

Law Reform Commission

**Consultation on Sentencing and related matters
in the review of sexual offences**

Submission of the Equal Opportunities Commission

February 2021



平等機會委員會
EQUAL OPPORTUNITIES COMMISSION

1. Introduction

1. The Equal Opportunities Commission (EOC) was established in 1996 and is Hong Kong's statutory body with responsibility for promoting equality and eliminating discrimination. It has duties and powers under four anti-discrimination Ordinances: the Sex Discrimination Ordinance (SDO); the Disability Discrimination Ordinance (DDO); the Family Status Discrimination Ordinance (FSDO); and the Race Discrimination Ordinance (RDO). In relation to the SDO, it prohibits discrimination on grounds of sex, pregnancy, breastfeeding, marital status, as well as sexual harassment in various public fields.
2. The EOC welcomes the public consultation by the Law Reform Commission (LRC) on sentencing and related matters in the review of sexual offences.¹ The EOC has made several recent submissions to the LRC and the Government in relation to the review of various aspects of sexual offences.² As sexual harassment and other forms of sexual violence violate the victim's right to sexual autonomy, it is the position of the EOC that the legal protections from such conduct must be sufficient and where necessary modernised, whether under the SDO in relation to sexual harassment, or under criminal laws in relation to other sexual offences.
3. Several fundamental principles are important to recognise in the context of the consultation. Firstly, sexual harassment and other forms of sexual violence disproportionately violate the human rights of women, is a form of gender-based violence and is sex discrimination. This is recognised in the context of the United Nations Convention on the Elimination of All Forms of Discrimination against Women:

"6. The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.

7. Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention..."³

¹ Law Reform Commission of Hong Kong, Consultation paper on Sentencing and Related Matters in the Review of Sexual Offences, published November 2020,

https://www.hkreform.gov.hk/en/docs/sentencing_related_matters_e.pdf

² Submission of the EOC to the Law Reform Commission Consultation on Sexual Offences involving children and persons with mental impairment, February 2017,

<https://www.eoc.org.hk/eoc/upload/201721016129562806.pdf>;

Submission of the EOC to the Security Bureau Consultation on the Proposed Introduction of Offences of voyeurism, intimate prying, non-consensual photography of intimate parts and related offences, October 2020, <https://www.eoc.org.hk/eoc/upload/20201012155723523576.pdf>

³ General Recommendation 19: Violence Against Women, United Nations Committee on the Elimination of Discrimination against Women, 1992,

4. As a result the United Nations has recommended:

“24.(t) That States parties should take all legal and other measures that are necessary to provide effective protection of women against gender-based violence, including, inter alia:

Effective legal measures, including penal sanctions, civil remedies compensatory provisions to protect women against all kinds of violence, including, inter alia, violence and abuse in the family, sexual assault and sexual harassment in the workplace...”⁴

5. A second point to recognise is that there is sometimes an overlap between conduct which would constitute sexual harassment under the SDO, and where conduct would also constitute a criminal offence, including in relation to recent proposals for criminal offences such as voyeurism, intimate prying and non-consensual photography of intimate parts. For example, the EOC in its submission on the Security Bureau consultation on introducing criminal offences of voyeurism, intimate prying and non-consensual photography of intimate parts stated that:

“5. The EOC believes the offences of voyeurism and up-skirting—which constitute severe forms of sexual harassment—could cause the victim immense distress and even significant adverse psychological impact. In fact, the first sexual harassment court case in Hong Kong, Yuen Sha Sha v Tse Chi Pan, was a case of voyeurism and intimate prying occurred in a university dormitory in 1997. Assisted by the EOC, the plaintiff brought proceedings against the defendant under the SDO after she discovered that the defendant had covertly placed a camcorder inside her room for an extended period of time, which had videotaped several undressing and cloth-changing scenes of her.

6. The plaintiff said she was shocked, upset, distressed and literally trembling upon discovery of the camcorder, and she was not even able to attend classes for a few weeks afterwards. The Court awarded the plaintiff a total of HK\$80,000, including exemplary and aggravated damages, as well as the compensation for her injury to feelings. While Yuen’s case was resolved under civil proceedings of the SDO, it actually showcased that voyeurism can seriously violate one’s privacy and dignity, as well as tremendously degrade and humiliate the victim. Judgements of similar cases in Hong Kong concurred with such views.”⁵

https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf

⁴ Ibid paragraph 24(t).

⁵ Submission of the EOC to the Security Bureau Consultation on the Proposed Introduction of Offences of voyeurism, intimate prying, non-consensual photography of intimate parts and related offences, paragraphs 5 and 6, <https://www.eoc.org.hk/eoc/upload/20201012155723523576.pdf>

6. Given that there is sometimes overlap between cases of sexual harassment under the SDO and criminal sexual offences, the EOC has an important role in advocating for civil and criminal laws that provide sufficient protections for victims and deterrents from perpetrators of such conduct.
7. It should also be noted, that the EOC undertook a Discrimination Law Review (DLR) of the protections from discrimination under all four anti-discrimination Ordinances and made submissions to the Government in March 2016.⁶ The DLR included recommendations to improve protections from sexual harassment in a number of fields such as workplaces, clubs and premises. The Government agreed to some of those proposals regarding sexual harassment (in common workplaces and clubs) and amendments were passed in June 2020.⁷ The amendments regarding new protections from sexual harassment in common workplaces are relevant to the review of the scope of coverage of the Sexual Conviction Record Check (SCRC) Scheme which are discussed further in this submission.
8. In 2020 the Government also requested the EOC to undertake a further review of the adequacy of protections from sexual harassment which the EOC is currently conducting. It is planned that the EOC will make further submissions to the Government in the first half of 2021.

