

THE LAW REFORM COMMISSION OF HONG KONG

REVIEW OF SEXUAL OFFENCES SUB-COMMITTEE

CONSULTATION PAPER

INTERIM PROPOSALS ON A SEX OFFENDER REGISTER

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The Sub-committee would be grateful for comments on this Consultation Paper by 31 October 2008. All correspondence should be addressed to:

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Preface

Terms of reference

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

"To review the common and statute law governing sexual and related offences under Part XII of the Crimes Ordinance (Cap 200) and the common and statute law governing incest under Part VI of the Ordinance, and to recommend such changes in the law as may be thought appropriate."

The Sub-committee

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

Mr Peter Duncan, SC (Chairman)	Senior Counsel
Hon Mrs Justice Barnes	Judge of the Court of First Instance of the High Court
Mr Eric T M Cheung	Assistant Professor Department of Professional Legal Education 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
Mr Stephen K H Lee [From January 2008]	Senior Superintendent of Police (Crime Support) Hong Kong Police Force

Mrs Apollonia Liu	Principal Assistant Secretary Security Bureau
Mr Ma Siu Yip <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
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

Expansion of the Sub-committee's terms of reference

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

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

(underlining added)

4. The part of the revised terms of reference underlined above was added as a result of judicial comment in various judgments in Hong Kong (which will be referred to in greater detail in Chapter One) as well as the public's comments on the desirability of setting up a sex offender register.¹

¹ See the discussion below on 'What is a sex offender register' in this chapter.

Work to date

5. Since its formation the Sub-committee has met regularly to discharge its obligations and has already given preliminary considerations to various topics which may require reform. It is clear that its terms of reference have a wide breadth covering a diverse range of sexual offences, many of which involve controversial issues requiring careful and judicious balancing of the interests at stake. Accordingly, the Sub-committee believes that the terms of reference should be dealt with in stages.

6. It has also concluded that some general principles should be applied to the topics raised in its terms of reference. These principles include:

- Clarity of the law

It is a guiding principle that the law should be as clear as possible. This issue has been examined by the Court of Final Appeal² which pointed out that the law must be sufficiently clear to indicate adequately how a person should regulate his conduct. The need for clarity of the law is particularly important for sexual offences because the conviction of a sexual offence may lead to serious consequences, including the deprivation of liberty and the resulting social stigma. It has been said that the law should prohibit specified forms of conduct but nothing more.³ In other words, sexual offences should not be open-ended.

- Respect for sexual autonomy

The guiding principle of respect for sexual autonomy has two aspects: first, an act which infringes another person's sexual autonomy is a wrong and should be treated as a crime; second, where a person freely chooses to engage in a sexual activity, that activity should not be outlawed save in exceptional instances for good reasons. According to the Scottish Law Commission, the principle of respect for sexual autonomy can be re-stated in terms of consent: first, non-consenting sexual conduct should be criminalised; second, consenting sexual conduct should not be criminalised unless there are strong reasons for doing so.⁴

The principle of respect for sexual autonomy has been the cornerstone of recent reforms in other jurisdictions in this area of law, and this guiding principle should apply unless it is in contravention of the protective principle.⁵ Since this guiding principle is based on consent, it has no application to children and other persons who do not have the mental capacity to give consent.

² *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381, [2002] 2 HKLRD 793.

³ Scottish Law Commission, Discussion Paper on *Rape and other Sexual Offences*, Jan 2006, at para 2.2.

⁴ See also the discussion in the UK Home Office's Paper "*Setting the Boundaries - Reforming the law on sex offences*", July 2000.

⁵ See the discussion, below, in this chapter.

- Protective principle

It is a stated principle of the UK Home Office's Paper⁶ that the law must ensure that people who do not have the mental capacity to give informed consent are protected, and those who induce or encourage children or other vulnerable people to participate in, or be exposed to, sexual behaviour are criminally culpable.

In some situations (for example, in relation to young children), it can be said that the protective principle simply reinforces the consent requirement, given that such persons cannot consent to sexual activity. In other situations, where the person can give consent (for example older children or persons over whom others hold a position of trust or authority), the protective principle acts to protect vulnerability and to prevent exploitation. In these latter situations, the protective principle overrides the preceding guiding principle that sexual conduct based on consent of the parties should not be criminalised.⁷

- Distinctions based on sexual orientation

The criminal law should not discriminate between those of different sexual orientation.⁸ Therefore, if sexual conduct involves consenting parties and takes place in situations where the protective principle does not apply, then the conduct should not be made criminal unless there are clear and convincing reasons to do so.⁹

A related point is that the criminal law on sexual offences should not, as far as possible, make distinctions based on gender; that is, the criminal law should not discriminate between men and women. Hence, it is a guiding principle that the legislation should be as gender neutral as possible.¹⁰

- Compliance with human rights

Any application of the criminal law must be fair, necessary and proportionate. In the Hong Kong context, this guiding principle has to be determined with reference to the Hong Kong Bill of Rights Ordinance (Cap 383), the Basic Law and the International Covenant on Civil and Political Rights.

7. During 2007, the Sub-committee began the work of reviewing the law governing the various sexual and related offences referred to in its terms of

⁶ "Setting the Boundaries - Reforming the law on sex offences", July 2000.

⁷ Scottish Law Commission, cited above, at para 2.6.

⁸ UK Home Office, *Setting the Boundaries - Reforming the law on sex offences*, at para 1.3.2. See also the Court of Final Appeal decision in *Secretary for Justice v Yau Yuk Lung* [2007] 3 HKLRD 903.

⁹ Scottish Law Commission, cited above, at para 2.7.

¹⁰ See also the Court of Appeal decision in *Secretary for Justice v Yau Yuk Lung* [2006] 4 HKLRD 196, and *Leung v Secretary for Justice* [2006] 4 HKLRD 211.

reference, in the light of these principles. Considerable progress has already been made by the Sub-committee in this respect.

8. At the same time two matters have become apparent to the Sub-committee:

- (a) that such review was going to take considerable time - it might not be until 2009 or even later that the Sub-committee could report fully;
- (b) that this timetable would fail to meet an immediate pressing need to address the topic of the sex offender register. This need was evident from the judicial comments referred to in this paper and from various media reports reflecting public anxiety that this topic should be addressed sooner rather than later.

9. The Sub-committee therefore decided to interrupt the previously planned sequence of its deliberations by commencing its work on the topic of the sex offender register.

What is a sex offender register?

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

11. In some of the literature, the term refers to the US style Megan's Law.¹¹ 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.

12. The term "sex offender register" also refers to the imposition of notification obligations on sex offenders after their release from prison.¹² 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.

