

Case Note

Developing the Common Law and Rewriting the History of Rape in Marriage in Australia: *PGA v The Queen*

Wendy Larcombe* and Mary Heath**

Abstract

In *PGA v The Queen* (2012) 245 CLR 355, the High Court was asked to determine whether rape in marriage was an offence under the common law of Australia in 1963. The Court held by majority that there was no ‘marital exemption’ from prosecution at the relevant time, as the foundation of any such rule was the presumption that wives gave irrevocable consent to intercourse by their husbands. That presumption was found to have ‘fallen away’ by 1935 as a result of statutory reforms creating access to divorce and property rights for married women. The dissentients considered that the immunity was a settled rule of the common law in 1963 and to restate the law in other terms now would criminalise conduct that was lawful at the time it was committed. This case note argues that the majority judgment fails to engage with this and other important points of principle regarding methods of common law development and its relationship to statutory and extra-judicial sources. Moreover, in finding that the immunity did not form part of the common law from 1935, we suggest this decision implicitly denies the law’s part in authorising marital rape for most of the 20th century, effectively rewriting history.

I Introduction

Was marital rape an offence under the common law of Australia in 1963? The appellant in *PGA*¹ was charged in 2009 with two counts of rape for offences that allegedly occurred in 1963 when the complainant and PGA were married and cohabiting. Had the complainant alleged rape to the police in 1963 it is profoundly unlikely that PGA would have been prosecuted because the widely-held view at that time was that the common law did not recognise ‘rape in marriage’. The basis of the ‘marital immunity’ for rape prosecution is consistently traced to a statement by Sir Matthew Hale published in *The History of the Pleas of the Crown* (1736):

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.²

* Senior Lecturer, Melbourne Law School, University of Melbourne. Email w.larcombe@unimelb.edu.au.

** Associate Professor, Flinders Law School, Flinders University. Email mary.heath@flinders.edu.au.

¹ *PGA v The Queen* (2012) 245 CLR 355 (‘PGA’).

² Matthew Hale, *The History of the Pleas of the Crown* vol 1 (1736) ch 58, 629.

The continued application of the marital immunity as a common law rule remained largely unquestioned into the 1970s, when it became the focus of wider feminist pressure for modernisation of the law of rape. South Australia was the first jurisdiction to respond: in 1976 it passed controversial reforms that made rape in marriage a criminal offence when ‘aggravating circumstances’ existed.³ In the 1980s, other jurisdictions progressively introduced legislation that removed distinctions between married and unmarried women in relation to intimate-partner rape.⁴ South Australia introduced further reforms in 1992, removing the requirement for aggravating circumstances to be proved in addition to the elements of rape when the complainant and accused were married.⁵ From that point forward, no jurisdiction in Australia has made any legislative distinction between rape inside and outside marriage.

In *PGA*, the High Court was asked to determine whether rape in marriage was recognised by the common law of Australia in 1963 — prior to the statutory reforms of the 1970s and 1980s. The Court had considered the issue of marital rape in obiter in the 1991 case of *R v L*⁶ and there accepted that Hale’s statement probably reflected the common law in his own time. The majority went on without settling the status of the rule to state that by 1991 ‘it is appropriate for this Court to reject the existence of such a rule as now part of the common law of Australia.’⁷ It was not necessary for the Court in *R v L* to determine exactly when the marital exemption had ceased to be part of Australian law, however.⁸ *PGA* thus afforded the High Court its first opportunity to determine as a matter of ratio whether any marital immunity for rape had been part of the common law of Australia and, if so, whether it had ceased to be part of the common law by 1963.

For this reason, *PGA* is an important case. Because it took so long for the question of marital rape to come before the Court, however, the decision in *PGA* was always going to be open to criticism. If the appeal were dismissed, and the High Court found that rape in marriage was a criminal offence in 1963, *PGA* would be liable to prosecution for acts he allegedly committed almost 50 years earlier, arguably subjecting him to a different legal standard than the one likely to have been applied to him in the years immediately following his alleged offending. Such a finding would also mean that the ‘progressive’ South Australian statutory reforms of 1976 had in fact restricted the protections offered to married women by the common law. On the other hand, if the appeal were upheld on the basis that no crime of marital rape was legally recognised in 1963, this would confirm that married women’s sexual violation had been condoned by the common law since its reception into Australia. Such a decision may well be interpreted as an

³ For an account of the controversy, see Duncan Chappell and Peter Sallmann, ‘Rape in Marriage Legislation in SA: Anatomy of a Reform’ (1982) 14 *Australian Journal of Forensic Sciences* 51.

