

**Legislative Council Panel on Administration of Justice and Legal Services**

**Meeting on 16 January 2001**

**Information Paper**

**Consultation on Marital Rape and Related Sexual Offences**

- Responses from
- (1) Hong Kong Bar Association
  - (2) The Law Society of Hong Kong
  - (3) City University of HK - Andy Chiu
  - (4) City University of HK - Sin Wai Man
  - (5) Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong

**LETTERHEAD OF HONG KONG BAR ASSOCIATION**

19 December, 2000

Ms. Agnes Cheung, SGC  
Legal Policy Division  
Department of Justice  
4/F., High Block  
Queensway  
Hong Kong

Dear Ms. Cheung,

**Marital Rape**

With reference to your letter of 18th October 2000, this matter has now been considered by the Bar Council.

We agree to your proposal under para. 33(1) but disagree with your para. 33(2), which we think would lead to more problems that it is designed to solve.

The simplest method of addressing the problem is in our view to remove the word "unlawful" from S. 118 and make it clear that marital rape is an offence, and leave the word "unlawful" to remain in other sections to bear the meaning at common law as explained in your paragraphs 30(2) and 32.

For our part we think that the amendment we suggest together with the common law as defined in Reg v. R and HKSAR v.Chan Wing Hung is enough in order to achieve your purpose.

Yours sincerely,

Ronny Tong, S.C.  
Chairman  
Hong Kong Bar Association

RT/WMK/pt



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22 December 2000

BY FAX (28690720) AND BY POST

Ms. Agnes Cheung  
 Senior Government Counsel  
 Legal Policy Division  
 Department of Justice,  
 4/F., High Block, Queensway Government Offices,  
 66 Queensway, Hong Kong.

Dear Ms. Cheung,

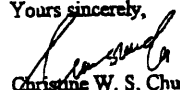
**Marital Rape and Related Sexual Offences**

Further to my letter to you dated 23 November 2000, I am pleased to advise that the Society's Criminal Law & Procedure Committee has considered the Administration's various proposals in the Consultation Paper on the above subject at its recent meeting.

The Committee agrees that the law should be clarified but has difficulty with the options put forward in the Consultation Paper. In particular, the Committee does not agree to the Administration's proposal for the word "unlawful" to be defined. Members can see problems with properly defining the word "unlawful". The term obviously does not exclusively mean "within marriage", as this would effectively limit the offence of rape to circumstances occurring between married partners. On the other hand, if it were an inclusive definition, query would arise on what is included or excluded and it will be unclear on what the definition is seeking to define. The Committee believes that what the Administration is seeking to clarify is that "unlawful sexual intercourse" include "sexual intercourse within marriage" as stated in the House of Lord decision but the House of Lords has already decided that the word "unlawful" is a surplusage. The Committee does not think that the offence should be clarified by putting a definition on the word "unlawful" as this may be inconsistent with the common law position.

The Committee would urge the Administration to revisit its various proposals in the light of the above and will give further comment on the issue upon receipt of the actual proposed amendments.

Yours sincerely,

  
 Christine W. S. Chu  
 Assistant Director of Practitioners Affairs

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**Letterhead of City University of Hong Kong**

School of Law

19 November 2000

received on 4/12/2000

Ms. Agnes Cheung  
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66 Queensway  
Hong Kong

Dear Ms Cheung

Re: Response Paper to  
Consultation Paper (Marital Rape and Related Sexual Offences)

Thank you for your letter dated 18 October 2000. It is really very encouraging that the Government proposes the abolition of the Marital Exemption of Rape ('the exemption', hereafter) as such exemption is a symbol of traditional gender discrimination within the legal discourse.

The Consultation Paper suggests 3 options, by which the Government believes that the exemption in Hong Kong could be effectively cancelled. Before discussing the options, we have to understand where the crux of the problem lies - the underlying theory of marital exemption of rape is that a lady, after marriage, has automatically given her consent to sexual intercourse to her husband, and thus becomes her husband's property. Unless this underlying assumption is removed, the marital exemption of rape cannot be completely cancelled. *Put simply, after the total abolition of the exemption, every man should be guilty of rape if the female victim does not consent to have sexual intercourse with him, regardless whether they are married or*

*not.*

The Consultation Paper lists out 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... (para 30(1))
- (2) Outside marriage, or within marriage in any circumstances where the wife does not consent. (para 30(2))

It is exactly the second possible meaning of 'unlawful' that would bring the complete abolition of exemption. In other words, only if the future amendment could fulfil this meaning, the abolition would be effective.

### *Option 1*

The option says that there is no need to amend the present statute on rape law, as the court could take the cases R v. R and R v. Chan Wing Hung as references. The consultation paper claims that the cases have already confirmed that the exemption is removed.

This, however, is not a good suggestion because: (1) R v. R is an English case, and is a judgment of House of Lords. So, whether it can bind any Hong Kong courts is a problem. Moreover, the court in Hong Kong may also restrict the application of the case to its own particular fact. Further, *if the Hong Kong court holds that only the first meaning of 'unlawful' - under certain circumstances, marital consent to sexual intercourse can be assumed - can be applied in the local context, then marital exemption cannot be regarded as completely cancelled, as I have stated above.* In fact, if R v. R has restated the law clear enough, the Law Commission in England would not have suggested a revision of rape law in 1994. (2) The fact in R v. Chan Wing

Hung does not concern the dispute between wife and husband, and the opinion given by the judge concerning the exemption is only an Obiter Dictum.

### *Option 2 and Option 3*

Option 2 in fact includes 2 choices: (1) abolition of the term 'unlawful' in section 118; and (2) addition of another provision, stating that 'rape may be committed between husband and wife' (Consultation Paper, page 8). The Consultation Paper states that choice (1) would make the meaning of 'unlawful sexual intercourse' in other sections look confusing, we therefore have to consider the context where the term 'unlawful' in provisions other than section 118(3) exists, so as to determine whether there will be any possible misunderstanding if the term in section 118(3) is cancelled. So, option 3 states that the definition of 'unlawful' has to be stated clearly in all other sections.

The term 'unlawful' in Section 118, in fact, has its own particular meaning; since even the term is deleted, the legal meaning of 'rape' is still clear; in other words, the term 'unlawful' is simply a redundancy. That was also why the traditional jurists thought that the term means 'extra-marital sexual intercourse'. However, 'unlawful' in other sections do not have the same problem, they do not mean 'extra-marital sexual act', but simply 'illegal sexual intercourse'.

In short, even if the term 'unlawful' in Section 118 is cancelled, 'unlawful sexual intercourse' in other sections could still be understood clearly, as the terms in sections other than section 118 would automatically be reduced to 'rape' and other illegal sexual act. No confusion will be caused. As Margaret Davies states in her book *Delimiting the Law: Postmodernism and the Politics of Law*, meaning of law and legal terms depends very much on the discourse where the interpretation takes place - if the law respects the women's autonomy on their bodies, then would law allow any heterosexual intercourse if the women's consent is not yet sought? The answer is so obvious.

