



**TALK HONG KONG  
PUBLIC CONSULTATION  
SUBMISSION**

to

**The Law Reform Commission of Hong Kong  
Review of Sexual Offences Sub-committee  
Sentencing and Related Matters in the  
Review of Sexual Offences**

**10 February 2021**

## Introduction

TALK Hong Kong is a volunteer peer led group of women / femme survivors of sexual abuse and assault based in Hong Kong. We aim to support survivors with meetings and work as an advocacy group on related topics.

We agree with many of the proposals set forth in the HKLRC's review and applaud their in-depth work on issues related to sexual offences. In this submission we focus on those areas that we believe should be altered with a particular focus on crimes against children. We submit these views based on our own lived experience of childhood sexual abuse and sexual assault and hope that these first hand insights will be useful to the Commission. We welcome your further inquiries and requests for collaboration.

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## Submission 1 on “Penalties for offences proposed in the overall review of substantive sexual offences”

### New offences regarding children under 13 and under 16

The Sub-Committee is recommending 30 new sexual offences; 14 with no corresponding Hong Kong legislation<sup>1</sup> and 16 with corresponding Hong Kong legislation.<sup>2</sup> Certain of the new offences, are divided by the age of the victim, so that there are higher maximum penalties recommended for sexual offences against a child under the age of 13 and lower maximum penalties recommended for sexual offences against a child under the age of 16.<sup>3</sup>

#### Division of offences by “younger” and “older” children

It is TALK’s submission that with respect to all new sexual offences against children, there should be no division of offences into: (1) offences against children under 13 years old; and (2) offences against children under 16 years old. TALK’s position is that all offences against a child under the age of 16 should be treated as sexual offences against a child with no distinction. Further, the sentences for sexual offences against a child should be the higher of the penalties recommended by the Sub-Committee, e.g., for penetration of a child under 16, the maximum penalty should be life imprisonment.

#### Defining what constitutes an offence against a child vs an adult

TALK is of the view that sexual offences against a child should not be defined by reference to the age of consent but instead, by reference to the age at which a person is legally considered to be a child. According to the Interpretation and General Clauses Ordinance (Cap 1) an “adult” is a person who has attained the age of 18 years and an “infant” or “minor” is a person who has not yet attained the age of 18. TALK therefore, submits that sexual offences against a child be defined in accordance with the legal definition of infancy or childhood.

#### Proximity of age defence

In view of protecting the healthy sexual autonomy of young people, TALK further recommends that the Sub-Committee consider implementing a proximity of age consideration, such that where the sexual offence is between children between the ages of 13-15 and the age difference is 2 years or less<sup>4</sup>, this may act as a mitigating factor.

This submission refers to the following new offences as proposed by the Sub-committee:

- Penetration of a child under 13;
- Penetration of a child under 16;
- Sexual assault of a child under 13;

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<sup>1</sup> Para 1.8 of the Consultation Report

<sup>2</sup> Para 1.9 and 1.55 of the Consultation Report

<sup>3</sup> See the tables at Para 1.9 and 1.55 of the Consultation Report

<sup>4</sup> Rape, Abuse & Incest National Network (RAINN): Child Sexual Abuse <https://www.rainn.org/articles/child-sexual-abuse>



- Sexual assault of a child under 16;
- Causing or inciting a child under 13 to engage in sexual activity;
- Causing or inciting a child under 16 to engage in sexual activity;
- Engaging in sexual activity in the presence of a child under 13;<sup>5</sup>
- Engaging in sexual activity in the presence of a child under 16;<sup>6</sup>
- Causing a child under 13 to look at a sexual image (including texts and audio messages);<sup>7</sup> and
- Causing a child under 16 to look at a sexual image (including texts and audio messages).<sup>8</sup>

Given the above, the Sub-Committee could consider the introduction of a statutory provision in part XII of the Crimes Ordinance (Cap 200) (“CO”) (being the part of the Ordinance setting out all sexual offences) requiring that the court consider various factors when sentencing the defendant convicted of sexual offences.

Whilst the drafting of such a provision should be subject to further consultation and discussion, TALK suggests something along the lines of the following:

[Section no. to be determined] – Matters to which court is to have regard in sentencing the convicted defendant.

