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For information on
20 June 2000

LegCo Panel on Administration of Justice and Legal Services

Marital Rape (section 118 of the Crimes Ordinance, Cap 200)

This issue last came before the ALJS Panel on 16 May 2000. The Administration presented a paper (Annex A). At that meeting, members of the Panel invited the Administration to further consider the issue in the light of the comments made at that meeting concerning the issue of marital rape. (The Panel also discussed the issue of competence and compellability but it would appear that this needs no further discussion at this time.) Further comments were made by the Chair of the Panel (the Hon Margaret Ng) in a letter to Stephen Wong, Deputy Solicitor General dated 17 May 2000 (Annex B). The concerns of the Panel were also elaborated on in a letter dated 18 May 2000 from Mrs. Percy Ma, the Clerk to the Panel (Annex C).

2. The Administration has carefully considered the comments made and this paper sets out responses to those comments and suggests a series of paths that might be followed.

3. The consensus at the Panel meeting appeared to be that there was not much doubt about the law and that it was clear that a man would be guilty of rape if he had sexual intercourse with his wife without her consent and at the time of that act he was aware she was not consenting or was

indifferent to that issue. The essential concern of the Panel was that steps should be considered to amend the law to put this issue beyond doubt.

4. Concerns were expressed by the Panel that, despite the position of the Administration to the contrary, the police were uninformed about the law and were, in any event likely to be unsympathetic to a woman who went to the police with a complaint that her husband had raped her.

The current law

5. The letter of the Chair of the Panel dated 17 May 2000, questions the first assumption in the sense that the letter appears to be saying that there is some doubt about the effect of *R v R* in Hong Kong. The Administration respectfully disagreed. The Administration's understanding is that the phrase 'unlawful sexual intercourse' in the English equivalent of Hong Kong's section 118 of the Crimes Ordinance was originally understood to mean sexual intercourse outside the bounds of matrimony. The implication of that was that sexual intercourse within the bounds of matrimony (consensual or otherwise) was not covered. The effect of the decision of the House of Lords was that as the word 'unlawful' was surplusage in the phrase 'unlawful sexual intercourse' (*i.e.* the word had no effect). Thus if a man had sexual intercourse with a woman without her consent, it was irrelevant that the intercourse was within or outside the bounds of matrimony. Thus, a man could be guilty of raping his wife.

6. *R v R* was, of course, binding on the courts of Hong Kong prior to the advent of the Basic Law. While in strict theory it may be that as a result of the Basic Law, the decision is not now binding, the view of the Administration is that the chances of the courts of Hong Kong Special Administrative Region not following the decision is, at most, theoretical. The Administration has never said that *HKSAR v Chan Wing-hung* [1997] 3 HKC 472 was a rape case. Its significance is that the Court of Appeal there expressed in a non-binding way, that it considered that it would be proper to follow *R v R*. In this narrow context, it simply adds weight to the assessment

of the legal advisers to the Administration that what was undoubtedly the law immediately before the advent of the Basic Law remains the law in the HKSAR: a man who has sexual intercourse with his wife without her consent is liable to be prosecuted for and be found guilty of the crime of rape.

Accessibility of the criminal law

7. The Administration accepts the point made by the Hon Margaret Ng that it is unlikely that many members of the public or members of the police force have read either decision – or, for that matter, the various text books which discuss the topic. However, that is true in virtually every area of the criminal law – especially where the words of a statutory offence have been interpreted by courts or the words of such a provision are to be applied in a special way by reason of history or the established usage of words. The piece-meal amendment of every such provision to place it beyond doubt would involve a large amount of effort and legislative time. That would be so even if such exercises were limited to particular provisions which excited the interest of the public from time to time.

