

RESPONSE OF THE EQUAL OPPORTUNITIES COMMISSION

THE LAW REFORM COMMISSION OF HONG KONG

**CONSULTATION PAPER ON SEXUAL OFFENCES INVOLVING CHILDREN AND
PERSONS WITH MENTAL IMPAIRMENT**

February 2017

**Equal Opportunities Commission
Hong Kong, China**



平等機會委員會
EQUAL OPPORTUNITIES COMMISSION

1. Introduction

The Equal Opportunities Commission (EOC) was established in 1996 and is Hong Kong's independent 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). These provide protection from discrimination to everyone in Hong Kong on grounds of sex, pregnancy, marital status, disability, family status, and race.

The EOC welcomes the public consultation on the issues of reforming sexual offences involving children and persons with mental impairment. Protecting children and persons with disabilities from sexual exploitation is essential in order that their human rights are respected. The EOC is broadly in favour of the proposals given that there are a number of areas where the existing provisions under the Crimes Ordinances do not adequately protect children and persons with mental impairment from sexual offences.

The consultation also raises concerns with a number of the existing provisions, given that they only apply to particular groups in society. This creates discrimination against particular groups in society, given that some offences only apply to persons of a particular sex or sexual orientation.

The EOC response addresses the particular issues and recommendations which we believe are relevant to our role in promoting equality and eliminating discrimination and harassment in society. We have not provided responses to all of the questions, given that some raise technical issues about the structure of amendments or possible new criminal provisions.

2. Obligation to protect children and persons with mental impairment from sexual offences

All children have human rights to be adequately protected from sexual abuse and exploitation. The Hong Kong government is a party to the United Nations Convention on the Rights of the Child. Article 19 provides that:

"1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification,

reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.”¹

The EOC therefore welcomes the proposals to improve the criminal offences relating to sexual abuse of children in Hong Kong.

In relation to the human rights of persons with disabilities, they also have the right to be protected from sexual abuse and exploitation. The Hong Kong government is a party to the United Nations Convention on the Rights of Persons with Disabilities. This provides an obligation to protect persons with disabilities, including mental impairment, from exploitation, violence and abuse:

“States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.”²

The EOC therefore also welcomes the proposals to improve the criminal offences relating to sexual abuse of persons with mental impairment in Hong Kong.

The EOC also notes recent concerns of sexual assault in private residential care homes, such as the alleged sexual abuse of residents with intellectual disabilities in the Bridge of Rehabilitation. In response the EOC has taken a number of measures relating to its remit to prevent sexual and disability harassment. This has included:

- on 18 August and 30 November 2016, the EOC held a forum for heads and management of social service agencies in Hong Kong to promote prevention of sexual and disability harassment, in collaboration with the assistance of the Hong Kong Council of Social Service. The EOC also developed a “Framework for Sexual Harassment Policy in Social Service Agencies” for the relevant organisations to make reference and to formulate their own policy;
- on 14 December 2016, the EOC held a seminar for the parents, carers and social workers of persons with intellectual disabilities to educate them on disability rights as well as ways to protect persons with intellectual disabilities from sexual harassment;
- on 6 January 2017, the EOC held an event for operators and management personnel of private residential care homes to promote ways of preventing sexual and disability harassment in private residential homes for persons with intellectual disabilities with the assistance of the Social Welfare Department (SWD). The EOC also educated them on their legal responsibilities.

¹ Convention on the Rights of the Child, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

² Article 16(1) Convention on the Rights of Persons with Disabilities, <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>

- In order to enhance health workers' awareness on discrimination issues, in particular sexual and disability harassment, the EOC and the SWD are exploring the provision of training to frontline staff from the 68 private residential care homes for persons with disabilities. The objective of the training programme will be not only to explain the anti-discrimination concepts, but also help staff and operators put into practice those concepts in providing services.³

The EOC believes that it is also important to improve the legislation regarding sexual offences against persons with mental impairment, which is why it is responding to this consultation.

3. The age of consent

Chapter 2 of the consultation paper discusses issues relating to the age of consent and sexual offences. Recommendation 1 states:

“We recommend that there should be a uniform age of consent in Hong Kong of 16 years of age, which should be applicable irrespective of gender and sexual orientation.”

