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By fax
16 April 2002

Mrs Percy Ma,
Clerk to Bills Committee,
Legislative Council Secretariat,
Legislative Council Building,
8 Jackson Road, Central,
Hong Kong.
(Fax No.: 2509 9055)

Dear Mrs Ma,

Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2001

I refer to your letter dated 28 March 2002. As requested, attached is a paper in response to item (h) of your letter regarding the following matter –

Part V of the Bill (Marital rape and related sexual offences)

- (h) to advise on the Administration's position on the proposal to adopt the "minimalist" approach to deal only with the issue of marital rape at the present stage, leaving the amendments to other related sexual offences provisions to be considered as appropriate at a later stage, and explain the implications of this proposal, if any.

Yours sincerely,

(Michael Scott)
Senior Assistant Solicitor General

c.c. D of J (Attn: Miss Monica Law
Mr Gavin Shiu
Miss Doris Lo)

#50171

Statute Law (Miscellaneous Provisions) Bill 2001

Part V Marital rape and related sexual offences

Crimes Ordinance (Cap. 200)

Paper for Bills Committee meeting on 18 April 2002

Executive summary

This paper discusses possible ways to simplify Part V of the above Bill to make it clear that marital rape is an offence under section 118 of the Crimes Ordinance (Cap. 200).

- It is considered that it is possible to retain “unlawful” in section 118 (paragraphs 4(c) and 11 below). This avoids the complexity of potential problems regarding the meaning of that term in non-rape offences arising from the expressio unius rule of statutory interpretation (paragraph 8).
- It is considered that sufficient (as opposed to technically absolute) clarity that marital rape is an offence may be achieved by means of a modified clause 12 of the Bill which would add a new section 118(3A) to the effect that, for the avoidance of doubt, and without affecting the generality of any other section, it is declared that “unlawful sexual intercourse” includes sexual intercourse between a man and his wife (paragraphs 12, 13 and 16).
- Accordingly, clauses 11 and 13 to 17 of the Bill, which were mainly consequential to the originally proposed deletion of “unlawful” from section 118, may now be considered to be peripheral to the object of Part V, and may be deleted pending a future full review of sexual offences (paragraphs 3, 4, 14 and 15).

Introduction

2. Part V of the Bill (clauses 11 to 17) amends section 118 of the Crimes Ordinance to make it expressly clear that marital rape is an offence and, in respect of other sections, makes certain amendments that are mainly consequential to the present method of achieving such clarity.

3. At its meeting on 28 March 2002, the Bills Committee noted that the present Part V of the Bill makes the achievement of a simple object very complicated. The Bills Committee requested the Administration to consider taking as minimalist an approach as possible to the present amendments, pending a subsequent full review of sexual offences. There followed a helpful informal meeting to discuss possible ways forward between the Hon Margaret Ng (Chairman of the Bills Committee), Ms Bernice Wong (Assistant Legal Adviser, LegCo Secretariat) and members of the Administration.

Possible committee stage amendments

4. At the informal meeting, it was decided that the Administration would consider the implications of making the following possible committee stage amendments to Part V of the Bill –

Clause 11 (interpretation)

- (a) The new section 117(1B)(b) be deleted (and the new section 117(1B)(a) be retained in order to provide a non-exhaustive definition of “unlawful sexual intercourse” to include sexual intercourse between a husband and his wife if at the time of the intercourse the wife does not consent to it).
- (b) The new section 117(1C) (the proposed new definition of “consent”) be deleted.

Clause 12 (rape)

- (c) The amendment repealing “unlawful” from section 118(3)(a) be deleted.
- (d) The new section 118(3A), which provides for the avoidance of doubt that “sexual intercourse” (“unlawful sexual intercourse” if (c) above is adopted) in section 118(3)(a) includes sexual intercourse between a husband and his wife, be retained.

Clause 13 (procurement by threats)

- (e) The amendment to section 119(1) adding “or marital intercourse” after “act” be deleted.

Clause 14 (procurement by false pretences)

- (f) The same amendment to section 120(1) as in (e) above be deleted.

Clause 15 (administering drugs to obtain or facilitate unlawful sexual act or marital intercourse)

- (g) The same amendment to section 121(1) as in (e) above be deleted.

Clause 16 (intercourse with girl under 16)

- (h) The amendment to section 124(2) regarding consent be deleted.

Clause 17 (indecent conduct towards child under 16)

- (i) The amendment repealing and replacing section 146(3) regarding consent be deleted.

Background of the present Part V

5. The term “unlawful” in “unlawful sexual intercourse” is ambiguous. At common law it primarily meant intercourse outside marriage until, in Reg v R [1991] 3 WLR 767, the House of Lords held that it is clearly “unlawful” to have

intercourse with any woman without her consent, and that “unlawful” was surplusage in the offence of rape.

6. Because of such ambiguity, the Administration proposed that “unlawful” should be deleted from section 118. Together with expressly providing that a marital relationship is immaterial to the offence of rape under the proposed new section 118(3A), this would achieve absolute certainty that marital rape is an offence under section 118.

7. However, the Administration considers that “unlawful” should not be deleted from any other sections of the Crimes Ordinance without a wider ranging review of sexual offences that is beyond the object and scope of the current exercise.