2. Delay in reform of sexual offences

9. The EOC notes that the LRC's review of sexual offenses in Hong Kong has involved analysing a substantial number of laws and issues and therefore has necessitated a long process. However, the EOC is concerned that the process has in fact been extremely protracted, and to date most of the proposed reforms to the sexual offences have not been implemented yet, close to 15 years after this review process commenced.
10. We are aware that the Sub-committee on the review of sexual offences was appointed in July 2006. The consultation paper on the review of rape and other non-consensual sexual offences was not issued until September 2012. The consultation paper on sexual offences involving children and persons with mental impairment (PMIs) was not issued until November 2016. Although the EOC is pleased the Government has indicated that it intends to introduce a Bill to implement new offences relating to voyeurism, intimate prying, non-consensual photography of intimate parts and related offences in the second half of 2021, there is no timetable in relation to reforming or introducing other offences the subject of the final report and recommendations of the LRC which was published in December 2019.⁸

⁶ EOC Discrimination Law Review submissions, March 2016, <https://www.eoc.org.hk/EOC/GraphicsFolder/InforCenter/dlr/content.aspx?ItemID=13664>

⁷ Discrimination Legislation (Miscellaneous Amendments) Ordinance 2020, <https://www.gld.gov.hk/egazette/pdf/20202425/es1202024258.pdf>

⁸ Law Reform Commission, Review of substantive sexual offences, December 2019, https://www.hkreform.gov.hk/en/docs/rsubstantive_sexual_offences_e.pdf

11. We note that in November 2014, the United Nations Committee on the Elimination of Discrimination against Women made specific recommendations to the Hong Kong Government to implement reforms to the sexual offences as soon as possible to better protect women, including children and those with intellectual disabilities:

“54. The Committee notes that the Law Reform Commission in Hong Kong, China, has made proposals for the reform of legislation that governs sexual offences, including the definition of rape, which is currently restricted to penile penetration. The Committee is, however, concerned that Hong Kong, China, has not yet produced any proposals concerning sexual offences against children and persons with intellectual disabilities to adopt the reform proposals made by the Commission.

55. The Committee urges the State party to expedite the consideration of the reform proposals made by the Law Reform Commission and to adopt a clear and specific time frame within which to revise the legislation on sexual offences, including those against children and persons with intellectual disabilities, and the definition of rape so that it is in line with international standards. In this context, Hong Kong, China, should allocate adequate resources to ensure the effective combat of all forms of violence against women, including domestic violence by, inter alia, providing adequate shelters and enforcing protection orders.”⁹

12. The reforms of sexual offences is essential to protect a number of vulnerable groups in society from sexual violence, including women who are disproportionately the subject of sexual violence, as well as children and persons with disabilities. The LRC’s recommendations for the substantive sexual offences include for example recommendations to introduce new offences relating to children and PMIs. As the EOC highlighted in its submission to the LRC consultation on sexual offences involving children and PMIs in February 2017, international human rights obligations under the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities, both require Member States to introduce legislative measures to appropriately protect children and persons with disabilities from sexual violence.¹⁰
13. As a result, the EOC recommends to the LRC that it conclude the review process of sexual offences as soon as possible, and that the Government implement as soon as possible all the legislative reforms to sexual offences proposed by the LRC in December 2019, and any recommendations from this consultation.

⁹ Concluding Observations on China, Committee on the elimination of discrimination against women, CEDAW/C/CHN/CO/7-8, 14 November 2014, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fCHN%2fCO%2f7-8&Lang=en

¹⁰ Submission of the EOC to the Law Reform Commission Consultation on Sexual Offences involving children and persons with mental impairment, February 2017, pages 2-3, <https://www.eoc.org.hk/eoc/upload/201721016129562806.pdf>

Recommendation 1

In order to provide necessary and appropriate protection from sexual violence against all persons, particularly women (including children and persons with disabilities), it is recommended that the LRC conclude the review process of sexual offences as soon as possible, and that the Government implement as soon as possible all the legislative reforms to sexual offences proposed by the LRC in December 2019, and any recommendations from this consultation.

3. Proposed penalties for offences

14. The EOC does not wish to comment on all the proposed penalties for the various recommended offences referred to the consultation. Generally speaking the EOC agrees with Recommendation 1 of the consultation, that the current penalties for the offences of rape and incest should continue to apply, and that the penalties for the proposed new offences should be set by reference to the corresponding offences in relevant overseas jurisdictions, subject to any appropriate adjustments.
15. The EOC also agrees with the key principles that have been applied to determining the length of sentences such as:
 - Higher penalties should be imposed for offences involving penetrative conduct than non-penetrative conduct;
 - That all penalties for the same offence should be gender neutral and not discriminate on grounds of sex or sexual orientation;
 - Penalties for offences involving a sexual element should be higher than those not involving a sexual element, as sexual offences are more serious given they violate a person's right to sexual autonomy and privacy;
 - Penalties for sexual offences involving children and persons with disabilities where it involves a position of trust should be higher than for an equivalent offence involving adults or persons without disabilities, as children and persons with disabilities are more vulnerable to sexual abuse.
16. The EOC has some specific comments in relation to several proposed offences and penalties. The EOC also continues to believe as it submitted to the LRC in February 2017 in relation to sexual offences involving children, that there should be a new offence to protect children between the ages of 16 and 17 from sexual abuse by persons in positions of trust.¹¹ This is discussed further in section 3.2 below.