The EOC agrees with this proposal. Generally the age of consent in Hong Kong for sexual activity is 16 years of age. However as stated in the consultation paper, there are currently some offences that only apply to a particular gender (ie offences against boys or offences against girls). In addition there are some offences that only apply to persons based on their sexual orientation (ie sexual offences by gay men against boys).

The EOC agrees with the guiding principles of the Law Reform Commission's review of sexual offences that the offences should be:

- gender neutral; and
- avoiding any distinction based on sexual orientation.

Offences that only apply to a particular gender, means that only that gender would be protected from sexual exploitation. For example as the consultation document states (page 12), there are a number of offences which only protect girls, but do not have equivalent provisions protecting boys from sexual offences.

³ See Equal Opportunities Commission Press Release, 16 November 2016, <http://www.eoc.org.hk/eoc/graphicsfolder/ShowContent.aspx?ItemID=14139>

Differences in protections between genders in relation to particular offences would be likely to constitute sex discrimination under the Basic Law and Bill of Rights, which includes protection from sex discrimination by the government.⁴

The EOC does not consider there to be any justification for having gender specific offences, and agrees with the proposal that all offences be gender neutral, as is the situation in most other similar jurisdictions such as England and Wales, Scotland and Canada.

In relation to offences that apply based on sexual orientation, they are also likely to be discriminatory under the Bill of Rights on grounds of sexual orientation. As referred to in the consultation paper, the court decisions in *Leung v Secretary for Justice*, and *Secretary for Justice v Yau Yuk Lung Zigo* previously found that provisions of the Crimes Ordinance which applied based on sexual orientation, were discriminatory and unconstitutional.

The United Nations has recently highlighted that criminalisation of people based on their sexual orientation is a key concern of abuse of the human rights of LGBT people globally.⁵ It also recommended that:

“States should address discrimination by:

(a) Revising criminal laws to remove offences relating to consensual same-sex conduct and other offences used to arrest and punish persons on the basis of their sexual orientation and gender identity or expression; ordering an immediate moratorium on related prosecution; and expunging the criminal records of individuals convicted of such offences...”⁶

The EOC also recently in January 2017 sent submissions to the United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity.⁷ The EOC included in its response, concerns that in Hong Kong there are still a number of criminal offences which only apply to persons based on their sexual orientation and therefore are discriminatory.⁸

The EOC therefore believes that the government should repeal all the other criminal offences that discriminate on grounds of sexual orientation as soon as possible.

⁴ Article 22 Bill of Rights.

⁵ Discrimination and violence against individuals based on their sexual orientation and gender identity, Report of the Office of the United Nations High Commissioner for Human Rights, 4 May 2015, A/HRC/29/23, paragraph 15.

⁶ Ibid paragraph 79(a).

⁷ Equal Opportunities Commission, Public Consultation on protection from violence and discrimination on grounds of sexual orientation and gender identity, January 2017, <http://www.eoc.org.hk/EOC/Upload/submission/201701.pdf>

⁸ Ibid pages 3 and 4.

4. General issues relating to reform of sexual offences involving children and young persons

Chapter 3 of the consultation paper relates to gender issues on reforming sexual offences involving children and young people. Recommendation 2 states:

“We recommend that offences involving children and young persons should be gender-neutral in the new legislation.”

As stated in relation to Recommendation 1, the EOC agrees that both girls and boys should be equally protected from all types of sexual exploitation, and therefore all offences should be gender neutral.

5. Defence of marriage to sexual offences involving children between 13 and 16 years

Chapter 5 of the consultation document concerns the current defence of marriage to sexual offences involving children between 13 and 16 years. Recommendation 7 states:

“We recommend that there should not be any marital defence to offences involving children in the new legislation (and any such existing defence should be abolished).”

The EOC agrees the proposal to repeal the defence of marriage (for sexual intercourse or indecent assault) with a wife between the ages of 13 and 16.

The repeal of this defence would mean that men who are legally married in other countries to girls aged between 13 and 16, could be prosecuted in Hong Kong in relation to the above sexual offences.

The consultation paper notes that the current defence particularly affects certain racial groups in Hong where it is lawful to marry girls under the age of 16.⁹ The repeal of the defence therefore may be a form of indirect racial discrimination. This is because although the repeal of the defence would apply to all racial groups, it would particularly affect certain racial groups (eg persons of Indian ethnic or national origin).

