IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A15 of 2011

BETWEEN:

PGA

Appellant

10

and

THE QUEEN

Respondent

SUBMISSIONS FOR THE RESPONDENT AND
20 **THE ATTORNEY-GENERAL OF SOUTH AUSTRALIA (INTERVENING)**

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Concise Statement of Issues

2 The Appellant has been charged on Information with a number of offences including two counts of rape. The rapes are alleged to have occurred in 1963. In each instance the alleged
30 victim is the Appellant's then wife. The District Court of South Australia reserved for the consideration of the Full Court of the Supreme Court of South Australia a question that required that the Full Court consider whether or not, as a matter of law, a husband could properly be convicted of the rape of his wife in 1963.[1] The answer to that question is the subject of this appeal. It requires a consideration by this Court of the following issues:

i. did this Court in its 1991 judgment in *The Queen v L* determine what was the common law of Australia with respect to the availability to a husband charged with rape of an irrebutable presumption that by virtue of marriage his wife irrevocably consented to sexual intercourse (the 'marital exemption')?[2]

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The Respondent contends that this Court determined that the marital exemption no longer formed part of the common law of Australia. The Respondent concedes that such conclusion was *obiter dicta*.

ii. was the Full Court bound to follow the decision of this Court in *The Queen v L* in this case?

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1 The question was reserved pursuant to s350(2)(b) of the *Criminal Law Consolidation Act, 1935* (SA).
2 *The Queen v L* (1991) 174 CLR 379.

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The Respondent contends that as seriously considered *dicta* the Full Court was bound to apply *The Queen v L*.

iii. does *The Queen v L* resolve the question reserved in this case?

The Respondent contends that it does. As a seriously considered statement of the common law regarding the marital exemption, *The Queen v L* determined not only what the common law was in 1991, but what it must be taken to have always been.

iv. do the 1976 South Australian statutory amendments to the offence of rape serve as a bar to the judicial development of the common law as to that offence, and the availability of the marital exemption in South Australia, by courts after the date upon which the amendments came into operation in relation to matters occurring before the date upon which the amendments came into operation?

The Respondent contends that the 1976 amendments did not have retroactive effect. Accordingly, they do not operate as a bar to the judicial development of the common law as to the offence of rape, and the availability of the marital exemption in South Australia, by courts after the date upon which the amendments came into operation in relation to matters occurring before the date upon which the amendments came into operation.

v. if the Full Court was bound by *The Queen v L*, is this Court at liberty to declare that the seriously considered *dicta* concerning the marital exemption shall be of only prospective effect?

The Respondent contends that it is not. As made clear in *Ha v New South Wales* the prospective overruling of the common law is inconsistent with judicial power.[3]

vi. if *The Queen v L* does not resolve this case, was the marital exemption part of the common law of Australia at the time the alleged rapes took place?

The Respondent contends that the marital exemption was not, and had never been, a valid statement of the common law regarding the relations of husband and wife, and, even if it was at the time it was written, it was no longer part of the common law of Australia by 1963.

Part III: Relevant Facts

3. The Respondent accepts the Appellant's statement of facts contained in his written submissions at [5.1]-[5.3].

Part IV: The Respondent's Submissions

A. The Queen v L

4. In *The Queen v L* the Respondent was charged with the rape in 1989 of his wife contrary to s48 of the *Criminal Law Consolidation Act 1935* (SA). It was contended that s73(3) of the *Criminal Law Consolidation Act 1935,* which abolished the marital exemption, was inconsistent with s114(2) of the *Family Law Act 1975* (Cth) which, it was argued, impliedly preserved the common law notion of conjugal rights with the consequence that a wife could not refuse her consent to sexual intercourse with her husband. In the alternative it was

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3 *Ha v New South Wales* (1997) 189 CLR 465 at 503-4 (Brennan CJ, McHugh, Gummow, Kirby JJ), 515 (Dawson, Toohey, Gaudron JJ).

contended that the *Family Law Act 1975* (Cth) and the *Marriage Act 1961* (Cth) evinced an intention on the part of the Commonwealth to cover the field concerning the legal consequences of marriage. As Doyle CJ noted:

> [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.[4]

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5. All members of this Court rejected the inconsistency argument. In doing so it was not necessary to determine whether or not the marital exemption formed part of the common law of Australia. Mason CJ, Deane and Toohey JJ commented:

> Although what has been said really disposes of the inconsistency argument, it may be useful to say something more about the reference in s.114(2) of the Commonwealth Act to marital services and conjugal rights, since the respondent's argument rests on the proposition that the sub-section preserves the common law. ...[5]

20 6. Their Honours noted that as at the passing of the *Family Law Act 1975* (Cth) no court in Australia had considered the question of whether or not the marital exemption formed part of the common law of Australia.[6] They proceeded to consider a number of English decisions[7] concluding:

> None of these decisions 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.[8]

Their Honours noted that the only statement of support for the marital exemption in absolute terms was to be found in Sir Matthew Hale's *The History of the Pleas of the Crown*. They
30 then proceeded to observe that Hale's text was not published until sixty years after his death, that the impugned proposition appeared in that part which he had not had the opportunity to revise, that the proposition stated in absolute terms did not find support in the ecclesiastical courts, and that a century after Hale wrote his proposition it was yet to find unanimous support among judges.[9] With apparent approval Their Honours quoted the English Court of Appeal's description of Hale's proposition in *Reg v R*[10] as "anachronistic and offensive".[11] They concluded:

> 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.[12]

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7. Importantly, Their Honours then acknowledged the constraints that operate upon this Court in developing the common law. They concluded:

> ... 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

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4 *R v P, GA* (2010) 109 SASR 1 at [50].
5 *The Queen v L* (1991) 174 CLR 379 at 386.
6 *The Queen v L* (1991) 174 CLR 379 at 387.
7 *The Queen v L* (1991) 174 CLR 379 at 387-8.
8 *The Queen v L* (1991) 174 CLR 379 at 388.
9 *The Queen v L* (1991) 174 CLR 379 at 389.
10 *Reg v R* [1992] 1 AC 599 at 611 (Lord Lane CJ)
11 *The Queen v L* (1991) 174 CLR 379 at 389.
12 *The Queen v L* (1991) 174 CLR 379 at 389.

> 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.[13] (footnotes omitted)

8. Justice Brennan noted that the law of marriage was developed in the ecclesiastical courts, and not the courts of common law, and that in the ecclesiastical courts the mutual right to *consortium vitae* meant that each spouse had the "mutual right to sexual intercourse provided the right be exercised reasonably, subject to the health of the spouses and the exigencies of family life. It is a right to be exercised by consent".[14] This then undermined the supposed foundation for Sir Matthew Hale's proposition.[15] That said, Brennan J accepted that Hale's proposition had been accepted as the common law, although he proceeded to refer to other indications of its frailty. As with the joint reasons, Brennan J also referred with approval to the Court of Appeal's description of the exemption as "a common law fiction which has become anachronistic and offensive". Justice Brennan added:

> 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. ...[16]

9. Justice Dawson also noted that it was unnecessary to the resolution of the case to express any opinion as to the content of the common law regarding the marital exemption.[17] For Dawson J the marital exemption was a presumption, initially irrebuttable, but developed overtime to become rebuttable to the point where in *S v HM Advocate* the High Court of Justiciary in Scotland had held that "the critical question in any case must be whether or not consent has been withheld".[18] That view, as adopted by the House of Lords in *Reg v R,*[19] should, Dawson J considered, be adopted in Australia. He concluded:

> ... 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.[20]

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13 *The Queen v L* (1991) 174 CLR 379 at 390.
14 *The Queen v L* (1991) 174 CLR 379 at 396 (Brennan J).
15 *The Queen v L* (1991) 174 CLR 379 at 399, 401 (Brennan J).
16 *The Queen v L* (1991) 174 CLR 379 at 399, 401-2 (Brennan J).
17 *The Queen v L* (1991) 174 CLR 379 at 405 (Dawson J).
18 *S v HM Advocate* [1989] SLT 469 at 473 (Lord Justice-General (Lord Emslie) for The Court).
19 *Reg v R* [1992] 1 AC 612.
20 *The Queen v L* (1991) 174 CLR 379 at 405 (Dawson J).

