

WOMEN'S COMMISSION
Legislative Amendments Related to Marital Rape

INTRODUCTION

This paper informs Members on the proposed amendments to the Statute Law (Miscellaneous Provisions) Bill 2001 (the Bill) in relation to marital rape, which is currently being examined by a Bills Committee of the Legislative Council.

OBJECT

2. Part V of the Bill deals with marital rape and related sexual offences. The object which the Administration is seeking to achieve under the Bill is :—

- (1) principally, to amend Part XII of the Crimes Ordinance (Cap. 200) to make it expressly clear that marital rape is an offence; and
- (2) to achieve that object without :—
 - (a) the delay that would be incurred by a wide-ranging review of sexual offences; or
 - (b) inadvertently altering the scope of other sexual offences before a wider review can be undertaken.

BACKGROUND

3. In a letter dated 17 May 2000 to the Department of Justice, the Hon Margaret Ng, Chairman of the Legislative Council Panel on Administration of Justice and Legal Services (“AJLS Panel”), expressed the view that there was doubt whether the term “unlawful sexual intercourse” in section 118 of the Crimes Ordinance (the Ordinance) covered marital rape and suggested that an amendment was necessary to make the law clear. At a meeting of the AJLS Panel on 20 June 2000, the Chairman suggested that the amendment should take the form of the deletion of the term “unlawful” from section 118 and an express declaration

that the crime of rape covers marital rape. The United Nations Committee on the Elimination of Discrimination against Women has also commented in 1999 that the term “unlawful” might create ambiguities and expressed concern that marital rape was not considered a criminal offence in Hong Kong.

PROBLEM

4. The problem with the current law related to marital rape may be summarised as follows –
- (a) section 118 of the Ordinance makes non-consensual “unlawful sexual intercourse” an offence (rape);
 - (b) under the traditional common law meaning of “unlawful”, with certain exceptions, a wife could not withdraw her consent to marital intercourse and “unlawful” was defined as outside marriage;
 - (c) in Reg v R [1991] 3 WLR 767 the House of Lords held that it is clearly unlawful to have intercourse with any woman, married or not, without her consent, and “unlawful” is therefore surplusage in the offence of rape. This approach was adopted by the Administration;
 - (d) however, it is arguable that Reg v R was contrary to the intention of the legislature, or may not be good law in the Hong Kong Special Administrative Region after 30 June 1997 despite the continuity of the common law provided for under Article 8 of the Basic Law and strong obiter approval by the Hong Kong Court of Appeal in HKSAR v Chan Wing Hung [1997] 3 HKC 472, a case under section 119 (procurement of unlawful sexual act by threats or intimidation) rather than section 118 of the Ordinance; and
 - (e) accordingly, amendment to Part XII is desirable to make the matter clear.

DEFINITIONS

“Unlawful”

5. In common law, “unlawful” in respect of rape and related sexual offences means either outside marriage or (under Reg v R and Chan Wing Hung) within marriage where the wife does not consent to marital intercourse (hence making “unlawful” surplusage in section 118 of the Ordinance).

“Unlawful sexual act”

6. Section 117(1A) of the Ordinance defines “unlawful sexual act” as :–

- (a) unlawful sexual intercourse;
- (b) buggery or an act of gross indecency with a person of the opposite sex with whom a person may not have lawful sexual intercourse; or
- (c) buggery or an act of gross indecency with a person of the same sex.

7. In the Administration’s view of “unlawful” under the present common law (to be clearly reflected under the proposed amendments), of the definition of “unlawful sexual act” in section 117(1A) of the Ordinance:–

- (a) subparagraph 6(a) would apply to unmarried parties (“unlawful” as outside marriage) or to a husband and wife where the wife did not consent to marital intercourse (Reg v R: it is clearly “unlawful” to have intercourse with any woman without her consent);
- (b) subparagraph 6(b) would only apply to unmarried parties since a husband and wife, being bound by matrimony, may have “lawful” sexual intercourse with each other. (Note that non-consensual buggery with any person is an offence under section 118A of the Ordinance); and
- (c) subsection 6(c) would only apply to unmarried parties (same sex marriage not being valid under Hong Kong law).

CONSULTATION

8. The Administration canvassed three options for legislative amendment in a Consultation Paper issued in September 2000:–

Option 1 : maintain the status quo, relying on Reg v R;

Option 2 : make it clear in section 118 of the Ordinance that marital rape is an offence, and delete “unlawful” from the section; and

Option 3 : clarify the meaning of “unlawful” in “unlawful sexual intercourse” and “unlawful sexual act” to ensure that in the other sexual offence sections the term means outside marriage, or within marriage in any circumstances where the wife does not consent.

