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Secretary for Justice
Department of Justice
Legal Policy (General) Section
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BY FAX

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(Attn : Mr Michael Scott
Senior Assistant Solicitor General)

Dear Mr Scott,

Statute Law (Miscellaneous Provisions) Bill 2001

I refer to your letter of 19 April 2002 in relation to our discussion on Part V of the Bill (marital rape).

The Bills Committee is waiting for the Administration's response before proceeding to discuss the implication of your proposed section 118(3A) on section 149 and item 1 of the Schedule to the Crimes Ordinance. Members have asked the Administration to review the proposed amendment in consultation with me.

Thank you for your detailed analysis of the judgment in *HKSAR v Chan Wing Hung*. You may however wish to consider :

- (a) that the statement made by Power VP is obiter dictum and it is not binding;
- (b) that the obiter dictum may be regarded by the court as no longer relevant after the introduction of the kind of legislative amendment that is being proposed.

My concern is that if your proposed amendment is passed, the court may

interpret that the legislative intent is to restrict the newly added interpretation of "unlawful sexual intercourse" to the offence of rape in section 118. In view of the obvious impact of the amendment on the Crimes Ordinance as a whole (or specifically, section 149 and item 1 of the Schedule), the absence of any express application of that interpretation to sections 119, 120 and 121 may well be construed by the court to mean that in those provisions, insofar that unlawful sexual act includes unlawful sexual intercourse, the latter does not include sexual intercourse between a married couple. Since there is a likelihood that the court would come to such an interpretation, which is contrary to the Administration's stated objective, it may be necessary to make the drafting more explicit than your current suggested version.

It is up to the Administration to put before the Bills Committee the policy that you decide and the legislative proposal that gives effect to that policy. I believe it would be outside my scope of duty to propose whether item 1 of the Schedule should be amended, and if so in what way.

As complicated legal issues are involved, I would be happy to comment on an informal basis on any proposal that you wish to make before the matter is put before the Bills Committee.

Yours sincerely,

(Bernice Wong)
Assistant Legal Adviser

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