THE LAW REFORM COMMISSION OF HONG KONG

CONSULTATION PAPER

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

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The Commission would be grateful for comments on this Consultation Paper by 23 September 2013. All correspondence should be addressed to:

The Law Reform Commission of Hong Kong
20th Floor, Harcourt House
39 Gloucester Road
Wanchai
Hong Kong

Telephone: (852) 2528 0472

Fax: (852) 2865 2902

E-mail: hklrc@hkreform.gov.hk

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Preface

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Terms of reference

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

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

Consultation paper

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

3. We emphasise that this is a consultation paper, and the recommendation presented here is put forward to facilitate discussion. We welcome views, comments and suggestions on any issues discussed in this Paper. We will carefully consider all responses in drawing up final recommendations in due course.

Chapter 1

Background to the call for the reform of the excepted offences

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Introduction

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

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

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

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

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

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

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

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

The Law Society's views

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

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

… judges should be given full discretion to impose any sentences, including suspended sentences, appropriate to the

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

facts before [them] rather than [being] arbitrarily restricted in 'Excepted Offences' cases."

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

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

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

The Bar Association's views

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

"*The imposition of a suspended sentence is a common form of sanction available to and used by the judiciary as part of its sentencing 'armoury': although it is well established that such a sentence can be imposed only in 'exceptional circumstances' each case falls for consideration on its own facts - consistent no*

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

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

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

doubt with the manner in which the Bar would like to see judicial discretion exercised. It goes somewhat 'against the grain' that the executive should impose such a significant inhibition on the independence of the judiciary."

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

Chapter 2

The current law on excepted offences

Existing provisions on excepted offences

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

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

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

> *"(1) No court shall sentence a person of or over 16 and under 21 years of age to imprisonment unless the court is of opinion that no other method of dealing with such person is appropriate; and for the purpose of determining whether any other method of dealing with any such person is appropriate the court shall obtain and consider information about the circumstances, and shall take into account any information before the court which is relevant to the character of such person and his physical and mental condition.*
>
> *(1A) This section shall not apply to a person who has been convicted of any offence which is declared to be an excepted offence by Schedule 3."*

The "excepted offences" under Schedule 3 of Cap 221

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

> *"1. Manslaughter.*
>
> *2. Rape or attempted rape.*

3. *Affray.*

4. *Any offence against section 4, 5 or 6 of the Dangerous Drugs Ordinance (Cap 134).*

5. *Any offence contrary to section 10, 11, 12, 13, 14, 17, 19, 20, 21, 22, 23, 28, 29, 30, 36 or 42 of the Offences Against the Person Ordinance (Cap 212).*

6. *Any offence or attempted offence against section 122 of the Crimes Ordinance (Cap 200).*

7. *An offence under any section in Part III of the Firearms and Ammunition Ordinance (Cap 238).*

8. *Any offence against section 10 or 12 of the Theft Ordinance (Cap 210).*

9. *Any offence against section 33 of the Public Order Ordinance (Cap 245).*

10. *Any offence under section 4 or 10 of the Weapons Ordinance (Cap 217)."*

Background of the present law

2.4 The Criminal Procedure (Amendment) Bill 1971 introduced the concept of suspended sentences to Hong Kong. The Bill's provisions broadly followed those of the Criminal Justice Act 1967 in England. However, neither the Bill put forward by the Government nor the English Act incorporated any reference to "excepted offences". The creation of excepted offences was the result of strong opposition from the unofficial members of LegCo, who expressed concern at "*the sharp increase in crime, and especially violent crime, since 1960*".[1]

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

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

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

2 HK Hansard, cited above, at 355.

to be advocating leniency towards offenders who resort to violence ….

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

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

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

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

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

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[3] HK Hansard, cited above, at 355.

[4] HK Hansard, cited above, at 356.

[5] HK Hansard, cited above, at 356.