¹¹ Submission of the EOC to the Law Reform Commission Consultation on Sexual Offences involving children and persons with mental impairment, February 2017, pages 15-16, <https://www.eoc.org.hk/eoc/upload/201721016129562806.pdf>

3.1 Sexual activity with a PMI by a person involved in their care and trust

17. In relation to the proposed offence for sexual activity with a PMI by people involved in their care, a position of trust or authority, or a relationship of dependency, the EOC agrees that there is a need to introduce a new offence to better protect PMIs from sexual abuse whether in care homes or other situations outside care homes. The EOC also agrees that the penalties should be higher than the existing penalties under section 65(2) of the Mental Health Ordinance to recognize the severity of such an offence and to act as a deterrent.
18. There have been recent reports of PMIs residing in care homes being sexual assaulted by the care home proprietor or other staff.¹² The Government also reported that between 2012 and 2017 in sub-vented care homes for persons with disabilities, there were 16 complaints of sexual harassment or sexual assault.¹³
19. The EOC also recommended in 2016, in response to allegations that a former superintendent of a care home for people with disabilities sexually assaulted a resident, that the Government should step up on-site inspections and improve the licensing system to better control the operation of residential care homes for people with disabilities.¹⁴ The EOC therefore strongly supports the introduction of this new offence and the proposed penalty to recognise the seriousness of the offence.

3.2 Sexual offences relating to children between the ages of 16 and 17 involving positions of care and trust

20. The EOC notes that the LRC in its report and final recommendations for sexual offences involving children in December 2019, decided not to recommend the introduction of specific sexual offences against children between the ages of 16 and 17 involving positions of trust. In particular it was stated:

“3.265 We note that the majority of those who responded were in favour of legislation to protect young persons aged 16 or above but under 18. We agree that under the protective principle, young persons should also be protected from sexual exploitation, especially when it involves a person in a position of trust. That said, we have also reminded ourselves that one should not ignore the opposing views which argue that a person's sexual autonomy should be respected once the person has reached the age of consent (ie 16).”

¹² See for example, Calls for action after Hong Kong care home sexual assault allegations, 17 October 2016, SCMP, <https://www.scmp.com/news/hong-kong/education-community/article/2028820/calls-action-after-hong-kong-care-home>; a cleaner working at a care home was convicted of indecent assault of five residents who were physically and intellectually impaired, 14 June 2019, <https://www.scmp.com/news/hong-kong/law-and-crime/article/3014516/care-home-cleaner-hong-kong-jailed-groping-vulnerable>

¹³ Sexual assault and harassment claims in sub-vented homes, Press Release, 29 March 2017, <https://www.info.gov.hk/gia/general/201703/29/P2017032900377.htm>

¹⁴ Urgent call to protect people with disabilities living in residential care homes, EOC Press Release, 16 October 2016, <https://www.eoc.org.hk/eoc/GraphicsFolder/ShowContent.aspx?ItemID=14077>

3.266 *On this final issue, instead of recommending that there be legislation for the protection of young persons aged 16 or above but below 18, we believe the proper course to take is to recommend that the Government consider the need for such legislation from the policy angle, in consultation with the legislature as and when appropriate. Our view is that, ultimately, it would be a matter for the Government to decide whether protection should be given to the young persons aged between 16 and 18.*¹⁵

21. The EOC made submissions to the LRC on this point in February 2017 and reiterates that we believe that it is important to introduce such sexual offences to better protect children from sexual harassment where it involves positions of trust. The EOC believes such offences should be introduced for the following reasons:
 - to comply with international human rights obligations under the Convention on the Rights of the Child;
 - there is evidence of sexual harassment by persons in position of trust of 16 to 17 year olds;
 - the insufficiency of Codes of Practice to deal with sexual abuse.
22. The approach under the English legislation provides a useful model for such offences as referred to by the LRC in its report.¹⁶ The EOC therefore calls on the Government to introduce such offences.

Recommendation 2

The Government should introduce specific sexual offences relating to children between the ages of 16 and 17 where the situation involves a position of care and trust.

3.3 Offences of sexual exposure, voyeurism, and non-consensual up-skirt photography

23. The EOC fully agrees with the LRC and the Government on the need to introduce these new offences to better protect people from these acts which are often an extreme form of sexual harassment.
24. As the EOC indicated in its submission on the Security Bureau consultation on introducing the offences of voyeurism, intimate prying, and non-consensual photography of intimate parts, the problem of Image Based Sexual Violence (IBSV) has been worsening in Hong Kong as in other parts of the world, consistent with greater use of new technologies such as smartphones, as well as widespread use of various forms of social media on the internet.¹⁷

¹⁵ Law Reform Commission, Report on Review of Substantive Sexual Offences, December 2019, pages 92-96, https://www.hkreform.gov.hk/en/publications/rsubstantive_sexual_offences.htm

¹⁶ Sections 16-19 Sexual Offences Act 2003, <https://www.legislation.gov.uk/ukpga/2003/42/part/1/crossheading/abuse-of-position-of-trust>

¹⁷ Submission of the EOC to the Security Bureau Consultation on the Proposed Introduction of Offences of voyeurism, intimate prying, non-consensual photography of intimate parts and related offences, paragraphs 10 and 11, <https://www.eoc.org.hk/eoc/upload/20201012155723523576.pdf>

25. According to police figures, around 300 cases of clandestine taking of indecent photos were reported every year between 2016 and 2018. The sexual violence crisis centre, RainLily, reported that every one in seven cases they received in 2019 was related to IBSV.¹⁸ A 2020 survey conducted by them found that 206 people experienced IBSV in the past three years and 29% of those were related to the distribution of intimate images without consent.¹⁹
26. The above findings were echoed by EOC's large-scale study, *Break the Silence: Territory-Wide Study on Sexual Harassment of University Students in Hong Kong*, conducted in 2019.²⁰ It found that 1,662 out of 14,442 surveyed university students were sexually harassed online within 12 months before the study was conducted, and 21% of which said someone had posted indecent image(s) or video(s) of the student him/herself online without his/her consent.²¹
27. The EOC agrees that the penalties for these offences should be higher where they involve a sexual element as they breach the human rights of the victims to sexual autonomy and to privacy. For similar reasons, the EOC also agrees that the penalties for the offence of sexual exposure, as well as the offences of voyeurism and non-consensual upskirt-photography, should be higher than for existing public order offences.

