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18 April 2002

BY FAX

Fax No. : 2180 9928
Total no. of page(s) : 2

(Attn : Mr Michael Scott
Senior Assistant Solicitor General)

Dear Mr Scott,

Statute Law (Miscellaneous Provisions) Bill 2001

Following the discussion of your paper (LC Paper No. CB(2) 1619/01-02(01)) on marital rape (Part V of the Bill) at the Bills Committee meeting this morning, I write to put forward my views expressed at the meeting.

I agree that it is possible not to repeal the word "unlawful" from section 118.

I have reservations in using the words "For the avoidance of doubt and without limiting the generality of any other section" in the proposed section 118(3A). I have spoken with the Law Draftsman prior to the meeting and understand that he has not been consulted on the proposed wording.

The focus of the discussion at the meeting today is whether the amendment should be restricted to section 118. Under section 149 and item 1 of the Schedule, if on the trial of a charge for rape the accused is acquitted, but it is proved that the accused is guilty of procurement by threats (section 119), procurement by false pretences (section 120) or administering of drugs (section 121), then he shall be convicted of such offence or of being a party to any such offence.

You mention in paragraph 14(a) of your paper that 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. However, it remains a fact that the court in *HKSAR v Chan Wing Hung* [1997] 3 HKC 472 ruled that the word "unlawful" in section 119 of the Crimes Ordinance (Cap. 200) meant illicit. It was held that in the context of "unlawful sexual act", this meant intercourse outside marriage.

In light of the ruling, if we adopt the Administration's proposed section 118(3A), a person acquitted of rape may be convicted, if proved guilty, of procurement or administration of drugs where that person is not married to the victim. A husband of the victim, however, could not even be charged with these alternative offences.

The Administration has been asked to reconsider the issue in light of the above. Subject to the Administration's response, it was suggested at the Bills Committee meeting that :

- (a) clauses 11 to 17 of the Bill be deleted;
- (b) section 117 of the Crimes Ordinance be amended by adding—

"(1B) Without prejudice to the operation of any of the other provisions of this Part, for the purposes of sections 118, 119, 120 and 121, "unlawful sexual intercourse" (非法性交、非法的性交) includes sexual intercourse between a husband and his wife."

I shall be grateful if you could revert to me on the Administration's position and your explanation for the policy decided. Please also let me have the proposed amendment after consulting the Law Draftsman.

Kindly note that the above suggestion is a preliminary draft and has been made to facilitate further discussion between the undersigned and the Administration. I believe that you may revise your proposed section 118(3A) along the lines of the above suggestion if the Administration's stance remains the same.

I look forward to hearing from you soon.

Yours sincerely,

(Bernice Wong)
Assistant Legal Adviser

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