L/M (2) to LP 5014/19/1/1C

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Urgent By Fax

25 April 2001

Mr Sin Wai Man,
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(Fax No. 2788 7530)

Dear Mr Sin,

Proposed amendments to the Crimes Ordinance (Cap. 200)
Marital Rape and Related Sexual Offences

Thank you for your letter dated 23 April 2001 (revised). In addition to general comments on the points you have raised in your letter, I have two minor additional amendments to suggest for your consideration which I hope would indeed achieve the Administration's purpose of ensuring that marital and non-marital victims are placed on an equal footing without making drastic changes to the Crimes Ordinance before a comprehensive review of sexual offences can be undertaken.

General comments

1. The proposition with which the House of Lords was concerned in Reg v R [1991] 3 WLR 767 was contained in Hale History of the Pleas of the Crown (1736) Vol. 1, Ch. 58, p.639 (cited by Lord Keith, p.770A-C) –

> "But the husband cannot be guilty of a rape committed by himself upon his wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract."

2. After reviewing various court decisions which established categories of circumstances in which the wife's implied consent to marital intercourse could be retracted, Lord Keith (p.775 B-D) said –

> "The position then is that that part of Hale's proposition which asserts that a wife cannot retract consent to sexual intercourse which she gives on marriage has been departed from in a series of decided cases. On grounds of principle there is no good reason why the whole proposition should not be held inapplicable in modern times. … If [section 1(1) of the Sexual Offences (Amendment) Act 1976, on which section 18(3) of the Crimes Ordinance was modelled] proceeds on the basis that a woman on marriage gives a general consent to sexual intercourse, there can never be any question of intercourse with her by her husband being without her consent. There would thus be no point in enacting that only intercourse without consent outside marriage is to constitute rape."

3. At p.776H, Lord Keith concluded that, "in modern times the supposed marital exception in rape forms no part of the law of England".

4. It seems to me that the proposition which the House of Lords held to be objectionable and inapplicable in modern times was not that of implied consent to sexual intercourse given on marriage in itself, but that such implied consent was general or non-retractable. It was the proposition of non-retractability which was the rationale of the marital exemption.

5. The proposition of non-retractability was gradually whittled down by the exceptions made in the cases cited by Lord Keith until the common law fiction that a wife could not retract implied consent, and with it, the marital exemption in rape, was abolished by Reg v R. The retraction of implied consent no longer depends on the existence of specific categories of circumstances but rather on the wife's genuine choice on each occasion of marital intercourse, or on possible factors invalidating genuine consent such as illness, injury, mental disability or the improper obtaining of consent. It appears, therefore, that the Law Lords did not hold implied consent on marriage to be abolished except in the special sense that the term included Hale's proposition that the wife's consent given on marriage was non-retractable so that a husband could not be guilty of rape of his wife.

6. If the Law Lords had held implied consent in itself to be abolished, it seems to me that their reasoning would have encountered problems with the law as incorporated in section 12(b) of the Matrimonial Causes Act 1973 (or section 20(2)(b) of the Matrimonial Causes Ordinance (Cap. 179)) that a marriage is voidable at the suit of a spouse if it has not been consummated owing to the wilful refusal of the other spouse to

consummate it. In this respect, Hale's reference to "their mutual matrimonial consent and contract" (in other words, the implied consent of both spouses to marital intercourse) is not objectionable. What is objectionable and outdated is the extrapolation of implied consent on the part of the wife to absolving her husband of marital rape based on the fiction that she could not retract her implied consent.

7. Given the above context, it seems to me that the Administration's interpretation of the decision in Reg v R is no less liberal than the alternative interpretation which you have suggested in your submission. Under both Reg v R and that decision as reflected in the proposed non-exhaustive definition of "unlawful", a husband will not be able to rely on implied consent as justification for having sexual intercourse with his wife heedless of whether in the circumstances she consents to it or not. Such definition will comply with the crux of the decision in Reg v R that it is clearly unlawful to have sexual intercourse with any woman without her consent. As has been noted in previous correspondence, the wider and much more complex question whether or not "unlawful" should be deleted from any or all of the sexual offence sections (other than section 118) cannot practicably be dealt with within the limited scope and purpose of the current exercise.

