

## THE PROPOSED OFFENCE OF PERSISTENT SEXUAL ABUSE OF A CHILD

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*The Hong Kong administration has expressed a wish to amend the Crimes Ordinance to introduce an offence of persistent sexual abuse of a child. The proposal is a direct response to the decision of the Court of Final Appeal quashing the convictions of Chim Hon Man in 1998. The proposal to introduce the new offence has created much controversy, largely stemming from fears that the prosecution of this offence will severely abrogate a defendant's right to a fair trial. This article considers the history of the proposal and what it is hoped will be achieved by the amendment and evaluates the criticism of the proposal. Finally, the author offers a suggested solution to the difficulties.*

### Introduction

In direct response to the important decision of the Court of Final Appeal to quash the convictions of Chim Hon Man,<sup>1</sup> the Department of Justice's Legal Policy Division has proposed an amendment to the Crimes Ordinance.<sup>2</sup> The 1998 ruling in *Chim's case* represents the Court of Final Appeal's first ever decision to quash a criminal conviction. The response of the Department of Justice has been to propose a new offence of persistent sexual abuse of a child. The proposed introduction of the new offence has caused some controversy. The universities, the Hong Kong Bar Association and the Law Society of Hong Kong have all been approached for comment on the amendment. All have expressed reservations. Despite criticism, the Department of Justice has not abandoned the proposal; the effective prosecution of child sexual abusers remains an area of real and legitimate concern.

This article considers the history leading to the proposal, what is hoped will be achieved by amending the Crimes Ordinance and why the amendment has been criticised. At the conclusion of their joint paper examining the proposed offence, the Bar Association and the Law Society submit that: "the real solution lies in re-examining the procedural and evidential rules, and applying them more effectively in the light of *Chim's case*."<sup>3</sup> This article

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<sup>1</sup> *Chim Hon Man v HKSAR* [1999] 1 HKC 428 (hereinafter referred to as *Chim's case*).

<sup>2</sup> Cap 200.

<sup>3</sup> *Joint Views of the Hong Kong Bar Association and the Law Society of Hong Kong on the Proposed Offence of "Persistent Sexual Abuse of a Child"*, 19 Feb 2001.

further examines those rules and offers a solution based on principles of common law that have previously been overlooked.

### The History

Prosecutors face many problems convicting sex offenders whose victims are children. This is not only because sexual offences are by their very nature committed in secret and without witnesses, but because children who have been the subject of repeated sexual abuse do not make solid witnesses. They are often unable to recall with particularity the number of times they have been abused or provide distinct evidence of each instance to enable differentiation of one attack from the next. Where a child is repeatedly abused over a long period of time it is not uncommon for him to be able only to specify that the abuse occurred once or twice a week for two years. The child may be able to describe to the police different forms the sexual attack took, but cannot be any more specific regarding the number of times or dates.

To prosecute the case an indictment must be drawn up which reflects the criminal offences alleged. The prosecutor must adhere to the Indictment Rules.<sup>4</sup> He should only charge one offence in one count. The prosecutor should also ensure that each count on the indictment contains a statement of the specific offence with which the accused is charged, including the particulars necessary for the accused to be able to answer the charge.

How then can the prosecutor deal with the type of sexual abuse case described above? The prosecutor clearly cannot draft an indictment alleging one or two offences per week over the two year period alleged by the complainant; the complainant cannot provide evidence to particularise each allegation and in any case the indictment would be overloaded and unjust to the accused.

One common practice is to choose specific instances recalled by the child and allege only those on the indictment. For example, the prosecutor may choose the date of the first attack and the last attack. He can then lead evidence of only those counts. It is accepted practice that an indictment need not be drafted to reflect every offence alleged, but the drafter should strive to reflect the criminality of the behaviour and the evidence that can be adduced from the witnesses.

In 1998, *Chim's case* was heard in the Court of Final Appeal. After trial, the appellant had been convicted in the High Court of two counts of rape. He appealed against his convictions to the Court of Appeal but his appeal was dismissed. The Court of Final Appeal, however, allowed his appeal and set aside his convictions.

<sup>4</sup> Made subsidiary to Cap 221.

The complainant was the stepdaughter of the appellant. She alleged that when she was nine years old her stepfather had sexually molested her on approximately ten occasions over the summer holidays between 14 July and 15 August 1989. Her complaint was made five years after the alleged offences occurred. At the time of the complaint she was largely unable to differentiate one attack from any other, either by describing the form of assault or by providing the date. All the attacks took place in her home whilst her mother was at work and her evidence at trial did not differentiate one attack from another.

