

Legislative Council Panel on Administration of Justice and Legal Services

Meeting on 16 January 2001

Information Paper

Consultation on Marital Rape and Related Sexual Offences

Background

In May 2000, members of the Panel expressed concern that, since it is possible that “unlawful sexual intercourse” in the offence of rape under section 118 of the Crimes Ordinance (Cap. 200) still means intercourse outside the bounds of matrimony, the Crimes Ordinance should be amended to make it clear that marital rape is an offence. Similarly, the United Nations Committee on the Elimination of Discrimination Against Women has commented that the term “unlawful” may create ambiguities. The Administration had taken the view that, following the decision of the House of Lords in Reg v R [1991] 1 WLR 767, a husband may be guilty of rape of his wife if, in the circumstances of the case, the wife does not consent to sexual intercourse.

2. The Administration, however, undertook to consider whether a legislative amendment should be made to put the matter beyond doubt. In September 2000 it issued a Consultation Paper to the Bar Association, the Law Society and various other interested persons or bodies (numbering 91 in total) with a request for comments to be submitted by 30 November 2000. A copy of the Consultation Paper is attached at Annex A.

3. The Consultation Paper set out three policy options regarding the possible amendment of the Crimes Ordinance –

Option 1: retain the status quo and rely on Reg v R and HKSAR v Chan Wing Hung [1997] 3 HKC 472 as authority for the proposition that a man

can be guilty of rape of his wife since “unlawful” is mere surplusage in section 118.

Option 2: make it clear in section 118 that marital rape is an offence, and delete “unlawful” from the section.

Option 3: clarify the meaning of “unlawful” in “unlawful sexual intercourse” and “unlawful sexual act” to ensure that the term means outside marriage, or within marriage in any circumstances where the wife does not consent. This would overcome any suggestion that, by deleting “unlawful” from section 118, the legislature intended that the term should take its traditional common law meaning in the other sexual offence sections.

4. In paragraph 33 of the Consultation Paper, the Administration provisionally suggested (and now recommends) the adoption of what is effectively a combination of Option 2 and Option 3 to the effect that rape and other sexual offences should be clarified by –

- (1) deleting “unlawful” from section 118 and adding an express provision that a marital relationship is immaterial to the offence of rape (Option 2); and
- (2) in respect of other sexual offence sections, defining “unlawful” non-exhaustively under section 117 to include non-consensual marital intercourse (Option 3).

Responses to the Consultation Paper to date

5. The responses received from consultees as at 2 January 2001 are summarised in the table below.

Consultee		Options supported		
		1	2	3
1	Desmond Keane, SC	x		
2	Equal Opportunities Commission			x
3	Hong Kong Bar Association		x	
4	The Law Society of Hong Kong		x	
5	City University of HK – Andy Chiu		x	
6	City University of HK – Sin Wai Man		x	
7	Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong		x	
8	The Hong Kong Family Law Association		x	x
9	Hong Kong Family Welfare Society		x	x
10	Jacqueline Leong, QC, SC			
11	The Family Planning Association of HK			x
12	Hong Kong Christian Council			x
13	Hong Kong Association for the Survivors of Women Abuse (Kwan Fook)		x	x
14	Harmony House – Women Ambassador Group		x	
15	Harmony House Ltd		x	x
16	HK Women’s Coalition on Equal Opportunities		x	x
17	The HK Girl Guides Association			x
18	HK Federation of Women’s Centres		x	x
19	The HK Council of Social Service		x	x
20	Association Concerning Sexual Violence Against Women			x
21	Zonta Club of Hong Kong			x
22	Social Welfare Department			x

6. As shown in the above table, so far only one respondent supports Option 1. Six respondents support Option 2, and seven respondents support Option 3. Seven respondents support a combination of Option 2 and Option 3. One respondent has not commented on the options. A further summary and a reply by the Administration to the more detailed responses is attached at Annex B.

7. Members of the Panel will be provided with copies of the responses raising detailed legal issues, on which the Administration has made comments in Annex B. These include the responses from the Bar Association, the Law Society, an Assistant Professor and a lecturer respectively of the School of Law, City University of Hong Kong,

and the Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong.

The way forward

8. Four respondents – namely, the Bar Association, the Law Society, a lecturer of the School of Law, City University of Hong Kong, and the Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong – have argued against Option 3 (defining “unlawful” non-exhaustively in section 117 to include non-consensual marital intercourse). Their arguments, and the Administration’s counter-arguments, are set out in detail in paragraphs 3, 4, 6 and 7 respectively of Annex B.

9. Having considered the arguments of the four respondents, the Administration, for the reasons given in its replies in the paragraphs of Annex B noted above, remains strongly of the view that both Option 2 and Option 3 should be implemented. A summary of the main reasons for keeping Option 3 is that –

- (1) if “unlawful” were to be deleted from section 118 because it is surplusage, it is arguable that the retention of that word in other sections demonstrated an intention that, in those sections, it should have its original common law meaning of outside marriage (see, for example, Smith and Hogan Criminal Law 7th Ed., p.475, as cited in paragraph 7.03 of Annex B). This could prevent the courts from deciding, for example, that section 119 covered intimidating a married woman (whether by her husband or a third party) to have sexual intercourse with her husband; and
- (2) Option 3 would overcome the uncertainty arising from deleting “unlawful” from section 118 alone by making it clear that other sexual offences could be committed where one of the elements of the offence is non-consensual marital intercourse. This would provide the prosecution with charging options, under the other sexual offence sections, in addition to marital rape

under section 118 (see, for example, Archbold 2000, para. 20-14, as cited in paragraph 6.08 of Annex B).

