

立法會
Legislative Council

LC Paper No. CB(2)2553/99-00
(These minutes have been seen
by the Administration and
cleared with the Chairman)

Ref : CB2/PL/AJLS

Legislative Council
Panel on Administration of Justice and Legal Services

Minutes of special meeting
held on Tuesday, 20 June 2000 at 8:30 am
in Conference Room A of the Legislative Council Building

Members Present : Hon Margaret NG (Chairman)
Hon Jasper TSANG Yok-sing, JP (Deputy Chairman)
Hon James TO Kun-sun
Hon Mrs Miriam LAU Kin-ye, JP
Hon Emily LAU Wai-hing, JP

Members Absent : Hon Albert HO Chun-yan
Hon Martin LEE Chu-ming, SC, JP
Hon Mr Ambrose LAU Hon-chuen, JP

Public Officers Attending : Item I

Mr Stephen WONG
Deputy Solicitor General (Advisory)
Department of Justice

Mr Andrew BRUCE, SC
Senior Assistant Director of Public Prosecutions
Department of Justice

Miss Agnes CHEUNG
Senior Government Counsel
Department of Justice

Item II

Mr Stephen WONG
Deputy Solicitor General (Advisory)
Department of Justice

Miss Agnes CHEUNG
Senior Government Counsel
Department of Justice

Clerk in Attendance : Mrs Percy MA
Chief Assistant Secretary (2)3

Staff in Attendance : Mr Jimmy MA, JP
Legal Adviser

Mr Paul WOO
Senior Assistant Secretary (2)3

Action
Column

- I. Marital rape under section 118 of Crimes Ordinance (Cap. 200)**
(LC Paper No. CB(2)2356/99-00(01) - Paper provided by the Administration
LC Paper No. CB(2)2427/99-00(01) - Letter dated 19 June 2000 from the Law
Society)

Deputy Solicitor General (Advisory) (DSG(A)) referred members to the Administration's paper (LC Paper No. CB(2)2536/99-00(01)) which was prepared in the light of the comments made by members at the Panel's meeting on 16 May 2000 when the issue of marital rape was discussed. The paper reflected the Administration's current thinking on the proposal to amend section 118 of Crimes Ordinance (the Ordinance) to put beyond doubt that marital rape was a crime - i.e. a man who had sexual intercourse with his wife without the latter's consent was liable to be prosecuted for and be found guilty of the crime of rape.

2. In response to the Chairman, Senior Assistant Director of Public Prosecutions (SADPP) said that the Administration had considered the suggestion to amend section 118(3) of the Ordinance to remove the word "unlawful" from the phrase "unlawful sexual intercourse". This would clarify that the crime of rape extended to marital rape. The Administration, however, had come to the view that such a "quick-fix" approach of amending section 118 alone would have direct ramifications on the offences under a number of other sections in Part XII of the Ordinance which contained the reference to "unlawful sexual act". These sections included section

119 on procurement of unlawful sexual act by threats, section 120 on procurement of unlawful sexual act by false pretence, and section 121 on administering drugs to obtain unlawful sexual act. SADPP pointed out that the effect of removing the word "unlawful" from section 118(3) while retaining the same word in other sections was that it would give rise to the interpretation that the offences under the latter sections did not cover non-consensual sexual act within the bounds of matrimony.

3. DSG(A) concluded that more time should be allowed for the Administration to conduct a more thorough review so that the issue of marital rape could be examined in the overall context of the laws governing sexual offences in Hong Kong.

4. Mr James TO enquired whether the Administration would refer the issue for the consideration of the Law Reform Committee (LRC). DSG(A) replied that at this stage the Administration was not in favour of the idea because it was estimated that it would take at least two years before the LRC could commence a study on the matter. A long delay was considered not desirable. The Administration preferred to conduct its own study which could also refer to the progress of a review on sexual offences currently undertaken by the Home Office in the UK. The UK review covered a wide scope of unwanted sexual conduct forced on an unwilling person. It was expected that the results and recommendations which came out of the UK review would shed light on how solutions might be worked out to address at least some of the problems encountered in relation to the offence of marital rape. He added that he understood that the findings of the UK review might be available in six months' time.

