

Supplemental paper for LegCo Panel on
Administration of Justice and Legal Services
Marital rape and related sexual offences

Background

At its meeting on 26 April 2001, the Panel requested the Administration to explain why amending the Crimes Ordinance (Cap. 200) to make it clear that marital rape is an offence could not be achieved merely by deleting “unlawful” from “unlawful sexual intercourse” in section 118. Such deletion would obviate any ambiguity regarding whether “unlawful” in the context of rape continued to mean outside the bounds of matrimony.

2. In paragraph 4 of the information paper provided to the Panel for its meeting on 16 January 2001 (the “Information Paper”), the Administration recommended that the law regarding rape and related 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.

3. At the time of the Panel’s meeting on 26 April 2001, the Administration was conducting correspondence (copied to the Panel) with the School of Law, City University of Hong Kong, the Faculty of Law, Hong Kong University, the Bar

Association, and the Law Society on two further issues –

- (1) the adoption of the definition of “consent” in sexual offences recommended by the English Law Commission (February 2000);
- (2) whether the proposed non-exhaustive definition of “unlawful” would be adequate to protect marital victims in respect of certain sexual offences related to rape.

4. The proposed amendments have now been finalised in Part V of the Statute Law (Miscellaneous Provisions) Bill 2001 which is to be introduced to LegCo on 4 July 2001. A copy of Part V of the Bill and the associated Explanatory Memorandum is attached at the Annex to this paper.

5. The matters noted above will be addressed below by way of explaining the effect of each proposed amendment and the policy reasons for them.

The proposed amendments

Clause 11. Interpretation

(a) Non-exhaustive definition of “unlawful”

6. The proposed new section 117(1B) defines “unlawful sexual intercourse” non-exhaustively to include marital intercourse that is non-consensual according to the criteria in the offence of rape. The reason for this is to pre-empt any suggestion that, by deleting “unlawful” from section 118 (see paragraph 11 below), the legislature intended that the term should take its traditional common law meaning of outside marriage in respect of the other sexual offence sections (for example, further to the definition, a person who by threats procured a married woman to have non-consensual sexual intercourse with her husband could be charged with an offence

under section 119). The definition reflects the basis of the decision in Reg v R [1991] 3 WLR 767 that it is clearly unlawful to have intercourse with any woman without her consent. There is detailed analysis of the effect of this meaning of “unlawful” in respect of the relevant sexual offence sections in paragraphs 30 and 31 of Annex A to the Information Paper.

7. As noted in paragraphs 24 to 28 of Annex A to the Information Paper, the proposed definition of “unlawful” is intended to ensure that deleting “unlawful” from section 118 does not lead to unintended results in respect of the other sexual offence sections in which “unlawful” is to be retained for the time being. A wide ranging review of the use of “unlawful” is beyond the scope of the current exercise.

8. In addition to the above considerations, the term “unlawful sexual act” in the Crimes Ordinance, which is not limited to unlawful sexual intercourse, is not used in the English Sexual Offences Act 1956. It is therefore insufficient simply to adopt the English response to Reg v R of deleting “unlawful” from provisions such as sections 119 to 121 of the Ordinance, seeking to imply that the related offences are intended to apply to a husband and his wife. Such deletion would also leave in those and some other provisions the term “sexual act”, for which there is no definition in the Ordinance.

(b) Definition of “consent”

9. The proposed new section 117(1C) incorporates the definition of “consent” recommended by the English Law Commission in its report Consent in Sex Offences (February 2000). Essentially, “consent” is defined as a subsisting, free and genuine agreement to the act in question, and the agreement may be express or implied, and evidenced by words or conduct, whether present or past.

10. The English Law Commission recommended this definition for the purpose of ensuring that the jury performs its duty of asking the question not only “did she consent?” but also “if so, what underlay her ‘consent’ which may as a matter of law invalidate her ‘consent’?”. A definition of “consent” is needed to help the jury to focus on what is often the most important defence in rape and related sexual offences. The definition of “consent” is relevant to marital rape since, for example, reflecting the judgment in Reg v R, the implied consent to marital intercourse given by a wife upon marriage would be invalidated if it were not subsisting when her husband had intercourse with her.

