

Letterhead of The University of Hong Kong

LC Paper No. CB(2)1342/00-01(04)

18 April 2001

BY FAX AND POST

Ms Agnes Cheung
Senior Government Counsel
Legal Policy Division
Room 102, 4/F High Block
Queensway Government Offices
66 Queensway
Hong Kong

Dear Ms Cheung

Proposed Amendments to the Crimes Ordinance (Cap 200): Marital Rape and Related Sexual Offences

Thank you for your letter dated 3 April 2001, attaching the second working draft of the proposed amendments to the Crimes Ordinance and related documents for our review.

As discussed in our submission of 19 December 2000, we strongly support the proposed amendments to section 118 of the Ordinance to make it clear that marital rape is an offence.

We have reviewed the arguments put forward for the proposed definition of "unlawful sexual intercourse" in section 117 of the Ordinance as set out in the *Summary and Consideration of Responses to the Consultation Paper* and the *Discussion Paper*. However, we remain of the view that it would be unwise to define "unlawful sexual intercourse" for the purposes of the other sexual offences, even if the definition is non-exhaustive. This is for the following reasons:

General Points

1. We agree with Sin Wai Man (letter dated 28 November 2000) that it would be a mistake to define "unlawful sexual intercourse" by reference to lack of consent in the context of sexual offences other than rape (even if on a non-exhaustive basis).

Historically, these offences were intended to protect women in situations where they had in fact consented to sexual intercourse, but their consent was improperly obtained, or invalidated by their age or mental incapacity. According to Smith and Hogan:

"The meaning given to "consent" in rape left a number of cases where consent was in some way imperfect, but which were not crimes at common law. The law has therefore been supplemented by several statutory crimes involving sexual intercourse *where consent has been improperly obtained* by threats, false pretences or the administration of drugs, or *where, the woman, though consenting in fact, is deemed by the law to be incompetent to consent on account of age or mental handicap*" (italics added).¹

The fact that consent is not a factor under these offences is also reflected in Halsbury's. Thus in relation to unlawful sexual intercourse with a girl under 13, Halsbury's states "it is an offence for a man to have unlawful sexual intercourse with a girl under the age of 13; *the consent of the girl is immaterial*",² and in relation to unlawful sexual intercourse with a girl under 16, "subject to certain exceptions, it is an offence for a man to have unlawful sexual intercourse with a girl under the age of 16; *the consent of the girl is immaterial*" (italics added).³

Defining these crimes by reference to consent therefore appears to be contrary to the historical basis for those offences.

2. The Administration states that one of the main objects of defining "unlawful sexual intercourse" as proposed is that otherwise the other sexual offence sections would "no longer provide the prosecution with charging options, in addition to section 118, where marital rape was an element of the offence".⁴ In our view, the definition will merely lead to *duplication*, rather than provide the prosecution with any meaningful alternative charges, resulting in a number of anomalies. First, the maximum penalties available under the other sexual offences (other than sexual intercourse with a girl under 13) are all less than for rape. There is no reason why marital rape of a girl

¹ *Criminal Law* (Butterworths, London, Edinburgh, Dublin, 9th edition, 199), 462

² Vol 11(1) *Criminal Law, Evidence and Procedure*, para 526.

³ *Ibid*, para 527.

under 16 (for which the maximum penalty is 5 years' imprisonment) or of a mentally incapacitated person (for which the maximum penalty is 10 years' imprisonment) should be a lesser offence than marital rape of an adult or a person who is of full mental capacity (which is punishable with life imprisonment), nor do we imagine is this an impression which the Administration would want to be given. Second, this duplication may lead to anomalies in the case law, which may develop differently under different sections.

Further, by reference to point (1) above, it seems to us that it is the very fact that these offences do not turn on the issue of consent that provides the prosecution with meaningful charging alternatives to section 118.

Scope of Offences

We note that a wide-ranging policy review is beyond the scope of the Administration's current exercise.⁵ This is regrettable, since we fail to see how "unlawful sexual intercourse" can be defined - even on a non-exhaustive basis - without such a review being undertaken. In particular, as mentioned above, we are concerned that the proposed definition of "unlawful sexual intercourse" will further confuse the (already unclear) scope of some of the other sexual offences.

Section 123 (Unlawful sexual intercourse with a girl under the age of 13)

By defining "unlawful sexual intercourse" to include non-consensual marital intercourse, it may be implied that *consensual* marital intercourse is *not* an offence under this section.