Also, choice (2) of option 2 may cause further complications, as the redundant term 'unlawful' remains and therefore provides more uncertainties for the court.

*Conclusion*

Based on the above analysis, I therefore suggest that choice (1) of option 2 is the most appropriate choice, because it can remove the assumption that wife consents to the marital sexual intercourse by deleting the redundant term 'unlawful'. Actually, that is what English Parliament did in 1994.

Thanks for your attention. Should you have any problems, please feel free to contact me.

Yours truly,

Andy Chiu  
Assistant Professor  
School of Law  
City University of Hong Kong

**Letterhead of City University of Hong Kong**

School of Law

28 November 2000

received on 30/11/2000

Ms Agnes Cheung  
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99 Queensway  
Hong Kong

Dear Ms Cheung,

Consultation Paper: Marital Rape and Related Sexual Offences

I have the following comments on the captioned:

1. I agree that marital exemption to rape should be abolished. I also agree with the recommendation in 33(1) of the captioned consultation paper that 'unlawful' be deleted from s.118 Crimes Ordinance and an express provision that a marital relationship is immaterial to the offence of rape be added.
2. I, however, fear that Option 3, tentatively preferred by the Administration, as it is now, might have unintended consequences on two categories of related sexual offences, namely unlawful sexual acts obtained through various conducts prohibited under s.119, s.120 and s.121 of the Crimes Ordinance and unlawful sexual intercourse related to the (in) capacities of the victims under s.123, s.124 and s.125 of the Crimes Ordinance.  
ss.119-121
3. For ss.119-121, consent of the victim is not an issue under the present law. Presumably, they could be used in cases where proof of non-consent is difficult evidentially or where the consent, though exists, is obtained through various conducts prohibited under these three sections. *Linekar* [1995] 3 All ER 69 and the Commentary on it in [1995] Crim LR 320 illustrate this point well.
4. If meaning (2) for 'unlawful sexual intercourse' in Option 3 (hereafter Option 3(2)), i.e. 'outside marriage, or within marriage in any circumstances where the wife does not consent', is adopted, consent, hitherto not an element of the offence, will be introduced into these offences, in so far as parties to a marriage are concerned. Thus, parties to a marriage would receive *lesser protection* from the law than other non-marital parties, as proof of non-consent is required in the former but not the latter.



5. This could not be the real intention of this exercise of abolition/confirmation of abolition of marital exemption from sexual offences in the black-letter law.
6. Thus, to afford equal protection to parties to a marriage as well as non-marital parties, I recommend that the word 'unlawful' should be deleted from all these three sections.
7. In fact, in UK, they have already deleted the word 'unlawful' from their equivalent of HK's ss.119 & 120 (ss.2(1) & 3(1) of Sexual Offences Act 1956) by s.168 (1), (3), Sch 9, Para 2 of Criminal Justice and Public Order Act 1994. They seem to have decided to retain 'unlawful' in their equivalent of HK's s.121 though. That however should not be followed, and we should also delete 'unlawful' from our s.121, for the reasons given above.

ss.123-125

8. Again, consent has never been an element of these offences. In fact, arguably, the purposes of creating these offences related to the capacities of the victims are to avoid the difficulty of proving consent in rape under s.118.
9. If Option 3(2) is adopted, consent will become an element.
10. But, in fact, if non-consent could be proved between parties to a marriage, rape could be charged. To introduce non-consent as a condition for parties to a marriage in these sections is therefore unnecessary. Moreover, it runs the risk of creating the impression that marital rapes against women suffering from the (in) capacities prescribed in ss.124-125 deserve only *lesser offences*, the maximum penalties for both of which are significantly lower than that for rape - life imprisonment.
11. If non-consent becomes an element, it also could create inconsistency in offences charged for marital rapes concerning women of these (in)capacities, e.g. one marital rape of a mentally incapacitated person may be charged under s.118, and the other under s.125.
12. However, 'unlawful' should not be deleted altogether from these offences. For ss.123 & 124, there might be foreign marriages where marriage under the age of 16 or 13 are allowed (e.g. *Alhaji Mohamed v Knott* [1969] 1 QB 1, 16). For s.125, mentally incapacitated persons may also be married. Therefore, sexual intercourse within marriage for these people should be allowed, unless we are of the view that, due to these (in)capacities, no sexual intercourses with these women should be allowed, even if they are married to the men with whom they have the sexual intercourses. I, however, believe this is not our intention.
13. Therefore, I recommend 'unlawful' should be retained for these three sections, with a definition in s.117 that 'unlawful' means outside marriage.

ss.127 & 128

14. Offences under ss.127 & 128 concern more infringement of parental rights over their children than marital rape. Consent of the girl(s) concerned is not an issue here.
15. I believe the present consensus is marital rape should be punished as other non-marital rapes. I doubt if that consensus extends to these two sections, which concerns parental rights more than marital rape. My suggestions on these two sections are therefore both on technical and normative issues.
16. For s.127, I think the law is unnecessarily paternalistic for girls aged 16-18. Consensual sexual intercourse with girls aged between 16-18 is not a crime. It should, therefore, also not be a crime to take these girls out of the possession of their parents or guardians *against the will of these parents or guardians* for sexual intercourse if that sexual intercourse is *consensual*.
17. Provided that we agree a law protecting parental authority over girls aged 16-18 is necessary, I recommend that we should only punish those instances where such girl is abducted with the intention of having sexual intercourse with her *without her consent*, within or outside marriage. This could be done by specifying in the section that in relation to girls aged 16-18, the word 'unlawful' should be deleted from the offence and the words 'without her consent' be added between 'a particular man' and 'shall be guilty'.
18. For abductions of girls under 16 or mentally incapacitated persons for sexual intercourse, even if we presume protection of such parental authority is generally necessary, there is no reason why it should be extended to consensual sexual intercourse within marriages of such persons. I, therefore, recommend for girls under the age of 13 or 16 and mentally incapacitated persons, the meaning for 'unlawful' under Option 3(2), i.e. 'outside marriage, or within marriage in any circumstances where the wife does not consent', should be adopted.

Yours sincerely,

Sin Wai Man  
Lecturer  
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**Letterhead of The University of Hong Kong**

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17 December 2000

Dear Agnes

**Consultation Paper on Marital Rape and Related Sexual Offences**

Please find enclosed our submission on the Consultation Paper on Marital Rape and Related Sexual Offences. We hope it will be useful, and look forward to hearing further from you on this issue.

Wishing you a Happy Christmas  
Kind regards

Robyn Emerton

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**CONSULTATION PAPER**

**MARITAL RAPE AND RELATED SEXUAL OFFENCES**

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**SUBMISSION TO THE LEGAL POLICY DIVISION**

**BY THE**

**CENTRE FOR COMPARATIVE AND PUBLIC LAW,**

**FACULTY OF LAW, THE UNIVERSITY OF HONG KONG**

**17 December 2000**

**Centre for Comparative and Public Law**  
**Faculty of Law**  
**The University of Hong Kong**

The Centre for Comparative and Public Law was established in 1995 within the Faculty of Law of the University of Hong Kong. The purposes of the Centre are to promote research and other activities in the field of public and comparative law. The Centre has organised many seminars relating to international law and human rights in Hong Kong, and has a number of active research projects in this area.