Implications of amendment

8. Even if section 118 was singled out upon the basis that to put beyond doubt that marital rape is covered by that provision is a highly desirable thing, the simple amendment of section 118 would have other effects within Part XII of the Crimes Ordinance. Assuming for the moment that section 118 was amended to remove the word ‘unlawful’ from the phrase ‘unlawful sexual intercourse’ which would, in law, do the trick, it must be remembered that the phrase ‘unlawful sexual intercourse’ or the related phrase ‘unlawful sexual act’ also occurs in:

- section 119 – procurement of unlawful sexual act by threats etc
- section 120 – procurement of unlawful sexual act by false pretences etc
- section 121 – administering (etc) drugs to obtain unlawful sexual act
- section 123 – unlawful sexual intercourse with a girl under 13

- section 124 – unlawful sexual intercourse with a girl under 16 (note the defence for spouses)
- section 125 – unlawful sexual intercourse with a mentally incapacitated person
- section 127 – taking an unmarried girl out of the possession of her parents with the intention that she have unlawful sexual intercourse with men or a particular man
- section 128 – taking a mentally incapacitated person out of the possession of a parent or guardian with the intention that he or she shall do an unlawful sexual act

9. Some of the crimes under the heading “Exploitation of other persons for sexual intercourse” (sections 129-137) refer to either unlawful sexual intercourse or an unlawful sexual act as the purpose of the prohibited conduct. However, these provisions probably do not give rise to problem immediately under consideration or it is highly unlikely that they would. The result in respect of these crimes is that to the extent that they refer to sexual intercourse it must mean sexual intercourse outside the bounds of marriage. To that extent they can probably be left out of consideration.

10. Indeed, that may be practically true for some of the offences mentioned in paragraph 8 (above). However, some of those listed offences give rise to precisely the same problem as arises under section 118: the meaning of *unlawful* sexual intercourse or an *unlawful* sexual act.

11. In *HKSAR v Chan Wing-hung* [1997] 3 HKC 472, the Court of Appeal considered the meaning of ‘unlawful sexual act’ in the context of section 119 (procurement of unlawful sexual act by threats etc). The Court held in the context of that section, ‘unlawful sexual act’ does in fact mean an act outside the bounds of matrimony. If *HKSAR v Chan Wing-hung* is correctly decided, a husband procures by threats etc a sexual act from his wife of a kind other than that covered by section 118 (rape) or section 118A (non-consensual buggery), such as oral sex, then he may well be immune from

prosecution. (The same issue arises in relation to sections 120 and 121.) At first blush, the obvious solution might be to amend this section (and sections 120 and 121) in the same manner as section 118. However that has implications for section 122 which renders indecent assault a crime. By section 122(3), a person is not guilty of indecent assault if he believes that the victim is married to him. (It should be noted that the view expressed in *HKSAR v Chan Wing-lung* as to the meaning of section 119 was foreshadowed in *R v R*.)

12. The main point is that the amendment of section 118 in a manner designed to put beyond doubt that it applies to marital rape has direct implications for at least sections 119-121 and perhaps indirect implications for section 122 (indecent assault). The effect of simply amending section 118 by removing the word 'unlawful' would put beyond doubt that it was meant to cover marital rape but the retention in sections 119-121 would almost certainly result in the opposite position being put beyond doubt in those sections.

13. The Administration readily sees that despite the concerns expressed in para. 7 (above), in some respects it would be desirable to make it plain that section 118 applies to marital rape. On its face it is also apparent that if all that was required was an amendment to section 118, the matter could be dealt with relatively quickly. However, despite the superficial attraction of this "quick fix", it creates (or reinforces) further problems and has undesirable consequences. The "quick fix" would have the effect of putting beyond doubt that other sexual conduct (apart from that in section 118A - buggery) visited on wives by their husbands without consent would be lawful.

14. This issue is perhaps underlined in the reference in the letter by the Clerk to the ALJS panel to the need for "statistics on complaints received from wives against husbands by relevant departments on sexual ill-treatment such as rape." This carries with it the assumption that other non-consensual sexual conduct by husbands towards their wives is at present against the criminal law. Buggery excepted, it is not.

