

THE LAW REFORM COMMISSION OF HONG KONG

REPORT

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

EXECUTIVE SUMMARY

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

Terms of reference

1. In April 2006, the Secretary for Justice and the Chief Justice 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
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Dr Chu Yiu Kong <i>[Until December 2007]</i>	Assistant Professor Department of Sociology University of Hong Kong
Mr Paul Harris, SC	Senior Counsel
Professor Karen A Joe Laidler <i>[From September 2008]</i>	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

The consultation exercise

3. In July 2008, the Sub-committee issued a consultation paper to seek views and comments from the community. About 200 written responses were received. Schools, other organisations and individuals that responded in writing are listed in the Annex to the Report.

Sex offender register/sexual conviction record check

4. 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.

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

6. The term "sex offender register" also refers to the imposition of notification obligations on sex offenders after their release from prison. Sex offenders are required to report to the local police with details of their whereabouts after serving their 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.

7. 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.

8. Although the consultation paper proposed a scheme such as that described in the preceding paragraph, we received numerous objections which were essentially criticisms of the US style Megan's Law or of 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.

Chapter 1 – The existing problem/lacuna in Hong Kong

Lacuna in our system

9. In many jurisdictions, those who work with children or mentally incapacitated persons are subject to criminal record checks and other safeguards. The situation in Hong Kong is different. There are no mechanisms here to prevent a person who has been convicted of a serious sex crime from applying for a position at a school (other than as a registered teacher) or other place or organisation where he would have access to children. Even if the school or organisation concerned wishes to verify whether a job applicant has any sexual conviction record, there is no means by which it can do so. It can request an applicant to declare any previous convictions for sexual offences but there is no way in which it can verify the accuracy of the applicant's self-declaration. This is so even if the applicant consents to a criminal record check being conducted on him. The problem applies with equal force where parents hire private tutors or coaches for their children. Parents have no means available to them to determine whether or not the prospective tutor or coach has a criminal record.

10. To educators and parents from jurisdictions with comprehensive mechanisms to ensure the safety of children, the current situation in Hong Kong would be unthinkable. Many local educators and parents would share the same views. We think it imperative that a minimum level of protection should be afforded to local children.

The Criminal Records Bureau

11. The Criminal Records Bureau of the police is responsible for maintaining records of persons convicted of certain offences in Hong Kong. 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 exceptions, as far as child-related work is concerned, are school managers and teachers registered under the Education Ordinance (Cap 279), childminders under the Child Care Services Ordinance (Cap 243), and social workers registered under the Social Workers Registration Ordinance (Cap 505). However, criminal records checks are not available in respect of a range of persons who have close contact with children during their work, including laboratory technicians, ushers and other school support staff, and 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.

Some cases in Hong Kong

12. There have been 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. We have highlighted a few of these cases:

- On 15 September 2006, a 36 year old former policeman pleaded guilty to nine charges of indecent assault involving four girls at the primary school where he worked as a technician. The defendant had previously been convicted of loitering in women's lavatories.
- 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. 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 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.

- 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 eight and nine during the weekly trumpet lessons taking place either at an international school or at the students' home. The judge pointed out that the acts were deliberate, sustained, and might have long term psychological impact on the young children. A starting point of two years and nine months' imprisonment was adopted, which was reduced to 20 months taking into account the guilty plea and relevant factors.
- 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. The indecent acts involved touching the breast, bottom and private parts, and kissing on the neck and mouth. 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. 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.
- 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.
- 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 nine. 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 lavatory and indecently assaulted him. A sentence of three months' imprisonment was imposed.

Need for restrictions on access to children

13. It is in society's interests for sex offenders to be rehabilitated but it is not conducive to their effective rehabilitation if they are allowed easy access to children; nor does it take account of society's and the government's duty to give proper and adequate protection to children.

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

- (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 include victim access, drug abuse and hostility.

Victim access

15. 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.

Crossover offending

16. 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. The research in this area is not conclusive. 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.