10. The specific reference by Mason CJ, Deane and Toohey JJ, to the authorities of *State Government Insurance Commission v Trigwell,*[21] *Public Service Board of N.S.W. v Osmond*[22] and *Lamb v Cotogno*[23] and the content of the statement that followed that reference as to the common law (reproduced at [7] above) makes plain the intent of Their Honours to re-state the common law of Australia regarding the marital exemption as, indeed, they were invited to do by the Applicant.[24] Justice Dawson likewise intended to re-state the common law.

11. Necessarily Their Honours must be taken to have been aware of the fact that in doing so the consequence was to expose to liability for the offence of rape, men who otherwise were not. That was the very reason that caused Brennan J to desist.

12. The Respondent contends that a majority of this Court in *The Queen v L* determined that the marital exemption no longer formed part of the common law of Australia. In the Full Court of the Supreme Court of South Australia Gray J considered that Mason CJ, Deane and Toohey JJ stopped short of re-stating the common law.[25] In Gray J's opinion this much was evident in Their Honours choice of language - "...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". With respect, that is to mis-read Their Honours' judgment in addition to reading it divorced from the argument presented by the Applicant. What was unnecessary was to determine whether or not Sir Matthew Hale was correct.

13. Justice Gray further sought to draw an inference from the reference in the joint reasons in *The Queen v L* to the common law of Australia as indicative of Their Honours intending to draw a distinction between the common law of Australia and the law in South Australia which had been subject to statutory amendment.[26] With respect, that distinction, if it be a distinction which Their Honours sought to make, does not speak to the position in South Australia prior to the 1976 amendments to the *Criminal Law Consolidation Act 1935* (SA). There is but one common law of Australia.[27] In each of the jurisdictions of Australia that common law applies save to any extent that it has been altered by statute. Where Mason CJ, Deane, Dawson and Toohey JJ refer in *The Queen v L* to the common law, they can only be understood as referring to the application of that law throughout the Commonwealth save where it has been altered by statute.

14. The odd result to which Gray J refers is not, with respect, odd at all.[28] It is the province of this Court as the highest Court in the land to say what the law is. In the discharge of that responsibility erroneous assumptions or misunderstandings on the part of legislatures or inferior courts as to what the law is does not preclude this Court from discharging its constitutional responsibility.[29]

B. Was the Full Court bound to follow the decision of this Court in The Queen v L ?

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21 *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617
22 *Public Service Board of N.S.W. v Osmond* (1986) 159 CLR 656.
23 *Lamb v Cotogno* (1987) 164 CLR 1.
24 *The Queen v L* (1991) 174 CLR 379 at 380-1.
25 *R v P, GA* (2010) 109 SASR 1 at [146].
26 *R v P, GA* (2010) 109 SASR 1 at [148].
27 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 53-4 (The Court); *Lipohar v R* (1999) 200 CLR 485 at [24] (Gleeson CJ), [43]-[44] (Gaudron, Gummow and Hayne JJ), [179] (Kirby J). See also, O Dixon, Sources of Legal Authority, in *Jesting Pilate* (2nd Ed. 1997) at 199.
28 *R v P, GA* (2010) 109 SASR 1 at [149].
29 *CSR Limited v Eddy* (2005) 226 CLR 1 at [51] (Gleeson CJ, Gummow and Heydon JJ).

15. The Respondent concedes that the restatement in *The Queen v L* of the common law as to the marital exemption was *obiter dicta*. However, as seriously considered *dicta* of this Court the Full Court of the Supreme Court of South Australia was not at liberty to reject it.[30] Seriously considered *dicta* of this Court must be taken as being binding upon an intermediate appellate court in the same way as the *ratio decidendi* of a decision of this Court.

C. Does The Queen v L resolve the question reserved in this case?

16. The Respondent contends that it does. As seriously considered *dicta* concerning the common law regarding the marital exemption, *The Queen v L* determined not only what the common law was as in 1991, but what it must be taken to have always been. That *dicta*, it can be expected, has been applied in matters pending as at the time judgment was handed down, where relevant, and in matters subsequently charged. Further, it can be taken as having been applied irrespective of when the alleged rape occurred. Thus the decision in *The Queen v L* can be taken as having been applied to other comparable cases which have subsequently come before Australian courts irrespective of when the events subject of those cases in fact occurred. It is in this sense that the common law is both declaratory and retrospective in effect.[31] As Doyle CJ stated:

> ...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.[32]

17. Chief Justice Doyle's opinion is supported by ample authority - "Judicial decisions have had retrospective operation for near a thousand years".[33]

17.1 Blackstone provided the following statement of the declaratory theory of common law:

> For it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworne to determine, not according to his private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be contrary to the divine law. *But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was* bad law, *but that it was* not law*; that is, that it is not the established custom of the realm, as has been erroneously determined.*[34]

17.2 It must be acknowledged that Blackstone's statement that judges do not make or develop law is an unsupportable fiction.[35] However, the process he describes of

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30 *Farah Constructions v Say-Dee* (2007) 230 CLR 89 at [134] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); See also *Lipohar v R* (1999) 200 CLR 485 at [45]-[46] (Gaudron, Gummow and Hayne JJ).

31 See generally Sampford and Palmer, 'Judicial Retrospectivity' (1995) 4 *Griffith Law Review* 170; Sampford, *Retrospectivity and the Rule of Law* (Oxford University Press, 2006), ch 5.

32 *R v P, GA* (2010) 109 SASR 1 at [86] (Doyle CJ, with whom White J agreed).

33 *Kuhn v Fairmont Coal Co* (1910) 215 US 349 at 372 (Holmes J).

34 Blackstone, *Commentaries on the Laws of England*, vol 1, Ch 3 at 69-70 (emphasis added).

35 See for example Lord Reid, 'The Judge as Law Maker' (1972) *Society of Public Teachers of Law* 22; Atiyah, 'Judges and Policy' (1980) 15 *Israel Law Review* 346; Krygier, 'Julius Stone: Leeways of Choice, Legal Tradition and the Declaratory Theory of Common Law' (1986) 9 *UNSW Law Journal* 26; McHugh, 'The Lawmaking Function of the Judicial Process – Parts 1 and 2' (1988) 62 *ALJ* 15-31, 116-127; Young, 'Judges make law – so what!' (1997) 13 ALJ 351.

applying precedent and the retrospective declaration of "absurd or unjust" laws as having not been the law remains valid.[36]

17.3 The declaratory theory of the common law and the concept of *stare decisis* was the subject of a practice statement issued by the House of Lords in 1966.[37] There the use of precedent was described as "an indispensable foundation upon which to decide what is the law and its application to individual cases". The practice statement also adverted to the possibility that "too rigid adherence to precedent may lead to injustice in a particular case", thereby providing a justification to "depart from a previous decision when it appears right to do so".[38] It was cautioned:

> In this connexion they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.[39]

The "danger of disturbing retrospectively" referred to is an acknowledgment of the retrospective effect of any statement of the common law.

