

# MARITAL RAPE AND RELATED SEXUAL OFFENCES: A REVIEW OF THE PROPOSED AMENDMENTS TO PART XII OF THE CRIMES ORDINANCE



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*A recent bill in Hong Kong proposes a number of amendments to the offence of rape and other related sexual offences as they apply to married persons. Part A of this article discusses the proposed amendments to the offence of rape and examines the case law under the analogous English legislation, with a particular focus on the House of Lords' decision of R v R [1992] 1 AC 599 and its relevance to Hong Kong law. Part B considers the effect of the proposed amendments on a number of related sexual offences, in particular the effect of the new definition of "unlawful sexual intercourse". It is argued that, whilst the amendments to rape and several other key offences are to be warmly welcomed, this new definition is likely to cause confusion and may also reduce the protection currently afforded to certain categories of women against sexual offences committed by their husbands, thus necessitating further review and reform.*

## Introduction

On 10 July 2001, the Statute Law (Miscellaneous Provisions) Bill 2001 (the "Bill") was introduced into the Hong Kong Legislative Council.<sup>1</sup> Part V of the Bill sets out a number of amendments to Part XII (Sexual and Related Offences) of the Crimes Ordinance (Cap 200), which are primarily intended to make clear that marital rape is an offence and to ensure that all other sexual offences apply to non-consensual intercourse between married persons.<sup>2</sup>

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<sup>1</sup> The Bill was gazetted on 22 June 2001, Legal Supplement No 3 to the Government of the Hong Kong SAR Gazette, No 25, Vol 5, 22 June 2001, also available online at the Hong Kong government's website at: <http://www.info.gov.hk/eindex.htm>. The text of the Bill, the Explanatory Memorandum to the Bill, and related documents are also available at the website of the Legislative Council at: <http://www.legco.gov.hk/english/index.htm> (under "Legislative Proposals") (sites visited 10 Oct 2001).

<sup>2</sup> See *Explanatory Memorandum to the Bill*, *ibid.*, para 5.

After discussing the background to the Bill, this article examines the protection currently afforded to women and children by the Crimes Ordinance in respect of sexual offences committed against them by their husbands. It then considers the effect that the main proposals under the Bill will have on this position. Finally, a number of areas requiring further review and reform are highlighted.

*Hong Kong's International Obligation to Combat Violence Against Women*

The genesis of the proposed amendments appears to have been Hong Kong's obligations under the *United Nations Convention on the Elimination of All Forms of Discrimination against Women* (the "CEDAW Convention"), which was extended to Hong Kong by the United Kingdom in 1996.<sup>3</sup>

Under the CEDAW Convention, the Hong Kong government is obliged to "pursue by all appropriate means and without delay a policy of eliminating discrimination against women",<sup>4</sup> which is defined to include "any distinction ... based on sex which has the effect ... of impairing or nullifying the recognition, enjoyment or exercise by women, *irrespective of their marital status*, on a basis of equality of men and women, of human rights and fundamental freedoms"<sup>5</sup> (emphasis added).

Whilst the CEDAW Convention contains detailed provisions on the different types of discrimination which require elimination, it makes no express reference to the issue of sexual or other violence against women. However, the position was clarified in 1992, when the monitoring body of the CEDAW Convention, the Committee on the Elimination of Discrimination against Women (the "CEDAW Committee"), issued its General Recommendation No 19 (Violence against Women).<sup>6</sup> This expressly states that discrimination includes gender-based violence, which, in turn, is described as "violence that is directed against a woman because she is a woman or that affects women disproportionately" and includes "acts that inflict physical, mental or sexual harm or suffering".<sup>7</sup> As emphasised by the CEDAW Committee, the effect of

<sup>3</sup> 1249 UNTS 13, adopted by the United Nations General Assembly on 18 Dec 1979 by resolution 34/180. The People's Republic of China agreed that the CEDAW Convention would continue to apply to Hong Kong after sovereignty was transferred to it by the United Kingdom on 1 July 1997, by notification to the United Nations Secretary General, dated 10 June 1997. See the rich resources available on "CEDAW in Hong Kong" on the website of the Centre for Comparative and Public Law, University of Hong Kong at: <http://www.hku.hk/ccpl/cedaw/index.html>. The CEDAW Convention and related documentation are also available online at the website of the United Nations Division for the Advancement of Women at: <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> (sites visited 10 Oct 2001).

<sup>4</sup> CEDAW Convention, Art 2.

<sup>5</sup> *Ibid.*, Art 1.

<sup>6</sup> UN Doc CEDAW/C/1991/L/1/Add.15(1992), available at the website of the United Nations Division for the Advancement of Women at: <http://www.un.org/womenwatch/daw/cedaw/recomm.htm> (site visited 10 Oct 2001).

such violence is to seriously undermine women's ability to enjoy and exercise their human rights and fundamental freedoms on a basis of equality with men.<sup>8</sup>

The Hong Kong government is therefore obliged under the CEDAW Convention to take all appropriate measures to eliminate gender-based violence, including violence committed by private persons,<sup>9</sup> and is specifically recommended to "ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to *all* women, and respect their integrity and dignity"<sup>10</sup> (emphasis added).

It is against this background that the CEDAW Committee, in making its concluding comments in March 1999 on Hong Kong's initial report under the CEDAW Convention,<sup>11</sup> "note[d] with concern that marital rape is not considered a criminal offence in the Hong Kong Special Administrative Region"<sup>12</sup> and "urge[d] the amendment of existing legislation to include marital rape as a criminal offence".<sup>13</sup>

#### *The Process of Legislative Reform*

Following the CEDAW Committee's comments, the issue was taken up one year later, in May 2000, by the Legislative Council Panel on the Administration of Justice and Legal Services (the "Panel"). The Panel expressed concern that the offence of rape under section 118 of the Crimes Ordinance might be interpreted to apply only to intercourse outside the bounds of matrimony, and requested the Administration to consider whether the legislation should be amended to make clear that marital rape is an offence. The Administration subsequently issued a Consultation Paper in October 2000, setting out its initial recommendations for legislative amendment in relation to both the offence of rape and other sexual offences between husband and wife. In January 2001, the Administration issued a report and commentary on the responses it had received on the

<sup>7</sup> *Ibid.*, para 6.

<sup>8</sup> General Recommendation No 19 (n 6 above), para 7.

<sup>9</sup> CEDAW Convention, Art 2(e). See also General Recommendation No 19 (n 6 above), para 9.

<sup>10</sup> General Comment No 19 (n 6 above), para 24(b).