Legal Policy Division

Department of Justice

January 2001

Consultation Paper
Marital Rape and Related Sexual Offences

This paper seeks comments on whether the Crimes Ordinance (Cap. 200) should be amended in respect of non-consensual marital intercourse.

The Problem

2. The offence of rape does not expressly state whether it includes non-consensual marital intercourse. The extent to which other offences that refer to “unlawful sexual intercourse” or an “unlawful sexual act” apply to non-consensual marital intercourse is unclear.

Recommendation

3. It is recommended that –
- (1) the offence of rape should be amended so that it expressly includes non-consensual marital intercourse;
 - (2) Part XII of the Crimes Ordinance should be amended to make it clear that all offences involving “unlawful sexual intercourse” or an “unlawful sexual act” apply to non-consensual marital intercourse.

Background

The offence of rape

4. Under section 118(3) of the Crimes Ordinance, a man commits rape if –

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

5. Earlier this year, the Legislative Council Panel on Administration of Justice and Legal Services (“AJLS Panel”) expressed concern that, since it is possible that “unlawful sexual intercourse” still means intercourse outside the bounds of matrimony, the Crimes Ordinance should be amended to make it clear that marital rape is an offence. Similarly, the United Nations Committee on the Elimination of Discrimination against Women (“UN Committee”) has commented that the term “unlawful” may create ambiguities. Consequently, the Administration is considering whether a legislative amendment should be introduced to put the matter beyond doubt.

6. The Administration’s preliminary view is that, following the landmark decision of the House of Lords in Reg v R [1991] 1 WLR 767, a husband may be guilty of rape of his wife if, in the circumstances of the case, the wife does not consent to sexual intercourse. Further, all front-line police officers are instructed to handle marital rape cases according to this view of the law.

English case law

7. In Reg v R, at p.770A-C, Lord Keith of Kinkel traced the common law meaning of “unlawful” back to Hale History of the Pleas of the Crown (1736) Vol. 1, Ch. 58, p.629, which states –

“But the husband cannot be guilty of a rape committed by himself upon his wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract.”

8. At pp.772C-775A of Reg v R, Lord Keith reviewed several court decisions in which it was held that the wife's implied consent to marital intercourse could be revoked: for example, on grounds of her knowledge that the husband suffered from venereal disease, that he imposed intercourse by violence, or the existence of a non-molestation order or a family protection order.

9. At p.775B-D of Reg v R, Lord Keith continued –

“The position then is that that part of Hale's proposition which asserts that a wife cannot retract consent to sexual intercourse which she gives on marriage has been departed from in a series of decided cases. On grounds of principle there is no good reason why the whole proposition should not be held inapplicable in modern times. The only question is whether section 1(1) of the [Sexual Offences (Amendment) Act] 1976 [on which section 118(3) of the Crimes Ordinance is based] presents an insuperable obstacle to that sensible course. The argument is that “unlawful” in the subsection means outside the bond of marriage. That is not the most natural meaning of the word, which normally describes something which is contrary to some law or enactment or is done without justification or excuse. Certainly in modern times sexual intercourse outside marriage would not normally be described as unlawful. If the subsection proceeds on the basis that a woman on marriage gives a general consent to sexual intercourse, there can never be any question of intercourse with her by her husband being without her consent. There would thus be no point in enacting that only intercourse without consent outside marriage is to constitute rape.”

10. At p.776C-G of Reg v R, Lord Keith noted that it was inconceivable that Parliament would have intended under section 1(1) of the 1976 Act to have abolished the exceptions to the marital exemption, and –

“In order that the exceptions might be preserved, it would be necessary to construe “unlawfully” as meaning “outside marriage or within marriage in a situation covered by one of the exceptions to the marital exemption.” ... However, the gloss which the suggested construction would place on the word “unlawfully” would give it a meaning unique to this particular subsection, and if the mind of the draftsman had been directed to the existence of the exceptions he would surely have dealt with them specifically and not in such an oblique fashion. ... The fact is that it is clearly unlawful to have sexual intercourse with any woman without her consent, and that the use of the word in the subsection adds nothing. ... it should be treated as being mere surplusage in this enactment.”

11. Lord Keith concluded, at pp.776H-777A of Reg v R –

“... in modern times the supposed marital exception in rape forms no part of the law of England ... [and this] (citing Lord Lane CJ in Reg v R in the Court of Appeal (Criminal Division) [1991] 2 WLR 1065, at p.1074) ... “is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it.”

English statutory amendments

12. The Criminal Justice and Public Order Act 1994 adopted the decision in Reg v R that a man can be guilty of rape of his wife by repealing section 1(1) of the Sexual Offences (Amendment) Act 1976 and substituting a new section 1 in the Sexual Offences Act 1956. The new section 1(2)(a) of the 1956 Act omits the word “unlawful” and refers simply to “sexual intercourse”.

13. The 1994 Act also deleted the word “unlawful” from sections 2(1) (procurement of a woman, by threats or intimidation, to have sexual intercourse) and 3(1) (procurement of a woman, by false pretences or false representations, to have sexual intercourse) of the 1956 Act.

