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律政司
法律政策科
香港金鐘道 66 號
金鐘道政府合署高座 1 樓

圖文傳真：852-2180 9928

DEPARTMENT OF JUSTICE
Legal Policy Division
1/F., High Block
Queensway Government Offices
66 Queensway, Hong Kong

Fax: 852-2180 9928

本司檔號 Our Ref.: LP 3/00/8C
來函檔號 Your Ref.: LS/B/57/00-01
電話號碼 Tel. No.: 2867 2157

Urgent by fax
19 April 2002

Ms Bernice Wong,
Assistant Legal Adviser,
Legislative Council Secretariat,
Legal Service Division,
Legislative Council Building,
8 Jackson Road,
Central,
Hong Kong.
(Fax No.: 2877 5029)

Dear Ms Wong,

Statute Law (Miscellaneous Provisions) Bill 2001

Thank you for your letter dated 18 April 2002 regarding our paper on Part V of the Bill (marital rape).

As to your third paragraph, the paper sets out the background to the development of Part V and discusses a proposed possible solution in principle, subject to the decision or advice of the Law Draftsman on the wording (paragraphs 13(b) and 16). Although the Law Draftsman would not be asked to provide a draft until the principle is settled, an advance copy of the discussion paper was sent to Miss Monica Law of the Law Drafting Division for information.

Regarding your fourth paragraph, my notes of the Bills Committee's meeting on 18 April 2002 unfortunately do not record the result of the discussion of section 149 and item 1 of the Schedule to the Crimes Ordinance (Cap. 200). I would therefore be grateful if you would

set out your views on the significance of item 1 of the Schedule in relation to your proposal for a new section 117(1B); and also let us know whether you propose that item 1 should be amended, and if so in what way.

Thank you for your view of the effect of the judgment in HKSAR v Chan Wing Hung [1997] 3 HKC 472. My personal view respectfully remains that the Court of Appeal did not rule that "unlawful sexual act" meant intercourse outside marriage for all purposes in the context of section 119 but rather was specific to the fact that the applicant and the victim were not married. Had they been married, the Court of Appeal indicated that it might have gone on to hold that section 119 also applied to them in that context. Unfortunately, paragraph (1) of the headnote to the report at p.472I (which says, "The word 'unlawful' in s 119 of the Crimes Ordinance (Cap. 200) meant illicit. In the context of 'unlawful sexual act', this meant intercourse outside marriage.") is not an accurate summary of pp.475I-476A of the judgment of the Court of Appeal given by Power VP.

It seems to me that this is made clear at pp.475F-476A of the judgment, which says –

> "We were concerned when this matter first came before the court by the use of the term 'unlawful sexual act' in that section and in particular the use of the word 'unlawful'. We considered that it would be helpful to hear further arguments as to the meaning that could properly be given to that word. The word is clearly a survival from earlier times when intercourse outside marriage was illicit and therefore unlawful. We do not think that prolonged discussion of the history of this and similar sections and of the niceties of antique usage will serve any real purpose. We 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 should be:
>
> … treated as being mere surplusage in this enactment.
>
> Lord Keith was conscious that it might be suggested that the court was usurping the power of the legislature when so holding as, indeed, we are. It is not, however, in the present case necessary to go further than to hold following the judgment of Donovan J (as he then was) in R v Chapman (1959) 42 Cr App R 257, [1958] 3 All ER 143 that unlawful in the context means illicit, that is outside the bounds of matrimony. It is common ground that the applicant and Ms Tong were not married, and that their intercourse was clearly

> illicit and was, therefore, for the purpose of the section 'unlawful'. That disposes of the first ground." [Emphasis added.]

On the basis of this passage of the judgment, it is submitted that is likely that, had the applicant and the victim been married, the Court of Appeal would have gone further and held that their intercourse was not illicit but that, following R v R, "unlawful" should be treated as being mere surplusage in section 119 in the particular factual context. Alternatively, the Court of Appeal could have applied another statement by Lord Keith in R v R (i.e. "it is clearly unlawful to have sexual intercourse with any woman without her consent": p.776G) and held that in the context "unlawful sexual intercourse" in section 119 included non-consensual marital intercourse. Either way, following the reasoning of Power VP, there is a significant likelihood that section 119 would have been applicable to the applicant and the victim had they been married, notwithstanding that in such context it might be more likely that the applicant would in the first place have been charged with rape. Further under the above principle emphasised in R v R and Chan Wing Hung, in a context in which a third party procured by threats a married woman to have non-consensual sexual intercourse with her husband, it appears that it would be possible to charge the third party with an offence under section 119.

I would be grateful for your comments. In the meantime, I will seek the advice of my colleagues in Prosecutions Division on the above and your suggested new section 117(1B), and revert with our view as soon as possible.

Yours sincerely,

(Michael Scott)
Senior Assistant Solicitor General

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

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