The Director of the Centre is Associate Professor Andrew Byrnes, the Deputy Director is Associate Professor Zhang Xian Chu and the Director of the Equality and the Law Project is Associate Professor Carole Peterson. The principal researcher at the Centre is Robyn Emerton.

This submission has been prepared by Robyn Emerton. With thanks to Andrew Byrnes for his comments.

Further information about the Centre, as well as its activities and publications, is available at its website at: <http://www.hku.hk/ccpl/cedaw.htm>.

17 December 2000

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## **I. EXECUTIVE SUMMARY OF PRINCIPAL COMMENTS AND RECOMMENDATIONS**

- It is imperative from both a legal and a public policy point of view that the offence of rape in section 118 of the Crimes Ordinance be amended to expressly include non-consensual marital intercourse. We strongly support the Legal Policy Unit's proposed amendments to this section.
- Consideration also needs to be given to the procedural matters pertaining to charges of marital rape and other sexual offences within marriage, in particular whether a woman should be compellable by law to give evidence for the prosecution against her husband.
- Legislative amendment is only the first step towards reform in this area. The effective legal protection of women can only be achieved by the effective implementation of the law, which in turn requires a long-term commitment on the part of the Government to change negative cultural attitudes and stereotypes in both society and the criminal justice system, through education and training.
- The word "unlawful" in the context of "unlawful sexual intercourse" appears to be superfluous in sections 123, 124 and 125 of the Crimes Ordinance. The proposal to define "unlawful" non-exhaustively to include non-consensual marital intercourse may make these sections even more ambiguous than before. We urge the Legal Policy Division to conduct a broader review of the policy issues raised by these sections, as well as those sections using the expression "unlawful sexual act", with a view to determining whether in relation to each individual section it is appropriate to include the word "unlawful", and if so, how it should be defined.
- We urge the Government to conduct a comprehensive review of sexual offences in the Crimes Ordinance, with the aim of wholesale reform of the law in this area, to bring it up-to-date, to make it reflective of women's experiences, and also to eliminate the serious discrimination against sexual minorities contained in it.
- We urge the Government to conduct a comprehensive review of the gender impact of the operation of the criminal justice system.

## II. DETAILED COMMENTARY ON PROPOSED AMENDMENTS TO THE LAW

### Introduction

1. Having conducted a detailed review of the issues, in particular by reference to academic commentary on similar law reform processes in the UK, Australia and USA, we set out below our comments on the Consultation Paper.

### The Demise of the Marital Rape Exemption

2. In 1991, the House of Lords decision in *R v R*<sup>1</sup> finally abolished what remained of the marital rape exemption in England and Wales, confirming the Court of Appeal's conclusion that "the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim."<sup>2</sup>

3. In the equivalent of section 118 of the Hong Kong Crimes Ordinance, i.e. section 1 of the Sexual Offences Act 1956, the House of Lords held that the use of the word "unlawful" in the phrase "unlawful sexual intercourse" added nothing, and was "mere surplusage".<sup>3</sup> Following the decision in *R v R*, the law in the UK was changed, with the word "unlawful" being deleted from section 1 of the Sexual Offences Act 1956 pursuant to section 124 of the Criminal Justice and Public Order Act 1994. As will be discussed below (paras 7-8), *R v R* is clearly binding law in Hong Kong.

4. The marital rape exemption has also been abolished by legislatures and courts in many other jurisdictions in recent years, either in its entirety (for example, in Canada, New Zealand, Israel and certain states in Australia and the USA) or in part (for example, other states in Australia and the USA).

5. Indeed, endorsing the *R v R* decision in *CR v UK*,<sup>4</sup> the European Court of Human Rights stated that the abolition of the marital rape exemption conformed not only with "a civilised concept of marriage but also, and above all, with the fundamental objectives of the

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<sup>1</sup> [1991] 1 WLR, 767

<sup>2</sup> [1991] 2 All ER, 257, per Lord Lane CJ, 266

<sup>3</sup> [1991] 1 WLR, 767, per Lord Keith, 776

<sup>4</sup> European Court of Human Rights, judgement of 22 November 1995, Publications of the European Court of Human Rights, Series A, No 335 - C. The case actually argued before the ECHR was that the convictions and sentences in *R v R* were in breach of Article 7 of the Convention (retrospective punishment).



Convention, the very essence of which is respect for human dignity and human freedom".<sup>5</sup> Marital rape is also a form of gender-based violence, and as such is contrary to women's human rights to equality and non-discrimination, as confirmed by the United Nations Committee on the Elimination of Discrimination against Women (the *CEDAW Committee*) in its General Recommendation No.19 (*Violence against Women*).<sup>6</sup>

6. The Government is obliged to protect these same human rights - human dignity, freedom, equality and non-discrimination - in Hong Kong, pursuant to the International Covenant on Civil and Political Rights, which is directly incorporated into Hong Kong law in the form of the Bill of Rights Ordinance, and the Convention on the Elimination of all forms of Discrimination against Women (the *CEDAW Convention*), which was ratified in respect of Hong Kong in 1996. Indeed, in its Concluding Comments on the Initial Report of the Hong Kong SAR (3 February 1999),<sup>7</sup> the CEDAW Committee expressly called for legislative amendment in Hong Kong, "urg[ing] the amendment of existing legislation to include marital rape as a criminal offence"<sup>8</sup>. Thus clear and definitive abolition of the marital rape exemption in Hong Kong through legislative amendment is imperative as a public and positive affirmation of (women's) human rights in this area.

### **Does the House of Lords' decision in *R v R* represent binding Hong Kong Law?**

7. In our opinion, the House of Lords decision in *R v R*, having been handed down in 1991, is clearly binding on the courts in Hong Kong. However, we note that the Legal Policy Division had some hesitation in reaching this conclusion, stating in paragraph 16 of the Consultation Paper that the House of Lords decision in *R v R* "*probably* still represents the law in Hong Kong under Articles 8 and 18 of the Basic Law" (emphasis added).

8. Article 18 of the Basic Law provides that the laws in force in the Hong Kong Special Administrative Region shall be "the laws previously in force in Hong Kong as provided for in Article 8", which in turn defines such laws to include "the common law", provided it is not in contravention of the Basic Law and provided it has not been subject to legislative amendment.

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<sup>5</sup> *CR v UK*, supra (note 4), para 42. As discussed further in Stephanie Palmer, *Rape in Marriage and the European Convention on Human Rights*, *Feminist Legal Studies* 5(1) 91, 95.