5. The Chairman referred to paragraph 15 of the Administration's paper which stated that the English legislation had been amended by the deletion of the word "unlawful". The English approximate equivalents of sections 119 and 120 of the Ordinance were likewise amended to remove the word "unlawful". She said that in her opinion, "unlawful" carried a wider meaning than "outside the bounds of marriage". Apart from amending section 118 of the Ordinance as discussed, another way to deal with the issue might be to provide a statutory definition of rape to include an express declaration that the crime of rape covered marital rape.

6. The Chairman further drew members' attention to a letter from the Law Society which was tabled at the meeting (LC Paper No. CB(2)2427/99-00(02)). The Law Society's position was that there should be no marital immunity to the offence of rape. According to the Society, it was prepared to comment on any proposed legislative amendment should a decision be taken to amend the law to make this point clear.

7. The Chairman also referred to paragraph 6 of the Administration's paper which stated that the chances of the courts of the Hong Kong Special Administrative Region not following the judgment of the House of Lords in the case of R v R [1992] 1 AC 599 after July 1997 was, at most, theoretical. The judgment held that marital rape was a crime. She said that a decision of the House of Lords, as opposed to that of the Privy Council, did not bind the courts of Hong Kong prior to the reunification.

Therefore, the case of R v R could only serve as a reference and had no binding effect. This was all the more the case after the advent of the Basic Law, hence justifying a greater need to clarify the law on rape in terms of statute.

8. Following up on the Chairman's comments, the Legal Adviser said that to facilitate the Panel's consideration, it might be useful if the Administration could provide more justifications to support the statements made in paragraph 6 of its paper which suggested that R v R was binding on the courts of Hong Kong prior to the advent of the Basic Law.

Adm 9. DSG(A) said that the remarks made in paragraph 6 of the Administration's paper reflected the Administration's thinking about the effect of the House of Lords' decision so far as the interpretation of the statutory provisions on rape was concerned. He agreed to provide a legal advice on the binding authority of R v R when the matter of marital rape would be further discussed by the Panel.

10. Ms Emily LAU considered that it was necessary to take early steps to clarify that marital rape was a crime and that it was a crime under existing law. The urgency was pinned down by the fact that cases of marital rape did happen but a large number of members of the public and even Government Departments, social services groups, women organizations and the like were not aware of the state of the law. She asked whether there were statistics on complaints about marital rape.

11. DSG(A) responded that he was not aware of any complaints received by Government Departments on marital rape. Furthermore, no prosecution for marital rape had been instituted in the past. SADPP supplemented that indecent assault under section 122 of the Ordinance did not apply to conduct between husband and wife.

12. Ms Emily LAU said that the absence of reports and prosecutions against marital rape could well be an indication that the community in general did not know that marital rape was a prosecutable crime. Referring to paragraph 14 of the Administration's paper, she said that apart from rape, all other kinds of non-consensual sexual conduct by a person towards another, regardless of whether they were within the bounds of matrimony, should be made criminal offences.

13. On the last point made by Ms Emily LAU above, SADPP replied that he could not give a definitive stance because the matter involved a major change in the orientation of a significant aspect of the criminal law. In the end, a broad community view on the legal and social implications might have to be sought.

14. The Chairman said that it appeared to be a consensus view of all that a husband raping his wife was liable to be guilty of the crime of rape. She considered that it was necessary to amend section 118 of the Ordinance which was unclear on this matter. Such a legislative amendment could be done independent of a separate and

wider exercise to review the other sections of the Ordinance concerning unlawful sexual act. Regarding the other sexual offences under the Ordinance, she opined that the criminality of any non-consensual sexual conduct should not be taken away by the mere existence of a marital relationship between the persons concerned.

15. SADPP advised that the present position of the Administration had been elaborated in paragraph 17 of its paper. The Administration was of the view that the best course was to consider whether the law could be changed -

- (a) to make it plain that marital rape was contrary to Hong Kong law; and
- (b) in a manner which was in harmony with the rest of the law concerning sexual offences in Hong Kong and in a manner which, while fixing one problem, did not create or reinforce a series of other problems.

