

Letterhead of DEPARTMENT OF JUSTICE Legal Policy Division

LC Paper No. CB(2)62/00-01(06)

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

Tel. No.: 2867 4752

12 October 2000

Legislative Council Secretariat,
Legislative Council Building,
8 Jackson Road,
Central,
Hong Kong.
(Attn: Mrs Percy Ma)

Dear Mrs Ma,

Consultation Paper
Marital Rape and Related Sexual Offences
Meeting of Legislative Council Panel on Administration of
Justice and Legal Services on 17 October 2000

I refer to our telephone discussions in which you requested an update of the progress of consultation by this department on the question of marital rape.

After extensive research and consideration of the issues within the department, a consultation paper was finalised in September 2000. It is expected that translation of the paper will be completed by mid-October and that it will be circulated before the end of the month. Responses have been requested by 30 November 2000.

A copy of the consultation paper in English is enclosed for consideration by the Panel. We expect to be able to provide you with a copy of the Chinese version by the end of the week.

Yours sincerely,

(Stephen Kai-yi Wong)
Deputy Solicitor General (Advisory)

Consultation Paper

Marital Rape and Related Sexual Offences

This paper seeks comments on whether the Crimes Ordinance (Cap. 200) should be amended in respect of non-consensual marital intercourse.

The Problem

2. The offence of rape does not expressly state whether it includes non-consensual marital intercourse. The extent to which other offences that refer to "unlawful sexual intercourse" or an "unlawful sexual act" apply to non-consensual marital intercourse is unclear.

Recommendation

3. It is recommended that -

- (1) the offence of rape should be amended so that it expressly includes non-consensual marital intercourse;
- (2) Part XII of the Crimes Ordinance should be amended to make it clear that all offences involving "unlawful sexual intercourse" or an "unlawful sexual act" apply to non-consensual marital intercourse.

Background

The offence of rape

4. Under section 118(3) of the Crimes Ordinance, a man commits rape if -

- (1) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and
- (2) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it.

5. Earlier this year, the Legislative Council Panel on Administration of Justice and Legal Services ("AJLS Panel") expressed concern that, since it is possible that "unlawful sexual intercourse" still means intercourse outside the bounds of matrimony, the Crimes Ordinance should be amended to make it clear that marital rape is an offence. Similarly, the United Nations Committee on the Elimination of Discrimination against Women ("UN Committee") has commented that the term "unlawful" may create ambiguities. Consequently, the Administration is considering whether a legislative amendment should be introduced to put the matter beyond doubt.

6. The Administration's preliminary view is that, following the landmark decision of the House of Lords in Reg v R [1991] 1 WLR 767, a husband may be guilty of rape of his wife if, in the circumstances of the case, the wife does not consent to sexual intercourse. Further, all front-line police officers are instructed to handle marital rape cases according to this view of the law.

English case law

7. In Reg v R, at p. 770A-C, Lord Keith of Kinkel traced the common law meaning of "unlawful" back to Hale History of the Pleas of the Crown (1736) Vol. 1, Ch. 58, p.629, which states -

"But the husband cannot be guilty of a rape committed by himself upon his wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract."

8. At pp.772C-775A of Reg v R, Lord Keith reviewed several court decisions in which it was held that the wife's implied consent to marital intercourse could be revoked: for example, on grounds of her knowledge that the husband suffered from venereal disease, that he imposed intercourse by violence, or the existence of a non-molestation order or a family protection order.

9. At p.775B-D of Reg v R, Lord Keith continued -

"The position then is that that part of Hale's proposition which asserts that a wife cannot retract consent to sexual intercourse which she gives on marriage has been departed from in a series of decided cases. On grounds of principle there is no good reason why the whole proposition should not be held inapplicable in modern times. The only question is whether section 1(1) of the [Sexual Offences (Amendment) Act] 1976 [on which section 118(3) of the Crimes Ordinance is based] presents an insuperable obstacle to that sensible course. The argument is that "unlawful" in the subsection means outside the bond of marriage. That is not the most natural meaning of the word, which normally describes something which is contrary to some law or enactment or is done without justification or excuse. Certainly in modern times sexual intercourse outside marriage would not normally be described as unlawful. If the subsection proceeds on the basis that a woman on marriage gives a general consent to sexual intercourse, there can never be any question of intercourse with her by her husband being without her consent. There would thus be no point in enacting that only intercourse without consent outside marriage is to constitute rape."