<sup>6</sup> General Recommendations made by the Committee on the Elimination of Discrimination against Women, available on the website of the United Nations Division for the Advancement of Women, at: <http://www.un.org/womenwatch/daw/cedaw/recomm.htm> (site visited 17 December 2000).

<sup>7</sup> UN Doc Ref: C/1999/I/L.1/Add.7, available on the website of the Centre for Comparative and Public Law: <http://www.hku.hk/ccpl/cedawweb/cedawhkconccomments.html> (site visited 12 December 2000).

<sup>8</sup> *Ibid*, paragraph 74

The Legal Policy Division's statement in paragraph 16 presumably reflects some residual uncertainty as to the correct interpretation to be given to the "the common law" which was "previously in force in Hong Kong". Indeed, this has been the subject of considerable discussion - academic, judicial and political.<sup>9</sup> However, the common law of England, which was in force in Hong Kong as at 30 June 1997, has now been firmly established as being one of the relevant sources of law for the purpose of Article 18 of the Basic Law.<sup>10</sup> The House of Lords decision in *R v R* meets both those criteria. Finally, as the decision is not in contravention of the Basic Law, nor has it been subject to legislative amendment (the further criteria to be met under Article 8), it clearly represents the current status of the law in relation to marital rape in Hong Kong.

### **Court of Appeal decision in *Chan Wing Hung*: Obiter Dicta only**

9. From the Consultation Paper (paragraphs 17, 20, 21 and 32), the Legal Policy Division appears to give considerable weight to the Hong Kong Court of Appeal decision in *HKSAR v Chan Wing Hung*,<sup>11</sup> in which the Court considered the meaning of "unlawful" in the context of section 119 of the Crimes Ordinance (procuring an unlawful sexual act by threats or intimidation).

10. As noted in the Consultation Paper, Power VP made a very encouraging comment in the *Chan Wing Hung* case that the Court of Appeal "incline[d] to the view that it would be proper to follow the course adopted in *R v R* ... , in which Lord Keith said that the word [unlawful] should be 'treated as being mere surplusage in this enactment'".<sup>12</sup> However, Power VP went on to say that it was "not in the present case necessary to go further than to hold following the judgement of Donovan J in *R v Chapman* ... that unlawful in the context means illicit, that is outside the bounds of matrimony".<sup>13</sup> It is therefore clear that the Court of Appeal did not rely on *R v R* in making its decision in *Chan Wing Hung*, and that Power VP's comments in respect of the Court's inclination to follow *R v R* are *obiter dicta*. As such,

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<sup>9</sup> For a concise summary of the various interpretations given to these two terms, see Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong, Hong Kong University Press, 2nd Ed, 1999), 367 - 391.

<sup>10</sup> This cut-off date was confirmed in *HKSAR v Ma Wai Kwan David*, [1997] 2 HKC 315, Court of Appeal, per Chan CJHC, who stated, at 329F-G, that "the Basic Law came into effect on 1 July 1997 ... The only logical and in fact proper conclusion is that 30 June 1997 is the cut-off date."

<sup>11</sup> [1997] 3 HKC 472

<sup>12</sup> [1997] 3 HKC at 475, G-H

<sup>13</sup> *Ibid*, at 475, H-I

they are not binding on future courts (nor, in any event, would they be binding on the Court of Final Appeal) and are of much more limited authority than the Consultation Paper suggests.

### **Clear Legal Need to amend Section 118**

11. In paragraph 21 of the Consultation Paper, the Legal Policy Division reaches the conclusion, on the basis of *R v R* and *HKSAR v Chan Wing Hung*, that "it therefore appears that there is no requirement on legal grounds to amend the Crimes Ordinance solely in respect of marital rape". However, for a number of reasons, we disagree with this assessment and believe that there is a clear legal need to amend the Crimes Ordinance in respect of marital rape. These are set out below.

12. First, the Legal Policy Division itself is not consistent in its statements as to whether *R v R* is binding law in Hong Kong - whilst clear and positive statements to this effect are made in paragraphs 6 and 19, these are undermined by its statement in paragraphs 16 that "*R v R* ... *probably* still represents the law in Hong Kong" (as discussed in paras 7-8 above) and its conclusion in paragraph 21 that it only "*appears*" that there is no requirement to amend the Crimes Ordinance in respect of marital rape. Such uncertainties are probably reflected in the legal community at large. Indeed, the *CEDAW Committee*, in calling for legislative amendment in its Concluding Comments on the Initial Report of the Hong Kong SAR,<sup>14</sup> first "note[d] with concern that ... marital rape is not considered a criminal offence in the Hong Kong Special Administrative Region".<sup>15</sup> Such uncertainties can only be ironed out through clear legislative amendment.

13. Second, unless the abolition of the marital rape exemption is affirmed by legislative amendment, there is a risk that *R v R* might not be followed by the Hong Kong courts were such a case to come before it, for the following reasons:

13.1. Whilst the Court of Appeal made encouraging comments in *Chan Wing Hung* in relation to its inclination to follow *R v R*, as discussed above (paras 9-10), these comments were made in the context of section 119 of the Crimes Ordinance, and moreover, were *obiter dicta*. They are therefore not binding on a future court in interpreting the meaning of section 118 of the Crimes Ordinance.

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<sup>14</sup> UN Doc Ref: C/1999/I/L.1/Add.7, available at the website of the Centre for Comparative and Public Law: <http://www.hku.hk/ccpl/cedawweb/cedawhkconccomments.html> (visited 12 December 2000)

<sup>15</sup> *Ibid*, paragraph 73

- 13.2. (As a matter of law) it is open to the Court of Final Appeal, as the ultimate court of appeal in Hong Kong, to hold that *R v R* was decided wrongly and therefore to depart from the decision. Indeed, considerable concern was expressed at the time that the House of Lords had acted beyond its judicial powers in *R v R*, breaching the traditional principles of statutory interpretation and coming "perilously close to creating a new criminal offence"<sup>16</sup>. Power VP also makes reference to this in *Chan Wing Hung*, stating that "Lord Keith was conscious that it might be suggested that the court was usurping the power of the legislature ... as indeed are we" (emphasis added). A further argument might be made that the adoption of *R v R* is retrospective, as indeed was argued (albeit unsuccessfully) before the European Court of Human Rights in *CR v UK*.<sup>17</sup> Such criticisms may now have been stilled in the UK by legislative adoption of *R v R* in the form of an amendment to the Sexual Offences Act 1956, but they are issues which might well be raised before the Hong Kong courts to persuade it that the decision in *R v R* should not be followed in Hong Kong.
- 13.2. Notwithstanding the existence of a binding authority from the House of Lords that there is no longer a marital rape exemption, the Court of Final Appeal might in practice opt not to follow it, without any legal basis for its decision. Arguably, this is what occurred in the case of *Tang Siu Man v HKSAR*<sup>18</sup>, in which the Court of Final Appeal, whilst having before it a recent House of Lords decision directly on point<sup>19</sup>, showed no hesitation in departing from it (or, as one commentator expressed it, simply "assumed rather than argued that it was no longer bound by its decision"<sup>20</sup>).
14. Thirdly, as mentioned above (para 6), the CEDAW Committee called for legislative amendment in its Concluding Comments on the Initial Report of the Hong Kong SAR,<sup>21</sup> "urg[ing] the amendment of existing legislation to include marital rape as a criminal

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<sup>16</sup> Marianne Giles, *Judicial Law-Making in the Criminal Courts: The Case of Marital Rape*, Crim.L.R., 407, 410. See also, Ian Dennis, *Marital Rape*, CLP 1993, 46(1), 39-42, 41 and 42.