On the basis of her complaint the prosecution had drafted an indictment including two specimen counts of rape. Each was alleged on a date unknown during a two week period (the prosecution split the month and alleged one offence in each period). This is an acceptable manner to approach the drafting of an indictment, but problems arose when the complainant gave her evidence. She was sworn to tell the court what had happened and she did just that: she described not two specimen counts but numerous offences against her over the time periods stipulated in the indictment. The accused was convicted, but his conviction was later quashed by the Court of Final Appeal. In the judgment of that court Sir Anthony Mason said that leading evidence of more than one offence in proof of the count may result in latent ambiguity. The court applied the Australian case of *S v The Queen*.<sup>5</sup>

The complainant in *S v The Queen* had alleged that her father had sexual intercourse with her on numerous occasions. She stated that the first occasion was when she was aged about 14 and the offences continued for the next three years until she left home aged 17. She was unable to differentiate each attack with any particularity. The indictment was framed charging the defendant with three acts of incest, one for each year.

In the complainant's examination in chief, after describing the first occasion when her father had had sexual intercourse with her, her evidence continued:

“After that first occasion, were there any further acts of intercourse? – Yes. There were further acts but I cannot remember all the details of them or when they were. I have blanked them out.

Is there any particular reason why you can't remember the exact details? – I have blanked them all out, tried to forget them.

But do you know over what period of time they continued? – They would have been over the next two years.

<sup>5</sup> (1989) 168 CLR 266.

Until what age? – Until I left home at seventeen.

Are you able to tell the members of the jury how often during those years until you left home such acts occurred? – Actual sexual intercourse wasn't too often but it was a couple of times.

A couple of times every how often? – Every couple of months for a year.”<sup>6</sup>

The complainant was taken to mean that intercourse had occurred every couple of months during the three year period in which the assaults took place. She described multiple offences in her evidence but none was identifiable as the basis for any particular count on the indictment. No application was made that the prosecution be put to its election for the purpose of identifying from the evidence the specific occasions upon which it relied. The jury convicted the defendant of all the charges on the indictment. On appeal against conviction to the High Court of Australia the court held that in the absence of any act or acts being identified as the subject of an offence charged in an indictment the prosecution cannot lead evidence that is equally capable of referring to a number of occasions, any one of which might constitute an offence as described in the charge, and ask the jury to convict on any one of them.

In the light of the Court of Final Appeal's decision in *Chim's case* the Department of Justice no longer considers it safe to rely on specimen charges in cases where the complainant cannot identify the specific counts with sufficient particularity. The department's response has been to propose the new offence of persistent sexual abuse of a child. This new offence is not an example of re-inventing the wheel. The proposal follows the example of similar offences enacted in most states in Australia.<sup>7</sup> The Hong Kong proposal models itself on the offence enacted most recently in New South Wales. A similar offence has also been considered in the United Kingdom<sup>8</sup> and South Africa.<sup>9</sup>

### The Offence in Victoria

The offence as it is defined in the Australian state of Victoria requires substantiation of essentially the same elements required to prove the offence in

<sup>6</sup> *Ibid.*, p 268.

<sup>7</sup> Crimes Act 1900 (Australian Capital Territory), s 92EA; Crimes Act 1900 (New South Wales), s 66E; Criminal Code (Northern Territory), s 131A; Criminal Code (Queensland), s 229B; Criminal Law Consolidation Act 1935 (South Australia), s 74; Criminal Code (Western Australia), s 321A; Crimes Act 1958 (Victoria), s 47A. In Tasmania the offence relates to young people under 17 years of age: Criminal Code (Tasmania), s 125A.

<sup>8</sup> United Kingdom Home Office, *Setting the Boundaries, Reforming the Law on Sex Offence*, Consultation Paper, Vol 1 (July 2000).

<sup>9</sup> South African Law Commission, *Sexual Offences Substantive Law*, Project 107, Discussion Paper 85 (1999).

