



Plan International Hong Kong

Comment on ‘Sentencing and Related Matters in the Review of Sexual Offences’

A. Background

On 12 November 2020, the Review of Sexual Offences Sub-committee of the Law Reform Commission (“Sub-committee”) published a consultation paper making preliminary proposals for the reform of the law about sentencing and related matters in the review of sexual offences to invite public views, comments and suggestions on issues discussed in the consultation paper. Plan International Hong Kong (“Plan International”) sets out in this paper its position and recommendations specifically on the Sexual Conviction Record Check (“SCRC”) Scheme for the Law Reform Commission (“LRC”) to consider.

Plan International is an independent development and humanitarian organisation that advances children’s rights and equality for girls. Plan International is committed to ending violence against children and promoting a safe society to children and young people. Plan International advocates a holistic approach to ensure both preventive and responsive measures are in place so that no child is subject to harm due to their association with the organisations or communities at large.

Plan International recognises that building a safeguarding environment for children includes more than the screening of child-related workers. It also requires the implementation of a comprehensive Child Safeguarding Policy, with measures like training of workers and implementing reporting procedures in child-related organisations. Plan International calls on the government to establish minimum child safeguarding standards with relevant child-related sectors, prioritise resources to child safeguarding, and ensure the consistency of child safeguarding standards across different sectors.

B. Comments and Recommendations

Plan International appreciates the LRC’s initiative to review the operation of the Sexual Conviction Record Check (SCRC) Scheme to build a stronger safety net for children in Hong Kong. This administrative scheme was intended as an interim measure when it was first proposed in 2010. It is high time to review the scheme to consider issues including its scope of application, coverage of offences and the need for legislation to better protect children from risks of harm or abuse in child-related institutions or communities.

The LRC has recommended the following regarding the reform of the SCRC scheme: ¹

¹ The Law Reform Commission of Hong Kong. (2010). *Sentencing and Related Matters in the Review of Sexual Offences*. p.46-47 Retrieved from https://www.hkreform.gov.hk/en/docs/sentencing_related_matters_e.pdf



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

Plan International has laid down the following comments and recommendations regarding how the SCRC scheme could be enhanced to serve better its purpose of preventing harm against children.

Scope of application

1. Plan International supports the LRC's proposal, in principle, to extend the SCRC scheme's coverage to include existing employees, self-employed persons and volunteers who have direct contact with children given their role within an organisation. There have been numerous reported instances of past sex offenders who deliberately gained access to children and abused them as self-employed private tutors or volunteers.²³ These instances underscore the urgency to extend the scope of the scheme to build a more comprehensive safety net for children.
2. However, Plan International notes that child-related institutions, especially those relying on volunteers to help keep their organisation going and deliver services, may face substantial operation difficulties with the proposed scheme extension. Complicated clearance procedures and the required fee for clearance may create a huge barrier for people to volunteer and place huge administrative burdens on small NGOs which are already short on resources. Therefore, Plan International suggests the government take the following measures to streamline the procedure of the scheme to enhance the receptivity to child safeguarding in the child-related sectors:⁴

2.1. Checking service should be free for volunteers

The required fees for the SCRC should be free for volunteers, and related costs should be borne by the government, so as not to deter people from volunteering.⁵

²李慧娜 (2020 年 5 月)。〈男隱瞞前科非禮兩名補習小男生 官斥義教只為接近男童 囚 52 月〉。《香港 01》。取自 <https://bit.ly/3ngxvNT>

³梁芷君 (2017 年 1 月)。〈補習老師非禮 3 男童判入獄 37 月 官促優化性罪犯審視機制〉。《香港 01》。取自 <https://bit.ly/349KKso>

⁴ Take reference from the Disclosure and Barring Service of the United Kingdoms, which is an equivalent of the SCRC scheme in the U.K.

⁵ DBS check application process for volunteers (14 December 2020). Retrieved from <https://www.gov.uk/government/publications/disclosure-application-process-for-volunteers/disclosure-application-process-for-volunteers>

2.2. Clearance procedures should be streamlined

The Hong Kong Police Force should streamline the clearance procedures and step up their capacity in providing screening services (e.g. applicants should be allowed to perform the clearance procedures at different police stations) to better meet the rising demands of the SCRC screening service following the scheme extension. With faster clearance procedures, it is hoped that the screening process would pose less strain on the operation of child-related organisations which are dependent on volunteers to deliver their services.

2.3. Exemptions for ‘supervised activity involving non-frequent contact with children’

2.3.1. Considering the extent to which exemptions of screening should be granted for volunteers undertaking child-related work, factors regarding the frequency of contact with children and monitoring by staff should be taken into account.

