LC Paper No.CB(2)1363/03-04(01)

For discussion on
23 February 2004

LegCo Panel on Administration of Justice and Legal Services

List of outstanding items for discussion (as at 28 October 2003)

Item 11: Review of sexual offences in Part XII of the Crimes Ordinance

Background

The Bills Committee which scrutinised the amendments regarding marital rape in the Statute Law (Miscellaneous Provisions) Bill 2001 urged that, following the enactment of those amendments, the Administration conduct without delay a full review of the sexual offences in Part XII of the Crimes Ordinance (Cap. 200) "in the context of a law reform".

2. The Bills Committee requested the AJLS Panel to follow up the progress of the review and the Panel agreed that the issue should be followed up at an appropriate time. The review is listed as item 11 of the list of outstanding items for discussion by the Panel (the position as at 28 October 2003).

Approach

3. The Secretary for Justice made it clear, in her speech on the resumption of the Second Reading of the Statute Law (Miscellaneous Provisions) Bill 2001, that the Administration appreciated that there was a need to revise and update the law relating to sexual offences when there was an identified inadequacy in a particular area or offence. This has guided our approach to sexual offences. Examples include amendments to the rules related to the competence and compellability of spouses in criminal proceedings, a proposed offence of persistent sexual abuse of a child, and the recent enactment of the Prevention of Child Pornography Ordinance which aims at protecting children from sexual exploitation and sexual abuse by prohibiting child pornography, pornographic performance by children and child sex tourism.

4. Review of sexual offences is a multi-faceted issue, which should be addressed not only from a law enforcement perspective but also having regard to other dimensions such as rehabilitation of offenders, services for victims, education etc. Accordingly, in addition to the legislative efforts described in paragraph 3 above, the Administration has put in place other relevant measures. For example, the Working Group on Combating Violence, comprising representatives from non-Government organizations and various Government bureaux and departments[1], is set up to examine the problem of sexual violence and spouse battering, map out strategies and strengthen multi-disciplinary collaboration to tackle the problems.

5. Furthermore, experience has shown that the review and legislative process in respect of even a single sexual offence may take years to complete e.g. homosexual law reform, the recent failed attempt to create a new offence of persistent sexual abuse of a child, the marital rape amendment and abolition of the corroboration rules in sexual cases. Some brief information about these time-consuming projects is at the **Annex**. A complete review of sexual offences would be a very large-scale exercise. This might have the inadvertent effect of delaying the review and passage of legislation in respect of particular offences or forms of behaviour that require attention.

6. It is clear, therefore, that the Administration has been taking active steps to ensure that our sexual offences are revised where necessary, and that women and vulnerable persons are fully protected from sexual abuse.

The Administration's position on a full review

7. The Administration's position remains that instead of a full-scale review, specific sexual offences should be revised as and when the need arises and this should be a continuing process.

Legal Policy Division
Department of Justice
February 2004

#303134 v.6

---

[1] These departments include the Health, Welfare and Food Bureau, the Social Welfare Department, the Department of Health, the Legal Aid Department, the Department of Justice, the Education and Manpower Bureau, the Security Bureau and the Hong Kong Police Force.

Annex

Examples of time-consuming exercises in reforming or attempting to reform individual sexual offences

Homosexuality

1. On 14 June 1980, the then Attorney General and Chief Justice referred this topic to the Law Reform Commission for study.

2. On 5 July 1980, the Commission appointed a Sub-committee to research, consider and advise on the topic. The Sub-committee studied the topic for some two years. On 28 June 1982, the Sub-committee reported to the Commission.

3. With the benefit of the report of the Sub-committee, the Commission considered the topic at meetings during the subsequent 9 months between July 1982 and April 1983.

4. On 15 April 1983 the Commission published its final report on the topic, recommending various changes in the law governing homosexual conduct in Hong Kong.

5. The proposed changes were controversial, given the social values of the local community at the time. The decriminalization of consensual homosexual conduct by adults was seen as unacceptable by some people. They took the view that homosexuality was not tolerated by traditional Chinese concepts of morality and that man was by nature heterosexual.

6. In March 1991 the Crimes (Amendment) Bill was introduced into LegCo.

7. In July 1991, the Crimes (Amendment) Ordinance (90 of 1991) was finally enacted effecting the recommended changes to the relevant laws governing homosexual conduct in Hong Kong.

8. Roughly, it took about 11 years from the time a reference was made to the Commission to the time that the relevant reform was implemented by legislative changes.

Proposed creation of a new offence of persistent sexual abuse of a child

9. The proposal to create an offence "persistent sexual abuse of a child" was made in response to the ruling in the case *CHIM Hon-man v HKSAR* [1999] 1 HKC 428. It was observed that as a result of the ruling in the *CHIM* case, it is no longer possible to rely on sample charges in multiple incest/rape/sexual offences where the offences are alleged to have occurred over a lengthy period (which might be several years before the prosecution) and where the complainant is unable to identify specific allegations with particularity.

10. It was proposed that amendments be made to the Crimes Ordinance (Cap. 200) to create a new offence of "persistent sexual abuse of a child". This would model on the Crimes Legislation Amendment (Child Sexual Offences) Act 1998 No. 131 of New South Wales. Most of the Australian states, namely, Victoria, Tasmania, Queensland and the Australian Capital Territory, have already enacted similar legislation and New South Wales was the most recent state to do so.

