

Extract from the Report of the Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2001 for the House Committee meeting on 28 June 2002

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Marital rape and related sexual offences (Part V -- clauses 11 to 17)

6. At previous meetings of the AJLS Panel when the issue of marital rape was discussed, concerns were raised about the confusion caused by the definition of rape under section 118(3) of the Crimes Ordinance (Cap. 200) in that the term "unlawful sexual intercourse" could be interpreted, under the old common law interpretation, as sexual intercourse outside the bounds of marriage. It was also thought that there was a presumption of consent in marriage to sexual intercourse. Hence, it was sometimes thought that a husband could not be convicted of rape of his wife. The law was clarified in the English House of Lords decision of *Regina v R [1991] 4 All ER 481* to remove the old interpretation and presumption stated. The Panel considered that it was desirable to introduce legislative amendment to make it clear that marital rape is an offence.

7. The Administration advises the Bills Committee that in the case of *Regina v R*, the House of Lords had held that a husband may be guilty of rape of his wife if the wife does not consent to the sexual intercourse. In the views of the Administration, the House of Lords decision removes the outdated marital immunity under common law, i.e. a man could not be found guilty of rape of his wife. On the authority of this landmark judgment, therefore, marital rape is an offence. Nevertheless, the Administration supports the view that the legislation should be amended to put the matter beyond doubt.

8. Clause 12 of the Bill seeks to amend section 118 of Cap. 200 by deleting the word "unlawful" from "unlawful sexual intercourse" in section 118(3)(a), and expressly providing that "sexual intercourse" includes sexual intercourse between a husband and his wife. Clause 11 proposes to amend section 117 to define "unlawful sexual intercourse" used in Part XII of Cap. 200 to include non-consensual marital intercourse. Clauses 13 to 17 seek to make consequential amendments to certain (but not all) provisions which contain references to "unlawful sexual intercourse" or "unlawful sexual act".

9. In considering the scope of the proposed amendments, the Bills Committee agrees to the view expressed at meetings of the AJLS Panel that while it is necessary to review statutory sexual offences so as to remove outdated bias and give stronger protection to women, especially married women, it is desirable to bring about legislative amendment to remove the misconception on the offence of marital rape as a matter of urgency. The Bills Committee considers that instead of amending the sexual offence provisions in Part XII of Cap. 200, a "minimalist" approach mainly to

deal with the offence of rape would suffice for the purpose of the present amendment exercise. A comprehensive review of the other non-rape sexual offences should be conducted thereafter as soon as possible. The Administration supports this proposal.

10. The Administration proposes to delete all the clauses in Part V of the Bill and replace clause 12 with a modified version of a proposed section 118(3A). The proposed section 118(3A) reads as follows -

"(3A) For the avoidance of doubt, and without affecting any other provisions of this Part, it is declared that in subsection (3)(a), "unlawful sexual intercourse" includes sexual intercourse that a man has with his wife if the wife at the time of the intercourse does not consent to it."

11. In the views of the Administration, with the proposed new section 118(3A), it is possible to retain "unlawful sexual intercourse" in section 118, and at the same time clarify that marital rape is an offence. Accordingly, clause 11 and clauses 13 to 17 of the Bill, which are mainly consequential to the originally proposed deletion of "unlawful" from section 118, become peripheral to the object of Part V, and may be deleted pending a future full review of sexual offences.

12. The Bills Committee accepts that the word "unlawful" may be retained in section 118 of Cap. 200. The Bills Committee has however asked the Administration to consider amending section 117 by providing an interpretation of "unlawful sexual intercourse" for the purposes of sections 118, 119, 120 and 121.

13. The Bills Committee notes that section 149(1) and item 1 of the Schedule to the Crimes Ordinance provide that where on a charge of rape the accused is acquitted, but it is proved that the accused is guilty of an offence under (a) section 119 (procurement of unlawful sexual act by threat or intimidation); or (b) section 120 (procurement by false pretences or false representations); or (c) section 121 (administering drugs to obtain or facilitate unlawful sexual act), he shall be convicted of such offence. The Bills Committee considers that to expressly provide that the interpretation of "unlawful sexual intercourse" applies for the purposes of sections 118, 119, 120 and 121 would ensure that an accused person acquitted of the offence of rape of his wife under section 118 could alternatively be convicted, in the circumstances of the case, of the non-rape sexual offences under sections 119, 120 or 121 when applying section 149 and the Schedule.