17.4 In *Mutual Life & Citizens' Assurance Co Ltd v Evatt*[40] Barwick CJ stated:

> The matter so far as this Court is concerned is free of binding authority. The Court's task is to declare the common law in this respect for Australia. There are indicative decisions in the courts of England: these are to be regarded and respected. With the aid of these and of any decisions of courts of other countries which follow the common law and of its own understanding of the common law, its history and development, the Court's task is to express what is the law on this subject as appropriate to current times in Australia.[41]

Barwick CJ went on to explain that in so declaring the common law the Court decides what the law should be. Whether described as "declaring" or "changing", any development or "change made by judicial decision would be also retrospective".[42] His Honour described it in the following terms in *Dugan v Mirror Newspapers Ltd*:

> ... The Court can, of course, decide what the common law always has been: and, if earlier decision is not to that effect, overrule or depart from such a decision: and the Court can, as it were, extend the principles of the common law to cover situations not previously encountered, or not as yet the subject of binding precedent.[43]

17.5 Further support for the retrospective effect of judicial law-making is contained in the following statement of Brennan J in *O'Toole v Charles David Pty Ltd*:

> 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. Within the proper limits, judges seek to make the law an effective instrument of doing justice according to contemporary standards in contemporary conditions. And so the law is changed by judicial

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36 *Re Spectrum Plus Ltd (in liq)* [2005] 2 AC 680 at [34] (Lord Nicholls of Birkenhead).

37 [1966] 1 WLR 1234; [1966] 3 All ER 77.

38 This Court has always possessed the power to refuse to follow its own previous decisions if it thinks fit, albeit such power has been used but sparingly: *Geelong Harbour Trust Commissioners v Gibbs Bright & Co* (1974) 129 CLR 576 at 582; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at [65]-[70] (French CJ).

39 [1966] 1 WLR 1234; [1966] 3 All ER 77.

40 *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556.

41 *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556 at 563.

42 *Geelong Harbour Trust Commissioners v Gibbs Bright & Co* (1974) 129 CLR 576 at 583 (Lord Diplock for the Court). See also Heydon, 'Judicial activism and the death of the rule of law' (2003) 23 *Aust Bar Review* 110 at 126.

43 *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 586 (Barwick CJ).

decision, especially by decision of the higher appellate courts. *Thereafter, the law is taken to be and to have been in accordance with the principle which informs the new decision: the ratio decidendi. The ratio, which is expressed in or necessarily implied by reasons for judgment to which a majority of the participating judges assent, is the law.* It is not merely a judicial opinion as to what the law is; it is a source of law: see *Salmond on Jurisprudence,* 12th ed. (1966), p. 141.[44]

17.6 The rationale for this theory of the law was given by Brennan J in *Giannarelli v Wraith*:

> There is much to commend an approach which takes a contemporary declaration of common law principle *prima facie* to be a correct statement of what the common law has always been. Such an approach not only avoids uncertainty in historical research; it is also conducive to an orderly development of the common law, for the notion of continuity of the common law gives much weight to past declarations of its content, while permitting a new departure when required by further reflection or changes in social conditions.[45]

17.7 A definitive statement of the retrospective effect of judicial decisions was given in *Kleinwort Benson Ltd v Lincoln City Council*.[46] There Lord Browne-Wilkinson stated:

> In truth, judges make and change the law. The whole of the common law is judge-made and only by judicial change in the law is the common law kept relevant in a changing world. But whilst the underlying myth has been rejected, its progeny – the retrospective effect of a change made by judicial decision – remains. As Lord Goff in his speech demonstrates, in the absence of some form of prospective overruling, a judgment overruling an earlier decision is bound to operate to some extent retrospectively: once the higher court in the particular case has stated the changed law, the law as so stated applies not only to that case but also to cases subsequently coming before the courts for decision, even though the events in question in such cases occurred before the Court of Appeal decision was overruled.[47]

17.8 Lord Goff dealt extensively with the process of judicial law-making in *Kleinwort Benson Ltd v Lincoln City Council*.[48] Of particular relevance is the following passage:

> ...the law which the judge then states to be applicable to the case before him is the law which, as so developed, is perceived by him as applying not only to the case before him, but to all other comparable cases, as a congruent part of the body of the law. Moreover, when he states the applicable principles of law, the judge is declaring these to constitute the law relevant to his decision. Subject to consideration by appellate tribunals, and (within limits) by judges of equal jurisdiction, what he states to be the law will, generally speaking, be applicable not only to the case before him but, as part of the common law, to other comparable cases which come before the courts, whenever the events which are the subject of those cases in fact occurred.
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> It is in this context that we have to reinterpret the declaratory theory of judicial decision. We can see that, in fact, it does not presume the existence of an ideal system of the common law, which the judges from time to time reveal in their decisions. The historical theory of judicial decision, though it may in the past have served its purpose, was indeed a fiction. But it does mean that, when the judges state what the law is, their decisions do, in the sense I have described, have retrospective effect. That is, I believe, inevitable. It is inevitable in relation to the particular case before the court, in which the events must have occurred for some time, perhaps some years, before the judge's decision is made. But it is also inevitable in relation to

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44 *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 267 (Brennan J) (emphasis added). See also *Atlas Tiles Ltd. v Briers* (1978) 144 CLR 202 at 208 (Barwick CJ).

45 *Giannarelli v Wraith* (1988) 165 CLR 543 at 586 (Brennan J). See also *Halabi v Westpac Banking Corporation* (1998) 17 NSWLR 26 at 34 (Kirby P, as he then was).

46 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349. See also *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2007] 1 AC 558.

47 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 358-359.

48 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 377-379.

> other cases in which the law as so stated will in future fall to be applied. I must confess that I cannot imagine how a common law system, or indeed any legal system, can operate otherwise if the law is to be applied equally to all and yet be capable of organic change.[49]

17.9 The retrospective effect of judicial decisions as described in *Kleinwort Benson Ltd v Lincoln City Council* was affirmed by the House of Lords in *R v Governor of Brockhill Prison; ex parte Evans (No 2)*.[50] In explaining the declaratory theory, Lord Hobhouse of Woodborough made the following statement about the relationship between the constitutional role of the courts and the retrospective effect of judicial decisions:

> The constitutional role of the courts is to decide disputes and grant remedies. The disputes will include disputes whether a previous decision still represents the law and should be followed or overruled. It is a denial of the constitutional role of the courts for courts to say that the party challenging the *status quo* is right, that the previous decision is over-ruled, but that the decision will not affect the parties and only apply subsequently. They would be declining to exercise their constitutional role and adopting a legislative role deciding what the law shall be for others in the future. This anomaly is also illustrated by the law of precedent and the concept of *ratio decidendi* which it uses. Such a decision would by definition not be part of the *ratio decidendi* of the case and therefore would not constitute an authoritative decision.[51]

18. The authorities make plain that the development of the common law as part of the judicial law-making process involves the retrospective application of decisions and principles. Ordinarily when an action is brought before the courts the dispute has occurred in the past and thus the parties expect the court to apply the law to past events. In some cases the law will not be settled, or indeed, may be anachronistic and in need of change. In the latter class of case a court may change the law and, as set out in the authorities above, such change is to apply to the events which brought the parties to the court. In short the common law necessarily operates with retrospective effect. That effect flows beyond the immediate case in that the *ratio* and/or seriously considered *dicta* must, in accordance with the doctrine of precedent, be applied by all lower courts in the same judicial hierarchy. As much is constitutionally mandated in Australia.