<sup>17</sup> See supra (note 4).

<sup>18</sup> [1998] 1 HKC 371

<sup>19</sup> Namely the Court of Appeal case of *R v Vye* (1991) 97 Cr App R 134, as approved by the House of Lords in *R v Aziz* [1996] 1 AC 41.

<sup>20</sup> Yash Ghai, *Hong Kong's New Constitutional Order*, supra (note 9), 370, note 14.

<sup>21</sup> Supra (note 14).

offence".<sup>22</sup> Legislative amendment is therefore also specifically required to fulfil Hong Kong's commitments under CEDAW.

### **Need to Amend Section 118 as Matter of Public Policy**

15. In paragraph 22 of the Consultation Paper, the Legal Policy Division states that it regards "the *only* drawback of the status quo" as being that "from a public perspective there is no express black-letter statement in the Ordinance to the effect that marital rape is an offence" (emphasis added). In our view, this very much understates the position. Notwithstanding the question of whether the proposed amendment is technically necessary as a legal matter, it is *imperative* that the law is amended as a matter of public policy, as a formal (and crystal clear) expression of society's condemnation of marital rape.

### **Conclusion**

16. We would therefore conclude that there is a definite (and pressing) need as a matter of law and public policy to amend section 118 of the Crimes Ordinance to expressly include non-consensual sexual intercourse within marriage as an offence.

17. We agree with the Legal Policy Division's proposal in paragraph 33 of the Consultation Paper, that the word "unlawful" should be deleted from section 118 and an express provision added that a marital relationship is immaterial to the offence of rape. Consideration might also be given to adding that a cohabiting relationship is immaterial to the offence of rape.

### **III. CRIMINAL LAW PROCEDURE: COMPELLABILITY AND OTHER ISSUES**

18. We were rather surprised that the scope of the Legal Policy Division's review did not extend to the procedural issues pertaining to cases of marital rape, since these can play a major role in the level of prosecution of such offences, which in turn impacts on the level of protection afforded to women against this crime.

19. The most important, if difficult, issue which arises in this context is whether a wife should be compellable to act as a witness for the prosecution in a charge of rape (or other sexual offence) committed against her by her husband.

20. We understand that the current position under Hong Kong law is that, even if a woman is *competent* to act as a witness for the prosecution in a case against her husband, she is never

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<sup>22</sup> *Supra* (note 14), paragraph 74

compellable in these circumstances, *Hoskyn v Metropolitan Police Commissioner*<sup>23</sup>. This is despite recommendations made by the Law Reform Commission in the mid-1980s for a spouse to be compellable for the prosecution in various situations, including "where the offence charged involved an assault on, or injury or threat of injury to, the wife ... of the accused".<sup>24</sup>

21. The issue of compellability was also considered in detail by the Law Commission of England and Wales in 1992, in its report *Criminal Law: Rape within Marriage*.<sup>25</sup> Section 80(1)(3)(a) of the Police and Criminal Evidence Act (1984) already made a spouse compellable where "the offence charged involves an assault on, injury or threat of injury, to the wife or husband of the accused", and had therefore largely reversed *Hoskyn* in England. However, the Law Commission could not be certain that section 80(1)(3)(a) would be interpreted to include cases of marital rape which were not accompanied by physical assault or injury (or threat thereof), and therefore recommended the insertion of a new sub-section in section 80, expressly making a wife compellable to give evidence for the prosecution in relation to any sexual offences committed against her by her husband. However, this recommendation does not appear to have been adopted<sup>26</sup>.

22. The Law Commission cited two main grounds for its conclusion that a woman should be compellable, first, that it would afford her some protection against pressure to withdraw her allegation, and second, that compellability was demanded by the public interest in the prosecution of a crime.<sup>27</sup> These grounds are equally relevant to the situation in Hong Kong.

23. In our view, the decision should be primarily driven by the issue of whether compellability would result in a greater level of protection for women (i.e. the first reason cited by the Law Commission). As Lord Edmund-Davies stated in his dissenting speech in *Hoskyn*, the dual role of the criminal law is "to render aid to citizens who themselves seek its protection, *and itself to take active steps to protect those other citizens, who, though grievously in need of protection, for one reason or other do not themselves set the law in*

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<sup>23</sup> [1978] 2 All ER 136. See Bruce, *Criminal Evidence in Hong Kong* (Hong Kong, Butterworths Asia, 1995, 3rd edition), paras 301 and 352.

<sup>24</sup> *Report on Competence and Compellability of Spouses in Criminal Proceedings*, as summarised in *Law Reform*, Commonwealth Law Bulletin, 1989 15(2), 481.

<sup>25</sup> Law Commission, *Criminal Law: Rape within Marriage*, No 205, 13 January 1992, paras 4.12 - 4.31

<sup>26</sup> As at October 2000, the Police and Criminal Evidence Act had not been amended in this manner.

<sup>27</sup> Law Commission, *Criminal Law: Rape within Marriage*, supra (note 25), para 4.17.

*motion*<sup>28</sup> (italics added). The views of relevant community groups, and of survivors of marital rape, would be key to making an assessment in this regard.

24. Other procedural issues which should be given proper consideration in the context of the current review are the rules on identifying parties to marital rape cases<sup>29</sup> and (also of relevance to victims of sexual offences generally), a review of how to make it less daunting and/or traumatic for women to testify in these cases, such as permitting them to give evidence through closed circuit television and providing witness support services throughout the proceedings.

#### **IV. PROTECTION OF WOMEN REQUIRES MORE THAN LEGISLATIVE AMENDMENT**

##### **Changing Negative Attitudes and Stereotypes**

25. Whilst it is imperative that section 118 of the Crimes Ordinance is amended to clearly encompass marital rape, this is the first and perhaps easiest stage of reform. As Australian academic Kathleen Mahoney puts it, "criminalizing an action within the home and between a husband and wife challenges a lot of the values and structures in our culture".<sup>30</sup> It is only by changing those values and structures that the law can be properly and effectively implemented, and thus provide true protection for women.

26. The Government has a vital role to play in this regard, in raising public awareness that marital rape is a crime, educating women about their rights, and ensuring that the law is implemented in a way that is not gender-biased against women. Whilst this is a far harder and more long-term task than legislative reform, it is a task that the Government has committed to under the CEDAW Convention, which obliges states parties to "take all appropriate measures ... to modify the social and cultural patterns of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on ... stereotyped roles for men and women" (Article 5).

