenders should not have the opportunity to commit again offences of the same nature. Regrettably recent experience has confirmed that while some former sexual offenders' behaviour has changed after serving their sentence, other offenders retain the propensity to repeat their offending and, if given the opportunity to do so, commit further serious offences of the same or a similar nature. The police and the other agencies therefore have the very heavy responsibility of deciding on the steps which it is appropriate to take to provide protection for children who could in this way be at risk from former offenders.

In reaching their decisions the police and the other agencies cannot ignore the position of the offender. The offender has served his sentence and he may be determined, so far as possible, to re-establish himself as a law-abiding member of society. His ability to do this will be made far more difficult if he is subject to the attention of the media or harassment by members of the community, who because of his past, do not want him to live amongst them. Sometimes a former sex offender can be at risk of physical attack from those who are outraged by his or her previous offending.

In addition to having to take into account the interests of the offender, it is also necessary to take into account the danger of driving those who have paedophile tendencies underground. When their whereabouts are known, it is simpler for those responsible to ensure that they are living and working in

conditions which reduce the risk of repetition of their previous conduct. Most importantly steps may be able to be taken to ensure that they are subject to suitable supervision, that they receive appropriate treatment and support and are suitably housed. If, instead, the former offender is driven underground by the conduct of the media or members of the community in which he is living, this may make it impossible to take steps which would otherwise be available to protect children living in the area.

The tension which is the result of these conflicting considerations makes the position of the police one of extreme difficulty and sensitivity. They can be criticised for taking no or inadequate action to protect children at risk. Where they take action they can be open to criticism, either because of its effect on the ability of the offender to live a normal life or because it causes the offender to conceal his whereabouts so that children are more at risk than they would have been if this had not happened."

The police's disclosure of information was considered both by the Divisional Court and the Court of Appeal to be a proportionate step in the circumstances of that case, particularly because less intrusive measures to encourage the couple to move elsewhere had failed and children were expected at the caravan site given the impending Easter holidays.

2.23 In *R(X) v Chief Constable of West Midlands Police*,¹² the Court of Appeal, (reversing the decision at first instance), held that there was no incompatibility between Article 8 of the European Convention on Human Rights, and a statutory scheme under Section 115 of the English Police Act, 1997, under which the Chief Constable in providing a certificate of no criminal conviction, known as an Enhanced Criminal Record Certificate, provided the information that the applicant, a social worker, had been charged with an offence of indecent exposure but had been acquitted. The court accepted that the practical effect of disclosing this information would be to prevent the applicant ever working as a social worker again. It nevertheless held that Article 8 was not infringed because a responsible employer in that field would, in accord with good employment practice, have asked the applicant whether he had ever been charged with an offence even though not convicted, and the applicant would have had to answer honestly and disclose the existence of the charge.

2.24 In *Re C (2002)*,¹³ C was a tenant in private housing who had had two "cautions" for indecent assault against children and a long history of allegations of serious sexual abuse made against him by young children. C had not been convicted of any sexual offences but had convictions for non-sexual offences. There were, however, findings of serious sexual abuse in the care proceedings relating to his child, where the family court judge expressed himself satisfied that C posed a considerable risk to any child or

¹² [2005] 1 WLR 65.

¹³ [2002] 2 FCR 385.

vulnerable adult whom he could seek to dominate. The police and social services convened a multi-agency conference to discuss the case and the decision was to disclose the findings made in the care proceedings to C's landlord, not for the purpose of moving C out, but to enable the landlord to make appropriate decisions when housing other tenants in the vicinity. Bodey J weighed up the factors for and against disclosure to C's landlord. Factors against disclosure included:

- C's privacy rights which encompassed the interests of C and his family, the likely impact which the disclosure might have on them in terms of vigilantism, and employment difficulties.
- The impact on the ability of the police and social services to manage C, including the risk of driving him "underground" whereby he might pose a greater risk to children.
- The difficulties in controlling sensitive information once it has been released outside "the usual" statutory agencies.

2.25 Bodey J then examined the factors in favour of disclosure, which included:

- The risk posed by C to children living in close proximity to him.
- The findings made during a detailed, six-day hearing, whilst not amounting to a criminal conviction, did carry all the weight of a judge's considered conclusions in civil proceedings where the facts were manifestly of a very serious nature.

Bodey J ruled that in the circumstances of that case the police and social services were entitled to reveal to the landlord the findings made in the care proceedings.

Chapter 3

Overseas experience

Introduction

3.1 Various types of schemes or mechanisms are in place in overseas jurisdictions to protect children and mentally incapacitated persons from sex offenders. These mechanisms can take many forms, but the primary objective is to reduce the risk of re-offending by the sex offender and to protect the public, particularly children, by enhancing crime detection, investigation and prevention. We summarise in this Chapter the mechanisms used in a number of other jurisdictions.

American jurisdictions

History of sex offender registration laws

3.2 Sex offender registration laws were adopted in some US states as long ago as in the 1940s (California and Arizona). In their original form, the sex offender registration laws sought only to impose legal obligations on certain sex offenders to register with the local police their present whereabouts and other personal details upon their release from detention, and to notify the police of any subsequent changes, so that the law enforcement agencies could keep track of them for the purpose of crime detection, investigation and prevention. However in the 1990's, in response to public outrage at a few highly publicised sex crimes against children, the vast majority of states started to enact sex offender registration laws, which covered not only the registration requirements but also some form of community notification scheme to render information to the public or targeted persons/bodies.

3.3 In October 1989, Jacob Wetterling, an eleven-year-old boy, was abducted at gun-point in Minnesota; he has never been found. Investigators later learned that, unknown to local law enforcement agencies, "halfway houses" nearby housed sex offenders after their release from prison. The boy's mother, Patty Wetterling, became an advocate for missing children and was appointed to a Governor's Task Force that recommended stronger sex offender registration requirements in Minnesota. In 1994, the US Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act¹ in Jacob's honour ("the Jacob Wetterling Act"), which required all states to enact laws to implement state sex offender

¹ 42 USC 14071.

registers. The Jacob Wetterling Act, however, did not require the state to allow public access to the information contained in the registers.

3.4 In July 1994, seven-year-old Megan Kanka accepted an invitation from a neighbour, who was a twice-convicted paedophile, to see his new puppy, but was then raped and murdered. Megan's parents said that they would never have allowed her to travel the neighbourhood freely if they had known that a convicted sex offender was living across the street. Consequently, they started a campaign to demand public access to, or dissemination of, the information contained in the sex offender registers, and received strong public support. In the same year, Megan's home state of New Jersey passed the first so-called "Megan's Law".² In 1996 Congress passed the federal Megan's Law³ to amend the Jacob Wetterling Act by mandating all states to enact laws to allow state law enforcement agencies to "*release relevant information that is necessary to protect the public concerning a specific person required to register*" as a sex offender.

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

3.6 By 1996, all 50 states had enacted sex offender registration laws. However, as noted by the UK Home Office Police Research Group in 1997:⁴

"In reviewing the available published literature on evaluation of registration as an investigative and preventive tool, one is struck by the dearth of good research studies This lack of research, in our view, has to be seen in the light of the general political and legislative background against which state registration schemes emerged."

Federal requirements and varying state practices

3.7 The Jacob Wetterling Act and Megan's Law (together with the Guidelines subsequently issued by the Attorney General⁵) set only broad parameters on the registration and notification arrangements, but allow wide discretion on the part of individual states to decide how the registers should be compiled and the method or degree of community notification required for protecting the public. As a result, there is considerable diversity among, and

² NJSA 2C: 7-1 through 7-11.

³ Violent Crime and Law Enforcement Act 42 USC 13701.

⁴ HOPRG Report, *Keeping Track? Observations on Sex Offender Registers in the US*, Crime Detection and Prevention Series Paper 83 (1997), at p 34.

⁵ Federal Register (1996) Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act Vol. 61, No. 66 April 4, Washington DC: Department of Justice; and Federal Register (1999) Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, as amended 22 January, Washington DC: Department of Justice.

even within, the states as to various aspects of the registration and community notification requirements. Some of the key components and differing state practices are briefly mentioned below.

Registration requirements

3.8 The Jacob Wetterling Act requires states to establish registries of offenders convicted of sexually violent offences or offences against children. However, a review of state sex offender registration laws in 2007 by Human Rights Watch⁶ revealed that some states require individuals to register as sex offenders even when their conduct did not involve coercion or violence, and may have had little or no connection to sex (eg at least five states require registration for adult prostitution-related offences, at least 13 states require registration for public urination and at least 29 states require registration for consensual sex between teenagers).⁷

3.9 An offender who is required to register must generally report in person to the local police within a short period of his release from prison and provide the necessary personal information, which varies among states but may include his name, alias used, photograph, fingerprints, social security number, driver licence and vehicle registration details, employer's name and details, and DNA sample. The local police would record the collected information in the sex offender register and may add other relevant information, such as the offender's previous criminal convictions, description of victim(s), *modus operandi*, assessed level of risk, and history of weapon use or of drug abuse.

3.10 Federal guidance under the Jacob Wetterling Act requires a minimum registration period of ten years for offences against children and sexually violent offences, and a lifetime registration for designated sexually violent predators. However, many states go beyond the minimum requirements. Human Rights Watch observed that 17 states require lifetime registration for all registrants, from the most minor offenders to the most serious.⁸

3.11 During the registration period, the offender must inform the local police of any changes to the information previously supplied. If the offender moves to another state or county, he must register again with the local police there. Federal law under the Jacob Wetterling Act requires that the state must verify and update the registration information at least every 12 months, and in the case of violent sexual offenders the updating must be done every three months. Different states have adopted different procedures and time periods for the updating exercise. Some send postal verification forms to the

⁶ *No Easy Answers: Sex Offender Laws in the US*, September 2007 ("the HRW Report 2007"), available at <http://hrw.org/reports/2007/us0907/index.htm>.

⁷ The HRW Report 2007, cited above, at p 39.

⁸ The HRW Report 2007, cited above, at p 42. Out of these 17 states, 15 states allow some registrants to petition a court for removal from registration requirements after living in the community offence-free for a specific number of years while two states allow no exception.

registrants for confirmation, but some require the registrants to attend in person, or require local officers to make home visits.

3.12 Non-compliance with the registration or updating requirements draws a wide range of sanctions among states. As observed by the UK Home Office Police Research Group,⁹ "*Penalties vary from state to state and range from \$50 (West Virginia) to \$10,000 fines (Wisconsin) and from 30 day (Mississippi) to 5 year periods of imprisonment (Alaska).*"

Community notification requirements

3.13 The federal Megan's Law makes it mandatory for community notification of registration information where it is relevant and necessary for public protection. Support for Megan's Laws within both Congress and the state legislatures has been overwhelming. As a result, all 50 states now provide for community notification in two ways, namely, direct notification to individuals and organisations within the community by local officials and indirect notification to the wider public by states making sex offender registries available on the internet. However, there remains considerable disparity among states as to how the offenders are selected for community notification, the actual manner of making direct notification, and the information to be included in the online sex offender registries.

3.14 As regards the selection of offenders for direct community notification, most states adopt the general principle of "risk justification"¹⁰ and seek to classify sex offenders into different tiers with different levels of disclosure.¹¹ Some states classify solely by reference to the types of offences committed, and some by way of risk assessment undertaken by the court,¹² the police¹³ or some multi-agencies or experts panels¹⁴ with reference to a combination of factors such as the seriousness of the offence, offence history or *modus operandi*, offender characteristics, treatment and rehabilitation plan. Some states provide for an element of fair hearing before classification.¹⁵

3.15 As to the actual manner of notifying the community that a sex offender has moved into the neighbourhood, most state laws do not provide guidance to the police regarding whom to notify or the method of notification.

⁹ HOPRG Report 1997, cited above, at p 12.

¹⁰ HOPRG Report 1997, cited above, at p 28.

¹¹ For example, Tier 1 with no community notification, Tier 2 with notification to schools and community organisations likely to encounter the offender, and Tier 3 with notification to the wider community within the area.

¹² For example, Idaho, West Virginia and Ohio. See Terry Thomas, Sex Offender Community Notification: Experience from America, *The Howard Journal* Vol. 42 No. 3, July 2003, pp 217-228.

¹³ For example, Arizona, Nebraska and Wisconsin.

¹⁴ For example, Minnesota.

¹⁵ For example, in Hawaii, there is a constitutional right for notice and an opportunity to be heard prior to public notice of sex offender status, and in Iowa, an offender is entitled to an evidentiary hearing as part of the risk assessment process. See the correspondence from The National Conference of State Legislatures (NCSL) to the SMART Office on 30 July 2007, available at <http://www.ncsl.org/standcomm/sclaw/SexOffenderCorrespondence073007.htm>.

Some police departments hang posters in community centres and libraries, or send letters or postcards to homes within a certain distance of the registrant. Some convene local neighbourhood meetings or fund non-governmental bodies to inform the community about released registrants.¹⁶

3.16 Every state now has a searchable state-wide website open to the public with information about individuals required to register as sex offenders. However, considerable variations exist among states with respect to the comprehensiveness of offender-related information that is made available on the internet. For example, some states confine disclosure in the internet registry to offenders who have been determined to be high-risk, while others provide for wider disclosure of offender information without reference to the risk level of specific offenders. As observed by Human Rights Watch,¹⁷ 32 states include every registrant who was convicted as an adult¹⁸ on their online database. Eighteen states exclude low-risk and, in some cases, medium-risk sex offenders from the internet registry. The information provided online for each offender typically includes the crime that triggered the registration requirement, name, photograph, physical description, date of birth and current address of the registrant (although a few states provide only the zip code of the individual). Some states provide additional personal information for certain offenders, including the address of the registrant's employer and the make, model, and licence plate number of any vehicle the registrant drives.

3.17 The US federal Department of Justice has established the Dru Sjodin National Sex Offender Public Website¹⁹ by drawing on data from the internet registries of individual states. It allows offenders' information to be searched by the public by keying in an offender's name, city, state or postal code. However, the US federal Department of Justice does not guarantee the accuracy, completeness or timeliness of the information on the website as the information is maintained by individual states based on information mostly provided by the registrants themselves. It was reported that 674,000 Americans are on the sex offender registries.²⁰

3.18 There are also non-government websites in the US. Some websites are based on coverage in newspapers; others use free/commercial access to government records. Private sites typically feature calls for stronger punishment and may indulge in vilification of offenders and their families, or incite action by vigilantes. Private registers have attracted considerable attention in the US. They often feature or are allied with notification services, such as email notification if an offender moves into the neighbourhood.

¹⁶ In New York, for example, Parents for Megan's Law has a contract with the state to distribute information about registrants recently released from custody.

¹⁷ The HRW Report 2007, cited above.

¹⁸ This includes youths who were under 18, but convicted as adults.

¹⁹ <http://www.nsopr.gov/>.

²⁰ *The Economist*, August 8th 2009, at p 8. The number keeps growing partly because in several states registration is for life, and partly because registries are not confined to offenders convicted of serious sex crimes.

Consequences of broad community notification

3.19 The broad community notification schemes under Megan's Law in the US are regarded by many as "naming and shaming" in nature, and not particularly helpful to parents' vigilance efforts and the rehabilitation of offenders. In many instances the result has been to drive paedophiles underground. Disclosure was intended as a preventive mechanism, allowing the community to maintain surveillance or adopt specific preventive actions. However, because of stigma and fear of vigilantism or harassment, offenders often move away without registering again. A study conducted in 1995 pointed out that in Tennessee, 28 per cent of offenders moved away without registering again.²¹ Another source stated that of the 600,000 sex offenders in the US, 150,000 have gone missing.²² Also, some US states have a high proportion of offenders registering as "homeless", suggesting that they either are not being truthful with the authorities or choose to live rough to avoid having their whereabouts published.²³ It has been suggested that uncontrolled publication of the personal data of sex offenders poses a greater threat to the public than if their names and addresses had remained accessible only to the police and relevant employers.

3.20 Some commentators are of the view, however, that high rates of voluntary compliance are not essential for a register to have value for police work. There is some evidence that the police consider the requirement to register to be beneficial since it creates legal grounds to detain offenders who fail to comply with registration requirements and are later found in suspicious circumstances, such as loitering near a school. The offender can be charged and prosecuted for failure to register, and this enables the police to intervene before a potential victim is harmed.²⁴

3.21 Community notification or disclosure can cause anxiety in the neighbourhood, and in some cases, the anger and fear leads to vigilantism or harassment of registrants. In Washington, there were 14 such cases recorded over a three year period.²⁵ The American Probation and Parole Association estimated the combined figures of resulting vigilantism or harassment for Arizona, Oregon and New Jersey to be around 10 per cent of disclosure cases.

New requirements under SORNA

3.22 On 27 July 2006, Title I of the Adam Walsh Act,²⁶ entitled the Sex Offender Registration and Notification Act ("SORNA"), was enacted to provide for a new comprehensive set of minimum national standards for sex offender registration and notification. All relevant jurisdictions²⁷ are required

²¹ HOPRG Report, cited above, at p 24.

²² The Times, 4 October 2006.

²³ UK Home Office, Review of the Protection of Children from Sex Offenders, June 2007, at p 10.