In relation to indirect discrimination, in order for it to be lawful, justification for the repeal would need to be established. In other words, the issue is whether its repeal would serve a legitimate aim and the means used are proportionate.

⁹ Examples of countries where it is lawful to marry girls under the age of 16 include Bolivia, Costa Rica, Democratic Republic of Congo, Equatorial Guinea, India, Iran, Kuwait, Mali, Saudi Arabia, Tanzania, and Yemen, page 56.

The consultation paper refers to a number of justifications for the repeal including: the need to protect children from premature sexual activity in Hong Kong; that some of the overseas marriages may be forced marriages; that in Hong Kong sex with children under the age of 16 is generally considered inappropriate; and the current defence only protects heterosexual couples in marriages, not homosexual couples, so there is discrimination on grounds of sexual orientation in who the current defence protects.

Overall, the EOC agrees that taking into all the above factors there are reasonable grounds for the defence to be repealed, and that it is likely that any possible indirect racial discrimination caused by the repeal could be justified.

6. Sexual offences involving children in the new legislation

Chapter 7 of the consultation paper examines both possible new offences, and reviews some existing offences as to whether they should be repealed. The position of the EOC in relation to the repeal of some provisions is described below.

6.1 A man committing buggery with a girl under 21

Recommendation 19 states:

“We recommend that the offence of a man committing buggery with a girl under 21 in section 118D of the Crimes Ordinance should be abolished upon the enactment of the new legislation.”

The EOC agrees with this proposal to repeal the offence. This is because as the consultation paper states there are several concerns with it. Firstly it only applies to men having anal intercourse with girls and therefore it not gender neutral. Secondly, it is not consistent with the general age of consent of 16. Thirdly, it discriminates against people on grounds of sexual orientation against heterosexual couples. This is because the equivalent offence which relates to homosexual buggery (for 16 to 21 year olds) was repealed as a result of the *Leung v Secretary of Justice* decision.

The EOC therefore believes that this provision should be repealed to ensure that there is no discrimination.

6.2 Homosexual offences involving young persons

Recommendation 20 states:

“We recommend that the offence of homosexual buggery with or by man under 16 (section 118C of Crimes Ordinance) and gross indecency with or by man under 16 (section 118H of Crimes Ordinance) should be abolished upon the enactment of the new legislation.”

The EOC agrees with the proposal to repeal these provisions given that they criminalize homosexual sexual activity and therefore discriminate against people on grounds of their sexual orientation. The reasoning on page 5 of this response is repeated.

6.3 Abduction Offences

Recommendation 21 states:

“We recommend that the offences of abduction of an unmarried girl under 16 (section 126 of the Crimes Ordinance) and abduction of an unmarried girl under 18 for sexual intercourse (section 127 of the Crimes Ordinance) should be abolished upon the enactment of the new legislation.”

The EOC agrees with the proposal to repeal these two offences. The EOC agrees that they inappropriately only apply to the abduction of girls and not boys which goes against the principle of having gender neutral offences. The EOC also agrees that it is inappropriate for an offence to apply to “unmarried” girls, implying that unmarried girls would need the approval of parents or guardians to have sexual intercourse.

7. Sexual offences involving persons with mental impairment in the new legislation

As stated in the introduction, the EOC believes that it is very important to improve the protections from sexual abuse of persons with mental impairment. The EOC is also negotiating with the SWD about the provision of training to staff at private residential care homes to prevent sexual and disability harassment of persons with intellectual disabilities.

In relation to the proposals to improve the criminal offences relating to sexual abuse of persons with mental impairment, as stated previously, the EOC broadly supports those

proposals. Where there is serious criminal conduct, it is important that effective criminal sanctions are in place.

The EOC position in relation to some specific proposals are described below.

7.1 Protection of persons with mental impairment in residential care homes from sexual abuse

Recommendation 31 states:

“We recommend that a relationship of care should exist if a person (A) who is involved in the care of a person with mental impairment (B) in any one of two situations:

- firstly, A is any person employed or not in a specified institution and who has a function to perform or provides volunteering service in that defined institution.**
- secondly, A is a provider of care, assistance or services to B in connection with B’s mental illness.**

We further recommend that the meaning of specified institutions should be determined by the Administration when the new legislation is put in place.”

