

**Extract from minutes of meeting of Administration of Justice
and Legal Services Panel held on 20 February 2001**

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VI. Proposed creation of a new offence of "persistent sexual abuse of a child"

(LC Paper Nos. CB(2)864/00-01(06); 893/00-01(01) and 908/00-01(02))

36. The Chairman informed members that the Panel had received two submissions on the subject, one from the Association Concerning Sexual Violence Against Women (LC Paper No. CB(2)893/00-01(01)) and the other from the Hong Kong Bar Association and the Law Society of Hong Kong jointly (LC Paper No. CB(2)908/00-01(02) tabled at the meeting).

37. SASG highlighted the Administration's proposal to amend the Crimes Ordinance (Cap. 200) to create a new offence of "persistent sexual abuse of a child", which was intended to deal with multiple offences of sexual abuse of a child where the offences were alleged to have occurred over a lengthy period and where the complainant was unable to identify specific allegations with particularity. The proposed offence was a response to the ruling in Chim Hon-man v HKSAR [1999] 1 HKC 428. In that particular case, there was evidence that the defendant had raped his stepdaughter on a number of occasions over a lengthy period. As the complainant was unable to differentiate significantly between any of the particular acts of sexual molestation, the prosecution brought specimen charges of rape against the accused, and led evidence of the various acts of molestation on a number of occasions. The Court of Final Appeal quashed the convictions of the defendant. It was held by the Court that in the absence of any act or acts being identified as the subject of an offence charged in an indictment, the prosecution could not lead evidence that was equally capable of referring to a number of occasions, any one of which might constitute an offence as described in the charge and then invite the jury to convict on any one of them.

38. SASG said that the Administration's paper (LC Paper No. CB(2)864/00-01(06)) set out the grounds for creating such a new offence, the arguments against it and the proposed major features of the new offence.

39. At the invitation of the Chairman, Ms Corinne REMEDIOS took members through the joint submission from the Bar Association and the Law Society. She said that whereas the two legal professional bodies fully appreciated and shared the public concern as to the seriousness of offences involving sexual abuse of a child, and supported measures to ensure that perpetrators of such offences be brought to justice, they were of the opinion that it was not necessary to introduce the proposed statutory offence. The

arguments were detailed in the joint submission and summarized as follows -

- (a) The difficulties highlighted in Chim's case of particularizing offences were not insurmountable. Those were essentially procedural problems which could be overcome by way of proper drafting of the indictment (the joint submission made reference to the approach suggested by Sir Anthony Mason NPJ in [*Archbold 1998 Ed p 49*] to deal with the problems in prosecuting offences alleged to have been repeatedly committed over a period of time);
- (b) Furthermore, the "latent ambiguity" resulted from the leading of evidence of the commission of more than one offence in proof of the one offence charged would not necessarily result in the trial being aborted. In the case of HKSAR v Kwok Kau Kan [2000]1 HKC 789, Chan CJHC held that [...with sufficient directions from the judge, even if evidence relating to other acts is also adduced, the prejudicial effect of such evidence on the jury would be eliminated or kept to a minimum]. The proposed legislative measure to create a new offence was not necessary to prevent the collapse of trials due to the introduction of such evidence;
- (c) The proposed new legislation would not solve the existing difficulties. In particular, the need to particularize the offence period and the nature of the offences still remained. Under the proposed legislation, the jury or, where sitting alone, the judge, must be satisfied that the defendant must have committed at least three specific acts, each of which amounted to a sexual offence, during the specified period of time. Therefore, the need to ensure that the evidence established the same three occasions would require the child to be able to distinguish the particular conduct of the three specific occasions in question;
- (d) It was conceptually unacceptable that the accused might be found guilty or sentenced upon criminal conduct that did not form part of the charge upon which he was indicted, as situations of miscarriage of justice would occur. Proof of guilt beyond reasonable doubt should be proof of a reasonably identifiable offence, not any alleged wrong doing of a like nature within a specified period.

40. Ms REMEDIOS further informed members that the legal professional bodies were in the process of obtaining comments from other jurisdictions on how they coped with the issues in question. They would make further submissions at a later stage when such views were received and when a draft Bill was available.

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41. Mr Martin LEE said that he agreed with the view that the problems encountered in the Chim's case were procedural and that it would be unwise to enact a new offence just to overcome procedural problems in prosecution. He opined that as provided under the proposed legislation, the requirement of proof of the commission of certain sexual offences against a child on at least three occasions would create even greater difficulties in the conviction of the offender.

42. Mrs Miriam LAU considered that the joint submission from the legal profession had presented very cogent arguments on the subject. She suggested that the matter be further discussed at another meeting.

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43. The Chairman said that in view of the fact that the submissions on the subject were received only shortly before the meeting, it was necessary to allow the Administration sufficient time to respond in detail. She suggested that the Administration should discuss with the two legal professional bodies on the issues raised and revert to the Panel on any new developments.

Panel

44. Members agreed to adjourn discussion in the meantime until another meeting was fixed to further pursue the matter.

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