19. In cases such as this one, where the trial court is asked to apply a rule of the common law that has already been changed by a superior court, the doctrine of precedent demands that it apply the changed rule, despite the lapse of time between when the facts giving rise to the particular cause occurred and the judicial declaration of the common law. For a lower court to acknowledge that it is bound but to consider that the law as determined by the superior court only applies to matters after a certain date is to accord the superior court's judgment prospective effect. For the reasons given below prospective overruling is inconsistent with the exercise of the judicial power.

19.1 To the extent that it may be contended that Mason CJ, Deane, Dawson and Toohey JJ in *The Queen v L* have expressed themselves in terms indicative of an intent to overrule prospectively, such contention should be rejected. Firstly, the power to prospectively overrule had never been entertained as at that time by this Court.[52] Secondly, the possibility of prospectively overruling the asserted proposition that at

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49 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 378-379 (Lord Goff).

50 *R v Governor of Brockhill Prison; ex parte Evans (No 2)* [2001] 2 AC 19 at 26H (Lord Slynn of Hadley), 35-37 (Lord Hope of Craighead), 43B and 47-49 (Lord Hobhouse of Woodborough). See also the judgments of Lord Woolf MR and Judge LJ in the Court of Appeal: [1999] QB 1043 at 1050G, 1057F and 1073H-1075A.

51 *R v Governor of Brockhill Prison; ex parte Evans (No 2)* [2001] 2 AC 19 at 48E.

52 It has been briefly adverted to in a number of authorities: *Babaniaris v Lutony Fashions Proprietary Limited* (1987) 163 CLR 1 at 15 (Mason J); *Trident General Insurance Co Limited v McNiece Bros Proprietary Limited* (1988) 165 CLR 107 at 171 (Toohey J); *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 257 (Deane J); *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 450-451 (Brennan J).

common law by marriage a wife gave irrevocable consent to sexual intercourse with her husband did not form part of the argument. Thirdly, the law making power of an ultimate appellate court is such that it may vary or alter what previously had been considered a settled principle of the common law in exceptional circumstances.[53] Where it exercises that power it will do so in the knowledge that the outcome will have a retroactive effect (which is one of the very reasons why the power is used in exceptional circumstances) and can be expected to express itself in terms similar to those used.

19.2 The Respondent contends that, properly understood, the decision in *Ha v New South Wales*[54] establishes that this Court has no power to prospectively overrule as to do so is to act in a manner inconsistent with the exercise of judicial power.[55]

19.3 In *Chu Kheng Lim v Minister for Immigration*, Brennan, Deane and Dawson JJ said:

> The Constitution is structured upon, and incorporates, the doctrine of the separation of judicial from executive and legislative powers. Chapter III gives effect to that doctrine in so far as the vesting of judicial power is concerned. Its provisions constitute "an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested ...No part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the Provisions of Chap. III". Thus it is well settled that the grants of legislative power contained in s 51 of the Constitution, which are expressly "subject to" the provisions of the Constitution as a whole, do no permit the conferral upon any organ of the Executive Government of any part of the judicial power of the Commonwealth. Nor do those grants of legislative power extend to the making of a law which requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power.[56] *(Footnotes omitted)*

An oft cited statement as to the content of judicial power is that contained in the judgment of Kitto J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd.*[57] His Honour said:

> Thus a judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist. It is right, I think, to conclude from the cases on the subject that a power which does not involve such a process and lead to such an end needs to possess some special compelling feature if its inclusion in the category of judicial power is to be justified.[58]

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53 *The Queen v L* (1991) 174 CLR 379; *SGIC v Trigwell* (1979) 142 CLR 617 at 633 (Mason CJ), 650-652 (Murphy J), 653 (Aickin J); *Trident v McNiece* (1988) 165 CLR 107 at 123-4 (Mason CJ, Wilson J), 130-1 (Brennan J), 143-4 (Deane J), 158-162 (Dawson J), 171 (Toohey J), 173 (Gaudron J).

54 *Ha v New South Wales* (1997) 189 CLR 465 at 503-4 (Brennan CJ, McHugh, Gummow and Kirby JJ), 515 (Dawson, Toohey and Gaudron JJ).

55 *R v P, GA* (2010) 109 SASR 1 at [88]-[89] (Doyle CJ with whom White J agreed); *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [215] (Kirby J).

56 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 26-27 (Brennan, Deane and Dawson JJ).

57 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361; See also *Fencott v Muller* (1983) 152 CLR 570 at 608 (Mason, Murphy, Brennan and Deane JJ); *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 (Griffith CJ).

58 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374-5.

In the exercise of judicial power a court determines rights and liabilities in a current controversy. The determination of a norm giving rise to future rights and liabilities or a declaration as to power, right or duty, disengaged from the resolution of a controversy is the province of the legislative power.[59] This remains the position irrespective of whether the relevant court is concerned with a question of statutory interpretation, the application of the common law, or questions of constitutional validity. The nature and content of judicial power is determined by Ch III. That content applies equally to a court of a State by reason of the operation of ss71, 73(2) and 77(iii) of the Constitution and the role and position of this Court contemplated by Ch III and ss73 and 76 of the Constitution in particular.[60] A common law rule of the type proffered by the Appellant cannot be countenanced as the common law must conform to the Constitution.[61] Similarly, because authorities in other common law jurisdictions concerning the power to overrule prospectively do not address the Australian constitutional context they are of no assistance.[62] Justice Gray is, with respect, incorrect in his understanding of the effect of this Court's decision in *Ha*.

20. There is no doubt that this Court can abolish or modify the common law. In *State Government Insurance Commission v Trigwell* Mason J said:

> The ultimate court of appeal can and should vary or modify what has been thought to be a settled rule or principle of the common law on the ground that it is ill-adapted to modern circumstances. If it should emerge that a specific common law rule was based on the existence of particular conditions or circumstances, whether social or economic, and that they have undergone a radical change, then in a simple or clear case the court may be justified in moulding the rule to meet the new conditions and circumstances.[63]

Effectively this Court did just that in *The Queen v L* and in doing so declared what the common law is to be and must be taken as having been.[64] The very caution with which this Court approaches any invitation to overrule or re-state past principles of the common law is a reflection of the fact that:

> If the legal process is to retain the confidence of the nation, the extent to which the High Court exercises its undoubted power not to adhere to a previous decision of its own must be consonant

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59 *South Australia v Totani* (2010) 242 CLR 1 at [220] (Hayne J). See also *The Commonwealth v Grunseit* (1943) 67 CLR 58 at 82 (Latham CJ); *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at [102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). See also, A Inglis Clark, *Studies in Australian Constitutional Law (1901)*, (1901, Melb) at 37-38.

60 *Lipohar v The Queen* (1999) 200 CLR 485 at [4]-[45] (Gaudron, Gummow and Hayne JJ).

61 *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 at 566 (The Court).

62 For example, *Lai v Chamberlains* [2007] 2 NZLR 7; *Hislop v Canada (Attorney-General)* [2007] 1 SCR 429; *Re Spectrum Plus* [2005] 2 AC 680; *Kleinwort Benson v Lincoln County Council* [1999] 2 AC 349; *Golak Nath v State of Punjab* (1967) SC 1643; *Linkletter v Walker* (1965) 381 US 618; *United States v Johnson* (1982) 457 US 537.