9. As noted in the Administration’s Information Paper dated January 2001 to the AJLS Panel, only one respondent supported Option 1. Six respondents supported Option 2 alone, and seven respondents supported Option 3 alone. Seven respondents supported a combination of Option 2 and Option 3.

RECOMMENDATION

10. Following consultation, for the reasons given in this paper, the Administration **recommended** the adoption of a combination of Option 2 and Option 3 to the effect that rape and other sexual offences should be clarified by:–

- (a) deleting “unlawful” from section 118 and adding an express provision that a marital relationship is immaterial to the offence of rape (Option 2); and
- (b) in respect of other sexual offence sections, defining “unlawful” non-exhaustively under section 117 to include non-consensual marital intercourse (Option 3).

Reasons for adopting both Options 2 and 3

11. Reasons not to adopt Option 2 alone include:–

- (a) to avoid the effect of the expressio unius rule of statutory interpretation (to include the one is to exclude the other) and pre-empt any suggestion that, by selectively deleting “unlawful” from section 118, the legislature intended that the term should take its traditional common law meaning in the other sexual offence sections (see Smith and Hogan Criminal law 7th Ed., p.475);
- (b) to ensure that the supplementary common law meaning of “unlawful” definable from Reg v R and Chan Wing Hung, of within marriage but without consent remains applicable as appropriate to the circumstances of the case in the other sexual offence sections. It is as important that the interests of spouses be protected, as applicable, under the other sexual offence sections as under section 118;

- (c) to make it clear that, where one of the elements of the offence is non-consensual marital intercourse (or where consent has been improperly obtained), the prosecution would have charging options, under other sexual offence sections, in addition to marital rape under section 118. Under section 149 and item 1 of the Schedule to the Ordinance, an accused who is acquitted of rape under section 118 may nevertheless be convicted, as the case may be, of an offence under section 119 (procurement of another person by threats to do an unlawful sexual act), 120 (procurement of another person by false pretences to do an unlawful sexual act), or 121 (administering drugs to obtain or facilitate an unlawful sexual act); and
- (d) to take advantage of the usefulness of the inclusive or non-exhaustive definition as a means of providing both certainty and any required flexibility in the law. Stipulating that “unlawful” includes non-consensual marital intercourse would make it certain that marital rape can feature under the other sexual offence sections while allowing the court to apply such other meaning as may be appropriate in the circumstances of the case. For example, outside marriage in the case of unmarried parties under section 119, as in Chan Wing Hung, or under section 127 (abduction of unmarried girl under 18 for unlawful sexual intercourse: R v Chapman [1959] 1 QB 100, 105).

12. Reasons not to adopt Option 3 alone include –

- (a) taking into account the views of the AJLS Panel and the UN Committee on the Elimination of Discrimination against Women noted in paragraph 3 above, the Administration considers that the Crimes Ordinance should be amended to make it clear beyond doubt – to the layman as much as to the lawyer – that marital rape is a crime;
- (b) such unequivocal clarity cannot be achieved if “unlawful”, with its ambiguity under the common law, is retained in section 118. Even if “unlawful” is defined in section 117 as proposed under Option 3, it will be necessary to read two sections (117 and 118) together before the scope of that term in section 118 becomes clear; and
- (c) the need for clarity in both section 118 and the other sexual offence sections was the principal theme not only of the Administration’s discussions with the AJLS Panel but also of the Consultation Paper and was supported by most consultees who responded.

CONSIDERATION OF THE BILL IN LEGCO (AS AT 29 APRIL 2002)

13. Part V of the Bill (clauses 11 to 17) amends section 118 of the Crimes Ordinance to make it expressly clear that marital rape is an offence and, in respect of other sections, makes certain amendments that are mainly consequential to the present method of achieving such clarity.

Possible Committee Stage Amendments

14. At its meeting on 28 March 2002, the Bills Committee noted that the present Part V of the Bill makes the achievement of a simple object very complicated. The Bills Committee requested the Administration to consider taking as minimalist an approach as possible to the present amendments, pending a subsequent full review of sexual offences. The Administration agreed that it would consider the implications of making the following possible Committee Stage Amendments to Part V of the Bill:–

Clause 11 (interpretation)

- (a) the new section 117(1B)(b) be deleted (and the new section 117(1B)(a) be retained in order to provide a non-exhaustive definition of “unlawful sexual intercourse” to include sexual intercourse between a husband and his wife if at the time of the intercourse the wife does not consent to it);
- (b) the new section 117(1C) (the proposed new definition of “consent”) be deleted;

Clause 12 (rape)