<sup>11</sup> The report is available at the website of the Health and Welfare Bureau, which houses Hong Kong's new Women's Commission, at: <http://www.info.gov.hk/hwb/english/ARCHIVE/INDEX.HTM> (site visited 10 Oct 2001).

<sup>12</sup> This was not strictly true since (as will be discussed in detail below, p 420) the Hong Kong courts (at least technically) would be legally bound by the English House of Lords' decision in *R v R* [1992] 1 AC 599 (HL(E)), 614. This held that all non-consensual sexual intercourse between married persons constitutes rape. However, the CEDAW Committee's comment is significant in that it indicates confusion amongst those reporting to it as to the correct position, as well as validly highlighting the lack of clarity in the legislation.

<sup>13</sup> UN Doc C/1999/1/L 1/Add 7, para 73, available at the website of the Centre for Comparative and Public Law, University of Hong Kong at: <http://www.hku.hk/ccpl/cedaw/cedawhkconcomments.html> and the website of the Health and Welfare Bureau at: <http://www.info.gov.hk/hwb/english/ARCHIVE/INDEX.HTM> (sites visited 10 Oct 2001).

Consultation Paper.<sup>14</sup> It continued an active dialogue with a number of interested parties as it refined its proposals, putting a second working draft before the Panel on 24 April 2001. Its final proposals appeared in the form of the Bill in June 2001.

### **Part A: Proposals Relating to the Offence of Rape (section 118)**

Under section 118(3) of the Crimes Ordinance, as it currently stands, 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 that time he knows she did not consent to the intercourse or he was reckless as to whether she consents to it” (emphasis added).

The Bill proposes to delete the word “unlawful” from section 118(3)(a), and to add an express provision that sexual intercourse between a husband and his wife falls within subsection (3)(a). These amendments will effectively bring Hong Kong law back in line with the position under English law, on which the legislation was historically based.

#### *Historical Background*

The statutory definition of rape contained in section 118(3) of the Crimes Ordinance was introduced into the Ordinance in 1978, tracking the definition introduced in England into section 1(1) of the Sexual Offences Act 1956 by the Sexual Offences (Amendment) Act 1976. In both cases, this was the first time that rape had been defined by statute.

Following its enactment in England, the new statutory definition of rape (which stated that “a man commits rape if he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it”) provoked considerable debate within both academic and judicial circles as to whether parliament, by using the phrase “unlawful sexual intercourse”, had intended that the offence of rape apply only to sexual intercourse outside marriage, with the effect that a husband would be immune from a charge of rape against his wife, regardless of the circumstances.

<sup>14</sup> *Consultation Paper: Marital Rape and Related Sexual Offences and Summary and Consideration of Responses to the Consultation Paper on Marital Rape and Related Sexual Offences*, copies on file with the author. (Unfortunately, neither of these documents is available online at the Department of Justice's website.)

This so-called “marital rape exemption” had in fact been established some 200 years earlier at common law, but had since been whittled down by the courts. The origins of the exemption are invariably traced back to Sir Matthew Hale, who declared in 1736 that a wife gave implied consent to sexual intercourse on marriage, which she could not subsequently retract:

“the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself in this kind unto her husband, which she cannot retract”.<sup>15</sup>

Whilst Hale’s proposition was not supported by any authorities,<sup>16</sup> in time, it became firmly entrenched in the English common law. It was only 150 years later, with the 1889 case of *R v Clarence*,<sup>17</sup> that the blanket nature of the marital rape exemption began to be questioned by the English courts. In that case, Wills J, whilst agreeing with the majority that the husband was protected by the marital rape exemption in the case before them, stated that he did not believe that “as between married persons, rape is impossible”,<sup>18</sup> and Field J, in his dissenting opinion, said that “there may, I think, be many cases in which a wife may lawfully refuse intercourse”.<sup>19</sup> Another 60 years later, starting with the case of *R v Clarke*<sup>20</sup> in 1949, the courts began to develop exceptions to the marital rape exemption, with the consequence that a wife’s implied consent to sexual intercourse would be deemed to be retracted *inter alia* by a judicial separation order,<sup>21</sup> a decree nisi of divorce<sup>22</sup> and a non-molestation order.<sup>23</sup> In these circumstances, her husband could be found guilty of rape.

When the statutory definition of rape was introduced in England in 1976, the courts generally took the view that parliament could not have intended to override the established common law exceptions to the marital rape exemption, and continued to apply those exceptions. Indeed, in some cases,

<sup>15</sup> 1 Hale Pleas of the Crown 629.

<sup>16</sup> Claire Glasman argues strongly that: “No legislation ever granted immunity, nor is there any basis for it in common law. Sir Matthew Hale, a 17th century witch-hunting judge, stated – in a book, not even a judgment – that marriage entails irrevocable consent, and one judge after another has maintained the legal fiction” (1991) 141 *NLJ* 395.

<sup>17</sup> [1889] 22 QBD 23.

<sup>18</sup> *Ibid.*, at 33.

<sup>19</sup> *Ibid.*, at 57.

<sup>20</sup> [1949] 2 All ER 448.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Reg v O’Brien (Edward)* [1974] 3 All ER 663, at 665 *per* Park J.

<sup>23</sup> *R v Steele* [1976] 65 Cr App R 22, at 25 *per* Lord Lane CJ. See also Lord Lane CJ’s brief summary of the historical background of the marital rape exemption in *R v R* [1992] 1 AC (CA) 599, at 602–605 and further J. L. Barton, “The Story of Marital Rape” (1992) 108 *LQR* 272 and Melisa J. Anderson, “Lawful Wife, Unlawful Sex – Examining the Effect of the Criminalization of Marital Rape in England and the Republic of Ireland” [1998] 27 *GAJ Int’l & Comp L* 139, 149–152.

such exceptions were refined and expanded,<sup>24</sup> with the effect that the marital rape exemption was further whittled down. However, as none of these cases reached the House of Lords, the issue was never finally determined.

*The House of Lords' Decision in R v R*

Finally, in 1991, a case of marital rape reached the House of Lords. In its landmark decision in *R v R*,<sup>25</sup> the House of Lords abolished the marital rape exemption in its entirety, unanimously upholding the decision of the Court of Appeal.