4. Treatment and rehabilitation of sex offenders

28. The EOC does not wish to provide detailed submissions on the issue of treatment and rehabilitation of sex offenders as it is not within the remit of the EOC.
29. In relation to situations where a psychological or psychiatric assessment report of an offender identifies that a person has any mental disability, the EOC believes that it is particularly important that appropriate specialized supervision and rehabilitation services are offered while the offender is imprisoned and after they are discharged. This would be important both to try to prevent reoffending, and to provide them with a better opportunity to reintegrate in society.

¹⁸ ZHANG, Karen (2020). "Concern Group Says Women Face Common Threat of Nude Photos Taken without Their Consent", South China Morning Post. Retrieved from <https://www.scmp.com/news/hongkong/law-and-crime/article/3074103/concern-group-says-women-face-common-threat-nude>

¹⁹ Association Concerning Sexual Violence Against Women (2020). Survey Report on Image-based Sexual Violence. Retrieved from <https://rainlily.org.hk/publication/2020/ibsvsurvey>

²⁰ CHAN, James K.S., LAM, Kitty K.Y., CHEUNG, Christy C.M., LO, Jimmy T.Y. (2019) *Break the Silence: Territory-wide Study on Sexual Harassment of University Students in Hong Kong*. Hong Kong: Equal Opportunities Commission. Retrieved from https://www.eoc.org.hk/eoc/Upload/ResearchReport/SH2018/ENG/SH%20University%20Report_ENG_Full%20Report.pdf

²¹ Ibid page 75.

5. Review of Sexual Conviction Record Check Scheme

30. The SCRC Scheme was established in December 2011 as administrative scheme for employers to check for criminal convictions for sexual offences of employees working with vulnerable groups of children and mentally incapacitated persons (MIPs).

5.1 Relationship between the SCRS and the work of the EOC

31. The SCRC Scheme is directly related to the work of the EOC for several reasons. Firstly, the EOC has a mandate to prevent sexual harassment in all fields of employment and the provision of goods, facilities or services, including working involving care of children and MIPs. Secondly, some sexual offences may also constitute extreme forms of sexual harassment, and therefore a victim may be able to make claims both under the SDO for sexual harassment, and to seek to press charges for criminal offences. The EOC has dealt with a number of complaints and provided legal assistance to individuals in claims for sexual harassment under the SDO where the claimant also made a complaint to the Police of criminal offences such as sexual assault or rape. As a result the EOC has an important stake in ensuring that the SCRC Scheme is effective to protect vulnerable groups from sexual harassment and criminal sexual offences in the context of workplaces.
32. The EOC previously provided submissions on the SCRC Scheme in its response to the Security Bureau consultation on the proposed offences of voyeurism, intimate prying, non-consensual photography of intimate parts, and related offences.²² This is because the Security Bureau originally recommended that all of those offences be included in the list of sexual offences under the SCRC Scheme which could be checked by an employer. The Bureau later proposed to only include the offenses of “voyeurism” and “non-consensual photography of intimate parts” into the list of sexual offences, after considering all the submissions, including EOC’s one,²³ of the public consultation exercise.²⁴
33. It also should be noted that the EOC has done considerable work with various sectors such as schools, sports organisations, churches, and NGOs working in the social service sector on issues of sexual harassment in those fields and the policies that those organisations have to prevent sexual harassment. These sectors involve employees and other workers having contact with children and MIPs and therefore the SCRC Scheme is directly relevant to preventing sexual harassment and other sexual violence involving criminal offences.

²² Submission of the EOC to the Security Bureau Consultation on the Proposed Introduction of Offences of Voyeurism, Intimate Prying, non-consensual photography of intimate parts and related offences, October 2020, <https://www.eoc.org.hk/eoc/upload/20201012155723523576.pdf>

²³ Submission of the EOC to the Security Bureau Consultation on the Proposed Introduction of Offences of voyeurism, intimate prying, non-consensual photography of intimate parts and related offences, <https://www.eoc.org.hk/eoc/upload/20201012155723523576.pdf>

²⁴ Security Bureau (2021). *Proposed introduction of offences on voyeurism and non-consensual photography of intimate parts, and related offences*. Retrieved from <https://www.legco.gov.hk/yr20-21/english/panels/se/papers/se20210115cb2-580-4-e.pdf>

5.2 Whether the scheme should be made a mandatory legislative scheme

34. The EOC believes that there are strong arguments that the current voluntary administrative scheme should be converted into a mandatory legislative scheme. Our arguments in support of introducing a mandatory legislative scheme are discussed below.