8. It also appears to be worth noting that the term "unlawful sexual act" in the Crimes Ordinance, which includes unlawful sexual intercourse, is not used in the Sexual Offences Act 1956. Unlike the English solution, therefore, it is not enough simply to delete "unlawful" from sections 119-121, implying that those offences are intended to apply to married couples. It should also be noted that the Sexual Offences Act 1956 was amended in 1994 to delete "unlawful" from sections 2 (threat or intimidation, our section 119) and 3 (false pretences, our section 120), but not from sections 4 (administering drugs, our section 121), 5 (intercourse with a girl under 13, our section 123), 6 (intercourse with a girl under 16, our section 124), and 7 (intercourse with a defective, our section 125) and this implies that those offences are not intended to apply to married couples. Smith and Hogan Criminal Law 9th Ed., p.461, comments that, "This selective repeal of "unlawful" indicates that the draftsman and the government were well aware of the significance of that word."

9. It seems to me that the statement in section 117 that the definition of "unlawful sexual act" is for the purpose of Part XII of the Crimes Ordinance would not make that definition inapplicable to sections 65 and 65A of the Mental Health Ordinance. It is part of the rule of construction that statutory words are to be interpreted not in isolation but according to their context that reference must be made to any other statute which overlaps in respect of the same subject-matter, and, if there is inconsistency, an interpretation must be given which best reconciles

the two (Burrows Statute Law in New Zealand (1990), p.125). In the present case, it appears that there is no inconsistency between sections 65 and 65A of the Mental Health Ordinance and Part XII of the Crimes Ordinance since both sections refer to "unlawful sexual intercourse", which is within the definition of "unlawful sexual act" in Part XII. It is also relevant that Part XII is incorporated by reference in section 65 ("Without prejudice to section 125 of the Crimes Ordinance"), thereby specifically reinforcing the contextual application of the Part XII definition in respect of both sections 65 and 65A.

The meaning of "consent"

10. I suggest that the consent to marital intercourse which needs to be vitiated for sections 119-121 to apply further to the proposed non-exhaustive definition of "unlawful" is more than the implied consent given on marriage and less than the consent that must be vitiated in order to found a charge of rape ("such consent demands a perception as to what is about to take place, as to the identity of the man and the character of what he is doing. But once the consent is comprehending and actual the inducing causes cannot destroy its reality and leave the man guilty of rape": Papadimitropoulus (1957) 98 CLR 249, 261, cited with approval in R v Linekar [1995] QB 251, 259). In this respect, Smith and Hogan, p.462, notes –

> "The meaning given to "consent" in rape left a number of cases where consent was in some way important, but which were not crimes at common law. The law has therefore been supplemented by several statutory crimes involving sexual intercourse where consent has been improperly obtained by threats, false pretences or the administration of drugs, or where the woman, though consenting in fact, is deemed by the law to be incompetent to consent on account of age or mental handicap."

11. Regarding the meaning of "consent", the English Law Commission in its report Consent in Sex Offences (February 2000), at paras 2.5-2.8 (copy attached at Annex A) considered that it may be unrealistic to ask a jury to separate out the question, "did she consent?" from the question, "if so, what underlay her 'consent' which may, as a matter of law, invalidate her 'consent'?" The Commissioners therefore recommended that the legislation should include a definition of consent along the following lines (para 2.12) –

> "We recommend that, for the purpose of any non-consensual sexual offence,
> (1) "consent" should be defined as a subsisting, free and genuine agreement to the act in question; but
> (2) the definition should make it clear that such agreement may be

(a) express or implied, and
(b) evidenced by words or conduct, whether present or past."