⁴ *Crimes (Amendment) Ordinance (No 5) 1985* (ACT) s 92R; *Crimes (Sexual Assault) Amendment Act 1981* (NSW) s 61A(4); *Criminal Code Act 1983* (NT) s 192(1); *Criminal Code, Evidence Act and other Acts Amendment Act 1989* (Qld) s 31; *Criminal Code Amendment (Sexual Offences) Act 1987* (Tas) s 185(1); *Crimes (Amendment) Act 1985* (Vic) s 62(2); *Acts Amendment (Sexual Assaults) Act 1985* (WA) s 325.

⁵ The *Criminal Law Consolidation (Rape) Amendment Act 1992* (SA) removed s 73(5).

⁶ *R v L* (1991) 174 CLR 379.

⁷ *Ibid* 389.

⁸ *Ibid*.

anachronistic affirmation of centuries-old rules that subordinated married women, out of step with contemporary standards of gender equality, with *R v L*, and with decisions in other jurisdictions abolishing the immunity.⁹

The majority in *PGA* (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) dismissed the appeal and held that if the ‘marital exemption’¹⁰ for rape prosecution were ever part of the common law of Australia, domestic statute law had removed any basis for its continued acceptance by 1935 at the latest.¹¹ As a consequence, *PGA* was liable to prosecution for the rapes he allegedly committed in 1963.¹² The majority state that their decision:

does not involve any retrospective variation or modification by this Court of a settled rule of the common law. At the time of the commission of the alleged offence the common law rule for which the appellant contends did not exist.¹³

In contrast, the dissentients, Heydon J and Bell J, would have allowed the appeal. In their separate opinions, the majority decision amounts to criminalising conduct which was legal at the time it was undertaken, in contravention of fundamental principles of the criminal law.¹⁴ The minority judgments each find that the marital immunity was part of the Australian criminal common law until abolished by statute in the late 20th century.

The decision in *PGA* most obviously has potential impacts on the prosecution of marital rapes committed in common law jurisdictions prior to the statutory reforms of the 1970s and 1980s. Any marital rape committed against a living adult is now deemed to have been a criminal offence under Australian common law. However, given that the decision renders restrictive or redundant the statutory reforms of the 1970s and 1980s that were previously thought to have limited or abolished the marital exemption, the decision in *PGA* also has implications for our understanding of the development of the common law and, in particular, its relationship to statutory and extra-judicial sources. In arriving at their conclusions, the majority and minority judgments had to negotiate a series of decisions — about the status of historical statements of common law rules; about the relevance of statutory changes to marriage and divorce law; about principles of criminal justice; and about the relation between common law development and statutory rules. The status of the High Court’s earlier dicta in *R v L* was also in issue in *PGA*.

In this case note, we argue that the minority judgments pose questions of principle and develop persuasive arguments that are not adequately addressed by

⁹ *R v R* [1992] 1 AC 599; *S v HM Advocate* 1989 SLT 469.

¹⁰ Both Heydon J and Bell J use the term ‘immunity’, reflecting their focus on the role of the rule in the criminal law, cf the majority’s term ‘marital exemption’. Heydon J uses ‘the immunity’ and ‘Hale’s proposition’ interchangeably: see *PGA* (2012) 245 CLR 355, 384 [67].

¹¹ *Ibid* 369 [18].

¹² At the time of writing, a directions hearing was scheduled in the District Court of South Australia for 1 November 2012. In the weeks before going to print, we were advised that a death certificate for *PGA* had been lodged with the court.

¹³ *PGA* (2012) 245 CLR 355, 369 [18].

¹⁴ For further comment from this perspective on the Supreme Court decision, see Kellie Toole, ‘Marital Rape in South Australia: *R v P,GA*’ (2011) 35 *Criminal Law Journal* 237.

the reasoning of the majority. After setting out the factual and legal context for the case (Part II) and the Supreme Court's decision (Part III), we analyse the contrasting High Court majority and minority judgments on the key issues for determination (Part IV). In Part V we discuss the reasoning and implications of the decision in *PGA* and conclude that this decision is unsatisfying. Having decided that the immunity had ceased to exist by 1935, the majority does not articulate reasons which engage with the issues raised by the minority concerning core principles of common law development. The decision also fails to acknowledge the lived experiences of wives and husbands and their relationship to the law as it was understood in 1963. As a consequence, the High Court has replaced the fiction of marital consent to sexual intercourse with a new fiction: namely, that the common law recognised rape in marriage throughout the 20th century.