10. At p.776C-G of Reg v R, Lord Keith noted that it was inconceivable that Parliament would have intended under section 1(1) of the 1976 Act to have abolished the exceptions to the marital exemption, and -

"In order that the exceptions might be preserved, it would be necessary to construe "unlawfully" as meaning "outside marriage or within marriage in a situation covered by one of the exceptions to the marital exemption." ... However, the gloss which the suggested construction would place on the word "unlawfully" would give it a meaning unique to this particular subsection, and if the mind of the draftsman had been directed to the existence of the exceptions he would surely have dealt with them specifically and not in such an oblique fashion. ... The fact is that it is clearly unlawful to have sexual intercourse with any woman without her consent, and that the use of the word in the subsection adds nothing. ... it should be treated as being mere surplusage in this enactment."

11. Lord Keith concluded, at pp.776H-777A of Reg v R -

"... in modern times the supposed marital exception in rape forms no part of the law of England ... [and this] (citing Lord Lane CJ in Reg v R in the Court of Appeal (Criminal Division) [1991] 2 WLR 1065, at p.1074) ... "is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it."

English statutory amendments

12. The Criminal Justice and Public Order Act 1994 adopted the decision in Reg v R that a man can be guilty of rape of his wife by repealing section 1(1) of the Sexual Offences (Amendment) Act 1976 and substituting a new section 1 in the Sexual Offences Act 1956. The new section 1(2)(a) of the 1956 Act omits the word "unlawful" and refers simply to "sexual intercourse".

13. The 1994 Act also deleted the word "unlawful" from sections 2(1) (procurement of a woman, by threats or intimidation, to have sexual intercourse) and 3(1) (procurement of a woman, by false pretences or false representations, to have sexual intercourse) of the 1956 Act.

14. However, the word "unlawful" remains in other offences under the 1956 Act, for example, sections 4 (administering drugs to obtain unlawful sexual intercourse), 5 (unlawful sexual intercourse with a girl under 13), 6 (unlawful sexual intercourse with a girl under 16), and 7 (unlawful sexual intercourse with a defective).

15. In Reg v R, at p.775H-776A, Lord Keith noted that, in the context of section 19 of the Sexual Offences Act 1956, cogent reasoning led the court in R v Chapman to the conclusion that "unlawful" meant outside the bond of marriage. Under section 19 of the 1956 Act it is an offence to abduct an unmarried girl under the age of 18 from her parent or guardian if she is taken with the intention that she have unlawful sexual intercourse with men or a particular man. Donovan J said, at p.105 of R v Chapman, that, "We do not think ["unlawful"] is mere surplusage, because otherwise a man who took such a girl 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."

Hong Kong law

16. Since in Reg v R the House of Lords held that the word "unlawful" added nothing, or was surplusage, in the then English equivalent of section 118(3)(a) of the Crimes Ordinance, that decision probably still represents the law in Hong Kong under Articles 8 and 18 of the Basic Law.

17. In HKSAR v Chan Wing Hung [1997] 3 HKC 472, at pp.475D-476A, the Hong Kong Court of Appeal considered the meaning of "unlawful" in section

119 of the Crimes Ordinance (under which it is an offence to procure another person, by threats or intimidation, to do an unlawful sexual act). At p.475G-H, Power VP said that the Court inclined to the view of Lord Keith in Reg v R that "unlawful" should be treated as mere surplusage. However, in the present case (the couple in question not being married), it was unnecessary to go further than to adopt the judgment of Donovan J in R v Chapman [1959] 1QB 100, at p.105, that "unlawful" in the context simply means illicit, that is outside the bond of marriage.

