

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
5 June, 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
Part V : Marital rape

I refer to the useful meeting on 4 June 2002, chaired by the Hon Margaret Ng, and including yourself and members of this department.

Further to the discussion at that meeting (and subject to the advice of the Law Draftsman) I have the following proposal to amend section 117 of the Crimes Ordinance (Cap. 200) to make it clear that marital rape is an offence –

“(1B) For the avoidance of doubt, it is declared that there is no

presumption that “unlawful sexual intercourse” is exclusive of sexual intercourse that a man has with his wife.”

I suggest that this amendment would have the following advantages –

- (1) it would reflect the modern common law incorporated in the judgment of the House of Lords in Regina v R which abolished the remainder of the presumption that a man could not be guilty of rape of his wife based on Holt’s concept of irrevocable matrimonial consent on the part of the wife (Regina v R suggested that section 127 was the only sexual offence provision in which “unlawful” was not mere surplusage);
- (2) it would obviate any need to refer to consent in section 117, since any applicable ingredients of lack, or vitiation, of consent would be determined in the circumstances of the case according to the particular sexual offence in which “unlawful sexual intercourse” appears;
- (3) it would make it clear that a husband could be charged with an offence under sections 119, 120 or 121, as opposed to the possibility only of being convicted of such offence in the alternative further to section 149 following an acquittal of a charge under section 118;
- (4) since it merely removes an outdated presumption for the avoidance of doubt (as opposed to making marital intercourse “unlawful sexual intercourse”), it would not alter, or pre-empt any development of, existing law or legal policy related either to improperly obtained consent or to incompetence to consent on grounds of age or mental incapacity in the marital context;
- (5) it would avoid controversy arising from an ostensible exclusion of the protection of married women (e.g. relating to incompetence to consent under sections 123, 124 or 125) because of the expressio unius rule were the amendment of Part XII of the Crimes Ordinance to be limited to specified provisions such as sections 118 (rape), 119, 120 and 121 (improperly obtained consent);
- (6) if the above is correct, it would achieve the required simplicity and clarity without consequential disadvantages.

I would be grateful for your comments (and also any comments which copy addressees may wish to make formally or informally) at your earliest convenience.

Yours sincerely,

(Michael Scott)
Senior Assistant Solicitor General

c.c. The Hon Margaret Ng 2801 7134
D of J (Attn: SG
DPP
Mr David Morris
Miss Monica Law
Mr Gavin Shiu
Mr Michael Lam
Miss Doris Lo)

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