

立法會
Legislative Council

LC Paper No. CB(2)2234/04-05(04)

Ref : CB2/PL/AJLS

Panel on Administration of Justice and Legal Services

Background brief for meeting on 12 July 2005

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

Purpose

This paper highlights the past discussions of Members of the Legislative Council (LegCo) on review of sexual offences in Part XII of the Crimes Ordinance and related issues.

Legislative amendments concerning marital rape and related sexual offences

2. In its Concluding Comments on the Initial Report of the Hong Kong Special Administrative Region under Convention on the Elimination of All Forms of Discrimination against Women, the United Nations Committee on the Elimination of Discrimination against Women urged for amendment of existing legislation to include marital rape as a criminal offence.

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

4. At the meeting of the AJLS Panel on 16 May 2000, Hon Margaret NG, Chairman of the Panel, pointed out that as a general common law rule, consent to sexual intercourse was implied in marriage. However, this common law rule had been abolished by the House of Lords decision in *Regina v R [1991] 4 All ER 481*. A husband could now be admitted of raping his wife. In the light of the House of Lord's decision, Hon Margaret NG requested the Administration to review whether amendments should be made to section 118(3) of the Crimes Ordinance (Cap. 200), which stated –

"A man commits rape if –

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

5. The AJLS Panel further discussed the matter at its meetings 20 June 2000, 16 January 2001 and 26 April 2001.

6. The Administration's initial views were as follows –

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

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

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

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

10. Subsequent to the consultation exercise, the AJLS Panel discussed various versions of proposed amendments to the Crimes Ordinance prepared by the

Administration and took note of the views of the two legal professional bodies on these proposed amendments. All the parties agreed that marital rape was an offence and the law should be amended to clarify that beyond doubt. It was a matter of working out a legislative proposal to reflect the policy intent.

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

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

Statute Law (Miscellaneous Provisions) Bill 2001

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

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

15. As a result, the Administration proposed to move Committee Stage Amendments (CSAs) to delete clauses 12 to 17 from the Bill and amend clause 11 to provide a new section 117(1B). New section 117(1B) provided that, for the purposes of sections 118 (rape), 119 (procurement by threats), 120 (procurement by false pretences), and 121 (administering drugs to obtain or facilitate unlawful sexual act), the expression "unlawful sexual intercourse" does not exclude sexual

intercourse that a man has with his wife. The Administration agreed that the issues relevant to proposed amendments to section 124 (intercourse with girl under 16) and section 146 (indecent conduct towards child under 16) in the Bill are peripheral to the principal object of amending section 118 and might be revisited as part of the said review on other sexual offences in Part XII of the Crimes Ordinance. The Bills Committee recommended that the AJLS Panel should follow up the progress of the review.

16. The Bill, as amended, was passed by LegCo on 10 July 2002.

Follow-up by the AJLS Panel

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

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

19. Some members pointed out that the speech of SJ at the resumption of the Second Reading debate on the Bill had departed from the agreement reached between the Administration and the Bills Committee regarding the review of the sexual offences in Part XII of the Crimes Ordinance. The Panel asked the Administration to reconsider whether it would conduct a review of sexual offences in Part XII of the Crimes Ordinance as agreed with the Bills Committee, and if not, the reasons for not proceeding with such a review.

20. The Administration subsequently advised the Panel in writing in April 2004 that it was prepared to continue reviewing the provisions related to sexual offences in the Crimes Ordinance which it originally proposed to amend in the previous legislative exercise under the Statute Law (Miscellaneous Provisions) Bill 2001. At its meeting on 26 April 2004, the Panel agreed to the Administration's approach and requested the Administration to revert to the Panel upon completion of the review.

Latest development

21. The Administration provided a paper in May 2005 which set out the outcome of its review. As advised by the Administration, it had reviewed the provisions relating to sexual offences in sections 123 to 125, 127 to 128, 130, 132

to 135, and 141 to 142 of the Crimes Ordinance, which were concerned with unlawful sexual intercourse and unlawful sexual act. In the view of the Administration, since these provisions were not concerned with unlawful sexual intercourse or unlawful sexual act within the bond of marriage, it was not necessary to amend them to give greater protection to married women. Besides, the amendments contained in the Statute Law (Miscellaneous Provisions) Ordinance (Ord No. 23 of 2002) enacted in 2002 provided sufficient criminal sanctions in respect of unlawful sexual intercourse and unlawful sexual act within the bond of marriage. The Administration did not see any need to legislate further.

22. The AJLS Panel will follow up the Administration's review at its meeting to be held on 12 July 2005.

Relevant papers

23. A list of the relevant papers considered by the AJLS Panel is in **Appendix**. Members are invited to note that the relevant papers are available on the LegCo website at <http://www.legco.gov.hk>.

Council Business Division 2
Legislative Council Secretariat
11 July 2005

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

Relevant Papers/Documents

LC Paper No.	Papers/Documents
<u>Paper provided by the Administration</u>	
CB(2)62/00-01(06)	-- Consultation Paper on "Marital Rape and Related Sexual Offences"
CB(2)1363/03-04(01)	-- Paper dated February 2004 on "Review of sexual offences in Part XII of the Crimes Ordinance"
CB(2)1590/03-04(01)	-- Letter dated 2 March 2004 on the work of the Working Group on Combating Violence
CB(2)2008/03-04(02)	-- Paper dated April 2004 on "Review of sexual offences in Part XII of the Crimes Ordinance "
CB(2)1608/04-05(01)	-- Paper dated May 2005 on "Review of sexual offences in Part XII of the Crimes Ordinance "
<u>Minutes of meetings of Panel on Administration of Justice and Legal Services</u>	
CB(2)2546/99-00	-- Minutes of meeting on 16 May 2000
CB(2)2553/99-00	-- Minutes of meeting on 20 June 2000
CB(2)1086/00-01	-- Minutes of meeting on 16 January 2001
CB(2)438/01-02	-- Minutes of meeting on 26 April 2001
CB(2)2004/03-04	-- Minutes of meeting on 23 February 2004
CB(2)2425/03-04	-- Minutes of meeting on 26 April 2004
<u>Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2001</u>	
CB(2)2410/01-02	-- Report of Bills Committee to House Committee on 28 June 2002
CB(2)27/02-03	-- Speech of the Secretary for Justice at the resumption of the Second Reading debate on the Bill at the Council meeting on 9 July 2002