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Information paper for meeting of
LegCo Panel on Administration of Justice
and Legal Services on 22 April 2002
Proposed offence of persistent sexual abuse of a child

Problem

The rules of indictment requiring the prosecution to prove one offence as the basis of one count charged present difficulties in the case of a child victim of sexual abuse over a long period. The child victim may be able to describe the nature of the sexual attacks but be unable to specify with sufficient precision the times, dates and circumstances of each act of abuse. It is therefore necessary to strike a reasonable balance between the rights of the accused and deterring the sexual abuse of children.

Background

2. Proposed amendments to the Crimes Ordinance (Cap. 200) to create a new offence of persistent sexual abuse of a child were scheduled for introduction into the Legislative Council in July 2001. All parties consulted recognise that children are a group that needs and deserves special protection.

3. In a joint submission to the Panel's meeting on 20 February 2001, the Bar Association and the Law Society submitted that the proposed amendments, while resolving some problems, would also create new problems. The Administration decided not to introduce the proposed amendments as scheduled pending consideration of the matters raised in the joint submission.

The Administration's proposal

4. The new offence of persistent sexual abuse of a child originally proposed by the Administration was based on similar legislation enacted in all eight criminal jurisdictions in Australia, in particular, section 66EA of the Crimes Act 1900 (NSW).

5. The main features of the proposed new offence are that –

(a) the offence would be committed if a person engages in a course of conduct involving the commission of a sexual offence against a particular child on at least three occasions, falling on separate days, whether or not the conduct is of the same nature, or constitutes the same sexual offence, on each occasion;

(b) it is immaterial that the conduct on any of the three occasions occurred outside Hong Kong, so long as the conduct on at least one of the three occasions occurred in Hong Kong;

(c) while the charge must specify the period during which the alleged conduct occurred as well as the nature of the sexual offences alleged to have been committed in the course of that conduct, it is not necessary to specify or to prove the dates or exact circumstances of the alleged sexual offences;

(d) the judge or an appropriate majority of the jury must be satisfied beyond reasonable doubt regarding the material facts of the three occasions in question. Where evidence has been led regarding more than three occasions, the jury must be so satisfied about the same three occasions and the judge must warn the jury of this requirement;

(e) the penalty for a person convicted of the proposed new offence is not to be lower than that for the substantive sexual offence (e.g. rape or incest) committed in the alleged course of conduct;

(f) proceedings for the proposed new offence may only be instituted with the consent of the Secretary for Justice.

The Administration's response to the joint submission

6. As a general matter, the Administration considers that the proposed offence is reasonable and justifiable on the ground that it does not place the accused at any greater risk of conviction. What determines whether or not an accused is found guilty of any offence is the strength of the evidence. It is submitted that the proposed offence represents a realistic and justifiable compromise between the stringencies of the rules of indictment and the acknowledgement that child victims of sexual abuse frequently are unable to particularise incidents which may have occurred over a significant time span.

7. The matters raised in the joint submission are considered below in the order in which they appear.

Introduction (paragraphs 1 to 9)

8. The joint submission properly acknowledges the need to protect the obviously vulnerable and the need to prosecute offenders. The Administration disagrees with the submissions that there are "conceptually unacceptable elements" (paragraph 6) and that a proper case has not been made out for the introduction of the new offence (paragraph 7).

9. It is important to emphasise that the proposed offence is not intended exclusively to remedy difficulties said to be generated by the Court of Final Appeal judgment in HKSAR v Chim Hon-man [1999] 1 HKLRD 764.

10. In addition to remedying such difficulties, it is intended –

(a) to create a wholly new offence; and

(b) to remove from the prosecution of those who, over a period of time

sexually molest children, the artificiality arising in cases of this type as a result of the existing Indictment Rules and rules of evidence.

11. The Administration considers that there is nothing "conceptually unacceptable" about such objectives. The judgment in Chim acknowledges that cases of this type almost inevitably present problems.

The problem (paragraphs 10 to 15)

12. If the object of the proposed legislation were only to remedy the problems created as a consequence of the judgment in Chim, the Administration acknowledges that, on experience to date following that case, there is substance in the submission (paragraph 12) that the problems are not insurmountable.

13. Subsequent to Chim, the Prosecutions Division and the Hong Kong Police have approached the preparation and investigation of cases of this type taking into account the observations of Sir Anthony Mason NPJ regarding allegations of a series of offences over a relatively short period of time. In particular, when complainants are interviewed, specific reference points are introduced to enable some degree of specificity regarding the dates or approximate dates of offences, e.g. the first and last occasions are usually readily identifiable. Using these two "markers" the interviewer is able to work backward or forward to identify other occasions which are then pleaded on the indictment in the manner suggested in Chim.

14. The Administration originally thought that such approach would be too clumsy and artificial, and it may in the future prove to be so. There has so far been no case in which a prosecution could not be advanced or was unsuccessful adopting this approach. To that extent, the problem is procedural (paragraph 11).