27. In this regard, the Government's performance to date has been very poor. In fact, the Initial Report of the Hong Kong SAR to the CEDAW Committee in February 1999 contained absolutely no information on specific measures taken to eliminate gender biases and stereotyping in relation to domestic violence and sexual offences. Rather, a cross-reference

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<sup>28</sup> [1978] AC, 474, p.501, as cited in *ibid*, para 4.18, note 19.

<sup>29</sup> See for example Law Commission, *Criminal Law: Rape within Marriage*, *supra* (note 25), 26-29

<sup>30</sup> Kathleen Mahoney, *Rape in Marriage: Has the Licence Lapsed?* in Patricia Eastal (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (Sydney, Federation Press, 1998)

was simply made to the educative measures taken in the school curriculum.<sup>31</sup> We trust that the proposed Women's Commission will take a pro-active role in this area, within the framework of advancing gender equality generally in Hong Kong - a pressing task.

### **Incidence Level**

28. We have not been able to identify any studies on the incidence level of rape or other sexual offences within marriage in Hong Kong. However, more general surveys have been conducted in Hong Kong in the context of domestic violence and sexual violence, which provide useful data:

28.1. A recent survey of sexual offences conducted by the Association Concerning Sexual Violence against Women in 2000 found that in 46% of the cases reviewed, the women knew their assailant (although there is no data on which percentage husbands comprised).<sup>32</sup>

28.2. Another recent survey, conducted by the Hong Kong Association for Survivors of Women Abuse in 2000 in the field of domestic violence, found that 38 of 41 battered wives questioned had been forced to have sex with their husbands<sup>33</sup>. Although this survey shows a clear correlation between domestic violence and marital rape, it is important that marital rape is not simply perceived as a sub-set of domestic violence, since women's experience of marital rape may not be accompanied by violence (see further para 37 below)<sup>34</sup>.

### **Reporting and Prosecution**

29. Surveys in jurisdictions which have abolished the marital rape exemption show that there is an extremely low level of reporting and prosecuting in relation to marital rape.<sup>35</sup> This is not surprising, given the persistently low level of reporting and prosecution in relation to sexual offences generally around the world.

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<sup>31</sup> *The Initial Report of the HKSAR under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women*, October 1998 (Hong Kong, Home Affairs Bureau, 1998) para 39, cross-referring to para 73.

<sup>32</sup> South China Morning Post, *Rape Crisis Centre Plan for Victims*, 1 March 2000

<sup>33</sup> South China Morning Post, *Marital Abuse Law Must be Made Clearer*, 10 April 2000

<sup>34</sup> For further discussion on this issue, see Lisa Eskow, *The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualising its Prosecution*, Stanford Law Review 48(3), 677, 685

<sup>35</sup> For example, in relation to the situation in Australia, see Mahoney, *Rape in Marriage: Has the Licence Lapsed?* *Supra* (note 30), 114-115



30. In Hong Kong, the Association Concerning Sexual Violence against Women survey mentioned above (para 28.1) found that 85% of women had not reported sexual offences to the police; and an earlier survey by the Census and Statistics Department in 1998 found that the situation was even more serious, with 96% of women not reporting such offences to the police<sup>36</sup>. It is hoped that this appallingly low level of reporting may be improved somewhat by the establishment of the first rape crisis centre in Hong Kong (see further para 38 below), and hopefully more to follow.

31. However, there are many reasons a woman may not report a rape, or other sexual offence, committed against her by her husband. Phyllis Wong of Harmony House has voiced concern that there is a traditional attitude in Hong Kong that women are under a duty to oblige their husband's sexual requests.<sup>37</sup> In the context of domestic violence, the survey conducted by the Hong Kong Association for the Survivors of Women Abuse found that some 68% of battered women actually believed their partners had a right to use violence against them, including rape.<sup>38</sup> Thus the woman might not perceive herself to be a rape victim in the first place. Other reasons for not reporting might include fear of reprisal, financial and emotional dependency, and a belief that the police will not act.

32. In relation to the belief that the police will not act, research conducted by the UK Home Office in 1992 has in fact shown that, even if a woman reports rape cases in the first place, rape cases involving intimates are more likely than other types of rapes to result in a police decision not to take further action.<sup>39</sup> From our review of the literature, including that available on the situation in Hong Kong,<sup>40</sup> the most common reasons for the lack of police action appear to be:

- the belief that it is a private matter, in which the police should not get involved;

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<sup>36</sup> South China Morning Post, *Sexual Assault Law Outdated, say Activists*, 12 April 2000

<sup>37</sup> South China Morning Post, *The Rape of a Marriage*, 30 July 1995.

<sup>38</sup> South China Morning Post, *A Woman's Lot*, 8 March 2000.

<sup>39</sup> S Grace et al, *Rape: From Recording to Conviction*, Research and Planning Unit, Paper 71 (London; Home Office, 1992, 15), as referred to in Stephanie Palmer, *Rape in Marriage and the European Convention on Human Rights*, supra (note5), at 98.

<sup>40</sup> See for example, South China Morning Post, *Marital Abuse Law "Must be made Clearer"* 10 April 2000; and in the context of domestic violence generally, see submission by the Association for the Survivors of Wife Abuse, *"Domestic Violence"*, 12-13, and submission by Edith Chang, Harmony House, *"Protection of Women against Violence"*, 19, in the *Combined NGO Submission to the Legco Panel on Home Affairs*, available at the website of the Centre for Comparative and Public Law: <http://www.hku.hk/ccpl/cedawweb/CEDAW4.html> (site visited 12 December).

- the belief that restoring domestic harmony, and maintaining family integrity, should be paramount;
- the perception that unless the couple are estranged and the case involves extreme violence, it is not really a criminal act; and
- police experience of women being reluctant to pursue their allegations, which in turn makes the police reluctant to take such allegations seriously.

33. Whilst we understand from paragraph 6 of the Consultation Paper that front-line police are currently instructed that marital rape is an offence, concern has been expressed by groups in Hong Kong that, in practice, stereotypes and prejudices are deep-rooted in the police-force, and that further training is necessary. This may equally apply to doctors and social workers, to whom women might report the offence. Thus the Association Concerning Sexual Violence Against Women in the Combined NGO Submission to the Legco Panel on Home Affairs called for training for front-line police officers, as well as doctors and social workers, to "increase their understanding of rape and its hidden issues of prejudice and stereotypes against women", in the belief that having "professionals who are gender sensitive and do not possess negative stereotypes towards victims [is] important".<sup>41</sup>

34. These same issues may in turn influence prosecutors in exercising their discretion whether or not to prosecute a case; in addition, availability of evidence proving lack of consent is likely to be a key determining factor (see para 37 below).

### **Conviction and Sentencing**

35. Even if a case actually makes it to the courts, the decision-making process also takes place in a cultural context, which can further prejudice the woman's position. As stated by Justice Rosalie Abella, "every decision-maker who walks into a courtroom to hear a case is armed not only with the relevant legal texts, but with a set of values, experiences and assumptions that are thoroughly embedded".<sup>42</sup> These may include stereotypical attitudes on the part of both judges and juries about the nature and roles of men and women within marital relationships, and about the nature of marital rape.