14. The Administration subsequently revises its amendment proposal by proposing to delete all the clauses in Part V except clause 11. Clause 11 is proposed to be replaced by a new section 117(1B) which reads -

"(1B) For the avoidance of doubt, it is declared that in this Part, "unlawful sexual intercourse" does not exclude sexual intercourse that a man has with his wife."

15. According to the Administration, the interpretation of "unlawful sexual intercourse" in the above proposed new section 117(1B) would make it clear that married women are protected under all of the sexual offence provisions. The Administration considers that the amendment gives statutory expression to the principal expounded in *Regina v R* and it is not necessary to limit the interpretation of "unlawful sexual intercourse" specifically to sections 118, 119, 120 and 121.

16. The Bills Committee has sought the views of the legal profession on Part V of the Bill and the Administration's proposed new amendments. The Law Society supports a minimalist approach and agrees that the immediate concern is to make it clear that a man may be guilty of rape of his wife. It is of the view that trying to offer a general definition of "unlawful sexual intercourse" for the purposes of Part XII of Cap. 200 may not be necessary, and the simplest means for clarifying the law is to delete "unlawful" from section 118(3)(a).

17. The Law Society, however, appreciates the difficulty as regards the interpretation of the other sections in Part XII of Cap. 200 which also contain the reference to "unlawful sexual intercourse" or "unlawful sexual act". The Law Society considers that if the word "unlawful" is retained and the approach of a new section 117(1B) is adopted, the provision should set out in express terms that the interpretation of "unlawful sexual intercourse" applies not only to section 118 but also to sections 119, 120 and 121 to enable alternative convictions under section 149 and the Schedule.

18. An academic has also made submissions to the Bills Committee on Part V of the Bill. He supports the view that a statutory provision defining "unlawful sexual intercourse" should cover sections 118, 119, 120 and 121. Other sexual offences should be the subject of a full scale review.

19. After further discussion of the Bills Committee, the Administration finally adopts the Bills Committee's proposal and revises the proposed section 117(1B) as follows -

"(1B) For the avoidance of doubt, it is declared that for the purposes of sections 118, 119, 120 and 121 and without affecting the generality of any other provisions of this Part, "unlawful sexual intercourse" does not exclude sexual intercourse that a man has with his wife."

20. The Bills Committee has considered the Law Society's query about law drafting in a double negative manner (i.e "does not exclude") which in its view is difficult for ordinary members of the public to understand. The Law Society prefers an inclusive definition along the line of ""unlawful sexual intercourse" includes sexual intercourse that a man has with his wife". Both the Bills Committee and the Administration, however, are of the view that an inclusive definition as suggested by the Law Society is not desirable as it might give rise to a misguided, unintended implication that sexual intercourse between a man and his wife is unlawful.

21. The Administration agrees with the Bills Committee that the revised new section 117(1B) in paragraph 19 above reflects the principle and effect of the decision in *Regina v R*. Moreover, the narrowing of the scope of the proposed amendment to sections 118 to 121 should not limit the protection afforded by *Regina v R* in relation to other sexual offences in other sections.

22. The Bills Committee accepts the Administration's proposed Committee Stage amendments (CSAs) to delete all the clauses in Part V except clause 11, and to replace clause 11 by the proposed new section 117(1B) specified in paragraph 19 above.

23. The Bills Committee requests that SJ, on resumption of the Second Reading debate on the Bill, should clarify the legislative intent and explain that the proposed CSAs to Part V of the Bill will not reduce in any way the protection given to women under the sexual offence provisions in Part XII of the Crimes Ordinance. An undertaking should also be made in the speech that a full scale review of the sexual offence provisions in Part XII will be conducted in the context of law reform without delay, and any progress will be reported to the relevant Panels. The Bills Committee also considers that the AJLS Panel should follow up the progress of the review.

24. The Administration responds that it has been working on other aspects of the law for the protection of women. An example is the bill on competence and compellability of spouses in criminal proceedings which has been recently introduced into LegCo.

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