L/M (2) to LP 5014/19/1/1C

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19 April 2001

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Dear Ms Emerton,

Proposed amendments to the Crimes Ordinance (Cap. 200)
Marital Rape and Related Sexual Offences

Thank you for your letter dated 18 April 2001 providing further detailed and most helpful comments on the Administration's proposed amendments to the Crimes Ordinance.

Since some of your arguments overlap with those made by Mr Sin Wai Man in his letter dated 28 November 2000 and subsequent correspondence with the Administration, I attach a copy of my reply dated 19 April 2001 to him for your consideration. Further comments on your letter from the perspective of the Administration are set out below.

General Points

1. It seems to me that no problem arises, either in theory or practical result, in respect of expressly providing for consent to be an issue, according to the context, in the definition of "unlawful sexual act". It is implicit in their historical origin that consent (or lack of consent) is an issue in the sexual offences related to rape since it must be determined whether or not consent has been improperly obtained or has been invalidated.

   I see no reason why married women should not be protected by these offences in the same way as unmarried women. It is not beyond the realms of possibility, for example, that a wife who has withdrawn her implied consent to marital intercourse may be induced to have sexual intercourse with her husband who has impersonated her lover. The proposed non-exhaustive definition of "unlawful" would enable the husband to be charged with procurement of his wife by false pretences to do an unlawful sexual act under section 120.

   It is correct that consent is immaterial in respect of unlawful sexual intercourse with girls under 13 or under 16, but provided only that the man is not married to the girl ("unlawful" in the traditional sense of outside marriage). Smith and Hogan Criminal Law 9th Ed., p.461, notes that, "A man surely does not commit a crime by having intercourse in England with his wife (sc. under a foreign domicile) who is under 16, or even under 13, or who is a defective." If, however, the girl (or girl victim) is the man's wife then consent is material further to Reg v R and will become expressly so to protect such girls and other married girls and women under the proposed definition of "unlawful".

2. I see no basis for the view that the proposed definition of "unlawful" would lead to duplication of marital rape with the other sexual offence sections. A wife who has withdrawn her implied consent to marital intercourse should be protected by the offence of rape under section 118 as much as unmarried women. Equally, she should also be protected, according to the context (as recognised in Chan Wing Hung), under the other sexual offence sections where her consent to marital intercourse has been improperly obtained or her implied consent has been invalidated by mental disability.

Scope of Offences

A wide-ranging policy review would be appropriate if wide-ranging amendments were to be proposed. The scope of the current exercise, however, is necessarily limited since its purpose is merely to amend the Ordinance relatively quickly by incorporating expressly the common law regarding marital rape as updated by Reg v R and Chan Wing Hung, including in respect of the related sexual offences. While the scope of some of the other sexual offences might be unclear, the proposed amendments will at least ensure that married as well as unmarried women can be protected under them, depending

on the context (for specific examples, see paragraph 1 above).

Section 123 (Unlawful sexual intercourse with a girl under the age of 13)
See paragraph 1 above, including the citation from Smith and Hogan.

Section 125 (Unlawful sexual intercourse with a mentally incapacitated person)
As noted in paragraphs 6.09 and 7.08 of the Summary and Consideration of Responses to Consultation Paper on Marital Rape and Related Sexual Offences which was copied with my letter dated 6 March 2001 to you, the proposed non-exhaustive definition of "unlawful" would ensure that marital intercourse with a mentally incapacitated person who was unable to give consent was an offence. Whether or not a married woman's implied consent to marital intercourse has been invalidated because she has become "mentally incapacitated", as currently defined, through illness or accident would be dependent on the circumstances.

Sections 119-121
See paragraph 1 above regarding the materiality of consent to the other sexual offence sections.

The amendment of sections 119-121 to state expressly that they apply as between husband and wife would detract from the purpose and utility of the proposed definition of "unlawful", which would achieve the same objective not only in respect of those sections but also of all the other sections to which the definition might apply depending on the context. In addition, it would lead to problems with the expressio unius rule by introducing the presumption that it was intended that married women would not be protected under the sexual offence sections in which the express application to husbands and wives did not appear.

Conclusion
On the question whether or not "unlawful" is superfluous in the sexual offence sections, see paragraph 1 above, and paragraphs 2 and 3 of my letter dated 19 April 2001 to Mr Sin. As noted above, a comprehensive review of the legislation relating to sexual offences is beyond the scope and purpose of the current exercise.

The Administration sees no potentially unintended and damaging consequences arising from the proposed amendments. To the contrary, it considers that the proposals will have the positive effect of clearly protecting married women under the Ordinance, consistently with the common law as evinced in Reg v R and Chan Wing Hung, in situations where it is presently unclear whether they are protected or not, particularly in respect of the sexual offences related to rape.

Alternative “Stop-Gap” Proposal
See the comments above regarding sections 119-121.

Yours sincerely,

(Michael Scott)
Senior Assistant Solicitor General

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