LC Paper No. CB(2)1689/01-02(02)

The Proposed New Offence of Persistent Sexual Abuse of a Child

Joint Response of the HK Bar Association and the Law Society of Hong Kong to the Information Paper

1. Having read the Information Paper produced by the Legal Policy Division dated April 2002 (the Information Paper), we, the Law Society of HK and the HK Bar Association, are not persuaded to support the introduction of the proposed new offence of the Persistent Sexual Abuse of A Child. We adhere to the views expressed in our Joint Paper dated 19th February 2001 (Joint Paper) and reiterate that the difficulties, if any, are merely procedural and do not justify the creation of a new offence.

2. We comment on the Information Paper briefly as follows:

(i) The Problem - The Indictment

3. The Information Paper identifies the "Problem" as that caused by the rules of indictment (para. 1, Information Paper) because the child may not be able to specify with precision "the times, dates and circumstances of each act of abuse".

4. The solution offered in Chim's Case by Sir Anthony Mason NPJ (see Joint Paper, para. 13) is that the charge be framed as "on an occasion other than that alleged [in the previous counts"].

5. We note that the Information Paper concedes (paragraph 14) that

> *"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."*

6. We submit therefore that the proposed legislation cannot be justified on the basis of current procedural difficulties in drafting particulars of the offences and/or providing a representative number of counts to reflect the gravity of the wrongdoing.

(ii) "Compartmentalising offences"

7. In the absence of a procedural drafting requirement for the proposed legislation, the Information Paper purports to justify it on a wider purpose, to prevent "artificial compartmentalising of offences".

8. Whereas we can well foresee the evidentiary difficulty of the child witness straying from earlier witness statements in the course of evidence, this does not justify the abolition of safeguards in the rules of evidence designed to ensure a fair trial. However we doubt that the Information Paper is suggesting that as soon as 3 incidents are particularised in a prosecution under the proposed legislation, the complainant should be permitted without restriction to make allegations for the first time in the witness box. A conviction could be inadvertently (and wrongly) procured by ambush. To allow this would undermine the fairness of our criminal justice system because the Defendant would have no idea of the nature of the wrongdoing of which he is alleged (although not charged) before he is called upon to answer the indictment, apart from the 3 incidents and the general allegation that he may have committed sexual offences in addition thereto.

9. Preferring a representative number of counts overcomes the "compartmentalising" objection and we reiterate that the solution offered by Mr. Justice Patrick Chan CJHC (as he then was) in Kwok's case overcomes the evidentiary difficulty.

(iii) Alternative Verdicts

10. For the very reason that under the proposed legislation, proof of the offences will not have been "compartmentalised" and proven in the conventional way, we do not consider it appropriate to permit statutory alternative verdicts of up to two substantive offences where less than 3 occasions are proved under the proposed legislation. (para. 30, Information Paper). Just as in conspiracy cases, the Prosecution should be made to elect between proceeding on the proposed legislation, alternatively on substantive acts of wrongdoing. If the Prosecution fail on the former, verdicts on the substantive acts should not be permissible

(iv) Which 3 occasions – Verdict and/or Sentence

11. The Information Paper recognises that clarification of the verdict may he required prior to sentencing. "*and may require questions to be asked of the jury where the allegations are not all of the same nature*"… (para. 33, Information Paper) The Information Paper states that where there have been allegations of a multitude of offences "*it is perfectly proper for the trial judge to ask the jury upon which allegations their verdict is based*." (para. 25) Should the trial judge also question the jury as to the course of conduct and which of the many sexual incidents upon which evidence was led they found proved?

12. We submit that if the jury have to be satisfied as to "*the material facts of the (same) three occasions in question*" (para. 5(d), Information Paper), appropriate investigation of this issue must be made by the Judge at the stage of verdict, as well as sentence.

13. With very few exceptions, the trial judge does not go behind the jury's verdict and for good reason. We believe that investigations of the basis of a jury's verdict, whether at the stage of taking the verdict or prior to sentence, may open up a can of worms. It is inappropriate to draw an analogy with the exception in the case of murder/manslaughter verdicts as this relates to a "compartmentalised" single offence, not a course of conduct, potentially over many years. We foresee ample scope for appeals eg where the jury's answers are equivocal and/or where Defence Counsel then seeks further clarification of the jury's answers.

(v) The Magic Formula and Sentencing

14. We do not accept that the effect of the proposed legislation would be "*in part to simplify the trial procedure*" (para. 26, Information Paper). We do not accept that the Chim approach would lead to an artificial sentence (para.22, Information Paper). The reality is, once a multitude of offences is proved under the conventional method of prosecution, the sentencing judge will be entitled to pass consecutive sentences that can properly reflect the aggravation of multiple offences. We believe that a Magic Formula approach – Three Strikes and You are Out – is more likely to lead to artificial sentences.

CONCLUSION

15. We say it is artificial to create a Magic Formula allowing the normal rules of evidence to be dispensed with, a verdict or sentence which cannot "stand alone" and/or sentencing potentially based on presumptions that in addition to the 3 incidents proved there may have been many others – the persistent abuse having been presumed by a mathematical formula.

16. We refer once more to the Information Paper's concession that

"the approach in Chim has not presented problems to date",

and respectfully submit that no proper justification has been laid to tinker with what is now working efficiently.

Dated the 22nd day of April 2002