The meaning of "unlawful sexual intercourse"

12. Clause 1 of the 2nd draft of the proposed amendments provides that –

> Section 117 of the Crimes Ordinance (Cap. 200) is amended by adding –
>
> "(1B) For the purpose of this Part, "unlawful sexual intercourse" includes sexual intercourse between a husband and his wife if –
> (a) at the time of the intercourse the wife does not consent to it; and
> (b) the husband knows, at the time of the intercourse, that his wife does not consent to it or he is reckless as to whether she consents to it."

13. Upon further consideration, it seems to me that the proposed new section 117(1B), as far as it goes, is inconsistent with the view noted in paragraph 10 above that the consent which needs to be vitiated for sections 119-121 to apply further to the proposed non-exhaustive definition of "unlawful" is more than the implied consent given on marriage and less than the consent that must be vitiated in order to found a charge or rape. At the moment, the proposed new section 117(1B) only incorporates the meaning of "consent" in rape. This would mean that marital victims, unlike non-marital victims, may be unable to benefit from the offences such as those under sections 119-121, 123-124 and 126-128 in circumstances where consent was improperly obtained or where consent was invalidated on grounds of age or mental disability.

14. Accordingly, I suggest that, in order for the proposed amendments to be self-consistent in the context of Part XII as a whole, and to give equal treatment to both marital victims and non-marital victims, the following paragraphs should be added disjunctively to the proposed new section 117(1B) –

> " ; or
> (c) the consent of the wife has been improperly obtained by or on behalf of her husband by threats or intimidation, or by false pretences or false representations, or by the administering of drugs; or
> (d) the wife is incompetent to consent on account of [age] or mental incapacity."

15. I have provisionally inserted brackets around "age" on the ground that

the issue whether or not to retain the marital defences which are applicable under the present law concerning sections 123 (intercourse with girl under 13) (possibly, further to Alhaji Mohamed v Knott [1969] 1 QB1, 16) and 124 (intercourse with girl under 16) (expressly, under section 124(2)) may be too complicated to resolve within the present limited amendment exercise. If so, "age" could be deleted, if not, the brackets could be deleted. For a discussion of the defence of marriage regarding age, see pp.48-49 of the Home Office report Setting the Boundaries : Reforming the law on sex offences (July 2000) (copy attached at Annex B). The report recommends that belief in marriage should remain a defence to offences involving sex with a child, but this should not apply where the child is below the age of 13. This recommendation appears to be consistent with section 123 which, unlike section 124, does not provide a marital defence.

Conclusion

16. I would be grateful for your views on whether or not the addition of a definition of "consent" to the Crimes Ordinance along the lines recommended by the Law Commission (see paragraphs 10 and 11 above) would be a worthwhile and straightforward supplementary amendment in the current exercise (I presently see no problem with such amendment which, after all, usefully makes plain the test that the jury should be applying under the present law) which would also allay your concerns regarding the proposed non-exhaustive definition of "unlawful".

17. I would also be grateful for your views on amending the proposed new section 117(1B) as suggested in paragraph 14 above. Aside from the possible question regarding the issue related to "age", it seems to me that this amendment too should be feasible in the current exercise.

Yours sincerely,

(Michael Scott)
Senior Assistant Solicitor General

c.c. Secretary, LegCo AJLS Panel (Attn: Mrs Percy Ma) w.copy of Mr Sin's letter dated 23.4.2001

#33188

The Law Commission

CONSENT IN SEX OFFENCES

A Report to the Home Office Sex Offences Review

consider to be indecent according to contemporary standards of modesty and privacy.[6]

2.4 Liability for assault (including indecent assault) is normally, but not always,[7] conditional upon the fact that the victim has not consented to the conduct in question. For the purposes of *indecent* assault the consent of a child under 16 does not count.

THE MEANING OF CONSENT

2.5 In the second consultation paper, we proposed an explanation of the meaning of consent. It was intended only for non-sexual offences against the person, and much of it is not relevant to this paper. The relevant part read:

> "consent" should mean a valid subsisting consent ... and consent may be express or implied ...