14. However, the word “unlawful” remains in other offences under the 1956 Act, for example, sections 4 (administering drugs to obtain unlawful sexual intercourse), 5 (unlawful sexual intercourse with a girl under 13), 6 (unlawful sexual intercourse with a girl under 16), and 7 (unlawful sexual intercourse with a defective).

15. In Reg v R, at p.775H-776A, Lord Keith noted that, in the context of section 19 of the Sexual Offences Act 1956, cogent reasoning led the court in R v Chapman to the conclusion that “unlawful” meant outside the bond of marriage. Under section 19 of the 1956 Act it is an offence to abduct an unmarried girl under the age of 18 from her parent or guardian if she is taken with the intention that she have unlawful sexual intercourse with men or a particular man. Donovan J said, at p.105 of R v Chapman, that, “We do not think [“unlawful”] is mere surplusage, because otherwise a man who took such a girl out of her parents’ possession against their will with the honest and bona fide intention of marrying her might have no defence, even if he carried out that intention.”

Hong Kong law

16. Since in Reg v R the House of Lords held that the word “unlawful” added nothing, or was surplusage, in the then English equivalent of section 118(3)(a) of the Crimes Ordinance, that decision probably still represents the law in Hong Kong under Articles 8 and 18 of the Basic Law.

17. In HKSAR v Chan Wing Hung [1997] 3 HKC 472, at pp.475D-476A, the Hong Kong Court of Appeal considered the meaning of “unlawful” in section

119 of the Crimes Ordinance (under which it is an offence to procure another person, by threats or intimidation, to do an unlawful sexual act). At p.475G-H, Power VP said that the Court inclined to the view of Lord Keith in Reg v R that “unlawful” should be treated as mere surplusage. However, in the present case (the couple in question not being married), it was unnecessary to go further than to adopt the judgment of Donovan J in R v Chapman [1959] 1QB 100, at p.105, that “unlawful” in the context simply means illicit, that is outside the bond of marriage.

The Options

18. There appear to be three policy options regarding the possible amendment of the Crimes Ordinance in respect of marital rape and related sexual offences –

- (1) retain the status quo and rely on Reg v R and Chan Wing Hung as authority for the proposition that a man can be guilty of rape of his wife;
- (2) make it clear in section 118 that marital rape is an offence; and
- (3) clarify the meaning of “unlawful” in all sections.

Option 1: The status quo

19. As noted in paragraph 6 above, the Administration considers that marital rape is an offence under section 118 on the authority of Reg v R.

20. Further, as noted in paragraph 17 above, the Hong Kong Court of Appeal approved Reg v R in HKSAR v Chan Wing Hung. That was a case under section 119, and, since the couple in question were not married, the Court found that it was not “necessary to go further than to hold ... that *unlawful in the context* means illicit, that is outside the bounds of matrimony”: p.475H of Chan Wing Hung [emphasis added]. Impliedly, had the couple been married, it would have

been open to the Court of Appeal “to go further” and hold on the authority of Reg v R that “in the context” the word unlawful was surplusage if the wife did not consent to the intercourse. Alternatively, the husband could (and probably would) have been charged with rape under section 118.

21. It therefore appears that there is no requirement on legal grounds to amend the Crimes Ordinance solely in respect of marital rape. Moreover, also as noted in paragraph 17 above, at p.475G-H of Chan Wing Hung, the Court of Appeal strongly indicated that it would have construed “unlawful” in section 119 in accordance with Reg v R had the context been that the man and woman concerned were married and the wife had not consented to the unlawful sexual act. Accordingly, it also appears that retaining the status quo has no negative implications for the meaning of “unlawful” in respect of other sexual offences.

22. The only drawback of the status quo appears to be that, from a public perspective, there is no express black-letter statement in the Ordinance to the effect that marital rape is an offence, and it is necessary to read section 118 with the relevant case law. It is, however, common for statute law to be supplemented by interpretation by the courts.

Option 2: Make it clear in section 118 that marital rape is an offence

23. Although such amendment is not considered to be legally necessary, a clear statement in section 118 to the effect that marital rape is an offence would allay public doubt regarding the meaning of “unlawful” such as has been expressed by the AJLS Panel and the UN Committee. At the same time, the word “unlawful” could be deleted from the section.

24. However, such an amendment could raise doubts about the coverage of other sexual offences that also include the expression “unlawful sexual intercourse” and “unlawful sexual act” (which is defined to include unlawful sexual intercourse). The word “unlawful” – which is the cause of the concern –

appears in other sections of Part XII of the Ordinance which create sexual offences (see paragraph 31 below). For example, it is an offence for someone to procure another, by threats or intimidation, to do an unlawful sexual act (section 119).

25. As shown by Reg v R and Chan Wing Hung, depending on the context, “unlawful” has two possible meanings, namely, outside marriage (that is, the traditional common law meaning – inclusive of the exceptions to the marital exemption noted in paragraph 8 above), or, if within marriage, without consent. Therefore if section 118 were not amended, the courts could give that word an appropriate meaning, depending on the context of each offence. For example, they could decide that, under section 119, it is an offence for someone to procure a married woman, by threats or intimidation, to have sexual intercourse with her husband.

26. However, if “unlawful” were to be deleted from section 118 because it is surplusage, it might be argued that the retention of that word in other sections demonstrated an intention that, in those sections, it should have its original common law meaning, i.e. outside marriage. This could prevent the courts from deciding (for example) that section 119 did cover intimidating a married woman to have sexual intercourse with her husband.

