

立法會
Legislative Council

LC Paper No. CB(2)2008/03-04(01)

Ref : CB2/PL/AJLS

Panel on Administration of Justice and Legal Services

Background brief prepared by Legislative Council Secretariat

**Review of sexual offences in Part XII of the Crimes Ordinance
and related issues**

BACKGROUND AND PURPOSE

The Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2001 requested and the Administration agreed that, following the enactment of the amendments regarding marital rape, the Administration conduct without delay a full review of the sexual offences in Part XII of the Crimes Ordinance (Cap. 200). The Bills Committee recommended the Panel on Administration of Justice and Legal Services (AJLS Panel) to follow up the progress of the review. The Bill, as amended, was passed by the Legislative Council (LegCo) on 10 July 2002.

2. The Administration briefed the AJLS Panel on the progress of the review at its meeting on 23 February 2004. The Administration has advised the Panel that as stated in the Secretary for Justice (SJ)'s speech at the resumption of the Second Reading on the Bill, the Administration's position is that instead of a full-scale review, specific sexual offences should be revised when certain inadequacy in a particular area is identified.

3. The Administration has also advised the AJLS Panel that, in addition to legislative efforts, other measures have been put in place, such as the setting up of the Working group on Combating Violence by the Social Welfare Department to examine the problem of sexual violence and spouse battering, map out strategies and strengthen multi-disciplinary collaboration to tackle the problems.

4. Some members have pointed out that the speech of SJ at the resumption of the Second Reading debate on the Bill has deviated from the agreement reached between the Administration with the Bills Committee regarding the review of the sexual offences in Part XII of the Crimes Ordinance. A member considers that the various concerns which have been raised in the community about protection of women are of a wider scope than the sexual offences covered under Part XII of the Crimes Ordinance. Spouse battering, for example, falls within the ambit of the Domestic Violence Ordinance. A comprehensive review might also cover such other relevant offences.

5. At the request of the Panel, this paper is prepared to provide information on past discussions held by Members of LegCo on marital rape and related sexual offences, and other related issues such as sexual violence and family violence. The AJLS Panel would consider how the issue of review of sexual offences should be taken forward.

MARITAL RAPE AND RELATED SEXUAL OFFENCES

Discussions by the Panel on Home Affairs (HA Panel)

6. In its Concluding Comments on the Initial Report of the Hong Kong Special Administrative Region (HKSAR) under Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the United Nations Committee on the Elimination of Discrimination against Women urged for amendment of existing legislation to include marital rape as a criminal offence, and requested the Government to provide information on sexual crimes, including rape and marital rape, in its next report.

7. At its meeting on 2 June 2000, the HA Panel followed up the Concluding Comments of the Committee. On the issue of marital rape, the Administration advised that under section 118 of the Crimes Ordinance, a man committed rape if he had unlawful sexual intercourse with a woman who at the time of the intercourse did not consent to it. However, since some commentators considered that the law was not entirely clear on this point, the Government was examining whether a legislative amendment should be introduced to put the matter beyond doubt, and would revert to the AJLS Panel.

Discussions by the AJLS Panel

8. At the meeting of the AJLS Panel on 18 April 2000, Hon Margaret NG, Chairman of the Panel, pointed out that as a general common law rule, consent to sexual intercourse was implied in marriage. However, this common law rule had been abolished by the House of Lords decision in *Regina v R [1991] 4 All ER 481*. A husband could now be admitted of raping his wife.

9. In the light of the House of Lord's decision, Hon Margaret NG requested the Administration to review whether any amendments should be made to section 118(3) of the Crimes Ordinance (Cap. 200) -

"A man commits rape if -

- (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and
- (b) at the time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it."

10. The AJLS Panel discussed the matter at its meetings on 16 May 2000,

20 June 2000, 16 January 2001 and 26 April 2001. Representatives of the Hong Kong Bar Association and the Law Society of Hong Kong attended the last two of these meetings.

The Administration's initial response and the Panel's concerns

11. The Administration's initial view was -

- (a) a man who had sexual intercourse with his wife without her consent would be liable to be convicted for rape under Hong Kong law. It was not necessary to amend the law; and
- (b) following the landmark decision of the House of Lords in *Regina v R*, a husband might be guilty of rape of his wife if the wife did not consent to sexual intercourse. The Hong Kong Court of Appeal had already accepted the correctness of the judgment of the House of Lords in *HKSAR v Chan Wing Hung* (1997) 3 HKC 472, albeit the case was not one that concerned with a charge of rape.

12. The Panel expressed concern that the phrase "unlawful sexual intercourse" in the statutory definition of rape had caused confusion that only "unlawful sexual intercourse" could be rape, and that marriage made sexual intercourse "lawful". The consensus of the Panel was that an express provision should be provided in the Crimes Ordinance to the effect that the offence of rape included non-consensual marital intercourse.

13. The Administration pointed out that removing the word "unlawful" from the phrase "unlawful sexual intercourse" in section 118(3) of the Crimes Ordinance would put beyond doubt that it applied to marital rape. However, such a "quick-fix" approach of amending section 118 alone would create other problems. If the word "unlawful" were deleted from section 118(3), it might be argued that the retention of the same word in other sections in Part XII of the Ordinance demonstrated an intention that, in those sections, it should have the original common law meaning, i.e. outside marriage.