II Background and Procedural History

PGA was charged in 2009 with six offences alleged to have been committed against the complainant, GP, in 1962–64: two counts of carnal knowledge¹⁵ alleging sexual intercourse prior to the parties' marriage on 1 September 1962, (counts 1 and 2); two counts of rape, charged as assault in the alternative, relating to events in March (counts 3 and 4) and April (counts 5 and 6) of 1963; and two charges of assault occasioning bodily harm on separate dates in 1964 (counts 7 and 8). At the time of the alleged offending, the parties were married and there were no orders in force restricting contact or anticipating termination of the marriage. The marriage ended after GP filed for divorce in 1969.

The charges against PGA were ultimately a result of evidence that GP gave on 7 March 2006 before the *Mullighan Inquiry* into the sexual abuse of children in state care.¹⁶ It should be noted, however, that there is evidence that public authorities were aware of PGA's alleged violence against GP during the term of their marriage. GP contacted police on numerous occasions during the 1960s to complain about PGA's violence against her but they declined to charge him at that time. Police even attended the house on the occasion of the assault now charged as count 8, but did not take action as they said it was a 'domestic problem'.¹⁷ They suggested GP obtain medical attention for her injuries.¹⁸

On 14 August 2006, GP gave a statement to police which was relied on to commence criminal proceedings against PGA in March 2009.¹⁹ The rape offences were charged as contrary to s 48 of the *Criminal Law Consolidation Act 1935* (SA)

¹⁵ 'Carnal knowledge' was replaced by the offence of 'unlawful sexual intercourse' in 1976: *Criminal Law Consolidation Act 1935* (SA) s 49.

¹⁶ Hon E P Mullighan QC, *Children in State Care: Commission of Inquiry — Allegations of Sexual Abuse and Death From Criminal Conduct*, Presented to the South Australian Parliament, 31 March 2008, XI ('*Mullighan Inquiry*'). Evidence of criminal conduct obtained through the *Mullighan Inquiry* was referred to police.

¹⁷ Transcript of Proceedings, *R v PGA* (District Court of South Australia, 1418/2009, Herriman J, 5 July 2010) 28.

¹⁸ *Ibid.*

¹⁹ PGA was first interviewed in June 2007, and in September 2007 the Port Adelaide Prosecution Service requested an opinion from the Director's office on the 'marital rape' charges. That opinion was provided in May 2008.

(‘*CLC Act*’), which in 1963 provided that: ‘Any person convicted of rape shall be guilty of a felony, and liable to be imprisoned for life, and may be whipped.’ The elements of ‘rape’ were supplied by the common law. Alternative charges of assault were included by the prosecution, anticipating a ruling that in 1963 rape in marriage was not an offence known to the common law when the parties were cohabiting and there were no legal orders restricting contact or relating to termination of the marriage.

At the time of the alleged rape offences, there was a time bar of three years on s 48 offences, contained in the *CLC Act* s 76A(1). Section 76A was repealed in 1985,²⁰ removing time limits on rape prosecutions. Whether the 1985 amending Act *retrospectively* removed the s 76A immunity was considered by the South Australian Supreme Court (Full Court) in *R v Pinder*.²¹ It decided that the repeal did not ‘deprive a person of an immunity already acquired under s 76A, before its repeal’.²² However, that decision was effectively reversed in 2003 by the *Criminal Law Consolidation (Abolition of Time Limit for Prosecution of Certain Sexual Offences) Amendment Act 2003* (SA) (‘2003 Amending Act’).²³ As a result, from March/April 1966 (three years after the alleged rapes in 1963) until the 2003 Amending Act came into force, PGA would have been immune from prosecution for these offences, even if marital rape were known to the law of South Australia at that time. Following the 2003 Amending Act, however, no time bar prevented PGA’s prosecution for rape.

In July 2010, PGA’s counsel sought a permanent stay of the criminal proceedings in the District Court on two main grounds: that any trial would amount to an abuse of process given the forensic disadvantage to the accused resulting from the delay in prosecution, and that the rape charges were doomed to failure because rape within marriage was not recognised by the common law of South Australia at the time of the alleged offending.²⁴ In response, the DPP sought a temporary stay to state a case to the Full Court of the Supreme Court on the ‘rape in marriage’ question.²⁵ The prosecution argued that the absence of evidence through the passage of time was a ‘two-edge sword’ that applied with equal force to the prosecution,²⁶ and that the delays since 2006 in bringing the matter to trial were not ‘unusual or exceptional’.²⁷ Herriman J found that potential, rather than actual prejudice to the defence had been demonstrated as delay and complaint

²⁰ *Criminal Law Consolidation Act Amendment Act 1985* (SA) s 5.