15. The proposed offence, however, is intended to go beyond these parameters. While the approach in Chim, when applied correctly, results in the

ability to prosecute it does not address the root cause of the problem. This is that, for offences of this nature spanning a broad time frame, it is wholly artificial to attempt to compartmentalise incidents and adduce evidence only as to those incidents. The compartmentalised incidents will not give a fully or realistically representative picture of the incidents which are alleged to have occurred over the whole time frame.

16. It is important to note that in all jurisdictions where this offence has been created, it is not a substitute for other specific offences where these can be particularised, e.g. incest, rape, or indecent assault. Rather, the premise behind the legislation in such jurisdictions is that this is a wholly new offence designed to cover a very specific type of conduct, hence the expression "persistent sexual offender". The offence is not normally charged when other offences are charged.

17. The new offence has the advantage of alleviating the problems which are generated by the artificial compartmentalising of offences over relatively short periods of time when the essence of the allegations made is that the accused has committed many different sexual offences against a child victim over a long period of time which makes the need to specify each of those offences of itself artificial.

18. The Administration has, to allow consideration of the submissions made, suspended the preparation of the draft legislation. The New South Wales model, however, appears to be the best of those enacted in the Australian jurisdictions.

Existing problems solved? (paragraphs 25 to 36)

19. It is important to note that Chim identified more than one problem.

20. The prosecution case in Chim was advanced on the basis that the charges on the indictment were "specimen counts" which were truly representative samples of many offences. This approach was, and still is, held to be realistic and permissible in other jurisdictions, including the United Kingdom and New Zealand. It was

considered to be good law in Hong Kong until Chim established otherwise, following the judgment of the High Court of Australia in S v The Queen (1989) 168 CLR 266.

21. In R v Accused (CA 160/92) [1993] 1 NZLR 384, the New Zealand Court of Appeal refused to follow S v The Queen, and held that truly sample specimen counts were unobjectionable where the evidence of the complainant and any other prosecution evidence did not enable more particularity than that the conduct alleged occurred a number of times over quite a long period, such as a year or more. The court observed (p.387) that there is a degree of absurdity in holding that someone cannot be prosecuted because he is alleged to have offended often in the same way, whereas he might well be if he had offended only once or twice. Further the court observed (p.392) that the basic ingredients of a fair trial remain. The court had an inherent jurisdiction to prevent unfair trials which jurisdiction would be available if truly needed in a case in the present field. In S v The Queen, Brennan J (p.270), who dissented on the facts, observed that it was also necessary to protect "the administration of the criminal law" from "outworn technicality".

Paragraphs 26 and 27

22. Where the approach suggested in Chim identifies offences alleged to have been committed over a relatively short period of time with sufficient particularity then those would be and are charged. However, the proposed new offence is intended to overcome the difficulty arising where there are multiple offences that are incapable of precise specification and where the alleged offences extended over a long period of time. In such cases the Chim approach would lead to artificiality in the indictment and, in all probability, to an artificial sentence.

Paragraph 28

23. The reference to Kwok Kau-kan [2000] 1 HKC 789, 799 does not assist since the Court of Appeal in that case emphasised that where, in a trial for offences of a sexual nature, a victim gives evidence of other offences not charged on the

indictment, the trial should not be aborted provided that the trial judge warns the jury to ignore that evidence. It does not advance the law with respect to similar fact evidence so as to make it proper for the complainant to narrate a "course of conduct". The evidence of other similar conduct remains inadmissible unless it is from another source (e.g. another victim) and is then used properly to establish independently of that victim either propensity or identity. Paragraph (1) of the headnote to Kwok (p.790F-I) is a clear endorsement of Chim.

Paragraph 31

24. On a charge of rape, the alternative verdict open to a jury is attempted rape (unless there are specific alternative counts alleged – which is not appropriate unless there is a doubt that intercourse has occurred).

Paragraphs 32 and 33

25. If there are no alternative charges on the indictment then no question of ambiguity arises for the purposes of sentencing. Likewise, if there are multiple allegations of a different nature it is perfectly proper for the trial judge to ask the jury upon which allegations their verdict is based. This is the same situation as in, for example, a murder trial when the jury returns a verdict of manslaughter. It is open to the jury to return this verdict on different bases, e.g. provocation, lack of intent, and the judge is required to determine from the jury which of the options was the basis of their verdict.

Paragraph 34

26. The premise behind the proposed legislation is in part to simplify the trial procedure. Where, for example, a victim has when making her complaint to the authorities identified a multitude of offences spanning a period of years, each of which is identified with some precision, then under the existing regime for her to be enabled to give evidence of each of those offences, there must be one count on the indictment to reflect this. As a hypothetical example, a victim may be able to say,

and does say, that her father had sexual intercourse with her every Saturday night. She knows this because she was forbidden to leave the home for that very reason. There was not one occasion when this did not happen and she can state with precision that this commenced on her 13th birthday and that, after she complained to the police, he was arrested, and it ceased on her 18th birthday. Under the present regime, she could not give evidence of the true nature of the conduct towards her unless there were 260 counts on the indictment. With the proposed legislation, there would be but one count.

