THE
LAW SOCIETY OF HONG KONG
香 港 律 師 會

SUBMISSIONS BY THE CRIMINAL LAW AND PROCEDURE COMMIXTEE OF THE LAW SOCIETY OF HONG KONG ON THE ADMINISTRATION'S LATEST PROPOSAL ON PART V OF THE STATUTE LAVY (MISCELLANEOUS PROVISIONS) BILL - MARITAL RAPE

1. The Law Society's Criminal Law and Procedure Committee has considered the Administration's latest proposals regarding the law on Marital Rape as set out in its June 2002 Information Paper.

COMMENTS

2. The Administration has now proposed adding a new section 117(1B) reading: *'For the avoidance of doubt, it is declared that in this Part, "unlawful sexual intercourse" does not include sexual intercourse that a man has with his wife.'* **The Committee does not support this proposed CSA.**

3. Our objections are principally twofold. Firstly, we do not believe that the best way to clarify the law relating to marital rape is by defining the term *'unlawful sexual intercourse'* in a negative manner. The general public's understanding that rape includes marital rape will not be promoted by this proposed amendment, which effectively purports to incorporate a double negative (something that is not always well understood by non-lawyers, especially those who are not native English speakers). Secondly, we believe it is inappropriate to try and offer a general *'definition'* of 'unlawful *sexual intercourse'* for the purposes of Pan: XI1 covering all sexual offences, since it seems

unfortunately to be the case that the expression *'unlawful* ***sexual intercourse'*** is capable of different meanings in different contexts. Our immediate concern is with rape, and perhaps with certain alternative offences that a husband charged with rape might be convicted of (namely, ss.119, 120 and 121)

4. **The Committee reiterates its support for the simplest, most direct amendment that will overcome the immediate concerns relating to marital rape, i.e. by deleting *'unlawful'* from the definition of rape in s.118(3), Crimes Ordinance.**

BACKGROUND

5. The Committee would reiterate the background to the problem we are dealing with:

a) Prior to 1976 in England, rape was an offence contrary to s.1(1) of the Sexual Offences Act 1956. This read simply: *'It is [an offence] for a man to rape a woman.'* There was no definition of *'rape'*, which remained a matter of common law. At the same time, there was a host of other sexual offences consolidated in the Sexual Offences Act 1956 (it was not a reforming Act - it merely pulled together existing statutory offences), many of which used the language *'unlawful sexual intercourse*'. The meaning of this expression in various contexts had been considered on occasion, but (as mentioned below) it seems clear that there was no uniform meaning.

b) The common law meaning of rape, as adopted *in* *DPP* *v Morgan,* referred to *'unlawful sexual intercourse',* thereby recognizing and incorporating the common law view that a husband could not be convicted of rape, the so-called *'marital immunity' or 'marital exemption'* (although there were some

cases in which the courts had already begun recognizing common law exceptions to this supposed immunity).

c) When s.l(1) of the Sexual Offences Act 1956 was amended in 1976 (s.l(1), Sexual Offences (Amendment) Act 1976)) and a statutory definition of '*rape*' was added, in the terms subsequently adopted in HK as s.l18(3), Crimes Ordinance, the expression *'unlawful sexual intercourse'* was not surprisingly incorporated.

d) Subsequently, after further cases had recognized yet more common law exceptions to the common law marital immunity and the issue of marital rape reached the House of Lords in *R* v *R*, the House of Lords had to consider whether they should declare that the common law immunity had been abolished. This was their inclination (Lord Keith: *'On grounds of principle, there is now no justification for the marital exception in rape')*, but it was necessary for them to deal with the argument that the immunity was statutorily recognized by the express reference *to 'unlawful sexual intercourse' in the* 1976 statutory definition of rape The Lords considered all the cases in which this expression had been considered, noting in particular *R* v *Chapman* [1959] 1 QB 100 (N.B. prior to the 1976 amendment to s.l(1), SOA 1956) in relation to s.19, Sexual Offences 1956 (HK: s.127, Crimes Ordinance), in which Donovan J concluded 6,at *'unlawful'* sexual intercourse in the context of s.19 was *not 'surplusage'* but meant *'illicit, i.e. outside the bond of marriage'.* This interpretation, the Lords observed, was one reflecting th*e 'context'* of the specific offence, i.e. s.19.