27. An alternative approach might be to leave “unlawful” in place in section 118 but to add a provision, “for the avoidance of doubt”, stating that the offence of rape may be committed notwithstanding that the man and woman involved are married to each other.

28. However, as with the selective deletion of “unlawful”, a disadvantage of such an amendment is that, by its confinement to section 118, this might also suggest that “unlawful”, in the other offence sections in Part XII, was intended to have its traditional common law meaning of outside marriage. In other words, while such an amendment would ensure that non-consensual marital intercourse is

an offence for the purposes of section 118, it may have the opposite effect in respect of the offence sections in which the terms “unlawful sexual intercourse” or “unlawful sexual act” appear.

Option 3: Clarify the meaning of “unlawful” in all sections.

29. The third option would overcome the problems arising from an amendment of section 118, by making it clear whether other sexual offences could be committed where one of the elements of the offence is non-consensual marital intercourse.

30. Under this approach, it is necessary to consider each of the offences that refers to “unlawful sexual intercourse” or “unlawful sexual act” and to decide which of the two possible meanings of “unlawful” is appropriate. As has been explained above, there are two possible meanings of “unlawful”.

- (1) Outside marriage, or within marriage but without the wife’s consent in circumstances in which a man could (under common law exceptions) be guilty of rape of his wife. These circumstances include where there has been a judicial separation or decree nisi of divorce or nullity; where an injunction against molestation has been granted; where an undertaking has been given to the court not to molest; and where a formal deed of separation has been made. These circumstances are referred to below as “special marital circumstances”.
- (2) Outside marriage, or within marriage in any circumstances where the wife does not consent.

31. An analysis of the effect of these two possible meanings of “unlawful” in respect of the relevant offence sections is set out below.

Sections 119 (procurement of unlawful sexual act by threats or intimidation), 120 (procurement of unlawful sexual act by false pretences or false representations), and 121 (administering drugs to obtain or facilitate unlawful sexual act)

- Under meaning (1), the procurer or facilitator of an unlawful sexual act in the form of non-consensual sexual intercourse of a wife with her husband (marital rape) would commit an offence under these sections only if one of the special marital circumstances applied.
- Under meaning (2), all procurers or facilitators of marital rape could be prosecuted under sections 119, 120 or 121 (as the case may be) even if there were no special marital circumstances.

Section 123 (unlawful sexual intercourse with girl under 13)

- Under meaning (1), a husband who had non-consensual intercourse with his wife who was under 13 could be guilty under this section only if there were special marital circumstances.
- Under meaning (2), a husband could be guilty under this section if, in any circumstances, he had sexual intercourse with his wife without her consent.

Section 124 (unlawful sexual intercourse with girl under 16)

- The comments noted above in respect of section 123 also apply to section 124.
- Section 124(2) provides a specific defence for a husband who believes a girl under 16 to be his wife and has reasonable grounds for the belief notwithstanding that the marriage is invalid under section 27(2) of the Marriage Ordinance (Cap. 181) by reason of the wife being under 16.

However, if such husband had non-consensual intercourse with the person he believed to be his wife, under meaning (1) he would commit an offence under this section only if there were special marital circumstances. Under meaning (2), he would commit an offence if he had sexual intercourse with her without her consent in any circumstances.

Sections 125 (unlawful sexual intercourse with mentally incapacitated person) and 128 (abduction of mentally incapacitated person from parent or guardian for unlawful sexual act)

- It is possible that married persons may through accident or illness become so severely mentally incapacitated that they lose their capacity to consent to sexual intercourse.
- Under meaning (1), non-consensual sexual intercourse between a husband and his mentally incapacitated wife would only be “unlawful” if there were special marital circumstances.
- Under meaning (2), such non-consensual intercourse would be “unlawful” under these sections irrespective of whether there were such circumstances.

Section 127 (abduction of unmarried girl under 18 for unlawful sexual intercourse)

- The offence under section 127 is committed by “a person who takes an unmarried girl under the age of 18 out of the possession of her parent or guardian against the will of the parent or guardian with the intention that she shall have unlawful sexual intercourse with men or with a particular man.”
- As noted in paragraph 15 above, it was held in R v Chapman that

“unlawful” was not mere surplusage in section 19 of the 1956 Act (the equivalent of section 127) since otherwise a man who took a girl under 18 out of her parents’ possession against their will with the honest and bona fide intention of marrying her might have no defence, even if he carried out that intention.

- The issue of non-consensual marital intercourse would only arise under this section in the unlikely event of a man taking away such a girl with the intention that he, or another man, should marry her and then commit marital rape. In that situation, meaning (1) of “unlawful” would generally result in no offence being committed under this section, but meaning (2) would result in an offence.

32. Having reviewed all these offences, it is considered that meaning (2) is to be preferred in all cases. The adoption of that meaning would reflect the common law as developed by Reg v R and Chan Wing Hung and ensure that marital rape was included not only in section 118 but also in the related sexual offence sections in which “unlawful” appears.

The preferred approach

33. It is provisionally considered that the third option should be adopted, and that the relevant sexual offences should be clarified by -

- (1) deleting “unlawful” from section 118 and adding an express provision that a marital relationship is immaterial to the offence of rape; and
- (2) in respect of other sexual offence sections, defining “unlawful” non-exhaustively under section 117 to include non-consensual marital intercourse.

Comments sought

34. It should be noted that this Consultation Paper is a discussion paper and does not necessarily represent any fixed views of the Administration. The object is to obtain feedback from interested members of the public on this topic to enable the Administration to reach a settled view. Comments on this paper by 30 November 2000 would be greatly appreciated.

