

# SUPREME COURT OF SOUTH AUSTRALIA

(Court of Criminal Appeal: Case Stated)

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment. The onus remains on any person using material in the judgment to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court in which it was generated.

## Question of Law Reserved NO 2 OF 2010

**R v P, GA**

[2010] SASCFC 81

### Judgment of The Court of Criminal Appeal

(The Honourable Chief Justice Doyle, The Honourable Justice Gray and The Honourable Justice White)

23 December 2010

**CRIMINAL LAW - APPEAL AND NEW TRIAL - PROCEDURE - MISCELLANEOUS MATTERS - SOUTH AUSTRALIA - CASE STATED AND RESERVATION OF QUESTION OF LAW**

**CRIMINAL LAW - PARTICULAR OFFENCES - OFFENCES AGAINST THE PERSON - SEXUAL OFFENCES - RAPE AND SEXUAL ASSAULT - CONSENT - PRESUMPTION OF**

**PROCEDURE - COURTS AND JUDGES GENERALLY - PRECEDENTS - PRECEDENTS GENERALLY - DEVELOPMENT OF COMMON LAW**

Case stated from the District Court – accused charged with two counts of the rape of his wife – alleged offences occurred in 1963 – whether the offence of rape by one lawful spouse of another was an offence in 1963 – whether a statutory provision precludes the Court from identifying the elements of the offence in accordance with the common law – effect of a mistaken understanding by Parliament of the state of the common law when it enacts a statutory measure changing that part of the common law - whether irrebuttable presumption of consent to sexual intercourse between married couples in 1963 – effect of the High Court’s decision in *The Queen v L* (1991) 174 CLR 379 on the common law in 1963 - whether any change to the common law should be treated only as prospective in its effect – defendant liable to be found guilty of the offences of rape.

*Criminal Law Consolidation Act 1935 (SA)* s 5, s 46, s 47, s 48, s 48(1), s 48(2), s 72A, s 73, s 73(3), s 73(5) (repealed), s 76a (repealed), s 350(2)(b); *Criminal Law Consolidation Act Amendment Act 1952 (SA)*; *Criminal Law (Sexual Offences) Amendment Act 1975 (SA)* s 6; *Criminal Law Consolidation Act Amendment Act 1976 (SA)*; *Criminal Law*

---

**On Appeal from DISTRICT COURT OF SOUTH AUSTRALIA (HIS HONOUR JUDGE HERRIMAN)  
DCCRM-09-1418**

**Prosecution: R Counsel: MR M HINTON QC SG WITH MR K LESSES - Solicitor: DIRECTOR OF PUBLIC PROSECUTIONS (STATE)**

**Defendant: P, GA Counsel: MR P MUSCAT SC - Solicitor: LEGAL SERVICES COMMISSION OF SA**

**Hearing Date/s: 21/07/2010, 24/09/2010**

**File No/s: SCCRM-10-179**

**A**

*Consolidation Act Amendment Act 1985 (SA); Criminal Law Consolidation (Rape) Amendment Act 1992 (SA); Criminal Law Consolidation (Abolition of Time Limit for Prosecution of Certain Sexual Offences) Amendment Act 2003 (SA); Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2008 (SA); Family Law Act 1975 (Cth) s 114(2); Sexual Offences (Amendment) Act 1976 (UK) s 1(1); War Crimes Act 1945 (Cth); Criminal Code 1913 (WA) s 325; Crimes (Sexual Offences) Act 1980 (Vic); Crimes Act 1958 (Vic) s 44, s 62(2); Crimes (Sexual Assault) Amendment Act 1981 (NSW); Crimes Act 1900 (NSW) s 61A(4), s 63, s 92R (repealed); Crimes (Amendment) Ordinance (No. 5) 1985 (ACT); Criminal Code, Evidence Act and Other Acts Amendment Act 1989 (Qld); Criminal Code Act 1899 (Qld) s 347; Rape Law Reform (No. 2) Act 1985 (NZ); Crimes Act 1961 (NZ) s 128(4); Criminal Justice and Public Order Act 1994 (UK); The Criminal Code (Tas) s 185; Criminal Code Amendment Act (No. 3) 1994 (NT); Criminal Code Act 1983 (NT) s 192; Criminal Law Consolidation Act Amendment Act 1981 (SA), referred to.*

*The Queen v L* (1991) 174 CLR 379, applied.

*The Queen v Pinder* (1989) 155 LSJS 65; *Birmingham Corporation v West Midland Baptist (Trust) Association (Inc)* [1970] AC 874; *CSR Limited v Eddy* (2005) 226 CLR 1; *S v Her Majesty's Advocate* [1989] SLT 469; *Regina v R* [1992] 1 AC 599; *R v Petroulias* (2005) 62 NSWLR 663; *Zecevic v Director of Public Prosecutions (Victoria)* (1987) 162 CLR 645; *Polyukhovich v The Commonwealth of Australia* (1991) 172 CLR 501; *Ha v State of New South Wales* (1997) 189 CLR 465; *Eso Australia Resources Limited v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49; *In re Spectrum Plus Ltd (In Liquidation)* [2005] 2 AC 680; *R v Brown* (1975) 10 SASR 139; *R v Sherrin (No 2)* (1979) 21 SASR 250; *R v McMinn* [1982] VR 53; *R v C* (1981) 3 A Crim R 146; *R v Clarence* (1889) LR 22 QBD 23; *R v Miller* [1954] 2 QB 282; *R v Clarke* [1949] 2 All ER 448; *R v O'Brien* [1974] 3 All ER 663; *Canada (Attorney General) v Hislop* [2007] 1 SCR 429; *Chamberlains v Sun Poi Lai* [2007] 2 NZLR 7; *Torrens Aloha Pty Ltd v Citibank NA* (1997) 72 FCR 581, discussed.

*Inland Revenue Commissioners v Dowdall, O'Mahoney & Co Ld* [1952] AC 401; *Honeywood v Munnings* (2006) 67 NSWLR 466; *The Queen v Howe* (1958) 100 CLR 448; *Viro v The Queen* (1978) 141 CLR 88; *Farah Constructions Pty Limited v Say-Dee Pty Ltd* (2007) 230 CLR 89; *John v Commissioner of Taxation of the Commonwealth of Australia* (1989) 166 CLR 417; *R v Wozniak & Pendry* (1977) 16 SASR 67; *R v Cogan & Leak* [1976] 1 QB 217; *R v Steele* (1977) 65 Cr App R 22; *R v Roberts* [1986] Crim L R 188; *R v Kowalski* (1988) 86 Cr App Rep 339; *CR v United Kingdom*; *SW v United Kingdom* [1996] 1 Fam Law R 434; *Attorney General for Jersey v Holley* [2005] 2 AC 580; *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1; *Bropho v State of Western Australia* (1990) 171 CLR 1, considered.

**Question of Law Reserved NO 2 OF 2010**  
**R v P, GA**  
**[2010] SASFC 81**

**Court of Criminal Appeal: Doyle CJ, Gray and White JJ**

1 **DOYLE CJ:** An Information filed in the District Court charges Mr P with a number of offences. Each of count 3 and count 5 charges an offence of rape, contrary to s 48 of the *Criminal Law Consolidation Act 1935* (SA) (“the CLCA”). Count 3 alleges an offence committed between 22 March 1963 and 25 March 1963. Count 5 alleges an offence committed about 14 April 1963. Each count alleges vaginal sexual intercourse.

2 The alleged victim in each case is Mrs P, the then spouse of Mr P. They were lawfully married in September 1962. At the time of the alleged offences they were cohabiting as husband and wife. There were no court orders, agreements or undertakings affecting the marital relationship.

3 In 1963 s 48 of the CLCA provided:

48 Any person convicted of rape shall be guilty of felony, and liable to be imprisoned for life, and may be whipped.

The elements of the offence against s 48 were supplied by the common law.

4 In 1963 one would have found statements by judges and writers of textbooks to the effect that at common law a husband could not be guilty of raping his wife, except in certain circumstances, none of which are relevant here.

5 Since then it has become clear that it is no longer the law that a husband cannot be guilty of raping his wife. In this State a number of statutory changes to the law relating to rape have been made, and now the CLCA provides that there is no presumption from marriage of consent to sexual intercourse.

6 A Judge of the District Court has reserved for the consideration and determination of this Court a question of law. The question is whether the offence of rape by one lawful spouse of another, in the circumstances that I have outlined, was an offence known to the law of South Australia as at 1963. I would prefer to express the question as whether Mr P can, as a matter of law, properly be convicted of count 3 and count 5 in the circumstances outlined.

7 I have concluded that even if at an earlier time, in 1963 or thereabouts, the answer to that question would have been in the negative, today it must be answered in the affirmative.

8 In *The Queen v L* (1991) 174 CLR 379 four of the five members of the High Court said that it was no longer the common law that by marriage a wife gave irrevocable consent to sexual intercourse by her husband. This Court

should apply those statements when deciding on the state of the common law today. The statements are considered statements, although they were not necessary for the decision in the case, and so are not binding on this Court. Consistently with my understanding of the operation of the common law, the statements as to the content of the common law relating to rape made in 1991 are now to be applied, when the content of the common law relating to rape is relevant, to events occurring before those statements were made. To the extent that it is necessary in this case to identify the common law elements of the offence of rape in 1963, those elements are to be identified in light of the statements in *The Queen v L*.

9 Mr P is charged with offences against the then s 48 of the CLCA. In 1963 the elements of that offence were determined by the common law. Today, those elements are determined by the common law as stated by the majority in *The Queen v L*.

10 My reasons for this conclusion are set out below.

11 I will begin by referring to relevant statutory provisions in this State. It is necessary to demonstrate that no statutory provision precludes the Court from identifying the elements of the offence in accordance with the common law. It is also necessary to demonstrate that there is no time limit that protects Mr P from being convicted of the offence. Next I will refer to the state of the common law before the decision in *The Queen v L*, and say a little more about what was said in that decision. Then I will explain why I conclude that what was said in *The Queen v L* should now be applied to events occurring in 1963.

### Legislation

12 I have set out above s 48 of the CLCA as it stood in 1963.

13 At that time the CLCA included s 76a. That section had been inserted by the *Criminal Law Consolidation Act Amendment Act 1952* (SA) (No. 27 of 1952). It provided as follows:

76a (1) No information shall be laid for any offence specified in subsection (3) of this section more than three years after the commission of the offence.

An offence against s 48 was one of the offences specified.

14 The *Criminal Law (Sexual Offences) Amendment Act 1975* (SA) (No. 66 of 1975) added to s 5 of the CLCA a definition which expanded the range of sexual acts included within the concept of rape. Section 6 of that Act also amended s 48 by striking out the words “convicted of” and inserting the words “who commits”.

15 The *Criminal Law Consolidation Act Amendment Act 1976* (SA) (No. 83 of 1976) recast the provisions relating to rape. In March 1976 the Criminal Law and Penal Methods Reform Committee of South Australia made a Special Report

to the Attorney-General upon the law relating to rape and other sexual offences (“the Mitchell Report”). Importantly, the Committee stated at para 6.2 of the Mitchell Report that:

The view that the consent to sexual intercourse given upon marriage cannot be revoked during the subsistence of the marriage is not in accord with modern thinking. In this community today it is anachronistic to suggest that a wife is bound to submit to intercourse with her husband whenever he wishes it irrespective of her own wishes.

16 At para 6.2.1 of the Mitchell Report the Committee made the following recommendation:

We recommend that a husband be indictable for rape upon his wife whenever the act alleged to constitute the rape was committed while the husband and wife were living apart and not under the same roof notwithstanding that it was committed during the marriage.

Although Parliament did not act on this recommendation, no doubt the Mitchell Report prompted a reconsideration of the law relating to rape, as reflected in the 1976 amendment.

17 Section 5 of the CLCA was amended to include a widened definition of acts embraced by the expression “sexual intercourse.” Section 48 was repealed and was replaced by s 48(1) which provided as follows:

48(1) A person who has sexual intercourse with another person without the consent of that other person –

(a) knowing that that other person does not consent to sexual intercourse with him;

or

(b) recklessly indifferent as to whether that other person consents to sexual intercourse with him,

shall be guilty of the felony of rape and liable to be imprisoned for life.

A new s 73 was inserted into the CLCA. It provided as follows:

73(1) For the purposes of this Act, sexual intercourse is sufficiently proved by proof of penetration.

(2) No person shall, by reason of his age, be presumed incapable of sexual intercourse.

(3) No person shall, by reason only of the fact that he is married to some other person, be presumed to have consented to sexual intercourse with that other person.

(4) No person shall, by reason only of the fact that he is married to some other person, be presumed to have consented to an indecent assault by that other person.

(5) Notwithstanding the foregoing provisions of this section, a person shall not be convicted of rape or indecent assault upon his spouse, or an attempt to commit, or

assault with intent to commit, rape or indecent assault upon his spouse (except as an accessory) unless the alleged offence consisted of, was preceded or accompanied by, or was associated with –

- (a) assault occasioning actual bodily harm, or threat of such an assault, upon the spouse;
  - (b) an act of gross indecency, or threat of such an act, against the spouse;
  - (c) an act calculated seriously and substantially to humiliate the spouse, or threat of such an act;
- or
- (d) threat of the commission of a criminal act against any person.

I will deal later with the submission by Mr Muscat SC, counsel for Mr P, based on s 73(3). Although s 76a of the CLCA was amended, the time limit it contained continued to apply to an offence against s 48 of the CLCA.

18       The *Criminal Law Consolidation Act Amendment Act 1981* (SA) (No. 107 of 1981) repealed s 48(2) of the CLCA. That provision is not material for present purposes.

19       The *Criminal Law Consolidation Act Amendment Act 1985* (SA) (No. 98 of 1985) amended s 5 of the CLCA by substituting a new and expanded definition of “sexual intercourse.” It also amended the concluding part of s 48(1) of the CLCA so that it read:

... shall (whether or not physical resistance is offered by that other person) be guilty of the felony of rape...

20       More significantly, this amendment repealed s 76a of the CLCA, thereby removing the time limit on prosecutions for rape.

21       In *The Queen v Pinder* (1989) 155 LSJS 65 this Court held that the repeal of s 76a did not authorise the laying of an information which would deprive a person of an immunity already acquired under s 76a, before its repeal: King CJ at 66, Cox J and Bollen J at 67.

22       *The Queen v L* was decided in 1991.

23       The *Criminal Law Consolidation (Rape) Amendment Act 1992* (SA) amended s 73 of the CLCA by striking out subsection (5). That removed the limitation upon the circumstances in which a person could be convicted of rape of that person’s spouse. This meant that on the trial of a charge for rape the fact that the person charged was married to the alleged victim was, of itself, irrelevant to the elements of the offence. A new subsection (5) was inserted, but its provisions are irrelevant for present purposes.

24 The *Criminal Law Consolidation (Abolition of Time Limit for Prosecution of Certain Sexual Offences) Amendment Act 2003* (SA) in effect reversed the decision in *Pinder*. This amendment added s 72A to the CLCA in the following terms:

**72A – Former time limit abolished**

Any immunity from prosecution arising because of the time limit imposed by the former section 76A<sup>1</sup> is abolished.

<sup>1</sup> Repealed by section 5 of the *Criminal Law Consolidation Act Amendment Act 1985*.

The effect of this was that persons who had acquired an immunity under the repealed s 76a, and who could not be convicted consistently with the decision in *Pinder*, could now be convicted.

