LC Paper No. CB(2)1708/01-02(01)

Sin Wai Man
c/o School of Law
City University of Hong Kong
Tat Chee Avenue
Kowloon
Hong Kong

Phone: 852 27887390
Fax: 852 27887530
Email: lwsin@cityu.edu.hk

By Fax: 25099055

23 April 2002

Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2001
Legislative Council
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Sir/ Madam,

Statute Law (Miscellaneous Provisions) Bill 2001

I understand from the Administration's letter dated 16 April 2002 to the Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2001 on possible ways to simplify Part V of the captioned bill (the Letter) [CB(2)1619/01-02(01)] posted on the LegCo website that the Administration has proposed, at the urge of the Bills Committee, a minimalist approach in dealing with the amendments to marital rape and related sexual offences. I disagree with the approach and urge the Bills Committee to reconsider it, for the following reasons (please note that I am making these comments in my personal capacity):

1. I agree that the addition of the proposed s.118(3A) could achieve the purpose of making expressly clear that marital rape is an offence.

A job better done by the court than the legislature?

2. It is equally important that the law should evince that marital victims enjoys equal protection in relation to other sexual offences, as well as non-marital victims, under the law, and to leave, amongst other sections, ss.119, 120, 121, 123, 124 and 125, intact would create enormous uncertainty and confusion regarding the applicability of these offences to marital cases.

3. The Administration seems satisfied that the minimalist approach would not attract the *expressio unius* rule, and thus decides to "leave the court 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" (para 13(a), the Letter). Even if the point on the *expressio unius* rule is correct, I have serious doubt as to whether the applicability of the non-rape offences to marital cases should be left to the court.

4. As succinctly summarized by Robyn Emerton in "Marital Rape and Related Sexual Offences: A Review of the Proposed Amendments to Part XII of the Crimes Ordinance" (*Hong Kong Law Journal* (2001) 31(3): 415-34), the English courts began to develop exceptions to the marital rape exemption - which dated back to 1736 - in 1949. Such development took a setback in 1976, when their parliament passed the Sexual Offences (Amendment) Act 1976, defining rape as "unlawful sexual intercourse", which the court took as an indication that marital rape exemption was meant to be retained by the legislature. Legal wrangling only ended in 1991, when the House of Lords decided in *R v R* that the exemption was abolished. This shows the court may not be able to keep pace with the change in social thinking and thus may not be the most appropriate forum to effect a change in legal policy.

5. It should, more importantly, be borne in mind that there are the interests of real-life victims at stake, and these victims may be either wives (if the court decides marital exemption still applies in non-rape offences) or husbands (if the court decides marital exemption ceases to apply in non-rape offences and the husband wrongly believes otherwise when he commits the 'crime'). This concerns legal policy that should be the responsibility of the legislature. *Hong Kong people have a right to expect its legislature not to shy away from making a decisio*n.

6. The Administration argues that one of the reasons why the minimalist approach is justified is "the courts in Hong Kong [*HKSAR* v *Chan Wing Hung* [1997] 3

HKC 472] have strongly indicated an inclination to apply the principle in Reg v R, in respect of the non-rape offences" (para 14(a), the Letter). While I agree with the Administration's interpretation of the *obiter dictum* in *HKSAR* v *Chan Wing Hung*, it is not as clear to everyone as believed. In LC Paper No. LS69/01-02 LegCo's Assistant Legal Adviser understood the court to decide "[i]n the context of 'unlawful sexual act', [unlawful sexual intercourse] means intercourse outside marriage (para 5, Annex A LC Paper No. LS69/01-02; see further the whole Section C, Annex A LC Paper No. LS69/01-02). Carol Jones, Associate Professor, School of Law, City University of Hong Kong, also states in her article "Law, Patriarchies, and State Formation in England and Post-Colonial Hong Kong" (*Journal of Law and Society* (2001) 28(2): 265-289):

> The Hong Kong courts did not follow *R v R*. Indeed, when in 1997 in *HKSAR v Chan Wing-hung*, they considered it, [*sic*] they opted for the old definition of unlawful as being 'outside the bounds of matrimony'. Any other interpretation would, they said, overrule Hong Kong statue law, the Hong Kong Crimes Ordinance s.118 defining rape as unlawful sexual intercourse with a woman without her consent….Since Hong Kong has never altered its statue and its judiciary seems hesitant to boldly go where the House of lords had gone before, intercourse within marriage – even if coerced – is not a crime. (p.267)