Legal Policy Division
Department of Justice
September 2000

Summary and Consideration of Responses to
Consultation Paper on Marital Rape
and Related Sexual Offences

1. Desmond Keane, SC

- 1.1 Supports Option 1.
- 1.2 Amendments are best avoided unless necessary.
- 1.3 The amendment process might cause unnecessary uncertainty as to the pre-amendment law when in fact the present law is clear.

2. Equal Opportunities Commission

- 2.1 Supports Option 3 as the most comprehensive of the three options.

3. Hong Kong Bar Association

- 3.1 Supports Option 2 (paragraph 33(1) of the Consultation Paper).
- 3.2 Disagrees with Option 3 (paragraph 33(2) of the Consultation Paper) which it is thought would lead to more problems than it is designed to solve.
- 3.3 Submits that the simplest method of addressing the problem is to remove “unlawful” from section 118 and make it clear that marital rape is an offence, and leave “unlawful” to remain in other sections to bear the common law meaning as explained in paragraphs 30(2) and 32 of the Consultation Paper. Suggests that such amendment, together with the common law as defined in Reg v R and Chan Wing Hung, is enough to achieve the intended purpose.

Reply by the Administration to the Bar Association

- 3.01 If Option 3 reflects the common law as discussed in paragraphs 30(2) and 33 of the Consultation Paper, and as described in Reg v R and Chan Wing Hung (which the Administration considers to be the case), it would not lead to more problems but rather would improve matters by removing ambiguities which exist under the common law (including particularly the argument that the decision in Reg v R was contrary to the intention of the legislature).
- 3.02 In particular, Option 3 would make it clear that a court could continue to apply the common law meaning defined in Reg v R and Chan Wing Hung, according to the context of the case, in any of the other sections. Without such amendment, the court would be confronted with a strong argument, based on the expressio unius rule (namely, the presumption of statutory interpretation that the inclusion of the one is the exclusion of the other) that, because “unlawful” was deleted only from section 118, the legislature intended to exclude the Reg v R and Chan Wing Hung meaning of “unlawful” from the other sexual offence sections (see, for example, Smith and Hogan Criminal Law, 7th Ed., p.475, as cited in paragraph 7.03 below). Those sections would therefore no longer provide the prosecution with charging options, in addition to section 118, where marital rape was an element of the offence (see further, paragraphs 6.07 and 6.08 below).

4. The Law Society of Hong Kong

- 4.1 Supports Option 2.
- 4.2 Disagrees with Option 3. Considers that there are problems with properly defining “unlawful”.
- 4.3 Submits that an inclusive definition would give rise to queries about what is included or excluded and it will be unclear what the definition is seeking to define.
- 4.4 Submits that while the Administration is seeking to make it clear that

“unlawful sexual intercourse” includes (non-consensual) “sexual intercourse within marriage”, the House of Lords (in Reg v R) has already decided that “unlawful” is surplusage. Therefore the offences should not be clarified by defining “unlawful” as this may be inconsistent with the common law position.

Reply by the Administration to the Law Society

- 4.01 An inclusive or non-exhaustive definition is commonly used in legislative drafting. It provides both certainty and any required flexibility. Such definition does not require the court to apply any one meaning to a term – it is able to apply a meaning stipulated in the definition, or a common law meaning, or an ordinary meaning, according to the context. Accordingly, stipulating that “unlawful” includes non-consensual marital intercourse makes it certain that marital rape can feature under the relevant sexual offence sections while allowing the court to apply such other meaning as may be proper in the circumstances of the case.
- 4.02 The Administration considers that defining “unlawful” to include non-consensual marital intercourse would not be contrary to the common law as declared in Reg v R and approved in Chan Wing Hung. It would in fact reflect it. The reason that it was held in Reg v R (p.776G) that “unlawful” is mere surplusage in the offence of rape is because it is clearly unlawful to have intercourse with any woman without her consent. From this it follows that “unlawful” refers to non-consensual marital intercourse as much as to intercourse outside the bond of marriage. The effect is therefore the same whether “unlawful”, depending on the context, is treated as mere surplusage – as it presently is under the common law – or, in the interests of certainty, is defined non-exhaustively to include an absence of consent to intercourse within marriage.
- 4.03 Further, a failure to define “unlawful” clearly to include non-consensual marital intercourse runs the risk, because of the expressio unius rule, of

reinstating in the other sexual offence sections the former common law meaning of the term contrary to Reg v R as a result of deleting “unlawful” from section 118 alone. Accordingly, it is necessary to implement both limbs of the recommendation in paragraph 33 of the Consultation Paper in the current amendment exercise.

5. Andy Chiu, Assistant Professor, School of Law, City University of Hong Kong

- 5.1 Does not recommend Option 1 since Reg v R is English authority not binding in Hong Kong, and the approval of Reg v R in Chan Wing Hung is only obiter.
- 5.2 Supports Option 2.
- 5.3 Submits that “unlawful” has a different meaning under section 118 (where it refers to “extra-marital sexual intercourse”) than under the related sexual offence sections (where it refers to “illegal sexual intercourse”).
- 5.4 Since “unlawful” is redundant in section 118, its deletion would still leave the legal meaning of “rape” clear.
- 5.5 Deleting “unlawful” from section 118 would reduce the terms in the sexual offence sections other than section 118 to “rape” and “illegal sexual act”.