(a) Intention was to introduce a mandatory legislative scheme

35. Firstly we note as the LRC has highlighted in the consultation document, the intention was that the current administrative scheme introduced in December 2011 would only be an “interim” measure until a legislative scheme was introduced:

“3.2 The LRC’s proposal for an administrative scheme was intended to be an interim measure, pending the formulation of a comprehensive legislative scheme, 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’. The reason was that during the course of its deliberations, it became apparent to the LRC that a comprehensive legislative scheme would take considerable time to be implemented.”²⁵

36. There has been in our view ample time for a legislative scheme to be introduced in the nine years since the “interim” administrative scheme commenced.

(b) A mandatory scheme is necessary to provide sufficient protection to vulnerable groups

37. In the view of the EOC a mandatory legislative scheme is necessary in order to provide sufficient protection for vulnerable groups of children and MIPs from sexual harassment and other sexual violence. Having a mandatory scheme is also appropriate as it would ensure that penalties are provided for non-compliance by employers, as is the case in other jurisdictions with similar legal systems.

38. There is clear evidence of substantial numbers of cases of children and MIPs being subjected to sexual harassment or other sexual violence over the years. The LRC’s report on introducing the scheme in February 2010 referred to numerous examples.²⁶ There have also been reported cases of sexual offences more recently, such as against the former superintendent of a care home for persons with mental disabilities. At that time the Secretary for Labour and Welfare Matthew Cheung Kin-chung said the government would seek legal advice over whether it could compel nursing home owners and licensees to declare their criminal records.²⁷

²⁵ Law Reform Commission of Hong Kong, Consultation paper on Sentencing and Related Matters in the Review of Sexual Offences, published November 2020, page 38, https://www.hkreform.gov.hk/en/docs/sentencing_related_matters_e.pdf

²⁶ Law Reform Commission, Sexual Offences Records Check for child related work: Interim Proposals, February 2010, see pages 8-12, https://www.hkreform.gov.hk/en/docs/rsexoff_e.pdf

²⁷ Hong Kong minister pledges stronger rules after assault claims against former nursing home head, SCMP, 18 October 2016, <https://www.scmp.com/news/hong-kong/law-crime/article/2029009/im-victim-not-her-former-hong-kong-care-home-head-sexual>

39. Further, as the LRC highlighted in its report on the scheme in February 2010, the Government has a positive obligation²⁸ under domestic and international human rights laws to provide necessary and appropriate measures to protect children, including those with disabilities from sexual violence and abuse.²⁹ In the view of the EOC a voluntary scheme cannot provide the necessary comprehensive protection required under domestic and international human rights laws from sexual violence.
40. It should also be noted that in other jurisdictions with similar legal systems such as the United Kingdom and Australia, the systems for checks of employees working with vulnerable groups such as children and persons with disabilities are predominately mandatory legislative schemes.
41. For example, as the LRC noted in its report on the scheme in February 2010, in England and Wales a mandatory legislative scheme was introduced by the Safeguarding Vulnerable Groups Act 2006 which requires a criminal record check of persons that work with vulnerable groups, being children and vulnerable adults such as the elderly and disabled people in healthcare settings or care homes.³⁰ It is also a criminal offence for an employer to employ a person that has a criminal conviction for a sexual offence that bars them from working with vulnerable persons.
42. In Australia the laws relating to criminal record checks are governed by State legislation. Again, as highlighted by the LRC in its report on the scheme in February 2010, in most States such criminal record checks are mandatory in relation to persons that work with children.³¹ Penalties are also provided for employers that do not comply and employ a person without a check.³²

(c) The voluntary scheme is not being comprehensively used in relevant sectors

43. The EOC has also examined the use of the SCRC Scheme in some of its research on sexual harassment in sectors which mostly involve the employment of staff who work with children and MIPs. The research highlights that the SCRC Scheme is not being used comprehensively in some key sectors with vulnerable groups.
44. In July 2017, the EOC published the results of a survey on sexual harassment in the social service sector. This examined the progress of the formulation of anti-sexual harassment policies by NGOs working in the social service sector. The results indicated that there

²⁸ See article 20 of the Bill of Rights, article 24 of the International Covenant on Civil and Political Rights (ICCPR), article 19 of the UN Convention on the Rights of the Child, and article 16 of the UN Convention on the Rights of Persons with Disabilities.

²⁹ Law Reform Commission, Sexual Offences Records Check for child related work: Interim Proposals, February 2010, see pages 18-20, https://www.hkreform.gov.hk/en/docs/rsexoff_e.pdf

³⁰ See the Safeguarding Vulnerable Groups Act 2006, <https://www.legislation.gov.uk/ukpga/2006/47/contents>, and amendments introduced by the Protection of Freedoms Act 2012, <https://www.legislation.gov.uk/ukpga/2012/9/contents/enacted>

³¹ See for example the Working with Children Act 2005 (Victoria); the New South Wales' Commission for Children and Young People Act 1998; and the Working with Children (Criminal Record Checking) Act 2004 (Western Australia).

³² See for example section 22 Working with Children (Criminal Record Checking) Act 2004 (Western Australia)

was a lack of comprehensive preventive measures on sexual harassment in the social welfare sector. Among the 51 responding NGOs, almost one-fifth (18%) had not taken any preventive measures against sexual harassment. Less than half of the NGOs (45%) had required criminal record checks of prospective employees: “Requiring the prospective employee to verify nil criminal conviction records against a specified list of sexual offences under the ‘Sexual Conviction Record Check’ Scheme” (45%).³³

45. More recently the EOC conducted a desktop research on sexual harassment policies of the sports sector in 2020, which found that out of all 79 NSAs in Hong Kong only 45 (57%) of them required their prospective employees to conduct criminal record checks, according to the information available on their websites.³⁴ Although some NSAs may not be providing services for children and MIPs, this figure still highlights that a significant proportion of them may not be requiring criminal record checks in appropriate situations involving children and MIPs.
46. In light of all the above factors, the EOC differs from LRC’s views of not recommending “the SCRC Scheme to be a mandatory one at the time being”. On the contrary, the EOC recommends that a mandatory legislative scheme be introduced as soon as possible to provide appropriate protection from sexual harassment and other sexual violence against vulnerable groups of children and MIPs.