The (mis)interpretation by the Assistant Legal Adviser and Carol Jones is perhaps caused by their overemphasis on Power VP's statement that "It is not, however, in the present case [which is a non-marital case] necessary to go further than to hold following the judgement of Donavan J … in *R* v *Chapman* … that unlawful in the context means illicit, that is outside the bound of matrimony" (p.475H-I), while overlooking Power VP's observation that "[w]e incline to the view that it would be proper to follow the course adopted in *R* v *R* [1991] 3 WLR 767, in which Lord Keith said that the word [unlawful] should be: … treated as being mere surplusage in this enactment." (p.475G) If even legal experts would have such different interpretations, laypersons may be even more confused. To pre-empt such misunderstanding, it is important that amendments be made, *at this stage*, to those non-rape offences for which consensus that they should be equally applicable to both marital and non-marital cases exits. And, I submit (and as is also implied by the Administration in para 9, the Letter) ss.119-121 are such non-controversial non-rape offences.

7. A survey of the law reports would show there have not been any cases of marital rape reported in Hong Kong. Whether it is because Hong Kong husbands have

really never forced their wives to have sex with them, or the victims have not reported to the police or the police have decided not to proceed, we will never know. But it seems reasonable to suggest that such 'non-reporting' may be due to an ignorance of the common law after *R v R*, and a reluctance of the prosecution to challenge the pre-*R v R* common law. Addition of the new proposed s.118(3A) would convey the message to the public and law enforcement personnel that marital rape is, indeed, an offence. For the same reason, it would be advisable also to amend ss.119-121 - for which, I suppose, there is consensus that they should apply to marital cases.

8. It seems to me that one of the purposes of the present exercise is to *clarify the law for the benefit of the public*, and it is for this reason that, despite the clear authority of *R* v *R* on the applicability of s.118 to marital rape, amendment to that section is still considered necessary. It, therefore, seems illogical and unreasonable for the Bills Committee to decide to leave the applicability of other non-rape offences - for which there are no clear case authority as *R v R* is for marital rape – to marital cases unclarified. The Administration's latest proposal, if adopted, would create, or at least, fail to remove, uncertainty as to the applicability of the non-rape offences to marital cases.

Recommendations

9. I understand that the Bills Committee are of the view that changes to non-rape offences should better wait until a full policy review has been conducted. A distinction should however be drawn between the uncontroversial ss.119, 120 and 121 and other non-rape offences.

10. Sections 119, 120 and 121

In connection with these three sections, it is recommended that a s.117(1B) along the following line (which, in turn, is modeled on the Administration latest proposal) be added:

> For the avoidance of doubt, and without limiting the generality of any other section, it is declared that in subsection (1A), "unlawful sexual intercourse" includes sexual intercourse between a husband and his wife.

I believe this is possible under the present exercise, as it, indeed, reflects the modern common law in *HKSAR v Chan Wing Hung* and the existing consensus, and it adopts a similar minimalist approach that is preferred by the Bills Committee.

11. Furthermore, as suggested in my submission dated 24 March 2002 to the Bills Committee [CB(2)1453/01-02(02)], "with whom that person may not have lawful sexual intercourse" should be deleted from s.117(1A)(b). This, I believe, is absolutely necessary, even if my suggestion to add a s.117(1B) is not accepted, as the present wording of s.117(1A)(b) would leave the courts no room to apply *R v R* or *HKSAR v Chan Wing Hung* to buggery and acts of gross indecency under that section but to find them inapplicable to marital cases.

12. *Non-rape offences related to the incapacity of the victim*

I am in favour of retaining the marital exemption for other non-rape offences related to the incapacity of the victim for reasons of age or mental capacity, such as ss.123, 124, 125 and 146, until and unless a full review has been conducted. A full review of these other non-rape offences should be done as soon as possible and, preferably, a timetable should be set.

13. *Sections 127 and 128*

My recommendations regarding these two sections have already been given in paras 14-18 of my letter dated 28 November 2000 to the Administration [CB(2)730/00-01(02)].

14. *Consent*

The construction of consent in rape has long been controversial. Feminists have criticized that the difficulty of proving non-consent reflects a bias against women embedded in the law. In this context, the introduction of the proposed s.117(1C) - which, in substance, is a codification of the common law, e.g. *Olugboja* [1981] 3 All ER 443 - in the Bill is indeed a welcomed improvement. I, therefore, recommend that s.117(1C) should be retained.

<u>*Conclusion*</u>

15. I can understand that my recommendations in paras 12-14 may not be in line with the minimalist approach the Bills Committee now prefers. If that is the case, I would still urge the Bills Committee to consider my recommendations in paras 10-11 above, which adopts a similar minimalist approach and reflects, I believe, the present consensus regarding ss.119-121.

Yours faithfully,

Sin Wai Man

cc. Mr Michael Scott, DoJ (21809928)