The problems arising from the current law

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

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

Chapter 3

The law in other jurisdictions

The United Kingdom

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

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

> "*(1) A court which passes a sentence of imprisonment for a term of at least 28 weeks but not more than 51 weeks in accordance with section 181 may –*
>
> *(a) order the offender to comply during a period specified for the purposes of this paragraph in the order (in this Chapter referred to as 'the supervision period') with one or more requirements falling within section 190(1) and specified in the order, and*
>
> *(b) order that the sentence of imprisonment is not to take effect unless either –*
>
> *(i) during the supervision period the offender fails to comply with a requirement imposed under paragraph (a), or*
>
> *(ii) during a period specified in the order for the purposes of this sub-paragraph (in this Chapter referred to as 'the operational period') the offender commits in the United Kingdom another offence (whether or not punishable with imprisonment),*
>
> *and (in either case) a court having power to do so subsequently orders under paragraph 8 of Schedule 12 that the original sentence is to take effect."*

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

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

Australia (except the state of Victoria)

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

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

> *"Where a court has imposed a sentence of imprisonment upon a defendant, the court may, if it thinks that good reason exists for doing so, suspend the sentence on condition that the defendant enter into a bond –*
>
> *(a) to be of good behaviour; and*
>
> *(b) to comply with the other conditions (if any) of the bond."*

3.6 A bond under the South Australian Act may include such conditions as the court thinks appropriate. These may include a condition requiring the defendant to be under the supervision of a community corrections officer for a specified period; to reside with or not to reside with a specified

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2 As defined by section 199.

3 As defined by section 201.

4 As defined by section 202.

5 As defined by section 203.

6 As defined by section 204.

7 As defined by section 205.

8 As defined by section 206.

9 As defined by section 207.

10 As defined by section 209.

11 As defined by section 212.

12 As defined by section 213.

13 As defined by section 214.

person or in a specified place or area; to perform a specified number of hours of community service; to undertake an intervention program; to undergo medical or psychiatric treatment; to abstain from drugs of a specified class or from alcohol; to restore misappropriated property; or to pay compensation of a specified amount to any person for injury, etc.[14]

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

> *"A court that imposes a sentence of imprisonment on an offender (being a sentence for a term of not more than 2 years) may make an order:*
>
> *(a) suspending execution of the whole of the sentence for such period (not exceeding the term of the sentence) as the court may specify in the order, and*
>
> *(b) directing that the offender be released from custody on condition that the offender enters into a good behaviour bond for a term not exceeding the term of the sentence.*"

The State of Victoria in Australia

3.8 By virtue of the Sentencing Amendment Act 2010,[15] the State of Victoria in Australia abolished suspended sentences for "serious offences" which were broadly defined to include murder, manslaughter, child homicide, rape and a long list of other violent and sexual offences.

3.9 Later, the Sentencing Further Amendment Act 2011[16] was enacted and abolished suspended sentences also for "significant offences".

3.10 The "significant offences" are:[17]

(a) Causing serious injury recklessly (ie, an offence against Crimes Act 1958, section 17);[18]

(b) Aggravated burglary (ie, an offence against Crimes Act 1958, section 77);[19]

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14 Section 42(1).

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

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

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

18 15 years imprisonment maximum.

19 25 years imprisonment maximum.

(c) Destroying or damaging property by fire (arson) (ie, an offence against Crimes Act 1958, section 197(6) and (7));[20]

(d) Arson causing death (ie, an offence against Crimes Act 1958, section 197A);[21]

(e) Trafficking in a large commercial quantity of a drug of dependence (ie, an offence against Drugs, Poisons and Controlled Substances Act 1981, section 71);[22]

(f) Trafficking in a commercial quantity of a drug of dependence (ie, an offence against Drugs, Poisons and Controlled Substances Act 1981, section 71AA).[23]

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

Canada

3.12 In Canada, a "conditional sentence of imprisonment", which is a hybrid of suspended sentences, intensive supervision and probation orders, was introduced in 1996. However, legislation was passed in May 2007 removing the possibility of its application in relation to certain serious offences.[24]

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

> "*Conditional sentencing, introduced in September 1996, allows for sentences of imprisonment to be served in the community, rather than in a correctional facility. It is a midway point between imprisonment and sanctions such as probation or fines. The conditional sentence was not introduced in isolation, but as*

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20 15 years imprisonment maximum.

