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

Submission to the Department of Justice

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1. Meaning of 'Unlawful'

1.1 It seems from Para 6.01 and 6.03 of the 'Summary and Consideration of Responses to Consultation Paper on Marital Rape and Related Sexual Offences' (referred to as 'Summary' hereafter) and Para 11.2 of the 'Discussion Paper: Proposed Amendments to the Crimes Ordinance (Cap.200) Marital Rape and Related Sexual Offences' (referred to as 'Discussion Paper' hereafter) that the Administration takes 'unlawful' (in relation to 'unlawful sexual intercourse') to mean *non-consensual* marital intercourse, as according to *R* v *R* and *Chan Wing Hung*.

1.2 I doubt if this is the correct understanding of meaning accorded to 'unlawful' in these two cases. In *R* v *R* Lord Keith stated in p.776G (cited in Para 6.03 of the Summary) that:

> The fact is that it is clearly unlawful to have sexual intercourse with any woman without her consent, and that the use of the word [unlawful] in the subsection adds nothing. In my opinion there are no rational grounds for putting the suggested gloss on the word, and it should be treated as mere surplusage.

The Summary seems to have relied on the first part of the first sentence in this quotation ('it is clearly unlawful to have sexual intercourse with any woman without her consent') to come to the view that unlawful means non-consensual marital intercourse. But it must not be overlooked that the element of non-consent is included explicitly in the statutory definition of the offence, and, thus, the major concern of Lord Keith was not whether 'unlawful' should imply non-consent, but rather it should still mean 'outside marriage'. I submit that that first

part of the first sentence quoted here should better be understood as an argument made to support the conclusion that 'unlawful' should be treated as mere surplusage, and not implying non-consent.

1.3 Neither could non-consent be understood as implied by Power VP into the meaning of 'unlawful' in his judgement in *Chan Wing Hung*. He stated in p.475F-G:

> The word [unlawful] is clearly a survival from earlier times when intercourse outside marriage was illicit and therefore unlawful…We incline to the view that it would be proper to follow the course adopted in *R* v *R*,…in which Lord Keith said that the word should be…treated as being mere surplusage in this enactment.

Therefore, Power VP's comment on the meaning of unlawful is concerned with whether it should still mean outside marriage, rather than whether non-consent is an element of 'unlawful'.

1.4 Thus, I submit that *R* v *R* and *Chan Wing Hung* have *only* decided that 'unlawful', in relation to the offence of rape, (s.118 in HK) is a mere surplusage that should no longer mean 'outside marriage'. If my view is correct, the Administration's recommendations, especially in relation to ss.119-121, will fail the task it sets itself - to 'make it certain that the modern common law principle in *R v R* and *Chan Wing Hung*…is clearly reflected in the Crimes Ordinance' (Para 14, Discussion Paper).

2. <u>Consent and ss.119-121</u>

2.1 I understand that what the Administration proposes is an inclusive or non-exhaustive definition for 'unlawful'. Thus, I am aware of the argument that most of the problems I am going to raise regarding ss.119-121 may indeed be alleviated, in practice, by the concerned judge by adopting a meaning different from the one proposed by the Administration for 'unlawful'. However, such reliance on judicial discretion is better avoided if the potential problems could be addressed at the legislative stage by adopting a different definition for, or deleting from the offences, the word 'unlawful', as I will propose. In fact, the rule of *expressio unius* further renders the exercise of discretion doubtful (see Para 2.8 below).

2.2 I agree with Para 6.02 of the Summary that consent *may* indeed be an issue in relation to ss.119-121, in cases where consent could be raised as a defense. It however is inconceivable that consent *will* be in issue in *every* such case. But if the Administration's recommendation is adopted, unlike non-marital cases, consent will become an issue in *every ss.119-121 case concerning husband and wife*, as the prosecution will have to prove every time that the sexual act is obtained without the consent of the victim. (See, e.g., Law Commission (2000) *Consent in Sex Offences*, pp.40-63, for a discussion of the relationship between consent and deception and threat.) In short, **if the Administration's recommendation is adopted, there will be created two offences for each of the offences in ss.191-121 respectively: one for non-marital case, which only requires the proof of sexual act procured by threat, intimidation, or false pretence, or obtained or facilitated by the administration of drugs; and another for marital cases, which requires the proof of sexual intercourse**

procured by threat, intimidation, or false pretence, or obtained or facilitated by the administration of drugs *and non-consent*.