13. 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.

¹¹ See the discussion, below, in Chapter 3.

¹² See the discussion, below, in Chapter 3.

The Sub-committee's work to date on the sex offender register

14. During the course of its work on this topic the Sub-committee encountered very significant issues including matters related to fundamental human rights. Such issues have arisen in many overseas jurisdictions and have been tackled in various ways with different methods of resolution.

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

16. The main objective of the Sub-committee in considering this part of the terms of reference is to recommend 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).

17. Looking at the experience overseas, in order to come up with a holistic scheme, the Sub-committee needs to carry out in-depth comparative studies and carefully consider whether, and if so to what extent, Hong Kong should introduce reform in particular 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 doing 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; (6) enhancing risk assessment and management work (for example, by establishing multi-agency panels); (7) enhancing treatment and rehabilitation work in prison and upon release.

18. It will take considerable time for the Sub-committee to come up with comprehensive proposals on all these areas. It will also take considerable time to implement many of these proposals as they would require the introduction of legislation and the allocation of considerable resources.

Consideration of interim measure

19. It has occurred to the Sub-committee that pending its final conclusions on these matters, and given the very considerable period of time likely to elapse until then, 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.

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

21. Having debated the merits and possible mechanisms of such a measure, and for reasons elaborated in this paper, the Sub-committee recommends for consultation 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.

22. 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))¹³ whose mental disorder or mental handicap, as the case may be, is of such a nature or degree that that person is incapable of living an independent life or guarding himself against serious exploitation, or will be so incapable when of an age to do so.*" In this paper, unless the context suggests otherwise, references to children will include mentally incapacitated persons.

¹³ "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.

This consultation paper

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

Chapter 1

The existing problem/lacuna in Hong Kong

Judicial comment in Hong Kong

1.1 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.¹ Deputy District Court Judge Thomas noted the benefits of a registration system in England. He further commented that a range of sanctions and remedies that are available both to the offender and to society at large in other jurisdictions are not available in Hong Kong.²

1.2 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.³ Mr Justice Stuart-Moore VP commented that the case had highlighted a lacuna in the criminal justice system in Hong Kong. Part of the judgment is extracted as follows:

- "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.*
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*

¹ DCCC 1051/2005.

² See paras 34, and 38-41.

³ CACC 515/2005.

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."*

1.3 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 12.⁴ 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 convicted of paedophile crimes from working in close proximity to children."⁵

⁴ DCCC 564/2006.

⁵ At para 16.

1.4 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 2005.⁶ 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.

1.5 On 15 September 2006, a 36 year old former policeman pleaded guilty to nine charges of indecent assault involving 4 girls at the primary school where he worked as a technician.⁷ The defendant had previously been convicted of loitering in women's lavatories. The media reported Deputy District Judge Wong as having commented that the Government should carefully consider the need for a database for sex offenders.

1.6 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 2006.⁸ 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.

1.7 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."⁹

The existing lacuna

1.8 As can be seen from the cases and judicial comment mentioned above, if a paedophile is minded to seek out areas of work which would provide him with continued contact with children, there is no system in place which would prevent him from using his employment or voluntary services to target and sexually abuse the children with whom he works. From the further discussion below, the lacuna lies in the lack of an effective system whereby

⁶ HCCC 104/2006.

⁷ DCCC 665/2006.

⁸ HCCC 189/2006.

⁹ 11 March 2008, The Standard.

employers or parents may ascertain whether those who are in child-related work or employment have any previous convictions for sexual offences.

1.9 The Criminal Records Bureau of the police is responsible for maintaining records of persons convicted of certain offences under the Laws of Hong Kong¹⁰. Such records are kept primarily to assist the police in discharging their statutory duties of preventing, detecting and investigating crimes. Hence the police will not generally assist ordinary employers to check whether their existing or prospective employees have any criminal record. The main exception is that if there are express statutory provisions which provide that the existence of previous convictions is a ground for refusing the registration or approval of persons working in a particular profession or field, then the police will assist in carrying out the criminal records check upon the request of the approving authorities or bodies in order to help them discharge their statutory functions.

1.10 As far as child-related work is concerned, the above-mentioned exception covers school managers and teachers registered under the Education Ordinance,¹¹ childminders under the Child Care Services Ordinance,¹² and social workers registered under the Social Workers Registration Ordinance.¹³ However there remains a vast range of persons who have close contact with children during their work where a criminal records check is not available. Within the school system, these include: laboratory technicians, ushers and other support staff. Outside the school system, these include: tutors working in tutorial centres or at home, music teachers and sports coaches, staff working in children's wards in hospitals, staff and volunteer workers helping at youth centres, churches or other organisations.

1.11 The Sub-committee has addressed the rate of recidivism of sex offenders with the assistance of statistics supplied by the Hong Kong Police. There seems no evidence that the rate of recidivism is high in Hong Kong. Statistics with regard to reported indecent assault cases on persons under 17 between 2003 and 2005, where the alleged offender was a teacher/tutor, revealed only one repeat offender. Nonetheless the Sub-committee takes the view that the available statistics may not be detailed or comprehensive enough for one to reach any conclusion on the actual recidivism rate.¹⁴ That there are repeat cases from time to time is apparent from the court cases above referred

¹⁰ 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 (e.g. wounding, assault occasioning actual bodily harm); involving pecuniary loss to the public (e.g. theft, forgery); which are sexual in nature (e.g. 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).

¹¹ Cap 279, sections 30 and 46.

¹² Cap 243, sections 15A and 15D.

¹³ Cap 505, section 17.

¹⁴ 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.

to. In any event, the Sub-Committee believes that this is not a good reason for ignoring the lacuna identified above. Sexual offences are likely to be serious and emotionally damaging, particularly to the young and vulnerable. The Sub-committee is of the view that practicable and effective measures should be considered in order to minimise the occurrence of repeat sexual offences, in particular against children.

Chapter 2

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

Interests at stake

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

Human rights considerations

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.

The ICCPR

2.3 The Hong Kong Bill of Rights Ordinance ("the HKBORO") is the local law giving effect to relevant provisions of the ICCPR, and it binds the Government and public authorities and those acting on their behalf. The application of the ICCPR is also provided for in Article 39 of the Basic Law. It 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."

Protection of privacy

2.4 Article 17 of the ICCPR¹ stipulates that:

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

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

2.5 Article 8(1) of the European Convention on Human Rights contains similar protection of privacy. The European Court in *Rotaru v Romania*² held that even though criminal convictions are made in public, criminal records when systematically collected and stored in a file held by agents of the State, still falls within the scope of "private life" for the purposes of Article 8(1) of the Convention.