²⁴ HOPRG Report, cited above, at p 23.

²⁵ Study conducted in 1993. HOPRG Report, cited above, at p 32.

²⁶ Public Law 248-109.

²⁷ The term "jurisdictions" instead of "states" is used in SORNA because it covers not only the 50 states, but also the District of Columbia, the principal US territories and the Indian tribal jurisdictions.

to comply with these new federal requirements within three years²⁸ (ie before 27 July 2009) or they will lose ten percent of the federal funding for the criminal justice programme. With the introduction of SORNA, it is expected that there will be greater convergence among the states in the operation of the sex offender registration and community notification arrangements. However, as SORNA provides only a set of minimum national standards and individual states may provide more stringent requirements, there will not be uniformity. A summary of the SORNA requirements for certain key components of sex offender registration and community notification is set out below.

New federal registration requirements under SORNA

3.23 SORNA significantly expands the federal requirements as to who must register as a sex offender by defining a sex offence as one *"that has an element involving a sexual act or sexual contact with another."*²⁹

3.24 SORNA prescribes more extensive mandatory registration information. Each sex offender must provide the following registration information: his name; Social Security number; address or multiple addresses; employer and employer's address; school (if a student) and school address; licence plate number and description of any vehicle owned or operated by the offender; and any other information required by the Attorney General. Each jurisdiction must include the following information for each offender in the registry: a physical description; the criminal offence; the criminal history of the offender, including dates of arrests and convictions and correctional or release status; a current photograph; fingerprints and palm prints; a DNA sample, a photocopy of a valid driver's licence or ID card; and any other information required by the Attorney General.

3.25 SORNA defines and requires a three-tier classification system for sex offenders based solely on the offence committed, on which other requirements (duration of registration, frequency of reporting in person, and the extent of website disclosure) are based:

Tier I: Offences other than Tier II or Tier III offences, such as minor sexual offences punishable by not more than one year's imprisonment.³⁰

²⁸ The Attorney General is authorised to provide up to two one-year extensions of this deadline.

²⁹ SORNA section 111(5)(A)(i). SORNA section 111(5)(C) qualifies the foregoing definition of "sex offence" to exclude "[a]n offense involving consensual sexual conduct if the victim was an adult, unless the adult was under the custodial authority of the offender at the time of the offense, or if the victim was at least 13 years old and the offender was not more than four years older than the victim."

³⁰ SORNA section 111(2).

- Tier II: Offences of sexual abuse or sexual exploitation against a minor which are punishable by more than one year's imprisonment but not as serious as a Tier III offence, such as solicitation of a minor to practise prostitution, production or distribution of child pornography, or when there has already been a previous Tier I conviction.³¹
- Tier III: Offences of aggravated sexual abuse regardless of victim age (such as rape), abusive sexual contact with a child under 13, non-parental kidnapping of minors, or when there has already been a previous Tier II conviction.³²

3.26 As regards the duration of the registration requirement, SORNA specifies the minimum required duration for Tier I sex offenders to be 15 years, for Tier II sex offenders to be 25 years, and Tier III sex offenders must be registered for life. SORNA acknowledges in a limited way the significance of living offence-free: Tier I registrants can petition for removal from the registration requirements if they maintain a clean record for 10 years. But, contrary to the existing practices of some states, Tier II offenders and Tier III offenders must register for 25 years or the rest of their lives, respectively, regardless of how long they live offence-free or whether they can present other evidence of rehabilitation.

3.27 Registered sex offenders are required to report in person to the local police regularly to verify their address and other registry information and to update the required photo. The minimum frequency for personal appearance is set according to the tier system:

- Tier I – annually
- Tier II – every six months
- Tier III – every three months

3.28 As regards the sanctions for non-compliance with the registration or updating requirements, SORNA requires all jurisdictions to have a criminal penalty that includes a maximum term of imprisonment greater than one year.

New federal community notification requirements under SORNA

3.29 SORNA broadens the jurisdictions' obligation to provide for broad community notification through public websites of all registered sex offenders by all internet registries to disclose the following mandatory information:

- The name of the sex offender, including all aliases.

³¹ SORNA section 111(3).

³² SORNA section 111(4).

- The address of each residence at which the sex offender resides or will reside and, if the sex offender does not have any (present or expected) residence address, other information about where the sex offender has his or her home or habitually lives. (If current information of this type is not available because the sex offender is in violation of the requirement to register or cannot be located, the website must note this.)
- The address of any place where the sex offender is an employee or will be an employee and, if the sex offender is employed but does not have a definite employment address, other information about where the sex offender works.
- The address of any place where the sex offender is a student or will be a student.
- The licence plate number and a description of any vehicle owned or operated by the sex offender.
- A physical description of the sex offender.
- The nature of the sex offence for which the sex offender is registered and any other sex offence of which the sex offender has been convicted.
- A current photograph of the sex offender.

3.30 Certain information must not be made available on public websites. However, SORNA does not limit the discretion of jurisdictions to disclose these types of information in other contexts, such as to assist law enforcement. The four types of prohibited information are:

- The victim's identity,
- The Social Security number of the sex offender,
- Any reference to arrests of the sex offender that did not result in conviction, and
- Passport and immigration document numbers.

3.31 There are also optional exemptions, which apply to information that jurisdictions may exempt from their websites in their discretion. These are:

- Any information about a Tier I sex offender convicted of an offence other than a specified offence against a minor.
- The name of an employer of the sex offender.

- The name of an educational institution where the sex offender is a student.
- Any other information which the Attorney General allows to be exempted.

3.32 Other federal initiatives to assist with the implementation of SORNA and to protect the public from sexual abuse and exploitation are:

- Stepped-up federal investigation and prosecution efforts to assist jurisdictions in enforcing sex offender registration requirements,
- New statutory provisions for the National Sex Offender Registry and the Dru Sjodin National Sex Offender Public Website that compile information obtained from registration programmes across the country and make it readily available to law enforcement agencies or the public,
- Federal development of software tools, which registration jurisdictions will be able to use to facilitate the operation of their registration and notification programmes in conformity with the SORNA standards, and
- Establishment of the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking ("the SMART Office") to administer the national standards for sex offender registration and notification and to assist registration jurisdictions in their implementation.

Some criticisms of SORNA

3.33 In its 146-page report, Human Rights Watch argued that the new federal requirements on sex offender registration and community notification under SORNA were "*ill-considered, poorly crafted, and may cause more harm than good.*"³³ The registration laws were said to be overbroad in scope and overlong in duration, unjustifiably subjecting to the registration requirements offenders who would pose no safety risk. The broad community notification laws were criticised for allowing anyone anywhere to access online sex offender registries for purposes that might have nothing to do with public safety.

3.34 It was pointed out that most sex crimes are not committed by registered offenders. For example, a 1999 study on the Massachusetts sex offender registry showed that of the 136 new sex crimes, only six were committed by individuals listed on the police registry. With over 670,000³⁴ men and women listed on the various sex offender registries, it would be difficult for the law enforcement agencies to actively monitor all the registrants. It could also be true that the expansion of state sex offender registries to

³³ The HRW Report 2007, cited above.

³⁴ Reported in *The Economist*, August 8th 2009, at p 8.

include more offences and longer registration periods would compromise the law enforcement agencies' ability to monitor high-risk sex offenders.

England and Wales

3.35 In England and Wales, significant efforts have been made to protect children from sex offenders by an array of arrangements, including:

- criminal records checks to vet and bar sex offenders from child-related work;
- new criminal offences to enforce the vetting and barring scheme;
- notification obligations on sex offenders after their release from prison.

Criminal records checks to vet and bar sex offenders from child-related work

List 99

3.36 The Secretary of State has a long-established power to bar an individual from working in schools and Local Education Authority education services.³⁵ The list of those individuals subject to the bar is known as "List 99", which has been in place for over 80 years. The vast majority of the more than 4,000 people on the list are subject to a complete prohibition from working in the listed institutions. Educational organisations are under an obligation not to allow an individual to work in contravention of the bar, and so it is mandatory for them to conduct a "List 99" check before employment.

3.37 It is a criminal offence for any individual on List 99 to seek employment in the education settings covered by List 99. It is also a criminal offence for any employer to employ the listed individuals. However, not all persons who have committed sexual offences are included in List 99 because List 99 only automatically covers those individuals who are already working in the education sector when they commit the offence. Hence List 99 is treated as an important complement to, but not a replacement for, the Criminal Records Bureau check discussed below.

Criminal Records Bureau check

3.38 The Criminal Records Bureau ("the CRB") is an Executive Agency of the Home Office, and offers access to criminal record information through its disclosure service which enables public, private and voluntary organisations to make safer recruitment decisions by identifying candidates

³⁵ Hansard HC, Statement on "*Safeguarding Children – Review of the List 99 decision making process and policy implications*", 12 Jan 2006, at www.publications.parliament.uk/pa/cm200506. Statement repeated in the House of Lords on the same day.

who may be unsuitable for certain work, especially that which involves children or vulnerable adults.³⁶ There are now two levels of CRB check available: standard and enhanced disclosures:

Standard Disclosure

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

Enhanced Disclosure

This level of check is for anyone involved in regularly caring for, training, supervising or being in sole charge of children or vulnerable adults.³⁷ In addition to the Standard Disclosure, any relevant information (including non-conviction information) held by the local police forces is made available.

3.39 Currently, CRB checks can be conducted only by registered organisations which are entitled to ask exempted questions under the Exceptions Order to the ROA 1974. Some large registered organisations (called "Umbrella Bodies") may decide to offer access to CRB checks to smaller organisations.³⁸ CRB checks cannot be requested by individuals and so parents who employ a nanny, *au pair*, or babysitter directly cannot apply for a CRB check. Where the nanny, *au pair* or babysitter is referred by an agency, however, the agency is entitled to carry out a CRB check.

3.40 As from 12 May 2006, schools are required to obtain enhanced CRB checks for all new appointments to schools and for those who have not been working in a school for at least three months.³⁹ Previously, CRB checks were strongly recommended. Now, the checks are mandatory for all new appointments to the schools' workforce, including caretakers, dinner ladies and administration staff. This would be in addition to the usual checks, such as obtaining references from previous employers and checking qualifications.⁴⁰

The Safeguarding Vulnerable Groups Act 2006

3.41 The Safeguarding Vulnerable Groups Act 2006 provides the legislative framework for the creation of a new scheme for England and Wales to vet and bar people from working with children and vulnerable adults, integrating List 99, the Protection of Children Act list and the Disqualification

³⁶ The CRB was established under Part V of the Police Act 1997 and was launched in March 2002. Prior to 2002, access to police checks was mainly confined to organisations in the statutory sector for staff who had "*substantial unsupervised access*" to children.

³⁷ Also for certain licensing purposes and judicial appointments.

³⁸ Examples of Umbrella Bodies are local authorities, independent schools and organisations that provide personnel services to schools.

³⁹ The School Staffing (England) (Amendment) Regulations 2006.

⁴⁰ "*Safeguarding Children – Review of the List 99 decision making process and policy implications*", cited above, at para 7.

Order regime. The new arrangements will be introduced in managed phases from autumn 2009.

3.42 The 2006 Act enabled the creation of the Independent Barring Board⁴¹ which is currently referred to as the Independent Safeguarding Authority ("the ISA"). The ISA is an independent statutory body, equipped with the expertise to take all discretionary decisions as to which individuals should be barred, decisions that were formerly taken by the Secretary of State. The ISA works in partnership with the CRB to deliver the new vetting and barring scheme.

3.43 The 2006 Act created two new Barred Lists.⁴² These are:

- a list of people barred from working with children; and
- a list of people barred from working with vulnerable adults.

Regulated activity

3.44 Persons on the list(s) will not be permitted to work with children and/or vulnerable adults in a "regulated activity", which is rather elaborately defined in Schedule 4 to the 2006 Act. An activity is a "regulated activity" relating to children⁴³ if:

- (a) it is one of the following activities and it is carried out frequently by the same person or the "period condition" is satisfied:⁴⁴
 - Teaching, training or instruction of children
 - Care for or supervision of children
 - Advice or guidance provided wholly or mainly for children
 - Treatment or therapy provided for a child
 - Moderating a public electronic interactive communication service which is likely to be used wholly or mainly by children
 - Driving a vehicle which is being used only for conveying children
- (b) it is carried out frequently by the same person (or the period condition is satisfied) while engaging in any form of work (whether or not for gain) in connection with the purposes of one of the following establishments, and it gives that person the

⁴¹ Section 1.

⁴² Section 2.

⁴³ There is a similar list for vulnerable adults.

⁴⁴ The "period condition" is satisfied if the person carrying out the activity does so at any time on more than two days in any period of 30 days: section 10(1) of Schedule 4 to the 2006 Act.

opportunity, in consequence of anything he is permitted or required to do in connection with the activity, to have contact with children:

- An education institution exclusively or mainly providing full-time education to children
 - An institution exclusively or mainly providing nursery education (within the meaning of section 117 of the School Standards and Framework Act 1998)
 - A hospital exclusively or mainly for the reception and treatment of children
 - An institution exclusively or mainly for the detention of children
 - A children's home (within the meaning of section 1 of the Care Standards Act 2000 or a home provided under section 82(5) of the Children Act 1989)
 - Childcare or day care premises (within the meaning of the Childcare Act 2006 or Children Act 1989)
- (c) Fostering
- (d) An activity carried out by those in various defined positions of responsibility, including school governor, director of social services and trustee of certain charities.

Controlled activity

3.45 Individuals on the barred list(s) can only work with children in "controlled activities"⁴⁵ with safeguards.⁴⁶ "Controlled activity" includes:⁴⁷

- (a) Support work in general health settings, the National Health Scheme and further education, such as cleaners, caretakers, shop workers, catering staff, car park attendants and receptionists.
- (b) Work by individuals of specified organisations (eg a local authority) who have frequent access to sensitive records about children and vulnerable adults.
- (c) Support work in adult social care settings, such as day centre cleaners and those with access to social care records.

⁴⁵ Sections 21 and 22.

⁴⁶ Section 23. Set out in relevant regulations.

⁴⁷ Fact sheet dated April 2009 issued by ISA.

Offences covered by automatic barring (with or without right to make representations)

3.46 Certain serious offences result in automatic barring. The serious offences that result in automatic barring, are divided into two categories: (1) automatic barring with no right to make representation, and (2) automatic barring with the right to make representations. In a consultation document, the Welsh Assembly Government has proposed a list of barring offences for each category.⁴⁸

⁴⁸ Children's Automatic Barring Offences – with no right to make representations:
Sexual Offences Act 1956: "Rape [of a child]; Sexual intercourse with girl under 13".
Sexual Offences Act 2003: "Rape [of a child]; Assault by penetration; Rape of a child under 13; Assault of a child under 13 by penetration; Sexual assault of a child under 13 [*intentionally touched a girl/boy and the touching was sexual*]; Causing or inciting a child under 13 to engage in sexual activity; Sexual activity with a person with a mental disorder impeding choice [where the victim is a child]; Causing or inciting a person with a mental disorder impeding choice, to engage in sexual activity [where the victim is a child]; Engaging in sexual activity in the presence of a person with a mental disorder impeding choice [where the victim is a child]; Causing a person, with a mental disorder impeding choice, to watch a sexual act [where the victim is a child]; Inducement, threat or deception to procure sexual activity with a person with a mental disorder [where the victim is a child]; Causing a person with a mental disorder to engage in or agree to engage in sexual activity by inducement, threat or deception [where the victim is a child]; Engaging in sexual activity in the presence, procured by inducement, threat or deception, of a person with a mental disorder [where the victim is a child]; Causing a person with a mental disorder to watch a sexual act by inducement, threat or deception [where the victim is a child]; Care workers: sexual activity with a person with a mental disorder [where the victim is a child]; Care workers: causing or inciting sexual activity [where the victim is a child]; Care workers: sexual activity in the presence of a person with a mental disorder [where the victim is a child]; Care workers: causing a person with a mental disorder to watch a sexual act [where the victim is a child]."
Children's Automatic Barring Offences – with right to make representations:
Common law: "murder, kidnapping, false imprisonment, infanticide."
Children and Young Persons Act 1933: "Cruelty to children [*Being a person 16 years or over having responsibility for a child under 14/young person under 16 wilfully assaulted/ill treated/neglected/abandoned/exposed the child/young person in manner likely to cause unnecessary suffering/injury to health*]."
Infanticide Act 1938: "Infanticide [*Caused the death of own child under age 12 months by wilful act/omission whilst balance of mind disturbed by offender not having recovered from giving birth to the child/effect of lactation consequent upon birth of the child*]."
Sexual Offences Act 1956: "Rape [of an adult]; Procurement of a woman by threats [*By threats or intimidation procured a woman/child to have unlawful sexual intercourse*] Repealed by s. 140 of and Schedule 7 to the Sexual Offences Act 2003; Procurement of a woman by false pretences [*Procured a woman/child to have unlawful sexual intercourse*] Repealed by s. 140 of and Schedule 7 to the Sexual Offences Act 2003; Administering drugs to obtain or facilitate intercourse; Sexual intercourse with a girl under the age of 16; Intercourse with defective*; Procurement of defective*; Incest by a man [*Being man/boy had sexual intercourse with woman/girl he knew to be grand daughter/mother/sister/half-sister/daughter*]; Incest by a woman [*Being a woman with consent permitted a man you knew to be your grandfather/father/brother/half-brother/son to have sexual intercourse with you*] Repealed by s. 140 of and Schedule 7 to the Sexual Offences Act 2003; Buggery; Indecency between men [*man aged 18/19/20 years or man over 21 years committed gross indecency with man under 16 years*] Repealed by s. 140 of and Schedule 7 to the Sexual Offences Act 2003; Indecent assault on a woman; Indecent assault on a man; Assault with intent to commit buggery; Abduction of a woman by force or for sake of her property; Abduction of unmarried girl under 18; Abduction of unmarried girl under 16; Abduction of defective* from parent or guardian; Causing prostitution of women; Procurement of girl under 21; Detention of a woman in a brothel or other premises; Permitting girl, under 13, or between 13 and 16, to use premises for intercourse; Permitting defective* to use premises for intercourse; Causing or encouraging prostitution of, intercourse with or indecent assault on, girl under 16; Causing or encouraging prostitution of defective*; Man living on earnings of prostitution; Woman exercising control over prostitute."
*Defective means a person suffering from a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning.
Mental Health Act 1959: "Sexual intercourse with patients."