Reply by the Administration to Andy Chiu

- 5.01 The Administration agrees that the deletion of “unlawful” from section 118 would not alter the legal meaning of rape.
- 5.02 However, with respect to sections other than section 118, the Administration considers that, even if obiter, Chan Wing Hung is a strong indication by a Hong Kong court that “unlawful” either (as held in Reg v R) applies to marital intercourse without the consent of the wife, or, in the case of an unmarried man and woman, “means illicit, that is outside the bounds of matrimony”.
- 5.03 The deletion of “unlawful” from section 118 if, as proposed by the Administration, Reg v R is expressly reflected in section 117, would not

prevent the application of either of these meanings, according to the context of the offence, in the sexual offence sections other than section 118.

6. Sin Wai Man, Lecturer, School of Law, City University of Hong Kong

- 6.1 Supports Option 2.
- 6.2 Submits that the consent of the victim is not an element under sections 119-121, citing R v Linekar [1995] 3 All ER 69, [1995] Crim. L.R. 321. Accordingly, the alternative meaning of “unlawful” in Option 3(2), namely, “outside marriage, or within marriage in any circumstances where the wife does not consent”, would result in married parties receiving less protection than unmarried parties under sections 119-121.
- 6.3 Recommends that “unlawful” should therefore be deleted from sections 119-121 to afford equal protection to both married and unmarried parties.
- 6.4 Submits that consent is not an issue under sections 123-125. Their object is related to the capacities of the victims and to avoid the difficulty of proving consent in rape under section 118.
- 6.5 Option 3(2) would introduce consent as an element in the sections. This is unnecessary since if non-consent could be proved between unmarried parties rape could be charged.
- 6.6 If non-consent becomes an element there is a risk of creating an impression that marital rape of women of the capacities specified in sections 124-125 deserve lesser offences since the maximum penalties for both are less than that for rape. There could also be inconsistency since one marital rape of a mentally incapacitated woman might be charged under section 118 and another under section 125.
- 6.7 However, under sections 123 and 124, marriage under the ages of 16 or 13 might be allowable in respect of foreign marriages (Alhaji Mohamed v Knott [1969] 1QB1, 16). Suggests that, under section 125, sexual intercourse with a mentally incapacitated person should be allowed within marriage. Accordingly, “unlawful” should be retained in sections 123,

124 and 125, and defined in section 117 to mean outside marriage.

- 6.8 Submits that the offences under sections 127 and 128 concern the infringement of parental rights rather than marital rape, and that consent is not an issue.
- 6.9 Suggests that, since consensual sexual intercourse with girls aged 16-18 is not a crime, section 127 should only apply where any such girl is abducted for the purpose of sexual intercourse without her consent. Accordingly, “unlawful” should be deleted from section 127 in relation to girls aged 16-18 and “without her consent” inserted after “a particular man”.
- 6.10 Suggests that the protection of parental authority over girls under 16 or mentally incapacitated persons need not extend to consensual sexual intercourse within the marriages of such persons. Accordingly, in these offences, the meaning of “unlawful” in Option 3(2) should be adopted.

Reply by the Administration to Sin Wai Man

- 6.01 Since the meaning of “unlawful” based on Reg v R includes non-consensual marital intercourse, that meaning could, as appropriate to the context, apply to the sexual offence sections in addition to section 118, including sections 119-121, 123-125 and 127-128. This was recognised in Chan Wing Hung in respect of section 119.
- 6.02 Depending on the circumstances, consent could feature under sections 119-121. A consent which was genuinely obtained and given may mean that the unlawful sexual act in fact had not been procured, obtained or facilitated by threats or intimidation, false pretences or false representations, or the administration of drugs. If, for example, the victim in R v Linekar (cited in paragraph 6.2 above) had subsequently agreed (before intercourse) to waive payment, it may have been arguable that her consent became genuine and that the intercourse was not procured by fraud despite the accused’s intention never to pay. Intercourse without consent was the issue in Chan Wing Hung (p.476D), a case under section 119.

- 6.03 Option 3(2) would in fact enhance the protection of married parties by expressly applying the Reg v R meaning of “unlawful”, namely, that intercourse with any woman without her consent is clearly unlawful (p.776G). Under the traditional common law meaning, the consent of a married woman could not be withdrawn except in limited circumstances.
- 6.04 Further, Option 3(2) would provide the prosecution with a range of charging options in respect of non-consensual marital intercourse as appropriate to the circumstances, including not only section 118 but also, as the case may be, any one or more of the other sexual offence sections.
- 6.05 It is not proposed that “unlawful” be deleted from any section other than section 118 at this stage. Based on the argument that “unlawful” is ambiguous, the Administration has proposed that the term should be deleted from section 118 to make it plain that marital rape is an offence. Nevertheless, the Administration considers that “unlawful” should remain in the other sexual offence sections for the time being, to ensure that the scope of Part XII of the Crimes Ordinance is not inadvertently altered.
- 6.06 However, it follows from the premise that “unlawful” is ambiguous that, arguably, because of the expressio unius rule, the legislature may have intended to exclude the Reg v R meaning from those sections from which “unlawful” has not been deleted. Hence it is necessary to pre-empt such argument by defining “unlawful” to include non-consensual marital intercourse.
- 6.07 The Administration recognises that a man who has non-consensual marital intercourse in the circumstances described in the other sexual offence sections could be charged with rape under section 118. However, paragraph 31 of the Consultation Paper specifies some of the potential problems or contradictions which appear to arise from the logical application of the argument that “unlawful” is ambiguous. These help to illustrate how defining “unlawful” as proposed would help to make the intended scope of the other sections very clear and certain in respect of

marital rape. The offences under sections 119-121 would, for example, be clearly extended to a husband who procures by threats, or administers drugs to, his own wife. This is a result which has been achieved in England in respect only of the equivalents of sections 119 and 120, and only by the selective – and confusing – deletion of “unlawful” (see further, Smith and Hogan Criminal Law 7th Ed., p.475, as cited in paragraph 7.03 below).

