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Urgent by fax
21 May, 2002

Mr Paul Woo,
Clerk to Bills Committee,
Legislative Council Secretariat,
Legislative Council Building,
8 Jackson Road,
Central,
Hong Kong.
(Fax No.: 2509 9055)

Dear Mr Woo,

Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2001

Part V (amendment of Crimes Ordinance (Cap. 200)
Marital rape

I refer to your letters dated 3 and 14 May 2002 requesting a response from the Administration regarding Part V of the Bill for the meeting to be held on 23 May 2002.

As noted by the Administration in earlier meetings of the Bills Committee (2 and 9 May 2002) this matter was referred for the specialist advice of our Prosecutions Division. We are grateful for the helpful analyses of this matter provided by the Assistant Legal Adviser in her letters dated 18 and 25 April 2002.

After receiving the advice of Prosecutions Division, the Administration considers that Part V of the Bill should be amended by a

Committee Stage Amendment which would delete all of the present clauses and replace clause 12 with a new proposed section 118(3A) –

"**12. Rape**

Section 118 of the Crimes Ordinance (Cap. 200) is amended by adding –

"(3A) For the avoidance of doubt, and without affecting any other provisions of this Part, it is declared that in subsection (3)(a), "unlawful sexual intercourse" ("非法性交") includes sexual intercourse that a man has with his wife if the wife at the time of the intercourse does not consent to it."

At its meeting on 18 April 2002 the Bills Committee requested the Administration to consider the suggestion that Part V be amended as follows –

(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."

The argument for the suggested new section 117(1B) relates to section 149(1) and item 1 of the Schedule to the Crimes Ordinance under which, if on a charge of rape the accused is acquitted, but it is proved that the accused is guilty of an offence under section 119 (procurement by threats), 120 (procurement by false pretences) or 121 (administering drugs), he shall be convicted of such offence or of being a party to any such offence.

It was submitted that if the Administration's new proposed section 118(3A) were adopted, the husband of a victim of marital rape could not even be charged with the alternative offences specified in item 1 of the Schedule. The basis of this view was that in HKSAR v Chan Wing Hung [1997] 3 HKC 472 the Hong Kong Court of Appeal held that "unlawful" in section 119 meant illicit, and in the context of "unlawful sexual act" this meant intercourse outside marriage.

In the Administration's view, the new proposed section 118(3A) is justifiable since it would have the opposite effect to that suggested above. That is, because it would be made clear that "unlawful sexual intercourse" in

section 118(3) includes sexual intercourse that a husband has with his wife without her consent, it would follow that a husband who was acquitted of rape of his wife could nevertheless be convicted under sections 118, 119 or 121 (if the conditions specified in section 149 were met). In addition, since section 149 refers to proof of another offence on the trial of the offence charged, it would be unnecessary for the accused to be charged, for example, with a section 119, 120 or 121 offence, in order for him to be convicted in the alternative of any one of those offences under section 149.

The Administration also considers that Chan Wing Hung is not a seminal case on the meaning of "unlawful". The ground of appeal that raised some consideration of the word "unlawful" did not complain that the trial judge applied the wrong meaning but that he did not make any finding on whether the sexual act concerned was unlawful. Power VP (at p.475F-G) made it clear that the Court of Appeal did not propose to consider the matter at any length or pronounce on it in depth, as there was no need (i.e. the sexual intercourse in the context of that case was clearly unlawful as the victim neither freely consented nor was married to the applicant).

Rationale of the new proposed section 118(3A)

The wording of the new proposed section 118(3A), cited above, makes it clear that "unlawful sexual intercourse" includes sexual intercourse that a man has with his wife without her consent. This resonates directly – as is intended – with the principles supporting the decision of the House of Lords in Regina v R [1992] 1 AC 599 (e.g. at p.622H, "it is clearly unlawful to have sexual intercourse with any woman without her consent"). It should also allow the other provisions of the Ordinance to be interpreted in the light of the reasoning in Regina v R.