Indecency with Children Act 1960: "Indecency with children under the age of 16."
Sexual Offences Act 1967: "Procuring others to commit homosexual acts; Living on the earnings of male prostitution."
Theft Act 1968: "Burglary [with intent to rape]."
Misuse of Drugs Act 1971: "[Supply of drugs to children]."
Criminal Law Act 1977: "Inciting a girl under the age of 16 to have incestuous sexual intercourse."
Protection of Children Act 1978: "Take, or permit to be taken, or to make any indecent photograph or pseudo-photograph of a child; distribution or possession of indecent photograph of a child."
Mental Health Act 1983: "Making or possessing false or forged medical, etc. documents; Ill-treatment or wilful neglect of a patient with a mental disorder; Induce or knowingly assist a patient under guardianship or a person in 137 custody to absent themselves without leave; or knowingly harbours a patient who is absent without leave; Refuses to allow the inspection of any premises; or to allow the visiting, interviewing or examination of any person by a person authorised; or to produce for the inspection of any person so authorised any document or record the production of which is duly required by him; or otherwise obstructs any such person in the exercise of his functions."
Child Abduction Act 1984: "Abduction of a child by parent; Abduction of child by other persons."
Criminal Justice Act 1988: "Possession of indecent photographs of children."
Sexual Offences (Amendment) Act 2000: "Abuse of trust [*Being a person aged 18 years or over in a position of trust has sexual intercourse/engage in sexual activity with a person under 18*] Repealed by s. 140 of and Schedule 7 to the Sexual Offences Act 2003."
Nationality, Immigration and Asylum Act 2002: "Traffic in prostitution."
Sexual Offences Act 2003: "Rape [of an adult]; Assault by penetration; Sexual assault; Causing a person to engage in sexual activity without consent; Sexual activity with a child; Causing or inciting a child to engage in sexual activity; Engaging in sexual activity in the presence of a child [*Being a person aged 18 years or over for the purpose of obtaining sexual gratification intentionally engaged in sexual activity in the presence of/a place where you could be observed by a child under 13 OR 13/14/15 years knowing/believing that the child was or intending that the child should be aware that you were engaging in that activity*]; Causing a child to watch a sexual act [*Being a person aged 18 years or over for the purpose of obtaining sexual gratification intentionally caused a child under 13 OR 13/14/15 years whom you did not reasonably believe was aged 16 years or over to watch a third person/look at an image of any person engaging in a sexual activity*]; Arranging or facilitating commission of a child sex offence; Meeting a child following sexual grooming [*Being a person 18 or over having on at least two earlier occasions met/communicated with a girl/boy under 16 and who you did not reasonably believe was 16 or over intentionally met/travelled with the intention of meeting that girl/boy and at the time you intended to do anything to/in respect of her/him during/after the meeting and in any part of the world which if done would have involved the commission by you of a relevant offence*]; Abuse of position of trust: sexual activity with a child; Abuse of position of trust: causing or inciting a child to engage in sexual activity; Abuse of position of trust: sexual activity in the presence of a child [*Being a person 18 or over in a position of trust in relation to a child under 13 for the purpose of obtaining sexual gratification intentionally engaged in sexual activity in the presence of/a place where you could be observed by that child knowing or believing that the child was/intending that the child should be aware that you were engaging in that activity or caused that child to watch a third person/look at an image of any person engaging in a sexual activity*]; Abuse of position of trust: causing a child to watch a sexual act [*Being a person 18 or over in a position of trust in relation to a child aged 13/14/15/16/17 whom you did not reasonably believe was aged 18 or over for the purpose of obtaining sexual gratification intentionally caused that child to watch a third person/look at an image of a person engaging in sexual activity*]; Sexual activity with a child family member; Inciting a child family member to engage in sexual activity; Sexual activity with a person with a mental disorder impeding choice [where the victim is an adult]; Causing or inciting a person, with a mental disorder impeding choice, to engage in sexual activity [where the victim is an adult]; Engaging in sexual activity in the presence of a person with a mental disorder impeding choice [where the victim is an adult]; Causing a person, with a mental disorder impeding choice, to watch a sexual act [where the victim is an adult]; Inducement, threat or deception to procure sexual activity with a person with a mental disorder [where the victim is an adult]; Causing a person with a mental disorder to engage in or agree to engage in sexual activity by inducement, threat or deception [where the victim is an adult]; Engaging in sexual activity in the presence, procured by inducement, threat or deception, of a person with a mental disorder [where the victim is an adult]; Causing a person with a mental disorder to watch a sexual act by inducement, threat or deception [where the victim is an adult]; Care workers: sexual activity with a person with a mental disorder [where the victim is an adult]; Care workers: causing or inciting sexual activity [where the victim is an adult]; Care workers: sexual activity in the presence of a person with a mental disorder [*Being a care worker involved in the care of a*]

Other cases not within the automatic barred lists

3.47 Parts 1 and 2 of Schedule 3 of the 2006 Act further describe the types of conduct that allow the ISA to include a person in the barred list after hearing his representation. The relevant conduct is:

- conduct which endangers a child or is likely to endanger a child;
- conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him;
- conduct involving sexual material relating to children (including possession of such material);
- conduct involving sexually explicit images depicting violence against human beings (including possession of such images), if it appears to the Independent Barring Board (IBB) that the conduct is inappropriate;
- conduct of a sexual nature involving a child, if it appears to the IBB that the conduct is inappropriate.

3.48 The ISA will consider a range of information from the police and referrals from employers, regulatory bodies and other agencies as part of its decision-making process. In addition to convictions and cautions, the ISA will consider any evidence of inappropriate behaviour and evidence of behaviour that is likely to harm a child or vulnerable adult.

person who could reasonably be expected to have known had such a disorder intentionally engaged in an activity for the purpose of obtaining sexual gratification in the presence of/a place where you could be observed by that person knowing/believing that she/he was aware/intending that she/he should be aware that you were engaging in it]; Care workers: causing a person with a mental disorder to watch a sexual act [Being a care worker involved in the care of a person in a way which falls within s. 42 of the SOA 2003 who had a mental disorder and who you knew/could reasonably be expected to have known had such a disorder intentionally caused him/her to watch a third person/look at an image of a person engaging in a sexual activity]; Paying for sexual services of a child; Causing or inciting child prostitution or pornography; Controlling a child prostitute or a child involved in pornography; Arranging or facilitating child prostitution or pornography; Causing or inciting prostitution for gain; Trafficking into the UK for sexual exploitation; Trafficking within the UK for sexual exploitation; Trafficking out of the UK for sexual exploitation; Administering a substance with intent [intentionally administered a substance to OR caused a substance to be taken by another person knowing he/she did not consent and with the intention of stupefying/overpowering him/her so as to enable any person to engage in a sexual activity involving him/her]; Committing an offence or trespassing with intent to commit a sexual offence; Exposure [Intentionally exposed genitals intending someone would see them causing alarm/distress]; Voyeurism [For the purpose of obtaining sexual gratification observed/operated equipment/recorded/installed equipment OR constructed/adapted a structure/part of a structure (to observe) – another person doing a private act knowing that the person did not consent to being observed]."

Asylum and Immigration Act 2004: "Trafficking people for exploitation."

Domestic Violence, Crime and Victims Act 2004: "Causing or allowing the death of a child or vulnerable adult."

Mental Capacity Act 2005: "Ill-treatment or wilful neglect."

New criminal offences to enforce the vetting and barring scheme

3.49 Successful vetting often depends on effective information sharing originally held by different sources.⁴⁹ Organisations and individuals⁵⁰ may refer relevant information to the ISA if they are concerned about the behaviour of an individual; in addition, there are new provisions legally requiring certain organisations⁵¹ to refer relevant information to the ISA.

3.50 Starting from 12 October 2009, the relevant organisations must start referring information to the ISA. Pursuant to sections 35 to 38 of the 2006 Act, regulated activity providers and personnel suppliers are liable on summary conviction to a fine⁵² if they fail to provide the information without reasonable excuse.

Other offences

3.51 **Barred person not to engage in regulated activity:** A person commits an offence if he seeks to engage, offers to engage or engages in a regulated activity from which he is barred.⁵³ The person guilty of this offence is liable: (a) on conviction on indictment to imprisonment not exceeding five years and/or a fine; or (b) on summary conviction to imprisonment not exceeding 12 months and/or a fine.

3.52 **Use of barred person for regulated activity:** A person commits an offence if he permits an individual (B) to engage in regulated activity from which B is barred with the knowledge or reason to believe that B is barred from that activity, and B engages in the activity.⁵⁴ The sentences applicable are the same as those in the preceding paragraph.

3.53 If a regulated activity provider⁵⁵ fails to conduct a check, or a personnel supplier⁵⁶ fails to check an individual, he would be guilty of an offence on summary conviction and to a fine.⁵⁷

⁴⁹ An important lesson learnt from the Ian Huntley case was that, although the offender's behaviour had caused concern to a number of agencies and on several occasions, no single organisation had access to a full picture. See Bichard Inquiry into how two police forces failed to vet a killer, Ian Huntley, who managed to get a job as a school caretaker in Cambridgeshire despite being linked to several sex-related crimes in Humberside. Sir Michael Bichard pointed out that a "one stop shop" list which pools together all the disparate information was a key reform necessary to make the vetting system safe and to restore public confidence.

⁵⁰ Employers of those working with children and/or vulnerable adults, parents/private employers (their information should be referred to social services or the police first).

⁵¹ Employers and service providers of regulated and controlled activity; adult/child protection teams in local authorities; named professional bodies and supervisory authorities; and personnel suppliers (eg employment agencies, employment businesses).

⁵² Not exceeding level 5 on the standard scale.

⁵³ Section 7.

⁵⁴ Section 9.

⁵⁵ Section 11.

⁵⁶ Section 12 and Schedule 6.

⁵⁷ Not exceeding level 5 on the standard scale.

Notification obligations on sex offenders after their release from prison

3.54 Notification obligations on sex offenders after their release from prison were introduced in England and Wales by the Sex Offenders Act 1997.⁵⁸ This scheme is often called "the sex offender register" in England and Wales although it does not involve the creation of a separate register. Instead it requires certain categories of sex offenders to provide the police with a record of their name, address, date of birth and National Insurance number within a short time⁵⁹ after their sentencing or release, and to notify the police of any subsequent changes during a specified notification period⁶⁰ thereafter in order to assist the police or other agencies to keep track of and monitor the offenders. A person is subject to the notification requirements if he is convicted or cautioned in relation to⁶¹ sexual offences such as rape, sexual assault, sexual activity with a child, causing a child to watch a sexual act; meeting a child following sexual grooming, indecent exposure, voyeurism, sexual penetration of a corpse, offences relating to the taking or possession of indecent photographs of children, and certain customs offences relating to the prohibited importation of indecent or obscene articles.⁶² The compliance rate with the requirements by sex offenders has been assessed at 97 per cent.⁶³

3.55 It may be noted that the information which must be given by the offender to the police under the Act is more limited than that required in the US. However, on 8 May 2008 the Criminal Justice and Immigration Act was passed,⁶⁴ which confers a power on the Secretary of State to prescribe by regulations additional information to be furnished by the sex offender. The Home Office had previously indicated that the intention was to require all registered sex offenders to provide a DNA sample and notify the police of their e-mail addresses, bank account numbers, any foreign travel and whether they are living in the same household with a child.⁶⁵

3.56 Unlike Megan's Law in the US, there is no public right of access to the registration information contained in the UK Sex Offender Register. Attempts to amend the Sex Offenders Bill to allow public access were unsuccessful⁶⁶ and subsequent demands also failed. The Home Office has consistently refused to provide the Megan's Law type of uncontrolled public disclosure of registration information through the internet or leaflets. The approach adopted in the UK is one of "controlled disclosure" on a need-to-know basis.

⁵⁸ The 1997 Act was re-enacted with amendments as the Sexual Offences Act 2003.

⁵⁹ Originally it was 14 days, but now it is generally shortened to three days.

⁶⁰ The notification period depends essentially on the length of custodial sentence imposed on the offender eg indefinite period for a custodial sentence of 30 months or more, 10 years for a sentence of six months to 30 months, seven years for a custodial sentence under six months and five years for a non-custodial sentence: see section 82 of the Sexual Offences Act 2003.

⁶¹ This also includes situations where the person is found not guilty by reason of insanity, or found to be under a disability when committing that act.

⁶² See sections 80 and 81 and Schedule 3 of the Sexual Offences Act 2003.

⁶³ UK Home Office, Review of the Protection of Children from Sex Offenders, June 2007, at p 8.

⁶⁴ This part of the legislation will come into operation on a date to be appointed by the Secretary of State.

⁶⁵ UK Home Office, Review of the Protection of Children from Sex Offenders, June 2007, at p 18.

⁶⁶ See House of Commons Debate, 25 February 1997, cols. 214-232.

The CEOP website

3.57 While general uncontrolled public disclosure of sex offenders' information via websites has been rejected, an exception was created in 2006 when the Child Exploitation and Online Protection (CEOP) Centre was set up. A public website was established by CEOP (www.ceop.gov.uk) to publish details (including photographs, names and aliases, dates of birth and other identifying information) of high-risk sex offenders who have failed to comply with their notification requirements and have gone missing. The Home Office takes the view that public disclosure of non-compliant offenders' details is helpful, as it reinforces the offender's need to comply with notification requirements, and helps the police find them or take further action if they do not.⁶⁷

Other European jurisdictions

3.58 In most EU member states, arrangements are in place enabling their nationals to obtain certificates of good conduct or other types of official confirmation that they have no criminal record.⁶⁸ The preferred method of screening applicants for employment is by means of a Certificate of Conduct (Belgium, Germany, Greece, Luxembourg, The Netherlands, Portugal and Spain) or a Certificate of Criminal Record (Italy).⁶⁹ Instead of disclosing the whole of a person's criminal record, the certificates declare the suitability of the applicant. However, in Denmark and France, the full record is likely to be produced.

Canada

Federal – Sex Offender Information Registration Act 2004

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

3.60 Under this Act, sex offenders must report for registration after serving the custodial portion of a sentence, but an order for registration can be made also if:

- they are convicted of the offence but are not given a custodial sentence;

⁶⁷ UK Home Office, *Review of the Protection of Children from Sex Offenders*, June 2007, at p 10.
⁶⁸ UK Home Office, "On the Record: The Government's Proposals for Access to Criminal Records for Employment and Related Purposes in England and Wales", CM 3308 June 1996, at p 19.
⁶⁹ Grier and Thomas, "The Employment of Ex-offenders and the UK's New Criminal Record Bureau", *European Journal on Criminal Policy and Research* 9: 459-469, 2001, at 460.

- they receive an absolute or conditional discharge or if they are found not criminally responsible on account of mental disorder;
- they are released from custody pending the determination of an appeal.⁷⁰

3.61 Apart from the usual provisions on the offenders' obligations to provide specified information for registration, the Act contains provisions which safeguard the accuracy of the database, as well as the rights of the offenders. Some provisions are extracted below:

- The police service must register the specified information in the database without delay and ensure the confidentiality of that information.⁷¹
- The person who collects information must ensure that the sex offender's privacy is respected in a manner that is reasonable in the circumstances, and the information is provided and collected in a manner and in circumstances that ensure its confidentiality.⁷²
- All information collected or registered must be destroyed or permanently removed from the database if the person is finally acquitted.⁷³
- No person shall consult any information collected under this Act unless he is a member of the police service who consults the information for the purpose of investigating a specific crime.⁷⁴
- Unauthorised use or disclosure of any information collected under the Act or registered in the database may amount to an offence punishable by a fine and/or imprisonment.⁷⁵

Australian jurisdictions

3.62 Given the constitutional provisions in Australia, the different states/territories and the national government each maintain their own legislation to protect children and to vet job applications for child-related work. Efforts have been made to achieve greater standardisation and sharing of information in recent years.