11. The Administration consulted the Bar Association and the Law Society regarding the proposal. The proposal met with strenuous opposition from the legal profession. In their joint response of 22 April 2002, the Bar and Law Society indicated that they have strong reservations over the proposed creation of a new offence. They considered that the proposed legislation could not be justified on the basis of current procedural difficulties in drafting particulars of the offences and/or providing a representative number of counts to reflect the gravity of the wrongdoing. They were concerned that as soon as three incidents are particularized in an indictment under the proposed legislation, the complainant would be permitted without restriction to make allegations for the first time in the witness box. A conviction could be inadvertently (and wrongly) procured by ambush. To allow this would undermine the fairness of our criminal justice system.

12. At the AJLS Panel meeting held on 22 April 2002, the Administration briefed the Panel that, subsequent to the CFA case of CHIM Hon-man v HKSAR [1999] 1 HKC 428, the Prosecutions Division and the Hong Kong Police have approached the preparation and investigation of cases of this type by introducing specific reference points during interview with complainants to enable some degree of specificity regarding the dates of offences. By introducing some markers, the interviewer is able to work backward or forward to identify other occasions which are then pleaded on the indictment. The Panel was told that there had so far been no

case in which a prosecution could not be advanced or was unsuccessful by adopting this approach.

13. On May 2003 the DPP decided that the matter should be put on hold until such time as we can point to specific instances pointing to a pressing need for the proposed change. The DPP suggested that the position should be reviewed sometime in January 2005, to see whether problems exist at that time such as to require the revival of the proposals.

Marital rape

14. In May 2000, the AJLS Panel expressed concern that it was unclear whether "unlawful sexual intercourse" in the offence of rape under section 118 of the Crimes Ordinance (Cap. 200) could still mean intercourse only outside the bounds of matrimony. Therefore they recommended that the Crimes Ordinance should be amended to make it plain that marital rape is an offence.

15. The Department of Justice was of the view that, following the decision in *Regina v R [1992] 1 AC 599*, 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, it agreed to propose legislative amendments to put the matter beyond doubt.

16. On June 2001, the Statute Law (Miscellaneous Provisions) Bill 2001 was introduced to clarify the law on marital rape by deleting the word "unlawful" from section 118, and clarifying the meaning of "unlawful" in "unlawful sexual act" to ensure that the term means outside marriage, or within marriage in any circumstances where the wife does not consent.

17. After subsequent detailed discussion of the proposed amendment and consultation with the Law Society and the Bar Association, the Bills Committee suggested a minimalist approach. Under this approach, the express scope of the proposed clarification of the law would be limited to the offence of rape, and to three other offences of which a person charged with rape may be convicted, but without affecting the application of *Regina v R* to other sexual offences.

18. The drafting of the Bill took about four months between February 2001 and June 2001. However, there were a number of Committee Stage Amendments

when the Bills Committee scrutinized the Bill from 3 April 2002 to 10 July 2002. As the drafting of the last batch of Committee Stage Amendments was completed on 8 June 2002, the drafting process in fact took 16 months.

19. The Statute Law (Miscellaneous Provisions) Ordinance was passed by the LegCo on 10 July 2002. Section 11 of the Ordinance makes it clear that, for the purposes of sections 118 (rape), 119 (procurement by threats), 120 (procurement by false pretences) and 121 (administering drugs to obtain or facilitate unlawful sexual act) of the Crimes Ordinance (Cap 200), the expression does not exclude sexual intercourse that a man has with his wife. The applicability of the principles in *Regina v R* to any other provisions under Part XII of the Crimes Ordinance dealing with sexual and related offences remains unaffected.

The abolition of corroboration rules in sexual offences

20. On 3 July 1998, the DPP referred this topic to the Legal Policy Division (LPD) for study.

21. LPD undertook the necessary research and formulated proposals for reform. In September 1998, the Administration consulted the Bar Association and the Law Society for their preliminary views on the proposal.

22. In December 1998, the drafting process commenced and Draft Drafting Instructions were issued. The drafting and approval of the draft took about 8 months.

23. The LegCo AJLS Panel was consulted on 27 May 1999 and the Legal Affairs Policy Group was consulted on 21 May 1999.

24. On 7 July 1999, the Evidence (Amendment) Bill 1999 was introduced into the LegCo.

25. The Bills Committee issued written questions for the Administration on four occasions on 11, 13, 25 and 28 April 2000. There were also written queries on the proposal from various concerned bodies – Bar Association, Association Concerning Sexual Violence Against Women, Equal Opportunities Commission, Hong Kong Council of Social Services, and Hong Kong Human Rights Monitor.

26. The Bill then went through three Bills Committee meetings between 15 April 2000 and 30 May 2000.

27. The Evidence (Amendment) Ordinance (Ord. 43 of 2000) was enacted on 21 June 2000 and gazetted on 30 June 2000, abolishing the requirement that a jury must be given a warning about the danger of convicting an accused charged with any sexual offence (including incest) on the uncorroborated evidence of the person in respect of which that offence is alleged to have been committed.

#304246v2