16. On the time required for the review, SADPP responded that the review could be completed in about six months' time, taking account of the need to consult the relevant parties such as the legal professional bodies.

17. Ms Emily LAU urged the Administration to conduct an early review and report progress as soon as the new Legislative Council (LegCo) term commenced. In the meantime, the Administration should take steps to promote greater awareness in the community that marital rape was a crime.

18. Mrs Miriam LAU was in support of having a clear statutory provision on marital rape. However, she expressed concern that the community at large was not aware of the fact that marital rape was a crime which could be caught under the existing legislation. She said that unlike other unlawful sexual act, marital rape was a sensitive issue affecting every family and marriage, and there might be diverse views within the community as to whether marital rape should be a crime. She suggested that the public should be consulted on the matter so that any views expressed could be considered and addressed.

19. The Chairman said that on the premise that marital rape was a crime and the existing law was unclear, members had discussed whether the law should be made clear by way of an amendment. The public consultation raised by Mrs LAU was a different issue which could open up the potential of not having the law clarified.

20. In response to Mr TSANG Yok-sing on the purpose of the public consultation she referred to, Mrs LAU responded that it was her view that the public should be educated on what was the existing law and consulted on whether the law should be amended to make it clear that marital rape was a crime. However, she was not suggesting that the public should be asked to give views on whether marital rape should or should not be a crime. Mr TSANG pointed out that a consultation exercise was different from an education/publicity exercise.

21. After some further discussion, members agreed that for the purpose of the consultation in question, the Administration should, firstly, explain to the public what was the current law, i.e. the offence of rape under section 118 of the Crimes Ordinance covered marital rape although there were no express provisions to that effect and secondly, seek the public's views on whether the existing legislation should be amended to make it explicit that marital rape was a crime. The Chairman added that depending on the result of the consultation, the matter might have to be re-examined by the Administration from the angle of legal policy.

22. In the light of members' views, DSG(A) said that the Administration would start preparing a consultation paper and carry out the consultation exercise during the summer recess of LegCo. Furthermore, the Department of Justice would work on a draft legislative amendment proposal for the purpose of consulting the legal profession and other relevant bodies on the issue of marital rape. He undertook to provide an updated report on the progress to the Panel at the start of the new LegCo term and then revert on the result of the review by the end of the year.

Adm

23. As a related issue, DSG(A) informed members that the Administration would conduct another consultation exercise on competence and compellability of spouses giving evidence against the other spouse. The consultation would commence in about early July 2000.

II. The Court's power under section 13(1) of the Conveyancing and Property Ordinance (Cap. 219) (CPO)

(LC Paper No. CB(2)2356/99-00(02) - Paper provided by the Administration;

LC Paper No. CB(2)2385/99-00(01) - Letter dated 5 May 2000 from the Bar Association to the Administration; and

LC Paper No. CB(2)2427/99-00(01) - Letter dated 19 June 2000 from the Law Society)

24. DSG(A) informed members that following the meeting on 15 February 2000, the Administration had completed an exercise to consult relevant organizations on the proposal to provide the court a discretionary power to order return of deposits to purchasers in appropriate cases, similar to that conferred on the courts in the UK under section 49(2) of the Law of Property Act 1925. He advised that the initial responses from the nine consultees were that three were in support of the provision of such power to the court, one opposed to it, while the others had expressed various views but had yet to come up with any conclusion on the matter.

25. The Chairman drew members' attention to the letters from the Bar Association and the Law Society respectively. The Bar Association supported the proposed discretionary power to be provided to the court. The Law Society, on the other hand, expressed the view that the matter was one of complex but not apparently urgent

nature and it preferred to refer the issue to the LRC for an in-depth examination. The Chairman further reminded members that the Law Society had, nonetheless, previously submitted a detailed paper prepared by Mr John MORGANS, who was a member of its Property Committee, on the subject. The paper had been discussed by the Panel at its meeting on 15 February 2000.