25 The *Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2008* (SA) again recast the law relating to rape. No material change has been made since then.

26 The definition of “sexual intercourse” in s 5(1) was amended. A new s 46 was enacted. It has detailed provisions relating to consent to sexual activity, which includes sexual intercourse. It also enacted a new s 47 which makes detailed provision relating to reckless indifference to the fact that another person does not consent to an act or has withdrawn consent. A new and much extended definition of rape was contained in a new s 48.

27 Section 73 was amended by deleting subsection (5). The other provisions of s 73, including in particular s 73(3), were retained. It remained the case that there was no time limit on the laying of a charge of rape.

**Comments on legislation**

28 Mr P is charged with offences against s 48 of the CLCA. As I have indicated, in 1963 the elements of that offence were supplied by the common law. The CLCA contained no provision affecting the elements of the offence at common law.

29 In 1963 s 76a of the CLCA prohibited the laying of an Information for an offence against s 48 more than three years after the commission of the offence. By mid April 1966, Mr P was entitled to the benefit of that provision. He was immune from prosecution for the offences now charged.

30 That immunity was abolished by s 72A of the CLCA. There is no time limit that Mr P can invoke as an answer to the charges that he faces.

31 Neither party has submitted that changes to the elements of the offence of rape from 1976 onwards apply with retrospective effect.

32 The changes made in 1976 are significant.

33 Mr Muscat submits that Parliament legislated in 1976 on the assumption that at common law a husband could not be guilty of the rape of his wife (other than in exceptional circumstances) because marriage gave rise to consent to sexual intercourse, or to an irrebuttable presumption of consent. On this basis Parliament changed the elements of the offence, but with prospective effect only.

34 Mr Muscat submits that this Court and the High Court are now bound to accept and to act on that assumption. Alternatively, he submits that if this Court or the High Court has power to determine the elements of the offence at common law prior to 1976, and to do so contrary to an earlier understanding of the law, the Court should refrain from doing so. It should refrain because as from 1976 Parliament has indicated what the elements should be prospectively, and has chosen to leave undisturbed the common law as it prevailed before 1976.

35 I will deal with the second submission when considering the position at common law.

36 The first submission is a submission that by making the prospective change to the elements of the offence of rape that Parliament made in 1976, Parliament has commanded that the law prior to 1976 is to remain unchanged. I do not accept that submission.

37 A mistaken understanding by Parliament of the state of the common law when it enacts a statutory measure changing that part of the common law is no more than that, a mistaken understanding. The mistake has no legal effect. It might affect the manner in which a court interprets the statutory change. But that is all that the mistaken understanding can do.

38 In *Birmingham Corporation v West Midland Baptist (Trust) Association (Inc)* [1970] AC 874 at 898 Lord Reid said:

These provisions do show that Parliament (or the draftsman) must have thought that the law was that compensation was assessable on the basis of value as at the date of notice to treat. But the mere fact that an enactment shows that Parliament must have thought that the law was one thing does not preclude the courts from deciding that the law was in fact something different. This has been stated in a number of cases including *Inland Revenue Commissioners v Dowdall, O'Mahoney & Co Ltd* [1952] AC 401. No doubt the position would be different if the provisions of the enactment were such that they would only be workable if the law was as Parliament supposed it to be. But, in my view, all that can be said here is that these enactments would have a narrower scope if the law was found to be that compensation must be assessed at a date later than that of the notice to treat.

Lord Upjohn agreed with Lord Reid (at 908) as did Lord Wilberforce (at 913). Lord Donovan said nothing on the point.

39 A similar observation was made by Lord Radcliffe in *Inland Revenue Commissioners v Dowdall, O'Mahoney & Co Ld* [1952] AC 401 at 426. Lord Reid agreed with those observations at 417 and at 420-421.

40 The same point was made by Gleeson CJ, Gummow and Heydon JJ in *CSR Limited v Eddy* [2005] HCA 64; (2005) 226 CLR 1 at [51], where their Honours said, with reference to a provision of Queensland legislation:

[51] ... Section 59(3) assumes that at common law damages are available for services provided by the injured person – a sound assumption in Queensland if *Sturch v Willmott* were correct. Section 59(3) limits recovery to non-gratuitous services outside the household. Section 59(3) is an example of Lord Reid's principle: "the mere fact that an enactment shows that Parliament must have thought that the law was one thing does not preclude the courts from deciding that the law was in fact something different". Section 59(3) is not an example of legislation unworkable unless an assumption as to the common law is correct. To overrule *Sturch v Willmott* and *Sullivan v Gordon* would not make s 59(3), which simply limited the common law rule, unworkable. By itself that legislative decision is not a conclusive or even persuasive guide to the content of the common law; it merely reflects a legislative policy choice.

*Footnotes omitted*

The reference to Lord Reid is to the passage set out above.

41 The same approach was taken by the Court of Appeal of the Supreme Court of New South Wales in *Honeywood v Munnings* [2006] NSWCA 215; (2006) 67 NSWLR 466 at [37]-[40] Handley JA, with whom the other members of the Court agreed at [43] and [44].

42 For Mr Muscat's first submission to succeed one would have to conclude that by necessary implication in 1976 Parliament stated that the then existing common law should remain as it stood, and that the Court should not exercise the power that it ordinarily has to determine the content of the common law prior to 1976.

43 There is no basis for such an implication. It was not beyond the power of Parliament to declare that the existing common law in South Australia was to remain unchanged. But there is no reason to read the 1976 amendment as doing so by implication. A mistaken understanding of the state of the existing law and a prospective change by legislation does not imply an intention that the existing law is not to be changed by judicial decision.

44 It cannot be said that to declare now the pre-existing common law to be different from the understanding of Parliament in 1976 would be to render the 1976 amendment unworkable or ineffective. Either way, it will continue to operate according to its terms. Nor, as Handley JA pointed out in *Honeywood*, can one infer what Parliament would have done if it had believed the common

law to accord with statements later made by members of the High Court in *The Queen v L*.

45 By 1976 the notion of an irrevocable and general consent to intercourse arising from marriage, or from a presumption attributable to marriage, was already seen by some as anachronistic: see the Mitchell Report at para 6.2. The reform made in 1976 demonstrates what Parliament intended the law to be thereafter. On one approach to the content of the common law the 1976 amendment limited what would have been the reach of the common law by limiting the circumstances in which a husband could be convicted for the rape of his wife. On another view the 1976 amendment amended the law relating to rape to permit a husband to be convicted of the offence of rape of his wife in circumstances in which there could be no conviction at common law. But while the 1976 amendment, and its circumstances, indicates what Parliament intended the law to be, it does not give rise to an implication as to Parliament's intention as to what the law applicable to past events was to be.

### **Common law**

46 In *The Queen v L* the respondent was charged with the rape of his wife, contrary to s 48 of the CLCA. The offences were alleged to have occurred on 9 April 1989. At the time of the alleged offence s 48 was in the form as amended in 1985. It was an offence to have sexual intercourse with another person without the consent of that other person, knowing that the other person did not consent or being recklessly indifferent as to consent, and whether or not physical resistance was offered. Section 73 of the CLCA was in force at the time of the alleged offences, in the form of the 1976 amendment.

47 The respondent challenged the Information.

48 Section 114(2) of the *Family Law Act 1975* (Cth) then provided:

In exercising its powers under sub-section (1), the court may make an order relieving a party to a marriage from any obligation to perform marital services or render conjugal rights.

49 The respondent argued that s 73(3) of the CLCA was inconsistent with s 114(2) of the *Family Law Act*. The submission was summarised as follows by Mason CJ, Deane and Toohey JJ at 384-385:

The respondent submitted that the two provisions are directly inconsistent in that the State Act "eliminates the obligation to perform 'conjugal rights' for every married person in the State of South Australia" while the Commonwealth Act "assumes the existence of the obligation [to render conjugal rights] but gives the Family Court a discretion to relieve a party from it if appropriate". Section 114(2), the respondent argued, preserves the common law notion of "conjugal rights" and that notion, he said, involves the proposition that a wife, by virtue of being married, cannot refuse her consent to sexual intercourse with her husband; that a husband has a "right" to sexual intercourse and that a wife has an obligation to submit to it.

The respondent further submitted that, if the two provisions are not inconsistent, nevertheless the Commonwealth “has intended to ‘cover the field’ concerning the legal consequences of marriage” and that the State Act seeks to regulate one of those consequences.

50 Underlying this submission was the proposition that as between married persons marriage gave rise to a consent to sexual intercourse, and that accordingly the respondent could not be guilty of the rape of his wife because he was entitled to sexual intercourse pursuant to that consent. There was no suggestion that any of the exceptional circumstances under which a husband could be guilty of the rape of his wife at common law were applicable.

51 The High Court unanimously rejected the inconsistency submission. Mason CJ, Deane and Toohey JJ held that the *Family Law Act* did not identify or preserve any particular marital service or conjugal right. Nor did the Commonwealth law cover the field of the rights and obligations of the parties to a marriage: at 385-386. Brennan J denied that by the law of marriage (developed in the ecclesiastical courts) a husband had a right to sexual intercourse with his wife whenever he wished, irrespective of the circumstances (at 391), and denied that the *Family Law Act* said anything to the contrary (at 396). Dawson J agreed with Brennan J (at 404).

52 Each member of the High Court considered the common law relating to the offence of rape as between spouses.

53 Mason CJ, Deane and Toohey JJ referred to a number of English decisions and commented (at 388) that none of them “... lends credence to the proposition that, by virtue of her marriage, a wife gives her consent to sexual intercourse with her husband, whatever the circumstances”. They noted that the proposition appeared to derive from a statement by Sir Matthew Hale in *The History of the Pleas of the Crown* (1736) Vol. 1 p 629 in the following terms:

But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.

They accepted that this statement probably reflected the common law as it then stood, but noted that the later course of authority did not necessarily support that opinion. They then said at 389:

Without endeavouring to resolve the development of the common law in this regard, it is appropriate for this Court to reject the existence of such a rule as now part of the common law of Australia.

They noted the restraints that the High Court should observe when developing the common law, and said at 390:

But the situation here is that the respondent invites the Court to give its support to a proposition which, in the terms contended for, does not have the backing of the common law for which he contends.

They then said:

In any event, even if the respondent could, by reference to compelling early authority, support the proposition that is crucial to his case, namely, that by reason of marriage there is an irrevocable consent to sexual intercourse, this Court would be justified in refusing to accept a notion that is so out of keeping with the view society now takes of the relationship between the parties to a marriage. The notion is out of keeping also with recent changes in the criminal law of this country made by statute, which draw no distinction between a wife and other women in defining the offence of rape. It is unnecessary for the Court to do more than to say that, if it was ever the common law that by marriage a wife gave irrevocable consent to sexual intercourse by her husband, it is no longer the common law.

*Footnotes omitted*

It is clear that in their opinion the common law no longer reflected the opinion expressed by Sir Matthew Hale.

54 Brennan J also noted the influence of Sir Matthew Hale on the common law relating to rape (at 398), and that this view was not in accord with the doctrines of the ecclesiastical courts. He said that Sir Matthew Hale's reason for the rule that he stated (matrimonial consent) was not supported by the law of marriage or by any other doctrine of the common law: at 401. He referred with apparent approval to recent decisions in *S v Her Majesty's Advocate* [1989] SLT 469 and *Regina v R* [1992] 1 AC 599, to which decisions I refer below. But he found it unnecessary to consider the present state of the common law in South Australia, because s 73(3) of the CLCA abolished the common law fiction of a wife's presumed consent to intercourse: at 402-403.

55 Dawson J also referred to the opinion of Sir Matthew Hale (at 405). Having referred to the decisions in *S v Her Majesty's Advocate* and *Regina v R*, he said at 405:

But I think that it is appropriate to say that, whatever may have been the position in the past, the institution of marriage in its present form provides no foundation for a presumption which has the effect of denying that consent to intercourse in marriage can, expressly or impliedly, be withdrawn. There being no longer any foundation for the presumption, it becomes nothing more than a fiction which forms no part of the common law.

56 It is convenient at this point to refer briefly to *S v Her Majesty's Advocate* and *Regina v R*.

57 *S v Her Majesty's Advocate* is a decision of the High Court of Justiciary of Scotland. A man was charged with the rape of his wife while they were cohabiting. He raised a preliminary objection to the charge on the ground that he

was immune from prosecution for the rape of his wife while cohabiting with her. The presiding Judge “repelled” the objection, but granted leave to appeal.

58 The High Court refused the appeal. In Scotland as in England there were statements by authoritative commentators on the criminal law, and by text book writers, to the effect that a man could not be guilty of the rape of his wife when they were cohabiting. This opinion as to the state of the law in Scotland is traced back to the writings of Baron Hume in 1797 and in later editions of his work. The Court thought it likely that Baron Hume had been influenced by Sir Matthew Hale: 472-473. The Court considered the soundness of the reasons given for the suggested immunity, and concluded (at 473):

... that whether or not the reason for the husband’s immunity given by Hume was a good one in the 18<sup>th</sup> and early 19<sup>th</sup> centuries, it has since disappeared altogether.

A little later (at 473) the Court said:

The reason given by Hume for the husband’s immunity from prosecution upon a charge of rape of his wife, if it ever was a good reason, no longer applies today. There is now, accordingly, no justification for the supposed immunity of a husband. Logically the only question is whether or not as matter of fact the wife consented to the acts complained of, and we affirm the decision of the trial judge that charge 2 (b) is a relevant charge against the appellant to go to trial.

The Court rejected a submission that there should be no change in the law of rape as it affects a husband: at 474.

59 It is clear that the High Court of Justiciary intended to and did change the law relating to rape with retrospective effect, because they declared that law to be the law applicable to the events the subject of the charge in question.

60 This decision was referred to in *The Queen v L* by Brennan J at 401 and by Dawson J at 405, with apparent approval.

61 In *Regina v R* a man was charged with the rape of his wife. They had separated, she having returned to live with her parents. Each had spoken to the other about getting a divorce. The alleged rape occurred when the wife was living with her parents. The trial Judge rejected a submission that the offence of rape was one which was not known to the law if the defendant was the husband of the alleged victim. This submission turned on a consideration of the common law and of the wording of the *Sexual Offences (Amendment) Act 1976* (UK) s 1(1) of which provided:

For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if – (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it ...

The argument was that this was the first statutory definition of rape, and the word “unlawful” was intended to preserve the common law immunity of the husband: at 608D.

62 All members of the House of Lords agreed with the reasons of Lord Keith: at 623. Lord Keith also identified the influential statement by Sir Matthew Hale, and accepted that it had accurately stated the common law: at 615-616. He referred at some length, and with approval, to the decision in *S v Her Majesty’s Advocate*: at 616-618. He said that there was “no justification for the marital exemption in rape”: at 618B. He held that the word “unlawful” in the 1976 legislation was mere surplusage because (at 622H):

... it is clearly unlawful to have sexual intercourse with any woman without her consent ...

In relation to a submission that the House of Lords should leave it to Parliament to determine the status of the supposed marital exception to rape he adopted what had been said by Lord Lane CJ in the Court of Appeal: *Regina v R* [1992] 1 AC 599 at 611E:

The remaining and no less difficult question is whether, despite that view, this is an area where the court should step aside to leave the matter to the Parliamentary process. This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it.

63 There can be no doubt that their Lordships denied that Sir Matthew Hale’s opinion reflected the common law as at the time of their decision, and equally denied that it reflected the common law at the time of the 1976 enactment. The legislation was interpreted on the basis that at that time Sir Matthew Hale’s proposition was no longer good law.