In delivering the judgment of the Court of Appeal in *R v R*,<sup>26</sup> Lord Lane CJ set out three possible interpretations of the word “unlawful” in the statutory definition of rape: first, the “literal solution” that the offence was limited to sexual intercourse outside marriage and that a husband therefore had full immunity against a charge of rape against his wife; second, the “compromise solution” that the word “unlawful” was to be construed so as to preserve the exceptions to the husband’s immunity which had developed at common law, and to allow further exceptions as the occasion arose; and third, the “radical solution” to hold that the word “unlawful” was surplusage, and to abolish the marital immunity entirely.<sup>27</sup> The Court of Appeal opted for the “radical solution”, holding that Hale’s proposition that a wife giving implied consent to sexual intercourse on marriage was a “common law fiction” which had become “anachronistic and offensive”.<sup>28</sup> It concluded that “the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim”.<sup>29</sup>

The House of Lords, whose judgment was delivered by Lord Keith of Kinkel, fully agreed with this position, finding that “in modern times the supposed marital exception in rape forms no part of the law of England”.<sup>30</sup> Since it was “clearly unlawful to have sexual intercourse with any woman without her consent”, the use of the word “unlawful” in section 1 of the Sexual Offences Act added nothing and was “mere surplusage”.<sup>31</sup>

Whilst the end result, ie the complete abolition of the marital rape exemption, was, with very few exceptions welcomed,<sup>32</sup> considerable concern

<sup>24</sup> See, for example, *R v Roberts* [1986] Crim LR 188, where it was held that a formal deed of separation, which did not contain a specific non-cohabitation or non-molestation clause, was sufficient to revoke the wife’s implied consent to marital intercourse. However, other courts took the view that it was not open to them to build further on the exceptions to the marital rape exemption since the 1976 Act had “defined the common law as it stood at the time of the passing of the Act” which “precluded any up-to-dated declaration of the state of the common law”, *R v C* [1991] 1 All ER 755, at 767 *per* Rougier J, as cited by Lord Lane in *R v R* [1992] 1 AC (CA) 599, at 608–609.

<sup>25</sup> [1992] 1 AC 599 (HL(E)).

<sup>26</sup> [1992] 1 AC 599 (CA).

<sup>27</sup> *Ibid.*, at 263–265.

<sup>28</sup> *Ibid.*, at 611, B.

<sup>29</sup> *Ibid.*, at 611, E.

<sup>30</sup> *Ibid.*, at 623, B.

<sup>31</sup> *Ibid.*, at 622, H, to 623, B.

was expressed at the time that the House of Lords had acted beyond its judicial powers in *R v R*, and indeed had come “perilously close to creating a new criminal offence”.<sup>33</sup> Indeed, both the Court of Appeal and the House of Lords in *R v R* had anticipated these concerns. However, the House of Lords held that it was not necessary to refer the matter to parliament, since this was not “the creation of a new offence” but “the removal of a common law fiction which ha[d] become anachronistic and offensive”, and that “it was the court’s duty to act upon it”.<sup>34</sup>

In the midst of this debate, the appellant in *R v R* brought a case before the European Court of Human Rights, arguing that, as he had been protected by the marital rape exemption at the time he committed the offence, his conviction and sentence for rape constituted retrospective punishment and was therefore contrary to Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>35</sup> The European Court held that there had been no violation of Article 7, since it was of the view that the English common law had evolved to a stage where the abolition of the marital rape exemption was reasonably foreseeable.<sup>36</sup> Moreover, the European Court held that the abolition of the immunity was “in conformity not only with a civilised concept of marriage, but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom”.<sup>37</sup>

Any remaining concerns were, however, stilled when the UK parliament decided to amend section 1(1) of the Sexual Offences Act to reflect the House of Lords’ decision in *R v R*. The amendment deleted the word “unlawful” from the phrase “unlawful sexual intercourse” in the definition of rape, as well as from two other related offences, namely procuring sexual intercourse by threats or false pretences (sections 2 and 3). The latter have their equivalents in sections 119 and 120 of the Crimes Ordinance (and will be discussed further below).

<sup>32</sup> One ardent critic of this decision was Glanville Williams, who, commenting in the context of the English Law Commission’s earlier proposal to abolish the marital rape exemption, expressed the view that it was “too extreme to extend the law of rape to cohabiting husbands”, as “a charge of rape is too powerful (and even self-destructive) a weapon to put in the wife’s hands”, “The Problem of Domestic Rape” (1991) 141 *NLJ* 205, 206.

<sup>33</sup> Marianne Giles, “Judicial Law-Making in the Criminal Courts: the Case of Marital Rape” [1992] *Crim LR* 407, 410. See also Ian Dennis, “Marital Rape” (1993) 46(1) *CLP* 39, 41–42.

<sup>34</sup> Lord Keith of Kinkel, citing Lord Lane CJ with approval, [1992] 1 AC (HL(E)) 599, at 623C.

<sup>35</sup> European Court of Human Rights, *CR v United Kingdom*, judgment of 22 Nov 1995, Series A, No 335-C. (See also European Court of Human Rights, *CS v United Kingdom*, judgment of 22 Nov 1995, Series A, No 335-B on the same point.)

<sup>36</sup> *Ibid.*, at paras 34 and 41.

<sup>37</sup> *Ibid.*, at para 42. For a full discussion of the issues raised before the European Court, see Stephanie Palmer, “Rape in Marriage and the European Convention on Human Rights” (1997) 5(1) *Feminist Legal Studies* 91. See also C. Osborne, “Article 7 and the Marital Rape Exemption” (1996) 4 *EHRLR* 406, who argues that the European Court’s conclusions in this case, however socially desirable, were legally incorrect.

*The Effect of R v R on Hong Kong Law*

The House of Lords' decision in *R v R* is (at least theoretically) legally binding on the Hong Kong courts. This is because Article 18 of the Basic Law, which came into effect on the transfer of sovereignty of Hong Kong to the People's Republic of China on 1 July 1997, provides that the laws in force in the Hong Kong Special Administrative Region shall be "the laws previously in force in Hong Kong as provided for in Article 8". These are in turn defined in Article 8 to include "the common law".<sup>38</sup> The date for determining which laws were "previously in force" for the purposes of Article 18, whilst not addressed in the Basic Law, was clarified by the Court of Appeal in *HKSAR v Ma Wai Kwan David*, which held that, as "the Basic Law came into effect on 1 July 1997 ... [t]he only logical and in fact proper conclusion is that 30 June 1997 is the cut-off date."<sup>39</sup> Therefore, as a pre-1 July 1997 decision, *R v R* is clearly binding on the Hong Kong courts.