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<sup>41</sup> Association Concerning Violence against Women, *Sexual Violence against Women*, in Combined NGO Submission, supra (note40).

<sup>42</sup> As quoted in Kathleen E. Mahoney, *Gender and the Judiciary: Confronting Gender Bias*, in K Adams and A Byrnes (eds) *Gender Equality and the Judiciary* (London; Commonwealth Secretariat, 1999)

36. In relation to judges, whilst no formal statistics are available,<sup>43</sup> there is no doubt that the number of male judges far outweighs the number of female judges in Hong Kong (certainly, there are no female judges at all serving on the Court of Final Appeal, whether as permanent, non-permanent or overseas judges<sup>44</sup>). There must therefore be a real risk of gender bias within the judiciary (however unwitting), that is, a propensity on the part of the judiciary to view issues primarily from the male perspective, rather than fully taking into account women's experiences. In addition, the "neutral" application of laws which are in themselves gender-biased can be prejudicial to the protection of women under the criminal justice system.

37. Academic studies in other jurisdictions identify a number of key areas in which negative cultural attitudes and stereotypes, as well as gender bias, tend to infiltrate the courtroom<sup>45</sup>, affecting the success of prosecutions and the level of sentencing in marital rape charges. These key areas relate to the issue of consent, and to the harm suffered by a woman who has been raped by her husband, and can be briefly summarised as follows:

- Whilst proving a lack of consent can be difficult in *any* charge of rape, it is likely to be particularly difficult to prove in a charge of marital rape. For, even if the law no longer deems a woman to have given irrevocable consent to sex when she marries, the traditional belief that a woman is under a duty to oblige her husband's sexual requests tends to linger on in society (see para 31 above) and hence in the courtroom.
- The fact that a woman has consented to sexual intercourse with her husband on previous occasions also tends to undermine the seriousness of her lack of consent on the occasion in question (particularly if she is still co-habiting with her husband). Thus Glanville Williams expresses the view that branding a husband a rapist and imprisoning him seems unfair, since "the [stranger rapist] never received consent, while the [husband rapist] has received favour in the past and is now perhaps only

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<sup>43</sup> We would urge the Government to produce such statistics.

<sup>44</sup> List of Judges of the Court of Final Appeal available from the Government's Judiciary website, at <http://www.infor.gov.hk/jud/guide2cs/html/cfa/judgeslast.htm>. (visited 13 December 2000)

<sup>45</sup> In particular see: in relation to the USA, Keith Burgess-Jackson, *Wife Rape*, Public Affairs Quarterly (1998) 12(1), 1; Rene Augustine, *Marriage: The Safe Haven for Rapists*, Journal of Family Law (1990-1991) Vol 3, 559, 572; in relation to California, Lisa Eskow, *The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualising its Prosecution* supra (note 34); in relation to Australia, see Mahoney, *Rape in Marriage: Has the Licence Lapsed?*, supra (note 30); in relation to UK, see Melisa Anderson, *Lawful Wife, Unlawful Sex - Examining the Effect of the Criminalisation of Marital Rape in England and the Republic of Ireland*, GA.J.Int'l & Comp.L, 27(57), 139.

temporarily out of favour".<sup>46</sup> This attitude has been shown to play a role in sentencing - the "prior relationship mitigation" as Mahoney dubs it.<sup>47</sup>

- Proving lack of consent in practice will usually require evidence of violence and resistance, yet it has been shown that this often does not reflect women's experience of marital rape, that women may submit through intimidation that involves threats that are not physical, for example that the husband threatening to cut off money to support the family.<sup>48</sup>
- There is a misguided belief that rape within marriage "cannot be nearly so traumatic for the wife as stranger-rape".<sup>49</sup> Thus, it has been shown that that in the UK, there is a tendency for much more lenient sentences to be handed down to husband rapists than stranger rapists, unless the rape was accompanied by extreme violence.<sup>50</sup> Yet, marital rape can be just as traumatic physically and psychologically as stranger-rape, if not more so, given the grave breach of trust involved. Further, the harm suffered by a woman in these circumstances is likely to be exacerbated, due to the fact that rape with marriage is more susceptible to repeated occurrences.<sup>51</sup>

There is no reason to believe that these "cultural and courtroom myths"<sup>52</sup> would be any less pervasive in Hong Kong

### **Support Services**

38. Finally, public resources must be made available to provide proper support to women in reporting sexual offences. In this regard, we welcome the setting-up of the first crisis centre for rape victims in Hong Kong at Kwong Wah Hospital, with Jockey Club funding. We would urge the Government to provide long-term financial assistance for these services, and for the setting-up and servicing of other such centres throughout Hong Kong. Other support services which should be considered include witness support services to guide and support women through the court proceedings.

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<sup>46</sup> Glanville Williams, *The Problem of Domestic Rape*, New Law Journal (1991), 205, 206.

<sup>47</sup> Mahoney, *Rape in Marriage: Has the Licence Lapsed?*, supra (note 30), at 120.

<sup>48</sup> Mahoney, *Rape in Marriage: Has the Licence Lapsed?*, supra (note 30), 116.

<sup>49</sup> Glanville Williams, *The Problem of Domestic Rape*, supra (note 46), 206

<sup>50</sup> Melisa Anderson, *Lawful Wife, Unlawful Sex - Examining the Effect of the Criminalisation of Marital Rape in England and the Republic of Ireland*, supra (note 45)

<sup>51</sup> Rene Augustine, *Marriage: The Safe Haven for Rapists* (note 45).

<sup>52</sup> Lisa Eskow, *The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualising its Prosecution*, supra (note 34), 695.

## **Conclusion**

39. Legal amendment, whilst in itself imperative, is only the first step in the reform process. It is only through the effective implementation of the law, in a non-stereotypical, non-gender biased manner, that women will be afforded effective legal protection. This requires a long-term commitment by the Government to raise public awareness that marital rape is an offence, to educate women about their rights, and to change the negative cultural attitudes and stereotypes which have been shown to pervade the reporting, prosecution, conviction and sentencing processes in relation to these offences. Thus in addition to a general public education campaign, education and training of the police, social workers, prosecutors, judges and juries in relation to the issues involved is also key.

## **V. THE MEANING OF "UNLAWFUL SEXUAL INTERCOURSE" IN OTHER SECTIONS OF THE CRIMES ORDINANCE**

### **Introduction**

40. We agree with the Legal Policy Division that serious ambiguities will arise if the word "unlawful" is deleted from the expression "unlawful sexual intercourse" in Section 118 of the Crimes Ordinance but remains in other parts of the Crimes Ordinance where the same expression is used. We also agree that further confusion arises with the use of the expression "unlawful sexual act" in parts of the Crimes Ordinance. However, we are not convinced that the proposal put forward by the Legal Policy Division in paragraph 33 of the Consultation Paper, namely to define "unlawful" non-exhaustively in section 117 to include non-consensual marital intercourse, will clarify the situation. In fact, we are concerned that it may make it even more confused.