Recidivism rate

17. A number of the responses received quoted the 6% recidivism rate of sex offenders calculated by the Correctional Services Department, and argued that such a low recidivism rate did not justify the proposed scheme which aims to prevent re-offending. On the other hand, psychiatrists have advised that the recidivism rate of even treated paedophile offenders is high.

18. Recidivism rates can vary widely depending on factors including:

- (a) The length of time over which the data is collected:

Over a short period (say three years), the rate will be lower. Over a longer period (say ten years), a higher recidivism rate will be seen.

- (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.

19. In the case of the Correctional Services Department's calculation of a recidivism rate of 6%, 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. The Correctional Services Department's recidivism rate contrasts with rates ranging from 10% to 50% in international studies since 2007. 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 recidivism for the purposes of the statistics.

Chapter 2 – The interests at stake in the possible introduction of a sexual conviction record check for child-related work in Hong Kong

20. We are aware that 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.

Right to privacy

21. One of the human rights issues raised concerns the protection of a sex offender's right to privacy guaranteed by Article 17 of the International Covenant on Civil and Political Rights ("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."

Equality before, and equal protection of, the law

22. Article 26 of the ICCPR 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

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

Rights of sex offenders not absolute

Government's constitutional duty to protect children from sexual exploitation

24. 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 ICCPR imposes a positive obligation on the government to take reasonable and necessary measures to protect children from harm and exploitation by sex offenders. It 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."

25. Article 19 of the United Nations 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."

Chapter 3 – Overseas experience

American jurisdictions

Registration requirements

26. The Jacob Wetterling Act requires states to establish registries of offenders convicted of sexually violent offences or offences against children. 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, such as his name, alias used, photograph, etc. That information is recorded by the local police would record the collected information in the sex offender register, along with other relevant information, such as the offender's previous criminal convictions.

Community notification requirements

27. The federal Megan's Law makes community notification of registration information mandatory where it is relevant and necessary for public protection. Community notification may be by 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.

New requirements under SORNA

28. On 27 July 2006, Title I of the Adam Walsh Act, 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 jurisdictions were required to comply with these new federal requirements by July 2009.

England and Wales

29. 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

30. The Secretary of State may bar an individual from working in schools and Local Education Authority education services. The list of those individuals subject to the bar is known as "List 99" Educational organisations are under an obligation not to allow an individual to work in contravention of the bar, and so it is mandatory for them to conduct a "List 99" check before employment. It is a criminal offence for any individual on List 99 to seek employment in the education settings covered by List 99, or for any employer to employ the listed individuals.

Criminal Records Bureau check

31. The Criminal Records Bureau ("the CRB") offers access to criminal record information through its disclosure service. 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. In addition to the Standard Disclosure, any relevant information (including non-conviction information) held by the local police forces is made available.

32. 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 may decide to offer access to CRB checks to smaller organisations. CRB checks cannot be requested by individuals, so parents who employ a nanny or babysitter directly cannot apply for a CRB check, but an agency referring the prospective employee to the parent can.

33. As from 12 May 2006, schools are required to obtain enhanced CRB checks for all new appointments to their workforce and for those who have not been working in a school for at least three months.

The Safeguarding Vulnerable Groups Act 2006

34. The Safeguarding Vulnerable Groups Act 2006 integrates List 99, the Protection of Children Act list and the Disqualification Order regime. The 2006 Act enabled the creation of the Independent Safeguarding Authority ("the ISA"), which has 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.

35. 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.

New criminal offences to enforce the vetting and barring scheme

36. Successful vetting often depends on effective information sharing originally held by different sources. Organisations and individuals 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 organisations to refer relevant information to the ISA. Starting from 12 October 2009, the relevant organisations must start referring information to the ISA. Regulated activity providers and personnel suppliers are liable to a fine if they fail to provide the information without reasonable excuse.

Other offences

37. **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.

38. **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.

39. If a regulated activity provider fails to conduct a check, or a personnel supplier fails to check an individual, he would be guilty of an offence on summary conviction and to a fine.