The Options

18. There appear to be three policy options regarding the possible amendment of the Crimes Ordinance in respect of marital rape and related sexual offences -

- (1) retain the status quo and rely on Reg v R and Chan Wing Hung as authority for the proposition that a man can be guilty of rape of his wife;
- (2) make it clear in section 118 that marital rape is an offence; and
- (3) clarify the meaning of "unlawful" in all sections.

Option 1: The status quo

19. As noted in paragraph 6 above, the Administration considers that marital rape is an offence under section 118 on the authority of Reg v R.

20. Further, as noted in paragraph 17 above, the Hong Kong Court of Appeal approved Reg v R in HKSAR v Chan Wing Hung. That was a case under section 119, and, since the couple in question were not married, the Court found that it was not "necessary to go further than to hold ... that *unlawful in the context* means illicit, that is outside the bounds of matrimony": p.475H of Chan Wing Hung [emphasis added]. Impliedly, had the couple been married, it would have

been open to the Court of Appeal "to go further" and hold on the authority of Reg v R that "in the context" the word unlawful was surplusage if the wife did not consent to the intercourse. Alternatively, the husband could (and probably would) have been charged with rape under section 118.

21. It therefore appears that there is no requirement on legal grounds to amend the Crimes Ordinance solely in respect of marital rape. Moreover, also as noted in paragraph 17 above, at p.475G-H of Chan Wing Hung, the Court of Appeal strongly indicated that it would have construed "unlawful" in section 119 in accordance with Reg v R had the context been that the man and woman concerned were married and the wife had not consented to the unlawful sexual act. Accordingly, it also appears that retaining the status quo has no negative implications for the meaning of "unlawful" in respect of other sexual offences.

22. The only drawback of the status quo appears to be that, from a public perspective, there is no express black-letter statement in the Ordinance to the effect that marital rape is an offence, and it is necessary to read section 118 with the relevant case law. It is, however, common for statute law to be supplemented by interpretation by the courts.

Option 2: Make it clear in section 118 that marital rape is an offence

23. Although such amendment is not considered to be legally necessary, a clear statement in section 118 to the effect that marital rape is an offence would allay public doubt regarding the meaning of "unlawful" such as has been expressed by the AJLS Panel and the UN Committee. At the same time, the word "unlawful" could be deleted from the section.

24. However, such an amendment could raise doubts about the coverage of other sexual offences that also include the expression "unlawful sexual intercourse" and "unlawful sexual act" (which is defined to include unlawful sexual intercourse). The word "unlawful" - which is the cause of the concern -

appears in other sections of Part XII of the Ordinance which create sexual offences (see paragraph 31 below). For example, it is an offence for someone to procure another, by threats or intimidation, to do an unlawful sexual act (section 119).

25. As shown by Reg v R and Chan Wing Hung, depending on the context, "unlawful" has two possible meanings, namely, outside marriage (that is, the traditional common law meaning - inclusive of the exceptions to the marital exemption noted in paragraph 8 above), or, if within marriage, without consent. Therefore if section 118 were not amended, the courts could give that word an appropriate meaning, depending on the context of each offence. For example, they could decide that, under section 119, it is an offence for someone to procure a married woman, by threats or intimidation, to have sexual intercourse with her husband.

26. However, if "unlawful" were to be deleted from section 118 because it is surplusage, it might be argued that the retention of that word in other sections demonstrated an intention that, in those sections, it should have its original common law meaning, i.e. outside marriage. This could prevent the courts from deciding (for example) that section 119 did cover intimidating a married woman to have sexual intercourse with her husband.

27. An alternative approach might be to leave "unlawful" in place in section 118 but to add a provision, "for the avoidance of doubt", stating that the offence of rape may be committed notwithstanding that the man and woman involved are married to each other.

28. However, as with the selective deletion of "unlawful", a disadvantage of such an amendment is that, by its confinement to section 118, this might also suggest that "unlawful", in the other offence sections in Part XII, was intended to have its traditional common law meaning of outside marriage. In other words, while such an amendment would ensure that non-consensual marital intercourse is

an offence for the purposes of section 118, it may have the opposite effect in respect of the offence sections in which the terms "unlawful sexual intercourse" or "unlawful sexual act" appear.