²¹ (1989) 155 LSJS 65.

²² *R v P, GA (Question of Law Reserved No 2 of 2010)* (2010) 109 SASR 1, 6 [21] (Doyle CJ) (‘*R v P, GA*’).

²³ The 2003 Amending Act inserted a new s 72A into the *CLC Act* providing that: ‘Any immunity from prosecution arising because of the time limit imposed by the former section 76A is abolished’ (footnote omitted).

²⁴ Before Herriman J, the defence emphasised that PGA could have been charged with the alleged assaults in 1964 or in 1968 when GP applied for a restraining order, but the police ‘decided to take no action’: Transcript of Proceedings, *R v PGA* (District Court of South Australia, 1418/2009, Herriman J, 5 July 2010) 38. In respect of the later alleged aggravated assaults, where the complainant said that she had called police and welfare at the time but they failed to act, Herriman J stated ‘it is notorious that domestic violence matters were not taken as seriously in those times as they should have been’: at 2.

²⁵ *Ibid* 9–10.

²⁶ *Ibid* 62.

²⁷ *Ibid* 70.

issues could be the subject of directions at trial and such directions continued to be required by law.²⁸ Herriman J considered the ‘public interest in seeing charges of serious offences heard’ and ‘the need to maintain public confidence in the administration of justice’. He determined that although PGA’s health was ‘poor’, a fair trial was possible. Having reached this conclusion, Herriman J considered the marital rape issue and decided to state a case under s 350 of the *CLC Act*, finding that the matter was a question of law alone, antecedent to trial, critical to the conduct of the trial and of general importance.²⁹ The question of law was referred to the Full Court of the South Australian Supreme Court in the following terms:

Was the offence of rape by one lawful spouse of another, in the circumstances as outlined above [where the parties were cohabiting and no legal orders related to the marriage were in force], an offence known to the law of South Australia as at 1963?³⁰

III R v P,GA in the Supreme Court of South Australia

In answering the referred question, the majority, Doyle CJ (with whom White J agreed), held that no rule affording immunity existed in 1963 in South Australia. Gray J, in the minority, held that it did. Central to their different opinions was the standing and effect attributed to *R v L*, in which the High Court stated in obiter that if the exemption had ever formed part of the common law of Australia, it no longer did.³¹ The precedential value to be accorded to High Court dicta was thus a central issue in the Supreme Court decision.

A *The Majority (Doyle CJ, with whom White J Agreed)*

The majority felt bound to follow the High Court’s dicta on rape in marriage in *R v L*. Doyle CJ adopted a deferential approach in line with *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*³² which has been interpreted to require intermediate appellate courts to follow ‘seriously considered dicta’ of the High Court reflecting

²⁸ Ibid 4.

²⁹ Herriman J stated that, ‘in recent times, and no doubt due in part to the Mullighan Royal Commission, there have been numerous aged sex cases brought to trial in this Court and a resolution of the question now may very well be of general importance’: ibid 5.

³⁰ *R v P, GA* (2010) 109 SASR 1, 4 [6] (Doyle CJ); 45 [173] (Gray J).

³¹ *R v L* (1991) 174 CLR 379.

³² (2007) 230 CLR 89 (*Farah*). In *Farah*, the High Court reversed a decision of the New South Wales Court of Appeal because the changes to the common law made by the lower Court ‘were unsupported by authority and flew in the face of seriously considered dicta uttered by a majority of this [the High] Court’: at 159 [158] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). The meaning of ‘seriously considered’ dicta, and its relation to ‘long established authority’ is being debated. See, eg, Keith Mason, ‘President Mason’s Farewell Speech’ (2008) 82 *Australian Law Journal* 768; Norman O’Byrne and Chris Young, ‘A View from Outside the Vortex on Keith Mason’s Retirement Speech and the Australian Doctrine of Judicial Precedent’ (2008) 82 *Australian Law Journal* 771; Matthew Harding and Ian Malkin, ‘The High Court of Australia’s Obiter Dicta and Decision-Making in Lower Courts’ (2012) 34 *Sydney Law Review* 239.