64 The decision by the Court of Appeal in *Regina v R* was referred to in *The Queen v L*: Mason CJ, Deane and Toohey JJ at 389, Brennan J at 398 and Dawson J at 405. The decision by the House of Lords was published after argument took place before the High Court, and that decision is referred to also.

65 These three decisions reflect substantial agreement by the highest authority in each of those jurisdictions that the common law as declared by Sir Matthew Hale was unsoundly based having regard to ecclesiastical law, was undermined by exceptions, was inconsistent with common law principles that allowed a married man to be charged with offences of violence against his wife, and was anachronistic and had been so for some time. It was only in *S v Her Majesty’s Advocate* that it was necessary for the Court to determine and apply the common law, and to apply it to earlier events. But, in my opinion, in *The Queen v L* and in *Regina v R* firm statements were made as to the content of the common law as it was and had been.

### Submissions on the common law

66 Mr Muscat began with the proposition that in 1963 had the issue arisen for decision this Court, and presumably the High Court, would have decided that Sir Matthew Hale had accurately stated the common law, subject to the then recognised exceptions. He adopted the following passage from the reasons of Mason P in *R v Petroulias* [2005] NSWCCA 75; (2005) 62 NSWLR 663 at [129].

[129] The law understands that some legal propositions can be stated with certainty whilst others cannot. Matters may change over time, such that what is certain in one era may be problematical in another. To give an example: when Sir Matthew Hale's *History of the Pleas of the Crown* (Sir Matthew Hale, *The History of the Pleas of the Crown* (1736) London, Nutt & Gosling) was published in 1736, the common law was quite clear that a husband could not be guilty of raping his wife. The situation was arguable in the 1980s, but became clear again (to the opposite effect) after 1991 in light of *R v L* (1991) 174 CLR 379 and *R v R* [1992] 1 AC 599.

Mr Muscat may be correct. However, the consideration of the common law in the cases to which I have referred shows that the common law was not necessarily clear, and that there were a number of difficulties with Sir Matthew Hale's statement of the law, difficulties that would have been evident in 1963. Even in 1963, a respectable challenge to Mr Matthew Hale's opinion could have been mounted. Nevertheless, I am prepared to accept that it is likely that Sir Matthew Hale's opinion would have been accepted in 1963.

67 Next Mr Muscat submits that in *The Queen v L* the majority denied the existence of any presumption that marriage gives rise to an irrevocable consent on the part of the wife to sexual intercourse with the husband. He submits that their Honours did not consider the elements of the offence of rape at common law, confining their attention to the South Australian amendment enacted in 1976.

68 I do not accept this submission. Reference to a presumption of consent to intercourse attributable to marriage is merely a way of expressing or explaining the principle that at common law a man could not be guilty of rape of his wife, other than in certain exceptional circumstances. If the presumption of consent attributable to marriage, or a rule that there is an irrevocable consent by marriage, is rejected, as it was, then there remains no obstacle in law to a husband being convicted of the rape of his wife if she does not consent. The suggested immunity of a husband from prosecution, and the suggested presumption of consent, are manifestations of one and the same principle.

69 In the alternative Mr Muscat submits that after the 1976 amendment rape was no longer a common law offence. Its elements were to be found in s 48 and s 73 of the CLCA. I agree.

70 I have dealt earlier with the submission that the 1976 amendment denies a court power to determine the content of the common law relating to rape as it was in earlier times.

71 Mr Muscat also submitted that after 1976 there was in South Australia no surviving common law relating to rape to be developed. Accordingly, the common law had ceased to be capable of change or development. I disagree.

72 There is only one common law of Australia. That point was recently reaffirmed in passing by Gleeson CJ, Gummow and Heydon JJ in *CSR Limited v Eddy* at [54]. There is no separate common law of South Australia. The Parliament of South Australia cannot prevent the High Court from declaring the common law of Australia.

73 In any event, when the 1976 amendment was enacted it remained possible for a man to be charged with and convicted of the rape of his wife under the pre-existing law, as long as an Information was laid within three years of the alleged offence. Any such charge would have required the court to determine the state of the common law in its application to the events the subject of the charge. Once s 72A was added to the CLCA in 2003, an Information could have been filed alleging a common law offence at any time prior to 1976 (as this case illustrates). Again, that would require the court to determine the state of the common law as at the time of the alleged offence.

74 Unless the 1976 amendment denied a court power to change the common law in relation to the offence of rape in relation to events in South Australia (a proposition that I have already rejected), it remains the task of this Court and of the High Court to determine the common law applicable to a charge of rape as between husband and wife at a time before the 1976 amendment took effect, should the occasion arise.

75 Mr Muscat was on stronger ground in submitting that there are good reasons not to declare the common law as at 1963 to be any different from the postulated opinion in 1963 as to its content.

76 His submission is as follows. Parliament has not failed to respond to social change, nor to the need for change in the law. From 1976 onwards Parliament has, by a series of measures, reformed the law relating to rape. Nor did Parliament choose to make any of these changes retrospective, except for s 72A, which retrospectively removes a time based immunity that existed before its enactment. In its legislative measures after 1976 Parliament has indicated the extent to which the law of South Australia should be changed. A similar trend is observable throughout Australia. In the States and Territories the immunity of a husband on a charge of rape of his wife was limited and then ultimately removed. It is not necessary to go into details.

77 In light of this pattern of measured reform throughout Australia, Mr Muscat submits that there is no case for the Court to recast the common law in its application to events today, and that it is not appropriate to recast the common law with retrospective effect, going beyond what Parliament saw fit to do in the various Australian jurisdictions. To accept the submissions of Mr Hinton QC SG for the Director would be to give rise to a new liability retrospectively. It would be to apply to events in 1963, the subject of the charge, a statement of legal principle first identified for Australia in 1991 in *The Queen v L*. To do so would be contrary to, for example, Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms which states:

- 1 No one shall be guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed ...

That is a fundamental principle that can be found in a number of international covenants. It is an aspiration and a principle of statutory interpretation embedded in the common law. It is not, strictly speaking, a rule of law.

78 There is force in the submission, particularly in the last point.

79 The operation of the principle against retrospective application of criminal law was considered by the High Court in *Zecevic v Director of Public Prosecutions (Victoria)* (1987) 162 CLR 645. There the High Court decided to reformulate the law of self defence, and to depart from the law as declared in *The Queen v Howe* (1958) 100 CLR 448 and *Viro v The Queen* (1978) 141 CLR 88. Wilson, Dawson and Toohey JJ said at 664:

We have anxiously considered whether the departures which we propose from *Howe* and *Viro* could occasion injustice to persons presently awaiting trial for offences where self-defence may be raised, including the present appellant in the event of a new trial. For the reasons which we have given we think this unlikely. Of course, the risk of injustice, however slight, must be weighed carefully. On the other hand, there are compelling reasons for the course which we propose.

They went on to conclude, having considered a number of factors, that the law of self defence should be reformulated in the relevant respect. Deane J was opposed to reformulating the law. One of the matters upon which he relied was the principle invoked by Mr Muscat. He said at 677-678:

There may be circumstances in which an ultimate appellate court is justified in overruling a previous decision of its own with the consequence that what had previously been accepted as a defence to a charge of murder is no longer, and never was, such a defence ...

The vice of such a retrospective abolition of a defence to a charge of murder lies not in the prospect of injustice to some imaginary killer who has killed on the basis that his crime will be reduced from murder to manslaughter in the event that he was found to have been acting excessively in self-defence. It lies in the fundamental injustice of inequality under the law which is unavoidable when the administration of the criminal

law is reduced to a macabre lottery by what the late Professor Stone described as flagrant violation of the "well-established judicial policies of the criminal law in favorem libertatis, and against ex post facto punishment": *Precedent and Law* (1985), p. 190. It is simply wrong that an accused may be adjudged not guilty or guilty of murder according to the chance of whether his trial is completed before or after this Court has abolished a defence which, under the law which the Court itself had definitively settled (see per Gibbs J. in *Viro* (1978) 141 CLR 88 at 128) at the time the offence was committed, reduced the offence from murder to manslaughter. An obvious consequence of a decision of this Court overruling *Viro* and *Howe* would be to deprive all those accused whose trials have been delayed by inefficiencies in the administration of criminal justice of a defence which would have been available to them if their trials had not been unduly delayed.

The other members of the Court did not find it necessary to consider these matters. The decision in *Zecevic* demonstrates the need for careful consideration of the point made by Mr Muscat.

80 The matter was also considered by the High Court in *Polyukhovich v The Commonwealth of Australia* (1991) 172 CLR 501. The Court was there concerned with the retroactive effect of Commonwealth legislation amending the *War Crimes Act 1945* (Cth) so as to make the commission of a "war crime" at an earlier time an indictable offence under the Commonwealth law. The potential retroactive reach of the law was almost 40 years. This aspect of the law was relied upon as a basis for various attacks upon the validity of the legislation. Toohey J considered the question of retroactivity as a free standing principle. He referred to "a general abhorrence of retroactive criminal law": at 687. I refer to the following parts of his reasons at 688-689:

All these general objections to retroactively applied criminal liability have their source in a fundamental notion of justice and fairness. They refer to the desire to ensure that individuals are reasonably free to maintain control of their lives by choosing to avoid conduct which will attract criminal sanction; a choice made impossible if conduct is assessed by rules made in the future. ...

Prohibition against retroactive laws protects a particular accused against potentially capricious state action. But the principle also represents a protection of a public interest. This is so, first, in the sense that *every* individual is, by the principle, assured that no future retribution by society can occur except by reference to rules presently known; and secondly, it serves to promote a just society by encouraging a climate of security and humanity.

In so far as the principle of non-retroactivity protects an individual accused, it is arguably a mutable principle, the right to protection dependent, to some extent, on circumstances. Where, for example, the alleged moral transgression is extremely grave, where evidence of that transgression is particularly cogent or where the moral transgression is closely analogous to, but does not for some technical reason amount to, legal transgression, there is a strong argument that the public interest in seeing the transgressors called to account outweighs the need of society to protect an individual from prosecution on the basis that a law did not exist at the time of the conduct. But it is not only the issue of protection of an individual accused at the point of prosecution which is raised in the enactment of a retroactive criminal law. It is both aspects of the principle – individual and public interests – which require fundamental protection.

In his opinion the law was not offensively retroactive in relation to the information laid against the plaintiff, and accordingly it was not necessary to consider whether the law was, for that reason, invalid.

81 On the other hand, to accede to Mr Muscat's submission is to leave in place in South Australia (in relation to events before 1976) a principle of the common law with an unsound basis in ecclesiastical law, the subject of inconsistencies and exceptions, and reflecting an attitude to marriage and to the status of women which had been rejected in Australian society well before the decision in *The Queen v L*. Nor can it be said that people would have ordered their affairs or made decisions based on the earlier state of the common law.

82 In my opinion, in *The Queen v L* the majority of the High Court rejected as part of our common law the proposition that by marriage a wife gives irrevocable consent to sexual intercourse with her husband. These are considered statements of the common law which this Court should apply: *Farah Constructions Pty Limited v Say-Dee Pty Limited* [2007] HCA 22; (2007) 230 CLR 89 at [134]. True, it cannot be said that the statements of law appearing in *The Queen v L* represent "long established authority". But they do reflect the view that the common law had well and truly changed by the time of the decision in *The Queen v L*. This Court cannot ignore those observations. It cannot reinstate Sir Matthew Hale's opinion as part of the common law. This Court is called upon to determine the principles of law applicable to events occurring in 1963. Those principles are principles of the common law, and in *The Queen v L* the High Court has stated what those principles are.

83 It is for the High Court, not this Court, to decide that the matters advanced by Mr Muscat are sufficient to decide that the statements in *The Queen v L* should not be applied to events before that decision, or before 1976.

84 Mr Muscat's final submission is that any change to the common law should be treated as prospective in its effect. He did not elaborate on the question of whether that change operated prospectively from 1991, or as from today. For present purposes that does not matter.

85 That would give rise to a curious consequence, which makes one pause. By 1981 in no Australian jurisdiction did the common law exclusively determine the elements of the offence of rape as between husband and wife. By 1991 Sir Matthew Hale's statement of the law had been rejected by legislation throughout Australia. In substance the law relating to rape as between husband and wife treated a wife in the same way as a single woman. A declaration of the state of the common law with prospective effect would be of academic interest only, except to the extent that it served to remove a blot on the history of the common law.

86 The difficulty with Mr Muscat's submission is that the orthodox doctrine is that when the common law changes, by virtue of a decision of a court, that

change operates on events that have already occurred and on events that are yet to occur. The concept of a prospective change to the common law has not been accepted by the High Court in Australia.

87 In *The Queen v L* the members of the Court spoke as if they were dealing with the common law as it then was and as it had been.

88 In *Ha v State of New South Wales* (1997) 189 CLR 465 the High Court considered a submission that if legislation enacted by the Parliament of New South Wales was invalid, the Court should declare that legislation to be invalid with prospective effect only, because of the impact on the revenue of the State. The submission was formulated as a submission that the Court should overrule prospectively certain decisions of the High Court, leaving the authority of those cases unaffected for a period of twelve months. Only the majority had to consider this submission, because only the majority were of the opinion that the relevant cases should be overruled. Brennan CJ, McHugh, Gummow and Kirby JJ said at 503-504:

The Court was invited, if it should come to that conclusion, to overrule the franchise cases prospectively, leaving the authority of those cases unaffected for a period of twelve months. This Court has no power to overrule cases prospectively. A hallmark of the judicial process has long been the making of binding declarations of rights and obligations arising from the operation of the law upon past events or conduct. The adjudication of existing rights and obligations as distinct from the creation of rights and obligations distinguishes the judicial power from non-judicial power. Prospective overruling is thus inconsistent with judicial power on the simple ground that the new regime that would be ushered in when the overruling took effect would alter existing rights and obligations. If an earlier case is erroneous and it is necessary to overrule it, it would be a perversion of judicial power to maintain in force that which is acknowledged not to be the law. This would be especially so where, as here, non-compliance with a properly impugned statute exposes a person to criminal prosecution.

*Footnotes omitted*

89 In my opinion the same principle applies to the function of the Court when it develops or changes the common law. This has always been accepted although it is not easy to find authoritative statements to that effect. Often it is implicit in a decision changing the common law, because that changed law is applied to antecedent facts without any comment. In *John v Commissioner of Taxation of the Commonwealth of Australia* (1989) 166 CLR 417 Brennan J at 450-451 doubted the jurisdiction to overrule past decisions prospectively. In *Esso Australia Resources Limited v Commissioner of Taxation of the Commonwealth of Australia* [1999] HCA 67; (1999) 201 CLR 49 Callinan J referred to some of the issues that arise when the law is changed by a court with retrospective effect. He said at [164]:

[164] ... If the proposition that judges do not change the law is to be acknowledged as a fiction, then something may have to be done to displace the effect of the other legal fiction, that the law as found by the Court has always been so, and those who may have acted upon a different understanding in the past are nonetheless bound by the

Court's most recent exposition of the law. Merely to state the problems is to expose the difference between the legislative and curial roles. Certainty, predictability, the desirability of a gradual and incremental development of the common law only, and respect for the knowledge, wisdom and experience of those who made the earlier decision are very important considerations. The last of these matters will always however invite the question whether those who made the decision under challenge themselves paid due deference to those who in the past held a different opinion.