21 25 years imprisonment maximum.

22 Life imprisonment.

23 25 years imprisonment maximum.

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

part of a renewal of the sentencing provisions in the Criminal Code*. These provisions included the fundamental purpose and principles of sentencing. The fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The renewed sentencing provisions set out further sentencing principles, including a list of aggravating and mitigating circumstances that should guide sentences imposed.*

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

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

Concern has been expressed that some offenders are receiving conditional sentences of imprisonment for crimes of serious violence, sexual assault and related offences, driving offences involving death or serious bodily harm, and theft committed in the context of a breach of trust. While allowing persons not dangerous to the community, who would otherwise be incarcerated, and who have not committed a serious or violent crime, to serve their sentence in the community is widely believed to be beneficial, it has also been argued that sometimes the very nature of the offence and the offender require incarceration. The fear is that to refuse to incarcerate an offender can bring the entire conditional sentence regime, and hence the criminal justice system, into disrepute. In other words, it is not the existence of conditional sentences that is problematic, but, rather, their use in cases that appear to justify incarceration."[25]

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

(i) A serious personal injury offence (as defined in section 752) which means:

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

(a) An indictable offence, other than high treason, first degree murder, or second degree murder,[26] involving (i) the use or attempted use of violence against another person, or (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person, and for which the offender may be sentenced to imprisonment for ten years or more;

(b) Sexual assault;

(c) Sexual assault with a weapon, threats to third party or causing bodily harm; and

(d) Aggravated sexual assault.

(ii) A terrorism offence; and

(iii) A criminal organization offence.[27]

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

New Zealand

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

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

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

specific addresses and electronic monitoring of curfews. Any breaches can be promptly detected. The court can also sentence offenders to home detention immediately where it would otherwise have sentenced them to a short term of imprisonment.[28]

Singapore

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

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

(1) has attained the age of 16 years but has not attained the age of 21 years at the time of his conviction; and

(2) has not been previously convicted of any such offence.[29]

Where a person in whose case an order for conditional discharge was made has been convicted and dealt with in respect of an offence committed during the period of conditional discharge, the court may deal with him in any manner, in respect of the offence for which the order for conditional discharge was made, as if he had just been convicted of that offence.[30]

Overseas position in summary

3.19 The option of suspending an imprisonment sentence in most of the overseas jurisdictions reviewed where this option is available is applicable to all offences. That is to say, there are no excepted offences.

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

[29] Proviso to section 8 of the Probation of Offenders Act (Chapter 252).

[30] Section 9(5) of the Probation of Offenders Act (Chapter 252).

3.20 However, the State of Victoria in Australia and Canada have recently moved towards a regime with excepted offences in respect of serious criminal offences.

3.21 Victoria enacted the Sentencing Amendment Act 2010 and the Sentencing Further Amendment Act 2011 whereby suspended sentences are abolished for "serious offences" and "significant offences". As a result, suspended sentences are not available for such offences as murder, manslaughter, child homicide, rape, violent and sexual offences, causing serious injury recklessly, aggravated burglary, arson, and trafficking in a large commercial quantity of drug of dependence.

3.22 In Canada, pursuant to Bill C-9 amending the Criminal Code (conditional sentence of imprisonment) "conditional sentences of imprisonment" was abolished in relation to certain serious offences such as serious personal injury offences (including sexual assault), a terrorism offence or a criminal organization offence.

