

28 November 2000

Ms Agnes Cheung
Senior Government Counsel
Legal Policy Division
Department of Justice
4/F High Block
Queensway Government Offices
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.
3. ss.119-121
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
School of Law
City University of Hong Kong