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DEPARTMENT OF JUSTICE


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By Fax and By Post  
(Fax : 2509 9055)

Mrs Percy MA  
Clerk to Panel on Administration of  
Justice and Legal Services  
3/F, Citibank Tower  
3 Garden Road  
Hong Kong

via Mr Michael Scott, SASG(GLP) 

Dear Mrs Ma,

**Panel on Administration of Justice and Legal Services**  
**List of follow-up actions**

I refer to your letter of 21 September 2005.

I give below the required written response to the queries raised by Assistant Legal Adviser 1 in relation to certain sexual offence provisions in the Crimes Ordinance (paragraphs 39 and 40 of the minutes of the AJLS Panel meeting of 12 July 2005).

**Para. 39(a) - whether the marital defence in section 124(2) required proof of consent on the part of the wife**

Section 124(2) provides that where a marriage is invalid under section 27(2) of the Marriage Ordinance (Cap 181) by reason of the wife being under the age of 16, the invalidity shall not make the husband guilty of an offence under this section because he has sexual intercourse with her, if he believes her to be his wife and has reasonable cause for the belief.

The elements of offence under section 124 are (a) a man who has (b) unlawful sexual intercourse with (c) a girl under the age of 16. Consent is not an issue as far as an offence under section 124 is concerned. In other words, the prosecution is not required to prove that the sexual intercourse is with or without the girl's consent in order to prove the commission of the offence under section 124. However, if the sexual

intercourse is without the girl's consent, then the appropriate charge should be rape under section 118.

To establish the so-called marital defence in section 124(2), the husband is only required to prove on the balance of probabilities that he believes the girl under 16 to be his wife and has reasonable cause for the belief. In other words, the husband is not legally required to prove that the sexual intercourse is with the wife's consent in order to establish the so-called marital defence in section 124(2).

**Para. 39(b) - whether there was any contradiction in the Crimes Ordinance if a girl under the age of 16 was incapable of giving consent under section 124 but was capable of doing so where a man was charged with rape under section 118**

There is no contradiction. Section 124 does not provide that a girl under the age of 16 is incapable of giving consent. As mentioned above, consent is not an issue as far as an offence under section 124 is concerned. Section 124 aims to protect under-aged girls. If there is no consent, the man will be charged with rape, whatever the age of the girl.

**Para. 39(c) - the Administration's policy with regard to similar marital defence provisions in sections 118E (buggery with mentally incapacitated person), 122 (indecent assault) and 146 (indecent conduct towards child under 16)**

(i) Section 118E (buggery with mentally incapacitated person)

Consent is not an issue as far as an offence under section 118E is concerned. A so-called marital defence is available for an offence under section 118E. However, if the buggery is committed without the victim's consent, then the appropriate charge should be non-consensual buggery under section 118A. In other words, a married mentally incapacitated woman is still protected by the law if she does not consent to the buggery.

(ii) Section 122 (indecent assault)

*Victim under 16*

As far as a victim under 16 is concerned, the prosecution is not required to prove lack of consent on his/her part, but the defendant can claim a so-called marital defence under section 122(3). The burden is on the defendant to prove the defence on the balance of probabilities.

*Mentally incapacitated woman*

There is no marital defence under section 122 if the wife is mentally incapacitated. However, the husband can be guilty of indecently assaulting his mentally incapacitated wife if he knows or has reason to suspect that his wife is mentally incapacitated. It is for the prosecution to

prove the knowledge and the existence of reason on the part of the husband. But it is highly unlikely that the husband does not know or has no reason to suspect that his wife is mentally incapacitated.

(iii) Section 146 (indecent conduct towards child under 16)

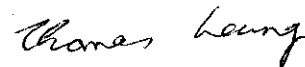
A so-called marital defence is available for an offence under section 146. It is for the defendant to establish that defence.

As the above clarification demonstrates, the marital defence provisions in sections 118E, 122 and 146 do not derogate from the existing protection given to married women under the Crimes Ordinance. This being so, the Administration considers that those marital defence provisions can be left as they are.

Comments

I trust that the discussion above of the three issues raised at the Panel meeting on 12 July 2005 will resolve matters to members' satisfaction and that no further action on this item is needed.

Yours sincerely,



(Thomas Leung)  
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