- 6.08 Further, with reference to the potential application of the other sections to marital rape, Archbold 2000, para. 20-14, states that, on a count of rape, the accused may be convicted of procurement of a woman by threats (section 119) or false pretences (section 120) or of administering drugs to obtain or facilitate sexual intercourse (section 121). It appears that this possibility of alternative verdicts would apply where the accused is both the alleged rapist and the alleged procurer or administrator. If, however, an accused procurer or administrator is other than the alleged rapist (on whose behalf the alleged victim was procured or administered to by the accused) that person could not be convicted under section 118 (except perhaps as an accessory to rape) but only, as the case may be, under section 119 or 120 or 121. Defining “unlawful” to include non-consensual marital intercourse, therefore, would help to ensure that the accused procurer or administrator would be caught under sections 119, 120 or 121 where the alleged rapist was the husband of the victim.
- 6.09 It would be inconsistent with the object of ensuring that marital rape is an offence to confine the meaning of “unlawful” to outside marriage for the purposes of sections 123, 124 and 125. Consistently with that object, marital intercourse with a mentally incapacitated person should not be permissible in circumstances that would be tantamount to rape.
- 6.010 Consent to marital intercourse is potentially an issue under sections 127 and 128 as it is under sections 119-121 and 123-125. Such consent is a separate issue from parental rights, which is implicitly recognised in the respondent’s suggestion (paragraph 6.9 above) to delete “unlawful” from

section 127 and to add “without her consent” after “a particular man”. However, such amendment would achieve no more than Option 2 and Option 3(2) proposed by the Administration. It would also introduce uncertainty arising from the expressio unius rule because of the selective deletion of “unlawful”.

7. Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong

- 7.1 Supports Option 2.
- 7.2 Submits that the proposal in paragraph 33 of the Consultation Paper to define “unlawful” non-exhaustively in section 117 to include non-consensual marital intercourse may make the situation in respect of sections 123, 124, 125 and 127 even more confused. Suggests that the approach to the meaning of “unlawful sexual intercourse” in paragraph 30 of the Consultation Paper is too narrow to address the specific policy issues raised by “unlawful” in these sections, which specifically relate to the protection of young and vulnerable women. Sets out a preliminary analysis of the sections.
- 7.3 Attributes no meaning to “unlawful” under section 123 on the assumption that sexual intercourse with a girl under 13 in Hong Kong is intended to be an offence regardless of the circumstances, including if she was married. Accordingly, “unlawful” is superfluous in section 123 and should be deleted. Considers that the position described in paragraphs 31 and 32 of the Consultation Paper would mean that a man could legally have sexual intercourse with a wife under 13, or with any girl, provided she consented.
- 7.4 Considers that “unlawful” has no meaning other than “outside marriage” under section 124 since section 124(2) provides a defence to a man who believed, and had reasonable cause to believe, a woman to be his wife despite the invalidity of the marriage under Hong Kong law. Understands the offence under section 124 to be for a man to have sexual intercourse

with a girl under 16, whether or not she consented, except where he was married to her under the laws of another jurisdiction. If the girl did not consent, the offence would also constitute rape under section 118. Concludes that “unlawful” is surplusage in section 124 and should be deleted, on the assumption that the meaning of “unlawful” as outside marriage is already adequately provided for in subsection (2).

- 7.5 Assumes that, if section 125 refers to persons who have lost their mental capacity to consent to sexual intercourse, the legislative intention was to make any sexual intercourse with such person an offence, unless the defence under section 125(2) applies. If that is correct, “unlawful” is superfluous and should be deleted from section 125. It is unclear why such offence – if of its nature it is non-consensual – should have a lesser maximum penalty than rape.
- 7.6 Considers that “unlawful” may remain in section 127 on the authority of R v Chapman [1959] 1QB 100.
- 7.7 Suggests that “unlawful sexual act” for the purposes of section 117(1A)(a) should be amended to mean sexual intercourse “which constitutes an offence under this Part”.

Reply by the Administration to the Centre for Comparative and Public Law

- 7.01 The Administration disagrees that defining “unlawful” non-exhaustively in section 117 would further confuse the situation under sections 123, 124, 125 and 127. To the contrary, such amendment is necessary to clarify the situation by preventing the operation of the expressio unius rule (arising from the deletion of “unlawful” from section 118) and ensuring that, depending on the context, marital rape may feature in the other sexual offence sections. Further, a non-exhaustive definition would not prevent any other meaning of “unlawful” from applying in these sections as may be appropriate to the circumstances of the case.
- 7.02 The object of sections 123, 124, 125 and 127 to protect young and

vulnerable women and girls does not alter the fact that the law recognises that marital intercourse with women or girls of such age or capacity is, in certain contexts, lawful. What the proposed non-exhaustive definition of “unlawful” would achieve, however, is to ensure not only that marital rape of the young women and girls described in the sections would be an offence but also that their husbands could be tried under those sections as well as under section 118 (see also paragraphs 6.07 and 6.08 above).