- (1) It shall be the duty of the court when determining the appropriate sentence on a defendant convicted of any offences under this part [i.e. Part XII of the Crimes Ordinance] summarily or on indictment to have regard the conduct of the defendant and all the circumstances of the case including the following matters:-
- a. the age of the victim of the offence;
  - b. the age difference between the victim of the offence and the defendant;
  - c. the physical and mental disability of the victim of the offence;
  - d. the duration of the offence;
  - e. whether there was an abuse of family or occupational position by the defendant when committing the offence;

TALK acknowledges that courts currently take these factors into account in appropriate cases, even without such a provision as suggested above, but putting these factors into a statutory provision may give a greater effect of deterrence to potential offenders. It also facilitates public education and prevention of crimes programmes organised by NGOs and/or

<sup>5</sup> Final Recommendation 13 (re Second CP)

<sup>6</sup> Final Recommendation 13 (re Second CP)

<sup>7</sup> Final Recommendation 14 (re Second CP)

<sup>8</sup> Final Recommendation 14 (re Second CP)



law enforcement agencies (where they often refer to a statutory provision as opposed to individual court cases).

In summary, TALK would like the Sub-Committee to appreciate that the age division currently supported by the Sub-Committee implies that the impact of a sexual assault on a child under 13 is greater than for a child between the ages of 13 and 15, that the ability of a child over the age of 13 to consent is greater than that of a child under the age of 13, and /or that an assault in and of itself against an older child is somehow not as serious as an assault against a younger one. While there may be some extraordinary exceptions, in our experience none are true, and the abuse is equally damaging at the age of 10 as at the age of 15.

As the Commission will also note, the Victim Impact Statements attached herewith unanimously agree that if possible we would recommend that the age of consent be changed to 18 years of age. A sexual crime against a child is always the responsibility of the older party in our view and this view is supported by many of the world's largest victim's rights advocacy groups.

### **TALK's RECOMMENDATIONS:**

**R1: There be no division of sexual offences against a child into offences committed against a younger child (13 years of age and younger) and older child (under 16 years of age).**

**R2: The definition of what constitutes a "child" for the purposes of demarcating sexual offences against a child should be by reference to the legal definition of infancy or minority (i.e., not yet attained the age of 18 years) under the law of Hong Kong and not by reference to the age of consent (i.e., under the age of 16 years).**

**R3: The maximum penalty for all sexual offences against a child be the maximum sentence currently recommended for younger children, e.g., there be a single offence of sexual penetration of a child under the age of 16 with the maximum penalty set at life imprisonment.**

### **Penalties**

With respect to the setting of a maximum penalty for the new offences, TALK is of the view that the Sub-Committee should also establish mandatory minimum sentences for all new offences, particularly those related to children.

Failing that, to impose greater deterrence and sending a clear message to the public that courts will not tolerate sexual offences against children. By way of example, we wish to refer the Sub-Committee to s 33 of the Public Order Ordinance (Cap 245) where the Court is bound to sentence the defendant in the manner specified in the provision (in the sense that only custodial sentences will be available).

Our reasoning for this is that despite there currently being maximum penalties of, for example, a life sentence for sexual offences in the CO, the reality is that sexual offenders in recent years have been given sentences of less than 2 years 80% of the time.<sup>9</sup> And in a

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<sup>9</sup> Para 2.47 of the Consultation Report



recent case involving a 35 year old man who molested multiple children between 11-14 years of age, was sentenced to only 4 years.<sup>10</sup> This record in sentencing seems extremely low when considering the impact of the offences on the victims and their families.