There is also encouraging *dicta* to this effect in *HKSAR v Chan Wing Hung*,<sup>40</sup> in which the Hong Kong Court of Appeal considered the meaning of "unlawful" in the context of section 119 of the Crimes Ordinance (procuring an unlawful sexual act by threats or intimidation). Power VP remarked that the Court of Appeal "incline[d] to the view that it would be proper to follow the course adopted in *R v R* ... , in which Lord Keith said that the word [unlawful] should be 'treated as being mere surplusage in this enactment'",<sup>41</sup> although on the facts (the parties in this case were not married), Power VP determined that it was "not in the present case necessary to go further than to hold following the judgment of Donovan J in *R v Chapman* ... that unlawful in the context means illicit, that is outside the bounds of matrimony".<sup>42</sup>

Notwithstanding the *dicta* in *HKSAR v Chan Win Hung*, there remains a risk that the Hong Kong courts might decide not to follow *R v R*. First, as a matter of law, it would be open to the Court of Final Appeal (being the ultimate court of appeal in Hong Kong) to determine that *R v R* was decided wrongly and to depart from the decision. This is not beyond the realms of possibility, given the criticisms made of *R v R* at the time. Indeed, Power VP made reference to such criticisms in *HKSAR v Chan Wing Hung*, stating that "Lord Keith was conscious that it might be suggested that the court was usurping the power of the legislature ... *as indeed are we*" (emphasis added).<sup>43</sup> Second, the Court of Final Appeal has held that it is not obliged

<sup>38</sup> This is subject to a number of limitations which are not relevant here.

<sup>39</sup> [1997] 2 HKC 315, *per* Chan CJHC at 329, F-G.

<sup>40</sup> [1997] 3 HKC 472.

<sup>41</sup> *Ibid.*, at 475, G-H.

<sup>42</sup> *Ibid.*, at 475, H-I.

<sup>43</sup> [1997] 3 HKC 472, at 475, H-I.

to follow pre-1 July 1997 House of Lords' decisions, without citing any particular legal basis for this decision. This was in *Tang Siu Man v HKSAR*,<sup>44</sup> where the Court of Final Appeal did not hesitate to depart from a 1996 decision of the House of Lords which was directly on point. As one commentator remarked, the Court of Final Appeal simply assumed rather than argued that it was no longer bound by this earlier decision.<sup>45</sup> Citing *Tang Siu Man* with approval in *Bank of East Asia Ltd v Tsien Wui Marble Factory Ltd and Others*,<sup>46</sup> Nazareth PJ, having first referred to Article 8 of the Basic Law, nevertheless took the view that "the Court would not be bound by decisions of the House of Lords in identifying and developing the Common Law of Hong Kong". However, he then added that "it may be thought, however, that this Court would not depart from the law as it applied immediately before 1 July 1997 without good reason".<sup>47</sup>

Given this background, the proposed amendment to the definition of rape in section 118(3) of the Crimes Ordinance is clearly to be welcomed.<sup>48</sup> By deleting the word "unlawful" from the phrase "unlawful sexual intercourse" in section 118 (and also, perhaps superfluously, adding an express provision to the effect that sexual intercourse includes intercourse between a husband and wife), it will be made absolutely clear that the offence of rape applies regardless of the marital status of the parties. This approach will put to rest any uncertainty as to whether or not the Hong Kong courts will follow the House of Lords' decision in *R v R*. Legal issues aside, the proposed amendment is also a clear and welcome affirmation, as a matter of public policy, of society's condemnation of marital rape.

## Part B: Related Sexual Offences

### *Introduction*

The more difficult challenge faced by the Administration, and the area in which opinion during the consultation process was most divided, was how the amendment to section 118 could be achieved without adversely affecting the application of other sexual offences to married persons. The Administration's concern was that if the word "unlawful" was deleted from section 118 but not from any other sections, the *expressio unius* rule would apply. On the basis of this rule, the courts would be likely to determine

<sup>44</sup> [1998] 1 HKC 371.

<sup>45</sup> Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 1999), 2nd edn, p 370, n 14.

<sup>46</sup> [2000] 1 HKC 1.

<sup>47</sup> *Ibid.*, at 91, B-C.

<sup>48</sup> Indeed, a firm consensus emerged during the consultation process that the amendment was necessary, or at least desirable.

that, wherever the word “unlawful” was retained, it was intended to bear its traditional meaning of “outside marriage”. Thus, married women would be deprived of the protection of the law in relation to all sexual offences other than rape.<sup>49</sup> This is a valid concern, given that the Administration was not mandated to delete the word “unlawful” from any other sections in the Crimes Ordinance.<sup>50</sup> Indeed, the selective deletion of the term “unlawful” in the English legislation has led some academics to conclude that where the term remains, it is to bear its traditional meaning of “outside marriage” (although this has yet to be tested by the courts). Thus, according to Smith and Hogan:

“‘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 with his wife ... The selective repeal of “unlawful” indicates that the draftsman and the government were well aware of the significance of that word.”<sup>51</sup>

#### *Proposal Under the Bill*

The Administration has therefore sought to ensure that the benefit of all other sexual offences be extended to married women by retaining the term “unlawful sexual intercourse” in those offences, but defining the term expressly, in a new section 117(1B), to include:

“sexual intercourse between a husband and wife if:  
 (a) at the time of the intercourse the wife does not consent to it; and  
 (b) the husband knows, at the time of the intercourse, that his wife does not consent to it or he is reckless as to whether she consents to it”.

The definition will apply to all sexual offences in Part XII of the Crimes Ordinance<sup>52</sup> in which the term “unlawful sexual intercourse” is used either

<sup>49</sup> *Supplemental Paper for the LegCo Panel on the Administration of Justice and Legal Services: Marital Rape and Related Sexual Offences*, June 2001, para 6, available at the website of the Legislative Council at: <http://www.legco.hk/english/index.htm> (under “Proposed Legislation”) (site visited 10 Oct 2001).

<sup>50</sup> A point which the Administration continually stressed throughout the Consultation Period, eg *Summary and Consideration of Responses* (n 14 above), para 7.05.

<sup>51</sup> Smith and Hogan, *Criminal Law* (London, Edinburgh, Dublin: Butterworths, 1999), 9th edn, p 461.

<sup>52</sup> Note that the Mental Health Ordinance (Cap 136) also uses the term “unlawful sexual intercourse” in s 65 (unlawful sexual intercourse with a woman patient) and s 65A (unlawful sexual intercourse with women under guardianship). By defining the term for the purposes of Part XII of the Crimes Ordinance only, the meaning which will be given to the term in the context of the Mental Health Ordinance remains unclear.

directly, or indirectly through the use of the term “unlawful sexual act” (since this term is defined in section 117(1A) to include “unlawful sexual intercourse”). There are 16 such offences in total, including procuring an unlawful sexual act through threats (section 119) or false pretences (section 120); administering drugs to obtain or facilitate an unlawful sexual act (section 121); and having unlawful sexual intercourse with a girl under 13 (section 123), a girl under 16 (section 124) and a mentally incapacitated person (section 125).<sup>53</sup>

By examining these six key offences as they apply between husband and wife, certain problems with the new definition of “unlawful sexual intercourse” proposed in the Bill will become clear.<sup>54</sup> Some of these problems have been creatively resolved in the Bill, while others remain in need of further review and amendment.