New South Wales. The two offences are not significantly different and the Victorian example has been chosen for comment as it was enacted prior to the New South Wales offence and thus has been the basis of several prosecutions. An appeal against convictions under the Victorian provision has also received recent attention from the High Court of Australia.<sup>10</sup> Since 1991 in Victoria the prosecution need only prove that the defendant committed an unlawful sexual offence within a specified time period on three or more occasions. The prosecution need not prove the dates or exact circumstances of each offence. The sexual offences can also be of different types, for example an oral rape, an indecent assault and a vaginal rape. The child must be able to give evidence that on at least three occasions an unlawful sexual attack occurred. It is not necessary for the child to provide the same type of particularity as to time, place, date or circumstances as would be required if the defendant was charged with the specific offence constituted by each act. The matters that must be proved are:

- 1 that the offence occurred at the place and time alleged (usually a time period is specified between dates);
- 2 that the offender was the accused; and
- 3 that on at least three occasions the accused willfully committed an unlawful sexual offence with the child who was aged under sixteen years at the time of each offence.

The jury must be satisfied that in respect of each occasion they all agree the same act has been proved beyond a reasonable doubt.<sup>11</sup>

Unless there is evidence led of a minimum of three sexual offences committed during the period of time specified on the indictment there can be no conviction. The evidence establishing that the defendant committed an unlawful sexual offence is admissible and probative to establish the persistent sexually abusive relationship in spite of the evidence failing to disclose the dates or exact circumstances of the acts.<sup>12</sup>

### The Criticisms of the Proposed Offence in Hong Kong

This lack of particularity forms the basis of the objections to the proposed offence in Hong Kong. An accused person has the right to know what is alleged against him and when and where the offence is alleged to have occurred so the person can defend the allegations. If the accused person cannot test the evidence against him or her by questioning the complainant about

<sup>10</sup> *KRM v The Queen*, unrep. (High Court of Australia, 8 Mar 2001).

<sup>11</sup> *KBT v The Queen* (1997) 191 CLR 417, pp 422, 433.

<sup>12</sup> Note 10 above.

the precise time or circumstances of the offence, his defence may be severely undermined. The accused can be prejudiced and embarrassed in the presentation of the defence without sufficient particulars to know the charge against him and answer it.

Rule 3(1) of the Indictment Rules provides:

“... every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence with which the accused is charged describing the offence shortly, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.”

The rule against duplicity at rule 2(2) of the Indictment Rules provides:

“Where more than one offence is charged in an indictment, the statement and particulars of each offence shall be set out in a separate paragraph called a count.”

This rule seeks to ensure that the defendant receives a fair trial because he knows the charge brought against him which he must answer. The jury must find any conviction on whether the elements of each count have been proved.

The principle confining the prosecution to proof of one offence for each count on the indictment is important. If evidence of the commission of multiple offences is led from the complainant, but only one offence is charged, the defendant must be prejudiced in his defence. He could not, for example, without sufficient particularity of offence, rely on alibi. The degree of prejudice will vary from case to case but in cases where the offences alleged cover a long period of time, particularly when the complaint is made many years after the attacks are alleged to have occurred, the prejudice would be considerable.

Another important reason for evidence of only one offence to be allowed to secure one conviction, instead of multiple complaints, is that jury members need to direct their minds to the particulars of each single offence to evaluate whether the prosecution has discharged its burden of proof. If the jury is allowed to use evidence of multiple acts to form the basis of their deliberations they may not sufficiently focus on the particulars of the act which is the subject of the count. Alternatively, they may be so overwhelmed by the number of allegations as to convict on the basis that the defendant must be guilty because of the number.

Another criticism of the offence is that it abrogates a defendant's common law right not to be found guilty of a criminal offence on the basis of his disposition, inclination or tendency. Basically this criticism maintains that the new offence introduces an offence of propensity. Propensity evidence is sometimes called similar fact evidence. Generally, evidence of criminal acts

committed by the defendant, other than that which is the subject of a count on the indictment, is inadmissible. This is because such evidence is usually irrelevant and its admissibility would be highly prejudicial to the defendant. However, sometimes propensity evidence may be admitted where it is both relevant and highly probative to the guilt of the defendant. Evidence of propensity or similar fact evidence must, however, be regarded as highly relevant and probative to overcome the competing considerations of prejudice to the defendant.<sup>13</sup>

A common reason for the prosecutor to seek to introduce into evidence acts showing propensity, rather than leading the evidence as the subject of charges, is because the acts cannot be sufficiently particularised in time and place. Justice Dawson considered the problem in *S v The Queen*:

“In this case, where there was a failure to identify the occasions upon which the offences charged took place, the whole of the evidence was, in effect, evidence of propensity which could not be related to the offences charged because of the lack of identification of those offences. In other words, the prosecution case sought to go no further than to establish that an incestuous relationship existed between the applicant and his daughter – which is to do no more than establish a particular kind of propensity – and to assert the guilt of the applicant upon three unspecified occasions during the existence of, and upon the basis of, that relationship. Far from establishing the necessary high degree of relevance, to proceed in this way was to obtain the conviction of the applicant upon evidence of propensity unrelated to a specific offence upon an identified occasion. Such a course was clearly objectionable.”<sup>14</sup>