Recommendation 3

The EOC recommends that a mandatory legislative SCRC Scheme be introduced as soon as possible to provide appropriate protection from sexual harassment and other sexual violence against vulnerable groups of children and MIPs.

5.3 Whether the scheme should cover existing employees

47. As the consultation document states, the LRC recommended in its Report on Interim Proposals in February 2010 that the SCRC Scheme should apply both to existing and prospective employees. The consultation document also notes that the current scheme doesn’t in fact cover existing employees unless they are situations of contract renewal of specified organisations:

“3.14 In other words, the existing scheme covers prospective employees and contract renewal of existing employees of specified organisations (namely, private tutorial centres and private interest/activity institutions). However, the SCRC Scheme does not cover all existing employees, as existing employees of those specified organisations not due for contract renewal are not covered.”³⁵

³³ “Sexual Harassment – Questionnaire Survey for Social Service Sector”, Equal Opportunities Commission, 11 July 2017, <https://www.eoc.org.hk/eoc/GraphicsFolder/ShowContent.aspx?ItemID=15071>

³⁴ Equal Opportunities Commission (2021). *Report on the Formulation of Anti-Sexual Harassment Policy among National Sports Association in Hong Kong 2020*. Retrieved from <https://www.eoc.org.hk/eoc/upload/ResearchReport/2021125143401215386.PDF>

³⁵ Law Reform Commission of Hong Kong, Consultation paper on Sentencing and Related Matters in the Review of Sexual Offences, page 41, published November 2020, https://www.hkreform.gov.hk/en/docs/sentencing_related_matters_e.pdf

48. The EOC agrees entirely with the LRC recommendation in the consultation document that the scheme should cover existing employees as it recommended previously 10 years ago. This is because:

- Sex offenders who have existing employment can avoid a record check (unless they are in the specified categories of contract renewal positions) which leaves a huge gap in the measures;
- This means that the Government is failing to provide sufficient protection from potential sexual harassment and other sexual violence of vulnerable groups of children and MIPs;
- As the LRC highlights, any employment issues that may arise from the SCRC Scheme being applicable to existing employees can be addressed by having the scheme be implemented in phases.

Recommendation 4

The EOC recommends that the SCRC Scheme should be extended as soon as possible to existing employees.

5.4 Whether the scheme should cover all self-employed persons

49. As the consultation document notes, the LRC recommended in its Report on Interim Proposals in February 2010 that the SCRC Scheme cover all self-employed persons, including private tutors and coaches.

50. The EOC agrees with the previous and current recommendation by the LRC that all self-employed persons should be covered. The position of the EOC is that all persons who do some form of work or provide a service in an environment involving children and MIPs should be covered by the scheme to ensure that the scheme provides more comprehensive checks, and as a result there is better protection from sexual harassment and other sexual violence. The EOC believes there is no reasonable or logical reason why self-employed persons should be excluded, when they provide the same or similar roles as employees working with children and MIPs. It is the nature of the work and whether it involves contact with children and MIPs that should be determinative of coverage of the scheme, not the employment status of the relevant person.

Recommendation 5

The EOC recommends that the SCRC Scheme should be extended to cover all self-employed persons undertaking child or mentally incapacitated persons related work.

5.5 Whether the scheme should cover volunteers and interns

51. As the consultation document notes, the LRC previously recommended in its Report on Interim Proposals in February 2010 that the scheme should cover “volunteers” and “trainees”.

52. The EOC agrees with the previous and current recommendation by the LRC that volunteers should be covered by the scheme. The position of the EOC is that all persons that work with or provide services to children and MIPs should be covered by the scheme, including volunteers and trainees.
53. The EOC has examined the issue of coverage of volunteers and interns in the context of protection from sexual harassment under the SDO. In the EOC's Discrimination Law Review it made recommendations that all volunteers and interns should be covered by amendments to protect persons from sexual harassment in common workplaces. The Government agreed with our proposals and amendments came into force in June 2020.³⁶
54. Although the situation of protection from sexual harassment in relation to common workplaces only covers those persons working in that workplace, the situation provides a useful comparison as it indicates the importance of providing a broad definition of a workplace and who should have obligations not to engage in sexual harassment. This is particularly important given the large numbers of people in Hong Kong who do volunteer work or internships. For example in relation to volunteering work, the Social Welfare Department (SWD) estimated that 1.33 million people in Hong Kong were doing volunteer work as of December 2019.³⁷
55. In addition, the EOC has long been recommending different sectors consider requiring their prospective staff to undergo the sexual conviction record check, which may serve as one of the possible measures to prevent sexual harassment.³⁸ Under the SDO, employers are vicariously liable for their employees' unlawful conducts like sexual harassment at the workplace or in the course of service provision, whether or not the act was done with the knowledge or approval of the employers.³⁹ Yet, the law provides a defence for the employers, as long as they can prove that they had taken reasonably practicable steps to prevent their employees from conducting the unlawful act.⁴⁰ Given the latest SDO law amendments made not only volunteers liable for engaging in sexual harassment at workplaces and other public fields, but also persons who engage the volunteers, the EOC believes that expanding the SCRC Scheme to cover volunteers can provide one extra step that companies or organisations can use to help prevent sexual harassment.
56. The EOC therefore agrees entirely that in the context of persons providing services to children and MIPs, that all volunteers and interns should be covered, to ensure that there is better protection from sexual harassment and other sexual violence of children and MIPs.