#### *Problems with the New Definition of “Unlawful Sexual Intercourse”*

The new definition of “unlawful sexual intercourse” will require the prosecution to prove in relation to each of the offences mentioned above that, as between husband and wife, (a) the wife did not consent to sexual intercourse and (b) her husband knew or was reckless as to that fact – in other words, the same consent-based elements which must be proved by the prosecution in relation to the offence of rape.

#### **Requirement to prove lack of consent**

The introduction of these two consent-based elements into sections 119–121 and sections 123–125, even if only in relation to situations involving husband and wife, appears to be contrary to the historical basis of these offences. This was to provide alternative, lesser offences to rape; offences which applied regardless of any apparent consent.

Whilst the English common law has recognised certain circumstances in which a charge of rape *can* be substantiated where apparent consent

<sup>53</sup> The other offences are: abducting an unmarried girl under the age of 18 for unlawful sexual intercourse (s 127); abducting a mentally incapacitated person for an unlawful sexual act (s 128); procuring a girl under the age of 21 or a mentally incapacitated person to have unlawful sexual intercourse with a third party (ss 132 and 133); and various offences relating, broadly, to third parties procuring, controlling, detaining or permitting others to be on their premises for the purposes of prostitution (ss 130, 134, 135, 140, 141 and 142).

<sup>54</sup> A number of concerns were raised about the new definition during the consultation process. However, the Administration argued that as the definition was non-exhaustive, technically it did not prevent any other meaning of “unlawful” from being applied in these sections as may be appropriate to the particular case. See, for example, *Summary and Consideration of Responses* (n 14 above), para 7.01. However, in this author’s view, it seems highly unlikely in practice that a court presiding over a case involving sexual intercourse between a husband and wife would depart from an express definition of “unlawful sexual intercourse” in the Crimes Ordinance in favour of an alternative meaning.

was given to sexual intercourse, these circumstances are very limited. They are: where the woman's consent was obtained through threats of violence or other serious threats;<sup>55</sup> where she was deceived as to the identity of the person she had agreed to have sexual intercourse with;<sup>56</sup> or where she was deceived as to the nature of the act.<sup>57</sup>

Rape charges have also been successfully brought where the prosecution was able to prove that a child or woman was not capable of consenting to sexual intercourse due to age<sup>58</sup> or mental incapacity<sup>59</sup> and, therefore, that her apparent consent did not constitute valid consent. However, the law does not provide an age under which a child or young woman is *deemed* incapable of consenting for the purposes of rape, nor is there a definition of (in)capacity to consent. Rather, incapacity to consent has to be proved on the facts of each case – even in relation to a child as young as six or seven years old. For example, in *R v Howard*,<sup>60</sup> where the accused had had sexual intercourse with a child aged six, the Court of Appeal held that the judge in the first instance had misdirected the jury by instructing them that, as a matter of law, a child of six years of age cannot give consent to sexual intercourse (although notwithstanding this, the conviction was upheld).<sup>61</sup> In *R v Watson-Sweeney*,<sup>62</sup> the court of first instance acquitted the defendant of the rape of a seven year old child, accepting the defendant's argument that the child had consented and that the consent was valid on the basis that her statement that "she knew what mummies and daddies did in bedrooms" showed sufficient understanding of what was involved.<sup>63</sup> Nor is there any

<sup>55</sup> Although the Court of Appeal upheld a conviction for rape which did not involve force or threats or fear of force in *R v Olugboja* [1981] 3 All ER 443, it is not yet clear what kinds of threat, other than threats of violence, will be sufficient to negate consent for the purposes of the offence of rape.

<sup>56</sup> Eg, *R v Clarence* (1888) 22 QBD 23. Section 118(2) of the Crimes Ordinance also specifically states that a man who induces a woman to have sexual intercourse with him by impersonating her husband commits rape.

<sup>57</sup> Eg, *R v Flattery* (1877) 2 QBD 410. In this case, the woman was persuaded that she was submitting to an operation, rather than to sexual intercourse.

<sup>58</sup> Eg, *R v Harling* [1938] 1 All ER 307, *R v Lang* [1975] 62 Cr App R50 and *R v Howard* [1965] 3 All ER 684.

<sup>59</sup> Eg, *R v Barratt* (1973) LRCLC R 81.

<sup>60</sup> [1965] 3 All ER 684.

<sup>61</sup> The Court of Appeal stated that "it would be idle for anyone to suggest that a girl of that age had insufficient understanding and knowledge to decide whether to consent or resist", *ibid.*, at 685.

<sup>62</sup> Unreported, *The Times*, 17 Dec 1983, as discussed in Temkin J, *Rape and the Legal Process* (London: Sweet and Maxwell, 1987), p 72.

<sup>63</sup> Broadly, the tests which have developed in relation to a child's capacity to consent to sexual intercourse are whether the child "understood her situation and was capable of making up her mind", *R v Lang* (1975) 62 Cr App R 50, or that she had "sufficient understanding and knowledge to decide whether to consent or resist", *R v Howard* [1965], 3 All ER 684, 685. However, the cases give little guidance as to what type of understanding or knowledge is required. See further UK Home Office, *Setting the Boundaries, Reforming the Law on Sex Offences: Volume 2: Supporting Evidence* (London: Home Office, July 2000), pp 94–96 and 135–138, also available at the website of the Home Office at: <http://www.homeoffice.gov.uk/cpd/sou/volmain2.htm> (site visited 10 Oct 2001).

definition of when a person is mentally incapable of consenting in the context of rape; incapacity needs to be proved on a case-by-case basis.<sup>64</sup>

Over time, certain circumstances were acknowledged in which a charge of rape could *not* be substantiated at common law, but which nonetheless required the protection of the criminal law. Thus, according to Smith and Hogan:

“The meaning given to ‘consent’ in rape left a number of cases where consent was in some way imperfect, but which were not crimes at common law. The law has therefore been supplemented by several statutory crimes involving sexual intercourse where consent has been improperly obtained by threat, false pretences or the administration of drugs, or where the woman, though consenting in fact is deemed by the law to be incompetent to consent on account of age or mental handicap.”<sup>65</sup>

These supplementary statutory offences (of which the six key offences identified above are examples) were therefore designed to be non-consent based offences. The Bill’s introduction of a consent-based definition of unlawful sexual intercourse into these offences in the context of husband and wife is therefore inconsistent with their historical basis.

