



SUBMISSIONS BY THE CRIMINAL LAW AND PROCEDURE COMMITTEE OF THE LAW SOCIETY OF HONG KONG ON PART V OF THE STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL - MARITAL RAPE

1. The Law Society's Criminal Law and Procedure Committee has considered the latest proposals by the Administration for amending s.118, Crimes Ordinance, as set out in its letters dated 19 April and 21 May 2002, together with the responses of the Assistant Legal Adviser dated 18 and 25 April 2002. The Committee notes the Bills Committee's concern that any amendment may need to apply not only for the purposes of rape pursuant to s.118, Crimes Ordinance, but also for the purpose of alternative convictions under ss.119, 120, 121, Crimes Ordinance, pursuant to s.149 and Schedule I, Crimes Ordinance.

MINIMALIST APPROACH – DELETION OF “UNLAWFUL” FROM SECTION 118(3)(a)

2. **The Committee would re-iterate its support for adopting a minimalist approach**

at this stage. From the outset, the Committee has been of the view that **the best way of proceeding in this area is incrementally, dealing first with the marital rape issue, before turning to a more general review of the law relating to sexual offences.** This view has been reinforced by recent case law developments relating to mistaken belief and sexual offences which the Committee considers need to be fully addressed in any general review of this area of the law.

3. The Committee believes it is important to keep the original objective of this '*reform*' in mind, namely to make it clear that a man may be guilty of raping his wife. The House of Lords has held in *R v R* [1991] 1 AC 599 that a husband has no immunity to a charge of rape by virtue of his marital status and that the reference to '*unlawful*' sexual intercourse in the context of the offence of rape is '*surplusage*' and may be ignored. The Committee believes most parties agree this probably is the law or would be held to be the law, on the basis that the House of Lords decision would be followed by the Hong Kong Judiciary were the issue to arise. The leading authority on this point in Hong Kong at present, *HKSAR v Chan Wing Hung* [1997] 3 HKC 472, certainly supports this assumption, although, as has been emphasized in the recent correspondence between the Administration and the Assistant Legal Advisor, it was not necessary for the Court of Appeal finally to decide the point and it expressly declared its intention not to do so. In the Committee's view, however, there is little reason to doubt that the Judiciary of Hong Kong would choose to follow *R v R*.

4. The present '*reform*' likely does not therefore, in the Committee's view, involve any actual change in the substance of the law. Rather, it concerns how best to clarify the law for

public understanding. Two principal difficulties presently exist. The first is the simple 'uncertainty' created by the fact that *R v R* has not been expressly applied in Hong Kong. The second is the retention of the term 'unlawful' in relation to sexual intercourse in the definition of rape in s.118(3)(a), Crimes Ordinance. So long as this remains in the definition, there is at least scope for argument that it means 'outside marriage' and that the view adopted in *R v R* that it is 'surplusage' and may be ignored does not, or should not, apply in Hong Kong.

5. For this reason, **the Committee continues to believe the simplest means of clarifying the law would be to delete 'unlawful' from s.118(3)(a), Crimes Ordinance.**

This would simultaneously overcome both of the above difficulties.

CONCERN ON THE EFFECT OF THE PROPOSAL ON RELATED SEXUAL OFFENCES

6. However, there continues to be concern that this might create a consequential difficulty as regards the interpretation of other sections where the language of 'unlawful sexual intercourse' is expressly retained (ss.123, 124, 125, 127, 132, 133, 141, 142), or incorporated by virtue of the use of the expression 'unlawful sexual act' (since this is defined in s.117(1A)(a) as including 'unlawful sexual intercourse') (ss.119, 120, 121, 128, 130, 134, 135, 140). The Committee has set out all these sections to re-emphasize the extent of use of the expression 'unlawful sexual intercourse' in Part XII of the Crimes

Ordinance.

7. **The Committee believes this concern is overstated.** It was raised by the Administration at an early stage, but has perhaps been somewhat undermined in its discussion of its latest proposal for amending s.118 by the addition of a new subs. (3A). In particular, in its letter dated 21 May 2002, the Administration has suggested that the reasoning of the House of Lords in *R v R* in ruling that 'unlawful' was 'surplusage' was *'largely based on a recognition of fundamental differences between the modern view of women - and particularly married women - and the proposition of ... Hale in 1736 that a wife cannot retract her matrimonial consent to sexual intercourse with her husband.'* The view of the Administration is stated to be that *'much of that reasoning would strongly apply to the non-rape offences in Part XII of the Ordinance'*.

8. On the other hand, the Committee recognizes that there may be a difference between rape, which requires proof of non-consensual sexual intercourse, and other sexual offences where the expression 'unlawful sexual intercourse' is expressly used or incorporated by the phrase 'unlawful sexual act', in that some of these other offences may not necessarily require proof of non-consensual sexual intercourse. This applies to ss.119, 120 and 121, which historically have involved liability even where there may seem to be 'consent', either because the lack of consent is not required for the commission of the offence or because any such purported consent is vitiated by the means by which it has been procured. The Committee recognizes that this therefore potentially leaves open the following argument: *R v R* is concerned only to remove the notion that a husband cannot be prosecuted of raping

his wife because of her deemed consent, that to this extent only '*unlawful*' in rape does not exclude marital sexual intercourse and prevent marital rape, but that where consent is not in issue it may still carry either the meaning '*outside marriage*' or some other residual meaning.

