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Urgent by fax
6 June, 2002

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

Dear Ms Wong,

Statute Law (Miscellaneous Provisions) Bill 2001

Thank you for your letter dated 5 June 2002.

It seems to me that the answer regarding the effect of the proposed amendment on the interpretation of "unlawful sexual intercourse" (or that term as incorporated in "unlawful sexual act") in sections 127, 132, 133, 134, 135, 140, 141 and 142 of the Crimes Ordinance (Cap. 200) is that it would ensure, where applicable, that a married woman would now be protected under those sections if in the past she may not have been because of Hale's outmoded and objectionable proposition.

In this respect, the proposed amendment merely gives statutory expression to the principle affirmed in Regina v R. It appears that, by definition, section 127 is the only sexual offence provision where

"unlawful" can apply only outside marriage, since the section refers to "an unmarried girl". In Regina v R the House of Lords observed that "unlawful" was not mere surplusage in the English equivalent of that section, since otherwise a man who took a girl under 18 out of her parents' possession against their will with the honest and bona fide intention of marrying her might have no defence, even if he carried out that intention.

I suggest that the crucial difference between the present proposed amendment and the various former proposed definitions of "unlawful sexual intercourse" is that the former proposals had the apparent effect of altering the substantive content of the relevant sections by declaring that "unlawful sexual intercourse" "includes" or "may include" marital intercourse or "may take place between a husband and his wife". By contrast, the present proposal merely confirms the removal (by Regina v R: "it is clearly unlawful to have sexual intercourse with any woman without her consent") of a defunct common law exclusion from the meaning of "unlawful sexual intercourse" in order to make it clear that married women can be properly protected under the applicable sexual offence provisions (sections 118, 119, 120, 121, 124, 125 and 126 are the main ones – it is very unlikely that married women would be involved as victims of their husbands under the other sexual offences noted above, even if not inevitably impossible). In these circumstances, it seems to me that the new proposal in fact complies with the agreed minimalist approach.

Regarding the expressio unius rule, my view is that its application is reinforced (and the qualification "without affecting any other provision" correspondingly diminished) where there are multiple specified provisions (e.g. sections 118, 119, 120 and 121) as opposed to one (e.g. section 118). This increases the risk of achieving the opposite (and unintended) effect in respect of the unspecified sections.

However, it appears that such problems would be avoided under the new proposal since it is simply confirmative of the abolition by the House of Lords of the remainder of Hale's proposition in Regina v R in 1991.

Yours sincerely,

(Michael Scott)
Senior Assistant Solicitor General

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