#### Higher evidentiary standard on married women than unmarried women

The introduction of consent-based elements into these offences, as between husband and wife, also imposes a higher evidentiary requirement on married women than unmarried women. In addition to establishing all the other elements of these offences, married women will have to prove that they did not consent to the sexual intercourse, and that their husband knew, or was reckless as to their lack of consent. Thus, married persons will receive less protection from the law under these offences than unmarried persons.<sup>66</sup>

In relation to sections 119–121 (procuring unlawful sexual acts, including unlawful sexual intercourse, through threats, false pretences or the administration of drugs), the Administration recognised this as a valid concern and made several proposals to address the point during the consultation exercise.

<sup>64</sup> In relation to a person’s mental capacity to consent to sexual intercourse, the authorities are extremely outdated and conflicting. The most frequently cited cases in this context date from the 1800s. Willes J held in *R v Fletcher* (1859) Bell CC 63, 70 that a 13 year old mentally disabled girl consented to sexual intercourse even if she acted out of mere “animal instinct”, whilst Palles CB in the later case of *R v Dee* (1884) 15 Cox CC 579 found this view “abhorrent” and held, at p 594, that consent, being the act of a man, and not that of an animal, must “proceed from the will sufficiently enlightened by the intellect to make such consent the act of a reasoned being”. See further Home Office, *Setting the Boundaries: Volume 2* (n 63 above), pp 94–96 and 135–138.

<sup>65</sup> *Criminal Law* (n 51 above), p 462.

<sup>66</sup> This argument was particularly well developed by Sin Wai Man, Lecturer, School of Law, City University of Hong Kong in his correspondence with the Administration, eg letter dated 28 Nov 2000 (copy on file with the author).

The final proposal set out in the Bill includes the term “marital intercourse” as an *alternative* to “unlawful sexual act” in each of sections 119, 120 and 121. For example, section 119, as amended, now reads:

“A person who procures another person, by threats or intimidation, to do an unlawful sexual act or marital intercourse in Hong Kong or elsewhere shall be guilty of an offence ...” (proposed amendment underlined.)

In the case of married persons, it will therefore be sufficient for the prosecution to prove procurement by threats or intimidation to *have marital intercourse*. Although this new term is not defined, on a literal interpretation, it would not require proof of lack of consent and knowledge (including recklessness) of the absence of such consent, unlike the new definition of “unlawful sexual intercourse”. Therefore, whilst it is linguistically clumsy and potentially confusing,<sup>67</sup> the proposed amendment should in practice provide parity in the application of sections 119, 120 and 121 to married women and unmarried women, as well as staying true to the historical basis of these offences.<sup>68</sup>

However, this alternative reference to “marital intercourse” has not been extended in the Bill to section 123 (unlawful sexual intercourse with girls under the age of 13) or section 125 (unlawful sexual intercourse with women who are mentally incapacitated).<sup>69</sup> Therefore, the new consent-based definition of “unlawful sexual intercourse” will apply to these offences, as between husband and wife.

It is accepted that these offences are rarely likely to be invoked in relation to married children, since it is not possible to marry a child under the age of 16 under Hong Kong law.<sup>70</sup> However, they will apply to children who have validly married under a foreign jurisdiction, and to women who are mentally

<sup>67</sup> It is submitted that the phrase “*have marital intercourse*” would be clearer. Also, the term “unlawful sexual act” still remains as an alternative, which is highly confusing where the offence involves married persons, since the term “unlawful sexual act” now invokes consent-based elements, yet the term “marital intercourse” applies regardless of consent.

<sup>68</sup> Indeed, the result should be the same as that achieved by amendment to the equivalent sections to ss 119 and 120 in the English legislation, where the word “unlawful” was deleted from “unlawful sexual intercourse” (although note that, rather oddly, the equivalent to s 121 in the English legislation was not amended). As the Crimes Ordinance uses the term “unlawful sexual *act*” in these sections, the same neat amendment was not possible (nor indeed, was the deletion of the word “unlawful” from any section other than s 118 permitted under the current exercise), hence the Administration’s proposal.

<sup>69</sup> Note that there is a marital defence to s 124 (unlawful sexual intercourse with a girl under the age of 16), so the issues raised by the new definition of “unlawful sexual intercourse” will only arise in the context of this section if the marriage defence fails.

<sup>70</sup> See s 27(2) of the Marriage Ordinance (Cap 181), which states that “a marriage shall be null and void if ... either party to the marriage is at the time of its celebration under the age of 16 years”.

incapacitated at the time of marriage, or become mentally incapacitated after marriage.<sup>71</sup>

In its Paper for the House Committee Meeting of the Legislative Council on 6 July 2001, the Administration stated that as it did not propose to amend sections 123 and 125, it had not clarified its policy in respect of them.<sup>72</sup> However, this overlooks the impact of the new definition of “unlawful sexual intercourse” on these offences, which, in this author’s view, has underlying policy implications warranting further review.

#### *The Underlying Policy Implications of the Bill*

As discussed above, the effect of the new definition of “unlawful sexual intercourse” will be to require the prosecution to prove in relation to married children, and to married women who are mentally incapacitated, that (a) the wife did not consent (or, on the facts of the particular case was incapable of consenting), and (b) her husband knew or was reckless as to the lack of consent. Since these are the same consent-based elements that must be proved in relation to rape, the new definition will deprive married women and children of the additional protection otherwise afforded by the lesser offences of sections 123 and 125, which are not consent-based.

Of course, if married women and children do not *currently* benefit from the protection of sections 123 and 125, then the Administration would be correct in stating that no policy issues are involved in relation to these offences under the Bill. However, it is clear from the drafting of sections 123 and 125 that these offences were intended to apply *regardless* of the marital status of the parties.

The basis for this assertion is that the legislature provided an express defence of marriage in relation only to the offence of unlawful sexual intercourse with a girl under the age of 16 (section 124). This defence applies if the man reasonably believed that he was married to the girl (notwithstanding the fact that the marriage was invalid under Hong Kong law), and, pursuant to an amendment proposed by the Bill, if the girl consented to the sexual intercourse.

However, section 123 (unlawful sexual intercourse with a girl under 13) does not contain such a defence, it simply states that “a man who has unlawful

<sup>71</sup> Note that a marriage to a person who, at the time, was not capable of consenting on the grounds of mental incapacity, is merely voidable (and not automatically void) pursuant to s 20(2)(c) and s 20(2)(d) of the Matrimonial Causes Ordinance (Cap 179). A marriage to a person who *becomes* mentally incapacitated after marriage is not voidable; nor is mental incapacity a ground for divorce under s 11A of the Matrimonial Causes Ordinance, unless the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent (s 11A(2)(b)), or the parties have lived apart for a continuous period of two years, for example, if the spouse who is mentally ill has lived in an institution (s 11A(2)(d)).

