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24 March 2002

Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2001
Legislative Council
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Sir/ Madam,

Statute Law (Miscellaneous Provision) Bill 2001

I gather from the materials posted on the Legislative Council website that the Bills Committee on the Statute Law (Miscellaneous Provisions) Bill 2001 is currently considering the captioned bill (the Bill). I have previously responded to the Administration's proposal on marital rape and related offences when it was considered by the Legislative Council Panel on Administration of Justice and Legal Services. I would like now to comment on the part of the Bill concerning marital rape and related offences. Please note that these comments, as well as my previous submissions to the Administration, are made in my personal capacity and they should not be attributed to the School of Law of the City University of Hong Kong.

1. I understand from the Administration's reply to the Legislative Council Assistant

Legal Adviser dated 15 March 2002 that the Administration is currently actively considering making committee stage amendments to the part of the Bill concerning marital rape and related offences, my comments will therefore be directed to both the Bill in its present form and the possible committee stage amendment (PCSA).

Applicability of acts of gross indecency and buggery proscribed in ss.119-121, Crimes Ordinance (CO) to marital victims

2. In a letter to the Administration dated 23 June 2001, I have raised the point that the proposed amendment to s.117 in Clause 11 of the Bill would exclude marital victim from protection from buggery and act of gross indecency obtained by acts (fraud, threat, administering of drugs, etc.) proscribed under ss.119-121.

3. In the Administration's reply dated 7 March 2002 to the Assistant Legal Adviser's question on what implications the amendments to s.117, CO (Clause 11 of the Bill) would have on non-consensual act of gross indecency within marriage, the Administration opined that:

> Since an *act of gross indecency cannot be perpetrated on a woman by a man,* this offence does not apply within marriage. There are prohibitions relating to acts of gross indecency by a man with another man in sections 118 to 118K. Protection for a woman against actions which might constitute indecent acts is provided by the offence of indecent assault under section 122. (emphasis added)

It seems to me that by saying "an act of gross indecency cannot be perpetrated on a woman by a man" the Administration has overlooked s.146, CO and the applicability of ss.119-121. These sections, in fact, criminalize acts of gross indecency between men and women provided certain conditions are satisfied.

4. Section 146 provides that:

> [A] person who commits an act of gross indecency with or towards a child under the age of 16, or who incites a child under the age of 16 to commit such an act with or towards him or her or another, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 10 years.

The sex of the 'child' in this section is not limited to male. In fact, in *R v Speck* [1977] 2 All ER 859, the English Court of Appeal has found a man guilty of their equivalent to s.146 (s.1(1) Indecency with Children Act 1960) by letting an eight-year-old girl put her hand on his genital.

5. CO does not prohibit acts of gross indecency between men and women of or above the age of 16 *per se.* However, s.117(1A) provides that:

> For the purposes of this Part a person does an unlawful sexual act if, and only if , that person-
>
> …
>
> (b) commits buggery or *an act of gross indecency with a person of the opposite sex* with whom that person may not have lawful sexual intercourse
>
> …(my emphasis)

And, there are, in turn, three offences concerning *unlawful sexual act* procured by threat, intimidation or false pretence, or obtained or facilitated by the administration of drugs, under ss.119-121, respectively. It is, therefore, obvious, that though acts of gross indecency between a man and a woman *per se* are not a crime, they could be under ss.119-121.

6. The present s.117(1A)(b) is not to be amended by the Bill (or the PCSA). It, I submit, in its present form, would exclude marital victims of buggery and acts of gross indecency from ss.119-121. Section 117(1A)(b) limits its application to "a person of the opposite sex with whom that person *may not* have lawful sexual intercourse" (my emphasis). The Bill (and also the PCSA) does not delete the reference to "unlawful sexual intercourse" altogether or extend it to marital sexual intercourse in all circumstances, but merely extend it to marital sexual intercourses under certain circumstances, namely non-consent in the Bill (and non-consent, consent obtained by conducts proscribed by ss.119-121 and incapacity of the wife in the PCSA). It, therefore, is obvious that *lawful sexual intercourse may still be had between a husband and a wife,* and only a man or a woman unmarried to each other would be "a person of the opposite sex with whom that person may not have lawful sexual intercourse". Consequently, marital cases will not fall within the ambit of s.117(1A)(b) and the protection afforded by ss.119-121 to a female victim of buggery or acts of gross indecency in a non-marital case would not be enjoyed by a marital victim.