#### **TALK's RECOMMENDATION:**

**R4: That the Sub-Committee consider implementing mandatory minimum sentences for sexual offences, and in particular, with respect to sexual offences against a child.**

## **Submission 2 on “Treatment and rehabilitation of sex offenders”**

### **Reoffending rates of sex offenders**

Regarding the data cited in the Consultation Report and relied upon by the Sub-Committee, TALK submits that it perpetuates a false view of what we do and do not know about the risk of sex offenders re-offending. The low recidivism rate declared in the consultation paper is not reliable given the small sample size of 34 individuals and the fact that it is acknowledged by Hong Kong officials that reporting rates for sexual offences are low.<sup>11</sup> It is further recognised that sexual crimes against children are even less frequently reported than crimes against adults.<sup>12</sup>

### **Reliability of data and opinions set out in the Consultation Report**

TALK further submits that it has concerns about the Sub-Committee's reliance upon a single expert, embedded in the very system she has been tasked with critiquing.

Given the above, TALK submits that the data and opinions *vis a vis* the utility and effectiveness of treatment should not be given weight by the Sub-Committee in deciding issues related to reoffending.

TALK is of the view that further, principled research and consultation needs to be undertaken prior to deciding on these crucial matters.

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<sup>10</sup> SCMP: Hong Kong policeman jailed for nearly four years for sexually assaulting multiple underage girls, 2021-01-27 <https://www.scmp.com/news/hong-kong/law-and-crime/article/3119454/hong-kong-policeman-jailed-nearly-four-years-sexually>

<sup>11</sup> *Crime and Its Victims in Hong Kong (2005)* <https://www.statistics.gov.hk/pub/B11302312007XXXXB0100.pdf>  
See: paragraph 1.14 “In a survey of this nature, respondents tend to be unwilling to report rape incidents. The number of rape cases captured is hence extremely small.”; Research Office Legislative Council Secretariat, “Sexual offences in Hong Kong 2009-2019” (2020 Oct) where it is noted that sex crime figures are widely believed to be under-reported, as victims are generally too “ashamed” to report such offences.

<sup>12</sup> See for example: [http://www.d2l.org/wp-content/uploads/2017/01/Statistics\\_1\\_M](http://www.d2l.org/wp-content/uploads/2017/01/Statistics_1_M) that shows that only about 38% of child victims disclose the fact they have been sexually abused; <https://napac.org.uk/key-facts-figures/> that estimates that only one in eight victims of sexual abuse come to the attention of statutory authorities (Children's Commissioner 2015); regarding traumatic memory: “It is very common for people experience a traumatic event to forget it or have only hazy memories of it, and for it to then emerge at some point in their later life. Research has found that it takes approximately 20 years for repressed memories of childhood sexual abuse to surface.” Paolo Borella (psychotherapist with NHS) *Therapy Today*, 2019 July; for the Hong Kong context: “victims under the age of 16 in average delay their reporting for assistance for 4,814 days (approx. 13.2 years)”. *The Living Evidence of Sexual Violence Against Women in Hong Kong: A Retrospective Study of RainLily's Crisis Services 2000-2018*



Our reasoning for these recommendations is that, while we understand there is a dearth of research on this topic in many jurisdictions, the data that is presented here is being presented as definitive on the issues under consideration and implies more clarity than we believe there is as supported by the facts we submit here.

#### **TALK's RECOMMENDATION:**

**R5: Prior to any decision based on the reoffending rates cited, that this matter be the subject of further independent research and a specific sub-committee.**

### **Post-release Stage: Provision of specialised post-release supervision to discharged sex offenders**

TALK agrees that post therapeutic support be given the paramount importance of helping reduce future offences. Particularly those who have offended against children (who are known to be least likely to report crimes and therefore the reoffending rate must be higher than we know).<sup>13</sup>

TALK notes that the current Post-Release Supervision of Prisoners Scheme covers only sex offenders with sentence lengths of two years or above. This group of sex offenders constitutes less than 20%<sup>14</sup> of all sex offenders admitted to correctional institutions and that the length of supervision should be less than their remission period (i.e. not longer than one-third of the imprisonment sentence). TALK agrees that the duration of community support and supervision required by some complicated high risk cases may at times be much longer than their actual supervision period and we support expanding services to better ensure safety in the community.

#### **TALK's RECOMMENDATION:**

**R6: Prior to any decision being made by the Sub-Committee regarding specialised post-release supervision, that this matter be the subject of further independent research.**

### **Submission 3 on “Review of Sexual Conviction Record Check Scheme”**

TALK submits that the SCRC scheme should include both existing and prospective employees as well as all categories of workers including, for example, self-employed persons, contractors and volunteers.