2.3 I believe the purposes of the present exercise are to confirm the abrogation of marital exemption in common law and afford equal protection to sex offences victims in marital cases. However, if the Administration's recommendation is adopted, as argued above, victims in marital cases would not be able to enjoy equal protection as non-marital victims (as a husband could not be guilty of 'merely' procuring his wife to have a sexual act with him by threat, intimidation, false pretence or administration of drugs, as non-consent must also be proved; while, in a non-marital case, proof of non-consent is not necessary, unless the circumstances otherwise dictate). But if the meaning I suggest (i.e. unlawful is a mere surplusage that means nothing) is adopted, victims of marital cases would enjoy equal protection as other female victims, as regards ss.119-121. Thus, the meaning I suggest is both more preferable, in terms of equal protection to victims in marital cases, and more correct, in terms of reflection of modern common law (see Para 1.1-1.4 above).

2.4 Para 6.07 of the Summary and Para 31 of the 'Consultation Paper: Marital rape and Related Sexual Offences' (referred to as 'Consultation Paper' hereafter) argue that the adoption of the recommended option could avoid the potential problems specified in the Consultation Paper and the alleged confusion in UK caused by their selective deletion of unlawful from their equivalents of our ss.119 and 120, but not s.121. The UK solution of selective deletion may indeed be unadvisable (they should also delete it from their equivalents of s.121, see, e.g., Selfe, D. &

Burke, V. (1998) *Perspectives on Sex, Crime and Society*. London: Cavendish, p.103), but the recommended option is also not free of its own problems.

2.5 The Administration's conclusion that the recommended option is preferable is arrived at by comparing two possible scenarios under two different definitions of 'unlawful', set out in Para 30 of the Consultation Paper:

(1) Outside marriage, or within marriage but without the wife's consent in circumstances in which a man could (under common law exceptions) be guilty of rape of his wife. These circumstances include where there has been a judicial separation or decree nisi of divorce or nullity; where an injunction against molestation has been granted; where an undertaking has been given to the court not to molest; and where a formal deed of separation has been made. These circumstances are referred to below as "special marital circumstances".

(2) Outside marriage, or within marriage in any circumstances where the wife does not consent.

The two possible scenarios, in turn, as set out in Para 31 of the Consultation Paper, are:

- Under meaning (1) the procurer or facilitator of an unlawful sexual act in the form of non-consensual sexual intercourse of a wife with her husband (marital rape) would commit an offence under these sections only if one of the special marital circumstances applied.

- Under meaning (2), all procurers or facilitators of marital rape could be prosecuted under sections 119, 120 or 121 (as the case may be) even if there were no special marital circumstances.

I would also have to agree that meaning 2 is preferable to meaning 1, if we were only allowed these two choices. But as I argued in Para 2.1-2.4 above, meaning 2, is, in fact, not the true meaning of unlawful in the modern common law of *R v R* and *Chan Wing Hung*. *So there could indeed be another meaning for unlawful – it, being a surplusage, means nothing or, put in another way, means outside or within marriage*.

2.6 Para 6.08 of the Summary maintains that if the recommended option is adopted "The offences under sections 119-121 would, for example, be clearly extended to a husband who procures by threats, or administers drugs, to his wife". My above argument should have proved this wrong. In fact, if it is adopted, 'The offences under sections 119-121 would be clearly limited to a husband who procures by threats, or administers drugs, to his wife to have sexual intercourse with her *without her consent*.'

2.7 Para 6.08 of the Summary cited *Archbold 2000* on the point that offences of ss.119-121 could be alternative verdicts to marital rape. Para 4-453 of *Archbold 2001* lays out the common law principle on alternative verdict as:

> At common law conviction of a lesser offence than that charged was permissible provided that the definition of the greater offence necessarily included the definition of the lesser offence…

S.149 and the Schedule of our Crimes Ordinance specifically provides for convictions under ss.119-121 as alternative verdicts to charges under s.118, but not vice versa. Thus, in a *non-marital* rape case, where consent could not be proved, but where, by one of the proscribed acts, the accused is found to have procured or obtained or facilitated the sexual intercourse of the victim with the accused or another person, the court could convict on the lesser offences of ss.119-121. But, in relation to *marital cases*, this use of ss.191-121 as alternative verdicts to s.118 could *not* be maintained, if non-consent is introduced to these sections for marital cases (as recommended by the Administration), as to return a verdict of, say, guilty of procurement of sexual act by threats by a husband against his wife the prosecution would have to prove *both* non-consent and procurement by threat. In fact, if the Administration's recommended option is adopted, ss.119-121 will become the greater offences than s.118, and alternative verdicts for s.118 provided for in the Schedule of the Crimes Ordinance will become inoperative, insofar as marital cases are concerned. This, I am afraid, is exactly the kind of inadvertent consequences (Para 6.05 Summary) or 'unintended results' (Para 13 Discussion Paper) that the Administration has been so wary of.