English reform

15. The English legislation was amended by the deletion of 'unlawful'. (The provision was also amended to include the rape by a man of another man.) The English approximate equivalents of our sections 119 and 120 were likewise amended to remove the word 'unlawful'. However, the approximate English equivalent of our section 121 (administering (etc) drugs to obtain unlawful sexual act) was not amended. (The English version of our section 121 refers to unlawful sexual intercourse as opposed to ours which refers to the broader unlawful sexual act.) The amendments came with no express statutory declaration that the crime of rape extended to marital rape. Perhaps most significantly, the Home office has very recently announced that it has commenced a review of sexual offences. (Home Office Announcement (Annex D); report in the Times of 4 May 2000 (Annex E)). While the scope of the review is quite wide, it is to be noted that a part of the review is the consideration of whether the definition of rape should be altered to include unwanted oral sex which might provide a solution to some of the problems highlighted above. It would appear that the Home Office will publish a consultation paper soon.

Reform in Hong Kong Special Administrative Region

16. The Administration has considered whether it would be appropriate to ask the Secretary for Justice and the Chief Justice to place this issue before the Law Reform Commission. Advice has been received that even if this course were to be taken it would be something of the order of two years before the Commission could begin consideration of the issue. It would be difficult to predict when the Commission could advise on the issue after it commenced work on it. Such a delay in considering this vital issue is inappropriate and the Administration does not favour this option.

17. Having taken careful account of the concerns of members of the ALJS Panel, the Administration considers the best course is to consider whether the law can be changed –

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

18. The Administration is not proposing a review which is as wide as that which is under way in the United Kingdom nor does it expect its deliberations to take as long.

Department of Justice

June 2000

#20037

For discussion on
16 May 2000

**Panel on Administration of Justice and Legal Services
Of the Legislative Council**

**Marital rape under section 118
Of Crimes Ordinances (Cap. 200)**

Introduction

By letter dated 20 April 2000 from the Clerk to the Administration of Justice and Legal Services of the Legislative Council, the administration has been asked to consider the issues of marital rape and the competence and compellability of a person giving evidence against the person to whom they are married. Set out below is the position of the Administration on these topics.

Marital Rape

2. The view of the Administration is that under Hong Kong law a man who rapes his wife is liable to be convicted for rape. That was settled in English law by the House of Lords in *R v R* [1992] 1 AC 599. It is to be noted that the law of rape in Hong Kong is in exactly the same terms as the legislation considered by the House of Lords. The view of the Administration is that Hong Kong courts would place the same interpretation on our legislation. The Hong Kong Court of Appeal has already accepted the correctness of the judgment of the House of Lords in *HKSAR v Chan Wing-hung* [1997] 3 HKC 472, albeit that was a case which was not concerned with a charge of rape.

3. The view of the Administration is that, in light of this clear and authoritative interpretation of the law, it is not necessary to amend the law.

4. If there was a complaint by a wife that her husband had raped her then this would be fully and fairly investigated by the Police. If on the basis of the evidence collected there was sufficient evidence to justify a prosecution by reference to the well-known guidelines for prosecuting then the Director of Public Prosecutions would institute a prosecution. To the extent that this may not sufficiently be known to the general public, the Administration will promote greater awareness as and when necessary.

5. The Prosecutions Division has not in recent times declined to initiate a prosecution for rape on the basis of the marital relationship.

Competence and compellability of spouses as witness for the prosecution

6. In relation to the issue of possible changes to the law concerning competence and compellability of a spouse to testify against an accused person to who he or she is married, Honourable members will recall that in 1988, the Law Reform Commission published a report on the competence and compellability of spouses giving evidence. A bill was introduced by the Administration in 1990 to implement the recommendations but it was eventually defeated. The Administration is presently reviewing the relevant rules of evidence and the LRC's recommendations and will consider whether a further Bill should be introduced. The Administration should be in a position to revert to the Panel with further details before the end of December this year when the review and necessary consultation will have been completed.

7. However, it should be noted on the narrow issue of competence and compellability of a wife to testify against her husband on a charge of rape against the husband, the law is clear. As a result of section 57 of the Criminal Procedure Ordinance, Cap 221 a wife would be competent (but not compellable) to testify against her husband on such a charge.