Notification obligations on sex offenders after their release from prison

40. Notification obligations on sex offenders after their release from prison were introduced in England and Wales by the Sex Offenders Act 1997. 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 time after their sentencing or release, and to notify the police of any subsequent changes during a specified notification period thereafter. A person is subject to the notification requirements if he is convicted or cautioned in relation to a range of sexual offences and certain customs offences relating to the prohibited importation of indecent or obscene articles. The compliance rate with the requirements by sex offenders has been assessed at 97 per cent. 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.

Other European jurisdictions

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

Canada

Federal – Sex Offender Information Registration Act 2004

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

Australian jurisdictions

Federal measures

43. At the federal level, information from the Australian National Child Offender Register ("ANCOR") is provided 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.

Working with Children Check

44. Within the last decade, most Australian jurisdictions have established regimes to ensure that people with certain criminal records do not work with children.

Victoria's Working with Children Act 2005

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

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

46. The Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 places an obligation on the Minister for Justice and Constitutional Development to establish and maintain a National Register for Sex Offenders. The register would include the names of persons convicted of a sexual offence against a child or a person who is mentally disabled. It seems, however, that convictions for sexual offences against a normal adult would not be covered by the register but allegations that a sexual offence has been committed against a child would be covered. An employer is prohibited from employing or continuing to employ a person whose particulars have been included in the register. There is also a prohibition on persons who have been convicted of sexual offences against children (or persons who are mentally disabled) from working with or having access to

children (or persons who are mentally disabled), whether as an employer, employee, foster parent or adoptive parent.

Chapter 4 – Recommendations

Introduction

47. 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), information as to a job applicant's previous convictions for any sexual offences would clearly be relevant in assessing the applicant's suitability.

48. We have seen that employers offering child-related work in other jurisdictions are provided with this much needed information. 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.

49. 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. 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.

50. 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.

Broad community notification not recommended

51. 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

52. 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

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

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

Recommendation 1

We 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

54. 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

55. 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.

56. 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. Those organisations that were against the recommendation included offenders' rehabilitation concern groups, homosexual interests concern groups, human rights concern groups and various other associations.

57. 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

58. The arguments advanced by those against the proposed scheme included:

- 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

59. 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.

60. We emphasise that the proposed scheme is not intended automatically to 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). Job opportunities in non child-related employment (such as catering, hospitality, retail, real estate, transport, logistics, trading, banking, insurance, etc) would, of course, not be affected. Even if child-related work were ruled out, sex offenders would have ample opportunities to re-integrate into society.

Human rights

61. 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. Further, the conviction information is already

in the public domain and the media could have chosen to report on the convictions 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 mistaken identification.

62. 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 the job in question. In the circumstances, we are of the view that the proposed scheme does not infringe a sex offender's right protected by Article 33.

63. 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 may live, within their workplace and in society at large.

Discrimination

64. 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 were reasonable and objective and if the aim was to achieve a purpose which was legitimate under the ICCPR. 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.

Comprehensive review of sexual offences first

65. We are charged under the terms of reference to review the common and statute law governing sexual and related offences. However, given the range of issues likely to arise in that review, including the need for legislative reform, we feel strongly that the implementation of our proposals in respect of criminal conviction records checks should not await the completion of that wider review.

Our views

66. There was strong support for the scheme proposed in the consultation paper from schools, parents, children concern groups, and medical groups. 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. 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

67. 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.

68. 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.

Recommendation 2

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

Child-related work and work relating to mentally incapacitated persons

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

69. The consultation paper recommended that the proposed administrative scheme for sexual convictions records checks should apply only to child-related work and work relating to mentally incapacitated persons ("MIP-related work") and that the proposed protection should cover all children under 18 years of age. 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

70. Few of the responses to the consultation paper opposed this recommendation. Other views and suggestions 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; and
- That legal guardians should be allowed to request a check in appropriate circumstances.

Our views

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

71. 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.

72. Some of the responses queried whether domestic helpers, cleaners or security guards would be included. That would depend not on the job title but on whether the job involved or was 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 for offences under Part XII of the Crimes Ordinance (Cap 200), but also under the Societies Ordinance (Cap 151), the Dangerous Drugs Ordinance (Cap 134) and for other offences involving fraud, dishonesty or violence.