We note that paragraph 10.47 of the consultation paper states:

*“The scope of the offences in this first situation would cover sexual exploitation committed on PMIs by persons who have function to perform in the institutions irrespective of whether they are employees of the institutions or not. These offences also cover sexual exploitation committed by volunteers who provide services at specified institutions. This would prevent perpetrators trying to sexually exploit PMIs under the guise of providing volunteer service. **However, mere visitors to a defined institution who have no function to perform in the institution would not be covered.**”*

The EOC agrees that it would be important to protect persons with mental impairment from sexual abuse not only by employees, but anyone providing services including volunteers.

However, the EOC believes that visitors should also be covered by the offences under the new legislation. This is because as many people visit family members or friends in residential care homes, there is a possibility that such persons could sexually abuse persons in the care homes. The EOC notes recommendations 23 and 24 relating to inducing, threatening or deceiving or procuring sexual activity with a person with mental impairment could cover

such situations depending on the actions of the visitor. The EOC therefore recommends that the new offences relating to recommendations 23 and 24 be drafted in such a manner that they could cover visitors to residential care homes.

7.2 Exception where a person with mental impairment and the carer are married or in a sexual relationship

Recommendation 32 states:

“We recommend that in respect of the proposed new offences covering situations where a relationship of care exists, there should be exceptions to liability (i) where the person with mental impairment and the person who is involved in his or her care are married; or (ii) where there is a lawful sexual relationship between them which pre-dated the care relationship.

We further recommend that the exception in respect of pre-existing sexual relationship should apply where a lawful sexual relationship existed between the parties within a reasonable period before a party became involved in the care, assistance or services of a person with mental impairment.”

The EOC supports this proposed exception for several reasons. Firstly where a person with mental impairment is over 16 years of age it is important to respect their right to family life, to marry or enter into other relationships, as well as to sexual autonomy. The right to family life of persons with disabilities is a key right under the United Nations Convention of Persons with disabilities. This applies to all forms of disabilities including intellectual ones.

Article 23 provides:

“1. States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:

(a) The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized;

(b) The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided;

(c) Persons with disabilities, including children, retain their fertility on an equal basis with others.”¹⁰

¹⁰ United Nations Convention on the Rights of Persons with Disabilities, <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>

The EOC also agrees with exception as its wording applies not only to couples that are married, but also to other forms of relationship. This would apply to both heterosexual couples that are not married, as well as same sex couples that are not married, or their relationship is not recognized in Hong Kong.

This would be important in order to prevent discrimination on grounds of marital status. As part of the EOC's Discrimination Law Review, the EOC made recommendations that there be better protections from discrimination where persons are not married, but in relationships. It also recommended that other existing legislation which discriminates on the basis of marriage should be reviewed, but we believe this should also apply when consideration is being given to develop new legislation, as is being done by this consultation.¹¹

The EOC also considers that the test of whether a couple is in a lawful sexual relationship which existed "within a reasonable period before a party became involved in the care, assistance or services of a person with mental impairment" is an appropriate one. This would enable a court to determine on a case by case basis what was a "reasonable period", without specifying a particular period.

7.3 Scope of protection of persons with mental impairment

Recommendation 35 concerns which persons with mental impairment are protected from sexual abuse. It states:

"We recommend that the proposed new offences involving persons with mental impairment should apply to mentally disordered persons or mentally handicapped persons (as defined in the Mental Health Ordinance)."

As stated in the consultation paper, there are two limbs to the current protection of persons with mental impairment:

- (i) a mentally disordered person or a mentally handicapped person as defined in the Mental Health Ordinance (Cap 136); and
- (ii) incapability of living an independent life or guarding himself against serious exploitation, or will be so incapable when of an age to do so: section 117(1) Crimes Ordinance).

The consultation paper proposes to remove the second limb as it unreasonably restricts the protections to persons who cannot live independently. The EOC agrees that the restriction is

¹¹ EOC Discrimination Law Review, <http://www.eoc.org.hk/eoc/upload/DLR/2016330179502227490.pdf>, pages 111 to 132.

unreasonable given that persons who have a mental disorder or are mentally handicapped may be sexually abused, even where they are capable of living independently. For example a person may be living in their own home and living independently, but be abused by a provider of care.

We also note that in relation to the definition of disability under the Disability Discrimination Ordinance (DDO), the definition is broad, and there is no restriction to protection from discrimination, or disability harassment to persons who are incapable of living independently.¹² Further in relation to sexual harassment under the Sex Discrimination Ordinance (SDO), there is no restriction on protections from sexual harassment to persons that are incapable of living independently.