It is clear that his Honour considered that if the common law was changed then, in according with current doctrine, it changed with retrospective effect.

90 The question of limiting a change in the law so that it operates prospectively only was considered at some length by their Lordships in the House of Lords in *In re Spectrum Plus Ltd (In Liquidation)* [2005] UKHL 41; [2005] 2 AC 680. There is no need for me to summarise all of the observations by their Lordships, because I consider that only the High Court could act on the submission made by Mr Muscat on this point. This is not a matter for an intermediate court of appeal. In *Spectrum* their Lordships were concerned with the interpretation of statutes, but I see no reason to distinguish as a matter of substance between this matter and changes to the common law. Lord Nicholls considered that prospective overruling of previous decisions lay within the power of their Lordships:

[39] The objections in principle and difficulties in practice mentioned above have substance, particularly in respect of the traditional interpretation of statutes. These objections are compelling pointers to what should be the normal reach of the judicial process. But, even in respect of statute law, they do not lead to the conclusion that prospective overruling can never be justified as a proper exercise of judicial power. In this country the established practice of judicial precedent derives from the common law. Constitutionally the judges have power to modify this practice.

[40] Instances where this power has been used in courts elsewhere suggest there could be circumstances in this country where prospective overruling would be necessary to serve the underlying objective of the courts of this country: to administer justice fairly and in accordance with the law. There could be cases where a decision on an issue of law, whether common law or statute law, was unavoidable but the decision would have such gravely unfair and disruptive consequences for past transactions or happenings that this House would be compelled to depart from the normal principles relating to the retrospective and prospective effect of court decisions.

[41] If, altogether exceptionally, the House as the country's supreme court were to follow this course I would not regard it as trespassing outside the functions properly to be discharged by the judiciary under this country's constitution. Rigidity in the operation of a legal system is a sign of weakness, not strength. It deprives a legal system of necessary elasticity. Far from achieving a constitutionally exemplary result, it can produce a legal system unable to function effectively in changing times. "Never say never" is a wise judicial precept, in the interest of all citizens of the country.

Those who appear to have agreed with him were Lord Hope at [74], Lord Walker at [161] and Baroness Hale at [162]. A more cautious view was taken by Lord Steyn at [45], Lord Scott at [126] and Lord Brown at [165].

91 My conclusion is that this Court must apply the statements made by members of the High Court in *The Queen v L*, even though they are not strictly binding, because they were not necessary for the decision of the matter before the Court. It is not for this Court to decide that a court can and should change the common law with prospective effect only. As the discussion by their Lordships in *Spectrum* indicates, to so decide would be to make a major change to the role of the courts in Australia charged with the development of the common law.

### **Conclusion**

92 I have dealt with the submissions advanced by the parties. I have not found it necessary to refer specifically to the submissions by the Director. My rejection of the submissions advanced by Mr Muscat reflects the submissions advanced by Mr Hinton for the Director.

93 I would answer the reserved question as follows: The defendant is liable at law to be found guilty of the offences of rape charged in count 3 and count 5 of the Information, notwithstanding that at the time of the alleged offence he was married to the alleged victim and was cohabiting with her, the marriage giving rise to no presumption of consent on her part to intercourse with her husband, and giving rise to no irrebuttable presumption to that effect.

## GRAY J:

### Introduction

94 On 7 July 2010, a question of law was reserved for the consideration of the Full Court by a District Court Judge in a criminal proceeding antecedent to trial.

95 In accordance with the practice of the Court, the Judge prepared a case stated. That case stated is relevantly in the following terms:

[P,GA] the defendant is charged on Information dated 5 July 2010. ...

The trial of the defendant was scheduled to commence in the District Court of South Australia on 5 July 2010. ...

On 5 and 6 July 2010, prior to the commencement of the defendant's trial, I heard an application by the defendant for a permanent stay of the proceedings on the ground that they constituted an abuse of process. On 6 July 2010 I dismissed that application.<sup>1</sup>

The defendant also made an alternative application that if the proceedings were not permanently stayed as an abuse of process, that the proceedings on Counts 3 and 5 of the Information be permanently stayed as they were foredoomed to failure. The defendant alternatively sought an order quashing Counts 3 and 5 on the ground that they did not charge an offence known to the law.

Counts 3 and 5 of the Information charge the defendant with allegedly committing offences of rape in 1963, contrary to section 48 of the *Criminal Law Consolidation Act, 1935* (SA).

Counts 3 and 5 of the Information allege the offences involved non-consensual penile-vaginal sexual intercourse.

The alleged victim of the offences charged in Counts 3 and 5 of the Information is [P,G].

The defendant and [P,G] were lawfully married in South Australia on 1 September 1962.

At the time of the alleged commission of the offences charged in Counts 3 and 5 of the Information, the defendant and [P,G] were lawfully married and were cohabiting as husband and wife at the home of [P,G]'s parents.

At the time of the alleged commission of the offences charged in Counts 3 and 5 of the Information there were no legal orders or undertakings of any kind in existence which affected the marital relationship between the defendant and [P,G].

The defendant submits that in the circumstances outlined above, he could not, as a matter of law, be properly convicted of the offences charged in Counts 3 and 5 of the Information.

---

<sup>1</sup> The District Court Judge reserved to the defendant the right to re-agitate the stay application following the determination of the question of law reserved.

On 5 July 2010 the Director of Public Prosecutions applied through the prosecutor for the reservation of a question of law for the consideration and determination of the Full Court.

I now reserve for the consideration and determination of the Full Court the following question of law:

**Was the offence of rape by one lawful spouse of another, in the circumstances as outlined above, an offence known to the law of South Australia as at 1963?**

96 The case according to its terms was stated pursuant to section 350(2)(b) of the *Criminal Law Consolidation Act 1935* (SA). That section relevantly provides:

(1) In this section—

*relevant question* means a question of law . . . .

(2) A court by which a person has been, is being or is to be tried or sentenced for an indictable offence may reserve for consideration and determination by the Full Court a relevant question on an issue—

(a) antecedent to trial; or

(b) relevant to the trial or sentencing of the defendant,

and the court may (if necessary) stay the proceedings until the question has been determined by the Full Court.

...

97 Important issues arise for determination.<sup>2</sup>

98 In the year 2010, the suggestion that a man who rapes his wife could avail himself of a defence as a consequence of a presumption of irrevocable consent to sexual intercourse in marriage, is repugnant. It is difficult to understand how such a view could ever have been held. In 2010 it is accepted that marriage ought to be a relationship of trust and respect, not one of abuse. The law recognises that rape may occur within the marriage relationship. It is understood that rape within marriage is no less reprehensible for having occurred in a relationship where sexual intimacy has previously been consented to. Indeed, it is recognised that rape within marriage may involve an abuse of trust and emotions in addition to the act of physical abuse, emphasising the particularly serious nature of such abuse. In these reasons I do not resile in any way from these observations and from the understanding that rape in any circumstance is deplorable.

---

<sup>2</sup> The issue of the presumption of consent and rape in marriage has been the subject of some commentary. See for example, S Kift, 'That All Rape is Rape Even if not by a Stranger' (1995) 4 *Griffith Law Review* 60; G Geis, 'Rape-in-Marriage: Law and Law Reform in England, the United States, and Sweden' (1978) 16 *The Adelaide Law Review* 284.

99           However, the issue of law to be determined in the within proceedings is whether the defendant, charged with the offence of the rape of his wife alleged to have occurred almost 50 years ago, is entitled to be tried according to the substantive law applicable at the time.

100           In 1963 it was still the common law, recognised and applied in South Australia, that a man could not commit the offence of rape of his wife. This issue is addressed in detail later in these reasons. The common law with respect to rape in marriage was the subject of legislative abolition in 1976. Subsequent to 1976, the presumption that marriage of itself denotes consent to sexual intercourse, no longer existed. However prior to that time, that presumption would have offered a defence to the defendant in the within proceedings. His conduct in 1963 was, at that time, lawful.

101           Traditionally, a fundamental principle of most legal systems is that the legal consequences of situations should be judged according to the law in force at the time. This is part of a wider principle that people should be judged by their contemporaries and by contemporary standards and beliefs, rather than many years later by people with perhaps very different standards and beliefs.<sup>3</sup>

102           The defence submits that it is the defendant's legal right to be tried according to the substantive law at the time of the alleged offending. On the defence case, the defendant's alleged conduct at the time was lawful and not criminal. Had he been tried in the years immediately following the alleged conduct, he would have been acquitted. The defence claims further injustice in that at the time of the alleged conduct, it was necessary for criminal proceedings to be commenced within three years of the time of the alleged conduct.<sup>4</sup> That did not occur.

103           The Director of Public Prosecutions contends that the defendant committed the crimes of rape, that no statute of limitation now operates, and that the defendant should be held to account for his criminal conduct notwithstanding that it occurred almost 50 years ago. Put another way, the prosecution contend that the defendant's conduct should be addressed by reference to the applicable law as retrospectively determined and that on this approach the alleged conduct of the defendant, if proved, would lead to convictions.

104           It was the prosecution case that the defendant should not escape this consequence because of outdated, outmoded and long-rejected views about the subservience of married women. This is to be contrasted with the defence position that it is a basic human right that a person should not face imprisonment

---

<sup>3</sup> Drawn from the comments of Lord Rodger, 'A Time for Everything Under the Law: Some Reflections on Retrospectivity' (2005) 121 *Law Quarterly Review* 57 at 63.

<sup>4</sup> *Criminal Law Consolidation Act 1935* (SA) section 76(a)(1) provided: "No information shall be laid for any offence specified in subsection (3) of this section more than three years after the commission of offence.

with respect to conduct that was legal when undertaken.<sup>5</sup> The gross tension between these two positions has given rise to the reservation of the question of law for the determination of this Court.

### **The District Court Proceeding**

105 The information filed in the District Court by the Director of Public Prosecutions with respect to the Criminal Sessions commencing on 5 July 2010 relevantly charged the defendant with a number of offences including the following two counts of rape:

#### Third Count

##### Statement of Offence

Rape. (Section 48 of the Criminal Law Consolidation Act, 1935).

##### Particulars of Offence

[P,GA] between the 22nd day of March 1963 and the 25th day of March 1963 at Largs Bay, had vaginal sexual intercourse with [P,G], without her consent.

...

#### Fifth Count

##### Statement of Offence

Rape. (Section 48 of the Criminal Law Consolidation Act, 1935).

##### Particulars of Offence

[P,GA] on or about the 14th day of April 1963 at Largs Bay, had vaginal sexual intercourse with [P,G], without her consent.

106 In 1963, rape was a common law offence in South Australia. Section 48 of the *Criminal Law Consolidation Act* provided:

Any person convicted of rape should be guilty of a felony, and liable to be imprisoned for life and may be whipped.

Whether or not a person had committed the offence of rape was determined at that time in accordance with the common law.

107 In 1963, criminal proceedings alleging an offence against section 48 of the *Criminal Law Consolidation Act* were subject to a limitation period whereby those proceedings had to be commenced within three years of the date of the

---

<sup>5</sup> See Article 7, Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (commonly referred to as the European Charter of Human Rights).

alleged offence.<sup>6</sup> It follows that had proceedings been commenced in the 1960s against the defendant for the offence of rape, they would have had to commence in the case of the third count, by March 1966 and in the case of the fifth count, by no later than April 1966. However, a statutory removal of the time limit relating to such proceedings means that persons previously immune to prosecution because of the limitation period can now be convicted.<sup>7</sup> As noted earlier, the proceedings with respect to these two counts were not commenced until 2010, nearly 50 years after the offences are alleged to have occurred.

## Historical Survey

### *The Common Law*

108 The determination of the question reserved requires a consideration of the common law and the statutory interventions since 1963. I turn now to consider these matters.

109 In South Australia there is no known reported case dealing specifically with the issue of marital rape until the decision in *Wozniak & Pendry* in 1977.<sup>8</sup> A reason for this might lie in the decision of prosecuting authorities not to lay charges where no crime had been committed, and so the absence of authority may simply be a reflection of what was understood to be the common law at the time. However, *dicta* in a number of authorities has addressed the issue.

110 The decision of *Brown*<sup>9</sup> in this Court in 1975 involved a consideration of the elements of the offence of rape at common law. Bray CJ, after referring to the *actus reus* of rape as being “unlawful sexual intercourse”, noted:<sup>10</sup>

I suppose the inclusion of the word "unlawful" in the definition just given is meant to exclude intercourse between spouses and, I assume without deciding, that the necessary mens rea must include an intention by the accused to have intercourse with a woman whom he knows not to be his wife. ...

111 When discussing the *mens rea* in relation to the crime of rape, Bray CJ relied upon the propositions stated by Hale, in *Pleas of the Crown*:

It has long been the law that mens rea or a guilty mind is an essential element of criminal liability unless the requirement is expressly or impliedly dispensed with. It is idle to

---

<sup>6</sup> See *Criminal Law Consolidation Act 1935* (SA) section 76(a)(1).

<sup>7</sup> The *Criminal Law Consolidation (Abolition of Time Limit for Prosecution of Certain Sexual Offences) Amendment Act 2003* (SA) enacted section 72A of the *Criminal Law Consolidation Act 1935* (SA), which provides:

Any immunity from prosecution arising because of the time limit imposed by the former section 76a is abolished.

[Footnote omitted]

<sup>8</sup> *R v Wozniak & Pendry* (1977) 16 SASR 67.

<sup>9</sup> *R v Brown* (1975) 10 SASR 139.

<sup>10</sup> *R v Brown* (1975) 10 SASR 139 at 141.

marshal authority for so fundamental a proposition. I will content myself with a quotation from *Hale, Pleas of the Crown*, vol. 1, p. 14:

The consent of the will is that, which renders human actions either commendable or culpable; as where there is no law, there is no transgression, so regularly where there is no will to commit an offence, there can be no transgression, or just reason to incur the penalty or sanction of the law instituted for the punishment of crimes or offences.

112 In *Brown*, Wells J also made observations in relation to the elements of the offence of rape at common law:<sup>11</sup>

There can be no doubt that rape has, since time immemorial, been classified in the English common law as a major felony. The incidence of rape has always been one of the chief concerns of law enforcement all over the world, and in Australia, in particular. Its principal characteristics are well known: to be guilty of rape it must be shown, at least, that the accused had carnal knowledge of a female other than his lawfully wedded wife, without her consent, by force, fear or fraud. ...

113 In *Wozniak & Pendry* Bray CJ made the following further remarks relevant to the issue of rape in marriage:<sup>12</sup>

...Suppose, in the days before a husband could rape his wife, a man has intercourse, say in the dark, with a woman, believing and, indeed, knowing that she is not consenting but also believing that she is his wife. In fact he has mistaken her identity. She is not his wife. He has, it seems to me, the *mens rea*, but he can escape under the plea of mistake if the belief that she was his wife was a reasonable one. ...

This decision followed the 1976 statutory amendments to the definition of rape.

114 These *dicta* would suggest that both Bray CJ and Wells J were of the view that at common law, a husband could not be guilty of the rape of his wife.