Chapter 4

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

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

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

Division of labour between the Judiciary and Legislature

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

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

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

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

> "*So, who is responsible for ensuring our justice system delivers punishments that fit the crimes and that meet community expectations? …*
>
> *The simple answer is that it should be the legislature. It is the legislature that is elected to represent the people and, by implication, community expectations. It is the legislature that is accountable to the people ….*
>
> *It is the legislature, then, that must take responsibility for fostering consistency in sentencing – to ensure that community expectations, as fickle as they may be, are met as far as possible – to ensure the punishment fits the crime.*"[2]

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

> "*… an important element of justice is ensuring that all of the relevant facts are considered fairly and fully when coming to a judgement and resultant sentence in criminal matters. Many issues need to be considered. For example, the forensic evidence, the forensic psychology assessment, the part played by the victim, and myriad other elements.*
>
> *The legislature simply cannot anticipate the range of facts and circumstances that surround every case. The judiciary must be allowed to judge each case on the basis of its own circumstances and its own facts.*"[3]

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

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

[3] Bill Stefaniak, cited above, at page 3.

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

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

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

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

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4 Justice Bruce Debelle, cited above, para 4.

5 Justice Bruce Debelle, cited above, para 7.

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

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

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

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

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

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

Challenges to mandatory minimum sentences in Canada

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

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

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

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

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

12 Justice Bruce Debelle, cited above, para 10.

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

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

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

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

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

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

4.17 Mr Justice Lamer went on to say:

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

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13 *R v Smith* [1987] 1 SCR 1045.

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

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

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

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

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

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

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

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

18 *R v Morrisey* [2000] 2 SCR 90.

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

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

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

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

Wider public interest and policy perspectives

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

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

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

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

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

[23] K Roach, cited above, at 412.

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

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

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

Community's views on law and order

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

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

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

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

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

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

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

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

[25] HK Hansard, cited above, at 352.

Chapter 5

Arguments for and against reform, and Recommendation

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

Argument in favour of maintaining the list of excepted offences[1]

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

Arguments in favour of reform[2]

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

(1) The significant fall in the prevalence of violent crimes in Hong Kong since the 1970s is an important societal circumstance to consider when evaluating the need to maintain or reform the list of excepted offences.[3] Hong Kong is now a much safer place than before and the prevalence of violent offences has decreased significantly since the 1970s. The original rationale for having exceptions therefore no longer applies. Times have

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

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

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

changed considerably, and the list of excepted offences has not been reviewed or updated for several decades.

(2) In the absence of a suspended sentence option, offenders, whose circumstances could merit a suspension, will normally be imprisoned. Some of the excepted offences, such as attempted indecent assault and the weapons related offences, can occur in a wide range of circumstances, including exceptional circumstances (eg offence occurring without circumstances of aggravation, first-time remorseful offender with little risk of re-offending) which would ordinarily justify a suspended sentence. Imprisoning such offenders for the lack of a better sentencing alternative could do them injustice. That was illustrated by four real cases of indecent assault in Hong Kong committed by first-time offenders where sentences of less than 2 years imprisonment were granted in the absence of the option of suspended sentence.[4] On the contrary, the court may have no better alternative but to order probation (or a community service order) when a suspended sentence is more appropriate. Whether the sentence is too harsh (imprisonment) or too soft (probation), there will inevitably be cases involving excepted offences that will push the court in either of these directions given the lack of a suspended sentence option. In both scenarios, injustice could result.

(3) Another important consideration is the need to allow judges and magistrates a wide degree of discretion to achieve a just and appropriate sentence. The list of excepted offences is not only anachronistic (unanchored by its historical justification), but also applies across-the-board in a disproportionate manner to all offenders charged with certain offences irrespective of circumstances. The exceptions restrict sentencing discretion and impair the court's ability to do justice in individual cases. Removing such constraints on discretion is consistent with human rights norms against disproportionate and arbitrary imprisonment.

(4) There is no reason to believe that repealing the exceptions will lead to either more offending or an increased risk of harm to the community. Suspension will continue to be made for only exceptional cases. Hong Kong courts can be trusted to continue to imprison offenders who pose a substantial risk to the community. The current suspended sentence power allows for the imposition of conditions, which if breached during the operational period can trigger the court to order that the suspended sentence be served in its entirety.