⁷⁰ Section 4(2).

⁷¹ Section 8.

⁷² Section 9(4).

⁷³ Section 15.

⁷⁴ Section 16. There are other specified grounds, but the scope is very limited.

⁷⁵ Section 15.

Federal measures

3.63 At the federal level, the Australian National Child Offender Register ("ANCOR") is maintained by the "Crim Trac" agency, the national criminal record agency which took over the federal sex offender registers developed by the Australian Bureau of Criminal Intelligence and Australian Federal Police. Crim Trac is also the custodian of the national fingerprint and DNA databases.

3.64 In 2002, the Federal Minister for Justice & Customs called on the state/territory governments to establish sex offender registers under consistent legislation. The state/territory governments would remain responsible for monitoring movements of offenders within their jurisdictions, and the information collected would be shared via Crim Trac in order to enhance surveillance of offenders who move interstate. Crim Trac would also render assistance to overseas agencies.⁷⁶ The registration regimes would be vetted by the federal and state privacy commissioners.

3.65 The Minister explained that the government did not support the release of the offenders' details to the community because public disclosure in other countries had led to attacks on offenders and on innocent persons mistaken for offenders.

3.66 Instead of unrestricted community notification, Crim Trac provides information to specific entities including:

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

⁷⁶ By 2005, Crim Trac had gathered sufficient information about the intended overseas travel by convicted paedophiles, and the information was passed to the Thai and Indonesian governments which then refused entry to those individuals.

State/territory legislation

3.67 Individual states/territories have enacted relevant legislation which includes:

- New South Wales *Child Protection (Offenders Registration) Act 2000*
- Victoria *Sex Offenders Registration Act 2004*
- Victoria *Serious Sex Offenders Monitoring Act 2005*
- Northern Territory *Child Protection (Offender Reporting and Registration) Act 2004*
- Queensland *Child Protection (Offender Reporting) Act 2004*
- Western Australia *Community Protection (Offender Reporting) Act 2004*

Victoria Sex Offenders Registration Act 2004

3.68 By way of example, the Victoria Register of Sex Offenders was established under Part 4 of the Victoria Sex Offenders Registration Act 2004. The register is to contain information specified in section 62(2) of the Act. Access to the register is restricted,⁷⁷ and disclosure of information on the register is only "... for law enforcement or judicial functions or activities and then, in any case, only to a government department, public statutory authority or court or as otherwise required by or under any Act or law."⁷⁸

3.69 Part 5 of the 2004 Act contains prohibitions on registered sex offenders taking up child-related employment, which is defined to mean employment involving contact with a child in connection with:

- (a) child protection services;
- (b) child care services;
- (c) child services;⁷⁹
- (d) educational institutions;

⁷⁷

Section 63.

⁷⁸

Section 63(1)(b).

⁷⁹

As defined in the Children's Services Act 1996. "Children's services" means a service providing care or education for 5 or more children under the age of six in the absence of their parents or guardians for fee or reward, or while the parents or guardians use services or facilities provided by the proprietor of the service.

- (e) community services, remand centres, youth residential centres, youth supervision units or youth justice centres⁸⁰ or probation services;
- (f) refuges or other residential facilities used by children;
- (g) paediatric wards of public and private hospitals;
- (h) clubs, associations or movements (including of a cultural, recreational or sporting nature) that provide services or conduct activities for, or directed at children or whose membership is mainly comprised of children;
- (i) religious organisations;
- (j) baby sitting or child minding services arranged by a commercial agency;
- (k) fostering children;
- (l) providing, on a publicly-funded or commercial basis, a transport service specifically for children;
- (m) coaching or private tuition services of any kind for children;
- (n) counselling or other support services for children;
- (o) overnight camps for children regardless of the type of accommodation or of how many children are involved;
- (p) school crossing services, being services provided by people employed to assist children to cross roads on their way to or from school;
- (q) providing, on a commercial basis and not merely incidentally to or in support of other business activities, an entertainment or party service specifically for children;
- (r) providing, on a commercial basis and not merely incidentally to or in support of other business activities, gym or play facilities specifically for children;

Example

The provision of play facilities for children by a fast-food business may be merely incidental to the business of providing food.

⁸⁰

As defined in the Children, Youth and Families Act 2005.

- (s) providing, on a commercial basis and not merely incidentally to or in support of other business activities, photography services specifically for children; or
- (t) talent or beauty competitions held for children on a commercial basis and not merely incidentally to or in support of other business activities.⁸¹

3.70 A registered sex offender must not apply for, or engage in, child-related employment,⁸² and failure to comply may incur a fine and/or a term of imprisonment for two years. "Employment" has been defined to mean:

- (a) performance of work –
 - (i) under a contract of employment or a contract for services (whether written or unwritten); or
 - (ii) as a minister of religion or as part of the duties of a religious vocation; or
- (b) undertaking practical training as part of an educational or vocational course; or
- (c) performance of work as a volunteer including the performance of unpaid community work under a community-based order, a drug treatment order or an intensive correction order.⁸³

Working with Children Check

3.71 Within the last decade, most Australian jurisdictions have established regimes to ensure that people with certain criminal records do not work with children. Commentators have noted that both legislators and employers can assume that a criminal record is an objective indicator of risk and use it as a requirement, sometimes with no flexibility or scope for discretion.⁸⁴

Victoria's Working with Children Act 2005

3.72 In April 2006, the Victorian Government introduced a new checking system to help protect children under 18 years of age from physical or sexual harm. The Working with Children (WWC) Check creates a mandatory minimum checking standard across Victoria. The WWC Check helps to keep children safe by preventing those who pose a risk to the safety of

⁸¹ Section 67(1) of the 2004 Act.

⁸² Section 68(1).

⁸³ As defined in Sentencing Act 1991.

⁸⁴ Bronwyn Naylor, Moira Paterson and Marilyn Pittard, 'In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks' (2008) 32(1) *Melbourne University Law Review* 171,177.

children from working with them, in either paid or volunteer work. The WWC Check is being phased in over five years.

3.73 The WWC Check involves:

- (1) a national police records check;
- (2) a review of relevant findings from prescribed professional disciplinary bodies (currently only the Victorian Institute of Teaching and the out of home care Suitability Panel but other professional bodies may be included in the future).

3.74 Broadly, the criminal offences of most significance for a WWC Check are:

- serious sexual offences;
- serious violent offences;
- serious drug-related offences;
- offences against the Working with Children Act 2005 itself.

3.75 The national police records check may reveal criminal history information held by police in Victoria and other states and territories. Further information can also be sought from other bodies, such as the courts, Corrections Victoria and employers. This information can include circumstances where a court has:

- made a formal finding of guilt in relation to an offence;
- convicted the person of an offence;
- accepted a plea of guilt from the person; or
- acquitted the person of an offence because of mental impairment.

3.76 It can also include information about:

- any spent convictions;
- convictions and findings of guilt from when the person was a child (aged under 18);
- any charges which are pending against the person; and
- the circumstances surrounding any of these charges or convictions.

3.77 There are four major differences between the WWC Check and a standard police records check:

- While a standard police records check gives information about a person's past criminal record, the WWC Check's system of initial and ongoing checking enables the Department of Justice to become aware of any new offences of potential concern. The department will consider re-assessing whether the person should continue to hold an Assessment Notice and WWC Check card when it is notified of new charges, convictions or findings of guilt.
- A new WWC Check is not required when the person changes his employer or volunteer organisation (except if moving from a volunteer to a paid position) as the WWC Check is valid for five years, unless it is revoked or surrendered in that time.
- Not all offences are of concern to the WWC Check. Broadly speaking, the WWC Check considers serious sexual, violent and drug offences.
- The WWC Check also considers any relevant findings made against a person by a prescribed professional disciplinary body (currently the Victorian Institute of Teaching and the out of home care Suitability Panel).

Check mechanism

3.78 Applicants must complete WWC Check application forms which are available from participating Australia Post outlets or on the website. Applicants also need to submit original identification documents, a passport-size photograph and, unless he is a volunteer, the \$73.90 application fee.

3.79 Applications are lodged at the Australia Post outlets. If an organisation wishes to facilitate the applications of all relevant employees and volunteers, a bulk application process can be arranged through the local participating Australia Post outlet.

3.80 The types of work covered are set out in the table below:

Type of work	Details	Code Number
Camps	All overnight camps for children	10
Child Care Services	Child care services including: <ul style="list-style-type: none"> • centre based long day care • occasional care • family day care • in home care • outside school hours care 	14 16 18 20 22

Type of work	Details	Code Number
Childminding	Babysitting or childminding services arranged by a commercial agency	12
Child Protection	Child Protection Services	24
Children's Services	Children's services (that are required to be regulated under the <i>Children's Services Act 1996</i>) including kindergartens or preschools	26
Clubs & Associations	Clubs, associations or movements of a recreational or sporting nature in connection with the following sport or recreation: <ul style="list-style-type: none"> - athletics (including Little Athletics) - basketball - cricket - football (Australian Rules) - football (soccer) - gymnastics (including trampolining) - martial arts - netball - tennis - swimming (including lifesaving) that provide services or conduct activities for, or directed at, children, or whose membership is mainly comprised of children	70
	Clubs, associations or movements of a recreational or sporting nature in connection with all remaining sport and recreation groups not previously phased-in that: <ul style="list-style-type: none"> - provide services or conduct activities for, or directed at, children, or - whose membership is mainly comprised of children 	72
	Clubs, associations or movements of a cultural nature that: <ul style="list-style-type: none"> - provide services or conduct activities for, or directed at, children, or - whose membership is mainly comprised of children 	74
Coaching & Tuition	Coaching or tuition services of any kind for children	28
Community Services	Community Services (that are established or approved under the <i>Children, Youth and Families Act 2005</i>)	38
Counselling Services	Counselling or other support services for children	40
Educational Institutions	Educational institutions for children, specifically: <ul style="list-style-type: none"> • State Schools (including all primary, secondary, technical and special State schools) 	44
	<ul style="list-style-type: none"> • Non-Government schools (including all primary, secondary and special non-Government schools) 	46
	<ul style="list-style-type: none"> • TAFE colleges and TAFE Divisions of universities providing VCE and/or Victorian Certificate of Applied Learning (VCAL) subjects 	48
	<ul style="list-style-type: none"> • Some adult education providers providing VCE and/or VCAL subjects 	50
	<ul style="list-style-type: none"> • Other institutions providing children's study or training programs 	52

Type of work	Details	Code Number
Entertainment & Party Services	Commercial entertainment or party services for children unless they are merely incidental to or in support of other business activities	30
Foster Care	Fostering children	54
Gym or Play Facilities	Commercial gym or play facilities for children unless they are merely incidental to or in support of other business activities	32
Paediatric Wards	Paediatric wards - of public or private hospitals as defined in the <i>Health Services Act 1988</i>	58
Photography Services	Commercial photography services for children unless they are merely incidental to or in support of other business activities	34
Refuges	Refuges or other residential facilities used by children	62
Religion	Religious organisations	64
School Crossings	School crossing services	66
Talent & Beauty Competitions	Commercial talent or beauty competitions for children unless they are merely incidental to or in support of other business activities	36
Transport	Publicly funded or commercial transport services specifically for children	60
Youth Justice	Youth Justice places or services including: <ul style="list-style-type: none"> • remand centres • youth residential centres • youth supervision units • youth training centres • probation services 	56
Other	Only administration of the <i>Working with Children Act 2005</i>	68

New South Wales' Commission for Children and Young People Act 1998

3.81 Section 11(i) of the Commission for Children and Young People Act 1998 requires "background checking" to be carried out by a corporate body, the Commission for Children and Young People, for any employment that involves direct contact with children.

3.82 The nature of the background checking is explained in section 34 as involving any or all of:

- (a) a check for any relevant criminal record of the person, and any relevant apprehended violence or any child protection prohibition orders made against the person, as well as any relevant employment proceedings completed against the person;

- (b) any other relevant probity check relating to the previous employment or other activities of the person;
- (c) an estimate of the risk to children involved in that child-related employment arising from anything disclosed by such a check, having regard to all the circumstances of the case, including any risk arising from the particular workplace;
- (d) the disclosure of the results of any such check or estimate of risk to any person who determines whether the person is to be employed or continue to be employed in that child-related employment (or to a person who advises or makes recommendations on the matter).

3.83 Under section 33B, a person is classified as a "prohibited person" if he/she has been convicted of:

- a serious sex offence;
- murder; or
- a child-related personal violence offence.

Child-related employers are obliged under section 33D to require applicants to disclose whether they are a prohibited person.

3.84 The Act has been described as setting out "*a very draconian regime*"⁸⁵ with respect to screening potential operators and employees of enterprises providing services for children including a provision for notification of any relevant disciplinary proceedings that might be taken at any time against an employee in such enterprises.

Western Australia's Working with Children (Criminal Record Checking) Act 2004

3.85 Unlike New South Wales and Queensland, there is no specific corporate body which carries out any screening or checking. Instead, applicants are assessed by the Department of the Public Service principally assisting the Minister in the administration of the Act. The head of this department is referred to as the CEO in section 4 of the Act.

3.86 By virtue of section 9(1), a person who is, or is proposed to be, employed in child-related employment by another person (the employer) may apply to the CEO for an assessment notice. On receiving the application, the CEO is empowered, by section 9(4), to ask the applicant to provide any further information or documents that the CEO reasonably needs to establish the applicant's identity or for a proper consideration of the application. The CEO is empowered by section 34 to carry out a criminal record check.

⁸⁵ *Commission for Children and Young People v V* (2002) 56 NSWLR 476, [11].

3.87 In Western Australia, the Working with Children (Criminal Record Checking) Act 2004 also made it an offence for employers to employ a person in child-related work unless the person had applied for or already possessed a Work with Children Check. Prior to the 2004 Act, employee criminal records checking was undertaken only by some service providers. There was concern that the screening and assessment process was not always consistent.⁸⁶ Under the 2004 Act, an employer must not employ a person in child-related employment if the person does not have a current assessment notice or has not made an application for an assessment notice that is pending.⁸⁷ The penalty for failing to comply with this requirement is a fine of \$12,000 and imprisonment for 12 months. The penalty is heavier if the employer is actually aware that the person had been convicted of certain offences or that a negative notice had been issued to the person.

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

3.88 The South African Commission's 2002 Report considered how to provide greater protection to children from sex offenders.⁸⁸ The following points are highlighted for information:

- (a) In Discussion Paper 102 the SALC recommended against the introduction in South Africa of community notification legislation along the lines of Megan's Law. The Commission also warned of the false sense of security inherent in notification and registration systems. It also observed that there was a real threat that communities might take the law into their own hands and expel offenders from their neighbourhoods.
- (b) In the Discussion Paper, the SALC recommended the extended use of the existing Criminal Records Centre by grouping the relevant sex offences under a separate category, so that the existing Criminal Records Centre could be used effectively as a base for a register of convicted sexual offenders. Besides presenting a record of previous convictions, it would be possible for such a register to be used for the purposes of preventing unsuitable persons from working with children or screening potential job applicants for positions that give them access to children.
- (c) The SALC recommended that the existing register could then be accessed and used in conjunction with the National Child Protection Register.⁸⁹ The latter register would contain two parts. Part A would list the names of children in need of care

⁸⁶ Screening legislation has been adopted in Queensland, New South Wales, Victoria, and including Western Australia.

⁸⁷ Section 22.

⁸⁸ At p 267 – p 279.

⁸⁹ Recommended by the Commission in its investigation into the Review of the Child Care Act (Project 110).

and protection. Part B would be a register of those found unfit to work with children by either a court or an administrative forum in disciplinary proceedings.

- (d) The SALC did not support the view that such a register be open to the public in general, but it considered it should be open to prospective employers of persons who would or might, in any manner whatsoever, work with children, supervise children or be in a position of authority, trust or responsibility over or in regard to children.
- (e) The SALC also recommended the creation of a new criminal offence of non-disclosure of conviction of a sexual offence as follows:

"Any person who has been convicted of a sexual offence and who fails to disclose such conviction when applying for employment that will place him or her in a position of authority or care of children, or when offering or agreeing to take care of or supervise children, shall be guilty of an offence and liable, upon conviction, to a fine or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment."⁹⁰

3.89 The recommendations have resulted in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007, enacted on 14 December 2007. Section 42 of the Act places an obligation on the Minister for Justice and Constitutional Development to establish and maintain a National Register for Sex Offenders. The register would include the names of persons convicted of a sexual offence against a child or a person who is mentally disabled.⁹¹ It seems, however, that convictions for sexual offences against a normal adult would not be covered by the register. On the other hand, the register is stringent in that allegations to have committed a sexual offence against a child would be covered.⁹² An employer is prohibited from employing or continuing to employ a person whose particulars have been included in the register.⁹³ There is also a prohibition on persons who have been convicted of sexual offences against children (or persons who are mentally disabled) from working with or having access to children (or persons who are mentally disabled), whether as an employer, employee, foster parent or adoptive parent.⁹⁴

⁹⁰ At p 279.

⁹¹ Section 50(1)(a)(i).

⁹² Section 50(1)(a)(ii).