<sup>72</sup> LC Paper No LS 136/00-01, paras 6 and 7, available at the website of the Legislative Council at: <http://www.legco.hk/english/index.htm> (under “Legislative Proposals”) (site visited 10 Oct 2001).

sexual intercourse with a girl under the age of 13 shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life". This clearly indicates that sexual intercourse with a girl under the age of 13 was intended to be an offence, regardless of her marital status. However, in responding to this point during the consultation process, the Administration cited the English case of *Alhaji Mohamed v Knott*<sup>73</sup> as authority for the proposition that there may be a defence of marriage at common law even if the girl is under the age of 13,<sup>74</sup> and drew on Smith and Hogan's comment to this effect.<sup>75</sup> However, since *Alhaji Mohamed* concerned a girl aged 13 and 2 weeks, and was therefore decided under the equivalent of section 124 (unlawful sexual intercourse with a girl under 16)<sup>76</sup> rather than the equivalent of section 123 (unlawful sexual intercourse with a girl under 13),<sup>77</sup> it seems to be rather weak authority for this position. In any event, as this author argued in response to the Administration, it is imperative to determine as a matter of public policy whether sexual intercourse with a girl under 13 should be an offence, regardless of consent or marital status, rather than leave this issue open.<sup>78</sup>

Similarly, section 125 (unlawful sexual intercourse with a mentally incapacitated woman) does not contain a marriage defence,<sup>79</sup> and was therefore obviously intended to apply regardless of the marital status of the parties.<sup>80</sup>

It therefore appears that, through the definition of "unlawful sexual intercourse", married women and children will no longer receive the protection previously afforded to them by sections 123 and 125. Rather, these lesser offences will become identical to the offence of rape, requiring lack of consent / incapacity to consent and knowledge or recklessness as to the lack of consent, to be proved on a case-by-case basis.

#### Duplication and anomalies

This duplication is also likely to lead to further problems. Whilst the Administration expressed the view that it was necessary to provide the prosecution with additional charging options where "marital rape" of children or mentally incapacitated persons was involved,<sup>81</sup> the duplication of the consent-based

<sup>73</sup> [1969] 1 QB1 16.

<sup>74</sup> *Summary and Consideration of Responses* (n 14 above), at para 7.03, p 11.

<sup>75</sup> Smith and Hogan, *Criminal Law* (n 51 above), p 461.

<sup>76</sup> Sexual Offences Act 1957, s 6.

<sup>77</sup> *Ibid.*, s 5.

<sup>78</sup> Letter to the Administration, dated 18 Apr 2001 (on file with the author).

<sup>79</sup> However, s 125 does provide a defence where the man did not know and had no reason to suspect the woman to be a mentally incapacitated person.

<sup>80</sup> Oddly, s 118E, which was added to the Crimes Ordinance in 1991, expressly provides a marriage defence to the offence of anal intercourse with a mentally incapacitated person; yet in none of the previous amendment exercises was a marriage defence ever added to ss 123 or 125.

<sup>81</sup> Legal Policy Division, Department of Justice, *Discussion Paper: Proposed Amendments to the Crimes Ordinance (Cap 200): Marital Rape and Related Sexual Offences*, Mar 2001, para 11(3) (on file with the author).

elements of rape into the lesser offences of unlawful sexual intercourse under sections 123 and 125 seems likely to result in confusion as to which offence should be charged in these circumstances. In addition, there are potentially harmful consequences if a charge of unlawful sexual intercourse rather than rape is pursued.<sup>82</sup> First, less social stigma is attached to a conviction of unlawful sexual intercourse than rape, and second, in relation to unlawful sexual intercourse with a wife who is mentally incapacitated, the penalty under section 125 is only 10 years' imprisonment, compared to life imprisonment for rape under section 118. (However, the penalty under section 123 is the same as for rape.) Both of these give the impression that a man who has non-consensual sexual intercourse with his wife should be treated more leniently if she is a child or a mentally incapacitated person. This is highly questionable. Finally, from a legal perspective, anomalies may arise if the case law develops differently under these different sections, for example, as to the test to be applied in establishing (in)capacity to consent.

#### Required policy decisions

The better approach, in this author's view, is for sections 123 and 125 (and indeed all other sexual offences using the term "unlawful sexual intercourse")<sup>83</sup> to be reviewed individually, and for policy decisions to be made as to whether each section should apply absolutely to husband and wife, regardless of consent (as they do for unmarried persons) or whether they should not apply between husband and wife at all, leaving all non-consensual sexual intercourse to be dealt with exclusively under section 118 (rape). Clear legislative amendment would be required to reflect these policy decisions, including, for example, the deletion of the word "unlawful" from relevant sections.

#### Recommendations under recent law reform proposals in Australia and the United Kingdom

In making such policy decisions, the legislature could usefully draw upon the ways in which the United Kingdom and Australia, both of which are currently undertaking a wholesale reform of their sexual offences legislation, have approached these issues.<sup>84</sup>

<sup>82</sup> Particularly given that a judge does not have the jurisdiction to convict a defendant of rape where he has been charged with unlawful sexual intercourse (nor indeed, under s 149 of the Crimes Ordinance, to convict a defendant of unlawful sexual intercourse where he has been charged and acquitted of rape).

<sup>83</sup> For comprehensiveness, this review should be conducted of all such offences in both the Crimes Ordinance and the Mental Health Ordinance (see n 52 above).

<sup>84</sup> Law reform commissions in other countries, such as South Africa, are also undertaking similar comprehensive reforms of their sexual offences legislation, see *Project 107: Sexual Offences: Discussion Paper 25: Sexual Offences, the Substantive Law* (South Africa: South Africa Law Commission, 1999) available online at: <http://www.law.wits.ac.za/salc/salc.html> (site visited 10 Oct 2001).

*Sexual intercourse (and other sexual activity) with a wife under the age of 13*

In the interests of protecting children, a clear public policy decision is required as to whether there should be an age, for example, 13, below which a child is deemed incapable of giving consent to sexual intercourse in all circumstances, including if she is married under the laws of a foreign jurisdiction. This also needs to be considered in relation to other sexual offences such as indecent assault and gross indecency, since the law in Hong Kong is currently based on the premise that married children under 16 can validly consent to indecent assault (section 122) and to gross indecency (section 146). There is no lower age limit at which incapacity to consent is assumed.