Whether volunteers should be included in the proposed scheme

73. Some responses suggested that the proposed check and the required fees would dampen volunteers' enthusiasm to take up work for non-governmental organisations. However, other voluntary associations took 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 MIPs. To afford adequate protection under the scheme, we believe volunteers should be included.

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

74. As the proposed scheme aims at protecting both children and MIPs, the definition of "employers" should also include legal guardians. Including legal guardians within the definition of "employers" would enable the actual person looking after an MIP to conduct the necessary sexual conviction records check.

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

75. 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.

76. 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. 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"

77. 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.

78. 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.

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

79. 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

80. A number of the written responses expressed the view that the checks should be mandatory, arguing 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 without having to face any consequences. Another response 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). On the other hand, many other consultees supported the view that the proposed scheme should be voluntary.

Our views

81. Under the existing law, an employer may be held vicariously liable in tort for any sexual abuse committed by its employee, 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. 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.

82. 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 the proposed interim measure is an administrative scheme, the checks cannot be made mandatory. 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.

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

83. If the proposed scheme were to apply only to prospective employees, the scope of the proposed scheme might be too restrictive, providing inadequate protection to children. On the other hand, a more modest start would enable the scheme to develop and to expand by stages if appropriate. Making the proposed scheme available to existing employers might lead to resource difficulties through a rush of employers checking the sexual conviction records of existing employees when the scheme is first launched, and might 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

84. Of those responses which dealt with the issue, the vast majority favoured the application of the scheme to both existing and prospective employees. The principal reason advanced was that a substantial loophole would otherwise be created. Some suggested that a sudden rush of check applications could be avoided by phased implementation.

Our views

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

86. 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. In either case, the question arises as to whether the employer can lawfully terminate the employment, either summarily or by giving notice (or by payment in lieu of notice). The answer to that question would depend on the facts and circumstances of the particular case and might include:

- (a) Whether before being offered employment the employee had been asked to declare whether he had any previous conviction;
- (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.

87. We are aware 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.

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.

Method of application

88. 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

89. A person may make a personal data access request under the Personal Data (Privacy) Ordinance (Cap 486) in respect of his own criminal records held by the police. At present, any such application can be made to the police's Criminal Conviction Data Office ("CCDO") upon payment. 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. 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.

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

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

The method of application proposed in the consultation paper

91. 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.
- (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.

- 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 involved in child-related work who seeks to abuse the system may also be liable under the Personal Data (Privacy) Ordinance (Cap 486) for violation of Data Protection Principle 1.
- (c) 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.
- 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. 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

92. 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. 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.
- 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.
- 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

93. 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.

94. 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 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

95. 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).

Consultees' responses

96. 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* and *Secretary for Justice v Yau Yuk Lung Zigo* 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.

Our views

97. 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.

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

99. With reference to the comments listed under the sub-heading "Consultees' responses", 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 scheme 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 have decided that offences against sections 123 and 124 of the Crimes Ordinance (Cap 200) should be revealed only if the offender was 18 or above.
- (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 either not be prosecuted or that there would be an acquittal, 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, 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, on considering the agreed principles, we again recommend the offence should be excluded from the proposed scheme.

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

101. In the light of these considerations, 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
- 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

102. 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. However, any extension of the scheme to include details 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.

103. We proposed that where a person has been arrested for, or charged with, a sexual offence and the trial is still pending the approach of the CNCC scheme should be followed so that his application for a sexual conviction records check will normally not be further processed until the matter has been concluded.

Consultees' responses and our views

104. 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

105. 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. 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 imprisonment exceeding three months or to a fine exceeding \$10,000, and he has not been convicted in Hong Kong on any earlier day of an offence; and a period of three years has elapsed without that individual being again convicted in Hong Kong of an offence, then subject to some exceptions no evidence shall be admissible in any proceedings which tends to show that that individual was so convicted in Hong Kong. Also, that

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

Consultees' responses

106. 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 bodies also held the same view. There were, however, other consultees who expressly agreed that spent convictions should not be disclosed.

Our views

107. 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. 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.

108. 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.

Observations and conclusions

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

110. 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.

Law Reform Commission Secretariat
February 2010