63 *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 633 (Mason J, with whom Aickin J agreed), 651 (Murphy J). See also *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 485 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49 at 71 (Gleeson CJ, Gaudron and Gummow JJ), 87 (Kirby J), 101, 104-05 (Callinan J); *Halabi v Westpac Banking Corporation* (1998) 17 NSWLR 26 at 38-39 (Kirby P, as he then was). Speaking with regard to the felony-tort rule Kirby P went on to say "Acknowledging the entirely changed circumstances listed above as reasons for now declaring the rule obsolete is a more honest and candid way for the common law to go about ridding itself of this interesting historical anachronism." Further Kirby P, did not regard taking this course as "offending the instruction of the High Court in *Dugan, Trigwell* or *Osmond*."

64 *R v P, GA* (2010) 109 SASR 1 at [87] (Doyle CJ, with whom White J agreed).

> with the consensus of opinion of the public, of the elected legislature and of the judiciary as to the proper balance between the respective roles of the legislature and of the judiciary as lawmakers.[65]

21. Whilst an appeal court should not lightly interfere with a settled rule or principle of the common law,[66] in an appropriate case the High Court has a "responsibility" to do so in order to avoid the "unsatisfactory" or "unjust" operation of the common law.[67]

22. Retrospective overruling of the criminal law requires a careful balance of the risk of injustice to an individual against the competing reasons in the public interest to change the common law.[68] Justice Deane in *Zecevic v Director of Public Prosecutions (Victoria)*[69] was opposed to reformulation of the common law as to self-defence in that case, yet acknowledged:

> 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 ...[70]

23. Abolishing the marital exemption does not create a new offence,[71] it merely removes a protection, arguably, formerly held by husbands. In *The Queen v L* this Court abolished the marital exemption recognising the modern status of a spouse and affording her the protection of the criminal law, a protection then shared by all other women in society at that time, and in 1963.

D. *Do the 1976 South Australian statutory amendments to the offence of rape serve as a bar to the judicial development of the common law as to that offence prior to those amendments coming into operation?*

24. The 1976 amendment to the *Criminal Law Consolidation Act 1935* (SA) resulted in the offence of rape being defined by statute. An example of the "symbiotic relationship"[72] between statute law and common law, the elements of the offence set out by the statute were adopted from a leading South Australian case on the subject.[73]

25. Whilst the offence of rape in South Australia as at 1963 was created by statute, the elements of the offence were provided by the common law.[74]

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65 *Geelong Harbour Trust Commissioners v Gibbs Bright & Co* [1974] AC 810 at 820 (Lord Diplock).

66 *The Queen v L* (1991) 174 CLR 379 at 389 (Mason CJ, Deane and Toohey JJ); *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 161 (Dawson J), 171 (Toohey J "certainly a court must look long and hard at the implications of declaring the law to be otherwise than hitherto accepted. In particular the court must consider the impact of any change on existing rights and obligations"); *Geelong Harbour Trust Commissioners v Gibbs Bright & Co* [1974] AC 810 at 818-821 (Lord Diplock); *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 633-634 (Mason J); *Lamb v Cotogno* (1987) 164 CLR 1 at 11 (The Court); *Halabi v Westpac Banking Corporation* (1989) 17 NSWLR 26 at 50-51 (McHugh JA).

67 *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 123 (Mason CJ and Wilson J); see also the comments of Murphy J in *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 651.

68 *R v P, GA* (2010) 109 SASR 1 at [79]-[81] (Doyle CJ with whom White J agreed).

69 *Zecevic v Director of Public Prosecutions (Victoria)* (1987) 162 CLR 645.

70 *Zecevic v Director of Public Prosecutions (Victoria)* (1987) 162 CLR 645 at 677-678 (Deane J).

71 *R v R* [1992] 1 AC 599 at 611.

72 *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [31] (Gleeson CJ).

73 See *R v Brown* (1975) 10 SASR 139 at 154-155 (Wells J); *R v Wozniak and Pendry* (1977) 16 SASR 67 at 73.

74 See *Papadimitropoulos v R* (1957) 98 CLR 249.

26. The 1976 amendment to the *Criminal Law Consolidation Act 1935* (SA) did not have retrospective operation. Nor did it prohibit a court from modifying or developing the common law as it stood in 1963.[75]

27. The facts of this case are unlike those in *A-G v Holley*.[76] This is not a case of the common law changing what the Parliament had declared the law to be. It is the common law as at 1963 - before any intervention by Parliament - with which this case is concerned.

28. There are two presumptions of statutory construction that are applicable in considering the impact of the 1976 amendments on the earlier common law. One is the presumption against the alteration of common law doctrines. The other is the presumption that legislation does not operate retrospectively. The presumption of statutory construction against the alteration of common law doctrines is well established.[77] A useful statement of this presumption was provided by Burchett and Ryan JJ in *Thompson v Australian Capital Television Pty Ltd*:

> Statutory reforms removing a particular plank from the edifice of the common law do not necessarily bring down the whole sections of the structure just because a rule expressly changed or abolished had an historical or logical connection with other rules of the common law. To forbid such a consequence the rule has been established (and should be adhered to: *Corporate Affairs Commn of NSW v Yuill* (1991) 100 ALR 609 at 610 per Brennan J) that Acts altering the common law should be construed as doing so only so far as is necessary to effect to their provisions: *Hocking v Western Australian Bank* (1909) 9 CLR 738 at 746; *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 37 ALR 613 at 616.[78]

29. The presumption may be displaced by implication.[79] Otherwise the legislature can deem or specify that a statutory provision is to operate or have a certain effect on preceding common law principles. As Deane J explained in *University of Wollongong v Metwally*:

> A parliament may legislate that, for the purposes of the law which it controls, past facts or past laws are to be deemed and treated as having been different to what they were. It cannot, however objectively, expunge the past or "alter the facts of history".[80]

30. The other relevant presumption of statutory construction is that legislation does not have retrospective operation.[81] The classic statement of this presumption is that of Dixon CJ in *Maxwell v Murphy*:

> The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law defined by reference to past events.[82]

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75 *R v P, GA* (2010) 109 SASR 1 at [43], [71]-[74] and [82] (Doyle CJ, with whom White J agreed).

76 *A-G v Holley* 2005] 2 AC 580.

77 *Potter v Minahan* (1908) 7 CLR 277 at 304 (O'Connor J); *Bropho v State of Western Australia* (1990) 171 CLR 1 at 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Coco v R* (1994) 179 CLR 427 at 437 (Mason CJ, Brennan, Gaudron and McHugh JJ); *K-Generation v Liquor Licensing Court* (2009) 237 CLR 501 at [47] (French CJ).

78 *Thompson v Australian Capital Television Pty Ltd* (1994) 54 FCR 513 at 526.

79 *Coco v R* (1994) 179 CLR 427 at 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

80 *University of Wollongong v Metwally* (1984) 158 CLR 447 at 478, cited by Lord Browne-Wilkinson in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 359.

81 *Fisher v Hebburn Ltd* (1960) 105 CLR 188 at 194 (Fullagar J); *Mathieson v Burton* (1971) 124 CLR 1 at 22 (Gibbs J); *Geraldton Building Co Pty Ltd v May* (1977) 136 CLR 379. See also *L'Office Cherifien Des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486 at 494-495 (Court of Appeal, Sir Thomas Bingham MR) and at 524-525 (House of Lords, Lord Mustill).