8. To avoid the effect of the expressio unius rule of statutory interpretation (to include one is to exclude the other) and pre-empt any suggestion that, by selectively deleting “unlawful” from section 118, the legislature intended that the term should take its traditional common law meaning in the other sexual offence sections (“non-rape offences”) the Administration proposed that “unlawful” should be defined non-exhaustively under the new section 117(1B) to include marital intercourse. This would allow marital rape to feature under the non-rape offences while allowing the courts to apply such other meaning of “unlawful” as may be appropriate to the circumstances of the case. For example, marital rape might be a factor under section 120 where a third party procured a wife by false pretences to have non-consensual intercourse with her husband – the husband might be guilty of rape under section 118. Under the proposed non-exhaustive definition of “unlawful”, the third party procurer could be charged under section 120 – this would not be possible under the traditional common law meaning of “unlawful” as outside marriage.

9. During the consultation process two main concerns were raised regarding the proposal for a non-exhaustive definition of “unlawful” –

- (a) the limitation of the proposed definition of “unlawful sexual intercourse” under the new section 117(1B) to the meaning of “consent” in rape would result in lesser protection of married women than for unmarried women in those offences involving sexual intercourse where consent has been improperly obtained by threats (section 119), false pretences (section 120), or the administration of drugs (section 121), or where the woman, though consenting in fact, is deemed to be incompetent to consent on account of age (sections 123 and 124) or mental incapacity (section 125);
- (b) notwithstanding the above, incompetence to consent on account of age or mental incapacity should not be included in the proposed non-exhaustive definition before the policy regarding the non-rape offences in these particular categories was fully reviewed.

10. To meet these concerns, the Administration decided to retain the proposed definition of “unlawful sexual intercourse” in section 117(1B) in its present form and add an express reference to “marital intercourse” in sections 119(1), 120(1) and 121(1). Sections 123 (intercourse with girl under 13), 124 (intercourse with girl under 16) and 125 (intercourse with mentally incapacitated person) would not be so amended.

Implications of the possible committee stage amendments

11. From the perspective of the Administration, if it is acceptable to retain “unlawful” in section 118(3)(a) for the time being (as is arguably the case), this would solve the main problem posed by the expressio unius rule which would arise from the selective deletion of that term.

12. In terms of the central legislative object of the present amendment

exercise, namely, to make it clear that marital rape is an offence, the Administration considers that abundant (as opposed to technically absolute), and therefore sufficient, clarity would be achieved by the addition of the proposed new section 118(3A) modified to declare, for the avoidance of doubt that, in section 118(3)(a), “unlawful sexual intercourse” includes marital intercourse.

13. The Administration submits that amending section 118 in such a way would not be affected by the expressio unius rule for the following reasons –

- (a) the retention of “unlawful” in section 118(3)(a) would obviate the suggestion that the legislature intended that “unlawful” should take its traditional common law meaning of outside marriage in the non-rape offences from which “unlawful” was not deleted. This would leave the courts free to apply the broad principle protecting married women evinced in Reg v R to the non-rape offences as may be appropriate to the circumstances of the case;
- (b) any suggestion that the proposed new section 118(3A) might also attract the expressio unius rule could be offset (subject to the decision of the Law Draftsman) by the possible addition of the formula, “and without affecting the generality of any other section”, after “For the avoidance of doubt”.

Possible entire deletion of proposed new section 117(1B)

14. If the proposition in paragraph 13(a) above is correct, namely, that the courts would apply the broad principle in Reg v R to protect married women as appropriate in the other sections of the Crimes Ordinance, the Administration submits that it would be reasonable to delete from the Bill the entire proposed non-exhaustive definition of “unlawful sexual intercourse” under the new section 117(1B). Arguments for adopting this approach include –

- (a) the courts in Hong Kong have strongly indicated an inclination to apply the principle in Reg v R, if appropriate, in respect of the non-rape offences. For example, in HKSAR v Chan Wing Hung [1997] 3 HKC 472, 475D-476A, the Hong Kong Court of Appeal observed that it might have held “unlawful” in section 119 (procurement by threats) to be surplusage for the purposes of that case had the man and woman concerned been married to each other and the wife had not consented to the intercourse procured by her husband. In the context, however, since the man and woman were unmarried, it was unnecessary to go further than to hold that “unlawful” in the circumstances of the case took its traditional common law meaning of illicit or outside the bond of marriage;
- (b) if future experience or analysis shows that protection of married women under the non-rape offences cannot appropriately be provided by the courts further to the broad principle in Reg v R, that is a factor which could be taken into account in a full review of sexual offences;
- (c) the deletion of the proposed non-exhaustive definition of “unlawful sexual intercourse” would avoid possible confusion regarding its precise application in the context of each of the non-rape offences;
- (d) the updating of archaic terminology such as “unlawful” in respect of sexual offences should as far as possible await a full review;
- (e) the deletion of the proposed new section 117(1B) from the Bill would be consistent with the originally intended minimalist approach.

Proposed new section 117(1C) (clause 11) and proposed amendments to sections 124 (clause 16) and 146 (clause 17)

15. The Administration agrees that the issues relevant to these proposed amendments are peripheral to the principal object of amending section 118 and may be revisited in a full review.

Proposed minimalist amendment

16. Based on the above discussion, it is submitted, for the consideration of the Bills Committee, that only a modified clause 12 (with clauses 11 and 13 to 17 to be deleted) needs to be retained in Part V of the Bill. The modified clause, subject to law drafting advice, would be in approximately the following form –

12. Rape

Section 118 is amended by adding –

“(3A) For the avoidance of doubt, and without limiting the generality of any other section, it is declared that in subsection (3)(a), “unlawful sexual intercourse” includes sexual intercourse between a husband and his wife.”.

Legal Policy Division
Department of Justice
April 2002