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 film³ 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."⁴

¹ Replicated in Article 14 of the HKBOR.

² "Public information can fall within the scope of private life where it is systematically collected and stored in files held by the authorities. That is all the truer where such information concerns a person's distant past." *Rotaru v Romania* (2000) 8 BHRC 449 at para 43.

³ See paras 8.6-8.14.

⁴ Para 8.1.

2.7 The Sub-committee agrees with these observations.

2.8 The Sub-committee also notes that by virtue of the Rehabilitation of Offenders Ordinance (Cap 297) a conviction can become "spent".⁵ Apart from some limited exceptions,⁶ 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.⁷ The Sub-committee notes, however, that most sexual offences under consideration in this paper will likely attract a heavier sentence than those which can become a "spent conviction".

2.9 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 law

2.10 Article 26 of the ICCPR⁸ 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

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

2.12 It is in the interest of society to encourage rehabilitation of sex offenders by allowing them to live down their past, make a new productive life and establish and maintain intimate and social relationships. Critics of a sex offender register might argue that the register would jeopardise the

⁵ 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.

⁶ For example, admission as a solicitor, barrister, accountant or authorised insurance broker: see section 4 of Cap 297.

⁷ See section 2 of Cap 297.

⁸ Replicated in Article 22 of the HKBOR.

rehabilitation opportunities of the sex offender. The wider community may therefore lose the benefit of the skills and involvement of sex offenders who have rehabilitated. At its worst, exclusion from the community or gainful employment may push these offenders towards re-offending.

Rights of sex offenders not absolute

2.13 The Sub-committee notes that the rights and interests of sex offenders quoted above are not to be regarded as absolute, and need to be balanced against conflicting rights and interests. In particular, Article 24 of the ICCPR⁹ stipulates that "*every child has the right to be protected, regardless of the child's race, colour, sex, language, religion, national or social origin, property or birth.*" This Article imposes a positive obligation on the government to take reasonable and necessary measures to protect children from harm and exploitation by sex offenders. Any failure by the government to provide an effective system to secure children's safety may also lead to the public taking the law into their own hands by, for instance, indiscriminate posting of details of sex offenders by the media or individuals on the internet or in other forms of publication.

2.14 In this regard, the Sub-committee notes that 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.

2.15 In *R v Chief Constable of North Wales, ex p Thorpe*,¹⁰ 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 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

⁹ Replicated in Article 20 of the HKBOR.
¹⁰ [1999] QB 396, [1998] 3 All ER 310.

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.

2.16 In *R(X) v Chief Constable of West Midlands*,¹¹ 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.

2.17 In *Re C (2002)*,¹² 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 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 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 the paedophile and his family, the likely impact which the disclosure might have on them in terms of vigilantism, and employment difficulties.

¹¹ [2005] 1 WLR 65.
¹² [2002] 2 FCR 385.

- The impact on the ability of the police and social services to manage C, including the risk of driving the paedophile "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.

2.18 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 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 A sex offender register can take many shapes and forms,¹ but the primary objective must be 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 have looked at practices in other jurisdictions to see what mechanisms have been introduced in this connection. There follows a summary of some of these mechanisms.

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 only sought 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 registered sex offenders for the purpose of crime detection, investigation and prevention. However, in response to public outrage at a few highly publicised sex crimes against children, in the 1990s 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 about persons convicted of sexual offences.

3.3 In October 1989, Jacob Wetterling, an eleven-year-old boy, was abducted at gun-point in Minnesota and has never been found. Investigators later learned that, unknown to local law enforcement agencies, "halfway houses" nearby housed sex offenders after their release from prison. The boy's mother, Patty Wetterling, became an advocate for missing children and was appointed to a Governor's Task Force that recommended stronger sex offender registration requirements in Minnesota. In 1994, the US Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act² in Jacob's honour ("the Jacob Wetterling Act"), which required all states to enact laws to implement state sex offender

¹ See Preface, above, for a discussion of the different types of sex offender register.

² 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 neighborhood 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".³ In 1996 Congress passed the federal Megan's Law⁴ 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 1997:⁵

"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 General⁶) 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

³ NJSA 2C:7-1 through 7-II.

⁴ Violent Crime and Law Enforcement Act 42 USC 13701.

⁵ HOPRG Report, *Keeping Track? Observations on Sex Offender Registers in the US*, Crime Detection and Prevention Series Paper 83 (1997) at p 34.

⁶ 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.

protecting the public. As a result, there is considerable diversity among, and 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 Watch⁷ 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 offenses, at least 13 states require registration for public urination and at least 29 states require registration for consensual sex between teenagers).⁸

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, 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.⁹

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

⁷ *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>.

⁸ The HRW Report 2007, cited above, at p 39.

⁹ 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,¹⁰ "*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"¹¹ and seek to classify sex offenders into different tiers with different levels of disclosure.¹² Some states classify solely by reference to the types of offences committed, and some by way of risk assessment undertaken by the court,¹³ the police¹⁴ or some multi-agencies or experts panels¹⁵ 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.¹⁶

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 who to notify or the method of notification.

¹⁰ HOPRG Report 1997, cited above, at p 12.

¹¹ HOPRG Report 1997, cited above, at p 28.

¹² 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.

¹³ 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.

¹⁴ For example, Arizona, Nebraska and Wisconsin, *ibid*.

¹⁵ For example, Minnesota, *ibid*.

¹⁶ 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.¹⁷

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 the Human Rights Watch,¹⁸ 32 states include every registrant who was convicted as an adult¹⁹ 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 Website²⁰ 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.

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.

¹⁷ 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.

¹⁸ The HRW Report 2007, cited above.

¹⁹ This includes youths who were under 18, but convicted as adults.

²⁰ <http://www.nsopr.gov/>.

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

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.

offender registration and notification. All relevant jurisdictions²⁷ are required 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 on 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 on 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

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 U.S. territories as well as the Indian tribal jurisdictions.

²⁸ Attorney General is authorized 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 for Tier III sex offenders to register for life. SORNA acknowledges in a limited way the significance of living offence-free: Tier I registrants can petition for removal from 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.
- The address of each residence at which the sex offender resides or will reside and, if the sex offender does not have any (present

³¹ SORNA section 111(3).
³² SORNA section 111(4).

or expected) residence address, other information about where the sex offender has his or her home or habitually lives. (If current information of this type is not available because the sex offender is in violation of the requirement to register or unlocatable, the website must note this.)