2.3.2. Plan International proposes that exemptions could, in principle, be extended to supervised activity given sufficient monitoring by staff in the institution. According to the Disclosure and Barring Service in the U.K., volunteers under reasonable day-to-day supervision by another person (engaged in “supervised activity”) in child-related work would all be exempted from the conviction record screening process.⁶

2.3.3. However, Plan International is concerned that such exemptions of the screening process may be inappropriate for volunteers who have frequent and close contact with children (e.g. volunteers in child-care service centres). It could open up grooming and sexual exploitation risks to children. Volunteers in some organisations may spend just as much time with children as staff members in delivering services. As informed by numerous studies, the proximity between the perpetrator and the child could be a breeding ground for sexual abuse, and 78% of the sex offenders would specifically arrange to meet children outside of an institution with the intention of abusing them. These studies underscore that risks of sexual abuse may still exist even if there are staff members to monitor past sex offenders in the institution.

2.3.4. Therefore, Plan International proposes that volunteers who have direct contact with children frequently (once a week or more often, or on four or more days in a 30-day period),⁷ should be subject to sexual conviction record check even if there

⁶ Department for Education in the U.K. (2012). *Regulated activity in relation to children: scope Factual note by HM Government*. Retrieved from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/550197/Regulated_activity_in_relation_to_children.pdf

⁷ Department for Education in the U.K. (2012). *Regulated activity in relation to children: scope Factual note by HM Government*. Retrieved from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/550197/Regulated_activity_in_relation_to_children.pdf

is another person to supervise them; while there can be exemptions for volunteers who are engaged in child-related work less frequently, given sufficient monitoring by staff.

3. Regarding the scope of SCRC application in employment roles, Plan International suggests that prospective and existing employees in any role to do with the operation of or working on the premises of prisons, remand schools, and remand homes; and individuals who have access to personal or sensitive information about children in the Hong Kong government, should also be subject to the sexual conviction record checking, with reference to the eligibility guide in Standard Disclosure and Barring Service Check in the U.K.⁸
 - 3.4. Although individuals working in prisons or remand centres serve detainees of all ages, and not only children, it is noteworthy that their encounters with children represent frequent and close contact with minors in total institutions, in which situated children are enclosed in the institution and cut off from the wider community for a considerable amount of time. As almost every aspect of a child's life is completely dependent on the institution for daily care and well-being, total institutions are generally higher risk environments for children and therefore warrant greater scrutiny in child safeguarding.⁹
 - 3.5. Individuals who have access to personal or sensitive information about children in the government should also be subject to the screening to better protect children from online predators. As the personal information of children could easily be used for online grooming and sexual exploitation of children, the scope of SCRC should be extended to include these roles which enable convenient access to children in the online environment.

Plan International's recommendations on the scope of application

- Plan International supports the extension of the SCRC scheme to include existing employees, self-employed persons and volunteers. However, there should be exemptions for volunteers who are engaged in supervised activities involving non-frequent contact with children.
- The scope of the scheme should cover individuals working in prisons, remand schools, and remand homes, and individuals who have access to personal or sensitive information about children in the Hong Kong government.
- Checking service should be free for volunteers and clearance procedures should be streamlined following scheme extension.

⁸ Disclosure and Barring Service. (Sept 2018). *Standard DBS check eligibility guide*. Retrieved from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/753972/Standards_eligibility_guide_v1.0_051118.pdf

⁹ Royal Commission into Institutional Responses to Child Sexual Abuse (2017). *Final Report Volume 2 Nature and Cause*. Retrieved from <https://www.childabuseroyalcommission.gov.au/nature-and-cause>

Comprehensive Legislative Scheme

4. Plan International recommends making the current SCRC scheme mandatory to ensure better compliance from child-related institutions and self-employed or volunteering child-related workers, which means that it should be an offence for a barred person to engage in regulated activity with children, or for an employer to permit an individual to engage in regulated activity with children.¹⁰
5. It was argued earlier in the LRC consultation paper in 2010 that most employers would choose to make use of the scheme voluntarily in their interest,

“Indeed, irrespective of whether there is negligence, an employer may be held vicariously liable in tort action for any sexual abuse committed by its employee, and so it would be in the interest of the employer to invoke the proposed scheme to reduce the risk of such liability when selecting and recruiting staff.”¹¹

However, many employers have not used the scheme in their staff recruitment. According to the End Child Sexual Abuse Foundation survey in 2013, 30% of the respondent private tuition centres had not used the SCRC scheme in recruiting full-time staff, and 34% of the respondents had not used the scheme in recruiting part-time staff.¹² Besides, without establishing legislation to make it an offence for barred persons to engage in regulated activity with children, it would be difficult to deter past sex offenders from committing child abuse by being as self-employed private tutors, coaches or caretakers.