Option 3: Clarify the meaning of "unlawful" in all sections.

29. The third option would overcome the problems arising from an amendment of section 118, by making it clear whether other sexual offences could be committed where one of the elements of the offence is non-consensual marital intercourse.

30. Under this approach, it is necessary to consider each of the offences that refers to "unlawful sexual intercourse" or "unlawful sexual act" and to decide which of the two possible meanings of "unlawful" is appropriate. As has been explained above, there are two possible meanings of "unlawful".

- (1) Outside marriage, or within marriage but without the wife's consent in circumstances in which a man could (under common law exceptions) be guilty of rape of his wife. These circumstances include where there has been a judicial separation or decree nisi of divorce or nullity; where an injunction against molestation has been granted; where an undertaking has been given to the court not to molest; and where a formal deed of separation has been made. These circumstances are referred to below as "special marital circumstances".
- (2) Outside marriage, or within marriage in any circumstances where the wife does not consent.

31. An analysis of the effect of these two possible meanings of "unlawful" in respect of the relevant offence sections is set out below.

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)

- Under meaning (1), the procurer or facilitator of an unlawful sexual act in the form of non-consensual sexual intercourse of a wife with her husband (marital rape) would commit an offence under these sections only if one of the special marital circumstances applied.
- Under meaning (2), all procurers or facilitators of marital rape could be prosecuted under sections 119, 120 or 121 (as the case may be) even if there were no special marital circumstances.

Section 123 (unlawful sexual intercourse with girl under 13)

- Under meaning (1), a husband who had non-consensual intercourse with his wife who was under 13 could be guilty under this section only if there were special marital circumstances.
- Under meaning (2), a husband could be guilty under this section if, in any circumstances, he had sexual intercourse with his wife without her consent.

Section 124 (unlawful sexual intercourse with girl under 16)

- The comments noted above in respect of section 123 also apply to section 124.
- Section 124(2) provides a specific defence for a husband who believes a girl under 16 to be his wife and has reasonable grounds for the belief notwithstanding that the marriage is invalid under section 27(2) of the Marriage Ordinance (Cap. 181) by reason of the wife being under 16.

However, if such husband had non-consensual intercourse with the person he believed to be his wife, under meaning (1) he would commit an offence under this section only if there were special marital circumstances. Under meaning (2), he would commit an offence if he had sexual intercourse with her without her consent in any circumstances.

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

- It is possible that married persons may through accident or illness become so severely mentally incapacitated that they lose their capacity to consent to sexual intercourse.
- Under meaning (1), non-consensual sexual intercourse between a husband and his mentally incapacitated wife would only be "unlawful" if there were special marital circumstances.
- Under meaning (2), such non-consensual intercourse would be "unlawful" under these sections irrespective of whether there were such circumstances.

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 paragraph 15 above, it was held in R v Chapman that

"unlawful" was not mere surplusage in section 19 of the 1956 Act (the 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 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. In that situation, meaning (1) of "unlawful" would generally result in no offence being committed under this section, but meaning (2) would result in an offence.

32. Having reviewed all these offences, it is considered that meaning (2) is to be preferred in all cases. The adoption of that meaning would reflect the common law as developed by Reg v R and Chan Wing Hung and ensure that marital rape was included not only in section 118 but also in the related sexual offence sections in which "unlawful" appears.

The preferred approach

33. It is provisionally considered that the third option should be adopted, and that the relevant sexual offences should be clarified by -

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

Comments sought

34. It should be noted that this Consultation Paper is a discussion paper and does not necessarily represent any fixed views of the Administration. The object is to obtain feedback from interested members of the public on this topic to enable the Administration to reach a settled view. Comments on this paper by 30 November 2000 would be greatly appreciated.

Legal Policy Division
Department of Justice
September 2000

#21974 v 5