- The address of any place where the sex offender is an employee or will be an employee and, if the sex offender is employed but does not have a definite employment address, other information about where the sex offender works.
- The address of any place where the sex offender is a student or will be a student.
- 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, it 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 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 offenders who would pose no safety risk to the registration requirements. 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 600,000³⁴ 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 include more offences and longer registration periods would compromise the law enforcement agencies' ability to monitor high-risk sex offenders.

³³ The HRW Report 2007, cited above.
³⁴ As of March 2007.

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 the creation of a sex offender register, controlled disclosure of sex offenders' information, criminal records checks for vetting job applications, and barring sex offenders from child-related work.

The Sex Offender Register

3.36 The Sex Offender Register was introduced in the UK by the Sex Offenders Act 1997.³⁵ Although commonly called a register, the Act makes no provision for 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 time³⁶ after their sentencing or release, and to notify the police of any subsequent changes during a specified notification period³⁷ 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 to³⁸ 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.³⁹ The compliance rate with the requirements by sex offenders has been assessed at 97 per cent.⁴⁰

3.37 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 passed⁴¹, 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.⁴²

³⁵ The 1997 Act was re-enacted with amendments as The Sexual Offences Act 2003.

³⁶ Originally it was 14 days, but now it is generally shortened to 3 days.

³⁷ The notification period depends essentially on the length of custodial sentence imposed on the offender e.g. indefinite period for a custodial sentence of 30 months or more, 10 years for a sentence of 6 months to 30 months, 7 years for a custodial sentence under 6 months and 5 years for a non-custodial sentence: see section 82 of The Sexual Offences Act 2003.

³⁸ 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.

³⁹ See sections 80 and 81 and Schedule 3 of The Sexual Offences Act 2003.

⁴⁰ UK Home Office, Review of the Protection of Children from Sex Offenders, June 2007, at p 8.

⁴¹ This part of the legislation will come into operation on a date to be appointed by the Secretary of State.

⁴² UK Home Office, Review of the Protection of Children from Sex Offenders, June 2007, at p 18.

Community notification v controlled disclosure

3.38 Unlike the US Megan's Law, 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 unsuccessful⁴³ 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.

3.39 In its first circular⁴⁴ issued in relation to the Sex Offenders Act 1997, the Home Office set out guidance for managing information acquired from sex offenders. It emphasises that the registration information must not merely be recorded or filed, but that risk assessment should be undertaken by the police working with other child protection agencies in order to protect children. Hence there is a general need to share the sex offenders' information with the Probation Service, Social Services Department, statutory agencies and partner bodies who have responsibilities for the protection of children from sexual abuse. Outside such agencies, disclosure should be regarded as an exception to a general policy of confidentiality, and should be seen as part of an overall plan for managing the risk posed by a potential offender and the need to protect an individual child, a group of children or other vulnerable persons. Following a risk assessment, it may be felt necessary to provide controlled disclosure to identified individuals directly affected by the risk of harm or with responsibilities towards others for the prevention of harm, such as head teachers, play group leaders and senior management of the offender's employer company. Professional advice and assistance from the appropriate professional agencies should be made available at the time of disclosure. Before making the disclosure, the police should be prepared to give advice and guidance on what action is required to be taken by the person receiving the information.

3.40 Pursuant to the Criminal Justice and Court Services Act 2000, Multi-Agency Public Protection Arrangements (MAPPA) have been introduced to bring together the police, probation and prison services and other agencies in identifying, assessing and managing the risks presented by serious sexual and violent offenders. The introduction of multi-agency cooperation to manage high-risk offenders through MAPPA seems to be successful. In 2006/07 there were around 48,000 offenders managed by MAPPA, and the rate of serious re-offending by these offenders successfully remained under 0.6%.⁴⁵

3.41 With the establishment of MAPPA, whether to make controlled disclosure of sex offenders' information to a third party is determined on a case by case basis under its guidance. Under the newly introduced Criminal Justice and Immigration Act 2008, there will be a statutory duty for the local

⁴³ See House of Commons Debate, 25 February 1997, cols. 214-232.

⁴⁴ UK Home Office Circular 39/1997 on *Sex Offenders Act 1997*.

⁴⁵ UK Home Office, *Saving Lives. Reducing Harm. Protecting the Public*, February 2008 at p 23.

MAPPA authority to consider whether to disclose information in its possession about the relevant previous convictions of any child sex offender to any particular member of the public.⁴⁶ The new scheme will allow, for example, the parents to register with the local police an interest in someone who has regular unsupervised access to their child. The police will then check whether that individual has been previously convicted of any child sex offences and, if so, will refer the case to the MAPPA to assess whether that offender poses a risk of causing serious harm to the child. If so, the statutory presumption will be in favour of controlled disclosure to the parents.⁴⁷

The CEOP website

3.42 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.⁴⁸

Access to criminal records for employment and related purposes

Home Office's White Paper of 1996

3.43 Checks on criminal records are widely considered to offer a significant contribution to the protection of society against people who may seek to abuse positions of trust. The UK Home Office issued a Green Paper in 1993⁴⁹ in response to the growing demands from a range of employing and other bodies to be able to check the criminal background of prospective employees and volunteers. The White Paper⁵⁰ published in 1996 revealed that 180 responses were received and the principal comments to emerge were:

- Confirmation that there is a significant and legitimate unmet demand for access to criminal record checks from, for example, the private security industry, financial institutions and those

⁴⁶ Section 140 of the Act, which amends the Criminal Justice Act 2003 by adding sections 327A and 327B.

⁴⁷ UK Home Office, Review of the Protection of Children from Sex Offenders, June 2007, at p 11.

⁴⁸ UK Home Office, Review of the Protection of Children from Sex Offenders, June 2007, at p 10.

⁴⁹ CM 2319 "Disclosure from Criminal Records for Employment Vetting Purposes".

⁵⁰ UK Home Office, "On the Record: The Government's Proposals for Access to Criminal Records for Employment and Related Purposes in England and Wales" June 1996, CM 3308.

concerned with the care of elderly and handicapped people, as well as the voluntary and private child-care sectors;

- Broad acceptance that the responsibility for obtaining criminal record details might fall to the individual concerned, rather than the prospective employer. Although many existing users of the checking system feared that this could lead to increased fraud and other disadvantages, the majority of those currently outside the system found the proposal acceptable. Many respondents noted that there are strong arguments for the individual knowing what information is being supplied to his or her employer, and this approach is consistent with that view;
- There was a mixed reaction to the proposal for a special agency to take over the conduct of checks from police forces, but a general desire for a fast and efficient service, with any charges kept as low as possible.⁵¹

3.44 The White Paper proposed that three types of criminal record checks be made available on written application by the individual who is the subject of the check. It was stressed that employers would have the discretion to decide whether a criminal record check was required.