⁹³ Section 45.

⁹⁴ Section 41.

Summary

3.90 It can be seen that the measures available in overseas jurisdictions are many and varied. The proposed interim measure to be discussed in the next chapter is a very modest scheme compared to many of the measures described.

Chapter 4

Recommendations

Introduction

4.1 Information about the background history of applicants for jobs is important to employers seeking to fill positions of trust. Where the job involves working with children or mentally incapacitated persons (collectively referred to in this chapter as "child-related work" for the sake of simplicity),¹ information as to a job applicant's previous convictions for any sexual offences would clearly be relevant in assessing the applicant's suitability.

4.2 We have seen that employers offering child-related work in other jurisdictions are provided with this much needed information, and it is evident that that enhances protection for children and vulnerable persons. It is something of an anomaly that in Hong Kong employers offering child-related work can ask an applicant to provide information about his sexual conviction record, but the employer has no means of finding out whether the applicant is being truthful.²

4.3 We are particularly concerned about the present lack of an effective system in Hong Kong to prevent sex offenders from using their employment or voluntary services to target and sexually abuse persons with whom they work.³ Having examined the relevant provisions and schemes in various jurisdictions, as well as the jurisprudence which has been developed, we believe that it is reasonable, responsible and necessary to introduce a system whereby employers or parents may ascertain whether those who are in child-related work or employment have any previous convictions for sexual offences.

4.4 We hope that the proposed interim measure will be capable of swift implementation by way of administrative guidelines without legislation. For reasons further elaborated below, we propose an interim measure whereby an administrative scheme is established to enable the sexual conviction records of persons who undertake child-related work to be checked, with proper measures built into the system to address human rights and rehabilitation concerns.

¹ As mentioned in the Preface, we believe that, apart from children, mentally incapacitated persons within the meaning of section 117 of the Crimes Ordinance (Cap 200) deserve the same protection under our proposed interim measure. In the discussion below, unless the context suggests otherwise, references to children will therefore include mentally incapacitated persons.

² Except in some limited circumstances. See para 1.2(c) above.

³ See the discussion, above, in Chapter 1 and the article by Sullivan and Beech "Professional perpetrators: sex offenders who use their employment to target and sexually abuse the children with whom they work" (2002) *Child Abuse Review* Vol.11: 153-167.

4.5 We wish to stress, however, that while our proposals should help employers to assess the suitability of applicants for child-related work, a sexual conviction record check in itself cannot take the place of prudent employment practice and proper parental supervision. The proposals represent only one small step towards the goal of ensuring protection to children whilst taking into account the right of ex-offenders to move on from their past crimes.

The consultation exercise

4.6 In July 2008, the Sub-committee issued a consultation paper setting out nine recommendations for comment and discussion by the public. The consultation exercise ended on 31 October 2008, but substantial responses were received as late as February 2009.

4.7 Almost 200 written responses were received from schools, other organisations and individuals. The written responses have provided us with valuable information and insight into this area of reform from different perspectives. These different views and perspectives have shaped the recommendations in the paper and will be discussed below. We wish to thank all those who responded to the consultation paper once again for their contribution to this report.

Broad community notification not recommended

4.8 The Sub-committee recommended in the consultation paper that a US-style "Megan's Law" whereby the names and other personal information of sex offenders are made available for inspection by the general public should not be introduced in Hong Kong.

Consultees' responses

4.9 The views received on this recommendation were almost unanimous. There was cross-sector agreement that a "public register" along the lines of the US-style Megan's Law was not suitable and would seriously hamper the rehabilitation opportunities of ex-offenders.

Our views

4.10 We are against the introduction of a sex offender register which is open for public inspection not only because it will stifle rehabilitation and reintegration opportunities for ex-offenders but also for the following disadvantages:

- A public register would in some cases cause the identity of the victim to be revealed.

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

4.11 Hence, this recommendation has not been amended.

Recommendation 1

We do not recommend the introduction in Hong Kong of a US-style "Megan's Law" whereby the names and other personal information of sex offenders are made available for inspection by the general public.

Sexual conviction record check

4.12 The Sub-committee recommended in the consultation paper that, as an interim measure, an administrative scheme should be established to enable the sexual conviction records of persons who undertake child-related work to be checked. The Sub-committee also recommended that proper measures should be built into the system to address human rights and rehabilitation concerns.

Consultees' responses

4.13 Among the 84 schools, school principals or related associations that responded in writing, there was overwhelming support for the proposed scheme, with only one school taking a neutral stance. One of the schools sent out 220 questionnaires and reported that 85% of the parents who responded were in support.

4.14 Among the 69 organisations that responded in writing, there were 43 supporting the recommendation, and 17 against, with the rest either neutral or unclear. We note that family service organisations and children concern groups were almost unanimous in their support for this recommendation.

Medical and affiliated associations were also supportive of the recommendation. Many of the organisations supporting the proposed scheme also made suggestions on other aspects of the scheme, and these will be dealt with later in this chapter. As for organisations that were against the recommendation, some of these were offenders' rehabilitation concern groups, homosexual interests concern groups, human rights concern groups and various other associations.

4.15 Of the 46 individuals who responded in writing, there were 18 supporting, and 24 opposing with the rest being unclear.

Arguments advanced by those against the proposed scheme

4.16 A number of the organisations and individuals who were against the proposed scheme based their arguments on studies of Megan's Law in the US, and it was evident that some respondents wrongly assumed that the "sex offender register" proposed was akin to that in Megan's Law, despite the explanation in the consultation paper. To avoid such misunderstandings, the title of this report has been amended.

4.17 The arguments against may be categorised as follows:

- The proposed scheme is not conducive to the rehabilitation of offenders.
- It violates human rights, and is discriminatory to sex offenders in that offenders convicted of violence-related and drug-related offences are not similarly treated.
- There should be a comprehensive review of existing sexual offences first.

Rehabilitation

4.18 It was argued that sex offenders have already lost the opportunity to work as medical doctors, civil servants or in the disciplinary forces; if they were to be barred from working in the educational sector or child-related jobs, then sex offenders would be deprived of a further opportunity to find a job with good prospects.

4.19 We emphasise that the proposed scheme is not a scheme to automatically bar previous sex offenders from working in child-related fields. It is a scheme which enables employers and parents to decide whether to employ a person with a previous sexual conviction record for child-related work on a fully informed basis. If there is clear evidence that a previous sex offender has been fully rehabilitated, he may still be employed in a child-related field and his employer may also adopt measures to minimise any risk of re-offending (eg not allowing him to work with children unsupervised). We appreciate that some employers or parents may simply refuse to allow a previous sex offender to work in a child-related field solely on the basis of his

conviction record, but we believe that Hong Kong is a mature society with many employers and parents being fair-minded and supportive of the rehabilitation of previous sex offenders. Moreover, there are also a vast range of job opportunities, offering good prospects which will not be affected: these include catering, hospitality, retail, real estate, transport, logistics, trading, banking, insurance, etc. Hence, even if child-related work were ruled out, sex offenders would have ample opportunities to re-integrate into society.

Human rights

4.20 With regard to the privacy rights of sex offenders and their rehabilitation, we accept that these are legitimate concerns which should be considered. These rights, however, are not absolute. Article 14 of the Hong Kong Bill of Rights (HKBOR) requires that any interference with a person's right to privacy must not be unlawful. However, since we propose that the data subject's informed consent is required before the sexual conviction records check is carried out and given that it is not mandatory for an employer to conduct such a check, the interference is unlikely to be unlawful for the purpose of Article 14 of the HKBOR. We also recognise that, notwithstanding that offenders are convicted in open court, any unnecessary disclosure of an ex-offender's records may still infringe his privacy rights.⁴ However, it is to be noted that the conviction information is already in the public domain and the media could have chosen to report on the convictions⁵ in the first place. Private registers, relying on news reports, have been set up in some other jurisdictions and we do not want this to happen in Hong Kong as the information may be incomplete and may easily lead to a mistaken identification. If proper measures are built into the proposed system to protect the legitimate interests of sex offenders, privacy concerns should not impede the introduction of the interim measure.⁶

4.21 As for Article 33 of the Basic Law which provides that "*Hong Kong residents shall have freedom of choice of occupation*", it should be noted that a sex offender is not prohibited from applying for child-related work and that it is up to the prospective employer to decide, after having considered the information obtained from the sexual conviction records check and the relevant circumstances of a particular case, whether the sex offender is suitable for performing the job in question. In the circumstances we are of the view that the proposed scheme does not infringe the sex offender's right protected by Article 33.

4.22 Moreover, the Government has a constitutional duty under Article 24 of the ICCPR to protect children from sexual exploitation. The UN Committee on the Rights of the Child considers that it is the obligation of States Parties to enact and enforce laws to prohibit all forms of sexual exploitation; to create a safe and supportive environment for adolescents, including within their family, in schools, in all types of institutions in which they

⁴ See HKLRC, Report on *Civil Liability for Invasion of Privacy* (2004), at Chapter 8.

⁵ Except for juvenile offenders.

⁶ See discussion in Chapter 2.

may live, within their workplace and in society at large.⁷ Children with disabilities are more vulnerable to all forms of abuse, be it mental, physical or sexual; and in all settings, including the family, schools, private and public institutions. States Parties are urged to take all necessary measures for the prevention of abuse of and violence against children with disabilities, such as ensuring that parents are vigilant about choosing caregivers and facilities for their children and improving their ability to detect abuse.⁸

Discrimination

4.23 As for the discrimination argument, differential treatment between the different types of offenders would be permissible under Article 22 of the HKBOR if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the ICCPR.⁹ Further, it has been held that differences in legal treatment are justified where the difference: (i) pursues a legitimate aim; (ii) is rationally connected to the legitimate aim; and (iii) is no more than necessary to accomplish the legitimate aim.¹⁰

Comprehensive review of sexual offences first

4.24 We are indeed charged under the terms of reference with the responsibility of reviewing the common and statute law governing sexual and related offences. However, given the range of issues likely to arise, including the need for legislative reform, we feel strongly that our proposed interim measure should not be delayed.¹¹

Our views

4.25 It is evident from the responses that there is strong demand for the proposed scheme from schools, parents, children concern groups, and medical groups. Those written responses which were in support of the proposed scheme recognised that there is a risk that those with proclivities to sexually molest or harm children may seek out areas of work which provide opportunities for contact with children. There is a clear public interest in safeguarding children from the risk of such sexual exploitation. Criminal record checks are widely considered to be one legitimate safeguard in providing the desired protection. Such checks may deter persons with previous sexual conviction records from applying to work with children, or, if they are not deterred, should be able to prevent those people from gaining positions involving child-related work.

⁷ General Comment No. 4 (2003) issued by the Committee on the Rights of the Child, Thirty-third session, 19 May – 6 June 2003, at paragraphs 37 and 39(a).

⁸ General Comment No. 9 (2006) issued by the Committee on the Rights of the Child, Forty-third session, 11-29 September 2006, at paragraphs 42 and 43(b).

⁹ See General Comment 18 (Thirty-seventh session, 1989) issued by the UN Human Rights Committee, at paragraph 13.

¹⁰ *Secretary for Justice v Yau Yuk Lung Zigo & Another* [2007] 3 HKLRD 903.

¹¹ See also Preface, at paras 12-20.

4.26 We have borne in mind that the privacy interests of sex offenders and the public interest in their rehabilitation and reintegration into the community require that access to the criminal record information, and its use and disclosure, should be subject to appropriate restrictions. These concerns will be reflected in various features of the proposed scheme to be discussed later in this chapter.

Limitations of the proposed scheme

4.27 As the proposed scheme is modest and has only limited scope of application, schools and parents should be aware of its limitations and remain vigilant. Limitations include:

- (a) It will not prevent first-time offenders from perpetrating crimes on children.
- (b) It will not prevent abuses perpetrated by strangers who intercept children in public places, and cannot replace the need for children to be supervised in such places.
- (c) It will not prevent abuses that take place within the family.
- (d) It will not cover overseas conviction records.

4.28 The prevention of sex crimes against children is a complex issue, and there is no single panacea for the problem. Hence, a variety of measures have been employed in other jurisdictions to achieve the objective.¹² If the proposed interim measure is likely to reduce the risks to children and the vulnerable, there is, in our view, justification for its introduction, provided that any curtailment of the sex offender's privacy rights is proportionate and necessary for the protection of children and the cost involved is not prohibitive. Further, the setting up of a proper sexual conviction records check system may forestall the development of private registers, as has happened elsewhere and led to other problems. Having considered the various views advanced during the consultation exercise we maintain the second Recommendation.

Recommendation 2

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

¹² See the discussion, above, in Chapter 3.

Child-related work and work relating to mentally incapacitated persons

4.29 As it is our objective to safeguard children and mentally incapacitated persons whilst protecting, as far as practicable, the rights and rehabilitation opportunities of sex offenders, the Sub-committee recommended in the consultation paper that the proposed administrative scheme for sexual conviction records checks should apply only to child-related work and work relating to mentally incapacitated persons ("MIP-related work").

What is child-related work and MIP-related work?

4.30 The consultation paper recommended that any proposed protection should cover all children under 18 years of age. As explained in paragraph 20 in the Preface, we believe "mentally incapacitated persons" within the meaning of section 117 of the Crimes Ordinance (Cap 200) deserve similar protection.

4.31 It was proposed that "child-related work" should cover work where the usual duties involve, or are likely to involve, contact with a child. There are many work situations where there is occasional contact with children or where the customers may be children; for example, the general retail industry, eateries or the cinema. It is not our intention that persons in those work situations should be required to undergo sexual offences records checks. Similarly, "MIP-related work" should cover work where the usual duties involve, or are likely to involve, contact with a mentally incapacitated person. Unless the context suggests otherwise, reference to child-related work in the discussion below includes MIP-related work.

Consultees' responses

4.32 It seems this is not one of the most contentious recommendations in the consultation paper; few of the responses expressed views contrary to this recommendation. Other views and suggestions received relating to this recommendation were:

- That the categories of "child-related work" should be made clearer;
- Whether volunteers should be included in the proposed scheme;
- That the protection of the scheme should cover only children under 16 years of age,¹³ and
- That legal guardians should be allowed to request a check in appropriate circumstances.

¹³ Hong Kong Bar Association.

Our views

That the categories of "child-related work" should be made clearer

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

- (a) educational institutions including secondary schools, primary schools, kindergartens, nursery schools, child care centres and special schools for mentally incapacitated persons;
- (b) community services, remand centres, detention centres, youth centres, training centres or probation services;
- (c) day centres, or refuges or other residential, boarding or camping facilities used by children and mentally incapacitated persons;
- (d) paediatric wards of public and private hospitals;
- (e) special wards for mentally incapacitated persons of public and private hospitals;
- (f) clubs, associations or movements (including of a cultural, recreational or sporting nature) that provide services or conduct activities for children or mentally incapacitated persons;
- (g) activities organised by religious organisations for children or mentally incapacitated persons;
- (h) baby sitting or child minding services;
- (i) coaching or private tuition services of any kind for children or mentally incapacitated persons including sports, music, language, and vocational;
- (j) counselling or other support services for children or mentally incapacitated persons;
- (k) providing transportation service specifically for children or mentally incapacitated persons; and
- (l) providing play facilities specifically for children or mentally incapacitated persons.

4.34 Some of the responses queried whether domestic helpers,¹⁴ cleaners or security guards would be included. This question should be determined not purely on the basis of the job title, but on whether the job responsibilities were governed by the definition of "child-related work", that is, "work where the usual duties involve, or are likely to involve, contact with a child." If a local domestic helper is serving a household of adults, then the helper's work is not child-related work even when occasionally she helps to take care of a child visitor. As for cleaners, those working in eateries or shops would clearly not be doing "child-related work"; whereas those working in schools would be. We envisage that there will be some less clear-cut cases, but any such query can be directed to the administrative body of the scheme. With regard to security guards, they are regulated under the Security and Guarding Services Ordinance (Cap 460). They are subject to conviction record checks not only under Part XII of the Crimes Ordinance (Cap 200), but also under the Societies Ordinance (Cap 151), the Dangerous Drugs Ordinance (Cap 134) and also other offences involving fraud, dishonesty or violence.

Whether volunteers should be included in the proposed scheme

4.35 Some responses mentioned that due to limited resources, volunteers play an important role in the delivery of services by many non-government organisations ("NGOs"). The proposed check and the required fees would dampen their enthusiasm to take up volunteer work. However, other volunteering associations take the view that volunteers should be regarded as equal to employees, especially in respect of reference checking if they are involved in services for children or MIPs. We agree that volunteers, like employees, would have opportunities to come into contact with children and mentally incapacitated persons. To afford adequate protection under the scheme, we believe volunteers should be included. If the particular association is confident that all volunteers would be subject to appropriate supervision, the association may well decide to dispense with the check. If volunteers are excluded from the scheme, a volunteering association has no means to find out about the conviction records of a particular volunteer.