6. LRC recommended, in its consultation paper in 2010, that “employers” should be construed in a broad sense to cover parents and legal guardians engaging the services of self-employed tutors:

“The reference to “employers” should accordingly be construed in a wide sense to cover also supervisors of volunteers, parents engaging the services of self-employed tutors, and legal guardians of MIPS.”¹³

With the new definition of “employers”, it was argued that it might be unreasonable to make the scheme mandatory as it would pose undue liability on parents:

“There may well be instances in which an employer is of the view that a sexual conviction record check is not necessary. An example would be a mother seeking

¹⁰ Safeguarding Vulnerable Groups Act 2006 (ENG) 7. 9. (UK) Retrieved from <https://www.legislation.gov.uk/ukpga/2006/47/contents>

¹¹ The Law Reform Commission of Hong Kong. (2010). *Sexual Offences Records Checks for Child-Related Work: Interim Proposals*. p.75 Retrieved from https://www.hkreform.gov.hk/en/docs/rsexoff_e.pdf

¹² Public Opinion Programme, the University of Hong Kong and End Child Sexual Abuse Foundation. (2013). *Survey on “Sexual Conviction Record Check” Mechanism*. Retrieved from <https://www.hkpop.hku.hk/chinese/report/ECSAF2012/content/resources/report.pdf>

¹³ The Law Reform Commission of Hong Kong. (2010). *Sexual Offences Records Checks for Child-Related Work: Interim Proposals*. p.67. Retrieved from https://www.hkreform.gov.hk/en/docs/rsexoff_e.pdf

to hire a private tutor to provide part-time tuition to her child at home. If the tutor is known by another parent to have worked reliably for a considerable period of time, and if the mother has decided that she would be present at all times, it may properly be considered that a check is not necessary. We, therefore, recommended in the consultation paper that it should not be mandatory for employers to conduct a check.”¹⁴

Plan International proposes that the criminal liability for not complying with the SCRC scheme should be placed on the self-employed persons or service providers. Parents or guardians should be granted the rights to request proof of sexual conviction record check from child-related service providers, such as tutoring, coaching or caretaking, for the screening purpose. The government should conduct an awareness-building campaign to encourage parents to make use of the scheme to protect their children from past sex offenders’ potential abuse.

Plan International’s recommendations on comprehensive legislative scheme

- The SCRC scheme should be mandatory to ensure better compliance from child-related institutions and self-employed or volunteering child-related workers.
- The definition of ‘employers’ should not be extended to include parents or legal guardians of children under a mandatory SCRC scheme. Parents or legal guardians should be allowed to use the scheme when necessary, without being held criminally liable for not doing so.

Coverage of spent convictions

7. The third issue regarding the SCRC scheme review is whether the scheme should be extended to include spent convictions. According to Article 2 of the Rehabilitation of Offenders Ordinance (RHO), the conviction of a person who is not sentenced to imprisonment exceeding three months, whether that sentence takes effect immediately or is suspended, or to a fine exceeding \$10,000, and who has not previously been convicted in Hong Kong of any offence will be treated as spent once three years has elapsed without another conviction for an offence in Hong Kong.¹⁵ Also, any convictions leading to sentences to a training centre, a detention centre or a rehabilitation centre become spent three years after the completion of post-release supervision following detention.

¹⁴ The Law Reform Commission of Hong Kong. (2010). *Sexual Offences Records Checks for Child-Related Work: Interim Proposals*. p.68. Retrieved from https://www.hkreform.gov.hk/en/docs/rsexoff_e.pdf

¹⁵ Rehabilitation of Offenders Ordinance 1986. (HONG). HK. Retrieved from https://www.elegislation.gov.hk/hk/cap297!en?INDEX_CS=N