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

(5) The illogicalities of the list of excepted offences are of two kinds. First, the list is not comprehensive. Other violent and serious offences have been left out. In addition, many other serious sexual offences are not on the list.[5] This means that those convicted of such offences, in theory, can be entitled to a suspended sentence of imprisonment. The second kind of illogicality concerns the less serious offences that exist on the list.[6] These illogicalities can give rise to a general sense of unfairness and arbitrariness.

(6) Of the jurisdictions studied that have a similar suspended sentence power (Victoria (Australia), Canada, UK), none of them has maintained exceptions as wide and extensive as those in Hong Kong. To be an excepted offence in these jurisdictions, the offence must typically involve significant violence or an element of organized crime.[7] New Zealand has tried new and innovative sentencing reforms that give the courts a wider range of discretion to order non-custodial sentences that have sufficient safeguards to protect the public. Singapore has not adopted the suspended sentence power.

Views of Hong Kong judges and judicial officers

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

(1) The vast majority (80% of those who responded) of the judges and judicial officers who responded, for the following reasons, agree with or support complete removal of the statutory restriction or at least the restriction in respect of certain offences (namely, indecent assault and wounding):

(a) the court's discretion should not be fettered;

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

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

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

(b) for serious offences, the restriction is superfluous since it is unlikely to be applicable, but for less serious offences where the power to suspend sentence is needed, the restriction will tie the court's hands; and

(c) the court is forced to pass a sentence which is disproportionate or does not reflect the criminality of the offence.

(2) Some of the responses specifically suggest removing the restriction on:

(a) both indecent assault and wounding contrary to section 19 of Offences against the Person Ordinance (Cap 212) for the reason that circumstances in which these two offences are committed are so varied (in contrast to a similar offence of assault occasioning actual bodily harm in respect of which the court can suspend a prison sentence);

(b) section 33 of Public Order Ordinance (Cap 245) (possession of offensive weapon in public place) which imposes a mandatory prison sentence; and

(c) offences with sentences of two years or less (but retaining the restriction on offences with sentences longer than two years).

(3) A few judges and judicial officers who did not experience difficulty arising from the statutory restriction accordingly saw no need to remove such restriction.

(4) The reasons for the minority view that the statutory restriction should be retained are as follows:

(a) indecent assault cases are becoming prevalent;

(b) the offence under section 33 of Cap 245 is serious;

(c) removing the restriction may send a wrong message to the public; and

(d) removal needs community consultation.

Conclusion and Recommendation

5.5 There are problems with the existing operation of the excepted offences regime, and thus there is support for the change of the *status quo*. The Law Society has adopted the views and conclusion in the CCPL Report.

As set out in the above paragraphs, about 80% of the responses of the judges and judicial officers support the removal of the restriction.

5.6 Academics are also of the view that the current regime should be reformed, as this was cogently argued in the CCPL Report. In particular, the public sentiments behind the creation of the excepted offences in the Criminal Procedure (Amendment) Bill 1971, some 40 years ago, have long gone. The community nowadays has different views on whether it remains justified for some or all of the offences listed in Schedule 3 of Cap 221 to be classed as excepted offences.

5.7 We agree with the CCPL Report that it is desirable to allow judges and magistrates a wide degree of discretion to achieve a just and appropriate sentence depending on the circumstances of the case, with the option of suspending sentences. Otherwise, the courts' hands may be tied. The result is that the sentence may be either too harsh (imprisonment) or too lenient (probation). Either way would lead to the undesirable result of doing injustice, whether to the victims or defendants.

5.8 We note that some members of the general public may take the view that excepted offences are justified on the grounds that they ensure that offenders of serious crimes do not "walk free" with a suspended sentence, and a clear message is made that certain kinds of serious crimes should not be dealt with leniently by the law. We agree with the CCPL Report that there is no cause to worry that repealing Schedule 3 will increase the risk of harm to the community. We have full confidence in the judges and magistrates in Hong Kong who would exercise their sentencing discretion without restrictions.

5.9 We therefore conclude that there is a strong case for repealing the excepted offences as listed in Schedule 3 of Cap 221.

Recommendation

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