Editorial: Rape within marriage: A privilege past its use by date?

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Little more than 20 years ago, it was not an offence to rape your wife in Australia. Indeed, the position was the same in jurisdictions that had inherited their criminal law from England. To modern eyes the marital rape immunity seems archaic and discriminatory, though it is important to recognise that sexual morals and ideas about marriage and conjugal rights and duties have changed significantly in a relatively short time. As recently as the 1980s, leading scholars of criminal law in both the United Kingdom and Australia courted controversy arguing against the criminalisation of marital rape. Professor David Lanham concluded his review of the immunity in this Journal, with the following caution about the dangers of criminalising unwanted marital sex:

> It is submitted that the law of rape is too blunt an instrument for dealing with the relationship between husband and wife and that marital immunity should be retained at least where the parties are living together. Where the marriage as a whole has become intolerable because of an act of unwanted intercourse the appropriate remedy is divorce or separation. Where force is used there is the possibility of criminal proceedings for crimes from assault to causing grievous bodily harm. In other cases the criminal law should keep out of it. [1]

Not surprisingly such views were seriously challenged by the feminist scholars. [2] The feminist movement was successful in moving both community and political opinion, and a wave of legislative reform swept across Australia. Repeal of the immunity occurred first in South Australia in 1976, followed by Western Australia (1976), Victoria and New South Wales (1981), the Australian Capital Territory (1985), Tasmania (1987), Queensland (1989) and the Northern Territory (1994).

Although the trend was firmly against the immunity in the 1980s, it was not until 1991 that High Court of Australia rejected the existence of such a rule as part of the common law. The accused was charged and convicted with raping his wife. In South Australia, the immunity had been abolished by statute, and the accused argued on appeal that the South Australian provision conflicted with a provision of the *Family Law Act 1975* (Cth). The Commonwealth provision allowed the Family Court to make an order relieving a party to a marriage from rendering conjugal rights. When the *Family Law Act* was enacted, conjugal rights included the right, under the criminal law, to have marital intercourse without consent. The accused submitted that there was an inconsistency between State and Commonwealth provisions. Section 109 of the *Constitution* states that in the event of a conflict between State and Commonwealth law, the Commonwealth law prevails. The High Court rejected the appeal on a number of grounds, including that there was no inconsistency between the provisions. Nevertheless, the High Court took the opportunity to clarify the status of the immunity. The majority of the High Court doubted whether the immunity had been part of the common law, and concluded that they 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. [3]

The High Court was no doubt emboldened by the House of Lords decision in *R v R*, [4] which only a few months earlier had considered the defence. As a young lawyer working for the Criminal Law Team of the Law Commission in the United Kingdom, this writer had been sent along to observe at the trial of *R v R* in the Leicester Crown Court in 1990. The Lord Chancellor had referred rape in marriage to the Law Commission the year before in order to make recommendations for reform. The proceedings in *R v R*, unbeknownst to this writer, were destined to become the landmark decision

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establishing that the marital immunity was not part of the common law of England. In that case, the husband and wife had not yet legally separated. The legal issue was whether the behavior of the wife – contacting lawyers with a view to obtaining a divorce – was sufficient to revoke her implied marital consent to sexual intercourse. The historical basis of the immunity was traced to a passage in the leading judge and jurist of the 18th century, Sir Matthew Hale, who noted: 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. Although a firmly established legal truism that a husband could not rape his

wife, the trial judge, Owen J, roundly rejected the defence submission of no case to answer, ruling that the common law did not recognise such immunity. At that point in the trial, the accused husband pleaded guilty to rape, appealing his subsequent conviction to the Court of Appeal and then onto the House of Lords. The House of Lords held that the immunity should play no part in the modern common law, a viewed shared by the High Court of Australia.

How then does the issue of marital rape immunity arise in 2011? In South Australia, prosecutors have charged a man in 2010 with rape of his then wife for an offence alleged to have occurred in 1963. The trial judge stated a case to the Court of Criminal Appeal in *R v P, GA* [5] to consider whether the immunity could be relied upon by the accused to bar the prosecution. The majority of the Court of Criminal Appeal ruled that the way is open to bring such charges, though Doyle CJ conceded that such a prosecution raises complex points of law relating to the retrospective operation of the criminal law. The matter now lies with the High Court. It is a fundamental principle of law, and one which is also reflected in the rules of statutory interpretation that criminal offences do not apply retrospectively. Indeed, the defence submission is that marital rape in effect became an offence only in 1976 (when the Parliament of South Australia abolished the immunity), many years before the alleged offence. The converse argument for the prosecution is that, consistent with the rulings of both the House of Lords and the High Court, the common law, as properly understood, never recognised the immunity; put simply, all the earlier judges and jurists (including Sir Matthew Hale in the 18th century), legal scholars and prosecutors had all been wrong (per incuriam), and the effect of the 1976 reforms in South Australia and elsewhere simply confirmed the position as it had always been – that rape is rape irrespective of marital status! This position is consistent with the declaratory theory of the common law that judges do not make law, but simply state and apply the law.