82 *Maxwell v Murphy* (1957) 96 CLR 261 at 267.

31. The enactment of legislation in a field covered by the common law does not entail that the common law becomes 'frozen' in time or ceases to exist. The comments of the majority judgment in *Brodie v Singleton Shire Council*[83] in dealing with the relationship between the 'highway rule' at common law and the *State Roads Act 1986* (NSW) (the RTA Act) which dealt with the construction and maintenance of public roads, bear this out:

> The legislation does not present an occasion for the analogical use of statute law to develop the common law. Rather, the Singleton Shire Council submits that the effect of the legislation is to freeze the development of the common law, apparently to its state as understood in New South Wales in 1986. There are obvious difficulties in subjecting the common law of Australia to paralysis by reason of the provisions of a State law giving particular protection to the activities of a public authority of that State. Moreover, the RTA Act did not attempt to declare what the relevant common law was before the RTA Act; this can only be ascertained from the relevant decided cases, and, in the words of Roskill LJ in *Henry v Geoprosco International Ltd*, in such a situation: "[o]ne cannot ascertain what the common law is by arguing backwards from the provisions of the statute".[84]

32. The 1976 amendment of the *Criminal Law Consolidation Act 1935* (SA) was silent with respect to rape at common law. The two presumptions referred to above are applicable. The 1976 amendment did not abrogate the offence of rape at common law. Nor did it preclude a court from developing or making declarations about the content of the common law of rape. The common law as to the offence of rape as at 1963 is the common law as declared in *The Queen v L* by virtue of the declaratory theory of law and the doctrine of precedent.

E. Was the marital exemption ever part of the common law of Australia ?

33. A review of the handful of decisions that considered the marital exemption reveals that the exemption was never authoritatively declared as part of the common law in Australia.

34. As indicated the origin of the suggested principle is to be found in Sir Matthew Hale's *The History of the Pleas of the Crown* where the learned author and former Lord Chief Justice of the King's Bench[85] states:

> But the husband cannot be guilty of the 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.[86]

35. The principle was not supported by any authority. It is not contained in legal commentaries preceding or post-dating Hale's work, such as Coke's *Institutes of the Laws of England* (1628-1644) or Blackstone's *Commentaries on the Laws of England* (1765). Furthermore, the statement of principle appears in a part of the *Pleas of the Crown* which Hale did not revise prior to his death in 1676.[87]

36. Standing alone, Sir Matthew Hale's statement does not, and could not, constitute the common law. At best Hale's pronouncement reflects his view of a custom in 17th century England. Unlike other customs which may form bases of common law principles, it nowhere appears that Hale set forth a general rule of conduct of such longstanding acceptability that "the memory of man runneth not to the contrary".[88]

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83 *Brodie v Singleton Shire Council* (2001) 206 CLR 512.
84 *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [132] (Gaudron, McHugh and Gummow JJ).
85 From 1671-1675.
86 Hale, *The History of the Pleas of the Crown*, vol 1, p629. Published posthumously in 1736.
87 See p2 of the introduction of Peter Glazebrook in the Professional Books 1972 edition of the *Pleas of the Crown*.
88 Blackstone, *Commentaries on the Laws of England* (1765) Vol 1, ch 3 at 67.

37. According to Blackstone, "the judges in the several courts of justice" were to determine the existence and validity of customs or maxims that were claimed to be part of the common law.[89] Blackstone went on to state that "judicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law".[90] To similar effect members of this Court have stated that the source of the common law is the reasons for decisions of courts, central to which is the doctrine of precedent.[91]

38. As at the date of the alleged offences in this case the suggested exemption did not have the backing of the common law in that no binding precedent can be found where the principle represented the *ratio decidendi.*

38.1 The exemption was first the subject of judicial comment in *R v Clarence*.[92] In *R v Clarence*, seven of the thirteen judges declined to comment on the issue;[93] of the six judges who did, two of them reiterated and confirmed the marital rape proposition,[94] three of them questioned or qualified it,[95] and another briefly adverted to it without engaging in it.[96] The comments of the judges in *R v Clarence* were *obiter dicta*, however, taken as a whole they indicate that even as at 1888 there existed no settled view.

38.2 The principle was next the subject of judicial comment in England in the 1950s and 1970s in the published rulings of trial judges. These trial rulings assumed the existence of the principle without question but qualified its operation by virtue of legal separation or the existence of court orders between spouses.[97] These published rulings of trial judges did not constitute any authoritative declaration of the common law on the matter.

38.3 The first appellate court that directly addressed the principle was the English Court of Appeal in *R v Steele*.[98] There the Court endorsed a further qualification of the principle, holding that where husband and wife are living apart and the husband gives an undertaking not to molest his wife, such an undertaking is the equivalent of a court's injunction and eliminates the wife's matrimonial consent to sexual intercourse and thereby renders a husband liable to rape if he breaches the undertaking. In arriving at this position, the Court of Appeal simply cited Hale's principle as supporting what was described as the 'general principle' that a husband cannot be guilty of the rape of his wife.[99]

38.4 The first Australian appellate court to consider the principle was the Full Court of the Supreme Court of Victoria in *R v McMinn*.[100] In *R v McMinn* Starke ACJ noted that there "can be no doubt that for centuries the law in England (and in Australia) has been that a man cannot rape his wife",[101] whereas Crockett J quoted from Hale and said that

89 Blackstone, *Commentaries on the Laws of England* (1765) Vol 1, ch 3 at 69.
90 Blackstone, *Commentaries on the Laws of England* (1765) Vol 1, ch 3 at 69.
91 *Lipohar v The Queen* (1999) 200 CLR 485 at 505 at [44] (Gaudron, Gummow and Hayne JJ).
92 *R v Clarence* (1888) 22 QBD 23.
93 Coleridge CJ, Huddleston B, Grantham, Mainsty and Matthew JJ (quashing the conviction); Charles J and Day AL (dissenting/upheld the conviction).
94 Smith J and Pollock B (quashing the conviction).
95 Wills J (quashing the conviction) and Hawkins and Field JJ (upholding the conviction).
96 Stephen J (quashing the conviction).
97 *R v Clarke* [1949] 2 All ER 448; *R v Miller* [1954] 1 QB 282; *R v O'Brien* [1974] 3 All ER 663.
98 *R v Steele* (1976) Cr App R 22.
99 *R v Steele* (1976) Cr App R 22 at 24 (Geoffrey Lane LJ).
100 *R v McMinn* [1982] VR 53.
101 *McMinn* [1982] VR 53 at 55.

"[i]t is plain that if such an obligation [ie: implied consent] 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".[102] Crockett J later referred to the then new Victorian legislative provision abolishing the husband's immunity, describing the marital rape exemption as an "unsatisfactory and artificial doctrine".[103] McGarvie J remarked that the husband's immunity is a principle that "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".[104] The judgments in *R v McMinn* reflect doubt and uncertainty as to whether the principle remained part of the common law in Australia as at 1982.