Section 2 of the DDO defines disability as:

“disability (殘疾), in relation to a person, means-
(a) total or partial loss of the person's bodily or mental functions;
(b) total or partial loss of a part of the person's body;
(c) the presence in the body of organisms causing disease or illness;
(d) the presence in the body of organisms capable of causing disease or illness;
(e) the malfunction, malformation or disfigurement of a part of the person's body;
(f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
(g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour, and includes a disability that-
(i) presently exists;
(ii) previously existed but no longer exists;
(iii) may exist in the future; or
(iv) is imputed to a person;”

Similarly to the protections from disability discrimination and harassment, we do not believe that protection from sexual abuse should be restricted to persons unable to live independently. This would also not be consistent with the broad protections from abuse of persons with disabilities under the United Nations Convention on the Rights of Persons with Disabilities.¹³

¹² Section 2, Disability Discrimination Ordinance,

¹³ Article 16(1) Convention on the Rights of Persons with Disabilities,
<http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>

7.4 Definition of persons with mental impairment

Recommendation 36 states:

“We recommend that the issue as to what term to be used to describe the person with mental impairment in the new legislation should be left to the draftsman to decide.”

The current definitions of persons with mental impairment include both persons who are mentally disordered or mentally handicapped persons. Mentally disordered is defined as:

- “(a) mental illness;*
- (b) a state of arrested or incomplete development of mind which amounts to a significant impairment of intelligence and social functioning which is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned;*
- (c) psychopathic disorder; or*
- (d) any other disorder or disability of mind which does not amount to mental handicap, and ‘mental disordered’ shall be construed accordingly.”¹⁴*

Mentally handicapped persons are defined as:

“sub-average general intellectual functioning with deficiencies in adaptive behaviour, and ‘mentally handicapped’ shall be construed accordingly.”¹⁵

The consultation paper raises a concern that the term “mentally incapacitated” suggests a person that has no mental capacity at all. But the proposals regarding reforms are that the offences would apply to persons with some mental impairment but who are still capable of consenting to sexual activity.

The EOC agrees there may be concerns if the term mentally incapacitated is construed as only protecting people with no mental capacity at all.

The EOC is also concerned with the term “handicapped” which is now considered outdated and derogatory in a number of similar jurisdictions such as the UK.¹⁶ It is therefore suggested that the term “mentally handicapped” is replaced with “intellectual disability”.

¹⁴ Section 2(1) Mental Health Ordinance.

¹⁵ Section 2(1) Mental Health Ordinance.

¹⁶ Office for Disability Issues, Guidance on Inclusive Language, 14 August 2014, <https://www.gov.uk/government/publications/inclusive-communication/inclusive-language-words-to-use-and-avoid-when-writing-about-disability>

8. Review of some existing offences involving of persons with mental impairment

There are several proposals relating to repealing existing offences.

Recommendation 37 states:

“We recommend that the offences of a man committing buggery with a mentally incapacitated person (section 118E of Crimes Ordinance), a man committing gross indecency with a male mentally incapacitated person (section 118I of Crimes Ordinance), a man having intercourse with a woman mentally incapacitated person (section 125 of Crimes Ordinance) should be abolished upon the enactment of the new legislation.”

The EOC agrees with these proposals. The consultation paper points out that the offences of a man committing buggery with an mentally incapacitated person (MIP) and a man having intercourse with a woman MIP are gender-specific. The offence of a man committing gross indecency with a male MIP is gender-specific and based on sexual orientation. The EOC therefore agrees that those offences are inconsistent with the principles of gender neutrality and/or avoidance of distinctions based on sexual orientation and should be repealed.

Recommendation 39 states:

“We recommend that the offence of sexual intercourse with patients in section 65(2) of the Mental Health Ordinance (Cap 136) should be abolished upon the enactment of the new legislation.”

The EOC agrees with the proposal to repeal the offence. This offence covers the situation where any male officer or employee of mental hospital, Correctional Services Department Psychiatric Centre has unlawful sexual intercourse with a woman detained there, or a male officer or employee of a mental or general hospital has unlawful sexual intercourse with a woman receiving treatment for a mental disorder. This offence can be criticized for being gender-specific, and therefore the EOC believes the offence should be repealed.