e) The question the Lords had to consider was whether it was necessary to adopt this same meaning (i.e. previously adopted in relation to a specific offence in the 1956 Act) for the purposes of the 1976 Act (which defined

rape). The Lords concluded that they were NOT required to do so. There was, they noted, another context, namely that for the purposes of rape, various common law exceptions to the marital immunity had been judicially recognized. Lord Keith continued:

> *Sexual intercourse in any of the cases covered by the exceptions [i.e. exceptions to the marital rape immunity] still takes place within the bond of marriage. So if "unlawful" in the subsection [i.e. s1(1), SO(A)A 19761 means "outside the bond of marriage" it follows that sexual intercourse in a case which falls within the exceptions is not covered by the definition of rape, notwithstanding that it is not consented to by the wife. That involves that the exceptions have been impliedly abolished. If the intention of Parliament was to abolish the exceptions it would have been expected to do so expressly, and it is in fact inconceivable that Parliament should have had such an intention. In order that the exception might be preserved, it would be necessary to construe "unlawfully" as meaning "outside marriage or within marriage in a situation covered by one of the exceptions to the marital exemption. " ... However, the gloss which the suggested construction would place on the word "unlawfully" would give it a meaning unique to this particular subsection [i.e. s1(1), SO(A)A 1976], and if the mind of the draftsman had been directed to the existence of the exceptions he would surely have deal' with them specifically and not in such an oblique fashion. In R v Chapman, Donovan L1 accepted ... that the word "unlawfully" in relation to carnal knowledge had in may early statutes not been used with any degree of precision, and he referred to a number of enactments making it u felony unlawfully and carnally to know any woman-child under the age of 10. He said ... "one would think that all intercourse with a child under 10 would he unlawful and on that*

> *footing the word would be mere surplusage."* ***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 [i.e.* ***"unlawful"] in the subsection [i.e. s1(1), S(A)A 1976] adds*** *nothing, In my opinion there are no* ***rational grounds for putting th****e suggested gloss on the word, and it should be treated as being mere surplusage in this enactment [i.e. s.1(1), SO(A)A 1976], as it clearly fell to be in those referred to by Donovan L.J. ...*
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> *I am therefore of the opinion that section 1(1) of the Act of 1976 presents no obstacle to this House declaring that in modern times the supposed marital exception in rape forms no part of the law of England.*

By use of this somewhat convoluted analysis, the Lords therefore concluded that it was not possible to have any acceptable meaning to the statutory language *'unlawful sexual intercourse',* despite the accusation that the courts were thereby usurping the power of the legislature (which had enacted legis1ation expressly incorporating that term).

CONCLUSION

6. The Committee has quoted the aforesaid passage at length because, in our mew, it reinforces several points. First, it is essentially misguided to try and define *'unlawful'* sexual intercourse compendiously for all the sexual offences gathered together in Part X11 of the Crimes Ordinance. Secondly, the central point of the House of Lords decision was that the statutory language did not stand in the way from their declaring that the common law marital immunity was no longer any pan of the law of England. **If, as the Committee believes, HK courts would also declare the common law immunity to have been abolished if this issue presented itself, then it is in our view misleading to**

try and clarify the issue of marital rape by *'defining' 'unlawful* along the various lines proposed. To do so is to do what the Lords in this passage rejected, namely, by and add *a 'gloss' on* the meaning of *'unlawfully'* in order to assert that it is not 'mere s*urplusage'. As* Lord Keith *stated: 'there are no rational grounds for punting the suggested gloss on the word, and it should be treated a mere surplusage'.* **The Committee believes this is the right approach, rather than adding complexity by attempting to define *'unlawful sexual intercourse',* and that *'unlawful'* should therefore be simply deleted from s.118(3)(a).** As the above passage shows, the meaning to be attributed to the same expression *'unlawful sexual intercourse'* elsewhere in Part XII may need to be decided according to the context of each particular provision.

7. However, as stated in our previous submission, **if *"`unlawful'* is to be retained, then the Committee would much prefer the inclusive definition proposed by thc Bills Committee to either of the Administration's most recent proposals. As mentioned above, the Committee believes the Administration's latest proposed CSA in particular should be rejected.**

The Criminal Law and Procedure Committee
The Law Society of Hong Kong
19 June 2002