The Administration's consultation exercise and legislative proposal

14. In September 2000, the Administration issued a Consultation Paper entitled "Marital rape and related sexual offences" to 91 interested persons and organisations to seek comments on whether the Crimes Ordinance should be amended in respect of non-consensual marital intercourse and set out three policy options regarding the possible amendment of the Crimes Ordinance.

15. Subsequent to the consultation exercise, the AJLS Panel discussed various versions of proposed amendments to the Crimes Ordinance prepared by the Administration and took note of the views of the two legal professional bodies on these proposed amendments. All parties agreed that marital rape was an offence and the law should be amended to clarify that beyond doubt. It was a matter of working out a legislative proposal which could reflect the policy intent.

16. The question of whether other related sexual offence sections in Part XII of the Crimes Ordinance containing the reference to "unlawful" should also be reviewed and amended was also raised during the discussion. The Administration advised that a "wholesale" review of sexual offences would take a long time to complete. It was the intention of the Administration to introduce legislative amendments to the Crimes Ordinance to deal with the issue of marital rape and the relevant consequential amendments, without expanding the scope to cover related sexual offences.

17. Members agreed that the primary concern of the Panel was that it should be made clear in the law that marital rape was a crime. It was expected that some relatively simple amendments to the Crimes Ordinance would suffice to achieve that purpose, and did not anticipate a concurrent overall review of related sexual offences.

Discussions by the Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2001

18. The Statute Law (Miscellaneous Provisions) Bill 2001 (the Bill) was introduced into LegCo on 4 July 2001. Part V (clauses 11 -17) of the Bill sought to amend sections 117, 118, 119, 120, 121, 124 and 146 of the Crimes Ordinance to make it clear that the statutory offence of rape did not exclude marital intercourse, and some sexual offences could apply in respect of marital intercourse.

19. The Bills Committee considered that dealing with other related sexual offences at the same time as proposed in the Bill would make the law amendment exercise too complicated. The misconception about the offence of marital rape should be dealt with as a matter of urgency for the stronger protection of women. The Bills Committee proposed that a "minimalist" approach mainly to deal with the offence of rape would suffice for the present amendment exercise. After detailed deliberations, the Bills Committee and the Administration agreed that the scope of the proposed amendments should be narrowed and confined to the offence of rape (section 118) and to three other offences (sections 119 - 121) of which a person charged with rape may be convicted. The other sexual offences in Part XII of the Crimes Ordinance should be reviewed in the context of a law reform exercise thereafter as soon as possible.

20. As a result, the Administration proposed to move Committee Stage amendments (CSAs) to delete clauses 12 to 17 and amend clause 11 to provide a new section 117(1B). New section 117(1B) provided 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), the expression "unlawful sexual intercourse" does not exclude sexual intercourse that a man has with his wife. The Administration agreed that the issues relevant to proposed amendments to sections 124 (intercourse with girl under 16) and 146 (indecent conduct towards child under 16) in the Bill are peripheral to the principal object of amending section 118 and might be revisited as part of the said review on the other sexual offences in Part XII of the Crimes Ordinance.

20. In the course of its deliberation, the Bills Committee sought the views of the two legal professional bodies on Part V of the Bill and the Administration's new proposed amendments. An academic had also made submissions to the Bills Committee on Part V of the Bill. Both the Law Society and the academic supported the "minimalist" approach to deal with the offence of marital rape, and that other non-rape sexual offences should be the subject of a full scale review.

FAMILY VIOLENCE AND SEXUAL VIOLENCE

Motion debate on "Sexual violence" held by the Council

21. At the Council meeting on 12 April 2000, Hon James TO moved a motion on "Sexual violence" for debate. The following motion, as amended by Hon Emily LAU Wai-hing, was passed by the Council -

"That, as the problem of sexual violence has all along been neglected in Hong Kong and there has been a lack of integrated measures to appreciate the actual situation, provide services, render legal protection and train the supporting personnel, resulting in appropriate assistance not being effectively provided to the victims, this Council urges the Government to expeditiously set up an inter-departmental working group to enable the relevant government departments to work in conjunction with non-government organizations, so as to -

- (a) provide comprehensive and timely "one-stop" emergency support service, and enhance the training of relevant professionals;
- (b) conduct a study on the issue and collate the relevant data;
- (c) review and amend the relevant legislation and procedures; and
- (d) step up community publicity, school education and the control of obscene and indecent articles, so as to enhance public awareness and prevent the occurrence of sexual violence."

Discussions by the Panel on Welfare Services (WS Panel)

22. The strategy and measures to prevent and tackle family violence was discussed by the WS Panel at its meeting on 11 March 2002. Four deputations and Dr Hon LAW Chi-kwong made submissions to the Panel. Issues raised for discussion included the housing needs of battered women, referral of family violence cases by the Police to the Social Welfare Department, review of outdated provisions of the Domestic Violence Ordinance and the Protection of Children and Juveniles Ordinance, and implementation of mandatory treatment for abusers as an alternative to imprisonment.

