

司法及法律事務委員會於2001年4月26日的會議摘錄

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**II. 建議修訂《刑事罪行條例》(第200章)第118條 ——
強姦配偶罪及有關的性罪行**
(立法會CB(2)1249/00-01(01)、1342/00-01(01)至(06)
及1392/00-01(01)號文件)

9. 高級助理法律政策專員告知委員，政府當局於2001年1月16日會議上討論此事項後，已就《刑事罪行條例》制訂多項法律修訂建議，澄清法律中有關強姦配偶罪的定義(見2001年4月3日的建議修訂第二稿，該修訂稿已隨立法會CB(2)1249/00-01(01)號文件發出)。主要修訂如下：

隨文附上

- (a) 在該條例擬議的新訂第117(1B)條內界定“非法性交”的含義，以包括夫妻之間未經同意的性交；及
- (b) 刪除第118(3)(a)條中“非法”一詞，並為免生疑問，澄清該條文所指的“性交”包括丈夫與他的妻子性交。

10. 高級助理法律政策專員又表示，2001年4月3日發出的修訂稿屬諮詢性質，當局已就其內容諮詢各法律專業團體的意見。他表示，政府當局只在最近才收到部分最新回應。政府當局會在考慮有關意見後，進一步修改有關的修訂。

11. 黃敏杰先生告知委員，大律師公會已在2001年4月14日致政府當局的函件中，載述了其對建議修訂第二稿的意見(立法會CB(2)1342/00-01(01)號文件)。大律師公會當時支持各項修訂建議。他補充，大律師公會會在考慮各方面就建議修訂提出的最新意見(如律師會所提出的)後，再考慮各項修訂，並會就政府當局將擬備的修正擬稿再發表意見。

隨文附上

12. Michael JACKSON先生表示，律師會已考慮各項建議修訂，並在2001年4月25日致函政府提出意見(立法會CB(2)1392/00-01(01)號文件)。下列為律師會意見書中要點：

隨文附上

- (a) 律師會支持刪除《刑事罪行條例》第118條內“非法”一詞的建議，以澄清強姦配偶在香港屬刑事罪行；
- (b) 律師會認為，該條例第119條(以威脅促致他人作非法的性行為)及第120條(以虛假藉口促致他人作非法的性行為)應予修訂，以確保妻子在這兩項條文所述的情況下，能獲得同樣保障；
- (c) 律師會並不支持在第117條內，如所建議的形式，就“非法”一詞加入並不包羅所有可能情況的定義。律師會認為，在未對與性罪行有關的法律作全面檢討前，這實無必要，此舉只會令法例變得不必要地繁複又含糊不清；及
- (d) 律師會質疑是否有必要引入“為免生疑問”的條文以明文訂定“性交”包括夫婦之間的性交。該會認為這種法例草擬方式並不可取。

13. Michael JACKSON先生又表示，若政府當局提出修改修訂擬稿，律師會會再次提供意見。

14. 助理法律顧問回應主席時表示對各項建議修訂有以下觀點：

- (a) 除非政府當局已完成檢討《刑事罪行條例》第XII部中所有有提述“非法性交”或“非法性行為”的條文，否則不宜就“非法性交”訂定一個普遍適用於第XII部的定義。舉例而言，條例中第123及125條分別將與13歲以下女童非法性交和與精神上無行為能力者進行非法性交列為刑事罪行；但未有清楚指出，例如，究竟這兩項條文所指的非法性交，是指因為雙方沒有婚姻關係以致其性交被視為非法(因此，若雙方為夫婦並同意性交可作為免責辯護)；還是上述兩類人士因其年齡或精神上無行為能力關係而被視作無能力同意性交；
- (b) 應考慮建議修訂對該條例第149條及附表的相應影響；
- (c) 擬議的新訂第117(1B)條的(a)及(b)段可合而為一；
- (d) 在標明有關建議修訂的條例文本(立法會CB(2)1342/00-01(06)號文件)英文本第146條所

提述的“she consents to the act”應改為“the child consents to the act”。

15. 主席表示，各界似已有普遍共識，認為應修訂《刑事罪行條例》第118條，以訂明強姦配偶屬刑事罪行。可是，該條例第XII部其他涉及有關性罪行的條文亦有提述“非法”一詞，對於應否同時檢討該等條文並在有需要時予以修訂，則仍沒有清晰意見。她建議政府當局可作進一步諮詢，看看應否就所有涉及有關性罪行的條文進行更廣泛檢討。