Criminal Conviction Certificates

3.45 The White Paper proposed to create a new type of check to be recorded on a "Criminal Conviction Certificate" ("CCC"). This would cover only convictions which are "unspent" under the ROA 1974. It was noted that similar certificates were already available to citizens in many countries, including most member states of the European Union.

3.46 The new CCCs would enable British citizens seeking to live or work abroad to produce either proof that they have no unspent convictions or verify details of any such convictions. Employers would not be able to apply directly for CCCs on their employees, but would be able to ask anyone seeking employment to provide a CCC. The new certificates were intended to meet the need voiced by employers in a range of businesses where exceptions to the provisions of the ROA 1974 did not apply, for a way of identifying people whose criminal record may make them unsuitable for a particular job.

"Full" criminal record checks

3.47 This type of check would include both "spent" and "unspent" convictions under the ROA 1974 and would include details of cautions, and would be made available due to the recognition that fuller checks would be necessary for more sensitive areas of employment or licensing. The list of groups or professions covered under this new check would broadly be:

⁵¹ At pages 5-6.

- Those whose duties involve regular contact with children and young people under the age of 18, the elderly, sick, and handicapped people.
- Those who must be checked in the interests of national security.
- Those involved in the administration of the law.
- Certain sensitive areas of licensing, such as for firearms, explosives and gambling.
- Certain professions in areas such as health, pharmacy and law.
- Senior managers in banking and financial services.

3.48 These proposals would require changes to the list of exceptions to the provisions of the ROA. As with CCCs the individual would apply for the check, but the application would be expected to be countersigned by the prospective employer.

"Enhanced" criminal record checks

3.49 These checks would be available only where public interest demands a still higher degree of protection, and would be limited to two areas:

- Prospective employees, trainees and volunteers having regular, unsupervised contact with children and young people under the age of 18.
- Gaming, betting and lottery licensing.

3.50 In addition to the "full" national criminal records check, a local police force check would also be conducted so that cautions and relevant non-conviction information would be available, subject to the police's discretion to withhold the information if any release would imperil a current or planned police operation.

3.51 The Home Office's recommendations have largely been implemented. The checks now conducted by the Criminal Records Bureau⁵² (CRB) are based on the recommendations.

⁵² The Criminal Records Bureau 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 who may be unsuitable for certain work, especially that involve children or vulnerable adults. 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.

Criminal Records Bureau check

3.52 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.⁵³ In addition to the Standard Disclosure, any relevant information (including non-conviction information) held by the local police forces is made available.

3.53 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.⁵⁴ 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.

3.54 As from 12 May 2006, schools are required to obtain enhanced CRB checks for all new appointments to schools and those who have not been working in a school for at least three months.⁵⁵ Previously, CRB checks were strongly recommended. Now, the checks are mandatory for all new appointments to the schools' workforce, including caretakers, dinner ladies and administration staff. This would be in addition to the usual checks, such as previous employer references and qualifications check.⁵⁶

VISOR

3.55 Before the launching of the Violent and Sex Offender Register ("VISOR"), police and probation officers fed offenders' details into local databases which made it difficult to track the offenders if they moved around the United Kingdom.⁵⁷ *VISOR* is designed to store details of registered sex offenders, non-registered sex offenders, violent offenders and potentially

⁵³ Also for certain licensing purposes and judicial appointments.

⁵⁴ Examples of Umbrella Bodies are local authorities, independent schools and organisations that provide personnel services to schools.

⁵⁵ The School Staffing (England) (Amendment) Regulations 2006.

⁵⁶ "Review of the List 99", at para 7.

⁵⁷ news.bbc.co.uk, *Offenders database 'to cut crime'*, published 2005.08.19.

dangerous persons.⁵⁸ *VISOR* is a unified national computer database which can be accessed across all 52 geographic police forces in the UK, and it was created following the recommendation of the 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.⁵⁹ 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.⁶⁰

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

List 99

3.56 The Secretary of State has the power to bar an individual from working in schools, Further Education colleges⁶¹ and Local Education Authority education services.⁶² 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.

3.57 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 of, the CRB checks.

The Safeguarding Vulnerable Groups Act 2006

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

⁵⁸ www.sussex.police.uk, Policy Document 746/2005.

⁵⁹ news.bbc.co.uk, *Offenders database 'to cut crime'*, published 2005.08.19.

⁶⁰ R Scorer, A vetting epidemic, *New Law Journal*, 15 NLJ 985, 13 July 2007.

⁶¹ For students over 18 years of age.

⁶² The power is currently contained in section 142 of the UK Education Act 2002. See further "*Review of the List 99 decision making process and policy implications*".

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

3.60 On 16 May 2008, it was announced that the ISA had appointed its board members, and the ISA board would start its work to define the criteria for barring individuals from working with children and vulnerable adults, a role currently partly carried out by ministers. It is expected that the ISA scheme will be operational by October 2009.

Other European jurisdictions

3.61 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.⁶³ 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).⁶⁴ 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

3.62 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.

3.63 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;
- they receive an absolute or conditional discharge or if they are found not criminally responsible on account of mental disorder;

⁶³ UK Home Office, *On the Record*, cited above, CM 3308 June 1996 at p 19.

⁶⁴ Grier and Thomas, cited above, at 460.

- they are released from custody pending the determination of an appeal.⁶⁵

3.64 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.⁶⁶
- 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.⁶⁷
- All information collected or registered must be destroyed or permanently removed from the database if the person is finally acquitted.⁶⁸
- 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.⁶⁹
- 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.⁷⁰

Australian jurisdictions

3.65 Given the constitutional provisions in Australia, the different states/territories and the national government each maintain their own sex offender registers. Efforts have been made to achieve greater standardisation and sharing of information in recent years. The Australian registers essentially have restricted disclosure to the public, and have evolved from criminal conviction databases.

⁶⁵ Section 4(2).

⁶⁶ Section 8.

⁶⁷ Section 9(4).

⁶⁸ Section 15.

⁶⁹ Section 16. There are other specified grounds, but the scope is very limited.

⁷⁰ Section 15.

Federal measures

3.66 At the federal level, the Australian National Child Offender Register ("ANCOR") is maintained by the "Crim Trac" agency, which has taken 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.

3.67 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.⁷¹ The registration regimes would be vetted by the federal and state privacy commissioners.

3.68 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.

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

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

⁷¹ 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

3.70 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

3.71 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,⁷² 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."⁷³

3.72 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;⁷⁴
- (d) educational institutions;

⁷² Section 63.

⁷³ Section 63(1)(b).

⁷⁴ 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 centres⁷⁵ 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.