115 King CJ in *Sherrin (No 2)*,<sup>13</sup> after noting that section 48 of the *Criminal Law Consolidation Act* was amended in 1976 to provide for a definition of rape, observed:<sup>14</sup>

The learned trial Judge did not direct the jury as to the elements of the crime in the language of the section. He began his direction on this aspect as follows: "So ladies and gentlemen, as you have heard, rape is unlawful sexual intercourse of a female by a male without the girl's consent. It has got to be unlawful in the sense there is no justification for it such as marriage." After defining sexual intercourse and explaining the meaning of consent he went on to deal with the mental element. It will be seen that the learned trial Judge clearly conveyed to the jury that there must be sexual intercourse with the alleged victim without her consent. He stipulated that the sexual intercourse must be unlawful and explained this as meaning that there must be "no justification for it such as marriage". The section does not make unlawfulness of the sexual intercourse an element of the crime of rape as it undoubtedly was at common law. The reason is no doubt to be found in sub-

<sup>11</sup> *R v Brown* (1975) 10 SASR 139 at 153.

<sup>12</sup> *R v Wozniak & Pendry* (1977) 16 SASR 67 at 71.

<sup>13</sup> *R v Sherrin (No 2)* (1979) 21 SASR 250.

<sup>14</sup> *R v Sherrin (No 2)* (1979) 21 SASR 250 at 252.

s. (3) of s. 73 of the Act, which was introduced into the principal Act by the same amending Act as introduced sub-s (1) of s 48 (see *Criminal Law Consolidation Act Amendment Act, 1976*, ss. 4 and 12). Section 73(3) reads as follows:

No person shall, by reason only of the fact that he is married to some other person, be presumed to have consented to sexual intercourse with that other person.

I think that by virtue of the statutory definition in s. 48(1), read together with the provisions of s. 73(3), unlawfulness of the sexual intercourse in the sense used in the familiar common law definition has ceased to be an element of the crime of rape. ...

These remarks demonstrate that King CJ understood that the common law applicable in South Australia prior to the 1976 legislative amendments did not allow for rape in marriage.

116 This view appears to have been shared by other common law jurisdictions in Australia. In 1982 in *McMinn*,<sup>15</sup> Starke ACJ of the Victorian Supreme Court made the following observations with respect to rape in marriage:<sup>16</sup>

There can be no doubt that for centuries the law in England (and in Australia) has been that a man cannot rape his wife. That this principle of law is out of tune with modern thinking has been recognized in Victoria by the *Crimes (Sexual Offences) Act 1980* and there are similar Acts in other States. However, the Victorian Act did not come into operation until 1 March 1981 and accordingly had no application to this case.

The principle stems back to a passage in *Hale's Pleas of the Crown*, vol. 1, p. 629: "by their mutual matrimonial consent and contract the wife hath given up herself in this kind to her husband, which she cannot retract."

117 Crockett J in the same authority referred to *Hale's Pleas of the Crown* with respect to a husband's marital right to sexual intercourse with his wife, before observing:<sup>17</sup>

It is plain that if such an obligation exists today (which, in the circumstances hereinafter referred to, I am prepared to assume without deciding) then it does so only whilst ordinary relations subsist between the parties. ...

After noting that there were no Australian authorities on point, Crockett J reviewed the English authorities with respect to what facts would serve to terminate the obligation of irrevocable consent supposedly resting upon the wife. Crockett J pointed out that the Victorian Parliament had legislated to do away with the presumption of consent in circumstances where a married person was living separately and apart from their spouse, and observed:<sup>18</sup>

These legislative provisions render it unnecessary to consider whether the venerable rubric of the common law should no longer be held to be part of the law of this State. Accordingly, I assume for the purpose of determining the present application that it is but

<sup>15</sup> *R v McMinn* [1982] VR 53.

<sup>16</sup> *R v McMinn* [1982] VR 53 at 55.

<sup>17</sup> *R v McMinn* [1982] VR 53 at 57.

<sup>18</sup> *R v McMinn* [1982] VR 53 at 59.

that appropriate legal process (at the least) can afford proof of the revocation of the wife's implied consent.

118 McGarvie J similarly referred to *Hale's Pleas of the Crown* and the relevant English authorities, observing:<sup>19</sup>

That principle runs oddly counter to modern notions of marriage. There does not seem to have been any recent case in which it was considered whether the principle remains part of the common law. In many cases in Victoria it will no longer operate because of s. 62(2) of the *Crimes Act 1958* as amended by the *Crimes (Sexual Offences) Act 1980*. It is not necessary in this case to examine the validity of the principle.

119 Although the members of the Court in *McMinn* considered it unnecessary to explore the continuing existence of the common law principle with respect to rape in marriage, it is apparent that the members were of the view that the principle did form part of the common law at an earlier time.

120 In New South Wales, in the matter of *C*,<sup>20</sup> O'Brien CJ adopted the seminal statement from *Hale's Pleas of the Crown* before observing:<sup>21</sup>

...The law in New South Wales, as in England, is that set out in *Steele* (1977) 65 Cr. App. R. 22. In that case the Court of Appeal commenced with an affirmation that, as a general principle, there is no doubt that a husband cannot be guilty of rape upon his wife. ...

O'Brien CJ went on to set out the following observations of Lord Lane CJ from the English Court of Appeal in *Steele*:<sup>22</sup>

The question which the Court has to decide is this. Have the parties made it clear, by agreement between themselves, or has the Court made it clear by an order or something equivalent to an order, that the wife's consent to sexual intercourse with her husband implicit in the act of marriage, no longer exists? A separation agreement with a non-cohabitation clause, a decree of divorce, a decree of judicial separation, a separation order in the justices' court containing a non-cohabitation clause and an injunction restraining the husband from molesting the wife or having sexual intercourse with her are all obvious cases in which the wife's consent would be successfully revoked. On the other hand, the mere filing of a petition for divorce would clearly not be enough, the mere issue of proceedings leading up to a magistrate's separation order or the mere issue of proceedings as a preliminary to apply for an ex parte injunction to restrain the husband would not be enough but the granting of an injunction to restrain the husband would be enough because the Court is making an order wholly inconsistent with the wife's consent and an order, breach of which would or might result in the husband being punished by imprisonment.

What then of the undertaking in lieu of an injunction? It is, in the judgment of this Court, the equivalent of an injunction. It is given to avoid, amongst other things, the stigma of an injunction. Breach of it is enforceable by the Court and may result in imprisonment. It is, in effect equivalent to the granting of an injunction. Indeed, whether one considers this as equivalent to the order of the Court or the equivalent of an agreement between the parties,

<sup>19</sup> *R v McMinn* [1982] VR 53 at 61.

<sup>20</sup> *R v C* (1981) 3 A Crim R 146.

<sup>21</sup> *R v C* (1981) 3 A Crim R 146 at 148.

<sup>22</sup> *R v C* (1981) 3 A Crim R 146 at 149-150 adopting the observations in *R v Steele* (1977) 65 Cr App R 22.

it does not matter. It may indeed have aspects of both. The effect is to eliminate the wife's matrimonial consent to intercourse. That is the judgment of the Court on that first point. Therefore, there is no bar to this man being found guilty of rape if the other ingredients of the offence are successfully proved by the prosecution.

O'Brien CJ noted that "[t]he law in New South Wales corresponds...with that pronouncement".<sup>23</sup>

121 It is apparent that the position in New South Wales, as in Victoria, was premised on a presumption of consent in marriage which, absent revocation of that consent in the manner outlined, meant that a husband could not be found guilty of the rape of his wife.

122 The position in England was to the same effect. As earlier referred to in the context of the Australian developments of the common law, the statement of the common law position was for many years that stated in *Hale's Pleas of the Crown*:<sup>24</sup>

That the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind to her husband which she cannot retract.

This pronouncement of the common law was accepted as sound by a majority of the judges in *Clarence*<sup>25</sup> in 1889. However the comments in that decision were *obiter* as the matter did not involve a charge of rape.

123 There appear to be no reported cases in England between 1736 and 1948, dealing with the issue of whether a husband could be prosecuted for raping his wife.<sup>26</sup> As earlier noted with respect to the position in South Australia, a reason for this might be that prosecuting authorities did not lay charges where no crime had been committed.

124 In 1949, in the decision of *Clarke*,<sup>27</sup> the issue of revocation of a wife's consent to sexual intercourse was under consideration. Byrne J held that the husband's immunity from prosecution was lost where the justices had made an order providing that the wife should no longer be bound to cohabit<sup>28</sup> with the defendant in that case. In the course of his reasons, Byrne J observed:<sup>29</sup>

<sup>23</sup> *R v C* (1981) 3 A Crim R 146 at 150.

<sup>24</sup> Sir Matthew Hale, *History of the Pleas of the Crown*, 1<sup>st</sup> ed (1736) Vol.1, Ch.58, at 629.

<sup>25</sup> *R v Clarence* (1889) LR 22 QBD 23.

<sup>26</sup> *R v Miller* [1954] 2 QB 282 at 286 (Lynskey J).

<sup>27</sup> *R v Clarke* [1949] 2 All ER 448.

<sup>28</sup> In that case "cohabit" relevantly meant intercourse. As Byrne J observed in *R v Clarke* [1949] 2 All ER 448 at 448:

...and by "cohabitation," as I understand it, is meant intercourse when the parties have begun to live together again, or intercourse although they are not living under the same roof. In this case at the material time the wife had not resumed cohabitation. The position, therefore, was that the wife, by process of law, namely, by marriage, had given consent to the husband to exercise the marital right during such time as the ordinary relations created by the marriage contract subsisted between them,

As a general proposition it can be stated that a husband cannot be guilty of rape of his wife. No doubt, the reason for that is that on marriage the wife consents to the husband's exercising the marital right of intercourse during such time as the ordinary relations created by the marriage contract subsist between them.

125 In 1954 in the matter of *Miller*,<sup>30</sup> Lynskey J ruled that the general proposition that a husband could not be guilty of the rape of his wife was correct, and directed a jury to find an accused husband not guilty of rape. It is to be noted that in that case, the wife had, before the act of intercourse, presented a petition for divorce. That petition had not reached the stage of a *decree nisi* and was not considered sufficient to revoke consent.

126 In 1974 in *O'Brien*,<sup>31</sup> Park J confirmed the common law position but held that a *decree nisi* effectively terminated the marriage and upon its pronouncement, the consent to marital intercourse given by a wife at the time of marriage, was revoked. Park J observed:<sup>32</sup>

Between the pronouncement of a decree nisi and the obtaining of a decree absolute a marriage subsists as a mere technicality. There can be no question that by a decree nisi a wife's implied consent to marital intercourse is revoked. Accordingly, a husband commits the offence of rape if he has sexual intercourse with her thereafter without her consent.

127 In 1976, in *Cogan & Leak*<sup>33</sup> the Court of Appeal stated that a man could not, by his own physical act, rape his wife during cohabitation. That same year, in *Steele*<sup>34</sup> the Court of Appeal again reaffirmed the general proposition that a husband could not, by his own physical act, rape his wife during cohabitation, however held that where a husband and wife were living apart and there was in existence an undertaking given by the husband to the court not to molest his wife, the wife's implied consent to sexual intercourse was eliminated.

128 In 1986 in the decision of *Roberts*,<sup>35</sup> the Court of Appeal confirmed that the law was as stated in *Steele*,<sup>36</sup> and that the wife's implied consent had been terminated when the husband was restrained from molesting or going near his wife.

129 In 1988, in *Kowalski*,<sup>37</sup> the general position that a husband could not rape his wife during cohabitation was again confirmed by the Court of Appeal.

---

but by a further process of law, namely, the justices' order, her consent to marital intercourse was revoked.

<sup>29</sup> *R v Clarke* [1949] 2 All ER 448 at 448.

<sup>30</sup> *R v Miller* [1954] 2 QB 282 at 285-286, 289-290.

<sup>31</sup> *R v O'Brien* [1974] 3 All E R 663.

<sup>32</sup> *R v O'Brien* [1974] 3 All ER 663 at 665.

<sup>33</sup> *R v Cogan & Leak* [1976] 1 QB 217 at 223.

<sup>34</sup> *R v Steele* (1977) 65 Cr App R 22.

<sup>35</sup> *R v Roberts* [1986] Crim L R 122.

<sup>36</sup> *R v Steele* (1977) 65 Cr App R 22.

<sup>37</sup> *R v Kowalski* (1988) 86 Cr App R 339.

130 In 1992, the issue of whether a wife was deemed to have consented irrevocably to sexual intercourse on marriage and therefore a husband could not be convicted of the rape of his wife, was finally resolved in England. In *R*<sup>38</sup> the House of Lords confirmed the decision of the Court of Appeal in that case, that such a rule was no longer a rule of the common law. In the Court of Appeal, the following observations were made by Lord Lane CJ:<sup>39</sup>

Ever since the decision of Byrne J. in *Rex v. Clarke* [1949] 2 All E.R. 448, courts have been paying lip service to the Hale proposition, whilst at the same time increasing the number of exceptions, the number of situations to which it does not apply. This is a legitimate use of the flexibility of the common law which can and should adapt itself to changing social attitudes.

There comes a time when the changes are so great that it is no longer enough to create further exceptions restricting the effect of the proposition, a time when the proposition itself requires examination to see whether its terms are in accord with what is generally regarded today as acceptable behaviour.

...

It seems to us that where the common law rule no longer even remotely represents what is the true position of a wife in present day society, the duty of the court is to take steps to alter the rule if it can legitimately do so in the light of any relevant Parliamentary enactment. ...

131 In the House of Lords, Lord Keith of Kinkel made the following pertinent observations in relation to Hale's proposition:<sup>40</sup>

For over 150 years after the publication of Hale's work there appears to have been no reported case in which judicial consideration was given to his proposition. The first such case was *Reg. v. Clarence* (1888) 22 Q.B.D. 23, to which I shall refer later. It may be taken that the proposition was generally regarded as an accurate statement of the common law of England. The common law is, however, capable of evolving in the light of changing social, economic and cultural developments. Hale's proposition reflected the state of affairs in these respects at the time it was enunciated. Since then the status of women, and particularly of married women, has changed out of all recognition in various ways which are very familiar and upon which it is unnecessary to go into detail. Apart from property matters and the availability of matrimonial remedies, one of the most important changes is that marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband. Hale's proposition involves that by marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happens to be feeling at the time. In modern times any reasonable person must regard that conception as quite unacceptable.

Lord Keith reviewed the authorities set out above before continuing:<sup>41</sup>

<sup>38</sup> *R v R* [1992] 1 AC 599. That decision was subject to further appeal at the European Court of Human Rights in Strasbourg on the grounds that it violated Article 7 of the European Charter of Human Rights, which prohibits retrospective changes to the criminal law. See *CR v United Kingdom; SW v United Kingdom* [1996] 1 Fam Law R 434.

<sup>39</sup> *R v R* [1992] 1 AC 599 at 610.

<sup>40</sup> *R v R* [1992] 1 AC 599 at 616.

The position then is that that part of Hale's proposition which asserts that a wife cannot retract the consent to sexual intercourse which she gives on marriage has been departed from in a series of decided cases. On grounds of principle there is no good reason why the whole proposition should not be held inapplicable in modern times. ...

132 This review of authority establishes that had the defendant been immediately charged with the offences of rape arising from the alleged incidents in March and April 1963, he would have been acquitted on the basis that the prosecution could not establish the element of the offence of lack of consent. Any prosecution would have been met with the presumption of law that the wife had consented to the alleged acts.

### *Statutory Intervention*

133 In March 1976 the Criminal Law and Penal Methods Reform Committee of South Australia reported to the Attorney-General upon the law relating to rape and other sexual offences. The Committee was chaired by Mitchell J.