³⁶ See the Discrimination Legislation (Miscellaneous Amendments) Ordinance 2020, <https://www.gld.gov.hk/egazette/pdf/20202425/es1202024258.pdf>

³⁷ Social Welfare Department, https://www.swd.gov.hk/en/index/site_pubsvc/page_supportser/sub_centraloff/

³⁸ See the Frameworks for Sexual Harassment Policy the EOC drafted for different sectors: <https://www.eoc.org.hk/eoc/graphicsfolder/inforcenter/framework/frameworklist.aspx>

³⁹ Sex Discrimination Ordinance, s 46(1).

⁴⁰ Sex Discrimination Ordinance, s 46(3).

57. Furthermore, the EOC notes that the amendments to the SDO in relation to volunteers and interns provide a definition of those terms. The EOC believes it would be preferable to define those groups in the Protocol on the SCRC Scheme and future legislation in order that it is clear what they mean. Given that there are a vast number of people doing volunteer work in Hong Kong, it is advised that the Government should develop appropriate measures—such as requiring regular volunteers who provide services to children and MIPs to be checked first, deploying additional resources for handling check requests, and streamlining the application procedures of the SCRC Scheme—in order to ensure that the potential surge in demand for checks under the SCRC Schemes can be met.
58. The EOC also believes that a broader coverage of “interns” is preferable rather than only “trainees” or “apprenticeships”. This is because some people who do internships at organisations are not trainees or apprentices which constitute formal work to obtain legal qualifications. For example persons doing internships as part of their university degrees may not be considered to be trainees or apprentices. The definitions of volunteers and interns in the SDO could be a useful reference in defining those terms in the Protocol and future legislation.

Recommendation 6

The EOC recommends that the SCRC Scheme should be extended to cover:

- **volunteers;**
- **interns as a broader concept than just trainees;**

and that those terms be clearly defined in the Protocol and any future legislation.

5.6 Whether the scheme should cover spent convictions

59. The LRC recommended in its Report on Interim Proposals that the SCRC Scheme should not cover spent convictions. The reason for so recommending was that to include spent convictions would be inconsistent with provisions of the Rehabilitation of Offenders Ordinance which require such “spent” convictions not be a ground excluding someone from any office profession, occupation or employment. In particular it states that:

“(1) Where—

- (a) an individual has been convicted in Hong Kong (before or after the commencement of this Ordinance) of an offence in respect of which he was not sentenced to imprisonment exceeding 3 months or to a fine exceeding \$10,000;*
 - (b) he has not been convicted in Hong Kong on any earlier day of an offence; and*
 - (c) a period of 3 years has elapsed without that individual being again convicted in Hong Kong of an offence,*
- then— ...*

(iii) *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.*"⁴¹

60. The intention of this provision is that where a person is convicted of a minor offence (as opposed to a more serious one), and the convicted person has not re-offended within three years, they should be provided an opportunity to rehabilitate and reintegrate into society, including by being able to work without discrimination on grounds of their conviction.
61. The EOC agrees with the LRC that for the reasons above a person should not have to disclose spent convictions.

Recommendation 7

The EOC recommends that the SCRC Scheme should not be extended to cover spent convictions of any person as defined by section 2(1) of the Rehabilitation of Offenders Ordinance.

6. Additional recommendations by the EOC

62. The EOC wishes to make submissions and recommendations in relation to two further issues: firstly the scope of which sectors or groups the SCRC Scheme should apply to; and secondly waiving or reducing the costs for persons doing the checks in relation to certain categories of persons.

6.1 Proposal to expand the scope of the scheme to cover other vulnerable groups

63. The aim of the SCRC Scheme is to better protect vulnerable groups from sexual violence by having a scheme to allow for criminal record checks of prospective or contract renewal employees in relation to convictions for listed criminal offences. Currently the scheme only covers sectors and persons who work with children and MIPs as defined by section 117(1) of the Crimes Ordinance.
64. The view of the EOC is that the current scope of sectors and persons to which the scheme applies is too narrow. This is because it does not cover other sectors with vulnerable groups in society, such as persons with physical disabilities and the elderly. This means that there are key vulnerable groups in society who are not benefiting from the scheme as a means of providing better protection from sexual violence. The EOC believes that a better approach would be to define the scope of the scheme by the sectors in which persons are more vulnerable to sexual violence. In addition to those working with children, the EOC believes this should include for example persons working in healthcare

⁴¹ Section 2(1) Rehabilitation of Offenders Ordinance, <https://www.elegislation.gov.hk/hk/cap297>

(whether relating to physical or mental health), social care, and all care homes for the elderly as well as persons with any form of disabilities.

65. The approach in other jurisdictions with similar legal systems provide useful references. In the United Kingdom a good example of such a system exists under the Safeguarding Vulnerable Groups Act 2006. It requires mandatory criminal record checks both for all persons working with children, as well as those working with vulnerable adults.⁴² Those who are defined to work with vulnerable adults are:

“7.(1) Each of the following is a regulated activity relating to vulnerable adults—

- (a) the provision to an adult of health care by, or under the direction or supervision of, a health care professional,*
- (b) the provision to an adult of relevant personal care,*
- (c) the provision by a social care worker of relevant social work to an adult who is a client or potential client,*
- (d) the provision of assistance in relation to general household matters to an adult who is in need of it by reason of age, illness or disability,*
- (e) any relevant assistance in the conduct of an adult’s own affairs,*
- (f) the conveying by persons of a prescribed description in such circumstances as may be prescribed of adults who need to be conveyed by reason of age, illness or disability,*
- (g) such activities—*
- (i) involving, or connected with, the provision of health care or relevant personal care to adults, and*
- (ii) not falling within any of the above paragraphs, as are of a prescribed description.”⁴³*

66. It is useful to refer to the United Kingdom Government Guidance on those working with vulnerable adults.⁴⁴ The coverage of mandatory criminal record checks is defined by all those persons working in sectors either with children or vulnerable adults whether persons receiving healthcare treatment, social care or living in all forms of care homes whether for the elderly or persons with disabilities.