- 7.03 It is not clear that section 123 makes sexual intercourse with a girl under 13 an offence regardless of the circumstances. Marital intercourse with girls under the ages of 16 or 13 may be lawful in respect of foreign marriages (Alhaji Mohamed v Knott, as cited in paragraph 6.7 above). Further, Smith and Hogan Criminal Law 7th Ed., p.475, states the following in respect of the sections of the Sexual Offences Act 1956 from which “unlawful” was not deleted after the decision in Reg v R –

“The term, “unlawful sexual intercourse,” was used in other sections of the 1956 Act but the word “unlawful” has been removed from ss. 2 and 3, procurement of a woman to have intercourse by threats or false pretences, thus extending these offences to a man who procures his own wife. But “unlawful” remains in numerous other sections of the 1956 Act, including ss. 4 (administering drugs to obtain intercourse), 5 (intercourse with a girl under 13), 6 (intercourse with a girl under 16) and 7 (intercourse with a defective). It seems clear that (with some possible exceptions) a man cannot commit these offences by having intercourse in England with his wife (sc. under a foreign domicile) who is under 16, or even under 13, or who is a defective. This selective repeal of “unlawful” indicates that the draftsman and the government were well aware of the significance of that word. The rule that a husband could not be guilty of rape of his wife was subject to a number of exceptions and it is probable that these would be held applicable to other offences under the Act where

the word “unlawful” is still used”.

- 7.04 The proposed non-exhaustive definition of “unlawful” would ensure that non-consensual marital intercourse was caught under section 123 (and the other sections) and would therefore provide the prosecution with a charging option in addition to section 118.
- 7.05 The word “unlawful” should not, for the time being, be deleted from section 123 or any other of the sections concerned without a wide-ranging policy review which is beyond the scope of the current exercise. There is no suggestion in paragraphs 31 and 32 of the Consultation Paper that sexual intercourse with an unmarried girl under 13 would be lawful.
- 7.06 If, as the respondent suggests (paragraph 7.4 above), “unlawful” under section 124 presently means outside marriage then the protection of married women would in fact be enhanced if the term were defined non-exhaustively to include non-consensual marital intercourse. Further, if the defence under section 124(2) indicates that “unlawful” means outside marriage, or indicates that marriage is a defence to sexual intercourse with a girl under 16, even if “unlawful” is deleted from section 124, then non-consensual marital intercourse would not be caught under the section. The prosecution would therefore be deprived of a charging option in addition to section 118.
- 7.07 It may also follow from the respondent’s argument that section 124 applies only outside marriage (whether “unlawful” is deleted or not) that non-consensual marital intercourse under section 124 (being a specific section) may not be covered by the offence of rape under section 118. Therefore, such possible argument should be pre-empted by retaining “unlawful” in section 124 for the time being and, as proposed by the Administration, defining the term non-exhaustively under section 117 to include marital rape. Further, section 124(2) could be simply amended to make it plain that the defence does not apply to non-consensual intercourse.
- 7.08 The word “unlawful” should not be deleted from section 125 except as the

result of a wide-ranging policy review. Such review could also encompass other issues raised by the respondent (paragraph 7.5 above) such as the differences in penalty between section 118 and section 125. In the meantime, the Administration's proposed non-exhaustive definition of "unlawful" would ensure that marital intercourse with a mentally defective person who was unable to give consent was an offence.

7.09 A wider review of the term "unlawful sexual act" is beyond the scope and object of the present exercise. The proposal (paragraph 7.7 above) to amend the definition of "unlawful sexual act" under section 117(1A)(a) as sexual intercourse "which constitutes an offence under this Part" would have the effect of reintroducing the term "unlawful" into section 118 (which creates "an offence under this Part") even if it were deleted from the section itself.

8. The Hong Kong Family Law Association

8.1 Supports Option 2, and the clarification of the meaning of "unlawful" in all sections (Option 3).

8.2 Notes that its membership "consists of different professionals interested in family law and practice, including solicitors, barristers, social workers, psychologists and others".

9. Hong Kong Family Welfare Society

9.1 Supports Options 2 and 3 (same response as the Hong Kong Family Law Association).

10. Jacqueline Leong, QC, SC

10.1 States that she is not qualified to offer a view.

11. The Family Planning Association of Hong Kong

11.1 Supports Options 2 and 3 (as set out in paragraph 33 of the Consultation

Paper).

12. Hong Kong Christian Council

12.1 A clear statement that marital rape is an offence is needed.

12.2 Supports Option 3.

13. Hong Kong Association for the Survivors of Women Abuse (Kwan Fook)

13.1 Supports Options 2 and 3.

14. Harmony House – Women Ambassador Group

14.1 Supports Option 2.

15. Harmony House Ltd

15.1 Supports Options 2 and 3.

16. HK Women’s Coalition on Equal Opportunities

16.1 Supports Options 2 and 3.

17. The HK Girl Guides Association

17.1 Supports Option 3.

18. HK Federation of Women’s Centres

18.1 Supports Options 2 and 3.

19. The HK Council of Social Service

19.1 Supports Options 2 and 3.

20. Association Concerning Sexual Violence Against Women

20.1 Supports Option 3.

21. Zonta Club of Hong Kong

21.1 Supports Option 3.

22. Social Welfare Department

22.1 Supports Option 3.