

Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2001

Part V : Marital Rape

Information Paper

Introduction

At its meeting on 10 June 2002, the Bills Committee requested the Administration to provide a written description of the effect of its proposed Committee Stage Amendment of section 117 in Part XII of the Crimes Ordinance (Cap. 200) on the interpretation of (a) “unlawful sexual intercourse” in sections 118, 123, 124, 125, 127, 132, 133, 141 and 142, and (b) “unlawful sexual act” in sections 119, 120, 121, 128, 134, 135 and 140.

2. The Administration has also been asked to consider a suggestion that the amendment be restricted to sections 118, 119, 120 and 121. In order to avoid possible controversy arising from the application of the expressio unius rule of statutory interpretation there would be added a qualification that the amendment would not affect other provisions in Part XII. References to the reasons why the Administration considers that this suggestion should not be adopted will be made below in the description of the effect of the proposed CSA.

The Administration’s proposal

3. The proposed CSA amends section 117 by adding –

“(1B) For the avoidance of doubt, it is declared that in this Part, “unlawful sexual intercourse” (非法性交、非法的性交) does not exclude sexual intercourse that a man has with his wife.”.

Definitions

“unlawful”

4. At common law, “unlawful” in respect of rape and the related (or “non-rape”) sexual offences now means either outside marriage or (under Regina v R [1992] 1 AC 599 and HKSAR v Chan Wing Hung [1997] 3 HKC 472) within marriage where the wife does not consent to marital intercourse (hence making “unlawful” surplusage in section 118, or in any other material non-rape provision except section 127: Regina v R, 622A-C).

“unlawful sexual act”

5. Section 117(1A) 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.

6. Of the definition of “unlawful sexual act” in section 117(1A) of the Ordinance –

- (a) subparagraph (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 (Regina v R, 622H: it is clearly “unlawful” to have sexual intercourse with any woman without her consent);
- (b) subparagraph (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) subparagraph (c) would only apply to unmarried parties (same-sex marriage not being valid under Hong Kong law).

7. Since, for relevant purposes, “unlawful sexual intercourse” and “unlawful sexual act” have the same meaning, the effect of the proposed new section 117(1B) on the rape and non-rape offences will be considered chronologically as follows.

Section 118 (rape)

- Section 117(1B) will make it expressly clear that the principle in Regina v R (which abolished Hale’s proposition (1736) that a wife was deemed to have consented irrevocably to sexual intercourse with her husband) continues to apply in Hong Kong.
- Accordingly, a husband could be convicted of the rape or attempted rape of his wife where she had withdrawn her consent to sexual intercourse.

Sections 119 (procurement of unlawful sexual act by threats or intimidation), 120 (procurement of unlawful sexual act by false pretences or false representations), and 121 (administering drugs to obtain or facilitate unlawful sexual act)

- The procurer or facilitator (who might include the husband) of an unlawful sexual act in the form of non-consensual sexual intercourse of a wife with her husband would commit an offence under these sections.
- Since the principle in Regina v R extends to improperly obtained consent (as would the proposed section 117(1B) because it expressly applies in Part XII), a husband could be charged with an offence under sections

119 to 121, as opposed to the possibility merely of being convicted in the alternative further to section 149 where he has been acquitted of rape.

Sections 123 (unlawful sexual intercourse with girl under 13) and 124 (unlawful sexual intercourse with girl under 16)

- Both of these sections concern incompetence (or deemed incompetence) to consent on account of age and are aimed at the protection of children. Accordingly, consent is not a defence to these offences. Unlike section 124, no express marital defence is provided under section 123.
- Nevertheless, under the proposed section 117(1B), the principle under Regina v R would continue to apply unambiguously to protect the girls specified in these sections should they be married and should they be victims of non-consensual sexual intercourse perpetrated on them by their husbands. This qualification is particularly important in respect of the marital defence provided under section 124(2). The position would be less clear than is presently the case under Regina v R if the proposed amendment were on its face to be restricted in scope to sections 118 to 121.

