

26 April 2001

Mr Michael Scott  
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Department of Justice  
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Dear Mr Scott,

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

Thank you for your letter of 25 April 2001. Since I understand that the LegCo Panel on Administration of Justice and Legal Services may consider the captioned in its meeting today, I venture to give the following preliminary comments on the two additional amendments.

1. With relation to ss.119-121, I agree, in principle, with adding a new paragraph to the proposed s.117(1B) to make it expressly clear that ‘unlawful sexual intercourse’ in those sections applies equally to marital and non-marital settings. But I have some difficulty with the drafting of s.117(1B). I understand the present draft, after adding the new paragraph (c), to read as:

For the purpose of this Part, “unlawful sexual intercourse” includes sexual intercourse between a husband and his wife if –

- (a) at the time of the intercourse the wife does not consent to it; and
- (b) the husband knows, at the time of the intercourse, that his wife does not consent to it or he is reckless as to whether she consents to it; or
- (c) the consent of the wife has been improperly obtained by or on behalf of her husband by threats or intimidation, or by false pretences or false presentations or by the administering of drugs; or
- (d) ....

It seems to me that the new paragraph (c) should be added, as you suggested, disjunctively to the two preceding paragraphs (a) and (b). To achieve this, I believe paragraphs (a) and (b) should be combined as one paragraph, instead of appearing as two and joined conjunctively by an ‘and’. The problem with the present drafting is it may be understood that paragraph (c) must be read together with paragraph (a).

2. I agree with your points in paragraph 10 regarding the meaning of consent. It should be noted that the consent referred to in the paragraphs from *Linekar* and *Smith & Hogan* quoted in your paragraph 10 is not the implied consent to

marital intercourse, but the one that needs to be proved to not exist for the offence of rape. It is in this context that Smith & Hogan understands the offences in ss.119-121 to be supplementary to rape and re-conceptualises their elements as 'sexual intercourses where consent has been improperly obtained by threats or intimidation, or by false pretences or false presentations or by the administering of drugs' (p.462). But, in fact, while it may be correct that the offences in ss.119-121 can be understood as involving 'consent improperly obtained', such is not mentioned in the statutory definition of these offences. Therefore, I am afraid to introduce the element 'consent improperly obtained' into the proposed s.117(1B)(c) may cause confusion as to whether consent needs to be proved in relation to ss.119-121 in marital cases, and, if so, the kind of consent (implied consent, consent in rape or some other consent) that needs to be proved or disproved. It is not inconceivable that such point may be raised in court to argue that s.119-121 when applied to a marital case does require the proof of one additional element, namely 'consent obtained by', which is not required in a non-marital case. Therefore, I am of the view that the present draft may not be able to achieve the purpose of ensuring that marital and non-marital victims are placed on equal footing.

3. It also seems to me that it is only in view of their implicit purposes (as suggested in Smith & Hogan) of supplementing rape that 'consent' is read into these offences. It is not inconceivable, as the present wording of ss.119-121 goes, that they can be totally independent of rape.
4. It may be argued that, assuming the Administration's view that implied consent to marital intercourse has not been abolished by *R v R* is correct, implied consent will invariably be in issue in a marital case regarding s.119-121. But it seems to me to be obvious that the consent referred to in the proposed s.117(1B)(c) is not the implied consent in marital intercourse, as it reads 'consent obtained by...'. If it were to refer to the implied consent, I believe it should rather read something like 'consent vitiated by'. Therefore, the present draft for s.117(1B)(c) will introduce the unnecessary element of consent into s.119-121 in relation to marital cases.
5. I recommend, therefore, in relation to s.117(1B), the present paragraphs (a) and (b) should be combined, and joined with paragraph (c) (retitled paragraph (b) after combining the present (a) and (b)) disjunctively by an 'or', and paragraph (c) should appear in the same wording as ss.119-121, as far as possible (which, I believe, is how the present s117(1B)(a)&(b) are drafted). My more exact suggestion for paragraph (c) is:
  - (c) if the intercourse is procured or facilitated by or on behalf of her husband by threats or intimidation, or by false pretences or false presentations or by the administering of drugs
6. I have some reservation over the proposed s.117(1B)(d) regarding mentally incapacitated persons. It seems to me that it is inconsistent with s.20(2)(d) Matrimonial Causes Ordinance (Cap.179) to criminalise sexual intercourse between a husband and wife only for reason of her mental capacity where the marriage is not voidable at the suit of a spouse under that section.

7. Similarly, I also have reservation over s.117(1B)(d) regarding persons incapacitated to consent on account of age.
8. I am of the view that your recommendation in paragraph 16 is to be welcomed.

Yours sincerely,

Sin Wai Man  
Lecturer