Prosecutions Division
Department of Justice
May 2000

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17 May 2000

Mr. Stephen Wong
Deputy Solicitor General
General Advisory Unit
Department of Justice
4th Floor, High Block
Queensway Government Offices
Hong Kong

Handwritten notes: AW.17/5. cc Mr. RA Bui via DPP. SG

Dear Stephen,

Marital Rape

I refer to the discussion on the above item in yesterday's Panel on Administration of Justice and Legal Services. Having read the case you brought the Panel's attention to, namely HKSAR v Chan Wing Hung [1997] 3 HKC 472, I am even more convinced that the law should be amended to make it clear beyond doubt that marital rape is a crime. Although the Court referred to R v R [1991] 3 WLR 767 and followed Lord Keith in holding that the word "unlawful" was "suplusage" in the context of s.119 of Cap. 200, the Court did so to come to the conclusion that the sexual intercourse in question was "unlawful sexual intercourse" because it was outside the bounds of matrimony.

Under the Basic Law, R v R is only of reference and not binding force in the Hong Kong courts. Chan Wing Hung is not on rape. Neither makes the law clear to the layman or indeed the average police constable.

I still maintain an amendment is necessary to make the law clear in this vital area in Hong Kong.

Yours sincerely,

Margaret Ng

Margaret Ng

c.c. Mrs. Percy Ma (Fax: 2509 9055)
Clerk to the AJLS Panel for circulation to members of the Panel

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18 May 2000

Secretary for Justice
(Attn : Mr Stephen WONG) *AW. 18/5*
4th floor, High Block
Queensway Government Office
Hong Kong

Dear Mr WONG,

LegCo Panel on Administration of Justice and Legal Services

Marital rape under section 118 of Crimes Ordinances (Cap. 200)


I write to follow up on the Panel's discussion on the above subject at the meeting on 16 May 2000.

As you are aware, it is the consensus view of the Panel that the law should be amended to make it clear that marital rape is a crime. The Chairman has reiterated the view in her letter to you the following day.

The Panel has requested the Administration to reconsider its position on the matter and revert to the Panel before the next meeting on 20 June 2000. In the event that the reply is in the negative, the Panel would like to be provided with further information such as the ramifications of amending the law, the definition of "rape" in other overseas jurisdictions, and statistics on complaints received from wives against husbands by relevant departments, e.g. the Police and Social Welfare Department on sexual ill-treatment such as rape.

I should be grateful for your bilingual reply by 13 June 2000.

Yours sincerely,


(Mrs Percy MA)
Clerk to Panel

Letterhead of Home OfficeAnnex D**A REVIEW OF SEX OFFENCES**

Why have a review?

A review of the criminal law on sex offences is long overdue. The structure of the law is complex and made more difficult by changes and amendments over time. Much of the law dates from a hundred years ago and more, when society was very different. We know far more about the patterns of sexual abuse than we did - the law needs to be able to reflect today's knowledge and to provide effective protection for individuals. The time is now right to take a good look at sexual offences and penalties to ensure that they meet the needs of society today.

What is the review going to look at?

The terms of reference of the review are:-

"To review the sex offences in the common and statute law in England and Wales, and make recommendations that will:-

- o provide coherent and clear sex offences which protect individuals, especially children and the more vulnerable. from abuse and exploitation;
- o enable abusers to be appropriately punished; and
- o be fair and non-discriminatory in accordance with the ECHR and Human Rights Act".

The review will be looking at the law on rape and sexual assault, at the homosexual offences, at offences of sexual exploitation and "flashing".

The review will **not** be looking at decriminalising prostitution or pornography, at reducing the age of consent below sixteen, or at procedural or evidential issues.

How will the review work?

A steering group of officials, lawyers and advisers will consider the whole framework of sex offences. An external reference group of individuals and organisations with relevant information and experience (and strong views) about issues relating to sex offences will advise the steering group.

The reference group will include individuals and organisations concerned with women's issues, the children's charities, gay and lesbian groups, medical, ethical, legal and religious interests.