- (c) the amendment repealing “unlawful” from section 118(3)(a) be deleted;
- (d) the new section 118(3A), which provides for the avoidance of doubt that “sexual intercourse” (“unlawful sexual intercourse” if (c) above is adopted) in section 118(3)(a) includes sexual intercourse between a husband and his wife, be retained;

Clause 13 (procurement by threats)

- (e) the amendment to section 119(1) adding “or marital intercourse” after “act” be deleted;

Clause 14 (procurement by false pretences)

- (f) the same amendment to section 120(1) as in (e) above be deleted;

Clause 15 (administering drugs to obtain or facilitate unlawful sexual act or marital intercourse)

- (g) the same amendment to section 121(1) as in (e) above be deleted;

Clause 16 (intercourse with girl under 16)

- (h) the amendment to section 124(2) regarding consent be deleted; and

Clause 17 (indecent conduct towards child under 16)

- (i) the amendment repealing and replacing section 146(3) regarding consent be deleted.

Background of the present Part V of the Bill

15. As noted in paragraph 11 above, to avoid the effect of the expressio unius rule of statutory interpretation and pre-empt any suggestion that, by selectively deleting “unlawful” from section 118, the legislature intended that the term should take its traditional common law meaning in the other sexual offence sections (“non-rape offences”) the Administration proposed that “unlawful” should be defined non-exhaustively under the new section 117(1B) to include marital intercourse. This would allow marital rape to feature under the non-rape offences while allowing the courts to apply such other meaning of “unlawful” as may be appropriate to the circumstances of the case. For example, marital rape might be a factor under section 119 where a third party procured a wife by threats to have non-consensual intercourse with her husband – the husband might be guilty of rape under section 118. Under the proposed non-exhaustive definition of “unlawful”, the third party procurer could be charged under section 119 – this would not be possible under the traditional common law meaning of “unlawful” as outside marriage.

16. During the consultation process two main concerns were raised regarding the proposal for a non-exhaustive definition of “unlawful” :-

- (a) the limitation of the proposed definition of “unlawful sexual intercourse” under the new section 117(1B) to the meaning of “consent” in rape would result in lesser protection of married women than for unmarried women in those offences involving sexual

intercourse where consent has been improperly obtained by threats (section 119), false pretences (section 120), or the administration of drugs (section 121), or where the woman, though consenting in fact, is deemed to be incompetent to consent on account of age (sections 123 and 124) or mental incapacity (section 125);

- (b) notwithstanding the above, incompetence to consent on account of age or mental incapacity should not be included in the proposed non-exhaustive definition before the policy regarding the non-rape offences in these particular categories was fully reviewed.

17. To meet these concerns, the Administration decided to retain the proposed definition of “unlawful sexual intercourse” in section 117(1B) in its present form and add an express reference to “marital intercourse” in sections 119(1), 120(1) and 121(1) of the Ordinance. Sections 123 (intercourse with girl under 13), 124 (intercourse with girl under 16) and 125 (intercourse with mentally incapacitated person) of the Ordinance would not be so amended.

IMPLICATIONS OF THE POSSIBLE COMMITTEE STAGE AMENDMENTS

18. From the perspective of the Administration, if it is acceptable to retain “unlawful” in section 118(3)(a) for the time being (as is arguably the case), this would solve the main problem posed by the expressio unius rule which would arise from the selective deletion of that term.

19. In terms of the central legislative object of the present amendment exercise, namely, to make it clear that marital rape is an offence, the Administration considers that abundant (as opposed to technically absolute), and therefore sufficient, clarity would be achieved by the addition of the proposed new section 118(3A) modified to declare, for the avoidance of doubt that, in section 118(3)(a), “unlawful sexual intercourse” includes marital intercourse.

20. The Administration submitted to the Bills Committee that amending section 118 in such a way would not be affected by the expressio unius rule for the following reasons :-

- (a) the retention of “unlawful” in section 118(3)(a) would obviate the suggestion that the legislature intended that “unlawful” should take its traditional common law meaning of outside marriage in the non-rape offences from which “unlawful” was not deleted. This would leave the courts free to apply the broad principle protecting

married women evinced in Reg v R to the non-rape offences as may be appropriate to the circumstances of the case;

- (b) any suggestion that the proposed new section 118(3A) might also attract the expressio unius rule could be offset (subject to the decision of the Law Draftsman) by the possible addition of the formula, “and without affecting the generality of any other section”, after “For the avoidance of doubt”.