134 In the report, the Committee considered whether the offence of rape should be extended to some cases to which it did not at that time apply, and in particular, whether a husband should be capable of being found guilty of the rape of his wife:<sup>42</sup>

The second class of persons which the committee has considered is that of husbands. **The principle at common law was that a husband could not be guilty of a rape upon his wife because the fact of marriage denoted consent to sexual intercourse.** The English Courts have held that if the wife has obtained an order for separation relieving her from the obligation to cohabit with her husband, the husband is guilty of rape if he has intercourse with her without her consent. The implied consent to sexual intercourse may be revoked by an agreement to separate but is not revoked merely by the filing of a petition for divorce. It is however revoked by a decree nisi, and a husband can be convicted of rape in respect of acts which occurred between the dates of the decree nisi and the decree absolute. Of course a husband who uses force upon his wife in order to compel her to have intercourse with him may be convicted of assault and, if the assault be a serious one, of the more serious offences of either assault occasioning actual bodily harm or assault occasioning grievous bodily harm. The offence of buggery having been subsumed in the offence of rape pursuant to the 1975 amendment to the Criminal Law Consolidation Act, 1935-1975, it is not clear whether a husband can be convicted of an offence of rape upon his wife where he has effected upon her penetration *per anum* without her consent and knowing that she does not consent. This question may arise for decision by the Court. We point out that the fact of marriage has never been understood as indicating a consent by the wife to the act of penetration *per anum* which, prior to the 1975 amendment, was an offence even where there was consent to the act. In any event we intend the recommendation which we make hereunder concerning rape by husbands to apply to rape in the meaning which it now bears in South Australia. The view that the consent to sexual intercourse given upon marriage cannot be revoked during the subsistence of the marriage is not in accord with modern thinking. In this community

<sup>41</sup> *R v R* [1992] 1 AC 599 at 621.

<sup>42</sup> Criminal Law and Penal Methods Reform Committee, *Special Report: Rape and Other Sexual Offences*, 1976, 13-15.

today it is anachronistic to suggest that a wife is bound to submit to intercourse with her husband whenever he wishes it irrespective of her own wishes. Nevertheless it is only in exceptional circumstances that the criminal law should invade the bedroom. To allow a prosecution for rape by a husband upon his wife with whom he is cohabiting might put a dangerous weapon into the hands of the vindictive wife and an additional strain upon the matrimonial relationship. The wife who is subjected to force in the husband's pursuit of sexual intercourse needs, in the first instance, the protection of the family law to enable her to leave her husband and live in peace apart from him, and not the protection of the criminal law. If she has already left him and is living apart from him and not under the same roof when he forces her to have sexual intercourse with him without her consent, then we can see no reason why he should not be liable to prosecution for rape. A fortiori if she has lived apart from him for 12 months and has instituted proceedings for divorce. If a husband breaks into the house in which his wife is living apart from him, overpowers her, and has sexual relations with her in circumstances in which he does not believe that she is consenting to intercourse, he should be liable to prosecution for rape. It should not be difficult to distinguish the circumstances in which a prosecution for rape is justified from those in which it is unjustified because the husband believes that the wife is consenting to sexual intercourse. The fact that the absence of a belief in consent may in many cases be difficult to establish, does not mean that the act should not amount to rape where absence of belief in consent is able to be proved. The committee recommends therefore an amendment to the law so that a husband may be convicted of rape of his wife where the parties are living apart and not under the same roof at the time that the act giving rise to the allegation of rape occurred.

[Emphasis added – footnotes omitted]

The Committee's formal recommendation with respect to rape by a husband was sated as follows:<sup>43</sup>

We recommend that a husband be indictable for rape upon his wife whenever the act alleged to constitute the rape was committed while the husband and wife were living apart and not under the same roof notwithstanding that it was committed during the marriage.

It is apparent that the commentary of the Committee accorded with the development of the common law in Australia and England to that point in time.

135 Subsequent to the recommendations, in 1976, the South Australian Parliament amended the *Criminal Law Consolidation Act*<sup>44</sup> by repealing the then section 73 and inserting in its place:

- (1) For the purpose of this Act, sexual intercourse is sufficiently proved by proof of penetration.
- (2) No person shall, by reason of his age, be presumed incapable of sexual intercourse.
- (3) No person shall, by reason only of the fact that he is married to some other person, be presumed to have consented to sexual intercourse with that other person.

<sup>43</sup> Criminal Law and Penal Methods Reform Committee, *Special Report: Rape and Other Sexual Offences*, 1976, 15 at [6.2.1].

<sup>44</sup> By the enactment of the *Criminal Law Consolidation Act Amendment Act 1976* (SA).

- (4) No person, by reason only of the fact that he is married to some other person, be presumed to have consented to an indecent assault by that other person.
- (5) Notwithstanding the foregoing provisions of this section, a person shall not be convicted of rape or indecent upon his spouse, or an attempt to commit, or assault with intent to commit, rape or indecent assault upon his spouse (except as an accessory) unless the alleged offence consisted of, was preceded or accompanied by, or was associated with –
- (a) assault occasioning actual bodily harm, or threat of such an assault, upon the spouse;
  - (b) an act of gross indecency, or threat of such an act, against the spouse;
  - (c) an act calculated seriously and substantially to humiliate the spouse, or threat of such an act;
- or
- (d) threat of the commission of a criminal act against any person.

136

As noted in the Second Reading speech:<sup>45</sup>

In brief, this Bill contains new provisions relating to rape and unlawful sexual intercourse, provides a definition of sexual intercourse, repeals various obsolete and repetitive provisions and strikes out all references to carnal knowledge, carnal connection, fornication, etc. The presumption that a boy under 14 years of age is incapable of sexual intercourse is abolished. **The presumption that marriage of itself denotes consent to sexual intercourse or an indecent assault is abolished.** This last provision, as members are no doubt aware, provides greater protection to a woman than do the recommendations of the Criminal Law and Penal Methods Reform Committee.

The Mitchell committee recommended that a husband be indictable for rape upon his wife whenever the act alleged to constitute the rape was committed while the husband and wife were living apart and not under the same roof notwithstanding that it was committed during the marriage.

The Government has decided, after thorough deliberations, to legislate so that marriage will not be a bar to the normal application of the law of rape. We feel – and the Mitchell committee points this out in the report – that it is anachronistic to suggest that a wife is bound to submit to intercourse with her husband whenever he wishes it, irrespective of her own wishes. If the Government were to accept the Mitchell committee's recommendation this anachronistic view would remain embodied in the law: the only wives who would have the protection of the law would be those who could afford to maintain a residence of their own.

As a Government, we are committed to a policy of equal rights and opportunity for all. In the light of this, we believe that all law which continues to treat a wife as the property of her husband, and marriage as a contract of ownership, should be abolished or amended. Every adult person must be given the right to consent to sexual intercourse both within and outside marriage. Marriage, and sexual relations within marriage, ought to be a matter of equality, sensitivity, care and responsibility. Indifference, force, reckless or

<sup>45</sup> South Australia, *Parliamentary Debates*, Legislative Council, 9 November 1976, 1942-1943.

even intentional sexual brutality should, of course, be no part of any relationship. But unfortunately they sometimes are, and at present a wife is virtually defenceless.

[Emphasis added]

137 The amending Act<sup>46</sup> was proclaimed on 9 December 1976 and was the first legislative reform of the common law relating to marital rape to occur both in Australia and other common law jurisdictions.<sup>47</sup>

138 In Western Australia, amendments were introduced in 1976, closely resembling the recommendations of the Mitchell Committee referred to earlier in these reasons.<sup>48</sup> In Victoria, similar amendments were introduced in 1981.<sup>49</sup> The common law presumption was abolished in New South Wales by statutory amendment, also in 1981,<sup>50</sup> as too the laws of the ACT in 1985,<sup>51</sup> in Tasmania 1987,<sup>52</sup> in Queensland in 1989,<sup>53</sup> and in the Northern Territory in 1994.<sup>54</sup>

---

<sup>46</sup> *Criminal Law Consolidation Act Amendment Act 1976* (SA).

<sup>47</sup> The *Criminal Code 1913* (WA) was also amended, with operation on exactly the same date as South Australia's amendments, to partially abolish the marital rape exemption: see Act No 133 of 1976 which amended section 325 of the *Criminal Code 1913* (WA).

<sup>48</sup> Section 325 of the *Criminal Code 1913* (WA) was amended by Act No 133 of 1976 to state:

Any person who has carnal knowledge of a woman or girl, not his wife, or of his wife whilst he is separated from her and they are not residing in the same residence, without her consent, or with her consent if the consent is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false and fraudulent representations as to the nature of the act or, in the case of a married woman, by personating the husband, is guilty of a crime which is called rape.

<sup>49</sup> See the legislative reform effected by the enactment of the *Crimes (Sexual Offences) Act 1980* (Vic) which repealed section 62 of the *Crimes Act 1958* (Vic), replacing it with section 62(2) which stated:

Where a married person is living separately and apart from his spouse the existence of the marriage shall not constitute, or raise any presumption of, consent by one to an act of sexual penetration with the other or to an indecent assault (with or without aggravating circumstances) by the other.

<sup>50</sup> The *Crimes Act 1900* (NSW) was amended by the *Crimes (Sexual Assault) Amendment Act 1981* (NSW) which came into operation on 14 July 1981. Section 61A(4) stated:

- (4) The fact that a person's marriage to a person –
- (a) upon whom an offence under section 61B, 61C or 61D is alleged to have been committed shall be no bar to the firstmentioned person being convicted of the offence; or
  - (b) upon whom an offence under any of those sections is alleged to have been attempted shall be no bar to the firstmentioned person being convicted of the attempt.

<sup>51</sup> By the *Crimes (Amendment) Ordinance (No.5) Act 1985* which came into operation on 28 November 1985 the *Crimes Act 1900* (NSW) in its application to the Australian Capital Territory was amended by including section 92R:

The fact that a person is married to a person upon whom an offence under section 92D [sexual intercourse without consent] is alleged to have been committed shall be no bar to the conviction of the first mentioned person for the offence.

That provision has subsequently been repealed.

<sup>52</sup> The *Criminal Code Act 1924* (Tas) was amended by the *Criminal Code Amendment (Sexual Offences) Act 1987* (Tas), which substituted section 185(1) with the following section:

Any person who has sexual intercourse with another person without that person's consent is guilty of a crime.

<sup>53</sup> Section 347 of the *Criminal Code Act 1899* (Qld) was repealed by the *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld) which came into operation 3 July 1989 and substituted it with the following section:

139 In Canada, the marital rape exemption was abolished in 1983<sup>55</sup> and in New Zealand, in 1985.<sup>56</sup> In 1994, the United Kingdom Parliament passed legislation which effectively removed the common law presumption.<sup>57</sup> However, as discussed above, the English Courts in 1991 had already effected the relevant change to the common law.<sup>58</sup>

### *The High Court of Australia – R v L*

140 In Australia, the issue of whether a man could be guilty of the rape of his wife was addressed by the High Court in 1991 in *L*,<sup>59</sup> where the Court discussed the common law position. Mason CJ, Deane and Toohey JJ observed:<sup>60</sup>

At the time of the passing of the Commonwealth Act, the Criminal Codes of Queensland, Western Australia and Tasmania contained in the definition of rape the words "not his wife"<sup>61</sup>. The non-Code States — New South Wales, Victoria and South Australia — had no comparable exclusion in their statutes dealing with rape<sup>62</sup>. But, as has been seen, the legislation of South Australia now makes special provision where a spouse is involved. The Court was told that, at the time of the passing of the Commonwealth Act, there had been no decision of a court of a non-Code State relating to any immunity on the part of a husband charged with raping his wife. But there had been decisions of the English courts which bore on the question.

---

Any person who has carnal knowledge of a female without her consent or with her consent if it is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false and fraudulent representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of a crime, which is called rape.

In the preceding paragraph 'married woman' includes a woman living with a man as his wife though not lawfully married to him and 'husband' has a corresponding meaning.

<sup>54</sup> The *Criminal Code Act 1983* (NT) was amended by the *Criminal Code Amendment Act (No.3) 1994* (NT) which came into operation on 1 June 1994 repealing section 192 and substituting it with a new section 192 which provided in subsection (3) that:

Any person who has sexual intercourse with another person without the consent of the other person, is guilty of a crime and is liable to imprisonment for life.

<sup>55</sup> In 1983 the Parliament of Canada amended the *Criminal Code* to abolish the marital exemption to the rape laws by an *Act to Amend the Criminal Code in Relation to Sexual Offences*. Chapter 125, section 246.8 of the *Criminal Code* stated:

A husband or wife may be charged with an offence under section 246.1 [sexual assault], 246.2 [sexual assault with a weapon, threats to a third party or causing bodily harm], or 246.3 [aggravated sexual assault] in respect of his or her spouse whether or not the spouses were living together at the time that the activity that forms the subject-matter of the charge occurred.

<sup>56</sup> The marital rape exemption was abolished in 1985 when the *Crimes Act 1961* (NZ) was amended by the *Rape Law Reform (No. 2) Act 1985* (NZ) which came into operation on 1 February 1986. Section 128(4) of the *Crimes Act 1961* (NZ) provided that:

A person may be convicted of sexual violation in respect of sexual connection with another person notwithstanding that those persons were married to each other at the time of that sexual connection.

<sup>57</sup> See the *Criminal Justice and Public Order Act 1994* (UK).

<sup>58</sup> *R v R* [1992] 1 AC 599.

<sup>59</sup> *R v L* (1991) 174 CLR 379.

<sup>60</sup> *R v L* (1991) 174 CLR 379 at 387.

<sup>61</sup> *Criminal Code* (Qld), section 347; *Criminal Code* (WA), section 325; *Criminal Code* (Tas), section 185.

<sup>62</sup> *Crimes Act 1900* (NSW), section 63; *Crimes Act 1958* (Vic), section 44; *Criminal Law Consolidation Act 1935* (SA), section 48.

The reference to “the passing of the Commonwealth Act” was to the *Family Law Act 1975* (Cth).

141 Their Honour’s reviewed a number of English authorities and concluded:<sup>63</sup>

...*Clarence's Case* makes it clear that there was no unanimity among the judges a century after Hale wrote. In *Reg. v. R.* the Court of Appeal rejected any rule of irrevocable consent as "anachronistic and offensive". Without endeavouring to resolve the development of the common law in this regard, **it is appropriate for this Court to reject the existence of such a rule as now part of the common law of Australia.**

[Emphasis added – footnote omitted]

Later in their reasons, their Honours observed:<sup>64</sup>

We are conscious [sic] of the restraints upon the development of the common law underlying decisions such as *State Government Insurance Commission v. Trigwell*, *Public Service Board of N.S.W. v. Osmond* and *Lamb v. Cotogno*. But the situation here is that the respondent invites the Court to give its support to a proposition which, in the terms contended for, does not have the backing of the common law for which he contends. It must be acknowledged that there is support for the proposition in some non-binding judicial statements and in some learned writings tracing back to Hale. But that support has been seriously undermined by the qualifications introduced by the various decisions to which reference has been made in this judgment. In any event, even if the respondent could, by reference to compelling early authority, support the proposition that is crucial to his case, namely, that by reason of marriage there is an irrevocable consent to sexual intercourse, this Court would be justified in refusing to accept a notion that is so out of keeping with the view society now takes of the relationship between the parties to a marriage. The notion is out of keeping also with recent changes in the criminal law of this country made by statute, which draw no distinction between a wife and other women in defining the offence of rape. **It is unnecessary for the Court to do more than to say that, if it was ever the common law that by marriage a wife gave irrevocable consent to sexual intercourse by her husband, it is no longer the common law.**

[Emphasis added – footnotes omitted]

142 Brennan J conducted a review of the common law authorities, concluding:<sup>65</sup>

Hale's reason for limiting a husband's liability for the crime of rape does not accord with the law of marriage. Nevertheless, the elements of the crime of rape were fixed in the light of Hale's mistaken reason so that the scope of the crime of rape at common law did not extend to acts of sexual intercourse between husband and wife. Hale's assertion that a husband could not be guilty (as a principal in the first degree) for rape of his wife was accepted as the common law. In *Reg. v. Bellchambers Neasey and Everett JJ.*, commenting on Hale's statement, said:

Despite a substantial degree of judicial criticism of this principle (for example, the views expressed nearly 100 years ago in parts of some of the dissenting judgments among those of the thirteen judges who comprised the Court of Crown Cases

<sup>63</sup> *R v L* (1991) 174 CLR 379 at 389.