2.6 We stressed that this was an *explanation* to aid juries. It was not intended to be a definition. Its purpose was to flesh out the distinction between consent and submission drawn in *Olugboja*.[8] Our proposal received widespread support.

2.7 We have thought carefully whether it is more appropriate to offer a *definition* of "consent", rather than merely an explanation for the illumination of the jury's consideration of the application of an ordinary English word. The latter approach could be justified on the basis that there is a two-stage process. The first stage involves the jury considering whether, as a matter of fact, there was, or may have been, consent to the act in question. If so, the jury may then go on to consider whether that consent was *vitiated* by reason of want of capacity, mistake or threat. That second stage would involve their applying rules of law, upon which they would be directed by the judge.[9]

2.8 Upon reflection, however, we have concluded that an explanation along these lines would be less helpful than a straightforward definition. It is too convoluted and artificial to ask a jury to separate out the question "did she consent?" from the question "if so, what underlay her 'consent' which may, as a matter of law, invalidate her 'consent'?" We therefore conclude that the legislation should include a *definition* of consent.

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[6] *Court* [1989] AC 28, 36, *per* Lord Ackner.

[7] See *Boyea* [1992] Crim LR 574; *Wollaston* (1872) 12 Cox CC 80; *Brown* [1994] 1 AC 212. In *Brown*, the House of Lords held by a 3:2 majority that consent is not a defence to (indecent) assault where the conduct in question causes actual or grievous bodily harm within the meaning of ss 47, 18 and 20 of the Offences Against the Person Act 1861.

[8] [1982] QB 320. Women Against Rape (London) thought it represented a retrograde step from that distinction.

[9] The law on these issues is the subject of consideration and recommendation in Parts III-VI below.

2.9 We also consider that, while it may be acceptable for an *explanation* to be couched in the same terms as that which it is explaining (as in our previous suggestion, that "'consent' should mean a valid subsisting consent"), this is less satisfactory in the case of a definition. The essence of consent, we believe, is *agreement* to what is done. "Agreement" is the principal synonym for "consent" to be found in dictionaries. Accordingly, we have selected it as the word most likely to illuminate the concept for juries.

2.10 For the purposes of the criminal law of sexual offences, we further believe that an apparent agreement should not count as consent unless it is a *free and genuine* agreement. The formula "free agreement", and variations on the theme, are to be found in a number of common law jurisdictions. The word "free" signifies that an agreement secured by duress will not suffice. We believe that it conveys and illuminates for juries the essential difference between consent on the one hand and mere submission on the other. We envisage that the concept of free agreement would be further defined in the way we recommend in Part VI below. Similarly, the word "genuine" raises the issues of deception and mistake.[10] We make recommendations in Part V as to the circumstances in which these factors should preclude an agreement from being regarded as genuine.

2.11 Consistently with our proposals in the second consultation paper, we also believe that an agreement to an act should not be regarded as a consent to that act unless it is *subsisting* at the relevant time. If what is relied on is past agreement, this will mean *both* (a) that, when previously given, the agreement must have extended to the doing of the act at that later time, *and* (b) that it must not have been withdrawn in the meantime.[11] We believe that it should be made clear that consent may be express or implied.[12] Finally, we think the definition should make it clear that consent may be evidenced by either words or conduct (whether present or past).

2.12 **We recommend that, for the purpose of any non-consensual sexual offence,**

(1) "consent" should be defined as a subsisting, free and genuine agreement to the act in question; but

(2) the definition should make it clear that such agreement may be

[10] Another possible term for this purpose might be "informed"; but that is, perhaps, more appropriately contrasted with both "misinformed" and "ill-informed". Further, "genuine" more graphically draws the jury's attention to this ground of potential invalidity of consent. The use of the word "informed" may serve to complicate the issue by diverting minds to the irrelevant issue of the lack of wisdom of the consent given.

[11] See also para 4.54 below, on the effect of incapacity which commences between the giving of the agreement and the doing of the act.