In the United Kingdom, the Home Office has recommended that whilst marriage should remain a defence to sexual intercourse with a girl under 16, it should not be a defence to sexual intercourse with a girl under 13, nor to the various new sexual offences recommended by it.<sup>85</sup> In Australia, the Model Criminal Code Officers Committee has recommended that an age be set (originally, somewhat controversially, at 10 years) under which no defences, including marriage and consent, will be available to *any* sexual offences (the “no defences age”).<sup>86</sup>

*Sexual intercourse (and other sexual activity) with a “mentally incapacitated” wife*

A potentially much more difficult policy issue is that relating to sexual intercourse between married persons where one party is mentally incapacitated – or as the current legislation stands, where the *wife* is mentally incapacitated.<sup>87</sup> The question is whether the law should deem that a mentally incapacitated person is incapable of giving consent to sexual intercourse (as currently appears to be the case under section 125), or whether this should be decided on a case-by-case basis (as will be the case under the proposed amendments in the Bill). The same applies to other sexual activities with mentally incapacitated persons. These are currently dealt with very inconsistently under the Ordinance. For example, a mentally incapacitated woman can give valid consent to anal intercourse with her husband (section 118E) but not to indecent assault by her husband (section 122).

<sup>85</sup> *Setting the Boundaries: Reforming the Law on Sexual Offences: Volume 1* (London: Home Office, 2000), paras 3.5.8 to 3.5.11, pp 42–43 and paras 3.6.17 to 3.6.12, p 48. Also available at the website of the Home Office at: <http://www.homeoffice.gov.uk/cpd/sou/vol1main.pdf> (site visited 10 Oct 2001).

<sup>86</sup> *Model Criminal Code: Chapter 5: Sexual Offences Against the Person: Report* (Australia: Model Criminal Code Officers Committee, 1999), p 143. Also available at the website of the Australian Attorney-General's Department, *Australian Law On-line*, at: [http://law.gov.au/publications/Model\\_Criminal\\_Code/sexual.pdf](http://law.gov.au/publications/Model_Criminal_Code/sexual.pdf) (site visited 10 Oct 2001).

<sup>87</sup> There are a number of sexual offences in the Crimes Ordinance which still remain gender-specific, despite others being made gender-neutral through the legislative amendment exercise in 1991. This is another issue which needs to be addressed in the context of a comprehensive reform of the sexual offences legislation.

Various law reform bodies in different countries have grappled with the problem of striking a balance in the legislation between, on the one hand, protecting those with severe mental disabilities against sexual abuse and exploitation, and on the other, respecting the private lives, including sexual lives, of persons with less severe mental disabilities. The UK Home Office has proposed an express definition of capacity to consent for the purposes of all non-consensual sexual offences (including rape), which includes where a person is, by reason of mental disability, unable to make a decision for themselves, for example, where he or she is unable to understand the nature and reasonably foreseeable consequences of the act.<sup>88</sup> In addition, it has recommended that there should be a specific alternative offence to rape in respect of sexual activity with a person with such a severe mental disability that they would not have the capacity to consent to sexual relations. This is intended as a fail-safe recommendation should a rape charge be considered too severe for the circumstances of the sexual activity, or where there is a real difficulty in prosecuting rape.<sup>89</sup> The UK Home Office felt that a marriage defence (or *de facto* partnership defence) would be unacceptable in these circumstances.<sup>90</sup> However, the Australian Model Criminal Code Officers Committee reached the opposite view that there must be defences based on marriage (and *de facto* partnerships) in these circumstances.<sup>91</sup>

Views on what should be the appropriate position to adopt are also likely to turn to the particular definition given to “mentally incapacitated persons”, for example, whether it relates only to those with extremely serious mental impairments, or whether it also covers those with less serious mental impairments. Currently, the term is somewhat problematically defined under section 117 of the Crimes Ordinance to include persons whose mental disorder or handicap is such that they are incapable of living an independent life, which is a different question altogether from whether they are capable of giving consent to sexual intercourse.

## Conclusion

The Bill’s proposed amendments to section 118 of the Crimes Ordinance will make it clear that marital rape is an offence, avoiding any uncertainties as to whether the courts will apply *R v R* in Hong Kong. With an appropriate public awareness campaign, this will send out a clear message to the public that marital rape is a crime. This is to be welcomed. The proposed amendments

<sup>88</sup> UK Home Office, *Setting the Boundaries: Volume 1* (n 85 above), p 73 (for further discussion of this issue, see para 4.5, pp 70–73).

<sup>89</sup> UK Home Office, *Setting the Boundaries: Volume 1* (n 85 above), para 4.6, pp 73–74.

<sup>90</sup> *Ibid.*, paras 4.6.5.

<sup>91</sup> *Model Criminal Code* (n 86 above), pp 128–184.

should also mean that the offences of procuring sexual acts through threats, false pretences or the administration of drugs (sections 119-121) will apply equally to married persons and non-married persons. In putting forward the Bill, the Hong Kong government has taken an important first step towards meeting its commitments under the CEDAW Convention to provide legislative (and other) protection against sexual violence against all women irrespective of marital status, and the proposals should therefore receive strong support.

However, the Administration's limited mandate has unfortunately prevented a more comprehensive policy review of the sexual offences legislation, even in the narrow context of its application to married persons. Whilst perhaps on the face of it, the proposed definition of "unlawful sexual intercourse" appears relatively harmless, it actually makes the sexual offences legislation even more confusing and complex than before. More worryingly, it appears to reduce the protection currently afforded to married children under 13 and married women who are mentally incapacitated. The prosecution will now have to prove lack of consent / incapacity to consent in relation not only to rape, but also in relation to the supposedly lesser offences of unlawful sexual intercourse under sections 123 and 125. This duplication could also lead to anomalies in charging and sentencing, and to anomalies in the development of the law under the different offences. In this author's view, this is an area which urgently requires proper policy review and amendment, a process which has unfortunately been side-stepped in the current limited exercise.

Even though the discussion has been limited to the application of the sexual offences legislation to married persons, it has hopefully demonstrated the urgent need for a comprehensive review and reform of the sexual offences legislation in Hong Kong. Partly due to its piecemeal development over the last 30 years, the legislation relating to sexual offences has become cumbersome and confusing and in some cases either inconsistent or archaic. In many other cases, it is discriminatory, whether on the grounds of marital status, gender or sexual orientation. It is time, therefore, for Hong Kong to follow the lead taken by the United Kingdom, Australia and other jurisdictions, and to modernise and strengthen the law in this area, thereby bringing its sexual offences legislation into the 21st century.