

**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