

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

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By Fax

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Dear Mr Sin,

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

Thank you for your letters dated 15 March (and attached submission) and 17 April 2001 in which (as in your letter dated 28 November 2000) you have provided extensive and very helpful comments on the Administration's proposed amendments to the Crimes Ordinance to make it expressly clear that marital rape is an offence. I have the following comments from the perspective of the Administration.

1. The reasons why the Administration considers that "unlawful" should not be deleted from sections 119-121 in the current exercise are set out in paragraphs 6.01 – 6.010 of the Summary and Consideration of Responses to Consultation Paper on Marital Rape and Related Sexual Offences which was copied with my letter dated 6 March 2001 to you.
2. While it is correct that at common law, according to Reg v R and Chan Wing Hung, "unlawful" in "unlawful sexual intercourse" is mere surplusage in the offence of rape, it is equally correct that the House of Lords so held (Reg v R, p.776G) because it is clearly unlawful to have

intercourse with any woman without her consent. The issue of consent (or non-consent) was a necessary part of the reasoning in Reg v R since the whole thrust of the decision was to abolish the former common law rule that a husband could generally not be guilty of rape since his wife, upon marriage, gave implied consent to marital intercourse which could not be revoked other than on exceptional grounds.

3. Even if “unlawful” were to be deleted from sections 119-121 it also appears to be correct that consent would invariably be an issue in the case of marital victims under those sections. This is because Reg v R did not abolish the implied consent given by a wife to marital intercourse upon marriage, it only abolished the traditional common law rule that the wife could not revoke such consent other than exceptionally. Thus it necessarily follows that marital victims will to an extent be treated differently (but not unequally in any illogical or unlawful sense) from non-marital victims under sections 119-121 since the first question that must be asked in a given marital case is whether or not, in the circumstances, the victim had revoked the implied consent which arose from her having acquired the legal status of being married. The question of implied consent does not arise in respect of non-marital victims who, of course, have not acquired such legal status – but, as observed in Chan Wing Hung (p.476D), intercourse without consent can also be an issue (as it was in that case) even in respect of unmarried parties (see paragraph 6.02 of the Summary).
4. It does not appear to be the case that, under the Administration’s recommended non-exhaustive definition of “unlawful”, sections 119-121 would become greater offences than section 118 such that the Schedule to the Crimes Ordinance would become inoperative in marital cases (paragraph 2.7 of your submission). The issue of non-consent (which Chan Wing Hung recognised could, depending on the context, arise in marital as well as non-marital cases following Reg v R) does not make section 118 a less serious offence than sections 119-121. Section 118 is the greater offence because rape (marital or non-marital) is punishable, at the discretion of the court, by life imprisonment whereas the offences under sections 119, 120 and 121 are punishable by lesser maximum prison terms of 14, 5 and 14 years respectively.
5. As indicated in paragraph 6.05 of the Summary, the Administration has proposed the combined amendments to sections 117 and 118 to ensure that the deletion of “unlawful” from section 118 does not lead to unintended results in respect of the other sexual offence sections in which “unlawful” is to be retained pending a wider ranging review that is beyond the scope of the current exercise (in fact the proposed non-exhaustive definition of “unlawful” goes no further than expressly incorporating in the Ordinance the updated common law meaning of that term to be derived from Reg v R and Chan Wing Hung – see paragraph

2 above). Within that scope, the Administration's proposals will make it expressly clear that there is in law such an offence as rape within marriage. The proposals also recognise that there are other sections in the Crimes Ordinance in which non-consensual sexual conduct between spouses is not presently covered in circumstances where it should be, and that can be achieved by defining "unlawful" in a way which will provide due protection to spouses.

6. On paragraphs 4 and 5.3 of your submission, regarding other sections in which "unlawful sexual intercourse" or "unlawful sexual act" appear, such as sections 130, 132-135, and 140-142 of the Crimes Ordinance, and sections 65 and 66 of the Mental Health Ordinance (Cap. 136), the proposed non-exhaustive meaning of "unlawful" would apply, or not, according to the context, under those sections in the same way as the same meaning evinced at common law by Reg v R and Chan Wing Hung does now (in the Administration's view) notwithstanding that the Administration's written analysis concentrated on the main sexual offences related to rape under sections 119-121, 123-125 and 127-128. It would, for example, be most unlikely that circumstances would occur in which marital rape featured as an unlawful sexual act under section 130(1) (control over persons for the purpose of unlawful sexual acts or prostitution) or as unlawful sexual intercourse under section 133(1) (procurement of a mentally incapacitated person to have unlawful sexual intercourse with a third person). It would also be unlikely that marital rape would feature as unlawful sexual intercourse under section 132(1) (procurement of a girl under 21 to have unlawful sexual intercourse with a third person). Although that offence is essentially similar in character to sections 119 and 120 it lacks the specific requirements for procurement by threats or intimidation, or false pretences respectively.
7. The Administration was also concerned that the principle or object of ensuring that intercourse with any woman, married or not, without her consent is unlawful as held in Reg v R would apply consistently in respect of all the relevant sexual offences. It is for this reason that clauses 3 and 4 of the draft Bill provide for the marital defences in sections 124(2) (intercourse with girl under 16) and 146(3) (indecent conduct towards child under 16) respectively not to apply where there is no consent to the intercourse or conduct.

Yours sincerely,

(Michael Scott)
Senior Assistant Solicitor General