That legal guardians should be allowed to request a check in appropriate circumstances

4.36 As the proposed scheme aims at protecting both children and MIPs, the definition of "employers" should include also legal guardians. Some MIPs may be adults who suffer from mental disorder or are mentally handicapped. They may not be under the care and control of their parents as their parents may have already passed away. Instead, they may be looked after by their legal guardians such as siblings and other relatives. To include legal guardians within the definition of "employers" would enable the actual person looking after the MIP to conduct the necessary sexual conviction records check.

¹⁴ As stated, any overseas convictions in respect of overseas domestic helpers will not be covered in the interim scheme.

That the protection of the scheme should cover only children under 16 years of age

4.37 The Hong Kong Bar Association ("the HKBA") is of the view that the protection of the scheme should cover only children under 16 years of age. The HKBA notes that the age of consent to sexual intercourse stands at 16 years of age unless the person needs special protection because of a mental condition. According protection against paedophiles to 16-18 year olds when the law has already provided that persons of this age range can have sexual autonomy may appear illogical.

4.38 We are of the view, however, that the age of consent to sexual intercourse is to be distinguished from the age of majority. Recognising that a person at 16 years of age or above should be given sexual autonomy does not mean that he or she does not require protection from sexual abuse. Under the Convention on the Rights of the Child, a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.¹⁵ The age of majority in Hong Kong is 18 and so Hong Kong has Convention obligations to provide reasonable protection to all children under 18.

4.39 A person doing child-related work is in many instances in a position of trust and authority, and a youth who is over 16 but below 18 may not have the maturity or strength to resist sexual abuse. The proposed scheme should therefore cover all children up to 18 years old.

Definition of "work"

4.40 In order to provide adequate protection, we propose that the word "work" should be given a wide meaning, and should include work carried out by an individual:

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

4.41 The reference to "employers" should accordingly be construed in a wide sense to cover also supervisors of volunteers, parents engaging the services of self-employed tutors, and legal guardians of MIPs.

¹⁵ General Comment No. 4 (2003) issued by the Committee on the Rights of the Child, Thirty-third session, 19 May – 6 June 2003, at paragraph 1.

Recommendation 3

We recommend that for the purposes of these recommendations "child-related work" be defined as work where the usual duties involve, or are likely to involve, contact with a child (ie a person aged under 18). Further, "work relating to mentally incapacitated persons" (or "MIP-related work") should include work where the usual duties involve, or are likely to involve, contact with a mentally incapacitated person. Employees, volunteers, trainees and self-employed persons undertaking child-related work or MIP-related work should be covered by the proposed system.

Checks should not be mandatory

4.42 We are aware that in some overseas jurisdictions, criminal record checks are made mandatory by legislation in respect of child-related work. We believe there are arguments for and against imposing such a mandatory obligation on employers. There may well be instances in which an employer is of the view that a sexual conviction record check is not necessary. An example would be a mother seeking to hire a private tutor to provide part-time tuition to her child at home. If the tutor is known by another parent to have worked reliably for a considerable period of time, and if the mother has decided that she would be present at all times, it may properly be considered that a check is not necessary. We therefore recommended in the consultation paper that it should not be mandatory for employers to conduct a check.

Consultees' responses

4.43 A number of the written responses were of the view that the checks should be mandatory.¹⁶ They believed that a non-mandatory scheme was too weak and that its flexibility meant that it could not ensure safety and protection for children. Employers would dispense with the check for the sake of convenience and could avoid doing checks without having to face any consequences.

4.44 Another response¹⁷ pointed out that a voluntary scheme could easily fall into disuse, and mentioned as an example the "certificate system" for childminders under the Child Care Services Ordinance (Cap 243).

¹⁶ Including Against Child Abuse, the Boys' & Girls' Clubs Association of Hong Kong, the Christian Family Service Centre (School Social Work Unit), the HK Association of Sexuality Educators, Researchers & Therapists, the HK College of Paediatricians (mandatory for registered organizations, not private hirers), the HK Council of Social Service and the HK Family Welfare Society.

¹⁷ HK College of Paediatricians.

4.45 On the other hand, many other consultees supported the view that the proposed scheme should be voluntary.

Our views

4.46 It is not correct that employers who take unjustified risks or are negligent about conducting the proposed checks can avoid any consequence. Indeed, irrespective of whether there is negligence, an employer may be held vicariously liable in tort action for any sexual abuse committed by its employee,¹⁸ and so it would be in the interest of the employer to invoke the proposed scheme to reduce the risk of such liability when selecting and recruiting staff.

4.47 While the risk that a voluntary scheme might fall into disuse cannot be ruled out, we believe many employers would still choose to make use of the scheme on a voluntary basis.

4.48 Whether to make checks mandatory but subject to certain defined exceptions merits further consideration as part of the comprehensive scheme to be devised in due course. However, as explained in the Preface, our proposed interim measure must be lawful and capable of implementation without legislation. Without legislative backup the checks cannot be made mandatory. Moreover, mandatory checks would not be appropriate in all situations (they would not be, for instance, in the example discussed in paragraph 4.42 above). The focus of our proposed scheme at this stage is to give the employer a choice and the means to ascertain whether an employee has any previous convictions for sexual offences.

Recommendation 4

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

¹⁸ The Court of Final Appeal in *Ming An Insurance Co (HK) Ltd v Ritz Carlton Co Ltd* [2002] 3 HKLRD 844 followed the English House of Lords decision in *Lister v Hesley Hall Ltd* [2002] 1 AC 215 and held that an employer was vicariously liable for an employee's unauthorised tortious act if the employee's tort was so closely connected with his employment that it would be fair and just to hold his employer vicariously liable. In the *Lister* case, the warden of a boarding house attached to a school had sexually abused pupils residing in the boarding house. The House of Lords held that the employers had undertaken to care for the resident children and had entrusted that obligation to the warden, so that the warden's unauthorised acts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable.

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

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

Consultees' responses

4.50 Not all the written responses dealt with the issue, but it is apparent that among those which did, the vast majority favoured the application of the scheme to both existing and prospective employees. The principal reason advanced was that a loophole would otherwise be created which would be too substantial for effective protection to be rendered to children. Among these responses, some¹⁹ mentioned that in order to avoid a sudden rush of check applications, implementation could be done progressively in phases.

Our views

4.51 We agree with the suggested phased approach not only because of resource and logistical problems, but also because this approach would keep the problems of employment disputes and the social problems stemming from unemployment to a minimum.

4.52 Employment issues may arise if an existing employee refuses to give consent to the sexual conviction records check, or if it is found out that he or she has a relevant sexual conviction. A major question that could arise in either scenario is whether the employer can lawfully terminate the employment, either summarily or by giving notice (or by payment in lieu of notice).²⁰

¹⁹ Including the HK Medical Association and the HK College of Paediatricians.

²⁰ An employer may be entitled to terminate an employment contract by giving notice, or by payment in lieu of notice, under sections 6 and 7 respectively of the Employment Ordinance (Cap 57). An employer is entitled to summarily terminate the employment contract without notice under section 9 of the Employment Ordinance: "(a) if an employee, in relation to his employment (i) wilfully disobeys a lawful and reasonable order; (ii) misconducts himself such conduct being inconsistent with the due and faithful discharge of his duties; (iii) is guilty of fraud or dishonesty... or (b) on any other ground on which he would be entitled to terminate the contract without notice at common law". Employers may well contend that an employee's

4.53 Given the wide variety of different circumstances which could arise, there is no simple answer to the question whether summary dismissal is justified unless the full facts and circumstances of the case in question are examined. Relevant facts and circumstances might include:

- (a) Whether before being offered employment the employee had been asked to declare whether he had any previous conviction;²¹
- (b) The terms of the employment agreement;
- (c) The nature of the employee's job; and
- (d) The nature and circumstances of the sexual conviction in question.

4.54 Instead of summary dismissal, the employer may lawfully terminate an employee's contract by giving the requisite notice under section 6 of the Employment Ordinance (or payment in lieu of notice under section 7). The employer is normally not under any obligation to disclose the reasons for the termination to the employee.²² Employers are also reminded that termination of employment should not be seen as the only way to resolve any differences; both employers and employees may consider other less drastic arrangements if the employee is found to have a relevant conviction or refuses to give consent to checking the employee's sexual conviction record. The employee might be re-deployed to undertake job duties which are not

refusal to give consent to his sexual conviction records being checked would fall under sub-paragraph (i) above. However, where an employer terminates a contract summarily, the onus is on the employer to prove that the dismissal was made according to one of the grounds set out in section 9 of the Employment Ordinance. If the decision to dismiss summarily cannot be justified, that employer may be liable to pay damages for wrongful dismissal.

²¹ Questions of this nature involve the collection of personal data and are subject to the Data Protection Principles set out in the Personal Data (Privacy) Ordinance (Cap 486). The Office of the Privacy Commission for Personal Data issued a Code of Practice of Human Resource Management in 2000, which provides that an employer should not collect data from job applicants unless the data are adequate but not excessive for the purpose of recruitment, but that generally it is not excessive to collect data to increase an employer's knowledge of a candidate's good character and, depending on the job nature, this may involve security vetting or integrity checking procedures (see paras 2.2.1 and 2.7.1 of the Code). Unless asked, there is no general duty for the job applicant to disclose his/her previous convictions (see eg the English Court of Appeal decision in *Sybron Corporation v Rochem Ltd* [1984] 1 Ch 112, citing an earlier House of Lords decision in *Bell v Lever Brothers* [1932] AC 161). If the employee lied when asked about his previous convictions, this may constitute a ground for summary dismissal under section 9(a)(ii) or (iii) of the Employment Ordinance (unless the previous conviction is treated as spent under the Rehabilitation of Offenders Ordinance (Cap 297): see the discussion at paragraph 4.83-4.88 below.).

²² However, where the employee has been employed under a continuous contract for a period of not less than 24 months, the dismissal or variation of employment terms of the employee may give rise to a presumption under Part VIA of the Employment Ordinance (Cap 57) that the employer intended to extinguish or reduce any right, benefit or protection conferred upon the employee. In that situation, it is for the employer to show that the true and relevant reason for dismissing the employee is one of the grounds provided in section 32K of the Ordinance. See for example the Court of Final Appeal's decision in *Vincent v South China Morning Post Publishers Ltd*. [2004] 4 HKC 205. It should be noted that Hong Kong's employment legislation is materially different from that of the United Kingdom. In the United Kingdom, the issue was whether the dismissal was fair or unfair, depending on whether the dismissal falls within the band of reasonable responses which a reasonable employer might have adopted.

child-related, or measures could be taken to ensure that the employee's contact with children is supervised by another staff member.

4.55 We are aware that some would like to see that all existing and prospective employees are covered even at the initial phase. Their reasons include:

- Sex offenders who have already gained employment in child-related work before the implementation of the proposed interim measure may escape the net of the sexual conviction records check;
- An employer may be held vicariously liable in tort action for any sexual abuse committed by its employee,²³ and so the existing employer may also wish to invoke the proposed scheme to reduce the risk; and
- Distinguishing between existing and prospective employees may also lead to complications in implementation – for example, whether a private tutor employed by a tutorial centre should be treated as an existing employee if he is tutoring different children from time to time, and whether an employee who intends to change from work that does not involve usual contact with children to work that does should be regarded as an existing employee for the purpose of the proposed scheme.

4.56 We are aware, however, that for practical reasons, it is common for similar schemes to be implemented in phases. Victoria's Working with Children Check under the Working with Children Act 2005 was phased in over five years. The phased approach can also give enough time to sex offenders who are affected by the scheme either to make alternative arrangements with their existing employer, or to find a new employer.²⁴

Recommendation 5

We recommend that the proposed scheme should apply to both existing and prospective employees. The scheme should be implemented in stages, covering prospective employees only in the initial phase, and then extending to existing employees; but in view of the strong community support in favour of an extension, the scheme should be extended to existing employees as soon as practicable.

²³ See footnote 18 above.

²⁴ The phased approach can be structured in various ways depending on the experience gained from the launch of the initial phase. One possible structure is to have three phases: the first phase covering only prospective employees, the second phase covering employees in continuous employment for two or three years, and the third phase covering the remaining employees.

Method of application

4.57 The Sub-committee recommended tentatively in the consultation paper that the existing schemes of Certificate of No Criminal Conviction ("CNCC") and data access requests for criminal conviction data be modified and adapted to enable the type of checks proposed. The checks should be initiated by the job applicant/data subject. A "clean" check result would not be recorded in writing but would be communicated verbally to the applicant or his employer(s).

Background information on data access requests for criminal conviction data

4.58 A person may make a personal data access request under the Personal Data (Privacy) Ordinance (Cap 486)²⁵ in respect of his own criminal records held by the police. At present, any such application can be made to the police's Criminal Conviction Data Office ("CCDO")²⁶ upon payment of a fee of \$50. If a person has a previous conviction, he will be provided with a written record listing out all the conviction records kept by the police. However, if the person has a clear record, he will only be advised of such a fact verbally and will not be given any certificate or written confirmation. In this regard, we have also noted a recent decision issued by the Administrative Appeals Board on 10 December 2008 in *Tuckfield v Privacy Commissioner for Personal Data* (No. 1 of 2008). The decision concerned how the Police should respond to a personal data access request made by the appellant for his and his family's criminal conviction record (or confirmation of its absence) under section 18 of the Personal Data (Privacy) Ordinance, but not under the Police's CNCC scheme and CCDO scheme. The Appeals Board was of the view that, given that the data access request and the data correction request are required to be made in writing, and that other notices to the requestor are also in writing, it would be unreasonable, if not absurd, to suggest that a requestor need only be verbally informed if no personal data of his were held. The Appeals Board also said that it was wrong for the Police to require a requestor to attend their office in order to have access to his personal data. The Appeals Board remitted the case to the Privacy Commissioner for Personal Data to continue his investigation of the Appellant's complaint.

4.59 We understand the primary reason for not issuing any written confirmation of no criminal conviction to the data subject arises from rehabilitative concerns: the police have long considered it undesirable to create a sub-class of people who are unable to produce a no-conviction certificate, putting them at a disadvantage in seeking employment generally and undermining the spirit of allowing offenders the opportunity to rehabilitate and lead a new life. Moreover, the police feel that if a certificate of no criminal conviction is generally available to the data subject, there would be a real

²⁵ Section 18.

²⁶ A proforma application form may be obtained from a police station or from <http://www.police.gov.hk/hkp-home/english/enquiry/doc/DataAccessRequestCriminal.pdf>.

possibility of fabrication of or alteration to such certificates. These concerns have not, however, been considered or discussed in the *Tuckfield* case.

Background information on Certificates of No Criminal Conviction ("CNCC")

4.60 However, as an exception to the general approach of not issuing written confirmation of no criminal conviction, a person may apply for a Certificate of No Criminal Conviction ("CNCC") to the police's Certificate of No Criminal Conviction Office for immigration and adoption purposes, upon payment of a fee of \$180. In order to ensure that the certificate will be used only for the stated purpose, the CNCC will not be issued to the data subject, but will be issued directly to the foreign consulates or the duly recognised adoption approving authorities concerned.

4.61 If the applicant is under investigation by the police, or is currently a defendant in criminal proceedings in Hong Kong, his application will not be further processed until the matter concerned has been concluded, and the police will issue a letter to the applicant informing that his application will not be finalised pending conclusion of the matter.

The method of application proposed in the consultation paper

4.62 The Sub-committee's recommendation in the consultation paper was based on the following considerations:

- (a) In the absence of any legislative basis, a sexual conviction record check should not be conducted without the data subject's consent, and should comply with the Personal Data (Privacy) Ordinance (Cap 486) and the relevant Data Protection Principles.
 - Hence, the application should be initiated only by the data subject who should be informed by the employer whether it is obligatory or voluntary for him to supply the data.²⁷
 - The employer should be made aware that the sexual conviction records information obtained under the proposed scheme should not be used for any other purpose.²⁸
- (b) The scheme should ensure, as far as practicable, that only *bona fide* employers involved in child-related work will have access to the information.

²⁷ Data Protection Principle 1 – purpose and manner of collection of personal data.
²⁸ Data Protection Principle 3 – use of personal data.