38.5 There are no known reported cases in South Australia dealing with marital rape before 1975. Similar to the previous English decisions, *obiter dicta* in several South Australian cases post 1975 simply assumed the validity of the principle without questioning or considering it.[105]

39. The state of the authorities up until the early 1980s shows that the principle was only considered by two appeal courts, namely the English Court of Appeal in 1976 and the Full Court of the Victorian Supreme Court in 1981.[106] In both decisions that the marital exemption forms part of the common law is not questioned. As at 1963 there was no decisive or binding judicial statement regarding the existence of the marital exemption. That said, it is apparent that the exemption was widely assumed to be the law. Thus, as Doyle CJ observed in the court below, "[e]ven in 1963, a respectable challenge to Sir Matthew Hale's opinion could have been mounted".[107]

40. The suggested principle was based on a legal fiction supposedly derived from the status of marriage. Known as the doctrine of coverture, the fiction was explained in the following terms by Blackstone in:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs everything; and is therefore called in our law-french, a *femme-covert*; and is said to be *covert-baron*, or lord; and her condition during marriage is called her *coverture*.[108]

41. The doctrine of coverture entailed that the legal rights and interests of the wife as an individual were "suspended" or assimilated with those of the husband.[109] The doctrine of coverture has never been fully embraced by the common law and has been the subject of criticism and judicial and legislative erosion.[110] The law of marriage was the province of the ecclesiastical courts, not the common law. In *The Queen v L* Brennan J conducted a review of the ecclesiastical law and held that the marital rape principle promulgated by Hale "has never been the law of marriage".[111] Brennan J considered the basis for Hale's principle

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102 *McMinn* [1982] VR 53 at 57.
103 *McMinn* [1982] VR 53 at 59.
104 *McMinn* [1982] VR 53 at 61.
105 *R v Brown* (1975) 10 SASR 139 at 141 (Bray CJ), and 153 (Wells J); *R v Wozniak and Pendry* (1977) 16 SASR 67 at 71 (Bray CJ); *R v Sherrin* (1979) 21 SASR 250 at 252 (King CJ); *Question of Law Reserved on Acquittal (No 1 of 1993)* (1993) 59 SASR 214 at 230 (Perry J).
106 *R v Steele* (1976) Cr App R 22; *R v McMinn* [1982] VR 53.
107 *R v P, GA* (2010) 109 SASR 1 at 13, para [66].
108 *Commentaries on the Laws of England*, bk I, ch 15, p430.
109 Pollock and Maitland, *The History of English Law* Vol II (Cambridge University Press, 1968), p309ff.
110 *R v Jackson* [1891] 1 QB 671; *Midland Bank v Green (No 3)* [1979] 1 Ch 496; Williams, 'The Legal Unity of Husband and Wife' [1947] *Mod LR* 16.
111 *The Queen v L* (1991) 174 CLR 379 at 391.

dubious.[112] Marriage law has never embraced the concept that a husband is entitled to have sexual intercourse with his wife at will and without her consent, or that a wife, by virtue of marriage, gives perpetual and irrevocable consent to sexual intercourse with her husband.

42. The logic of the principle as protecting the rapist but not the batterer, the mistress but not the wife, is anomalous.[113]

43. Hale's principle is capable of being read as an irrebuttable presumption. As an irrebuttable presumption, the principle has subsequently been eroded. It does not apply where the relationship of husband and wife has been interrupted by the making of a *decree nisi,* a separation order, or separation agreement.[114] Further, that a wife could be forced to submit to intercourse is inconsistent with *R v Lister*[115], *R v Jackson,*[116] and *R v Reid.*[117] The conclusion to be drawn from these authorities is that there is no irrebuttable presumption on the part of the wife – the consent of the wife may be revoked.

44. It was not until 1991 in *The Queen v L*[118] that a Court was called upon to consider whether or not the suggested principle ever formed part of the common law. For the reasons advanced above and in *The Queen v L* the proposition stands "on a dubious legal foundation... Hale's doctrine had not been given the stamp of legislative, judicial, governmental and academic recognition".[119] It should be rejected as ever having formed part of the common law in Australia.

F. If the exemption is prima facie applicable, should this Court alter the application of the principle as at 1963 as the High Court did in 1991?

45. If Hale's statement is considered an accurate statement of the common law as at 1676 then it may be assumed that it formed part of the received law in this State. Certainly, by implication, it has been treated as such.[120] If it is a settled principle, two questions arise; first, to what extent had the principle been developed by the common law since it was first promulgated. Second, to what extent was it liable in 1963 to further alteration?

46. As to the first question, the Respondent refers to the treatment of the relevant authorities at paragraphs [38] and [43] above. The Respondent contends that the development of the exemption as at 1963 had reached the point where the presumption was rebuttable. That fact, when taken with the changes in the status of married women in Australian society, allows this Court to conclude that the position arrived at by the High Court of Justiciary in *S v HM Advocate* reflects the common law as it stood in 1963 - "the critical question in any case must be whether or not consent has been withheld".[121]

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112 *The Queen v L* (1991) 174 CLR 379 at 391 and 398-401.
113 *R v Clarence* (1888) 22 QBD 23.
114 *R v O'Brien* [1974] 3 All ER 663; *R v Clarke* (1949) 2 All ER 448; *R v Miller* [1954] 2 QB 282.
115 *R v Lister* (1721) 1 Strange 477; 93 ER 645 (a deed of separation did not entitle a husband to deprive his wife of her liberty).
116 *R v Jackson* [1891] 1 QB 691 (a decree for restitution of conjugal rights did not entitle a husband to deprive his wife of her liberty).
117 *R v Reid* [1973] 1 QB 299 (abduction by a husband of his wife to force her to live with him amounts to kidnapping).
118 *The Queen v L* (1991) 174 CLR 379.
119 *C v DPP* [1995] 2 All ER 43 at 62a (Lord Lowry).
120 *The Queen v Brown* (1975) 10 SASR 139 at 153; *The Queen v Wozniak & Pendry* (1977) 16 SASR 67 at 71; *Question of Law (No 1 of 1993)* (1993) 59 SASR 214 at 230; see also Criminal Law and Penal Methods Reform Committee of South Australia, Special Report, Rape and Other Offences (1976) at 13.
121 *S v HM Advocate* [1989] SLT 469 at 473 (Lord Justice-General (Lord Emslie) for The Court).

47. As to the second question; as indicated the notion that the marital exemption was, if ever part of the common law in Australia, certainly not so by 1963, gains further support from a consideration of the status of married women by the time of the alleged offences. As indicated above the basis for Hale's proposition was the notion of coverture or 'unity of personality', namely that '...by their matrimonial consent and contract the wife hath given up herself in this kind unto her husband'.[122] The coverture of a wife meant that her legal status was 'suspended' or assimilated with that of her husband, thereby curtailing her legal rights and imposing duties and disabilities on her in many facets of life.[123]

48. By the turn of the twentieth century, the legal rights of married women had changed significantly. By means of both legislative reform and judicial development, the law came to acknowledge the rights and interests of married women as independent legal entities.

49. The English Court of Appeal in *R v Jackson*[124] dealt with the right of a married women to refuse to live with her husband in circumstances where the husband had imprisoned the wife in an effort to restore his conjugal rights. The court rejected the husband's application, stating that a husband never has enjoyed the right to the 'custody' of his wife or the right to detain or imprison her. The Court also rejected the more general notion that the marital relationship gives the husband complete dominion over the wife's person. Decided just a couple of years after *R v Clarence*, this case rejected by implication Hale's marital rape proposition,[125] and certainly at least, the legal fiction of coverture that underpinned it.

