

**Extract of minutes of meeting of Administration of Justice
and Legal Services Panel held on 26 April 2001**

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II. Proposed amendments to section 118 of the Crimes Ordinance (Cap. 200) - Marital rape and related sexual offences

(LC Paper Nos. CB(2)1249/00-01(01), 1342/00-01(01) to (06) and 1392/00-01(01))

9. Senior Assistant Solicitor General (SASG) informed members that subsequent to the discussion of the subject at the meeting on 16 January 2001, the Administration had worked out a number of proposed legislative amendments to the Crimes Ordinance to clarify the law regarding the offence of marital rape (second draft of the amendments dated 3 April 2001 circulated under LC Paper No. CB(2)1249/00-01(01) refers). The major amendments were -

attached

- (a) to define "unlawful sexual intercourse" in the proposed new section 117(1B) of the Ordinance to include non-consensual marital intercourse; and
- (b) to remove the word "unlawful" in section 118(3)(a) and, for the avoidance of doubt, clarify that "sexual intercourse" in that section included sexual intercourse between a husband and his wife.

10. SASG further said that the draft issued on 3 April 2001 was a consultation draft on which the views of the legal professional bodies had been sought. He said that the Administration had received some of the latest responses to the proposed amendments only very recently. The Administration would further revise the amendments having regard to the views expressed.

11. Mr M K WONG informed members that the Bar Association's views on the second draft of the proposed amendments were set out in a letter dated 14 April 2001 to the Administration (LC Paper No. CB(2)1342/00-01(01)). The Bar Association was then in favour of the proposed amendments. He added that the Bar Association would give further thoughts to the amendments in view of the latest round of submissions on the proposed amendments, such as those made by the Law Society, and would comment further on a revised draft to be prepared by the Administration.

attached

12. Mr Michael JACKSON said that the Law Society had considered the proposed amendments and submitted its views to the Administration in a letter dated 25 April 2001 (LC Paper No. CB(2)1392/00-01(01)). The gist of the Law Society's submission was as follows -

attached

- (a) the Law Society supported the proposed deletion of "unlawful" in section 118 of the Crimes Ordinance to clarify that marital rape was a crime in Hong Kong;
- (b) the Society considered that section 119 (procurement by threats) and section 120 (procurement by false pretence) should be amended to ensure that wives would be equally protected in the circumstances covered in those two sections;
- (c) the Society did not support a non-exhaustive definition of "unlawful" to be included in section 117 in the manner as proposed. In its view, this was unnecessary in the absence of any general review of the law relating to related sexual offences, and would make the legislation more complex and confusing than was necessary; and
- (d) the Society doubted the necessity to introduce an avoidance of doubt provision to expressly state that "sexual intercourse" included sexual intercourse between a husband and his wife, believing that this was not good drafting practice.

13. Mr Michael JACKSON also said that the Law Society would like to make further comments if revised draft amendments were proposed by the Administration.

14. In response to the Chairman, Assistant Legal Adviser made the following observations as regards the proposed amendments -

- (a) Unless the Administration had completed a review of every section in Part XII of the Crimes Ordinance containing the reference to "unlawful sexual intercourse" or "unlawful sexual act", it would not be advisable to prescribe a definition of "unlawful sexual intercourse" for the entire Part XII. For instance, sections 123 and 125 of the Ordinance respectively provided for offences of unlawful sexual intercourse with girls under 13 and unlawful intercourse with a mentally incapacitated person. It was not clear, for instance, whether unlawful intercourse in the contexts of these two sections meant outside the bounds of marriage, hence consensual marital intercourse could be a defence, or whether the two categories of persons in question were considered incompetent to give consent on account of age or mental incapacity;
- (b) The consequential effect on section 149 and the Schedule to the Ordinance should be considered;
- (c) Paragraphs (a) and (b) under the proposed new section 117(1B)

could be merged into one; and

- (d) In the marked-up copy of the proposed amendments (LC Paper No. CB(2)1342/00-01(06)), the English reference in section 146 to "she consents to the act" should be amended to "the child consents to the act".

15. The Chairman said that it appeared that there was a general consensus that section 118 of the Crimes Ordinance should be amended to clarify that marital rape was a crime. However, the picture was not so clear as to whether other related sexual offences sections in Part XII of the Ordinance containing the reference to "unlawful" should also be reviewed, and amended, if necessary. She suggested that the Administration might wish to conduct further consultation to see whether a wider exercise to review all the related sexual offences should be pursued.

16. The Chairman added that when the issue of marital rape was initially brought up for discussion, the primary concern of the Panel was that it should be made clear in the law that marital rape was a crime. It was expected that some relatively simple amendments to the Crimes Ordinance would suffice to achieve that purpose. The Panel did not anticipate a concurrent overall review of related sexual offences.

17. SASG responded that a "wholesale" review of sexual offences would take a long time to be completed. He said that as far as the present exercise was concerned, it was the intention of the Administration to introduce legislative amendments to the Crimes Ordinance to deal with the issue of marital rape and the relevant consequential amendments, without expanding the scope to cover related sexual offences. He said that the final legislative proposals would be introduced into the Legislative Council in the current legislative session.

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Proposed Amendments to the Crimes Ordinance (Cap. 200)

Marital Rape and Related Sexual Offences

1. Interpretation

Section 117 of the Crimes Ordinance (Cap. 200) is amended by adding -

"(1B) For the purposes of this Part, "unlawful sexual intercourse" includes sexual intercourse between a husband and his wife if -

- (a) at the time of the intercourse the wife does not consent to it; and
- (b) the husband knows, at the time of the intercourse, that his wife does not consent to it or he is reckless as to whether she consents to it."

2. Rape

Section 118 is amended -

- (a) in subsection (3)(a), by repealing "unlawful";
- (b) by adding -

"(3A) For the avoidance of doubt, it is declared that in subsection (3)(a), "sexual intercourse" includes sexual

intercourse between a husband and his
wife.".

3. Intercourse with girl under 16

Section 124(2) is amended by adding "she consents to the
intercourse and" after "if".

4. Indecent conduct towards child under 16

Section 146(3) is amended by adding "she consents to the act
and" after "if".

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