2.8 It may be argued that, as the definition is non-exhaustive, the court in this particular scenario may depart from the statutory definition (that incorporates non-consent into unlawful) to hold 'unlawful' to mean only, being a surplusage, outside or within marriage, and, thus, convict under ss.119-121, if it sees fit. However, it is feared that since the recommended definition defines clearly that in a marital case non-consent must be proved, it would require an exceptionally

strong case, if ever there could be one, to convince the court to depart from the rule of *expressio unius* to hold 'unlawful' to mean merely 'within or outside marriage' and that non-consent is irrelevant.

2.9 Para 6.08 of the Summary further maintains that:

> If, however, an accused procurer or administrator is other than the alleged rapist (on whose behalf the alleged victim was procured or administered to by the accused) that person could not be convicted 118 (except perhaps as an accessory to rape) but only, as the case may be, under section 119 or 120 or 121. Defining 'unlawful' to include non-consensual marital intercourse, therefore, would help to ensure that the accused procurer or administrator would be caught under sections 119, 120 or 121 where the alleged rapist was the husband of the victim.

It is admitted that adoption of the Administration's proposal would achieve this result. But, equally, such can be achieved by adopting the meaning for 'unlawful' that I propose.

2.10 My recommendation (regarding ss.119-121)

My conclusion is that the most appropriate meaning that should be accorded to 'unlawful' in ss.119-121 is: it, being a mere surplusage, means nothing, or, put in another way, within or outside marriage. Since it is a clumsy way to define unlawful as 'within or outside marriage' and it is feared that unintended consequence may result from the operation of the *expressio unius* rule if 'unlawful' is deleted from s.118, but retained in ss.119-121, with this 'correct' but

clumsy new definition, I propose that *'unlawful' should be deleted altogether from ss.119-121*.

2.11 It should be noted again that in UK they have deleted 'unlawful' from their equivalents of our ss.119-120. Thus deleting 'unlawful' from these two sections are not unprecedented. The confusion alleged in Para 7.03 of the Summary is in fact caused by their retaining 'unlawful' in their equivalent of our ss.121, and ss.123-125, without any definition given. Thus, to delete 'unlawful' from ss.119-121, as well as s.118, and add a definition in 117 for unlawful sexual intercourse in other sections should be a better option, as it provides clearer and more certain protection (than relying on the court's exercise of discretion on the meaning of 'unlawful') to wife victims.

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3. Ss.123-125

I still worry that the Administration's recommendation may create an unwarranted impression that marital rape victims who are below the age of 13 (s.123) or 16 (s.124) or mentally incapacitated (s.125) deserve only lesser protection. Having said that, I do not have strong opposition to the Administration's recommendation regarding these sections, *in principle*; though I urge the Administration to reconsider my recommendation regarding these three sections of defining 'unlawful' to mean 'outside marriage' made in my November 2000 submission (attached as Appendix A).

4. Other offences concerning 'unlawful sexual intercourse/act'

As far as I am aware, ss.130, 132, 133, 134, 140, 141 and 142 of the Crimes Ordinance and s.65 of the Mental Health Ordinance are also offences concerning unlawful sexual intercourse or unlawful sexual act (of which unlawful sexual intercourse is one of the three forms, s.117(1A) Crimes Ordinance), and they are not mentioned in the Administration proposal. It is not clear whether and how the Administration's proposal would affect these provisions. To avoid any unintended consequences under the *expressio unius* rule, decisions must also be made on the meaning of 'unlawful' in these offences.

5. Summary of Recommendations

5.1 'Unlawful', as under the modern common law of *R v R* and *Chan Wing Hung*, should be treated as a mere surplusage to mean nothing or 'within or outside marriage'. Non-consent should not be incorporated into 'unlawful', as implied in the Administration's recommended definition of 'unlawful' as 'outside marriage, or within marriage in any circumstances where the wife does not consent'.

5.1.1 'Unlawful' should be deleted from s.119-121, as well as s.118, instead of adopting the Administration's recommended option, for:

a. non-consent is not part of the meaning of 'unlawful' according to modern common law;

b. it would provide a clearer and more certain protection to wife victims than relying on the court's discretion in departing from the non-exhaustive definition of 'unlawful'; and

c. it could avoid the inadvertent consequences of the Administration's recommended definition would have on the offences, especially in relation to their possible use as alternative verdicts to s.118 under s.149.

5.2 The Administration's recommendation with regards ss.123-125 is acceptable, in principle, although it is worried that it may create an impression that victims suffering from incapacities specified in these sections deserve only a lesser protection.

5.3 Regarding ss.130, 132, 133, 134, 140, 141 and 142 of the Crimes Ordinance and s.65 of the Mental Health Ordinance, it is urged that the Administration is urged to clarify whether and how these sections will be affected by the recommendation.