

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

2867 2157

Urgent By Fax

26 April 2001

Mr Sin Wai Man,
Lecturer,
City University of Hong Kong,
83 Tat Chee Avenue,
Kowloon.
(Fax No.: 2788 7530)

Dear Mr Sin,

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

Thank you for your letter dated 26 April 2001 (and for the very helpful interest which you have taken in this matter). My preliminary comments follow.

1. Fine-tuning of the drafting will of course be a matter for the Law Draftsman. Nevertheless, I agree with your view that the proposed new section 117(1B)(a) and (b) should be combined into a single paragraph (a) in order to ensure that the additional proposed paragraphs are to be read disjunctively.
2. It seems to me that the references to threats or intimidation, false pretences or false representations, the administering of drugs, and to age or mental incapacity in the proposed new section 117(1B) will be effective to place marital victims on an equal footing with non-marital victims since the definition would then reflect the terminology or subject-matter of sections 119-121, 123-125, and 127-128. Fine tuning of the definition to achieve the intended object would again be a matter for the Law Draftsman.
- 3-5. Chan Wing Hung (p.476D) made specific reference to intercourse without consent as being the issue in that case under section 119. Sections 119-121 can be totally independent of rape but that is because

improperly obtained consent is outside the meaning of “consent” in rape (which depends on the absence of “consent”). This does not mean that consent (or what underlay any “consent”) is immaterial under sections 119-121. Whether “consent vitiated by” is preferable to “consent ... improperly obtained by” is a matter for the Law Draftsman, although the latter reflects Smith and Hogan’s analysis.

6. It would be inconsistent with the object of ensuring that marital rape is an offence to confine the meaning of “unlawful” to outside marriage for the purposes of sections 123-125. Section 20(2)(d) of the Matrimonial Causes Ordinance (Cap. 179) does not obviate this principle. Consistently with that object, marital intercourse with a mentally incapacitated person should not be permissible in circumstances that would be tantamount to rape.
7. In respect of age, the need to give equal treatment to both marital and non-marital victims is reinforced by the need to protect children.

Yours sincerely,

(Michael Scott)
Senior Assistant Solicitor General

c.c.	Clerk to the AJLS Panel (Attn: Mrs Percy Ma)	2509 9055	w.copy of
	Hong Kong Bar Association (Attn: Mr Michael Lunn, S.C.)	2869 0189	Mr Sin’s
	Law Society of Hong Kong (Attn: Mr Patrick Moss)	2845 0387	letter dated
	University of Hong Kong (Attn: Ms Robyn Emerton)	2559 3543	26.4.2001