⁷⁵ 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;
- (t) talent or beauty competitions held for children on a commercial basis and not merely incidentally to or in support of other business activities.⁷⁶

3.73 A registered sex offender must not apply for, or engage in, child-related employment,⁷⁷ 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.⁷⁸

3.74 In Western Australia, the Working with Children (Criminal Record Checking) Act 2004 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 record checking was undertaken only by some service providers. There was concern that the screening and assessment process was not always consistent.⁷⁹ 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.⁸⁰ The penalty for the offence 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.

⁷⁶ Section 67(1) of the 2004 Act.

⁷⁷ Section 68(1).

⁷⁸ As defined in Sentencing Act 1991.

⁷⁹ Screening legislation has been adopted in Queensland, New South Wales, Victoria, and including Western Australia.

⁸⁰ Section 22.

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

3.75 The South African Commission's 2002 Report considered the issue of a sex offender register.⁸¹ 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 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.⁸² The latter register would contain two parts. Part A would list the names of children in need of care 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:

⁸¹ At p 267 – p 279.

⁸² Recommended by the Commission in its investigation into the Review of the Child Care Act (Project 110).

"26. 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."⁸³

3.76 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.⁸⁴ 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.⁸⁵ An employer is prohibited from employing or continue employing a person whose particulars have been included in the register.⁸⁶ 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.⁸⁷

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

3.77 In addition to the above measures relating to sex offender registration, community notification and records check, a wide range of other measures have been developed in overseas jurisdictions to protect children and vulnerable persons from sexual harm. What follows is only a brief discussion and should not be regarded as a comprehensive study of those measures taken.

⁸³ At p 279.
⁸⁴ Section 50(1)(a)(i).
⁸⁵ Section 50(1)(a)(ii).
⁸⁶ Section 45.
⁸⁷ Section 41.

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

3.78 In some Australian jurisdictions,⁸⁸ orders can be made to allow for the continued supervision or detention of offenders who have reached the end of their custodial sentence but who are considered to pose a continued and serious danger to the community. In Victoria, for example, the extended supervision order⁸⁹ ("ESO") allows for an offender's ongoing supervision in the community under conditions⁹⁰ for a period of up to 15 years, though the continuing need for the order is reviewed at least every three years. A court needs to be satisfied, to a high degree of probability, that the offender is likely to commit a sexual offence if released unsupervised into the community after serving a custodial sentence.

3.79 As for New South Wales, in addition to the ESO, a continuing detention order ("CDO") may be issued if the court is satisfied to a high degree of probability that the offender is likely to commit a further serious sex offence if he or she is not kept under supervision and adequate supervision will not be provided by an ESO.

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

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

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

⁸⁸ Serious Sex Offenders Monitoring Act 2005 (Vic), Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), Dangerous Sexual Offenders Act 2006 (WA), Crimes (Serious Sex Offenders) Act 2006 (NSW).

⁸⁹ Serious Sex Offenders Monitoring Act 2005 (Vic).

⁹⁰ Types of conditions under ESOs include curfews, outings only under escort, or requirement to live in a temporary centre established by Corrections Victoria.

Peace bonds

3.82 Under section 810 of the Criminal Code of Canada, the police or a provincial crown attorney may apply to a provincial court to order an individual to "keep the peace", regardless of whether or not the individual has been convicted of any offence. This mechanism was introduced in 1892, aimed at property offenders, but it has been used in recent years for sexual offences against children and serious personal injury offences. The individuals would be required to comply with conditions including regular reporting to police, prohibitions against being within a specified distance of a particular place (such as schools), electronic surveillance or curfews.

Additional measures

3.83 In some overseas jurisdictions, additional measures have been devised to manage high-risk offenders and to afford better protection to the community. These include:

- community initiatives to assist the reintegration of offenders into the community;
- compulsory treatment and counselling of sex offenders; and
- introduction of multi-agency cooperative arrangements to improve the coordination and delivery of services.

Relevance of above summaries in overseas jurisdictions

3.84 It can be seen that the measures available in overseas jurisdictions are many and varied. For the purpose of this paper, it suffices to note that the Sub-committee's 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 Views have been expressed from various sectors that Hong Kong should create a "sex offender register"¹ to protect children from sexual abuse. There are others, however, who believe that a sex offender register may not deter paedophiles and, further, would infringe privacy rights and rehabilitation opportunities of ex-offenders and run the risk of encouraging vigilantism.

4.2 We mentioned in the Preface that any introduction of a sex offender register should not be considered in isolation, and that the goal of the Sub-committee is to devise 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, without unjustifiably infringing the privacy and other rights of the offenders (or their family members). For the reasons set out in the Preface, we believe it is pertinent to consider whether any interim measure should be proposed for consultation and implementation before the publication of our recommendations based on this holistic approach and before the introduction of any recommended legislation in due course.

4.3 In this regard, 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.² Having examined the sex offender registration and vetting schemes in various jurisdictions, as well as the jurisprudence which has been developed, we believe that it is reasonable 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 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.

¹ See Preface for the different meanings ascribed to the term.

² 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 It is our objective that the proposed interim measure should be capable of swift implementation by way of administrative guidelines without legislation. For reasons further elaborated below, the Sub-committee therefore proposes for consultation an interim measure whereby an administrative scheme is established to enable the sexual conviction records of persons who undertake child-related work and work related to mentally incapacitated persons to be checked, with proper measures built into the system to address human rights and rehabilitation concerns.

Broad community notification not recommended

4.6 For the avoidance of doubt, we should state at the outset that the Sub-committee does not favour the introduction of a US-style "Megan's Law"³ in Hong Kong. Although proponents of "Megan's Law" would argue that the public has the right to know the identity of an offender in order that they can take precautions, the Sub-committee is against the introduction of such a "public register" for the following reasons:

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

Recommendation 1

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

³ See discussion in paras 3.4-3.21.

Sexual conviction records checks

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

Arguments against controlled access to a person's sexual conviction records

4.8 We have considered the arguments against allowing controlled access to a person's sexual conviction records. Some of these are:

- (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 parental supervision.
- (c) It will not prevent abuses that take place within the family.
- (d) It will not cover overseas conviction records.
- (e) It infringes the privacy rights of sex offenders.
- (f) It interferes with the rehabilitation of sex offenders who might thereby face additional difficulties in finding employment and reintegrating into society.

4.9 Matters (a) (b), (c) and (d) above, in reality, amount to limitations in any criminal records checks, rather than arguments against allowing controlled access to a person's sexual offences records. 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.⁴ If the proposed interim measure is likely to significantly reduce the risks to the young and 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

⁴ See the discussion, above, in Chapter 3.

of children and the cost involved is not prohibitive.⁵ 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.