### **Other Offences containing the term "Unlawful Sexual Intercourse"**

41. We have reviewed the other sections containing the term "unlawful sexual intercourse" in the Crimes Ordinance (namely sections 123, 124, 125 and 127) to establish whether *any meaning at all* could be ascribed to the word "unlawful" in these sections, and if so, what that meaning could be in each of these sections. We have *not* assumed that the meaning of "unlawful" is the same in each section, since, in our view, the drafters do not appear to have been as careful in their drafting as one would expect.

42. We believe that this broad approach is much more useful than the more narrow approach undertaken by the Legal Policy Division (as described in paragraph 30 of the Consultation Paper). This narrow approach fails to address the specific policy issues raised by

the use of the term "unlawful" in sections 123, 124, 125 and 127, which specifically relate to the protection of young and vulnerable women.

43. We must emphasise that time has not permitted a review of any relevant case law on these sections (whether Hong Kong or English case law), nor have we located any commentary on the meaning of "unlawful sexual intercourse" in these sections. Nevertheless, we set out below our preliminary analysis.

### **Section 123 (unlawful sexual intercourse with girl under the age of 13)**

44. Section 123 provides that "unlawful sexual intercourse with a girl under the age of 13" is an offence. There is no meaning at all which we can attribute to the word "unlawful" in this context, since we assume that sexual intercourse with a girl under the age of 13 in Hong Kong is intended to be an offence, *regardless of the circumstances*, including if she was married (noting that there is no defence in this regard, unlike that provided in section 124), or if she consented. If the girl did *not* consent, the offence would also constitute rape under section 118, although we note that the maximum penalty (life imprisonment) is the same under both sections. We therefore conclude that the word "unlawful" is superfluous in section 123, and should be deleted.

45. By contrast, taking the Legal Policy Division's position (paragraphs 31 and 32) to its logical conclusion would mean that a man could legally have sexual intercourse with a wife under 13, or for that matter, with *any* girl under 13, provided she consented. We assume that this cannot have been intended by the law-makers.

### **Section 124 (unlawful sexual intercourse with girl under the age of 16)**

46. Section 124(1) provides that, subject to subsection (2), "unlawful sexual intercourse with a girl under the age of 16" is an offence. Subsection 124(2) provides that a husband is not guilty of an offence under section 124 if, despite the invalidity of the marriage under Hong Kong law, he believed the woman to be his wife, and had reasonable cause for the belief.

47. Our understanding of section 124 is that it is an offence for a man to have sexual intercourse with a girl under the age of 16, whether or not she consented, except where he was married to her under the laws of another jurisdiction. If the girl did not consent, then the offence would also constitute rape within section 118 (which is punishable with life imprisonment, as opposed to 5 years' imprisonment under section 124). We cannot therefore attribute any meaning to the word "unlawful" in this section other than "outside marriage", however, this is already adequately provided for in subsection (2). We therefore conclude that the word "unlawful" is superfluous in section 124, and should be deleted.

### **Section 125 (unlawful sexual intercourse with mentally incapacitated person)**

48. Section 125(1) provides that a man who has "unlawful sexual intercourse" with a mentally incapacitated person is guilty of an offence, unless, by virtue of section 125(2), he did not know and had no reason to suspect her to be a mentally incapacitated person.

49. We are not sure what interpretation is given to "mentally incapacitated person" in this context. If the section refers (as would seem its natural meaning) only to persons who have completely lost their mental capacity to make decisions, including to consent to sexual intercourse, we assume the intention of the law-makers was to make *any* sexual intercourse with a mentally incapacitated person an offence, unless the defence in section 125(2) applies. If this is correct, then again we would conclude that the word "unlawful" is superfluous and should be deleted from section 125. However, it is not clear why this offence - if it is non-consensual of its very nature - should be punishable with a lesser maximum sentence (10 years' imprisonment) than rape (life imprisonment). However, if this section is premised on the assumption that persons with any, or certain, mental disabilities cannot (ever) consent to sex, then it is problematic, given the increasing recognition of the personal, and in particular in this context, the sexual rights of persons with mental disabilities.

### **Section 127 (abduction of unmarried girl under the age of 18 for unlawful sexual intercourse)**

50. Section 127 makes it an offence to take 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.

51. We note that under the authority of *R v Chapman*, the meaning to be given to the word "unlawful" in this section is "outside the bond of marriage". It would not create any ambiguities if the word "unlawful" were removed from all the other sections, as recommended above, but remained in section 127.

### **"Unlawful Sexual Act"**

52. We have not had time to conduct a similar review of all the sections containing the term "unlawful sexual act". However, if the Legal Policy Division concludes that the expression "unlawful sexual act" needs to be retained in the Crimes Ordinance, then, we would suggest that the definition of "unlawful sexual act" in Section 117 could be usefully amended along the lines of the following:

"(1A)For the purposes of this Part, a person does an unlawful sexual act if, and only if, that person:

- (a) has sexual intercourse *which constitutes an offence under this Part ...*"

### **Non-exhaustive definition of "Unlawful"**

53. As it is not at all clear what meaning, if any, should be attributed to "unlawful" in the context of "unlawful sexual intercourse", we would seriously question the usefulness of defining "unlawful" non-exhaustively to include non-consensual intercourse. Moreover, we are not convinced that this is a meaning which should be ascribed to "unlawful" in the context of sections 124, 125 and 127, which appear specifically to be included to protect the young and mentally incapacitated against sexual intercourse (consensual or not). In fact, the proposed definition is likely to result in even more uncertainty and ambiguity in relation to these offences than before.

### **Conclusion**

54. We hope that our brief review of the issues has demonstrated the need for a broader analysis of the meaning of "unlawful" in relation to all sexual offences containing the term "unlawful sexual intercourse" or "unlawful sexual act". It is only in this way that the legislation can be clarified (and indeed not further confused).

## **VI. COMPREHENSIVE REVIEW AND REFORM OF LAW ON SEXUAL OFFENCES**

55. Although we recognise this is a long-term project, and one which would need to be undertaken by the Law Reform Commission rather than the Legal Policy Division, we would urge the Government to undertake a comprehensive review of the substantive and procedural law on sexual offences in the Crimes Ordinance, as well as the impact of gender in the operation of the criminal justice system, with a view to wholesale reform. The limited review in the context of marital rape has clearly demonstrated such a need, although we support the Legal Policy Division's efforts to clarify the law in this particular area as quickly as possible.

56. The sexual offences part of the Crimes Ordinance is in many places outdated, is based on concepts, such as that of consent, which may not be reflective of women's experiences, and is seriously discriminatory towards sexual minorities. Major reform in this area has recently been undertaken by Australia, South Africa and the UK - we urge the Government to follow their lead.