

For information

LegCo Panel on Administration of Justice and Legal Services

Follow up to meeting on 23 February 2004

Review of sexual offences in Part XII of the Crimes Ordinance

Background

As a follow up to the Panel meeting on 23 February 2004, the Chairman of the Panel has made a request through the Clerk to Panel (by a letter dated 23 March 2004) asking the Administration “to provide a written response to advise the Panel whether it will conduct a review of sexual offences in Part XII of the Crimes Ordinance as agreed with the Bills Committee, and if not, the reasons for not proceeding with such a review”.

The Statute Law (Miscellaneous Provisions) Bill 2001

2. The Statute Law (Miscellaneous Provisions) Bill 2001 (the Bill) was introduced into LegCo on 4 July 2001 to, among other things, clarify the law relating to marital rape. The problem with the law was that the offence of rape did not expressly state whether it would include non-consensual marital intercourse. Furthermore, the extent to which some offences that refer to "unlawful sexual intercourse" or an "unlawful sexual act" would apply to non-consensual marital intercourse was unclear.

3. Clauses 11 to 17 of the Bill sought to amend sections 117, 118, 119, 120, 121, 124 and 146 of the Crimes Ordinance (Cap 200) making it clear that the offence of rape would include non-consensual marital intercourse and some sexual offences could apply in respect of non-consensual marital intercourse or non-consensual marital act of gross indecency.

Bills Committee's minimalist approach

4. It was the majority view at the AJLS Panel discussion on the matter that the most urgent task of the legislative amendment exercise was to remove the then existing uncertainty in the law so as to make it clear that marital rape was an offence. The Bills Committee therefore took the view that rather than seeking to deal with other related sexual offences at the same time as proposed in the Bill, hence making the amendment exercise far more complicated, a more simplistic approach to deal only with marital rape would suffice at that stage. The Bills Committee agreed that the problems associated with other related sexual offences could be addressed at a later stage.

5. The Bills Committee therefore suggested a “minimalist” approach with which the Administration agreed. Under this approach, the express scope of the proposed clarification of the law would be limited to section 118 (rape) and to three other offences of which a person charged with rape may be convicted. Those three other offences are sections 119 (procurement by threats), 120 (procurement by false pretences) and 121 (administering drugs to obtain or facilitate unlawful sexual act).

Committee Stage Amendments (CSAs)

6. As a result of the “minimalist” approach, CSAs were moved to delete clauses 12 to 17 and amend clause 11 of the Bill to provide a new section 117(1B). The upshot of the CSAs was that all the amendments originally proposed in the Bill were taken away and replaced by the new 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.”

7. The Statute Law (Miscellaneous Provisions) Ordinance (Ord. No. 23 of 2002) was subsequently passed by LegCo only making it clear that for the purposes of sections 118, 119, 120 and 121, "unlawful sexual intercourse" would include non-consensual marital intercourse. The ambiguities that still could remain in the other sexual offences which were originally sought to be addressed by the Bill were not dealt with in that legislative exercise because of the "minimalist" approach.

Way forward

8. The LegCo Secretariat has prepared a background brief on "Review of sexual offences in Part XII of the Crimes Ordinance and related issues" (LC Paper No.CB(2)/03-04). Paragraph 28 of the background brief summarizes the position as follows -

"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".

9. As the offence of marital rape was dealt with as a matter of urgency in the last legislative exercise, the Administration takes the view that it is no longer necessary to continue with the "minimalist" approach which narrowed the scope of the amendments proposed in the Bill. Accordingly, the Administration considers that the implications of the offences relevant to the CSAs to the Bill should be reviewed.

10. In the circumstances, the Administration proposes to continue reviewing the provisions related to those sexual offences in Cap. 200 which it originally proposed to amend in the previous legislative exercise.

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