- We expressed concern as to the possibility that the introduction of the scheme might encourage employers not involved in child-related work to require a check to be done as well. Such a development would be undesirable because it would undermine the rehabilitation of sex offenders.
- Hence, we considered whether mechanisms could be devised to prevent employers not involved in child-related work from requiring job applicants (data subjects) to undergo a sexual conviction record check, particularly the feasibility of requiring the employer to join in the application process. If the employer were to become a party to the application, he would inevitably be required to submit his personal particulars for verification. Employers may feel uneasy about releasing their personal particulars to the applicant. Therefore, employers would either have to submit their details to the relevant checking authority separately, or attend the checking authority in person (together with the applicant) to submit their personal details.
- Even assuming that employers consented to submitting their personal particulars to the checking authority, in order to ascertain that the work was child-related work, information as to the nature of the employer's business would also be required. Not only would the application become complicated and onerous for employers, but it would also be out of proportion to the objectives of the interim scheme if investigation work had to be carried out to verify the business information rendered.
- We have also considered the possibility of relying on a declaration by the employer in order to avoid the need for investigative work. That would require a penalty for making a false declaration which would require legislation.
- Given these considerations, we are inclined towards not requiring the employer to join in the application.
- As a practical matter we believe that the structure of the system is unlikely to attract the interest of employers other than those involved in child-related work. Unlike the criminal record checks in other jurisdictions which reveal a broad spectrum of convictions, our proposed system would reveal only sexual offences, and should not have repercussions outside child-related work. Any employer not involving child-related work who seeks to abuse the system may also be liable under the Personal Data

(Privacy) Ordinance (Cap 486) for violation of Data Protection Principle 1.²⁹

- (c) The scheme should avoid creating a situation in which there is a sub-class of people in society who are unable to produce a no-conviction certificate for general employment purposes.
- Hence, like the CCDO scheme, the result of a "clean" sexual conviction records check would not be recorded in writing; instead, it would be communicated to the employer or the data subject orally.
 - If the applicant has a previous sexual conviction record, he will be provided with a written record listing out all those convictions, as in the CCDO scheme. If the applicant so consents, such a written record may be given to his employer so that the employer may make an informed decision as to whether the applicant should still be employed, notwithstanding the previous sexual conviction(s).
- (d) The scheme should be user-friendly.
- As the sexual conviction records check will not be mandatory, it is important that the proposed scheme is user-friendly so that employers are not discouraged from using it, which would defeat the purpose of setting up the scheme in the first place.
- (e) The scheme should be convenient for job applicants who need to make multiple job applications within a short time.

²⁹

Principle 1(1) provides that:

"Personal data shall not be collected unless-

- (a) the data are collected for a lawful purpose directly related to a function or activity of the data user who is to use the data;*
- (b) subject to paragraph (c), the collection of the data is necessary for or directly related to that purpose; and*
- (c) the data are adequate but not excessive in relation to that purpose."*

According to 3.2.3 of the Code of Practice of Human Resource Management issued by the Office of the Privacy Commission for Personal Data, an "employer may collect personal data of an employee to facilitate integrity checking" provided that:

- 3.2.3.1 the requirements mentioned in paragraph 3.2.1 are complied with;*
- 3.2.3.2 the data are important to the employer in relation to the inherent nature of the job for which the employee is appointed; and*
- 3.2.3.3 the employer has a policy covering such practices, prior notice of which has been brought to the attention of the employee concerned."*

And 3.2.1 reads:

"An employer may, pursuant to paragraph 3.1.2, collect personal data from an employee and his family members provided that the collection of the data is:

- 3.2.1.1 necessary for or directly related to a human resource function of the employer; or*
- 3.2.1.2 pursuant to a lawful requirement that regulates the affairs of the employer; and*
- 3.2.1.3 by means that are fair in the circumstances and the data are not excessive in relation to the purpose."*

- A private tutor or piano teacher may work for a number of employers at the same time, or a job applicant may need to show the check result to a number of prospective employers at different times. It is also important, however, that the check result remains current. To strike a reasonable compromise and avoid the unnecessary costs and inconvenience involved in making multiple applications, the proposed scheme should enable the applicant to make multiple use of the check result within a specified period of, say, three to six months.
- (f) The scheme should be cost-effective.
- Since most conviction information is already stored in the police's database, and the existing CCDO and CNCC schemes have been successfully administered by the police for many years, we believe it would be most cost-effective and reliable for the police to handle the sexual conviction records checks.
 - With the additional workload of the proposed system, there would inevitably be substantial staffing and resource implications for the police to take on this new commitment. It is envisaged that an administrative fee would be charged for each application in order to cover the operating costs of this new service.
 - To reduce the staffing costs, the result of the check may, if the police consider it feasible and desirable, be made available by way of an auto-telephone answering service. The process we envisage is that the applicant would apply in person, providing necessary personal and job details in an application form and paying a prescribed administrative fee. He would be given a code number, and be informed that the result of the check would be available during a specified period at a telephone number by keying in his identity card number and the code number. The auto-telephone answering service would then allow multiple access to the check result by the applicant or his employers during the specified period. The auto-telephone announcement would state whether or not as at a particular date the applicant has been convicted of any of the specified sexual offences.

Consultees' responses

4.63 The 84 schools, school principals and related associations all agreed that the checking procedures should be made as simple as possible to encourage more employers to use the mechanism.

4.64 In addition, some consultees have expressed the following views:

- An overwhelming majority of those who responded on this issue believed that the check result (even a clean result) should be recorded in writing or some system of documentation.³⁰
- Two organisations suggested that selected organisations should be able to obtain the check result electronically or by telephone by keying in the identity card number of the applicant.³¹
- Other suggestions were that the fees should be kept low or that there should be no charge, and that there should be a performance pledge on the time required for checking.

Our views

4.65 We note that a substantial number of consultees have reservations about the telephone checking system suggested in the consultation paper, and many would prefer to have the results recorded in writing. We have considered various existing schemes which involve the checking of criminal conviction records. Security personnel, for example, are subject to checks for offences under the Societies Ordinance (Cap 151), the Dangerous Drugs Ordinance (Cap 134), offences involving fraud, dishonesty or violence and sexual offences under Part XII of the Crimes Ordinance (Cap 200). Security personnel are issued with permits which are valid for five years at a time. The police's criminal record office runs daily checks electronically on the more than 280,000 permit holders against conviction records to ensure the validity of the permit and any necessary follow-up action.

4.66 We are, however, reluctant to have the check results made available in writing. Although the telephone checking system as set out in the consultation paper has yet to be tested, it is our view that if properly designed, it should be able to strike the correct balance between: (1) providing an efficient and convenient checking system to employers, (2) ensuring ex-offenders would not be disadvantaged in seeking employment, other than child-related work, (3) adhering to the data protection principles, and (4) ensuring cost effectiveness.

Recommendation 6

We recommend that the current schemes of Certificate of No Criminal Conviction ("CNCC") and data access requests for

³⁰ Including Against Child Abuse, the Fu Hong Society, the Hong Kong College of Paediatricians, the Hong Kong Sheng Kung Hui Welfare Council, Justice, the Medical Coordinators on Child Abuse of Hong Kong Hospital Authority and the Women's Commission.

³¹ The Boys' & Girls' Clubs Association of Hong Kong and the Scout Association of Hong Kong.

criminal conviction data be modified and adapted to enable the type of checks proposed in this report to be conducted. The checks should be initiated by the job applicant/data subject and sufficient personal data privacy safeguards should be put in place to regulate the amount of personal data to be disclosed, the purpose of disclosure, and the accuracy and retention period of the records. A "clean" record check result would not be recorded in writing but would be communicated verbally to the applicant or his employer.

Types of offences to be covered by the scheme

4.67 In the consultation paper, the tentative recommendation was that the proposed sexual conviction record check should reveal only a specified list of sexual offences, and the employer should be made aware of the limitations of the check. The list of specified sexual offences was based on the offences applicable under the Child Care Services Ordinance (Cap 243).³²

Consultees' responses

4.68 We received almost 50 responses on this issue. There was some support for the tentative list of specified offences, but the overwhelming majority was of the view that the ambit of specified offences was too wide. The comments included:

- (a) The applicable offences should be limited to sexual offences against children;
- (b) Convictions of minors below the age of 18 for sexual intercourse with an underage girl should be reviewed;
- (c) Offences that were ruled as inconsistent with the Basic Law and/or the Bill of Rights in *Leung T C William Roy v Secretary for Justice*³³ and *Secretary for Justice v Yau Yuk Lung Zigo*³⁴ should not be included in the proposed scheme; and
- (d) The offence of soliciting for an immoral purpose should not be included because this would limit the employment opportunities of former sex workers.

³² See Schedule to the Ordinance.

³³ [2005] 3 HKC 77.

³⁴ [2007] 3 HKLRD 903.

Our views

4.69 In the light of these responses, we have reviewed the list of offences proposed in the consultation paper. In doing so, we have discussed and agreed certain principles which we think should be applied in deciding whether to include an offence in the proposed scheme. We have concluded that the proposed scheme should only include those sexual offences which:

- (a) involve the use of force, threats or fraud or are otherwise non-consensual; or
- (b) involve exploitation or abuse of position; or
- (c) involve a person under the age of 16 or a mentally incapacitated person.

4.70 For the purposes of (a), we consider that the minimum age for giving consent should remain at 16, and for the purposes of (c) (as we explain at paragraph 4.71(b) below), an exception should apply where the offender is not yet 18 and the offences involve sexual intercourse with an underage partner.

4.71 With reference to the comments set out in paragraph 4.68, our views are as follows:

- (a) It would be inappropriately restrictive if the proposed scheme covered only sexual offences committed against children. As discussed in Chapter 1, studies have shown that some offenders are prone to crossover offending; that is, they do not exclusively offend against a preferred victim type. Their preference can change over time, and they may attack other victim types when the preferred type is unavailable. Besides, the list of applicable offences in the vetting scheme³⁵ in other jurisdictions is not limited to offences committed against children.
- (b) A number of the responses highlighted the point that special treatment is warranted for a minor below the age of 18 who commits offences involving sexual intercourse with an underage girl who was essentially the offender's girlfriend,. We are aware that in many of these cases, the Police Superintendents' Discretion Scheme would be used, and there would not be a conviction. Nonetheless, we decided to adopt the suggestion to the effect that offences against sections 123 and 124 of the Crimes Ordinance (Cap 200) would be revealed only if the offender was 18 or above.³⁶

³⁵ List 99 in England, for example. See Chapter 3 for details.

³⁶ We understand from the police that relevant police files for offences committed a long time ago may no longer be available. There may thus be a few cases in which the exact age of the offender at the time of the offence is not ascertainable as the criminal record shows only the conviction date. We are of the view that a practical solution under the proposed scheme is to reveal only those offenders who were aged 21 or over at the time of the conviction, thus allowing a grace period of three years to take into account the time lapse between the date of offence and the date of conviction.

- (c) As for the offences affected by the *William Roy Leung* and *Yau Yuk Lung* cases, at the time of the consultation paper the Sub-committee was of the view that cases after the two court decisions would be either not prosecuted or acquitted, and the proposed scheme would only reveal convictions before the dates of the decisions. However, it is evident from the responses that inclusion of the relevant offences would be seen as discrimination against homosexuals. In view of the relatively small number of cases on record,³⁷ we recommend that these offences (to the extent they were ruled unconstitutional) should be excluded from the proposed scheme.
- (d) As for the offence of soliciting for an immoral purpose,³⁸ on considering the agreed principles, we again recommend the offence should be excluded from the proposed scheme.

4.72 For the protection of children and young persons, sexual offences involving exploitation should, however, be covered under the proposed scheme.

4.73 Having considered the above, we have revised or qualified the list of offences covered by the proposed sexual conviction records check. The revised list of offences we now propose should fall within the scheme is as follows:

Crimes Ordinance (Cap 200)

- section 47 Incest by men
- section 48 Incest by women of or over 16
- section 118 Rape
- section 118A Non-consensual buggery
- section 118B Assault with intent to commit buggery
- section 118C Homosexual buggery with or by a man under 21 (only if the victim was under 16)
- section 118D Buggery with a girl under 21 (only if the victim was under 16)
- section 118E Buggery with a mentally incapacitated person
- section 118G Procuring others to commit homosexual buggery (only if to procure a victim under 16)
- section 118H Gross indecency with or by a man under 21 (only if the victim was under 16)
- section 118I Gross indecency by a man with a male mentally incapacitated person
- section 119 Procurement of an unlawful sexual act by threats or intimidation
- section 120 Procurement of an unlawful sexual act by false pretences

³⁷ The number of persons involved for s118C is 18, s118F is 7, s118H is 48 and s118J is 157.
³⁸ Section 147 Crimes Ordinance (Cap 200).

- section 121 Administering drugs to obtain or facilitate an unlawful sexual act
- section 122 Indecent assault
- section 123 Sexual intercourse with a girl under 13 (only if the offender was 18 or above)
- section 124 Sexual intercourse with a girl under 16 (only if the offender was 18 or above)
- section 125 Sexual intercourse with a mentally incapacitated person
- section 126 Abduction of an unmarried girl under 16
- section 127 Abduction of an unmarried girl under 18 for sexual intercourse
- section 128 Abduction of a mentally incapacitated person from parent or guardian for sexual act
- section 129 Trafficking in persons to or from Hong Kong for the purpose of prostitution
- section 130 Control over persons for the purpose of unlawful sexual intercourse or prostitution
- section 132 Procurement of girl under 21
- section 133 Procurement of a mentally incapacitated person to have unlawful sexual intercourse
- section 134 Detention for intercourse or in a vice establishment
- section 135 Causing or encouraging prostitution of, intercourse with, or indecent assault on, a girl or boy under 16
- section 136 Causing or encouraging prostitution of a mentally incapacitated person
- section 138A Use, procurement or offer of persons under 18 for making pornography or for live pornographic performances
- section 140 Permitting a girl or boy under 13 to resort to or be on premises or vessel for intercourse
- section 141 Permitting a young person to resort to or be on premises or vessel for intercourse, prostitution, buggery or homosexual act (only if the victim was under 16 and the offender was 18 or above)
- section 142 Permitting a mentally incapacitated person to resort to or be on premises or vessel for intercourse, prostitution or homosexual act
- section 146 Indecent conduct towards a child under 16

Prevention of Child Pornography Ordinance (Cap 579)

- section 3 Offences relating to child pornography

Related inchoate offences

- Inciting another to commit any of the above offences

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

Recommendation 7

We recommend that the proposed sexual conviction records check should reveal only a specified list of sexual offences. Employers should be made aware of the limitations of the check: offences committed out of Hong Kong and criminal convictions for offences not listed will not be revealed by the proposed check.

Information other than records of conviction

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

4.75 Article 11(1) of the Hong Kong Bill of Rights provides that *"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law"*. This article gives effect to a fundamental principle which has been part of English common law for centuries. Article 14 of the Bill of Rights further provides that: *"No one shall be subjected to arbitrary or unlawful interference with his privacy"*.

4.76 A scheme based solely on convictions is defensible against criticism relating to the privacy of the individual concerned, as a conviction is a publicly recorded fact, and the register simply brings together in a readily accessible form data which are already in the public domain. Gratuitous disclosure of the conviction information might still in some circumstances infringe the right to privacy although this is unlikely to be the case where there are legitimate reasons for disclosure.³⁹

4.77 The system for checking sexual conviction records which was proposed in the consultation paper would not be generally available to the public but would be made available only to an employer with the consent of the job applicant in relation to child-related work. It would therefore only be used to provide information to persons with legitimate reasons for inquiry and with the consent of the data subject. We therefore considered that it could not be said to infringe Article 14 of the Bill of Rights, and would be constitutional.

³⁹ See the discussion, above, at para 2.22 regarding the decision of the English Court of Appeal in *R v Chief Constable of North Wales Police, ex p Thorpe*.

4.78 However, any extension of the scheme to include information of charges laid against a person who is subsequently acquitted would in our view run the risk of infringing Hong Kong's constitutional guarantees of privacy. We expressed concern in the consultation paper about this risk, notwithstanding the fact that the system in force in the United Kingdom does provide for the disclosure of mere allegations of offences where there has been no conviction, and that the UK system has been upheld by the English Court of Appeal,⁴⁰ though not yet considered by the European Court of Human Rights.

4.79 Some members of the Sub-committee had reservations as to the reasoning of the English Court of Appeal. It is likely to lead to persons who have been acquitted by a court being treated as if they had been convicted and effectively banned for life from a wide range of occupations. While there could be cases where wide disclosure of this kind might prevent offences which would otherwise occur, there could well be other cases where persons charged but acquitted were wholly blameless but suffered the grave injustice of losing their career or occupation as a result of the disclosure of suspect information.

4.80 A further difficulty with the English system is that it places the responsibility on the police for deciding whether or not to reveal information about the charge which did not result in a conviction. This places a heavy burden on the police, and would tend to place an aura of authority on any information disclosed which would make it difficult to challenge.

4.81 What of the situation where a person has been arrested for, or charged with, a sexual offence and the trial is still pending? We expressed concern in the consultation paper at the possibility that an accused might take advantage of the time gap to obtain a "clean" check result in order to secure child-related work while he is on bail pending trial. We therefore proposed that the approach of the CNCC scheme be followed so that if the applicant has been arrested or charged with a sexual offence, his application for a sexual conviction records check will normally not be further processed until the matter concerned has been concluded.⁴¹ Where, however, the applicant considers it in his own interest to disclose such an arrest or charge to his employer to enable the latter to make an informed decision, he may request, and give specific consent to, the police to process the sexual conviction records check with disclosure to the employer of the fact of the applicant's arrest or charge. We recognised that providing such an option to the applicant might complicate the operation of the scheme and that there might be additional staff and resource implications for the police in taking on this new responsibility. However we believed it fairer to allow the applicant such a choice, and we envisaged that there would not be many cases where the applicant would choose this option.

⁴⁰ See the discussion, above, on *R(X) v Chief Constable of West Midlands Police* [2005] 1 WLR 65 in Chapter 2.

⁴¹ See para 4.61 above.

Consultees' responses and our views

4.82 Among the responses which commented on this issue, there was virtual unanimity that non-conviction information should not be revealed. One of the responses mentioned that the public's attention should be drawn to this feature of the proposed check. We agree with this suggestion and, subject to that change, maintain the original recommendation.

