23 April 2001 (**revised**)

Mr Michael Scott
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Department of Justice
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Dear Mr Scott,

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

Thank you for your letter of 19 April 2001. I have the following comments:

1. It is true that:

> 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. (paragraph 2 of your letter)

But I disagree that:

> *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. (my emphasis; paragraph 3 of your letter)

My view is rather that the House of Lords *did abolish the implied consent*. The correctness of the two interpretations (mine and the Administration's) will be of particular importance to the validity of the Administration's proposal regarding ss.119-121. If my view is correct, according to modern common law (*R v R* and *Chan Wing Hung*), it is not necessary to prove non-consent in order to vitiate the implied consent, as such consent to sexual intercourse is no longer implied into a marriage, and, therefore, the Administration's proposal of introducing non-consent into the statutory definition of 'unlawful sexual intercourse' is unnecessary and unreflective of the common law.

2. It is unfortunate that both the Court of Criminal Appeal and the House of Lords in *R v R* did not make it clear whether they meant to abolish 'only the traditional common law rule that the wife could not revoke such consent other than exceptionally' or the whole notion of implied consent, when deciding that the marital exemption is no longer available. But it seems from the House of Lords' judgment that the latter is more plausible. Lord Keith, in delivering the judgement of the House of Lords, quoted substantially from the judgement of

the Scottish case of *S v H M Advocate* 1989 SLT 469, which abolished the marital exemption1in Scotland. Part of the quoted judgement reads: 'The fiction of implied consent has no useful purpose to serve today in the law of rape in Scotland' (p.772A). Lord Keith went on to say, in relation to the whole quoted judgement: 'I consider the substance of that reasoning to be no less valid in England than in Scotland.' (p.772B) At a later part of his judgement, Lord Keith also described the notion of 'implied consent to sexual intercourse' as a 'fiction' himself. (p.774A)

3. Since the niceties of the two interpretations are unimportant to the offence of rape, as non-consent needs to be proved anyway in rape as an element of the statutory definition of the offence, and most commentators have concerned themselves only with the impact of *R v R* on the offence of rape, the correctness of the two interpretations has seldom been discussed by commentators. But, in commenting on the Court of Appeal's ruling on *R v R*, which was affirmed subsequently by the House of Lords, a commentator did observe that the Court of Criminal Appeal held that 'a husband may only have intercourse with his wife where she consents to the act of intercourse; *there is no presumption of consent arising from the fact of marriage*.' (my emphasis; Allen, Mike (1991) "Farewell to Hale?" *Solicitor's Journal* 135(11): 352-3, 353.)

4. For the above reasons, I am more inclined to the view that *the implied consent given by a wife to marital intercourse upon marriage has been abolished* by *R v R* since 1991.

5. Even if both interpretations (mine and the Administration's) are plausible, for reasons that I have listed in paragraphs 2.2 and 2.3 of my March submission, I am still of the view that the more liberal interpretation I suggest is to be preferred.

6. It is also argued in paragraph 3 of your letter that '[e]ven if "unlawful" is 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 this sections', as *R v R* did not abolish the implied consent. On the point of the correctness of the two interpretations, I have already stated my view. *To avoid further doubts, I propose, in conjunction with deleting 'unlawful' from ss.119-121, that a clause be added to s.117 to the effect that, in relation to s.119-121, a woman shall not be presumed to have consented to sexual intercourse/act with her husband on the ground of their marriage.*

7. It seems that the definition (as proposed by the Administration) in the amended s.117 in the 2nd draft of the amendment bill would not be applicable to ss.65 and 66 of the Mental Health Ordinance, as it is expressly stated 'For the purpose of this part' in the proposed amendment to s.117.

Yours sincerely,

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