50. In *Wright v Cedzich*,[126] the High Court held that a wife does not have an action for damages for the loss of consortium of her husband. Isaacs J, who was in dissent, made the following observations about the rights of married women as at that time:

> The mutual relations of all persons in the community are regulated by the circumstances of to-day. To those circumstances the recognized principles of the common law apply – and assumed conditions of society that have in any case no existence now may and must be dismissed from consideration. When we see that women are admitted to the capacity of commercial and professional life in most of its branches, that they are received on equal terms with men as voters and legislators; that they act judicially, can hold property, may sue and be sued alone, may and frequently have to provide a home and maintain the family, when too, they are organized in time of national danger as virtual combatants in defence of the country, it is time, I think, to abandon the assertion that in the eye of the law they are merely the adjuncts or property or the servants of their husbands, that they have the legal duty of yielding and employing their body to their husband's will and bidding in all his domestic relations, and that all they are correlatively entitled to in return for obedience, subordination, child-bearing and domestic services is the right to receive such necessaries of life as are suitable to the husband's position in life...[127]

51. Further statutory reform modified the doctrine of coverture in a number of ways:

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122 Hale, *History of the Pleas of the Crown*, vol 1, p629.

123 See Blackstone, *Commentaries on the Laws of England* (1785), vol I, ch 15, pp430-433; Pollock and Maitland, *The History of English Law*, vol II (Cambridge, 1968, 2nd ed), pp403-407; Williams, *The Legal Unity of Husband and Wife* [1947] *Modern Law Review* 16; *Midland Bank v Green (No 3)* [1979] 1 Ch 496 at 511-520. See also *Best v Samuel Fox & Co Ld* [1952] AC 716, where the House of Lords, in denying a wife an action in negligence against a third party for the loss of consortium in her injured husband, noted that the husband's right in the consortium of his wife was based on the 'proprietary' or 'quasi-proprietary' right in his wife: at 731-732 per Lord Goddard, at 735 per Lord Morton of Henryton and 736 per Lord Reid.

124 *R v Jackson* (1891) 1 QB 671.

125 Which was cited by counsel for the husband as an authority in support of the husband's case: (1891) 1 QB 671 at 675; although not specifically referred to in the judgments, Lord Halsbury LC did say at the outset of his judgment at 678, 'I confess that some of the propositions which have been referred to during the argument are such as I should be reluctant to suppose ever to have been the law of England'.

126 *Wright v Cedzich* (1930) 43 CLR 493.

127 *Wright v Cedzich* (1930) 43 CLR 493 at 504-505.

51.1 The *Married Women's Property Act 1882* (UK), which was enacted in substantially the same from in many of the colonies,[128] gave a married woman the right to acquire, hold and dispose of real and personal property as her separate property as if she were a *femme-sole* or single woman.[129]

51.2 Married women were given an independent legal status, as if they were *femme-sole*, in liabilities in tort, contract, debt or obligation, along with being capable of appointing an agent or attorney and of suing and being sued in either tort or contract.[130]

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51.3 Mothers were given rights to the custody and control of infants under the age of sixteen years and courts were empowered to make orders for the payment of child maintenance for mothers, where prior, upon separation, the child went to its father.[131]

51.4 The 'double-standard' in adultery as a basis for the granting of divorce[132] was removed as early 1881 in New South Wales and as late as 1923 in Queensland, thereby permitting a wife to petition for divorce on the ground of non-aggravated adultery as had been permitted to husbands.[133]

20 51.5 To supplement recourse by way of matrimonial relief, in South Australia the Parliament introduced the *Married Women's Protection Act* 1896 (SA), which enabled a summary court to make orders with respect to cohabitation, custody of children and payment of child maintenance on grounds of adultery, desertion, cruelty to children and neglecting to pay child maintenance.

51.6 Women of the age of 21 years and older were granted the right to vote in Australia as early as 1895 in South Australia, with Victoria being the last State to afford this right to women in 1908. Similarly, South Australia also pioneered the way to permitting women to stand for Parliament as early as 1895, with Victoria again being the last State to
30 afford this right to women in 1923.

52. Thus differences in status between the position of husband and wife had been extinguished or modified by Acts of Parliament with the result that the general nature of the relationship that existed between spouses had been significantly changed.[134] The nature and status of the marital relationship as at the early to mid twentieth century bore no resemblance to that of the days of Bracton and Blackstone.[135] The foundation upon which Sir Matthew Hale's proposition was dubiously erected had crumbled to dust.

53. In recent times the Family Court has, with respect, rightly observed that the social and legal
40 institution of marriage as it pertains to Australia has undergone transformations that are referable to the environment and period in which the particular changes occurred. The

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128 See *Married Women's Property Act 1883* (SA), *Married Women's Property Act 1884* (Vic), *Married Women's Property Act 1890* (Qld), *Married Women's Property Act 1892* (WA), *Married Women's Property Act 1893* (Tas), *Married Women's Property Act 1983* (NSW).

129 See Cowie, 'A History of Married Women's Real Property Rights' (2009) 1 *Australian Journal of Gender and Law* <https://genderandlaw.murdoch.edu.au/index.php/sisterinlaw> at 12 July 2011.

130 See *Law of Property Act 1936* (SA), s92.

131 See *The Infants Custody Act 1883* (SA).

132 See *Matrimonial Causes Act 1857* (UK), *Matrimonial Causes Act 1858* (SA), *Matrimonial Causes Act 1860* (Tas), *Matrimonial Causes Act 1861* (Vic), *Matrimonial Causes Act 1863* (WA), *Matrimonial Causes Act* 1864 (Qld), *Matrimonial Causes Act 1873* (NSW).

133 See Finlay *Divorce and the status of women: Beginnings in nineteenth century Australia* (2001) Australian Institute of Family Studies Seminar <http://www.aifs.gov.au/institute/seminars/finlay.html> at 12 July 2011.

134 *Best v Samuel Fox & Co Ld* [1952] AC 716 at 727 (Lord Porter).

135 *Best v Samuel Fox & Co Ld* [1952] AC 716 at 732-733 (Lord Goddard).

concept of marriage is not one that is or ever was frozen in time.[136] The authorities that touch upon the marital exemption, particularly those that began the development of exceptions to it, demonstrate this.

54. The doctrine of coverture did not form part of the law of marriage in Australia in the twentieth century. The advent of fault-based divorce, the development of women's rights in property, tort and contract, coupled with the civil rights of women to vote and stand for Parliament, make plain that the legislature, at both the Federal and State levels, had by necessary implication excluded the operation of the doctrine of coverture.

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55. The rights and privileges of married women in Australia by the mid twentieth century were entirely inconsistent with the principle that a wife gave irrevocable consent to sexual intercourse with her husband upon marriage. This was the position in 1963. The critical question is whether consent was withheld.

Conclusion

56. The Full Court of the Supreme Court of South Australia was bound to apply *The Queen v L.*

20 57. The statutory definition of rape introduced by the 1976 amendment to the *Criminal Law Consolidation Act* 1935 (SA) did not alter or preclude development of the common law of rape.

58. As at 1963 the marital exemption did not form part of the common law of Australia.

Part V: Order sought by the respondent

59. The appeal be dismissed.

30 **Part VI: Any special order for costs sought by the respondent**

60. No order for costs is sought by the Respondent.

Dated: 27 July 2011

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Martin Hinton QC
Solicitor-General for South Australia

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Kos Lesses
50 Counsel for the Director of Public Prosecutions (SA)

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136 *Attorney-General (Cth) v "Kevin and Jennifer"* (2003) 172 FLR 300 at 314-320 (The Court).