4.10 With regard to the privacy rights of sex offenders and their rehabilitation, we consider that these are legitimate concerns to which we should pay heed. On the other hand, these rights are not absolute and the Government has a constitutional duty under Article 24 of the ICCPR to protect children from sexual exploitation. The Sub-committee recognises that, notwithstanding that offenders are convicted in open court, any unnecessary disclosure of an ex-offender's records may still infringe his privacy rights.⁶ However, the conviction information is already in the public domain and the media could have chosen to report on the convictions⁷ 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 identity. 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.

4.11 As for the rehabilitation of sex offenders, we believe that as long as the criminal records check system covers only offences of a sexual nature, and that only limited categories of employers (duly authorised by the sex offender) are allowed access to that information, there will not be an undue adverse effect on the sex offenders' rehabilitation. Sex offenders would be encouraged to find suitable employment in areas other than those involving children.

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.

⁵ See para 4.26(f).

⁶ See HKLRC, Report on Civil Liability for Invasion of Privacy (2004), at Chapter 8.

⁷ Except for juvenile offenders.

Child-related work and work relating to mentally incapacitated persons

4.12 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, we believe 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?

4.13 We believe any proposed protection should cover all children under 18 years of age. As explained in paragraph 4.4, we believe "mentally incapacitated persons" within the meaning of section 117 of the Crimes Ordinance (Cap 200) deserve similar protection.

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

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

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

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

Definition of "work"

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

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

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

Recommendation 3

We recommend that for the purposes of these recommendations "child-related work" be defined as work where the usual duties involve, or are likely to involve, contact with a child, and "work relating to mentally incapacitated persons" (or "MIP-related work") should

include work where the usual duties involve, or are likely to involve, contact with a mentally incapacitated person. Employees, volunteers, trainees and self-employed persons undertaking child-related work or MIP-related work should be covered by the proposed system.

Checks should not be mandatory

4.18 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 to 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.

4.19 Whether to make checks mandatory but subject to certain defined exceptions may be worth further consideration. However, as explained in the Preface, our proposed interim measure should be plainly lawful and capable of implementation without legislation. Hence, we do not believe that the measure should require checks to be mandatory. The focus of our proposed scheme is to give the employer a choice and the means to ascertain whether a prospective employee has any sexual conviction records.

Recommendation 4

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

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

4.20 An issue which has to be considered is whether the proposed scheme should apply to prospective employees only, or whether it should apply also to existing employees. Should the proposed scheme apply only to prospective employees, some may find the scope of the proposed scheme to be too restrictive, and the intended protection rendered to children to be

inadequate. On the other hand, the advantage of a more modest start would enable the scheme to develop and to expand by stages if appropriate. In particular, we recognise that making the proposed scheme available to existing employers may have certain disadvantages: first, there may be a rush by many employers to check the sexual conviction records of existing employees when the scheme is first launched thereby leading to resource implications; second, it may raise a number of employment issues, which would have to be resolved between the employers and employees, or by the court.

4.21 The employment issues may arise if an existing employee refuses to give consent to the sexual conviction records check, or if it is found out that he or she has a relevant sexual conviction. A major question that will arise in either scenario is whether the employer can lawfully terminate the employment, either summarily or by giving notice (or by payment in lieu of notice).⁸

4.22 We would like to point out that, given the wide variety of different circumstances which could arise, there is no simple answer to the question as to whether summary dismissal is justified unless the full facts and circumstances of the case in question are examined. Relevant facts and circumstances might include:

- (a) Whether before the employment the employee has been asked to declare whether he has any previous conviction.⁹
- (b) The terms of the employment agreement.

⁸ 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 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.

⁹ 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). 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 4.44 below.).

- (c) The nature of the employee's job.
- (d) The nature and circumstances of the sexual conviction in question.

4.23 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.¹⁰

4.24 On the other hand, should the proposed scheme apply only to prospective employees, paedophiles who have already obtained employment in child-related work before the implementation of the proposed interim measure may escape the net of the sexual conviction records check. It may be argued that as a matter of principle no distinction should be drawn between existing and prospective employees if the check is considered a reasonable measure to protect children from sexual abuse. Indeed, an employer may be held vicariously liable in tort action for any sexual abuse committed by its employee,¹¹ and so the existing employer may also wish to invoke the proposed scheme to reduce the risk. Distinguishing between existing and prospective employees may also lead to complications in implementation – for example, whether a private tutor employed by a tutorial centre should be treated as an existing employee if he is tutoring different children from time to time, and whether an employee who intends to change his work nature from one that does not involve usual contact with children to one that does should be regarded as an existing employee for the purpose of the proposed scheme.

4.25 If it is decided to apply the proposed scheme to existing employees, we think it would be helpful to remind employers and employees when the scheme is introduced 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

¹⁰ 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 the Court of Final Appeal's decision of *Vincent v South China Morning Post Publishers Ltd.* [2004] 4 HKC 205, for example. 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.

¹¹ 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 Heselley 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.

found to have a relevant conviction or refuses to give consent to checking the employee's sexual conviction record. The employee might be re-deployed to undertake job duties which are not child-related, or measures could be taken to ensure that the employee's contact with children is supervised by another staff.

Recommendation 5

We recommend that the proposed scheme should apply to prospective employees. As to whether existing employees should be covered by the proposed scheme, the Sub-committee would welcome views from the public before finalising our recommendation.

Method of application

4.26 In order that our recommendations may be better understood, we explain briefly at this juncture the current arrangements for criminal record checks.

Data access requests for criminal conviction data

4.27 A person may make a personal data access request under the Personal Data (Privacy) Ordinance (Cap 486)¹² 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")¹³ upon payment of a fee of \$50.¹⁴ If a person has previous convictions, he will be provided with a written record listing out all the conviction records kept by the police. However, if the person has a clear record, he will only be advised of such a fact verbally and will not be given any certificate or written confirmation.

4.28 The primary reason for not issuing any written confirmation of no criminal conviction to the data subject arises from rehabilitative concerns: it has long been considered by the police as 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, it is felt by the police that if a certificate of no criminal conviction is generally available to the data subject, there would be a real possibility of fabrication of or alteration to such certificates.

¹² Section 18.

¹³ A proforma application form may be obtained from a police station or from <https://secure1.info.gov.hk/police/epol-forms/DataAccessRequestCriminal.htm>.

¹⁴ As at July 2008.

Certificates of No Criminal Conviction ("CNCC")

4.29 However, as an exception to this general approach, 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 \$180.¹⁵ 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.

4.30 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 is pending conclusion of the matter.