TALK notes that the Sub-Committee does not support mandatory use of the SCRC Scheme; we disagree. Not making the SCRC mandatory is to actively decide not to protect those who are the most vulnerable. In our work with victims of child sexual abuse, we talk to parents

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<sup>13</sup> Charité University Hospital Sexual Medicine Department – Dunkelfeld prevention network is a scaled up paedophile treatment program that offers a treatment protocol  
[https://sexualmedizin.charite.de/en/research/prevention\\_network\\_dunkelfeld/](https://sexualmedizin.charite.de/en/research/prevention_network_dunkelfeld/)

<sup>14</sup> Figure available as of June 2019.



and business owners and are surprised at how little they know about sexual offences and how much more common it is than they think. Most sexual offences are perpetrated not by strangers but by persons known to the victim or their family, usually by someone trusted by parents<sup>15</sup>, over time, and with repeated exposure. Implementing a mandatory, systematic approach to checking workers and volunteers who are placed in positions of proximity or responsibility for children is a good reminder to anyone hiring a tutor, coach, teacher, or volunteer that sexual offenses against children are not as uncommon as most think. For example, one in seven girls in the U.S.<sup>16</sup>, one in 10 girls in the U.K. are sexually assaulted in childhood.<sup>17</sup>

With respect to whether spent convictions should be disclosed as part of the SCRC, TALK notes that first, according to the Sub-Committee's own statistics, 80% of sexual offences receive sentences of 2 years or less. Second, offences with a sexual dimension to them may be charged as more minor offences, such as loitering. In the case of loitering, the maximum penalty is 6 months of imprisonment. In the event the offender is sentenced to 3 months or less, such an offence would fall within the parameters of the Rehabilitation of Offenders Ordinance (Cap 297) and would not appear on a SCRC report as a spent conviction after the appropriate period of time had passed.

TALK also notes that the Sub-Committee suggests that the issue of spent convictions may be addressed by simply asking a worker to volunteer information about such minor offences. At para 3.37 of the Consultation Report, the Sub-Committee states that:

Furthermore, as a spent conviction would usually involve a relatively minor offence,<sup>18</sup> it appears that the employee should not be hesitant in disclosing such record to the employer.

With respect, relying on the goodwill of the offender to self-confess to such convictions is unrealistic.

Further, TALK submits that when one balances the potential harm by failing to reveal such an offence against the underlying objectives of the Rehabilitation of Offenders Ordinance (Cap 297), TALK is of the view that the interests of protecting children from potential predators outweighs such objectives.

For these reasons, TALK is of the view that spent convictions should be disclosed as part of the SCRC process.

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<sup>15</sup> RainLily: The Living Evidence of Sexual Violence Against Women in Hong Kong: A Retrospective Study of RainLily's Crisis Services (2000-2018 ), <https://rainlily.org.hk/eng/news/retrolaunch2019>

<sup>16</sup> Darkness to Light: The Magnitude of the Problem, <https://www.d2l.org/child-sexual-abuse/statistics/>

<sup>17</sup> National Association for People Abused in Childhood (NAPAC): Key Facts and Figures, <https://napac.org.uk/key-facts-figures/>

<sup>18</sup> Usually an offence in respect of which the person was not sentenced to imprisonment exceeding 3 months or to a fine exceeding \$10,000 (Section 2(1) of the Rehabilitation of Offenders Ordinance (Cap 297)).



## TALK's RECOMMENDATION:

**R7: The SCRC should be expanded to include all definitions of workers including self-employed, volunteers, temporary or contract workers, and both current and prospective workers.**

**R8: The SCRC scheme should be mandatory.**

**R9: That spent convictions should be disclosed as part of the SCRC.**

*Submitted by*

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## Thanks

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TALK Hong Kong thanks you for your insights and experience and for taking part in this meaningful work.



## **Addenda**

**Victim Impact Statement - Taura Edgar**

**Victim Impact Statement – Beth Junell**

**Victim Impact Statement – Jill Marshall**

*[redacted in this version]*