Sections 125 (unlawful sexual intercourse with mentally incapacitated person) and 128 (abduction of mentally incapacitated person from parent or guardian for unlawful sexual act)

- Regina v R (as would the proposed section 117(1B)) operates potentially to protect married persons who may through accident or illness have become so severely mentally incapacitated that their capacity to consent to sexual intercourse is impaired. There is a risk that this existing potential protection of marital victims would be diminished if section

117(1B) were to be restricted under the suggested alternative amendment.

Section 127 (abduction of unmarried girl under 18 for unlawful sexual intercourse)

- The offence under section 127 is committed by “a person who takes an unmarried girl under the age of 18 out of the possession of her parent or guardian against the will of the parent or guardian with the intention that she shall have unlawful sexual intercourse with men or with a particular man.”
- As noted in Regina v R, 622A-C, “unlawful” is not mere surplusage in the English equivalent of section 127, since otherwise a man who took a girl under 18 out of her parents’ possession against their will with the honest and bona fide intention of marrying her might have no defence, even if he carried out that intention.
- The issue of non-consensual marital intercourse under Regina v R or the proposed section 117(1B) would only arise under this section in the unlikely event of a man taking away such a girl with the intention that he, or another man, should marry her and then commit marital rape or a non-rape offence against her.

Section 132 (procurement of girl under 21 to have unlawful sexual intercourse with a third person)

- It is extremely unlikely, even if possible, that the third person under section 132 would be the “girl’s” husband with whom she does not or would not consent to have sexual intercourse. Nevertheless, Regina v

R (as would the proposed section 117(1B)) operates potentially to protect a marital victim under this section.

Section 133 (procurement of a woman who is a mentally incapacitated person to have unlawful sexual intercourse)

- The same considerations as noted above in respect of sections 125, 128 and 132 apply under this section.

Section 134 (detention of a person against his or her will in a vice establishment with the intention that the other person shall do an unlawful sexual act)

- It is almost inconceivable that a wife would be so detained with the intention that she have non-consensual sexual intercourse with her husband within the terms of this section. Even so, the same considerations as noted above in respect of section 132 apply and, as a matter of presentation and principle, there is no good reason to dilute those considerations by restricting the interpretation of “unlawful sexual intercourse” in the proposed new section 117(1B) to sections 118, 119, 120 and 121.

Section 135 (person causing or encouraging, among other things, an unlawful sexual act with a girl or boy under 16 for whom that person is responsible)

- It is extremely unlikely that either Regina v R or the proposed section 117(1B) would have any relevance to this section. It may be questioned whether any person is responsible for a married girl under 16 other than herself or her husband or, in any event, that such person would (or could) cause or encourage her to have non-consensual sexual

intercourse with her husband. Similar considerations as noted above under section 132 apply.

Section 140 (permitting girl or boy under 13 to resort to or be on premises or vessel for, among other things, unlawful sexual act), 141 (permitting young person to resort to or be on premises or vessel for, among other things, unlawful sexual intercourse), and 142 (permitting mentally incapacitated person to resort to or be on premises or vessel for, among other things, unlawful sexual intercourse)

- Similar considerations to those noted above under section 132 apply.

Conclusion

8. The proposed section 117(1B) would confirm the removal (by Regina v R: “it is clearly unlawful to have sexual intercourse with any woman without her consent”) of a defunct common law exclusion from the meaning of “unlawful sexual intercourse”. This would make it clear that married women can be properly protected by the Regina v R principle under the applicable sexual offence provisions. As noted in paragraph 7 above, sections 118, 119, 120, 121, 123, 124, 125 and 128 are the main such provisions – the likelihood that married women would be involved as victims of their husbands under the other specified sexual offences is negligible, even if not inevitably impossible. Even in respect of the latter provisions, however, the Administration considers that there is no reason to restrict, or to appear to restrict, the protection which the updated common law now gives to married women by specifying or seeking to highlight particular provisions such as sections 118 to 121 in the proposed new section 117(1B).