As the review progresses there will be a series of conferences and seminars on particular topics to seek an even wider range of views—these will be held in various regional centres—not just London.

All of these will help the review team to develop proposals which will form the basis of a consultation paper which we hope to issue towards the end of the year.

How can you contribute to the review?

We want and need your views on how you think the criminal law should apply in this area. Sex offences, more than any other part of the criminal law, mirror the attitude of society to sexual roles, sexual behaviour, sexual orientation and sexual exploitation. These issues reflect fundamental views on life and behaviour which may vary widely.

In carrying out a review of this kind it is vital that the views of ordinary people, and those with relevant expertise, are sought and considered. We welcome all contributions which will help the Government develop the law in an open and fair way.

We would like to hear your views now. This will enable the review team to take the fullest account of existing opinion in formulating its proposals. Please write or e-mail or fax to the address below by **19 March 1999**.

How can I contribute?

Please send your comments in writing, about the law relating to sex offences and penalties to:-

Su McLean-Tooke
Sex Offences Review Team
Room 253
Home Office
50 Queen Anne's Gate
London SW1H 9AT

You can also fax us on: 020 7 273 2489

Review of Sex Offences
or email us on

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sex_offences_review.ho@gtnet.gov.uk

Your comments should reach us by Friday, 19 March 1999.

Sentencing and Offences Unit front page

Home Office front page

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New sex abuse law to protect children

By Richard Ford
Home Correspondent

THE Home Office is considering the creation of a new criminal offence intended to give children greater protection from sexual abuse in the family.

The measure would be an addition to the present law against incest. It is understood that it would reflect the modern structure of the family.

Also under consideration is proposed legislation to deal with sexual attacks by carers on children and adults, including victims who are mentally impaired. This follows claims that carers abuse tens of thousands of people each year.

A Home Office review found that many mentally impaired people regarded sexual abuse as a normal part of their lives, and that the offences committed against them were hardly ever prosecuted.

The review paper, being studied by ministers, is part of a planned overhaul of Britain's sex laws to reflect the modern sexual climate rather than that of Victorian times.

Jack Straw, the Home Secretary, is expected to publish a consultation paper next month, which will include an outline of reforms to Britain's sex laws since 1885.

Among the other proposals, ministers are expected to support new laws making the circumstances of marriage or a relationship aggravating factors in sexual crimes because of the breach of trust involved. This would be similar to the treatment of racial assaults, which carry a higher penalty in the courts.

A more consistent approach to age in legislation governing sexual offences relating to children is proposed. At present there is an offence of unlawful sexual intercourse with a girl under 13, carrying a maximum sentence of life imprisonment, and another of unlawful sexual intercourse

with a girl under 16, with a maximum sentence of two years.

Another proposal is to re-define the offence of indecent assault to ensure that the most serious offenders are properly punished. Violent attackers who stop short of raping a victim would face a longer jail term than the present maximum for indecent assault of ten years.

The review also includes a proposal to alter the definition of rape to include unwanted oral sex, and to change the definition of consent in rape cases. However, there is no proposal to create a lesser offence of "date rape".

The review found, too, that 75 per cent of prostitutes working in brothels in Soho came from overseas — in particular, the Balkans — and that more than £12 million was spent on prostitutes each year. The Home Office is now looking at increasing from seven to ten years the maximum term for pimps who put under-age girls into prostitution.

The review of sex offences was ordered two years ago after a series of piecemeal legislative changes had been introduced, including the introduction of a sex offenders' register and changes to the legal age for homosexual consent.

Britain's sex laws are based mainly on the 1885 Criminal Law Amendment Act, which made acts of gross indecency between men illegal.

The 1956 Sexual Offences Act — covering rape, intercourse with girls under the ages of 13 and 16, buggery, incest, indecent assault and keeping a brothel — consolidated the 1885 Act.

The review also looked at the Street Offences Act 1959, which dealt with prostitution; the 1960 Indecency with Children Act; and the 1967 Sexual Offences Act, which legalised homosexual acts in private between consenting men over the age of 18.