9. Sexual offences involving abuse of positions of trust of 16 to 17 year olds

Chapter 12 of the consultation paper concerns the issue of whether new offences should be introduced to protect young persons (between 16 and 17 years old) from sexual abuse by persons who are in positions of trust with them. This could cover a range of relationships such as teachers and students in schools, doctors and patients, and persons caring for children detained or in residential care homes.

Currently this would not be an offence as the offences only protect children under the age of consent (ie 16 years of age). As stated in the consultation paper, Several overseas countries have introduced legislation for the protection of 16 and 17 year-olds arising out of positions of trust including the State of New South Wales in Australia, England and Wales, Scotland, and Canada.

Recommendation 40 states:

“We are of the view that the issue as to whether there should be legislation for the protection of young persons aged 16 or above but under 18 should be considered by the Hong Kong community. Accordingly, we invite the community to express their views on the issue.”

The EOC believes that it would be appropriate to introduce legislation to protect children between 16 and 17 from sexual abuse by persons in positions of trust. The EOC agrees that there is a need for legislation for a number of reasons:

- to comply with international human rights obligations under the Convention on the Rights of the Child;
- 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.

In relation to international human rights obligations, the EOC agrees and as stated in the consultation paper that as the Convention on the Rights of the Child applies to children under 18, there is clearly a need to protect 16 to 17 year olds from abuse.¹⁷

Secondly there is evidence of the need for protections. In Hong Kong there have been a number of criminal cases relating to sexual abuse of children by persons in positions of trust. For example in November 2016 a former teacher at a High School was convicted of sexually assaulting three of his students under the age of 16.¹⁸ If those girls were between the ages

¹⁷ As required by article 19, Convention on the Rights of the Child.

¹⁸ 21 November 2016, <http://www.scmp.com/news/hong-kong/law-crime/article/2047962/five-years-jail-former-hong-kong-teacher-who-had-sex-pupils>

of 16 and 17 and they consented to the sexual activity, currently no criminal action could have been taken against the teacher.

The EOC has recently done considerable work on the issue of sexual harassment, including in schools. For example in 2013, the EOC published a research report "Study on Students' Sexual Attitudes and Views on Sexual Harassment".¹⁹ The survey was undertaken during the period of May to November 2011. A total of 5,902 students participated, including primary four, secondary one, four and six students, and students from tertiary institutions.

The study indicated that approximately 1% of the persons sexually harassing students in schools were teachers or other staff at schools.²⁰ Further teenagers (S4 and S6 between the ages of 16 and 18) indicated that they experienced high levels of certain forms of sexual harassment:

*"...Someone continuously made suggestions to you for sexual favors or sexual relationship (22%); Someone talked about sex all the time in your presence (27%); Someone made sexual comments about your looks, body, or private life (21%); Someone made sexual jokes about you (33%); Someone rubbed or touched against you on purpose (24%)."*²¹

This highlights that 16 to 18 year olds may be more vulnerable to certain forms of sexual harassment. Although overall the percentage of sexual harassment by teachers or other staff may be small (approximately 1%), given the position of trust that they occupy such sexual harassment if perpetrated by them is of particular concern.

Thirdly, Codes of Conduct are not sufficient to protect children as they are not legally binding and do not impose criminal sanctions. For example, the EOC is aware that the Council for Professional Conduct on Education has consulted on amending its "Code for the Education Profession of Hong Kong cum Practical Guidelines".²² The draft amendments include new provisions including "Principle IV: To develop a professional relationship with students grounded on mutual respect and trust." This requires teachers not to form sexual relationships with students.²³ However, even if these amendments are agreed, they are not legally binding. The EOC believes that new criminal offences are therefore appropriate.

The EOC also believes that the offences should apply to a wide range of situations of trust and therefore should be broadly defined, for example including list of possible positions of trust (eg teacher and student, doctor and patient), but also include in the definition a general test of any other positions of trust.

¹⁹ "Study on Students' Sexual Attitudes and Views on Sexual Harassment", http://www.eoc.org.hk/EOC/Upload/ResearchReport/SH_eFullReport.pdf

²⁰ Chart 8, paragraph 4.16, Ibid.

²¹ Chart 12, paragraph 4.20 Ibid.

²² http://cpc.edb.org.hk/en/consult_16.htm

²³ See page 14 of the Code for the Education Profession.