It is commonly said that the immunity in relation to marital rape was a legal fiction, but it seems the 1991 rulings of the House of Lords and High Court of Australia the immunity never existed suffers from a similar fictional quality too. The case of *R v P, GA* looms as a clash between legal fictions: on the one hand, the fiction that underscores the implied irrevocable sexual consent between husband and wife; on the other hand, the fiction that judges merely discover rather than make the common law.

Retrospectivity issues have been ventilated in marital rape cases previously. The landmark decision of *R v R* was challenged before the European Court of Human Rights on the ground that his liability for rape violated the presumption against retrospective operation of the criminal law, a principle enshrined in Art 7 of the *European Convention on Human Rights*. The European Court in *SW and CR v UK* [6] conceded that the nature of legal development in common law systems meant that the criminal law had the potential to operate retrospectively – it is not uncommon for judges to expand the scope of criminal liability or limit defences through case law development. Legal incrementalism, it held, did not necessarily violate the presumption in Art 7 provided that the development of the common law was consistent with principle and reasonably foreseeable.

There is a clear public interest in bringing prosecutions of sexual offences involving a serious violation of trust such as marital rape. The principle of equality also suggested cases of marital and non-marital rape should not be treated differently. On the other hand, such prosecutions raise significant challenges for the principle of fairness. Some of the relate to the procedural and evidential challenges of defending charges many decades after the alleged event, though, of course, the common

law contains safeguards against any abuse of process that may occur due to unfairness that apply on a case-by-case basis. Indeed, the staleness of the charge per se should not operate as a bar to prosecution. There may be reliable forensic evidence and contemporaneous statements taken from witnesses and victims themselves in the 1960s that would sustain a conviction. Unlike the criminal law in the United States, few statutes of limitations are applied in Australia. Indeed, in South Australia, the three-year statute of limitations for rape was abolished in 1985. The main forensic challenge to prosecuting old cases of marital rape predating legislative repeal of the immunity is simply the claim that the charge of rape (of a wife by her husband) violates the presumption against retrospectivity. Doyle CJ, delivering the majority opinion in *R v P, GA*, held that High Court had affirmed in 1991 the common law of Australia did not recognise the immunity, and the fact that Parliament of South Australia had taken a different (and incorrect) view of the law by proceeding to repeal the (non-existent) immunity did not alter that position. The dissenting judge, Gray J, agreed that immunity was repugnant, though in his view it was clear at law that the defendant was entitled to be tried according to the substantive law applicable at the time of the alleged offence: 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. [7]

The case before the High Court raises many issues going to the heart of the criminal law. The arguments of policy and fairness involved are not trivial. Upholding such a prosecution would signal the need to review earlier cases of spousal rape predating the statutory reforms that were considered to be barred by the immunity. However, such a decision would be unlikely to open a floodgates of prosecution of old cases – most will be defeated by simply lack of evidence or the difficulties in ensuring the accused receives a fair trial. The decision nevertheless raises important matters of legal principle and policy relating to retrospectivity, particularly concerning the proper role and responsibility of the courts in reforming the criminal law.

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Footnotes

1 Lanham D, "Hale, Misogyny and Rape" (1983) 7 Crim LJ 148 at 166. Glanville Williams favoured criminalisation of domestic rape though argued that it should be downgraded in seriousness to an offence in the nature of an assault punishable by fine or binding-over: Williams G, "The Problem of Domestic Rape" (1991) 141 New Law Journal 205.

2 On the accomplishments and failures of feminist reform see Mason G, Reforming the Law of Rape: Incursion into the Masculinist Sanctum in Kirkby D (ed), *Sex, Power and Justice: Historical Perspectives on Law in Australia* (Melbourne, Oxford University Press, 1995). See also Temkin J, *Rape and the Legal Process* (2nd ed, OUP, 2002).

3 *R v L* (1991) 174 CLR 379 at 390.

4 *R v R* [1992] 1 AC 599.

5 *R v P, GA* [2010] SASCFC 81.

6 *SW and CR v UK* (1996) 21 EHRR 363

7 *R v P, GA* [2010] SASCFC 81 at [100] (Gray J).