Recommendation 8

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

Spent convictions

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

4.84 According to section 2(1) of the Rehabilitation of Offenders Ordinance (Cap 297), where an individual has been convicted of an offence in respect of which he was not sentenced to imprisonment⁴² exceeding three months or to a fine exceeding \$10,000, and he has not been convicted in Hong Kong on any earlier day of an offence; and a period of three years has elapsed without that individual being again convicted in Hong Kong of an offence, then subject to some exceptions no evidence shall be admissible in any proceedings which tends to show that that individual was so convicted in Hong Kong. Also, that conviction, or any failure to disclose it, shall not be a lawful or proper ground for dismissing or excluding that individual from any office, profession, occupation or employment or for prejudicing him in any way in that office, profession, occupation or employment.

⁴² Section 2(4)(a) of the Ordinance reads "*'imprisonment' does not include detention in a reformatory school, in a detention centre, in a place of detention, in a training centre or in a rehabilitation centre*".

Consultees' responses

4.85 The schools, school principals and related associations that responded in writing were all of the view that spent convictions should be disclosed even though the incident might have happened many years ago and was of a minor nature. Some religious organisations, and professional bodies⁴³ also held the same view.

4.86 There were, however, other consultees who expressly agreed that spent convictions should not be disclosed.⁴⁴

Our views

4.87 We are aware that there is sizeable demand for "spent" convictions to be disclosed. We note also that the Child Care Services Ordinance (Cap 243) provides that (notwithstanding section 2 of the Rehabilitation of Offenders Ordinance (Cap 297)) a person shall not act as a childminder if he has been convicted of certain specified offences.⁴⁵ We are also aware that in England, for example, criminal records checks are divided into different grades, and spent convictions are disclosed in checks of higher grades.

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

Recommendation 9

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

⁴³ The Hong Kong Association of Sexuality Educators, Researchers & Therapists: *"The rates of recidivism of rape and child molestation are very high: 1 in 2 homosexual and bisexual pedophiles; 1 in 4 heterosexual pedophiles; in general 10% to 50% for pedophiles according to studies in the USA; rape 19% in 5 years in California and 28% in another study. Recidivism is difficult to study because the figures depend on whether subsequent arrest or subsequent conviction or subsequent incarceration is being used as a definition. Adding to the difficulty is the fact that sexual offences are highly under-reported due to the trauma and embarrassment involved or lack of evidence. Of equal importance is the period of follow-up. The longer the released convicts are followed-up, the higher will be the recidivism rates. Many pedophiles offend again after ten or more years."*

⁴⁴ The Christian Family Service Centre (School Social Work Unit), the Hong Kong Bar Association, Justice, and the Medical Coordinators on Child Abuse of the Hong Kong Hospital Authority.

⁴⁵ Section 15A(3).

Observations and conclusions

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

4.90 As stated in one of the written responses, the proposed interim measure "*is only a small piece in the jigsaw of the prevention of child sexual abuse*".⁴⁶ The Administration and the community as a whole should step up their efforts to protect vulnerable groups against sexual abuse.

4.91 Consideration could be given, for example, to the formulation of a holistic scheme for the treatment, rehabilitation, risk assessment and management of sex offenders in order to afford better protection to the community, particularly children and vulnerable persons, without unjustifiably infringing the privacy and other rights of the offenders (or their family members). Looking at the experience overseas, a holistic scheme would encompass areas including: (1) enhancing the court's sentencing powers, particularly in relation to post-release supervision of sex offenders and compulsory treatment/counselling; (2) giving power to the court to make preventative orders to prohibit a defendant from conducting any prescribed activities for the purpose of protecting the public from sexual harm; (3) imposing notification requirements upon certain sex offenders after their release; (4) barring certain sex offenders from child-related work; (5) allowing criminal records and non-conviction information checks by child-related organisations and/or mandating such organisations to do criminal record checks; enhancing risk assessment and management work (for example, by establishing multi-agency panels); enhancing treatment and rehabilitation work in prison and upon release.

4.92 Further, the different sectors should consider whether appropriate measures should be adopted. For instance:

- Guidelines on prudent recruitment practice should be developed for schools and organisations offering child-related work and mentally incapacitated person-related work.
- Organisations offering child-related work should carefully check the references and qualifications of job applicants, and should have prudent supervision systems for newly recruited staff or for potentially 'high-risk' job positions.
- Government departments which have access to checks by the police's Criminal Record Bureau should always verify the accuracy of a self-declaration of "no criminal record" by applicants for child-related work.

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The Hong Kong College of Paediatricians.

- Community education and support should be offered to enhance adults' ability to protect children, and children's ability to protect themselves.
- Relevant government departments should consider whether there should be mandatory reporting of child maltreatment.
- As the proposed measure can cover only sexual offences committed in Hong Kong, employers of workers with overseas experience should consider checking for overseas convictions in appropriate cases.
- There should be measures to prevent migrant workers (especially domestic helpers) in child-related jobs from obtaining work visas again if they have committed a relevant offence in Hong Kong.

4.93 Ensuring that people who work with children and the mentally incapacitated are fit to do so requires a range of practices and measures, including sound staff selection, adequate supervision systems and prudent checking of referees and qualifications. A check of relevant criminal convictions is a key component of these practices. Hong Kong has lagged behind overseas jurisdictions in devising a suitable mechanism for checking the sexual conviction records of persons working with children and mentally incapacitated persons. We hope the Administration can act on the recommendations in this report without delay.

Chapter 5

Summary of recommendations

(The recommendations of this report are to be found in Chapter 4)

Recommendation 1: Broad community notification not recommended (paragraphs 4.8 – 4.11)

We do not recommend the introduction in Hong Kong of a US-style "Megan's Law" whereby the names and other personal information of sex offenders are made available for inspection by the general public.

Recommendation 2: Sexual conviction record check (paragraphs 4.12 – 4.28)

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

Recommendation 3: Child-related work and work relating to mentally incapacitated persons (paragraphs 4.29 – 4.41)

We recommend that for the purposes of these recommendations "child-related work" be defined as work where the usual duties involve, or are likely to involve, contact with a child (ie a person aged under 18). Further, "work relating to mentally incapacitated persons" (or "MIP-related work") should include work where the usual duties involve, or are likely to involve, contact with a mentally incapacitated person. Employees, volunteers, trainees and self-employed persons undertaking child-related work or MIP-related work should be covered by the proposed system.

Recommendation 4: Checks should not be mandatory (paragraphs 4.42 – 4.48)

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

Recommendation 5: Whether the proposed scheme should apply to both existing and prospective employees (paragraphs 4.49 – 4.56)

We recommend that the proposed scheme should apply to both existing and prospective employees. The scheme should be implemented in stages, covering prospective employees only in the initial phase, and then extending to existing employees; but in view of the strong community support in favour of an extension, the scheme should be extended to existing employees as soon as practicable.

Recommendation 6: Method of application (paragraphs 4.57 – 4.66)

We recommend that the current schemes of Certificate of No Criminal Conviction ("CNCC") and data access requests for criminal conviction data be modified and adapted to enable the type of checks proposed in this report to be conducted. The checks should be initiated by the job applicant/data subject and sufficient personal data privacy safeguards should be put in place to regulate the amount of personal data to be disclosed, the purpose of disclosure, and the accuracy and retention period of the records. A "clean" record check result would not be recorded in writing but would be communicated verbally to the applicant or his employer.

Recommendation 7: Types of offences to be covered by the scheme (paragraphs 4.67 – 4.73)

We recommend that the proposed sexual conviction records check should reveal only a specified list of sexual offences. Employers should be made aware of the limitations of the check: offences committed out of Hong Kong and criminal convictions for offences not listed will not be revealed by the proposed check.

Recommendation 8: Information other than records of conviction (paragraphs 4.74 – 4.82)

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

Recommendation 9: Spent convictions (paragraphs 4.83 – 4.88)

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

**Responses to the consultation paper
on
Interim Proposals on a Sex Offender Register**

Schools

1. Aberdeen St Peter's Catholic Primary School
2. Alliance Primary School, Sheung Shui
3. Baptist Lui Ming Choi Primary School
4. Baptist Rainbow Primary School
5. Buddhist Fat Ho Memorial College
6. Bui O Public School
7. Catholic Mission School
8. CCC Kei Shun Special School Parents Staff Association
9. CCC Mong Man Wai College
10. CCC Rotary Secondary School
11. Chan Shu Kui Memorial School
12. Cho Yiu Catholic Primary School
13. Choi Wan St Joseph's Primary School
14. Christian Nationals' Evangelism Commission Lau Wing Sang Secondary School
15. Church of Christ in China Chuen Yuen College
16. The Church of Christ in China Fong Yun Wah Secondary School
17. Church of Christ in China Heep Woh College
18. The Church of Christ in China Kei Chi Secondary School

19. The Church of Christ in China Wanchai Church Kei To Primary School (Kowloon City)
20. Clementi Secondary School
21. Cotton Spinners Association Secondary School
22. Evangel College
23. Fukien Secondary School
24. Fung Kai No. 1 Primary School
25. General Chamber of Commerce and Industry of the Tung Kun District Cheong Wong Wai Primary School
26. Heung Hoi Ching Kok Lin Association Buddhist Ching Kok Lin Association School
27. Heung Hoi Ching Kok Lin Association Buddhist Ma Kam Chan Memorial English Secondary School
28. HKMLC Queen Maud Secondary School
29. Hoi Ping Chamber of Commerce Secondary School
30. Hong Kong and Macau Lutheran Church Wong Chan Sook Ying Memorial School
31. Hong Kong Taoist Association Tang Hin Memorial Secondary School
32. Hop Yat Church School
33. Immaculate Heart of Mary College
34. The John F Kennedy Centre, Hong Kong Red Cross
35. Ju Ching Chu Secondary School (Yuen Long)
36. King's College Old Boys' Association Primary School
37. Kowloon True Light Middle School
38. Kwun Tong Government Secondary School
39. Lai Pui-wa [Pentecostal Gin Mao Sheng Primary School]
40. Lingnan Primary School
41. Lions Clubs International Ho Tak Sum Primary School

42. Lok Sin Tong Young Ko Hsiao Lin Secondary School
43. Margaret Trench Red Cross School
44. Maryknoll Fathers' School (Primary Section)
45. Methodist Church Hong Kong Wesley College
46. New Life Schools Incorporation Peace Evangelical Secondary School
47. Ning Po No. 2 College
48. Our Lady of the Rosary College
49. Our Lady's Primary School
50. Po Kok Branch School
51. Po Leung Kuk Chong Kee Ting Primary School
52. Po Leung Kuk Fong Wong Kam Chuen Primary School
53. Po Leung Kuk Gold & Silver Exchange Society Pershing Tsang School
54. Po Leung Kuk Ma Kam Ming College
55. Po Leung Kuk Mr & Mrs Chan Pak Keung Tsing Yi School
56. Precious Blood Primary School (Wah Fu Estate)
57. Pui Kiu Primary School
58. Shatin Pui Ying College
59. Shatin Tsung Tsin Secondary School
60. Sheng Kung Hui Ching Shan Primary School
61. Sheng Kung Hui Fung Kei Millennium Primary School
62. Sheng Kung Hui Holy Trinity Church Secondary School
63. Sheng Kung Hui Kei Yan Primary School
64. Sheng Kung Hui Lam Kou Mow Secondary School
65. Sheng Kung Hui Li Fook Hing Secondary School
66. Sheng Kung Hui Li Ping Secondary School
67. Sheng Kung Hui Lui Ming Choi Secondary School

68. Sheng Kung Hui St Mary's Church Mok Hing Yiu College
69. Sheng Kung Hui St Matthew's Primary School
70. St Antonius Primary School
71. St Charles School
72. St Paul's Secondary School
73. St Stephen's College
74. Sun Fong Chung College
75. Tai Po Baptist Public School
76. Tai Po Government Primary School
77. Tai Po Old Market Public School (Plover Cove)
78. Tseung Kwan O Methodist Primary School
79. Tsuen Wan Public Ho Chuen Yiu Memorial Primary School
80. Tsung Tsin College
81. Tsung Tsin Middle School
82. Tung Wah Group of Hospitals Hong Kong and Kowloon Electrical Appliances Merchants Association Limited School (PM)
83. Wo Che Lutheran School
84. Yaumati Catholic Primary School

Organisations

85. Action for REACH OUT
86. Against Child Abuse Ltd
87. Agency for Volunteer Service
88. Amnesty International Hong Kong Section
89. Association Concerning Sexual Violence Against Women
90. Association for the Advancement of Feminism

91. Association of Principals of Secondary Schools, The Hong Kong Council of the Church of Christ in China
92. The Boys' & Girls' Clubs Association of Hong Kong
93. Breakthrough
94. Caritas Community Support Project on Development of Sexual Health
95. Caritas – Hong Kong, Family Services
96. The Chinese Muslim Cultural & Fraternal Association
97. Christian Family Service Centre School Social Work Unit
98. City One Baptist Church
99. Civil Human Rights Front
100. Committee on Child Abuse Secretariat
101. Committee on Community Support for Rehabilitated Offenders
102. Correctional Services Department
103. Co-signed declaration against the creation of “sex offender register”
104. Council on Professional Conduct in Education
105. Department of Justice, Legal Policy Division
106. Department of Justice, Prosecutions Division
107. Education Bureau
108. End Child Sexual Abuse Foundation
109. The Evangelical Lutheran Church of Hong Kong
110. For My Colours
111. Fu Hong Society
112. Harmony House Ltd
113. The Hong Kong Association of Sexuality Educators, Researchers & Therapists
114. Hong Kong Bar Association

115. Hong Kong Christian Institute
116. Hong Kong Christian Service
117. Hong Kong College of Paediatricians
118. Hong Kong College of Radiologists
119. The Hong Kong Council of Social Service
120. Hong Kong Customs and Excise Department
121. Hong Kong Doctors Union
122. Hong Kong Family Welfare Society
123. The Hong Kong Joint Council of Parents of the Mentally Handicapped
124. The Hong Kong Medical Association
125. Hong Kong Police Force
126. Hong Kong Sheng Kung Hui
127. Hong Kong Sheng Kung Hui Welfare Council
128. Hong Kong Society for the Protection of Children
129. Hong Kong Student Aid Society
130. Hong Kong Women Christian Council
131. Hong Kong Women's Coalition on Equal Opportunities
132. Hong Kong Young Women's Christian Association
133. Independent Commission Against Corruption
134. JUSTICE
135. Kowloon City District Council
136. Labour and Welfare Bureau and Social Welfare Department
137. Labour Department
138. The Law Society of Hong Kong (Criminal Law & Procedure Committee)
139. Legal Aid Department
140. Medical Coordinators on Child Abuse of the Hong Kong Hospital Authority

141. Midnight Blue
142. Po Leung Kuk
143. Privacy Commissioner for Personal Data
144. Rainbow Action
145. Rainbow of Hong Kong
146. Scout Association of Hong Kong
147. Security Bureau
148. Society For Community Organization
149. The Society for Truth and Light
150. The Society of Rehabilitation and Crime Prevention, Hong Kong
151. Women's Commission
152. Yang Memorial Methodist Social Service
153. Yuen Long Baptist Church

Individuals

154. A citizen
155. A group of counsellors
156. A Hong Kong citizen
157. A Hong Kong citizen
158. An offender
159. Professor Terry Kit-Fong Au, Department of Psychology, University of Hong Kong
160. Mr Chan (A New Territories resident)
161. Dr Edward K L Chan, Department of Social Work & Social Administration, University of Hong Kong
162. Chan Wing Lim, JP (Kowloon City District Councillor)

163. King Cole Cheung
164. Chiu Hin-cheung
165. Dr Chiu Man-chung, Associate Professor of Law, Hong Kong Shue Yan University
166. Terry Chung Kai Leung
167. Nigel A Collett
168. Din Wai Bun
169. Fong Fu-yun and Lee Hok-bun
170. Fung Chun-yip
171. Haze Hui
172. Kwok Lai-ming
173. Joseph Lam
174. Shirley Lam
175. Lam Tung-chun
176. Ms Lau
177. Lau Yau-lin
178. Mr Lee
179. Hester Lo
180. Reverend Lo Sek Wai, Senior Pastor, City One Baptist Church
181. David Man
182. Mark
183. Coy Michelle
184. Ng Hiu-man
185. Ng Man-lun, Vice-President, Hong Kong Sex Education Association
186. Peter (Tuen Mun NT)
187. Ray Rudowski

188. Professor P C Shaw, Department of Biochemistry, Chinese University of Hong Kong
189. Kevin She
190. Ted H W Tang
191. Harold Traver, Hong Kong Shue Yan University
192. Dr Sandra Kit-man Tsang & Dr Eric Wing-hong Chui, Department of Social Work and Social Administration, the University of Hong Kong
193. Dr Tsui Sing Yan, Eric
194. Michael Vidler
195. Dr K H Wan and Dr Alex C W Lo
196. Ms Wong, a local resident
197. Christine Wong
198. Wong Wai Ming
199. Reverend Wu Chi-wai (General Secretary of Hong Kong Church Renewal Movement Ltd)