The proposed method of application

4.31 In a sense, our proposed system of sexual conviction record checks can be considered as a modification and extension of the CNCC scheme and the data-subject's right to access his own personal data. It should be noted that there is no legislative basis for the current CNCC scheme; it is an administrative scheme.

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

- (a) In the absence of any legislative basis, a sexual conviction record check should not be conducted without the data subject's consent, and should comply with the Personal Data (Privacy) Ordinance (Cap 486) and the relevant Data Protection Principles.
 - Hence, the application should be initiated only by the data subject who should be informed by the employer whether it is obligatory or voluntary for him to supply the data.¹⁶
 - Also, the employer should be aware that the sexual conviction records information obtained under the proposed scheme should not be used for any other purpose.¹⁷
- (b) It should ensure, as far as practicable, that only bona fide employers involved in child-related work will have access to the information.

¹⁵ As at July 2008.

¹⁶ Data Protection Principle 1 – purpose and manner of collection of personal data.

¹⁷ Data Protection Principle 3 – use of personal data.

- We are concerned as to the possibility that the introduction of the scheme might encourage employers not involved in child-related work to require a check to be done as well. Such a development would be undesirable because it would undermine the rehabilitation of sex offenders.
- Hence, we have considered whether some 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 on 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 also make the proposed scheme unduly onerous and complicated for employers.
- Given these considerations, and subject to the comments to be gathered from the consultation exercise, 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 1.¹⁸

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

¹⁸

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."*

(e) It 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, two or three months.

(f) It should be cost-effective.

- Since most conviction information is already stored in the police's database, and the existing CCDO and CNCC schemes have been successfully administered by the police for many years, we believe it would be most cost-effective and reliable for the police to handle the sexual conviction records checks.
- With the additional workload of the proposed system, there would inevitably be substantial staffing and resource implications for the police to take on this new commitment. It is envisaged that an administrative fee would be charged for each application in order to cover the operating costs of this new service.
- 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 (see Recommendation 6 below).

Recommendation 6

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

Types of offences to be covered by the scheme

4.33 As our proposed scheme aims to protect children from the risk of sexual exploitation, the records check should cover only sexual offences or offences that may reasonably be associated with an increased risk of sexual exploitation of children (for example, child pornography offences and some prostitution-related offences). It will also be necessary to specify clearly the offences covered by the scheme so that employers understand the meaning and limitation of a "clean" record check. Those sex-related offences included in the Schedule to the Child Care Services Ordinance (Cap 243) may serve as a useful reference. We set out below a proposed list of offences to be covered by the scheme, but we would welcome views on the suitability of this list.

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

Crimes Ordinance (Cap 200)

- section 47 Incest by men
- section 48 Incest by women of or over 16
- section 118 Rape
- section 118A Non-consensual buggery
- section 118B Assault with intent to commit buggery
- section 118C Homosexual buggery with or by a man under 21
- section 118D Buggery with a girl under 21
- section 118E Buggery with a mentally incapacitated person
- section 118F Homosexual buggery committed otherwise than in private
- section 118G Procuring others to commit homosexual buggery
- section 118H Gross indecency with or by a man under 21
- section 118I Gross indecency by a man with a male mentally incapacitated person
- section 118J Gross indecency by a man with another man otherwise than in private

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

Prevention of Child Pornography Ordinance (Cap 579)

- section 3 Offences relating to child pornography

Common law offence

- Common law offence of outraging public decency

Related Inchoate Offences

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

Recommendation 7

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

Information other than records of conviction

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

4.36 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*".

4.37 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 is already in the public domain.

4.38 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.¹⁹

4.39 The system of sexual conviction records check which we propose in this 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

¹⁹ See the discussion, above, at para 2.15 regarding the decision of the English Court of Appeal in *R (Thorpe) v Chief Constable of North Wales*.

for good reason to provide information to persons with legitimate reasons for inquiry and with the consent of the data subject. We therefore consider that it could not be said to infringe Article 14 of the Bill of Rights, and would be constitutional.

4.40 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 constitutional guarantees of privacy. We are concerned 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,²⁰ though not yet considered by the European Court of Human Rights.

4.41 Some members have 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 sacrificing their career or occupation as a result of the disclosure of suspect information.

4.42 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.

4.43 What of the situation where a person has been arrested for, or charged with, a sexual offence and the trial is still pending? We are concerned with the possibility of a paedophile taking advantage of the time gap to obtain a "clean" check result in order to secure child-related work pending trial while he is on bail. We would therefore propose 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.²¹ 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 recognise that providing such an option to the applicant may complicate the operation of the scheme and may have additional staff and resource implications for the police to take on this new responsibility. However we believe it is fairer to allow the applicant such a choice, and we envisage that

²⁰ See the discussion, above, on *R(x) v Chief Constable of West Midlands* [2005] 1 WLR 65 in Chapter 2.

²¹ See para 4.30 above.

there will not be very many cases where the applicant will have an outstanding arrest or charge and where he will choose this option.

Recommendation 8

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

Spent convictions

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

4.45 We note, however, that the Child Care Services Ordinance (Cap 243) provides that (notwithstanding section 2 of the Rehabilitation of Offenders Ordinance (Cap 297)) a person shall not act as a childminder if he has been convicted of certain specified offences.²² The Sub-committee is also aware that in England, for example, criminal record checks are divided into different grades, and spent convictions are disclosed in checks of higher grades. In respect of the interim measure at least, however, the Sub-committee is of the view that spent convictions should not be revealed under the proposed scheme. We do not want any risk to be run that the scheme might breach the provisions or the spirit of Cap 297.

²² Section 15A(3).

Recommendation 9

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

Conclusion

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

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

Chapter 5

Summary of recommendations

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

Recommendation 1: Broad community notification not recommended (paragraph 4.6)

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

Recommendation 2: Sexual conviction records checks (paragraphs 4.7 – 4.11)

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 4.12 – 4.17)

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

Recommendation 4: Checks should not be mandatory (paragraphs 4.18 – 4.19)

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

Recommendation 5: Whether the proposed scheme should apply to both existing and prospective employees (paragraphs 4.20 – 4.25)

We recommend that the proposed scheme should apply to prospective employees. As to whether existing employees should be covered by the proposed scheme, the Sub-committee would welcome views from the public before finalising our recommendation.

Recommendation 6: Method of application (paragraphs 4.26 – 4.32)

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

Recommendation 7: Types of offences to be covered by the scheme (paragraphs 4.33 – 4.34)

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

Recommendation 8: Information other than records of conviction (paragraphs 4.35 – 4.43)

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

Recommendation 9: Spent convictions (paragraphs 4.44 – 4.45)

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.