[12] One respondent thought that only *express* consent should suffice, because courts are too ready to identify an implied consent in rape trials. We considered this view, but have come to the conclusion that sexual activity is frequently assented to by non-verbal conduct, and that it would be wrong to disregard such consent.

(a) **express or implied, and**

(b) **evidenced by words or conduct, whether present or past.**

THE BURDEN OF PROOF

2.13 It is convenient to deal here with the question of the burden of proof where consent is in issue. At present the prosecution must prove, to the criminal standard of proof, that the complainant did not consent.[13] In the second consultation paper, we had not formulated a firm view on whether this should be changed, but we set out the relevant arguments on both sides and invited responses.

2.14 More than two-thirds of those who responded to this issue supported the traditional view that the burden of proof should lie with the prosecution. Paul Roberts stated that it would be authoritarian to do otherwise, given that it is generally harder to prove innocence than to establish guilt, and that the prosecution has significant investigative advantages and therefore is in a better position to bear the burden of proof.

2.15 Of those who favoured reversing the burden of proof, several cited the need to protect vulnerable victims, especially females experiencing domestic violence. It was also said to be protective of the autonomy of the victim to make it harder for the defendant to rely on consent. Respondents also felt that it would not be unfair to expect the defence to prove something that is part of the defendant's own intimate knowledge, whereas it would be onerous for the prosecution to do so.

2.16 We believe that we should follow the views of the majority of respondents who were for retaining the orthodox approach. We are also aware that if we were to do otherwise we would, in the words of Paul Roberts, be saying to defendants:

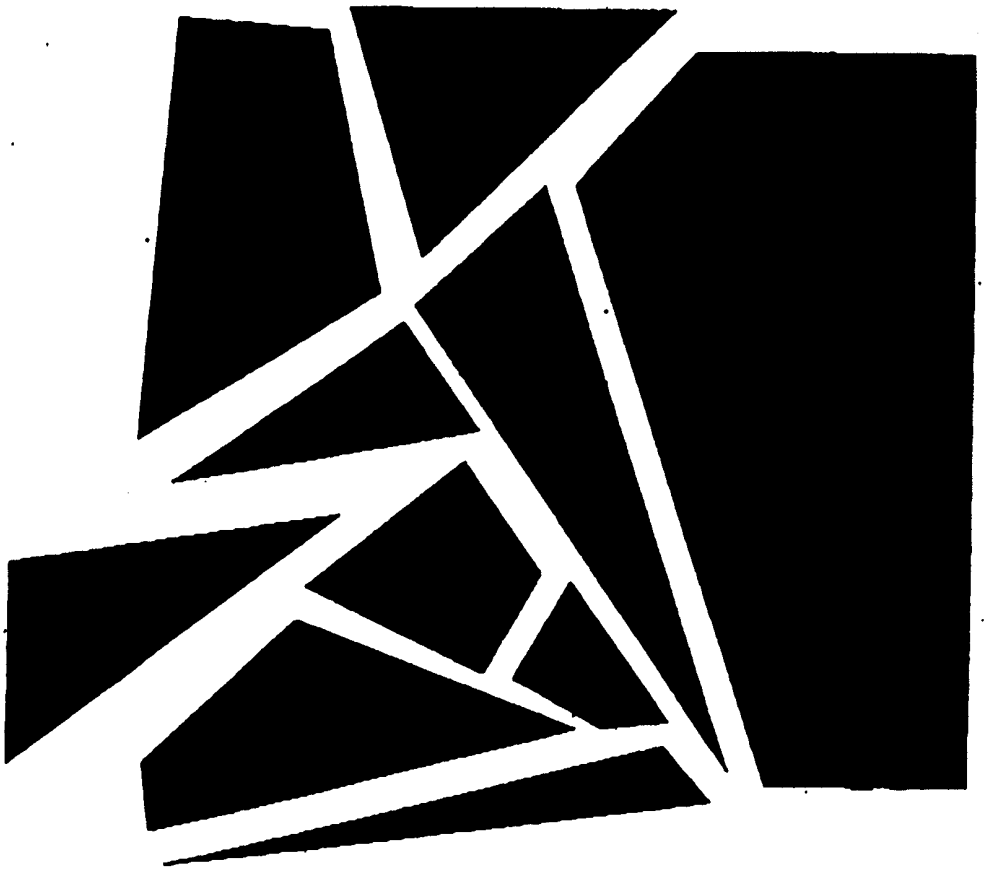
> You may be convicted of a serious criminal offence which attracts a substantial maximum sentence unless you can prove on the balance of probabilities that you did something that was not wrong. If, having