Propensity evidence is generally not admissible if it is only introduced to show the defendant has a propensity or disposition to commit a crime, or is the sort of person likely to commit the crime charged.<sup>15</sup> To be admissible, propensity evidence must be both relevant and highly probative. In any case such relevant evidence may be excluded if the prejudicial effect on the defendant would outweigh the probative value of its introduction. This is the position in the United Kingdom as recently stated by the House of Lords in *The Director of Public Prosecutions v P*.<sup>16</sup> It is also the Common Law position in Australia.<sup>17</sup>

<sup>13</sup> *Makin v The Attorney General for NSW* [1894] AC 57; *A-G of Hong Kong v Siu Yuk-shing* [1989] WLR 236.

<sup>14</sup> Note 5 above, pp 275–276.

<sup>15</sup> See *Makin* (n 13 above).

<sup>16</sup> [1991] 2 AC 447.

<sup>17</sup> *Pfennig v The Queen* (1995) 182 CLR 461.

It could be argued that evidence led in support of an offence of persistent sexual abuse of a child would create an offence of propensity. If evidence of the offence does not require particulars of time or place it is little different to the type of evidence described by Justice Dawson in *S v The Queen*. It is clear that the problem illustrated in *Chim's case* is real and substantial for both prosecution and defence, but the answer may not be to give the prosecution legislative sanction to lead evidence of multiple offences without electing the incident forming the basis of the charge. The proposed amendment creates an offence of propensity. In my view, there is a preferable way forward.

The judgment of Sir Anthony Mason in *Chim's case* referred the prosecution to a suggestion in *Archbold*<sup>18</sup> to be used to frame an indictment when differentiation is impossible. The suggestion is to allege in each count subsequent to the first count on the indictment another identical offence with the inclusion of the words "on an occasion other than that alleged [in previous counts]".

Would this have worked in *Chim's case*? The complainant could give evidence to establish that between 14 July and 15 August 1989 the defendant raped her on several occasions. If this indictment formula had been followed each rape would have been alleged as a separate count on the indictment. The complainant would not have been able to particularise the counts any better than she did but at least the jury would realise it needed to establish each count beyond a reasonable doubt. It would have been clear to the jury that each individual allegation related to one count on the indictment.

An indictment drafted in accordance with *Archbold's* suggestions formed the basis of the trial of *HKSAR v Kwok Kau Kan*.<sup>19</sup> In that case the first two counts drafted in accordance with *Archbold* suggestions were upheld on appeal but the third and fourth counts were not. The third and fourth counts failed because the evidence led from the complainant to establish those counts could not be differentiated from evidence led of other uncharged incidents. As such, the Court of Appeal concluded that there was unfairness to the appellant because he was not in a position to know which two incidents the complainant referred to as the basis of the third and fourth counts. The third and fourth counts alleged indecent assaults occurring on the staircase of the building the complainant visited frequently but her evidence alleged several such incidents over the time period framed.

The court considered that where multiple acts are alleged by a complainant to have taken place it is not easy to stop the complainant referring to uncharged incidents in the course of a trial. Chan CJHC stated:

<sup>18</sup> Richardson, James (ed), *Archbold: Criminal Pleading, Evidence and Practice 1998* (London: Sweet & Maxwell, 1998), p 49.

<sup>19</sup> [2000] 1 HKC 789.

“In the case of a trial without jury, a professional judge would be able to put such evidence aside when considering the guilt or innocence of the accused. In the case of a jury trial, a judge may, depending on the circumstances of the case, have to direct the jury in his summing up to ignore evidence of acts other than those particularised in the charges.”<sup>20</sup>

The court concluded that deliberately or inadvertently led evidence of other similar offences committed by the accused need not result in an aborted trial. Although the judgment goes further than *Chim’s case* towards recognising the real problems for the prosecution in bringing limited charges based on multiple allegations, it does not reflect all that could have been done.