<sup>64</sup> *R v L* (1991) 174 CLR 379 at 389-390.

<sup>65</sup> *R v L* (1991) 174 CLR 379 at 399-402.

Reserved in *Clarence*, it still expresses the common law, which may, however, as in Tasmania, be varied by statute.

That opinion accords with the decisions in other Australian jurisdictions.

...

Irrespective of the validity of Hale's reason for declaring that a husband could not be guilty as a principal in the first degree of rape of his wife, it appears that a substantive rule of the common law was established by his declaration. Thus Sir Samuel Griffith, in drafting his *Criminal Code* in accordance with his understanding of the common law, defined the relevant element of rape to be "carnal knowledge of a woman, not his wife". In common law jurisdictions, however, exceptions were judicially introduced to the substantive rule in cases where the ordinary relationship of husband and wife had been interrupted by the making of a decree nisi, or a separation order, or even by the spouses' making of a separation agreement on the ground that, in those situations, there was no deemed consent.

The House of Lords has held recently in *Reg. v. R.* that "in modern times the supposed marital exception in rape forms no part of the law of England". Their Lordships viewed this decision in the same way as Lord Lane C.J. had viewed it in the Court of Appeal (Criminal Division):

This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it.

In my respectful opinion, the common law fiction has always been offensive to human dignity and incompatible with the legal status of a spouse. However, a mere judicial repeal of the section would extend the liability for conviction of the crime of rape to cases which would be excluded from liability for conviction by s. 73(5) of the *Criminal Law Consolidation Act*.

[Footnotes omitted]

143 Brennan J addressed in further detail the South Australian 1976 amending legislation:<sup>66</sup>

In my respectful opinion, the common law fiction has always been offensive to human dignity and incompatible with the legal status of a spouse. However, a mere judicial repeal of the section would extend the liability for conviction of the crime of rape to cases which would be excluded from liability for conviction by s. 73(5) of the *Criminal Law Consolidation Act*.

It is not necessary to consider the present state of the common law in South Australia, for s. 73(3) of the Criminal Law Consolidation Act abolishes Hale's reason for investing the husband with immunity for marital rape and dispels Hale's misunderstanding of the effect of marriage upon a wife's consent to sexual intercourse. The common law fiction of consent has been statutorily removed. As the common law fiction found no resonance in the law which defined the nature and incidents of marriage, s. 73(3) does not affect the institution of marriage. Section 73(3) is wholly consistent with the law of marriage in that both deny that marriage carries with it the wife's irrevocable and general consent to acts

---

<sup>66</sup> *R v L* (1991) 174 CLR 379 at 402-403.

of sexual intercourse with her husband. The effect of s. 73(3) operating in conjunction with s. 48 of that Act is to extend the liability for conviction of the crime of rape to include cases of non-consensual sexual intercourse by a husband with his wife falling within s. 73(5). The protection of the criminal law of rape is thus extended to wives where the offence

consisted of, was preceded or accompanied by, or was associated with —

- (a) assault occasioning actual bodily harm, or threat of such an assault, on the spouse;
- (b) an act of gross indecency, or threat of such an act, against the spouse;
- (c) an act calculated seriously and substantially to humiliate the spouse, or threat of such an act; or
- (d) threat of the commission of a criminal act against any person (s. 73(5)).

144 The remaining member of the Court, Dawson J, concluded his view of the matter with the following statement:<sup>67</sup>

...It is, of course, unnecessary to express any opinion on the matter for the determination of this case. But I think that it is appropriate to say that, whatever may have been the position in the past, the institution of marriage in its present form provides no foundation for a presumption which has the effect of denying that consent to intercourse in marriage can, expressly or impliedly, be withdrawn. There being no longer any foundation for the presumption, it becomes nothing more than a fiction which forms no part of the common law.

145 The prosecution contended that the High Court decision in *L* should be interpreted as a declaration that the common law presumption of consent did not exist. It was further contended that this declaration of the common law operated retrospectively and not prospectively or with limited retrospectivity. Counsel for the defendant submitted that this was not the reach or effect of the decision in *L*, that the relevant observations in *L* were *dicta* and were carefully expressed so as not to amount to a declaration of the common law.

146 In my view, the majority of the High Court stopped well short of making a declaration with respect to the common law. In the passages referred to above, Mason, Deane and Toohey JJ spoke only of the position of the common law as at 1991, and in particular, rather than using words that amounted to a declaration, used an alternative expression:<sup>68</sup>

...it is unnecessary for the Court to do more than to say that, if it was ever the common law that by marriage a wife gave irrevocable consent to sexual intercourse by her husband, it is no longer the common law.

The order of the Court did not include any declaration.

<sup>67</sup> *R v L* (1991) 174 CLR 379 at 405.

<sup>68</sup> *R v L* (1991) 174 CLR 379 at 390.

147 The High Court in *L* was not dealing directly with the criminal law. It was concerned with a suggested inconsistency between the *Family Law Act* of the Commonwealth, and section 73(3) of the *Criminal Law Consolidation Act* of South Australia. That subsection formed part of the statute that abolished the common law of rape in South Australia. It does not appear that the full history of the law in South Australia, both common law and statute, was the subject of submissions before the Court. It does not appear that reference was made to the earlier referred to observations of Bray CJ and Wells J and King CJ. Further, it does not appear that any reference was made to the Mitchell Committee Report and recommendations, or to the second reading speeches that made it plain that the South Australian Parliament was setting out to abolish the common law presumption of consent.

148 As earlier noted, the members of the High Court stopped short of making any declaration in respect of the common law. When the Court spoke of the present state of the common law, it referred to the common law of Australia. This no doubt was in recognition of the fact that in South Australia, the crime of rape was no longer part of the common law but had been the subject of legislation.

149 The contention of the prosecution that the High Court in *L* had declared that the presumption of consent was never part of the common law gives rise to a number of difficulties. It would be an odd result for an aspect of the common law, which had been accepted by the Supreme Court and by a Law Reform Commission to exist and had been the subject of specific legislation to abolish and replace it with a statutory offence in circumstances where Parliament did not make the law retrospective, to be, two decades on, having been recognised and abolished, declared to have never existed.

150 It must be emphasised, as noted above, that the common law as it had been in 1963 in South Australia was abolished in 1976 by the relevant statutory amendment. The common law, once abolished by statute, ceased to exist. As observed by Lord Nicholls in *Holley*<sup>69</sup> when addressing a statutory alteration to common law provocation:<sup>70</sup>

The law of homicide is a highly sensitive and highly controversial area of the criminal law. In 1957 Parliament altered the common law relating to provocation and declared what the law on this subject should thenceforth be. In these circumstances it is not open to judges now to change ("develop") the common law and thereby depart from the law as declared by Parliament.

151 In the present matter, Parliament altered the common law relating to the presumption of consent and declared what the law on this subject should thenceforth be. It is not open to the judiciary to now change the common law by declaration or otherwise and thereby depart from the law as declared by

---

<sup>69</sup> *A-G v Holley* [2005] 2 AC 580.

<sup>70</sup> *A-G v Holley* [2005] 2 AC 580 at 593.

Parliament. The statutory enactment in 1976 in South Australia may explain the approach of the High Court in *L* in finding it unnecessary to resolve the development of the common law or the state of the common law at earlier times.

### In Summary

152 Having regard to the foregoing, the following would appear to be the position in South Australia:

- In 1963 a husband could not be guilty of the rape of his wife at common law.
- The 1976 statutory amendment abolished the common law of rape limiting the immunity from prosecution available to a husband.
- The common law, once abolished by statute, ceased to exist. This is highlighted by the earlier extracted observations of Lord Nicholls in *Holley*.<sup>71</sup>
- In 1991, Mason CJ, Deane and Toohey JJ in *L* were of the view that “[w]ithout endeavouring to resolve the development of the common law,” it was appropriate for the Court to “reject the existence of [the presumption of consent] as **now** part of the common law of Australia.”<sup>72</sup>
- Brennan J in *L* found it unnecessary to consider the present state of the common law as a consequence of the 1976 amendments.
- Dawson J in *L* considered that the modern institution of marriage provided no foundation for the presumption and as a consequence, the presumption had become nothing more than a fiction which formed no part of the common law.

153 In summary, at the time of the alleged offending in the present proceeding, the common law of rape applied in South Australia. At that time, the common law included a presumption of irrevocable consent on the part of a wife to sexual intercourse with her husband. Had the defendant been charged and tried in the years immediately following the alleged offending, the prosecution would have been unable to prove a lack of consent on the part of his wife because of that presumption. The common law in this respect was abolished in 1976. In my view, at his trial on the information presented in 2010, the defendant is entitled to have his conduct judged according to the law in force at the time of the alleged

<sup>71</sup> *A-G v Holley* [2005] 2 AC 580 at 593.

<sup>72</sup> *R v L* (1991) 174 CLR 379 at 389 (Mason CJ, Deane and Toohey JJ).

offending in 1963. That law included the presumption of consent. That is the law that should apply to the trial of the defendant.

### Prospective or Retrospective Determination

154 During the course of submissions on the hearing of the case stated, the prosecution contended, as noted above, that the High Court in *L* had declared that the common law of rape did not include a presumption of irrevocable consent on the part of a wife to sexual intercourse with her husband. This contention raised for consideration whether, if there had been such a declaration, it necessarily operated retrospectively, or whether the common law could be declared with partial retrospective or prospective effect.<sup>73</sup> My earlier conclusions make it unnecessary to resolve this question. However in the circumstance, the matter being fully argued, I propose to make some short observations on the topic.

155 The House of Lords considered the issue of common law prospective rulings in *Re Spectrum Plus Ltd (in liq)*.<sup>74</sup> The members of the House concluded that the Court did have the power to deliver rulings with prospective effect and with partial retrospective effect, instead of rulings that operated with unlimited retrospectivity. The decision involved a closely reasoned and detailed analysis of the power of the Court. For present purposes it is sufficient to provide the following extracts from the speeches of the members of the House.

156 In relation to the issue of prospective overruling, Lord Nicholls observed:<sup>75</sup>

People generally conduct their affairs on the basis of what they understand the law to be. This "retrospective" effect of a change in the law of this nature can therefore have disruptive and seemingly unfair consequences. "Prospective overruling", sometimes described as "non-retroactive overruling", is a judicial tool fashioned to mitigate these adverse consequences. It is a shorthand description for court rulings on points of law

---

<sup>73</sup> In addition to the authorities discussed in these reasons, this issue has been the subject of extensive academic commentary. See for example, S Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Sentencing' (2009) 99 *The Journal of Criminal Law & Criminology* 857; Lord Rodger, 'A Time for Everything Under the Law: Some Reflections on Retrospectivity' (2005) 121 *Law Quarterly Review* 57; The Hon A Mason, 'Legislative and Judicial Law-Making: Can We Locate an Identifiable Boundary?' (2003) 24 *Adelaide Law Review* 15; B Juratowitch, 'Questioning Prospective Overruling' [2007] *New Zealand Law Review* 393; D Sheehan & T Arvind, 'Prospective Overruling and the Fixed/Floating Charge Debate' (2006) 122 *Law Quarterly Review* 20; P Quint, 'The Border Guard Trials and the East German Past – Seven Arguments' (2000) 48 *The American Journal of Comparative Law* 541; The Hon A Mason, 'The Judge as Law-maker' (1996) 3 *James Cook University Law Review* 1; R Sackville, 'Why do Judges Make Law? Some Aspects of Judicial Law Making' (2001) 5 *University of Western Sydney Law Review* 59; A Nicol, 'Prospective Overruling: A New Device for English Courts?' (1976) 39 *Modern Law Review* 542; K Mason, 'Prospective Overruling' (1989) 63 *Australian Law Journal* 526; A Palmer & C Sampford, 'Judicial Retrospectivity in Australia' (1995) 4 *Griffith Law Review* 170; E Campbell, 'The Retrospectivity of Judicial Decisions and the Legality of Governmental Acts' (2003) 29 *Monash University Law Review* 49.

<sup>74</sup> *Re Spectrum Plus Ltd (in liq)* [2005] 2 AC 680.

<sup>75</sup> *Re Spectrum Plus Ltd (in liq)* [2005] 2 AC 680 at 690-691.

which, to greater or lesser extent, are designed not to have the normal retrospective effect of judicial decisions.

Prospective overruling takes several different forms. In its simplest form prospective overruling involves a court giving a ruling of the character sought by the bank in the present case. Prospective overruling of this simple or "pure" type has the effect that the court ruling has an exclusively prospective effect. The ruling applies only to transactions or happenings occurring after the date of the court decision. All transactions entered into, or events occurring, before that date continue to be governed by the law as it was conceived to be before the court gave its ruling.

Other forms of prospective overruling are more limited and "selective" in their departure from the normal effect of court decisions. The ruling in its operation may be prospective and, additionally, retrospective in its effect as between the parties to the case in which the ruling is given. Or the ruling may be prospective and, additionally, retrospective as between the parties in the case in which the ruling was given and also as between the parties in any other cases already pending before the courts. There are other variations on the same theme.

157 The following observations of Lord Nicholls are particularly apt:<sup>76</sup>

...[Blackstone's declaratory] is still valid when applied to cases where a previous decision is overruled as wrong when given. Most overruling occurs on this basis. These cases are to be contrasted with cases where the later decision represents a response to changes in social conditions and expectations. Then, on any view, the declaratory approach is inapt. In this context the declaratory approach has long been discarded. It is at odds with reality.

158 Lord Hope was unable to say that there would never be cases where the interests of justice might require the removal of the retrospective effect of a judgment, stating:<sup>77</sup>

...I would not rule out the possibility that in a wholly exceptional case the interests of justice may require the House, in the context of a dispute about the state of the common law or even about the meaning or effect of a statute, to declare that its decision is not to operate retrospectively. ...

159 Lord Scott agreed with Lord Nicholls about the appropriateness of prospective ruling in exceptional cases:<sup>78</sup>

...There is no doubt that it is one of the functions of judges in a common law country to try and develop the common law so that it serves the needs of the time. To that extent at least it is not controversial to say that judges make new law and it may be that in this area it would be open to the House to give a prospective ruling as to what the law would require of individuals in particular situations. ...

160 The approach taken in *Spectrum* has received favourable comment in other common law jurisdictions. In 2007 in *Canada (Attorney General) v Hislop*,<sup>79</sup> the

<sup>76</sup> *Re Spectrum Plus Ltd (in liq)* [2005] 2 AC 680 at 698.