[13] It is sometimes suggested that in the case of indecent assault (though not rape) consent is a defence in the strict sense, rather than its absence being an element of the offence; that the defence therefore has the *evidential* burden of raising the issue, as in the case of other defences such as self-defence; and that only if that burden is discharged does the prosecution have to discharge the *legal* burden of disproving consent. It would be surprising if there were a difference in this respect between rape and indecent assault, and we know of no clear authority for such a distinction. According to Professor Sir John Smith, the better view is that expressed by Glanville Williams in "Consent and Public Policy" [1962] Crim LR 74, 75, and emphatically endorsed by Lord Slynn in *Brown* [1994] 1 AC 212, viz that "It is ...inherent in the concept of assault and battery that the victim does not consent". Since an evidential burden can be discharged by the existence of evidence from any source, the question could only arise if the prosecution fails to adduce *any evidence at all* on the issue of consent – eg where P testifies that D touched her indecently but gives no comprehensible answer to the question "Did you consent to what he did?" – yet seeks a conviction anyway. We think it clear that, in the unlikely event of such circumstances arising, a submission of no case ought to succeed.

Home Office
BUILDING A SAFE, JUST AND TOLERANT SOCIETY

SETTING THE BOUNDARIES

Reforming the law on sex offences



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- ***Do you agree that there should be a limitation on the age of the defendant who can use a mistake of fact defence?***
- ***If so should it be absolute (i.e. set at a particular age) or should there be an age differential (e.g. a maximum gap in age between the defendant and the child)?***
- ***What should the age differential, if any, be?***

The defence of marriage

3.6.17 The second defence is that of marriage. S6 Sexual Offences Act 1956 presently allows a defence to a charge of usi that where a man believes a girl under the age of sixteen is his wife, and if he has reasonable cause for this belief he has not committed an offence of unlawful sexual intercourse, even where that marriage might be invalid in UK law. Thus those who are married in other jurisdictions where the age of consent is lower would have a defence to a charge of usi. This defence raises some interesting questions. Even though our new offence is gender-neutral, the defence would only be available to heterosexual couples. That in itself would not prevent its retention, because of the special status of marriage in the European Convention of Human Rights.

3.6.18 The defence may apply in only a very few cases, but these could be significant. Some countries have a low legal age of marriage, in places as low as 9 to reflect the earliest onset of puberty. Those who have undertaken a valid marriage with a child would believe that they are acting quite properly in having sex with their wife. In such circumstances there is no criminal intent. Our intention is to increase the protection for children from sexual abuse, and we were reluctant to agree to a continuation of a defence that would effectively legalise what we think could be serious child abuse.

3.6.19 Marriage has a special status in international law, and the UK has obligations to recognise valid overseas marriages. It would be more attractive simply to say that people in this country must obey our laws, including not having sex with children under 16 whether or not they have married in another jurisdiction. We believed that those whose faiths or law allowed them to marry young children should accept that the democratic process must prevail when they are in this country. However, it would be difficult to claim to be recognising the validity of a foreign marriage if we criminalised sexual contact between the spouses. Differing ages of marriage within the EU, and even differing ages of consent within the UK would create potential difficulties. We were satisfied that there were some safeguards in place, including the operation of the Immigration Rules in scrutinising and controlling the entry of very young spouses, that would protect children. We therefore thought that we could not remove the defence of marriage.