New Problems Created? (paragraphs 37 to 52)

Conceptual objection (paragraphs 37 to 41)

27. It is emphasised that what is intended by the legislation is a new and discrete offence, the elements of which are "that he is persistent sexual offender". The accused is under no illusion as to what is alleged against him. He is said to be a "persistent sexual offender" and this allegation is based upon the statements of the victim which are contained in the interviews given by him/her and which are served upon the accused prior to the commencement of the trial.

28. The concerns expressed in the joint submission were fully canvassed and taken into account in those jurisdictions which have introduced similar legislation.

29. In particular, the problem of alibi exists in the present formulation of counts on the indictment. Chim and the Indictment Rules permit an allegation in a count on an indictment without a specific date, e.g. on a date between January and June 2001. The accused is no more disadvantaged than before. What he does know is that it is alleged against him that he has committed a multitude of offences over a specific period. Further, in R v Accused (CA 160/92), the New Zealand Court of Appeal (p.392, lines 3-5) said, "It should be remarked that alibi defences commonly have little application in cases where continued offending of this type is alleged."

Disguised overloading of indictment and alternative verdicts (paragraphs 42 and 43)

30. This submission unfortunately implies that those responsible for advising on and preparing criminal charges will conduct themselves in an improper and unethical manner. They are, however, required to select appropriate offences based upon the evidence. Likewise, given both the object and the structure of the proposed legislation, if the jury find three allegations established then a verdict of guilty to the proposed offence is entered. If they are not so satisfied, a maximum of two verdicts of guilty to alternative substantive offences is possible and no more.

Similar fact evidence (paragraphs 45 and 46)

31. There is no difficulty for a trial judge in that similar fact evidence does not arise unless of course there is more than one complainant. A jury is inevitably directed that they can only convict of any offence if they are satisfied to the requisite standard that the elements of the offence are established, and the elements of the offence are three acts of a sexual nature which are defined for the jury.

Jurisdictional issues (paragraphs 47 to 48)

32. The Administration considers that the extraterritorial component of the proposed legislation does not present a jurisdictional problem. Whether or not a sexual attack committed overseas (e.g. by a father against his daughter while on holiday) is an offence would be determined by Hong Kong law. It is unnecessary for jurisdictional purposes to determine whether the attack was an offence under foreign law. There is precedent for extraterritoriality in other sexual offences under the Crimes Ordinance, including sections 119 and 120 (procurement by threats/false pretences to do an unlawful sexual act in Hong Kong or elsewhere). The Criminal Jurisdiction Ordinance (Cap. 461) is a further example of legislation under which offences that are capable of having an extraterritorial, as well as a Hong Kong, component (e.g. theft, conspiracy) may be tried in Hong Kong. Under the proposed

legislation, at least one of the constituent elements of the offence (there being three) must have been committed in Hong Kong.

Factual basis for sentencing (paragraphs 47 to 48)

33. The Administration sees no inherent difficulties in this regard. If it is apparent from the verdict that the jury has agreed on the same three occasions then, having heard allegations of a multitude of offences and having convicted the accused, the trial judge is in the most obviously appropriate position to evaluate them. That said, cases in this area may require more specific investigation and may require questions to be asked of the jury where the allegations are not all of the same nature, e.g. if they are all of rape and incest, no problem arises – the prospective problem arises where there are lesser offences involved, e.g. indecent assault.

Comparative legislation and problems experienced (paragraphs 53 to 59)

34. The Administration's enquiries do not reveal problems in jurisdictions where the offence has been established. In particular, the Administration has been advised that the offence is in use properly and effectively in NSW and all other Australian states. The NSW offence is the model for the proposed legislation.

35. The cases of Kemp and KBT deal with legislation in Queensland which differs from NSW's to the extent that it permits this offence to be charged in addition to other specific offences against the same victim in the same indictment. This was the root cause of the problem in Kemp where the trial judge failed to give proper directions to avoid the jury using the conviction on the persistent sexual offence charge as indicative of propensity in respect of the other charges. In KBT, the problem was that the trial judge did not properly instruct the jury on the preconditions for a conviction laid down in the legislation.

The Administration's present position

36. The Administration is mindful of the concerns expressed in the joint submission and considered above. It does not, however, agree that the proposed legislation represents a draconian change in the substantive law. The protection of the rights of the accused under the new offence would be the same as those which apply under the approach in Chim, including the requirement for sufficiency of the evidence and the duty of the court to ensure fairness to the accused in all of the procedures involved.

37. While the approach in Chim has not presented problems to date, it nevertheless does not provide comprehensive protection for children. It is therefore considered that there is a need for legislation which enables a charge to be preferred which realistically reflects a specific type of conduct by an accused (namely, persistent sexual abuse of a child over a relatively long period of time), and which enables appropriate and properly related evidence to be given in support of it.

38. It may be appropriate to revisit the issue of whether or not the charge could or should be the only one on the indictment and it may also be necessary to give consideration to the implications which arise from a sentencing perspective where the allegations are of offences of differing degrees of seriousness.

39. The Administration may also wish to consider whether there should be amendments to the Evidence Ordinance or the Indictment Rules to ensure that a full picture of the complainant's evidence is properly before the jury without the risk of the trial being aborted.

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