Clause 12. Rape

11. Section 118 is amended by repealing “unlawful” in subsection (3)(a) and by adding a new subsection (3A) declaring, for the avoidance of doubt, that “sexual intercourse” includes marital intercourse. The reason for such amendment is to achieve the policy object of making it expressly clear in section 118 that marital rape is an offence.

Clauses 13 (procurement by threats), 14 (procurement by false pretences), and 15 (administering drugs)

12. Sections 119(1), 120(1), and 121(1) respectively are amended by adding a reference to “marital intercourse”. The reason for these amendments is to make it clear that sections 119 to 121 are intended to protect all women from such sexual offences whether in the context of marital intercourse or of intercourse outside marriage.

Clauses 16 (intercourse with girl under 16), and 17 (indecent conduct towards child under 16)

13. Section 124(2) is amended, and section 146(3) is repealed and replaced,

to make it clear that the marital defences provided under the two subsections do not apply where the respective sexual offences are non-consensual.

Legal Policy Division

Department of Justice

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PART V

MARITAL RAPE AND RELATED SEXUAL OFFENCES

11. Interpretation

Section 117 of the Crimes Ordinance (Cap. 200) is amended by adding -

“(1B) For the purposes of this Part, “unlawful sexual intercourse” (非法性交、非法的性交) includes sexual intercourse between a husband and his wife if -

- (a) at the time of the intercourse the wife does not consent to it;
- and
- (b) at the time of the intercourse the husband knows that his wife does not consent to it or he is reckless as to whether she consents to it.

(1C) For the purposes of this Part, where a person’s lack of consent to a certain act is an element of, or relevant to, a sexual or related offence, “consent” (同意) means a free, genuine and subsisting agreement to the act, and the agreement -

- (a) may be express or implied; and
- (b) may be evidenced by words or conduct, whether present or past.”.

12. Rape

Section 118 is amended -

- (a) in subsection (3)(a), by repealing “unlawful”;
- (b) by adding -

“(3A) For the avoidance of doubt, it is declared that in subsection (3)(a), “sexual intercourse” (性交) includes sexual intercourse between a husband and his wife.”.

13. Procurement by threats

Section 119(1) is amended by adding “or marital intercourse” after “act”.

14. Procurement by false pretences

Section 120(1) is amended by adding “or marital intercourse” after “act”.

15. Administering drugs to obtain or facilitate unlawful sexual act or marital intercourse

Section 121(1) is amended by adding “or marital intercourse” after “act”.

16. Intercourse with girl under 16

Section 124(2) is amended by adding “she consents to the intercourse and” after “if”.

17. Indecent conduct towards child under 16

Section 146(3) is repealed and the following substituted -

“(3) A person who commits an act of gross indecency with or towards a child or who incites a child to commit an act of gross indecency with or towards him or her is not guilty of an offence under this section if -

- (a) that person is, or believes on reasonable grounds that he or she is, married to the child; and
- (b) the child consents to the act of gross indecency.”.

Explanatory Memorandum

5. Part V amends the Crimes Ordinance (Cap. 200) -

- (a) to provide that the reference to “unlawful sexual intercourse” in Part XII of that Ordinance includes non-consensual marital intercourse;
- (b) to provide for the meaning of “consent” in relation to sexual and related offences;
- (c) to make it clear that marital rape is an offence;
- (d) to add a reference to “marital intercourse” in 3 related sexual offences in sections 119 (procurement by threats), 120 (procurement by false pretences) and 121 (administering drugs to obtain or facilitate unlawful sexual act) of that Ordinance; and
- (e) to provide that marital defences are not applicable to non-consensual sexual intercourse and non-consensual gross indecency.