We note that the case of *Alhaji Mohamed v Knott* [1969] 1 QB1 16 is cited by the Administration in support of the argument that marital intercourse with a girl under 13 may be lawful in some circumstances. However, this is a weak authority for the point, since the case involved a girl who was aged 13 and 2 weeks, and was therefore decided under the equivalent of section 124 (unlawful sexual intercourse with a girl

⁴ *Summary and Consideration of Responses to Consultation Paper*, para 6.05. See also *Discussion Paper*, para 11(2).

⁵ *Summary and Consideration of Responses to Consultation Paper*, paras 7.05 and 7.09.

under the age of 16)⁶ rather than the equivalent of section 123 (unlawful sexual intercourse with a girl under the age of 13)⁷.

In any event, we believe it is imperative to decide as a matter of public policy whether sexual intercourse with a girl under the age of 13 should be an offence, regardless of consent or marital status. If so, then this should then be reflected in absolute terms in the legislation. The definition does not achieve this.

Section 125 (Unlawful sexual intercourse with a mentally incapacitated person)

Presumably, as stated in Smith and Hogan (see above), the intention of section 125 is to protect persons whose mental disability makes them incapable of giving proper consent to sexual intercourse.

If this is the case (giving due recognition to the human - including the sexual - rights of persons with disabilities), the definition of "mentally incapacitated" in section 117 should be amended to make it clear that section 125 applies only to those persons who do not have the mental capacity to give consent to sexual intercourse, and not to those who have a mental disability but are capable of giving such consent. As currently defined, "mentally incapacitated" refers to persons who are not able to live independently, which is a different question altogether than whether a person is capable of giving consent to sexual intercourse.

Further, it is obviously inappropriate in this context to use the proposed definition of "unlawful sexual intercourse" since it envisages the possibility of a mentally incapacitated person being properly able to give, or not to give, consent.

Sections 119-122

We agree that these offences should also apply as between husband and wife, but again are concerned that the proposed definition of "unlawful sexual intercourse" will introduce the issue of consent into these offences, which was not the legislative intent. Rather, the purpose of these offences was to deal with situations where consent was improperly obtained, and could not be relied on as the determining factor for the offence of rape - see Smith and Hogan as cited above.

⁶ Sexual Offences Act 1957, section 6

The point might be dealt with better by including a new subsection to each of these offences, to the effect that, for the avoidance of doubt, the offence also applies where a man procures his wife to do an unlawful sexual act etc. Ideally, we would also prefer to see the word "unlawful" deleted from these offences, as was effected by legislative amendment in the UK in the equivalent of sections 119 and 120, although oddly, not in the case of section 121. However, we note that the Administration is unfortunately not in a position to delete the word "unlawful" from any sections other than section 118 at present.⁸

Conclusion

We strongly support the proposed amendments to section 118. However, we cannot support the introduction of a definition of "unlawful sexual intercourse" where a full review of the relevant sections (including their purpose, scope and the very meaning (if any) of "unlawful" in each section) has not been undertaken. We view this proposal as a stop-gap measure with potentially unintended and damaging consequences. Our own view is that the word "unlawful" is superfluous in all of these sections, subject in the case of section 128 to the insertion of the words "without her consent", as proposed by Sin Wai Man (letter dated 28 November 2000, para 17). In any event, this exercise has shown how unclear the current legislation is. We urge the Administration to conduct a comprehensive review of the legislation relating to sexual offences.

Alternative "Stop-Gap" Proposal

Until a full review can be undertaken of the legislation, and relevant amendments made, we would propose the following "stop-gap" for consideration by the Administration and Panel:

- Section 118 to be amended as proposed by the Administration;
- Sections 119-121 to be amended to make it clear that they apply as between husband and wife (see above);
- No further amendments to be made.

⁷ Sexual Offences Act 1957, section 5

⁸ *Summary and Consideration of Responses to Consultation Paper*, para 6.05.

Whilst this is not an ideal solution, we do not believe that it will impede the protection of married women, which is clearly the priority of the current exercise. Marital rape will be an offence under section 118; procurement by a husband of sexual intercourse from his wife through threats, false pretences and the administration of drugs will be offences under sections 119-121. Whilst the interpretation of "unlawful" in sections 123-128 will be left to the courts, at least these offences will not be further confused for the sake of "charging options" which merely duplicate the offence of rape, rather than provide any meaningful alternative charges.

We look forward to hearing from you in due course regarding the outcome of the Panel's consideration of the matter on 24th April 2001.

Yours sincerely

Robyn Emerton

Principal Researcher
Centre for Comparative and Public Law
University of Hong Kong