

Consultation Paper on Interim Proposals on a Sex Offender Register

Submission of the Hong Kong Bar Association

1. The Hong Kong Bar Association (“HKBA”) submits its comments on the recommendations of the Law Reform Commission’s Review of Sexual Offences Sub-committee (“the Sub-committee”) in the Consultation Paper on Interim Proposals on a Sex Offender Register (“the Consultation Paper”).
2. The HKBA supports the Sub-committee’s Recommendation 1 against the introduction in Hong Kong of the US-style “Megan’s Law” whereby the names and other personal information of sex offenders are made available for inspection by the general public.
3. The HKBA supports in principle the Sub-committee’s Recommendation 2 that an administrative scheme be established to enable the criminal conviction records for sexual offences of persons who undertake child-related work and work relating to mentally incapacitated person to be checked. The HKBA considers that it is vital that the proposed administrative scheme must properly balance the public interest to protect children and mentally incapacitated persons from molestation and exploitation and the public interest that former sex offenders may rehabilitate and reintegrate in the community. Therefore, there must be suitable provisions in the administrative scheme to restrict access to the criminal conviction records in question.
4. The HKBA does not support the Sub-committee’s proposal that the protection of the administrative scheme should cover all children under 18 years of age. The HKBA is of the view that the protection of the scheme should cover only children under 16 years of age. The Consultation Paper asserts at paragraph 4.13 the Sub-committee’s *belief* that the coverage of the administrative scheme should cover all

children under 18 years of age without setting out any reasoning. The HKBA notes that the age of consent to sexual intercourse stands at 16 years of age unless the person needs special protection because of a mental condition. According protection against paedophiles to 16-18 year olds when the law has already provided that persons of this age range can have sexual autonomy appears illogical. This is also a strong disincentive to hire a 16-18 year old for a job if the employer is advised to carry out checks on other prospective employees by the sole reason of the age range of a potential co-worker. The workplace of many 16-18 year olds, whether an office, workshop or retail premises, is not a sheltered environment and opportunities for sexual exploitation will be no greater than if they were 18 year olds.

5. The HKBA agrees with the Sub-committee that for the purposes of the proposed administrative scheme, “child-related work” be defined as work where the usual duties involve, or are likely to involve contract with a child; and “work relating to mentally incapacitated persons” be likewise defined as (as opposed to “include” as in Recommendation 3) work where the usual duties involve, or are likely to involve, contract with a mentally incapacitated person. The HKBA also agrees with the Sub-committee that the word “work” should be given a wide meaning to include work carried out by an individual (a) under a contract of employment or apprenticeship; (b) on a voluntary basis; (c) as training undertaken as part of an educational or vocational course; or (d) on a self-employed basis.
6. The HKBA supports the Sub-committee’s Recommendation 4 that for the purpose of the proposed administrative scheme (be it interim or otherwise), there should be no requirement that employers, supervisors, organizers or parents engaging the service of self-employed tutors must conduct the criminal conviction record check under the scheme.

7. The HKBA supports the Sub-committee's Recommendation 5 that the proposed administrative scheme should apply only to prospective employees, etc but qualifies its support that the scheme must be administered in accordance with Recommendation 6, with the record check to be initiated by the prospective employee, etc.
8. As to whether the Sub-committee's final recommendation of any record checking scheme should apply to existing employees, the HKBA would reserve its views bearing in mind the difficult issues such a course may give rise to.
9. The HKBA has serious reservations of the list of offences that the Sub-committee proposes in Recommendation 7 to be covered by the proposed administrative scheme. A sex offender is not necessarily a paedophile. Not every case of a sexual offence involves an element of exploitation or predation of the young or vulnerable. An example is the secondary schoolboy who has sexual intercourse with a younger schoolgirl during a relationship. He commits the sexual offence of unlawful sexual intercourse with a girl under the age of 16, which, pursuant to So Wai Lun v HKSAR (2005) 9 HKCFAR 530, is an offence of absolute liability so that a defendant, as the defendant in that case, could have an honest belief that a girl was over 16 years of age but still be guilty of an offence. The Sub-committee's proposed record check would reveal merely the fact and the date of the criminal conviction of an offence without any further information. It is not known if information of the penalty imposed would be released (which may be an important consideration since a defendant convicted of unlawful sexual intercourse with a girl under the age of 16, like the defendant in the So Wai Lun case (above), is often sentenced to a comparatively light penalty of conditional discharge). The HKBA considers that the list of sexual offences recommended to be covered by the proposed administrative scheme is overbroad, capable of creating misunderstandings and confusion, and simply highlights to the detriment of the rehabilitation and social reintegration of former sex

offenders the problems in the present set of sexual offences that lead to the present reference to the Law Reform Commission. The example above is yet again to the point. It would seem disproportionate to have one's job prospects blighted at 17 years of age either because of engaging in sexual intercourse with a girl whom one believed was also 17 years of age or because of having engaged in sexual intercourse at 15 years of age with a girl of similar age.

10. The HKBA supports Recommendations 8 and 9.

Hong Kong Bar Association

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