3.6.20 However, the offence we recommend is quite broad and covers a range of sexual behaviour with children. We thought that it was increasingly hard to justify a statutory defence of marriage. Even the South African Law Commission has recommended that the defence of marriage should not be retained (they argued that it was still possible for a very young girl to be forced to marry). The Australian Model Code has made specific provision that the defence should not apply below the age of 16 – and applies this prohibition to sexual intercourse between partners in Aboriginal tribal marriages which are traditionally contracted at an early age. In short, in order to succeed by way of the defence, the accused and the child must either have been married according to the law of Australia, or the accused must have reasonably so believed.

3.6.21 The defence may reduce to two elements – whether there was a valid marriage and whether the accused believed he had a valid marriage. In terms of criminal culpability the belief is the more important. We do not think these situations arise often – we did not know of any instances that ended up in court. The CLRC thought the defence should be retained for the very unusual occasion when it might be justified. We very reluctantly conceded the difficulty in removing the defence in law, despite our concern that an overseas marriage (even one not valid in the country in which the 'ceremony' took place) meant that we should accept under-age sex

within the UK. However, our proposal to have an absolute age of no consent at 13 means that no defence would be available below that age. We also recognised that a defendant could put forward a defence of belief in marriage with an older child, but that would have to be robustly tested in court.

Recommendation 24: **Belief in marriage should remain a defence to offences involving sex with a child, but this should not apply where the child is below the age of 13.**

3.7 Persistent Sexual Abuse

3.7.1 One of the many distressing aspects of the sexual abuse of children is that it may take place over a long period of time. This makes it difficult to prosecute because there have to be specific instances listed on the indictment, and difficult to defend because it relates to behaviour over a period of time. The usual practice is to put counts on an indictment relating to specific incidents over a period of time as a way of indicating that it was part of a larger pattern of abuse. It is important that the instances are specified in a way that the child can relate to ("at Christmas", or "my birthday" for instance), and in a way that the defendant is able to consider and provide a proper defence. Both these are key elements for fairness and justice. However the other side of the picture is that by using such specific indictments the court does not deal adequately with the pattern of abuse, especially the nature of organised and/or multiple abuse, nor does sentencing necessarily reflect that course of conduct which the specific charges were brought in to illustrate.

3.7.2 One approach which has been adopted in some other countries is to introduce an offence of persistent sexual abuse of a child which is particularly intended to address the problem of how the courts can fairly and justly tackle the course of conduct illustrated by specific examples. The kind of offence which has been constructed provides that where a person has, on three or more separate occasions, engaged in abuse of a particular child, that is a criminal offence (and this need not be the same offence each time), he or she will be liable to a very serious sentence (25 years has been proposed in Australia). Effectively the sentencing will pay regard to the fact that what has been proposed is a continuing course of conduct that has been illustrated by examples. Any such offence will need to contain safeguards to ensure that it is fair to both defendant and victim, and that justice is properly served, for example that the alleged incidents are sufficiently detailed and particular to enable a proper defence to be made, and that the defendant could not be separately tried for the same behaviour.

3.7.3 We discussed this offence with practitioners in Victoria and they all welcomed it as a helpful addition to the powers of the courts. However, it has only been used on a couple of occasions since being introduced in 1991. Despite that, it was regarded as useful and important in providing a framework for establishing abuse and for providing a remedy that would not otherwise be available. Such an offence would not reduce the evidential burden in prosecuting what are always difficult offences, but it provides a particular remedy which goes directly to the nature of the problem and provides appropriate sanctions for very serious abuse.

Recommendation 25: **An offence of the persistent sexual abuse of a child reflecting a course of conduct should be introduced.**

3.7.4 In discussing the use of this proposed new offence, we also considered wider concerns raised by those who have had to deal with people who regularly adopt patterns of serial sexual offending within institutions or families against multiple victims. They argued strongly for a special offence, or a widening of the offence of persistent sexual abuse, to cover a course of conduct with a number of victims. Their concern was that the law did not have an adequate response to patterns of repeated abuse involving a number of victims in similar settings. The