Possible entire deletion of proposed new section 117(1B)

21. On the assumption that the proposition in paragraph 20(a) above is correct, namely, that the courts would apply the broad principle in Reg v R to protect married women as appropriate in the other sections of the Crimes Ordinance, the Administration also submitted that it would be reasonable to delete from the Bill the entire proposed non-exhaustive definition of “unlawful sexual intercourse” under the new section 117(1B). Arguments for adopting this approach include:–

- (a) the courts in Hong Kong have strongly indicated an inclination to apply the principle in Reg v R, if appropriate, in respect of the non-rape offences. For example, in HKSAR v Chan Wing Hung [1997] 3 HKC 472, 475D-476A, the Hong Kong Court of Appeal observed that it might have held “unlawful” in section 119 (procurement by threats) to be surplusage for the purposes of that case had the man and woman concerned been married to each other and the wife had not consented to the intercourse procured by her husband. In the context, however, since the man and woman were unmarried, it was unnecessary to go further than to hold that “unlawful” in the circumstances of the case took its traditional common law meaning of illicit or outside the bond of marriage;
- (b) if future experience or analysis shows that protection of married women under the non-rape offences cannot appropriately be provided by the courts further to the broad principle in Reg v R, that is a factor which could be taken into account in a full review of sexual offences;
- (c) the deletion of the proposed non-exhaustive definition of “unlawful sexual intercourse” would avoid possible confusion regarding its precise application in the context of each of the non-rape offences;

- (d) the updating of archaic terminology such as “unlawful” in respect of sexual offences should as far as possible await a full review; and
- (e) the deletion of the proposed new section 117(1B) from the Bill would be consistent with the originally intended minimalist approach.

Proposed new section 117(1C) (clause 11) and proposed amendments to sections 124 (clause 16) and 146 (clause 17)

22. The Administration agreed that the issues relevant to these proposed amendments are peripheral to the principal object of amending section 118 and may be revisited in a full review.

Proposed minimalist amendment

23. Based on the above discussion, the Administration submitted, for the consideration of the Bills Committee, that only a modified clause 12 (with clauses 11 and 13 to 17 to be deleted) needs to be retained in Part V of the Bill. The modified clause, subject to law drafting advice, would be in approximately the following form:–

12. Rape

Section 118 is amended by adding –

“(3A) For the avoidance of doubt, and without limiting the generality of any other section, it is declared that in subsection (3)(a), “unlawful sexual intercourse” includes sexual intercourse between a husband and his wife.”.

THE PRESENT POSITION

24. Following the meeting of the Bills Committee on 18 April 2002, the Administration was asked to consider a proposed alternative option of deleting all of the present clauses in Part V of the Bill and amending section 117 by adding –

“(1B) Without prejudice to the operation of any of the other provisions of this Part, for the purposes of sections 118, 119, 120 and 121, “unlawful sexual intercourse” includes sexual intercourse between a husband and his wife.”

25. The object of proposing this alternative to section 118(3A) is to make it expressly clear that not only section 118 but also the non-rape offences under sections 119, 120 and 121 of the Ordinance apply equally in rape and those non-rape cases alike.

26. Possibly conflicting issues which require resolution regarding the proposed alternative amendment include:-

- (a) the proposal would be a departure from the express clarity intended under section 118;
- (b) assuming that there are presently doubts about the approach of the courts (e.g. because the approval of Reg v R in Chan Wing Hung was obiter rather than binding) these should be dispelled by the new and clear statutory context of section 118(3A) (if enacted). Acquittal of rape under section 118 – whether marital or non-marital – would therefore be a trigger (further to section 149 and item 1 of the Schedule) for possible conviction, as the case may be, under sections 119, 120, or 121;
- (c) the question whether the fixed scope of “unlawful sexual intercourse” under the proposed new section 117(1B) would reduce the protection of married women now arguably afforded by the common law both in respect of rape and all of the non-rape offences. Under the proposed section 117(1B), marital intercourse would only be protected under sections 118 to 121. By omission, this would possibly negate any existing (or any development of) common law protection of marital victims under, for example, sections 123/124 (unlawful sexual intercourse with girl under 13/16) and 125 (unlawful sexual intercourse with mentally incapacitated person). In Reg v R, the House of Lords (approving R v Chapman [1959] 1 QB 100, 105) identified section 127 (abduction of unmarried girl for unlawful sexual intercourse) as possibly the only sexual offence in which “unlawful” was not mere surplusage; and
- (d) the proposed new section 117(1B) would be consistent with the tacit agreement, noted in paragraphs 16 and 17 above, that the consideration of the question of incompetence to consent on account of age or mental incapacity should be left to policy decisions to be taken in a full review of sexual offences. For example, regarding the age below which a person may be deemed to be incapable in law of giving consent, and the severity of mental incapacity that vitiates consent, even in a marital context.

ADVICE SOUGHT

27. Members are invited to note the contents of this paper.

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