23. At the meeting of the WS Panel on 10 February 2003, the Administration provided an update on the progress made and recent developments since the

meeting on 11 March 2002. On proposals to amend the Domestic Violence Ordinance, such as to widen the coverage and scope of protection, the Administration advised that with the support of Lotteries Fund grant, tertiary institutions had been invited to submit proposals before 21 February 2003 to carry out a study on child abuse and spouse battering. The study would, inter alia, identify possible areas of improvement including those that may be related with legislation. Relevant statistics were also being collected from the Judiciary to assess the effectiveness of the existing legal remedies under the Ordinance. This would shed light on the way forward, before the Administration considered embarking on an evidence-based legislative review.

24. Separately, the sub-committee of the Law Reform Commission had been finalizing its proposals on family disputes resolution process as well as access and custody, having regard to the outcome of the consultation exercise and recent overseas developments in the area. The Administration would consider the recommendations upon receipt of these reports.

LegCo question on "Amendment to Domestic Violence Ordinance"

25. At the Council meeting on 9 April 2003, Dr Hon LAW Chi-kwong raised a written question relating to the Domestic Violence Ordinance. He asked whether the Administration would adopt the recommendation in the Report on Stalking released by the Law Reform Commission in October 2000 that the Domestic Violence Ordinance should be amended to allow an application for a "non-molestation order" to be made by a person who was "associated with" the respondent (such as his/her former cohabitant or relative) so as to strengthen protection for family members.

26. The Secretary for Home Affairs had responded that the Administration was examining comprehensively the recommendations made by the Law Reform Commission and had yet to decide whether and how the recommendations would be adopted.

WAY FORWARD

27. When the issue of marital rape was discussed by the AJLS Panel, both the Panel and the Administration considered that legislative amendments should be introduced to the Crimes Ordinance to deal with the issue and relevant consequential amendments. As a result of the "minimalist" approach proposed by the Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2001, the Administration moved CSAs to narrow the scope of the proposed amendments in the Bill. The understanding was that a comprehensive review on the implications of the amendments introduced by the CSAs on other sexual offences in Part XII of the Crimes Ordinance would be undertaken by the Administration. Members may wish to consider how the issue of review of sexual offences should be taken forward.

28. As regards issues relating to family violence and sexual violence as well as possible amendments to the Domestic Violence Ordinance and other related ordinances, these are being followed up by the WS Panel.

RELEVANT PAPERS

29. A list of the relevant papers on previous discussions by LegCo on marital rape and related sexual offences, and other related issues such as sexual violence and family violence is in the **Appendix**. These papers are available on the Council's website at <http://www.legco.gov.hk>.

Council Business Division 2
Legislative Council Secretariat
15 April 2004

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Relevant Papers/Documents

<u>LC Paper No.</u>	<u>Papers/Documents</u>
<u>Panel on Home Affairs</u>	
CB(2)2159/99-00(02)	-- Progress report on "Follow-up on concluding comments of the UN Committee on the Elimination of Discrimination against Women on the initial report on HKSAR under the Convention on the Elimination of All Forms of Discrimination against Women"
CB(2)2574/99-00	-- Minutes of meeting of the Panel on 2 June 2000
<u>Panel on Administration of Justice and Legal Services</u>	
CB(2)2546/99-00	-- Minutes of meeting of the Panel on 16 May 2000
CB(2)2553/99-00	-- Minutes of meeting of the Panel on 20 June 2000
CB(2)1086/00-01	-- Minutes of meeting of the Panel on 16 January 2001
CB(2)62/00-01(06)	-- Consultation Paper on "Marital Rape and Related Sexual Offences"
CB(2)438/01-02	-- Minutes of meeting of the Panel on 26 April 2001
CB(2)1363/03-04(01)	-- Paper on "Review of sexual offences in Part XII of the Crimes Ordinance"
CB(2)1590/03-04(01)	-- Update on the work of the Working Group on Combating Violence
<u>Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2001</u>	
CB(2)2410/01-02	-- Report of Bills Committee to House Committee on 28 June 2002
CB(2)27/02-03	-- Speech of the Secretary for Justice at the resumption of the Second Reading debate on the Bill at the Council meeting on 9 July 2002

Panel on Welfare Services

- CB(2)1265/01-02(05) -- Paper on "Strategy and measures to prevent and tackle family violence"
- CB(2)1033/01-02(03) and 1265/01-02(06) - (09) and (11) -- Submissions from deputations
- CB(2)1490/01-02 -- Minutes of meeting of the Panel on 11 March 2002
- CB(2)1104/02-03(03) -- Paper on "An update on strategy and measures to prevent and tackle family violence"
- CB(2)1384/02-03 -- Minutes of meeting of the Panel on 10 February 2003

Official Records of Proceedings of the Council

- Council meeting on 12 April 2000 -- Motion moved by Hon James TO on "Sexual Violence"
- Council meeting on 9 April 2003 -- LegCo question raised by Dr Hon LAW Chi-kwong on "Amendment to Domestic Violence Ordinance"

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