<sup>77</sup> *Re Spectrum Plus Ltd (in liq)* [2005] 2 AC 680 at 710.

<sup>78</sup> *Re Spectrum Plus Ltd (in liq)* [2005] 2 AC 680 at 726.

<sup>79</sup> *Canada (Attorney General) v Hislop* [2007] 1 SCR 429, 2007 SCC 10.

Supreme Court of Canada considered the relevant principles concerning ruling prospectively in light of *Spectrum* and reviewed Supreme Court decisions in the United States of America. In the majority judgment of LeBel and Rothstein JJ, with McLachlin CJC and Binnie, Deschamps and Abella JJ concurring, it was noted that “[t]he Constitution empowers courts to issue constitutional remedies with *both* retroactive and prospective effects ...”.<sup>80</sup>

161 Their Honours considered Blackstone’s declaratory approach and situations in which it may be appropriate to issue prospective remedies:<sup>81</sup>

...the declaratory approach is derived from Blackstone's famous aphorism that judges do not create law but merely discover it. ... It reflects a traditional and widespread understanding of the role of the judiciary in a democratic state governed by strong principles of separation of powers between courts, legislatures and executives. In this perspective, courts grant retroactive relief applying existing law or rediscovered rules which are deemed to have always existed. On the other hand, legislators fashion new laws for the future.

Blackstone's declaratory approach has not remained unchallenged in modern law. Commentators and courts have pointed out that judges fulfil a legitimate law-making function. Judges do not merely declare law; they also make law. These critics argue that the Blackstone's view is a fiction as judges make law, especially in the common law world. .... They say such a fiction should not be turned into an ironclad principle.

However, this acknowledgement does not require abandoning Blackstone's declaratory approach altogether. The critique of the Blackstonian approach applies only to situations in which judges are fashioning new legal rules or principles and not when they are applying the existing law. In instances where courts apply pre-existing legal doctrine to a new set of facts, Blackstone's declaratory approach remains appropriate and remedies are necessarily retroactive. Because courts are adjudicative bodies that, in the usual course of things, are called upon to decide the legal consequences of past happenings, they generally grant remedies that are retroactive to the extent necessary to ensure that successful litigants will have the benefit of the ruling. ... There is, however, an important difference between saying that judicial decisions are *generally* retroactive and that they are *necessarily* retroactive. When the law changes through judicial intervention, courts operate outside of the Blackstonian paradigm. In those situations, it may be appropriate for the court to issue a prospective rather than retroactive remedy. The question then becomes what kind of change and which conditions will justify the crafting of judicial prospective remedies.

[References omitted]

162 In 2007 the New Zealand Supreme Court considered the issue in *Chamberlains v Lai*.<sup>82</sup> Tipping and Thomas JJ accepted that there was scope for prospective rulings. Tipping J observed:<sup>83</sup>

There is now a growing body of academic and judicial literature on the subject of what is generally called prospective overruling. That is convenient shorthand but I consider that

<sup>80</sup> *Canada (Attorney General) v Hislop* [2007] 1 SCR 429, 2007 SCC 10 at [81].

<sup>81</sup> *Canada (Attorney General) v Hislop* [2007] 1 SCR 429, 2007 SCC 10 at [84]-[86].

<sup>82</sup> *Chamberlains v Lai* [2007] 2 NZLR 7.

<sup>83</sup> *Chamberlains v Lai* [2007] 2 NZLR 7 at [134]-[135].

the subject is better understood when described as limiting the retrospective effect of judicial decisions. The House of Lords recently examined the subject in *In re Spectrum Plus Ltd (in liq)*. Professor Philip Joseph has done the same in an article in the New Zealand Law Review. Professor Joseph makes a number of forceful points in favour of the courts having an ability to overrule prospectively. I agree with him that there are difficulties with purely prospective overruling. An intermediate position between a fully prospective and a fully retrospective approach is likely to achieve the best reconciliation of all the competing issues. The pure version of prospective overruling applies the old law to the case in hand and to all other cases the facts of which pre-date the giving of judgment. The new law applies to all cases the facts of which occur after the overruling judgment is delivered. The pure approach therefore denies to the victor what would otherwise have been the fruits of victory. By contrast the partial version has the new law applying to the parties and perhaps to others who have already commenced proceedings, but not otherwise retrospectively.

A proper approach to this topic requires an appreciation of the realities of the role of the courts in our judicial system. Judges make law. They always have done: hence the expression “judge-made law”. The total body of law under which we live comprises law made by Parliament and law made by the judges. Parliament changes the law from time to time and so do the judges. It is inappropriate in a modern world to deny that judges can and do change the law. There is nothing constitutionally improper in their doing so. The expression judicial legislation is sometimes used pejoratively in this context, but that usage fails to understand that a large part of our law always has been and still is created by judges. In some circumstances that creation involves change; and whether there is change is often a matter of degree. The present issue concerns whether and how judicial changes to the law can be managed so as to avoid or at least mitigate, when necessary, the difficulties which arise from the retrospective effect of such changes. ...

[References omitted]

163 Tipping J further observed:<sup>84</sup>

Both our system of precedent and how we should handle the consequences of overruling earlier decisions are governed by the common law. There is no good reason why this aspect of the common law should be regarded as set in stone and uniquely incapable of modification and development. Nor do I consider that this Court should be deterred by allegations of excess of judicial power. The remedies which the courts give are almost uniformly of common law or equitable origin, albeit in some cases they have been amended or overlaid by statute. The ultimate task of any court is to do justice according to law in a manner which combines adherence to principle with an appropriate degree of pragmatism.

While I do not consider successful parties should usually be denied the fruits of their argument that the law should be changed, I do consider there may sometimes be cases where it would be wrong to extend the effect of a change to others who have legitimately ordered their affairs in reliance on the law being as earlier established. The retrospectivity issue will often be relevant to the earlier subject of whether the courts should leave a change to Parliament. The law must have the means to accommodate cases where, for whatever reason, it is not appropriate to do so, but where it would be unfair to citizens generally, or societally disruptive, to change the law with fully retrospective effect.

---

<sup>84</sup> *Chamberlains v Lai* [2007] 2 NZLR 7 at [139].

164 Before concluding his remarks on the subject, Tipping J referred to the suggestion of a possible “weaker” form of prospective overruling that may sometimes be appropriate.<sup>85</sup>

Rather than overruling an earlier decision, the court may simply not follow it. The rationale is that the earlier decision was correct at the time it was made and subsequently but, by reason of changed circumstances, is no longer correct and should thus not be followed, rather than that it should be overruled as erroneous from the beginning. This idea does not solve all problems but may provide another conceptual basis for addressing the difficult temporal issues which arise when a court decides that an existing rule should be changed.

165 Thomas J agreed with Tipping J that the Court should have the power to prospectively overrule, but that the case then before the Court did not warrant such a decision.<sup>86</sup>

I do not doubt that this Court should have the power to rule that, in exceptional cases, its decision is to have prospective effect only. Lord Nicholls has made a persuasive case for a final appellate court to possess such a power in *In re Spectrum Plus Ltd (in liq)*. I endorse what he has said. But I agree that there is nothing in this case so exceptional that the decision should have only prospective effect.

[References omitted]

166 The prosecution submitted that there was no ability of an Australian Court to make a declaration of a change in the common law with prospective effect or partial retrospective effect. It was said that any such change operated retrospectively. The prosecution relied on the decision of the High Court in *Ha*.<sup>87</sup> It is to be accepted that the observations of the Court in *Ha*<sup>88</sup> support the submission of the prosecution. However, that decision did not concern the common law, nor did it address the criminal law.

167 In my view, the decision in *Ha* has not closed off debate on the issue of prospective rulings. The observations of Sackville J in *Torrens Aloha v Citibank*<sup>89</sup> are pertinent. These observations pre-dated the decision of the House of Lords in *Spectrum*. Sackville J summarised the position in respect of judicial law making in the following terms:<sup>90</sup>

The appellant submitted that its action to recover the grossing up payments made to Citibank NA was not barred by s 14(1)(a) of the *Limitation Act* because the cause of action did not “first accrue” until the High Court changed the law in *David Securities* to allow restitutionary claims based on a mistake of law. Mr Walker contended that it was now virtually universally accepted that judges make law. The “fairy tale” that judges simply declare the law had been discarded. (Lord Reid characterised the declaratory

---

<sup>85</sup> *Chamberlains v Lai* [2007] 2 NZLR 7 at [148].

<sup>86</sup> *Chamberlains v Lai* [2007] 2 NZLR 7 at [205].

<sup>87</sup> *Ha v New South Wales* (1997) 189 CLR 465.

<sup>88</sup> *Ha v New South Wales* (1997) 189 CLR 465.

<sup>89</sup> *Torrens Aloha v Citibank* (1997) 72 FCR 581.

<sup>90</sup> *Torrens Aloha v Citibank* (1997) 72 FCR 581 at 593.

theory of law as a fairy tale in his influential article "The Judge as Law Maker". As Brennan J said in *O'Toole v Charles David Pty Ltd (No 1)*:

Nowadays nobody accepts that judges simply declare the law; everybody knows that, within their area of competence and subject to the legislature, judges make law.

[References omitted]

Noting a lack of Australian authority for the appellant's argument in that case, Sackville J observed:<sup>91</sup>

It is, perhaps, a little curious that the appellant's argument appears not to have been authoritatively considered in Australia. There is plainly nothing novel about courts making new law, whether by overruling previous decisions or by developing new or modified principles. It was not until 1966 that the House of Lords pronounced itself capable of overruling its own decisions: *Practice Statement (Judicial Precedent)*. But the High Court has not been so constrained and from an early stage has been prepared to depart from its own decisions: *Australian Agricultural Co Ltd v Federated Engine-drivers & Fireman's Association of Australasia*. In a constitutional context, the Engineers' case provides a striking example: *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*.

More fundamentally, there is nothing novel about judges and legal commentators acknowledging that courts make law. It is true that the acknowledgments have become more frequent as courts grapple with the difficult task of defining or identifying the limits of the judicial law-making function: see, for example, *Dietrich v The Queen*; *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*; *Mabo v Queensland (No 2)*. But rejection of the "fairy-tale" is not, as Mr Walker's submissions rather implied, a recent phenomenon. In *State Government Insurance Commission (SA) v Trigwell* Murphy J pointed out that in 1873 John Austin had characterised the theory that the judiciary does not make the law as a "childish fiction" .... Indeed in the same judgment, Murphy J noted ... that Bracton had accepted that the growth of the law through judicial decisions was inevitable and that Sir Francis Bacon, later Lord Chancellor, in *The Advancement of Learning* (1605), had recognised that the law grew consciously through decided cases.

Recognition of the law-making function of appellate courts has provided the rationale for the technique of prospective overruling, which has been applied by United States courts since at least the mid-nineteenth century: *Bingham v Miller, Great Northern Railway Co v Sunburst Oil and Refining Co, Linkletter v Walker*. ...

[References omitted]

168 Sackville J noted that while some commentators<sup>92</sup> had expressed support for such an approach to improve the consequences of judicial law-making, the approach had generally not been favoured by the Australian judiciary.<sup>93</sup> Referring to judicial law making, Sackville J then observed:<sup>94</sup>

<sup>91</sup> *Torrens Aloha v Citibank* (1997) 72 FCR 581 at 593-594.

<sup>92</sup> A Nicol, 'Prospective Overruling: A New Device for English Courts?' (1976) 39 *Modern Law Review* 542; K Mason, 'Prospective Overruling' (1989) 63 *Australian Law Journal* 526.

<sup>93</sup> *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 at 15 (Mason J), referring to concerns expressed by Lord Devlin that prospective overruling "turns judges into undisguised legislators": Lord

In the absence of a doctrine of prospective overruling, changes in the law effected by judicial decisions are not confined to events or transactions occurring after the date of the decision changing the law. Doubtless, from an historical perspective, this owes a good deal to the declaratory theory of law: compare the comments of McHugh JA in *Love and Peters v Attorney-General (NSW)*, relating to the principle that statutes held to be unconstitutional are void ab initio. However, the retrospective operation of judicial law-making also reflects views as to the nature and limits of the judicial law making function. Lord Devlin, for example, dismissed the retroactive objection to judicial law-making on the ground that:

"a judge-made change in the law rarely comes out of a blue sky. Rumbblings from Olympus in the form of obiter dicta will give warning of unsettled weather".

The need for judicial changes to the law to accord with what Brennan J has described as the "skeleton of principle" provides some justification for such changes to operate retrospectively. In the *Wik Peoples Case (Wik Peoples v Queensland)*, Gummow J referred to Lord Radcliffe's speech in *Lister v Romford Ice and Cold Storage Co Ltd*, where his Lordship said that no one really doubted that the common law is a body of law which develops over time in response to developments in society. Gummow J characterised this as:

"a broad vision of gradual change by judicial decision, expressive of improvement by consensus, and of continuity rather than rupture".

Whatever the limits of judicial law-making, the retrospective operation of judicial decisions does not imply, in modern times, an uncritical acceptance of the declaratory theory of law.

[References omitted]

169 These observations suggest that the decision of the High Court in *Ha* has not finally determined the question of the Court's power to make prospective and partially retrospective declarations of the common law. It is clear that the approach taken in *Spectrum* has been considered favourably in other common law jurisdictions. The observations in *Ha* do not involve a consideration of the English common law, which as was observed in *Spectrum*, includes the power to declare the common law to have changed or developed with prospective or partial retrospective effect. The common law of rape in 1963 in South Australia was part of the received English common law. As earlier mentioned, as a consequence of my earlier conclusions it is unnecessary to express any final view on the issue of prospective or partially retrospective rulings with respect to the common law.

## Conclusion

---

Devlin, 'Judges and Law Makers' (1976) 39 *Modern Law Review* 1 at 11; *John v Federal Commissioner of Taxation (Cth)* (1989) 166 CLR 417 at 450- 451 (Brennan J); *Bropho v Western Australia* (1990) 171 CLR 1 at 23, where the majority acknowledged that a new principle of statutory construction could apply differently to legislation, depending upon whether the legislation had been enacted before or after publication of the Court's decision.

<sup>94</sup> *Torrens Aloha v Citibank* (1997) 72 FCR 581 at 594-595.

170 The above analysis and review of the authorities and the statutory intervention following the Mitchell Committee recommendations, allows the conclusion that the common law presumption of consent formed part of the common law of South Australia in 1963 at the time of the alleged offending of the defendant.

171 In my view, the defendant is entitled to be tried with respect to the counts of rape – counts 3 and 5 on the information – in accordance with the common law as it was applied in South Australia in 1963. In particular the presumption as to the irrevocable consent of a wife to sexual intercourse should be applied.

172 It is to be observed that in the event that the common law presumption was not available to the defendant, much of the above discussion would be relevant to a consideration of any application for a permanent stay of the proceedings. The delay of nearly 50 years in the prosecution of the charges has deprived the defendant of an otherwise available defence, has denied the application of an earlier available statutory bar to proceedings and has given rise to the general prejudices that flow from an attempt to defend proceedings in circumstances of such a delay. No doubt these are matters that will be considered by the trial Judge in the event that he is invited to reconsider the stay application.

173 I would answer the question of law referred to the Full Court, namely:

*Was the offence of rape by one lawful spouse of another, in the circumstances as outlined above, an offence known to the law of South Australia as at 1963?*

in the negative.

174 **WHITE J:** I agree with the answer proposed by the Chief Justice to the question of law reserved for the consideration of this Court. I also agree with his reasons.