

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

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Urgent By Fax

26 April 2001

Mr Patrick Moss,
Secretary General,
The Law Society of Hong Kong,
3/F Wing On House,
71 Des Voeux Road,
Central,
Hong Kong.
(Fax No.: 2845 0387)

Dear Mr Moss,

Marital Rape

Thank you for your letter dated 25 April 2001 attaching a copy of the Society's Submission of the same date.

Your letter crossed with my letter dated 25 April 2001 to the President of the Law Society attaching copies of a letter dated 23 April 2001 (revised) from Mr Sin Wai Man, a lecturer of the City University of Hong Kong, to the Department of Justice, and my reply dated 25 April 2001 to Mr Sin.

You will note from the reply to Mr Sin that our consideration of this matter has changed in one significant respect to coincide with the major point (if not in respect of the proposed solution) made in the Society's Submission regarding the meaning of "consent" and the non-exhaustive definition of "unlawful sexual intercourse" under the proposed new section 117(1B) of the Crimes Ordinance. See paragraphs 12-17 of the letter dated 25 April 2001 to Mr Sin, which propose the inclusion of a new definition of "consent" and the addition of paragraphs to the definition of "unlawful sexual intercourse" under the proposed new section 117B which would be alternatives to the meaning of "consent" in rape for the purpose of covering cases of "consent" that has been improperly obtained by threats or intimidation, or false pretences or false representations, or the administering of drugs, or that has

been invalidated on grounds of age or mental incapacity.

I have the following comments regarding other points made in the Society's Submission.

Clause 2(b) of the 2nd working draft of the Bill

1. There appears to be no disadvantage in making it express in the Ordinance that the rape of a woman by her husband is an offence. The proposed new section 18(3B) will make the matter very clear (when it has hitherto been in doubt because of the ambiguity of "unlawful") to laymen as well as lawyers since the Ordinance is a public document.

The definition of "unlawful sexual act"

2. It appears that the definition of "unlawful sexual act" in section 117(1A) presents no problems for the proposed amendments. For the reasons noted in paragraphs 6 and 7 of the department's discussion paper dated March 2001, only "unlawful sexual intercourse" in paragraph (a) of the definition of "unlawful sexual act" in section 117(1A) can apply in respect of a husband and wife.

Delete "unlawful" and add subsections to sections 119 and 120

3. It appears that the deletion of "unlawful" and the addition of a subsection to each of sections 119 and 120 stating that, for the purpose of the respective sections, "unlawful sexual act" includes sexual intercourse between husband and wife would encounter difficulties with the expressio unius rule. This would give rise to the presumption that the other sexual offence sections which did not have such deletion and express reference were not intended to apply to marital victims. Provided the meaning of "unlawful sexual intercourse" as updated in Reg v R (i.e. it can refer to intercourse outside marriage or intercourse with any woman, married or not, without her consent) is properly reflected in the current amendments there will be no problem with retaining "unlawful" in the Ordinance pending a wider review.
4. As noted in paragraphs 11(1) and 14 of the department's discussion paper dated March 2001, the non-exhaustive definition of "unlawful sexual act" under the proposed new section 117(1B) (modified as indicated in the second main paragraph above) would be preferable to the selective amendment of the sexual offence sections since it will both overcome the expressio unius rule and ensure that marital rape (and the sexual offences involving a different meaning of "consent" than in rape) can feature in the other sexual offence sections and provide the prosecution with charging options for the protection of marital victims in addition to section 118.
5. In the Administration's view, the incorporation of the meaning of "consent" in rape in the proposed new section 117(1B) should be

retained (but now as an alternative as indicated in the second main paragraph above). This would help to ensure the maximum possible protection of marital victims. It would mean, for example, that section 119 and section 120 would apply to a husband procuring his wife to have sexual intercourse with him by threats or intimidation, or false pretences or false representations, notwithstanding that he would almost certainly be committing rape because he surely could not believe that she consented or at least would be reckless as to her consent. Furthermore, it would also mean that another person (a third party) could be charged (under either section 119 or section 120) for procuring the wife to have sexual intercourse (and actually having that sexual intercourse) with her husband without her consent. It would be an unusual fact situation where the husband in that scenario would not believe that his wife consented (so being within the meaning of “consent” in rape incorporated in the proposed new section 117(1B)) even if not impossible.

Attribution

6. In the first paragraph of the Society’s Submission there is a reference to “the Bar Association’s paper dated 15th March 2001”. This paper should in fact have been attributed to Mr Sin Wai Man. The Bar Association advised of its support of the Administration’s approach to the proposed amendments in a letter dated 18 April 2001 to the Department of Justice. The Bar Association has been copied with Mr Sin’s letter dated 23 April 2001 (revised) and the department’s reply dated 25 April 2001 (in which modifications of the proposed amendments have been suggested) to Mr Sin.

Yours sincerely,

(Michael Scott)
Senior Assistant Solicitor General

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