In Regina v R, the Law Lords were dealing with a rape case. Nevertheless, their reasoning in ruling that the word "unlawful" was surplusage was largely based on a recognition of fundamental differences between the modern view of women – and particularly married women – and the proposition of Sir Matthew Hale in 1736 that a wife cannot retract her matrimonial consent to sexual intercourse with her husband. In the view of the Administration, much of that reasoning would strongly apply to the non-rape offences in Part XII of the Ordinance. For this reason, it is considered that the new proposed section 118(3A) will strengthen a liberal interpretation of the sexual offences concerned and will not narrow such interpretation.

The new and originally proposed section 118(3A) compared

The originally proposed section 118(3A) in clause 12 of the Bill reads –

"(3A) For the avoidance of doubt, it is declared that in subsection (3)(a), "sexual intercourse" (性交) includes sexual intercourse between a husband and his wife.".

The main differences between the new and originally proposed versions of section 118(3A), and their drafting or policy implications, are noted below –

- The new version refers to "unlawful sexual intercourse" (as opposed to "sexual intercourse" in the original version). This has allowed a simplified (or "minimalist") approach to be taken to the amendment of Part XII of the Ordinance to make it clear that marital rape is an offence. The deletion of "unlawful" from section 118 under the original version generated much debate and uncertainty (and additional complicated amendment proposals, such as a possible non-exhaustive definition of "unlawful sexual intercourse" under section 117) for the purpose of ensuring as far as possible that amending section 118 by the selective deletion of "unlawful" would not inadvertently make married women less well protected under the non-rape offences than applied at common law according to the principles evinced in Regina v R.

- The simplified approach also ensures that the present limited amendment exercise does not introduce changes to the sexual offences which should properly be the subject of full review of, and public consultation on, Part XII of the Ordinance.

- The words "sexual intercourse between a husband and his wife" have been replaced by "sexual intercourse that a man has with his wife". Presentationally, the former appears to have an unfortunate connotation of mutuality whereas rape is a unilateral act of violence. The latter is also more consistent with the use of "man" elsewhere in section 118 and, as noted above, the terminology used in Regina v R.

- The new version includes the words "at the time of the intercourse" to better reflect the drafting of section 118(3). The express inclusion of the time element also obviates any possible argument that some difference was intended between an unmarried woman and a wife regarding the requirement of lack of consent in the offence of rape.

Letter from Mr Sin Wai-man

In your letter dated 3 May 2002, you requested a written response from the Administration to the letter dated 23 April 2002 from Mr Sin Wai-man of the School of Law, City University of Hong Kong to the Bills Committee on the proposed minimalist approach to dealing with

marital rape under the Bill. The Administration is grateful for the helpful and detailed contributions from Mr Sin to the discussion of this matter during both public consultation and the deliberations of the Bills Committee. It welcomes his support relating to the new proposed section 118(3A).

In his letter dated 23 April 2002, Mr Sin also recommended that a modified version of the proposed new definition of "unlawful sexual intercourse" under section 117(1B) be retained in respect of sections 119, 120 and 121. For the reasons noted above in support of retaining only the new proposed section 118(3A) – including the need for a minimalist approach and the need to avoid pre-empting public discussion of a full review of sexual offences – the Administration considers that such amendments should not be included in the present Bill.

There is also useful discussion in Mr Sin's letter of possible further amendments regarding, for example, the non-rape offences concerning incapacity to consent because of age or mental incapacity, the deletion of section 117(1A)(b) and its exclusion of buggery and acts of gross indecency in a marital context, and the retention of the definition of "consent" under the originally proposed new section 117(1C) in clause 11 of the present Bill.

These matters too are outside the originally intended scope of the Bill but can be revisited in a full policy review of sexual offences.

Yours sincerely,

(Michael Scott)
Senior Assistant Solicitor General

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