26. DSG(A) advised that in view of the controversial initial responses revealed by the recent consultation and the complex issues involved which could have far-reaching implications for the local conveyancing system and practice, the Administration's position at this stage was that it should take more time to research further the issues. These included a consideration as to whether a reference should be made to the LRC as suggested by some of the respondents. Furthermore, it had been pointed out by some that deliberations on the Land Titles Bill could have significant bearing on the problems and grey areas created by section 13 of the CPO. The effects and implications of the enactment of the Bill on the conveyancing system in Hong Kong would need to be assessed.

27. Mrs Miriam LAU agreed that in view of the divided views received from the initial consultation and the complexity of the matter, more time was required for all concerned parties to fully examine the proposed legislative amendment in greater detail. However, she had reservation about referring the matter to the LRC because it could probably take years for the LRC to complete its consideration. She shared the view that a number of the difficulties currently faced by solicitors and practitioners in the local conveyancing business concerning requisitions might be removed upon the passage of the Land Titles Bill.

28. Mrs Miriam LAU added that should the Administration in the end decide that a reference should be made to the LRC on this issue, the LRC might be asked to consider whether the matter could be dealt with more expeditiously with a higher degree of priority.

29. The Chairman expressed that view that, without pre-empting the eventual decision of the Administration, the proposal to provide a discretionary power of the court to order refund of deposits in exceptional circumstances was a matter of policy rather than a law reform issue.

30. Concerning the progress of the deliberation of the Land Titles Bill, the Chairman said that another round of public consultation was under way. It was expected that some fairly major changes would be introduced to the Bill. She said that she understood that the Bill might be re-introduced into LegCo at the beginning of the new legislative term.

31. The Chairman further expressed the view that incidental to the question of judicial remedy proposed to be included under section 13 of the CPO, a more immediate issue which also required to be addressed concerned the use of Provisional

Agreement (PA) in local conveyancing transactions. The use of PA quite often gave rise to unfairness and disputes between the parties and created difficulties for lawyers advising their clients in order to safeguard their interests. She said that there had been arguments for and against the use of PA in the Hong Kong situation and the merit for Hong Kong to continue to adopt such a system as it presently operated should be examined in detail.

32. Mr James TO and Mrs Miriam LAU agreed with the Chairman that the effect of PA was an issue which required careful study. Mrs LAU pointed out that the problem with PA primarily lay with the fact that a PA being a binding document was often signed by the buyer and the vendor at the very early stage of the transaction, when both of them were represented by the estate agent alone without the benefit of proper legal advice. In the event that the PA contained unfair obligations detrimental to the interests of the parties, lawyers who subsequently acted for the parties might find their hands tied in rectifying the shortcomings. Mr TO suggested that the following course might be taken -

- (a) to conduct a comprehensive review on the contractual terms and content of the model PA currently in use by estate agents with a view to ensuring fairness to both buyers and vendors; and
- (b) to look into relevant court cases to identify the circumstances and problems which most often led to disputes between the parties after the signing of PA.

33. The Chairman pointed out that it had been suggested by some that the Estate Agents Authority should promulgate a revised PA with improved clauses and provisions for use by estate agents.

34. On the question of empowering the court to return deposits, the Chairman said that such judicial discretion was intended to be exercised only in very exceptional situations where the court was satisfied that a case of grave unfairness existed. Hence, other improvement measures should also be considered in order to obviate unfairness generally. She pointed out that it had been suggested that Hong Kong might adopt an overseas practice so that a party was entitled to withdraw from a transaction free from liability provided that the withdrawal took place within a prescribed period of time after the signing of a sale and purchase document.

35. Mrs Miriam LAU did not support this practice which she thought would jeopardize the sanctity of contract and lead to a large number of unmeritorious disputes and litigation instituted by parties trying to renege on signed agreements, particularly in view of the volatile state of the property market in Hong Kong.

36. At members' request, the Administration agreed to report back to the new Panel in the next LegCo term on the progress of the Administration's deliberation on

Action
Column

Adm the proposed discretionary power of the court to order refund of deposits.

37. Regarding the study of the effect of PA and other law-related issues concerning the local conveyancing practice, members agreed that they could be followed up by the Panel at future meetings if necessary, and where appropriate, together with other relevant Panels.

38. There being no other business, the meeting ended at 10:25 am.

Legislative Council Secretariat
16 August 2000