67. Australia also has a scheme at Federal level which requires criminal record checks of anyone working or volunteering in care homes for any elderly persons, in order to better protect them from any abuse, including sexual abuse. Unlike Hong Kong, there is no restriction to the requirements only applying to MIPs. The legislative requirements are set out in the Aged Care Act 1997 (Cth) and the Department of Health of Australia has produced Guidance on the requirements for such checks.⁴⁵

⁴² Section 5(3) Safeguarding Vulnerable Groups Act, <https://www.legislation.gov.uk/ukpga/2006/47/contents>

⁴³ Ibid Schedule 4, Part 2, Safeguarding Vulnerable Groups Act 2006.

⁴⁴ Regulated Activities Adults, Department of Health, 2011, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/216900/Regulated-Activity-Adults-Dec-2012.pdf

⁴⁵ Police Certificate Guidelines, Department of Health, July 2019, https://www.health.gov.au/sites/default/files/documents/2020/01/police-certificate-guidelines-for-aged-care-providers_0.pdf

68. The current system in Hong Kong creates clear gaps in coverage of vulnerable persons. For example it would not cover a persons who work in healthcare generally, where for example persons who have a physical disability (eg blindness or deafness) are more vulnerable to sexual violence. It would also not cover care homes for the elderly where the persons residing there are elderly but don't have mental disabilities. Such an approach is clearly problematic and provides an inconsistent approach.
69. There is also clear evidence of cases of sexual abuse in Hong Kong in relation to the relevant sectors or types of work where the scheme currently does not apply. For example, in relation to the healthcare sector there was a case of a doctor being convicted of five counts of indecent assault of two female adult patients (in their 20s) at a public hospital.⁴⁶ The scheme would not apply in such a situation, if for example the doctor sought future work in the healthcare sector, and it did not involve working with children or MIPs. This means potential future employers would not be alerted to his previous criminal convictions for sexual offences.
70. As a result, the EOC recommends that the Government expand the scope of the SCRC Scheme to cover sectors and groups not currently covered including all persons working in healthcare, social care and residential care homes for the elderly and persons with disabilities (RCHEs and RCHDs). It is suggested that reference be drawn from other similar jurisdictions such as the United Kingdom and Australia to define the scope of coverage.
71. In addition, while introducing a mandatory SCRC Scheme via legislative means may take a considerable amount of time, it is recommended that the Government should, as soon as possible, also require institutions in the abovementioned sectors to conduct sexual conviction record checks using existing regulatory and administrative regimes. For instance, the SWD could compel all staff members of RCHEs and RCHDs to conduct checks, as a condition for renewing the licences or certificates of exemption of the care homes. Also, as the main source of funding for many sub-vented NGOs, the SWD has issued a set of Service Quality Standards (SQSs) to ensure the quality of services and appraise the performance of those NGOs regularly. The SWD could therefore easily update its SQSs, together with other related assessment indicators and guidelines, to require all staff providing services to children and vulnerable adults of sub-vented NGOs to conduct checks under the SCRC Scheme.

Recommendation 8

The EOC recommends that the Government expand the scope of the SCRC Scheme to cover sectors and groups not currently covered including all persons working in healthcare, social care and residential care homes for the elderly and disabled. It is suggested that reference be drawn from other similar jurisdictions such as the United Kingdom and Australia to define the scope of coverage.

⁴⁶ Disciplinary Inquiry, Medical Council of Hong Kong, Dr TANG Man Chun, 22 July 2013, https://www.mchk.org.hk/english/complaint/PDF/Judgement_handed_down_on_20130722.pdf

6.2 Proposal to waive or reduce fees for doing a check for volunteers and interns

72. In relation to the costs for a person who is a potential or existing person doing work in a relevant sector, the EOC believes that it would be appropriate to charge employees and other persons earning a regular income, but that volunteers and interns should not be charged for the check, or have a reduced fee given they either earn no income or often less income than others.
73. Currently applicants must pay a fee of HK\$105 to do a check. Whilst this is not a large amount of money, the EOC believes that as volunteers and often interns are not paid an income or often paid minimal income, it would be appropriate to waive the fee or have a reduced fee for them. Such an approach is taken in similar jurisdictions such as the United Kingdom and Australia. In the United Kingdom the fee for criminal record checks is waived for volunteers in relation to standard or enhanced checks.⁴⁷ In Australia, each State has their own system for criminal record checks, but in relation to volunteers the fees are either reduced or free.⁴⁸

Recommendation 9

The EOC recommends that the applicant's fee for a criminal record check under the SCRC Scheme should either be waived or reduced for volunteers and interns.

⁴⁷ DBS Guidance for Employers, 27 March 2013, <https://www.gov.uk/guidance/dbs-check-requests-guidance-for-employers#volunteer-applications>

⁴⁸ Police Checks for Volunteers in Australia, National Crime Check, https://www.nationalcrimecheck.com.au/resources/police_checks_for_volunteers_in_australia