7. Accordingly, to evince the principle of affording equal protection to marital victims, s.117(1A)(b) should be amended to ensure the offences concerning buggery and acts of gross indecency under ss.119-121 apply equally to marital and non-marital victims. This could be done by simply deleting "with whom that person may not have lawful sexual intercourse" from s.117(1A)(b).

The PCSA

8. The Administration indicates that PCSA may be made along the following lines:

> 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 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
>
> *(b)* 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
>
> *(c)* the wife is not recognised in law as competent to consent on account of age or mental incapacity.
>
> And that Clauses 13-15 of the Bill amending ss.119-121 will be deleted.

9. As regards the above paragraph (b), as it is materially the same as that is proposed in the Administration's letter dated 25 April 2001 to myself, I would like to reproduce, somewhat substantially, my response to that proposal dated 26 April 2001:

> 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* [[1995] 3 All ER 69] and Smith & Hogan quoted in your paragraph 10 [of letter dated 25 April 2001] 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 confusions 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 [see further Administration's letter to myself dated 19, 25 and 26 April 2001 respectively, and my letters to the Administration dated 23 and 26 April 2001 respectively, all copied to Panel on Administration of Justice and Legal Services]) 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.

10. I am therefore of the view that the amendment proposed in the Bill, though perhaps somewhat clumsy linguistically, as suggested by Ms Robyn Emerton ("Marital Rape and Related Sexual Offences: A Review of the Proposed Amendments to Part XII of the Crimes Ordinance" *Hong Kong Law Journal* (2001) 31(3): 415-34) and agreed to by the Administration (para 23, reply to the Assistant Legal Adviser dated 15 March 2002), is still to be preferred, in substance, to the PCSA. Further refinement and fine-tuning of the Bill is therefore more appropriate than adopting the PCSA.

11. Regarding the addition of paragraph (c) of the PCSA (quoted in para 8 above) to s.117, along with other amendments to ss.124 & 146, CO by Clauses 16 & 17 of the Bill, I am of the view that this may indeed create uncertainty as to the applicability of other offences under CO (and, indeed, those in other ordinances, such as the Mental Health Ordinance) – such as ss.123, 125, 127, 128 & 146, which make reference to unlawful sexual intercourse or unlawful sexual act with persons under a certain age or suffering from mental incapacity – to marital cases.

12. Take s.125 for example. It reads:

> (1) Subject to subsection (2), a man who has unlawful sexual intercourse with a woman who is a mentally incapacitated person shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 10 years.
>
> (2) A man is not guilty of an offence under this section because he has unlawful sexual intercourse with a woman if he does not know and has no reason to suspect her to be a mentally incapacitated person.

With paragraph (c) of the PCSA, it seems to me that s.125 may be argued as one of the instances where "the wife is not recognised in law as competent to consent on account of age or mental incapacity". Such a line of interpretation would deprive a mentally incapacitated person of the pleasure of sexual intercourse with even her husband!

13. The Administration maintains paragraph (c) would further help to make "it clear that consent is an ingredient of the offences under sections 123 and 125 in respect of both *martial and non-marital victims*" (para 19, Reply to Assistant Legal Adviser dated 15 March 2002; emphasis added). It seems to me clear that it is not the intention of s.123 or s.125 to introduce consent as an ingredient of the offence. If the Administration's view of the implication of paragraph (c) of the PCSA on ss.123 & 125 is correct, the PCSA would make, for instance, the consent of a girl under 13 to sexual intercourse a defence to a charge under s.123. I do not believe this is our intention, and I urge that paragraph (c) of the PCSA should not be adopted.

14. Ms Emerton reminds of the importance to undertake a policy review on the issues of age of consent and mental incapacity in relation to sexual offences in her recent paper in the *Hong Kong Law Journal*. I also acknowledge the importance and urgency of such an exercise. Barring that, I believe the more reserved approach in the Bill regarding the various offences related to unlawful sexual intercourse and unlawful sexual act in relation to marital and non-marital victims of particular age groups and mental capacity is to be preferred to the PCSA.

Yours faithfully,

Sin Wai Man

cc. Ms Robyn Emerton, HKU (25593543)
Mr Michael Scott, DoJ (21809928)