



**SENTENCING AND RELATED MATTERS
IN THE REVIEW OF SEXUAL OFFENCES
SUBMISSIONS**

1. The Law Society provides the following submissions in response to the three recommendations put forward by the Law Reform Commission of Hong Kong (“LRC”) in its a consultation paper issued in November 2020 on “*Sentencing and Related Matters in the Review of Sexual Offences*” (the “Consultation Paper”).

Recommendation 1 (Penalties for offences proposed in the overall review of substantive sexual offences):

Current penalties for the offences of rape and incest should continue to apply; penalties for the proposed new offences should be set by reference to the corresponding offences in the respective overseas jurisdictions with suitable adjustments.

2. We agree to the proposal that the current penalties for the existing offences of rape and incest should continue to apply to the recommended offences of sexual penetration without consent and incest (§§ 1.5 and 1.6, Consultation Paper).
3. In respect of the penalties for the new offences proposed, which there are 30 of them and which are set out in §§1.8 – 1.55 of the Consultation Paper, we in principle have no objection to the proposal that those penalties be set by reference to the penalties for the corresponding offences in the respective overseas jurisdictions with suitable adjustments, *subject to the following comments*.
4. We have not seen any draft legislation or draft bill on these new offences. In our view, the manner in which these crimes are defined by the legislature are important in the consideration of the penalties

(notwithstanding the fact that references have been made by the LRC Sub-Committee to the relevant statutes in the UK and the Scotland).

5. The above is relevant particularly in the consideration of those offences where there is *no corresponding legislation in Hong Kong*. An example is the proposed offence of “sexual grooming” (the table under §1.9). It is relevant to see exactly what conduct is to be criminalized before one could meaningfully comment on whether or not the proposed sentence (being 10 years maximum) is appropriate.
6. Without sight of the draft legislation, it is uncertain to us as to whether the proposed sentences for those sexual offences are consistent, proportional or uniform among themselves. For example, both the offences of “*Engaging in sexual activity in the presence of a child under 16*” and “*Causing a child under 16 to look at a sexual image (including texts and audio messages)*” carry the same maximum sentence of 5 years’ imprisonment (the table under §1.9). On a *prima facie* basis, the rationale of these two offences having the same level of maximum sentences is not apparent to us, as the former one appears to us to be more serious.
7. For those offences where *there is corresponding legislation in Hong Kong* (the table under §1.55), at this stage we have no particular comments on the various sentences proposed, except the following.
 - (a) We note the same maximum penalty is proposed for the offences of “*Sexual assault of a child under 13*” and “*Sexual assault of a child under 16*” (both being 14 years imprisonment). On a *prima facie* basis, the former seems to us to be more serious and should as a matter of principle attract a heavier sentence. On a policy level, we take the view that there should be a distinction in the penalty between the two offences, as the younger victims should be given better protection (see §1.23), and that the public safety would be better served by a clear message given by sentencing levels.
 - (b) On “*sexual exposure*” (the table under §1.55), the recommended maximum penalty is 5 years’ imprisonment. The relevant existing offence in Hong Kong is the offence of indecency in public (exposing body parts) under section 148 of the Crimes Ordinance which carries a maximum penalty of six

months' imprisonment (§1.37). The Sub-Committee of the LRC explains that the conduct of sexual exposure is “similar to” sexual assault (itself with a proposed sentence of 10 years maximum) and hence the recommended sentence (§1.39). Our preliminary observation is that such a comparison, for consideration of sentencing, is not fair or appropriate in all the circumstances. There are occasions where sexual exposure is not for the purpose of sexual gratification of oneself, or for threatening the victims. The offender on the other hand might not intend to target a specific victim. Examples include exposing oneself at a Rugby 7 in front of a crowd, or exposing oneself in protest for animal welfare.

We invite policy discussions on the above.

Recommendation 2 (Treatment and rehabilitation of sex offenders):

Current specialised treatment and rehabilitation programs for sex offenders and the provision of specialised post-release supervision to discharged sex offenders be maintained; the general practice for judges to obtain assessment reports of sex offenders continue to apply; the Government to review and consider the introduction of an incentive scheme in the prison institutions, and to consider strengthening the rehabilitation services.

8. We agree with the following recommendations,
 - (a) the current specialised treatment and rehabilitation programs for sex offenders available on a voluntary basis at the Correctional Services Department be maintained;
 - (b) the general practice for judges to exercise discretion to obtain psychological and psychiatric assessment reports of sex offenders for sentencing should continue to apply;
 - (c) the Government reviews and considers the introduction of an incentive scheme in the prison institutions;
 - (d) the provision of specialized post-release supervision to discharged sex offenders under the existing statutory schemes be maintained; and
 - (e) the Government considers strengthening the rehabilitation services for discharged sex offenders.

Recommendation 3 (Review of Sexual Conviction Record Check Scheme):

The Government to extend the SCRC Scheme to its fullest and evaluate the need to make it a mandatory scheme at an appropriate time; the Scheme be extended to cover all existing employees, self-employed persons, and volunteers; whether the SCRC Scheme should be extended to include spent convictions should be considered by the Hong Kong community

9. We agree to the recommendation that the Sexual Conviction Record Check Scheme ("the SCRC Scheme") should not become mandatory for the time being.
10. We have no objection that
 - (a) the Government is, at an appropriate time, to extend the SCRC Scheme to its fullest and evaluate the need to make it a mandatory scheme;
 - (b) the current SCRC Scheme be extended to cover all existing employees, self-employed persons, and volunteers.
11. As to whether the SCRC Scheme should be extended to include spent convictions, we consider that this is important not only to the offenders, but also to the society as a whole. We express no views at this stage and ask to be engaged in future discussion, after the HKSAR Government has canvassed views from the community, as the LRC Sub-Committee has suggested in the Consultation Paper.
12. Lastly, we suggest that when the LRC Sub-Committee is to consider feedbacks and responses to this Consultation Paper, it is relevant if they could canvass any latest developments and updates that are advanced since the publication of the Paper. Cases such as *Yeung Chu Wing v Secretary of Justice* 2019 3 HKLRD 238 (a judgment dated of 30 May 2019) could be of referential values.

**The Law Society of Hong Kong
2 February 2021**