### A Possible Solution

There is another way in which the prosecution could have proceeded. There is a rule at common law under which the prosecution could not only have led the evidence of the uncharged acts, but led it without fear the trial judge would direct the jury to ignore it or that the trial may be aborted. It has been established law for more than a century that the prosecution can adduce evidence of the relationship between the defendant and the complainant, not to show propensity but to explain the context in which the offence is alleged to have occurred.<sup>21</sup> Under this rule the prosecution may lead evidence of sexual acts or advances that are not the subject of a charge to show the true nature of the relationship, often referred to in cases as a “guilty passion”. The admissibility of such evidence has been expressly approved by the House of Lords in *The Director of Public Prosecutions v Boardman*,<sup>22</sup> where evidence of previous approaches to a boy later raped were admitted, including evidence of an indecent assault not made the subject of a count on the indictment.

Such evidence has been allowed under what is now referred to as the “similar transaction” rule. A complainant can give evidence not only of charged acts but of other offences against him which are not the subject of charges, and evidence that goes to corroborate the “uncharged” acts can be used to support the complainant’s testimony with regard to the offence charged. In

<sup>20</sup> *Ibid.*, p 799.

<sup>21</sup> *The Queen v Bond* [1906] 2 KB 389, p 401; *The Queen v Ball* [1911] AC 47, p 71; *The Queen v Flack* [1969] 1 WLR 937; *Wilson v The Queen* (1970) 123 CLR 334, pp 338–339; *Harriman v The Queen* (1989) 167 CLR 590.

<sup>22</sup> *Director of Public Prosecutions v Boardman* [1975] AC 421.

the judgment of the High Court of Australia in the case of *KRM v The Queen*, McHugh J observed:

“In cases concerning sexual offences, evidence of uncharged acts between the accused and the complainant have long been admitted, where it tends to explain the relationship of the parties or makes it probable that the charged acts occurred.”<sup>23</sup>

Why is evidence of the relationship between the defendant and the victim not objected to on the grounds that it is evidence of propensity? Sometimes it is. But as noted in *Blackstone's Criminal Practice*,<sup>24</sup> the objection is misconceived. The rules relating to evidence of the relationship between the defendant and victim exist independently of the rules of similar fact evidence. The only criteria determining the admissibility of relationship evidence is relevance. It need not also satisfy the test for high probative value required to introduce evidence of propensity. In the United Kingdom case of *The Queen v Ball*,<sup>25</sup> Lord Atkinson observed that evidence of previous acts or words showing animosity were admissible evidence relevant to motive. In 1986 the United Kingdom Court of Appeal re-asserted the general rule in *Ball* and held in *The Queen v Williams*<sup>26</sup> that relationship evidence is admissible where relevant to a fact in issue. Of course, the court may in its residual discretion exclude any relevant evidence where its prejudicial effect would outweigh its probative value, but the higher test of probity required for similar fact evidence is not required before relationship evidence can be led.

Evidence of acts led only to establish relationship need not be proved beyond a reasonable doubt as evidence of an offence charged on the indictment must be. The great value for the prosecution of evidence of the uncharged acts, however, is that it may be used by the jury to support the complainant's testimony with regard to the actual offences alleged.

## Conclusion

The problem in *Chim's case* could have been addressed through the introduction of relationship evidence. The prosecution could have chosen specimen counts from the multiple complaints made by the child, and then led evidence of the other acts as evidence of relationship (or uncharged acts). In *Chim's case* the prosecution should have asked the complainant to describe

<sup>23</sup> See *KRM* (n 10 above).

<sup>24</sup> *Blackstone's Criminal Practice 1999* (Blackstone Press Limited, 1999), p 2082.

<sup>25</sup> See *Ball* (n 21 above).

<sup>26</sup> (1986) 84 Cr App R 299.

the first occasion upon which she was assaulted. By her own evidence this would have constituted an attempted sexual penetration and could have been framed as charge one on the indictment. She would have been able to give evidence of the first occasion upon which actual penetration was achieved, and this offence could have been framed as charge two. She would also have been able to describe the last occasion upon which she was attacked and this could have been framed as charge three. Through consideration of the type of evidence which could be led from the complainant and careful examination in chief, evidence specific to the counts could have been adduced along with evidence of other occasions led only for the purposes of establishing relationship.

It is important not to assume, however, that the introduction of the proposed offence of persistent sexual abuse of a child is the only answer to the problems highlighted by *Chim's case* and *The Queen v S*. As observed by Sir Anthony Mason in the judgment of the Court of Final Appeal in *Chim's case*, it was not the constraint of the Indictment Rules that led to the overturning of the conviction. It is a mistake, therefore, for the Department of Justice to assume "specimen count" indictments can no longer be used in child sexual offence cases. They can and should be used, with the appropriate preparation, careful prosecution and reference to established common law rules.