THE LATEST PROPOSALS OF THE ADMINISTRATION AND THE BILLS COMMITTEE

9. The Committee assumes this is partly the concern motivating the latest proposals whereby '*unlawful*' would be retained, but defined in such a way as to include marital sexual intercourse (the Administration goes further and wishes to define it in terms of non-consensual marital intercourse). Our immediate response is that retention of '*unlawful*' flies in the face of the clear view of the House of Lords in *R v R*, supported by the HK Court of Appeal in *Chan Wing Hung*, that '*unlawful*' in the definition of rape in s.118(3)(a) is '*surplusage*'. In their view, it served no purpose other than to incorporate the historical view that a husband could not rape his wife, which view they declared no longer to be the law in England. **To retain '*unlawful*' in s.118(3)(a) may, in the view of the Committee, create room for the argument that '*unlawful*' sexual intercourse still has some meaning even in the context of rape.**

10. **Nonetheless, if, in accordance with a minimalist approach, it is thought to be preferable to retain '*unlawful*' in s.118(3)(a) for the time being, the Committee does not support the Administration's proposed subs.118(3A).** The Committee believes it

distorts the law by attempting to define '*unlawful sexual intercourse*' non-exhaustively (*'includes'*) in the manner proposed. Rape is an offence requiring proof of (unlawful) sexual intercourse and the lack of consent, as expressly stipulated in s. 118(3)(a). The Committee does not consider it good drafting practice to define one of these terms, '*unlawful sexual intercourse*', by incorporating the other element, i.e. lack of consent. For this reason, **the Committee prefers the proposal of the Bills Committee, which would non-exhaustively define '*unlawful sexual intercourse*' as including '*sexual intercourse between a husband and his wife*' (though we have no objection to the alternative language proposed by the Administration - '*sexual intercourse that a man has with his wife*' - for the reasons stated by the Administration.** The Committee is of the view that the Administration is perhaps misreading, or making too much, of the quotation from the Lords in *R v R* that '*it is clearly unlawful to have sexual intercourse with any woman without her consent*'. '*Unlawful*', in the view of the Committee, is here being used in the general sense of '*criminal*' rather than as a specific interpretation of '*unlawful*' sexual intercourse. The emphasis of this quotation in the Committee's view is on the word '*any*' woman, the purpose being to reinforce the idea that the criminal law should give equal protection to all women, regardless of whether they are married or not. In the Committee's view, it is erroneous to try and adopt this quotation as a basis for defining '*unlawful sexual intercourse*'.

11. The Bills Committee has raised a further point, namely, whether the definition of '*unlawful sexual intercourse*' as including sexual intercourse between a husband and wife should extend to ss. 119, 120 and 121, to enable alternative convictions under s. 149 and

Schedule I, Crimes Ordinance. The Committee notes the Administration's response that this arguably goes beyond a minimalist approach, and purports to amend these sections without the benefit of a general review of the law. Yet, at the same time, the Administration has attempted to support its proposal for amending only s. 118 (by adding subs. (3A)) by arguing that the reasoning of the Lords in *R v R* regarding 'unlawful' sexual intercourse for rape applies equally to other non-rape offences. The Committee agrees with this. That being so, then the Committee's view (and presumably also the Administration's) is that these additional offences, ss. 119, 120 and 121, should also be interpreted in the light of the notion that the criminal law should equally protect all women, regardless of marital status. Accordingly, it should follow that had the parties in *Chan Wing Hung* been married, so that it was necessary for the Court to rule on whether

the use of the expression '*unlawful sexual intercourse*' in s. 117(1A)(a) protected a husband from criminal liability, it is entirely likely that the Court would have applied *R v R*. In other words, these offences, correctly interpreted in the light of *R v R*, already draw no distinction between married and unmarried women; that is already the law. If this is so, but it is still thought preferable to retain '*unlawful*' for the time being, then the Committee believes the definition proposed by the Bills Committee, extending to ss. 119, 120 and 121, will not substantively alter the law. Instead, it will helpfully clarify what the Committee believes to be the present law, and ensure the possibility of an alternative conviction under ss. 119, 120 or 121 pursuant to s. 149.

CONCLUSION

12. In summary, the Committee considers:

- (a) the simplest way forward is to delete '*unlawful*' from s. 118(3)(a), Crimes Ordinance;**
- (b) if '*unlawful*' were to be retained, then the Committee supports the proposal of the Bills Committee, namely, define '*unlawful sexual intercourse*' as including '*sexual intercourse between a husband and his wife*' and apply this not only to s. 118, but also to ss. 119, 120 and 121.**

13. The Committee does not think it is appropriate for the enactment of the Bill to be held up by the existing legislative proposal in Part V of the Bill, which are being put forward to "*clarify*" rather than to make any actual change in the substance of

the law. If consensus remains elusive, the Law Society considers the proposal in Part V should be dropped until consensus is reached or a thorough review of the relevant sections can be conducted. These proposals should not be allowed to prevent passage of the rest of the Bill.

**The Criminal Law and Procedure Committee
The Law Society of Hong Kong
10 June 2002**