16. 主席補充，事務委員會最初提出討論強姦配偶此一事項時，其主要關注的，是要在法例中清楚訂明強姦配偶是一項罪行。當時預計只須對《刑事罪行條例》作若干相對簡單的修訂即可達此目的。事務委員會並未預期同時須就所有有關的性罪行作出全面檢討。

17. 高級助理法律政策專員回應時表示，要就所有有關性罪行完成全面檢討需時很長。他表示，就此次修訂而言，政府當局打算就《刑事罪行條例》提出法例修訂以處理強姦配偶一事，並進行有關的相應修訂，但無意將修訂範圍擴大至其他有關的性罪行。他表示會於本立法會會期內將法律建議最後定稿提交立法會。

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中文文本第 1 稿： 6. 4. 2001
(相當於英文文本 2nd draft： 3. 4. 2001)

對《刑事罪行條例》(第 200 章)的建議修訂

強姦配偶罪及有關的性罪行

PROPOSED AMENDMENTS TO THE CRIMES ORDINANCE

對《刑事罪行條例》(第 200 章)的建議修訂

強姦配偶罪及有關的性罪行

1. 釋義

《刑事罪行條例》(第 200 章)現予修訂，加入 —

“(1B) 就本部而言，“非法性交”(unlawful sexual intercourse)包括丈夫與他的妻子在以下情況下性交 —

- (a) 性交時他的妻子對此並不同意；及
- (b) 當時他知道他的妻子並不同意性交，或罔顧她是否對此同意。”。

2. 強姦

第 118 條現予修訂 —

- (a) 在第(3)(a)款中，廢除“非法”；
- (b) 加入 —

“(3A) 為免生疑問，現宣布在第(3)(a)款中，“性交”(sexual intercourse)包括丈夫與他的妻子性交”。

3. 與年齡在 16 歲以下的女童性交

第 124(2)條現予修訂，在“他的妻子”之後加入“，而她同意與他性交”。

4. 向年齡在 16 歲以下的兒童作出猥褻行為

第 146(3)條現予廢除，代以 —

“(3) 在以下情況下，任何人不會因與或向一名兒童作出嚴重猥褻作為或因煽惑該兒童與他或她或向他或她作出此種作為而犯本條所訂罪行 —

- (a) 他或她與或基於合理理由而相信他或她與該兒童為已婚夫婦；及
- (b) 該兒童同意作出該項作為。”。

LETTERHEAD OF HONG KONG BAR ASSOCIATION

立法會 CB(2)1342/00-01(01)號文件

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Your Ref : L/M (2) to LP 5014/19/1/1C

18th April 2001

Dear

**Proposed Amendments to the Crimes Ordinance (Cap. 200)
Marital Rape and related Sexual Offences**

The Bar Association has considered both the Administration's 'Discussion Paper' of March 2001 and the 2nd draft of the proposed legislation dated 3rd April 2001. As previously stated we are in favour of legislative amendment to reflect the acceptance in Hong Kong of the decision of the House of Lords in **Regina v. R.** We acknowledge that the differences between the Hong Kong legislation and that of the U.K. in the relevant legislation makes such amendment more difficult. By contrast to the legislative amendments made in the U.K. in consequence of that decision the proposed amendments to the Hong Kong legislation are cumbersome, but perhaps necessarily so. In the result, the Bar Association supports the proposed legislation.

Yours sincerely

Michael Lunn S.C.

Vice Chairman

**SUBMISSIONS ON THE PROPOSED AMENDMENTS TO SECTION 118 OF THE
CRIMES ORDINANCE (CAP. 200) - MARITAL RAPE**

The Law Society has considered the latest position paper of the government dated March 2001, together with their letter dated 3rd April 2001 enclosing the Second Working Draft of the proposed amendments to the Crimes Ordinance dealing with the issue of marital rape. The Law Society has also had the benefit reading the Bar Association's paper dated 15th March 2001, and the letter of the Centre of Comparative and Public Law, HKU, dated 18 April 2001.

We bear in mind that the genesis and purpose of this exercise was to remove possible ambiguities in the law regarding marital rape and to make it clear that a man may be guilty of raping his wife.

The House of Lords held in *R v R* [1991] 1 WLR 767 that a husband has no immunity to charge of rape because of his marital status. We believe that case correctly reflects the law not only in England but also in Hong Kong. We consider that deletion of the word "unlawful" in Section 118 of Crimes Ordinance (Rape), as proposed in clause 2(a) of the Second Working Draft, would achieve the desired objective of resolving the current ambiguity in the legislation. We do NOT consider it is good drafting practice to state expressly in the Ordinance, that the rape of a woman by her husband in an offence, as proposed in Clause 2(b) of the Second Working Draft. We believe this is a matter for the government to bring to the public's knowledge rather than making express provision in the legislation.