8. In deciding whether spent convictions should be included in the conviction record screening process, it is important to consider the nature of crimes and offenders' age, which may spell profound implications on the risks of harm posed to children.
 - 8.1. It is important to note that juvenile offenders and adult offenders' sentencing for the same sexual offences could be different. While adult offenders might face imprisonment with more than three months and have the conviction record for life, juvenile offenders may face different treatments other than imprisonment with their conviction record becoming spent after three years following its completion. As there is a discrepancy between the nature of crimes of adult offenders' spent convictions and that of the juvenile offenders, it begs the question of whether the juvenile offenders who have committed sexual offences but whose convictions are already spent should be restricted from getting access to children at work in the future.
 - 8.2. Plan International suggests including spent convictions for juveniles on offences related to sexual violence and exploitation in the SCRC scheme to protect children from sexual abuse and exploitation risks. Although there remain some arguments that adolescents' sexual development is still in progress and changeable, Plan International notices that there is no conclusive evidence that shows the reoffending rate of juvenile sex offenders is significantly lower than that of adult sex offenders. A meta-analysis study in 2008 found that the sexual recidivism rate for a juvenile was 12%.¹⁶ In an earlier meta-analysis study in 1998, the sexual recidivism rate for adults was 13%.¹⁷ Both studies had an average follow-up period of 5 years.
 - 8.3. However, Plan International notices that some sexual offences committed by juvenile offenders could be non-exploitative in nature. For instance, although consensual sexual activities between persons between 13 and 16 years old are criminalised in Hong Kong owing to the restrictions of sexual consent, these activities between minors may occur in the context of romantic relationships among young people and may not necessarily be related to sexual violence, as noted by the Sub-Committee.¹⁸
 - 8.4. Considering juvenile offenders of sexual offences that are not involving sexual exploitation may pose lower risks to children and be given opportunities for rehabilitation, some jurisdictions such as Scotland and Taiwan have made special disclosure arrangements on spent convictions committed by juvenile defenders.
 - 8.4.1. Scotland has specified a list of mild offences (i.e. sexual intercourse with a person under 16 years old) to be disclosed according to the age of the offender, specifying

¹⁶ McCann, Kristie, & Lussier, Patrick. (2008). Antisociality, Sexual Deviance, and Sexual Reoffending in Juvenile Sex Offenders. *Youth Violence and Juvenile Justice*, 6(4), 363-385.

¹⁷ Hanson, K., & Bussière, M. (1998). Predicting relapse: A meta analysis of sexual offender recidivism studies. *Journal of Consulting and Clinical Psychology*, 66, 348-362.

¹⁸ The Law Reform Commission of Hong Kong. (2016). "Chapter 6: Consensual sexual activity between persons who are between 13 and 16 years of age", *The Consultation Paper on Sexual Offences Involving Children and Persons with Mental Impairment*. P.11-12 Retrieved from: <https://www.legco.gov.hk/yr16-17/english/panels/ajls/papers/ajls20170227cb4-591-5-e.pdf>

that the convictions will appear on the individual's disclosure for a shorter period of time (7 years and 6 months) if the offender was under 18 at the date of conviction.¹⁹

8.4.2. Taiwan legislation includes spent sexual offences in the barring system. It makes a particular exemption regarding mild sexual offences committed by juvenile offenders, stating that if people aged below 18 are convicted of having sexual intercourse or performing an obscene act with under-aged children under 14 years old, their spent convictions will not restrict them from engaging in child-related work.²⁰

8.5. In view of the above references, Plan International recommends the LRC consider establishing an exemption and appeal mechanism to allow the record of spent convictions for the offence of having consensual sexual activity between persons who are between 13 and 16, that are not involving sexual exploitation, to be exempted from disclosure under the SCRC Scheme, if specific criteria are met.

Plan International's recommendations on coverage of spent convictions

- The SCRC scheme should include both spent and non-spent convictions of sexual-related offences.
- To establish an exemption and appeal mechanism to allow the record of juvenile convictions for the offence of having consensual sexual activity between persons who are between 13 and 16, that are not involving sexual exploitation, to be exempted from disclosure under the SCRC Scheme, if specific criteria are met.

C. Conclusion

Plan International welcomes the LRC's initiative to conduct a comprehensive review of the Sexual Conviction Record Check Scheme and extend its application scope to include all employees, self-employed persons and volunteers.

Plan International calls on the government to establish a comprehensive legislative scheme to make sexual conviction record check a mandatory recruitment practice for child-related institutions' employers, and extend the coverage to spent convictions for sexual-related offences.

¹⁹ Disclosure Scotland. (Dec 2020). *Convictions and higher level disclosures*. Retrieved from <https://www.mygov.scot/convictions-higher-disclosures/>

²⁰ The Protection of Children and Youth Welfare and Rights Act. 2003. (CHIN) 81. Retrieved from <https://law.moj.gov.tw/ENG/LawClass/LawParaDeatil.aspx?pcode=D0050001&bp=5>