There also appears to be a good case for amending Section 119 (procurement by threats) and 120 (procurement by false pretences) as has been done in England in order to ensure that wives are equally protected in the circumstances covered by those two sections, including where apparent consent was procured by her husband by threats or false pretences, and also where a third party has procured a wife by threats or by false pretences to have intercourse with her husband. In England the relevant sections were amended by deletion the word "unlawful". If the word "unlawful" remained, then neither the husband nor the third party would be guilty of procuring by threats or false pretences where the sexual act procured could be characterized as 'marital rape', at least without further judicial intervention.

The scope of Sections 119 and 120 in the Crimes Ordinance is, however, wider than the English Sexual Offences Act 1956. The English legislation refers to the procurement to have sexual intercourse. The Hong Kong legislation refers to procurement to do "an unlawful sexual act".

Unlawful sexual act is defined in Section 117(1A) as follows:-

"For the purposes of this Part a person does an unlawful sexual act if, and only if, that person-

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

In our view the simplest and preferred method of amending the Hong Kong legislation, to ensure that both Sections 119 and 120 are applicable in the circumstances outlined above, would be to enact an additional subsection to each of Sections 119 and 120 stating that for the purposes of each of these sections an unlawful sexual act would also include sexual intercourse between a husband and wife. We believe that the gist of the offences in Sections 119 and 120 is to criminalise situations in which sexual intercourse is respectively procured by threats or false pretences etc. Historically, these sections applied to situations where consent was arguably given (were it not, then rape would be available as a charge). We believe that the proposed amendment in clause 1 of the Second Working Draft (to add new subsection (1B) to Section 117) is misconceived in attempting non-exhaustively to define 'unlawful sexual act' to include marital sexual intercourse where it is non-consensual on the part of the wife and this is known to the husband or he is reckless as to this. If consent was not given, as this amendment would require, then the conduct in question may amount to rape (and anyone procuring its commission may be liable according to normal criminal principles as an accessory). If consent was purportedly given, then this will prevent liability for rape under Section 118 (subject to arguments about the validity of the consent). If the case is one in which consent is not necessarily vitiated by the circumstances in which it was given, so that rape is not available, but the case involves the use of threats or false pretences etc, to procure the sexual act (including sexual intercourse between a husband and wife), then it is appropriate to consider the use of Sections 119 and 120. That this is so is clear from the discussion of the equivalent English provisions in Smith & Hogan, Criminal Law (9th ed., 1999), at p.462:

'The meaning given to "consent" in rape left a number of cases where consent was in some way imperfect, but which were not crimes at common law. The law has therefore been supplemented by several statutory crimes involving sexual intercourse where consent has been improperly obtained by threats, false pretences or the administration of drugs; or where the woman, though consenting in fact, is deemed by the law to be incompetent to consent on account of age or mental handicap.'

Specifically, in relation to Section 2(1), Sexual Offences Act 1956 (Section 119, Crimes Ordinance), Smith & Hogan state, at 463:

'...there is some uncertainty as to what threats are sufficiently grave to negative consent for the purpose of rape. Whatever the limits in rape, it is possible that less grave threats will suffice for this much less serious offence'

and, in relation to Section 3(1) (Section 120, Crimes Ordinance), at 464:

'There is similar uncertainty about the meaning of false pretences..... It seems likely that it extends to cases where there is no mistake as to the nature of the act. It may be that any false pretence which in fact induces P to give consent which she would not otherwise have given is enough.'

Smith & Hogan add, at 464:

'The CLRC has recommended that these offences should continue in their present wide terms. Although rarely used, they are useful to deal with the occasional case which does not amount to rape but should not be allowed to fall outside the criminal law.'

We believe that the government's proposed amendment to Section 117, by the addition of a new subsection (1B), runs entirely contrary to this, by stipulating that 'unlawful sexual act' includes marital sexual intercourse if it occurs without the wife's consent and this is known to the husband or he is reckless in this regard (i.e. the elements of rape must be present).

Consequently, we do not support Option 3 and the use of non-exhaustive definition the word "unlawful" for the various sections dealing with sexual offences as proposed by the government. We believe that this step is unnecessary in the absence of any general review of the law relating to sexual offences, which clearly is not under consideration at this stage. Further, we strongly believe that this course would involve making the legislation more complex and confusing than is necessary.

The Law Society's Criminal Law & Procedure Committee
25 April 2001