‘long established authority’.³³ Doyle CJ determined that the reasoning in *R v L* constituted ‘considered statements of the common law’,³⁴ and stated that:

This Court cannot ... reinstate Sir Matthew Hale’s opinion as part of the common law.... It is for the High Court, not this Court, to decide that ... the statements in *The Queen v L* should not be applied to events before that decision, or before 1976.³⁵

Moreover, it was noted that the High Court in *R v L* cited with approval the decision of the High Court of Justiciary of Scotland, *S v Her Majesty’s Advocate*,³⁶ and the House of Lords decision in *R v R*,³⁷ both of which abolished the immunity. Doyle CJ considered that these 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.’³⁸

Doyle CJ stated that applying the dicta from *R v L* would ‘remove a blot on the history of the common law.’³⁹ However, the retrospective effect of this restatement of the common law raised two potential objections. The first concerned variation of criminal law. Counsel for PGA argued that the common law should not be stated in terms that imposed retrospective liability under criminal law.⁴⁰ Doyle CJ ultimately rejected this argument. While there was strong evidence that the law was understood in 1963 to afford a marital immunity for rape, in the majority view, it could not be said ‘that people would have ordered their affairs or made decisions based on the earlier state of the common law’.⁴¹ Doyle CJ also considered and rejected an argument that any change to the common law should be prospective only, because of the impact on the rights of an accused. He determined that such a finding would be inconsistent with the operation of the common law which, when changed, changes with retrospective effect.⁴²

The second objection concerned the relation between the common law and statute. Where the 1976 reforms had been intended to modify the common law by restricting the marital immunity for rape, Doyle CJ’s finding meant that the legislation was restrictive rather than protective of married women’s rights.⁴³ Doyle CJ characterised the 1976 reforms as arising from misunderstanding of the law:

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.⁴⁴

³³ *Farah* (2007) 230 CLR 89, 151.

³⁴ *R v P, GA* (2010) 109 SASR 1, 17 [82].

³⁵ *Ibid* [82]–[83].

³⁶ [1989] SLT 469.

³⁷ [1992] 1 AC 599.

³⁸ *R v P, GA* (2010) 109 SASR 1, 13[65].

³⁹ *Ibid* 17 [85].

⁴⁰ *Ibid* 14–15 [75]–[77].

⁴¹ *Ibid* 16 [81].

⁴² *Ibid* 19 [91]. See also Enid Campbell, ‘The Retrospectivity of Judicial Decisions and the Legality of Governmental Acts’ (2003) 29 *Monash University Law Review* 49.

⁴³ *R v P, GA* (2010) 109 SASR 1, 9 [45].

⁴⁴ *Ibid* 8 [37].

Hence an argument that the statutory law was indicative of what the common law had been in 1963 was also rejected.

B *The Minority (Gray J)*

Gray J considered the High Court's observations in *R v L* to be dicta only and 'carefully expressed so as not to amount to a declaration of the common law'.⁴⁵ Moreover, as a consequence of the issues raised in that case, the full history of the common law in relation to rape was not the subject of submissions before the court. For Gray J, this implied that the dicta in *R v L* should not be regarded as 'seriously considered' dicta of the High Court that ought to be followed by the Supreme Court (although *Farah* is not mentioned in his judgment). In the absence of binding authority, rather than asking, as Doyle CJ implicitly did, who is authorised to declare the common law of rape in 1963, Gray J characterised the central issue as 'whether the defendant ... is entitled to be tried according to the substantive law applicable at the time.'⁴⁶ His review of legal authority focused not on the 'highest' relevant authority — arguably, *R v L* — but rather on historically contemporaneous dicta.⁴⁷ On the basis of available judicial comment — much of it supplied by Bray CJ⁴⁸ — Gray J concluded that, if tried in South Australia before 1980, PGA would have met the judicial view that the common law afforded spousal immunity (until partially removed by the reforms of 1976).⁴⁹ A key concern for Gray J was the fact that it would give rise to 'an odd result'⁵⁰ if it were accepted that *R v L* had declared that the presumption of marital consent was not part of the common law of Australia at a point in time when Parliaments were being lobbied or developing legislation to abolish the presumption.

IV *PGA v The Queen in the High Court*

The South Australian Supreme Court decision was appealed to the High Court of Australia. Again, the majority determined that the offence of rape in marriage was known to the common law of Australia in 1963, while the minority held that it was not. The issues addressed by the High Court were rather different to those which were the focus of the South Australian Supreme Court. Where the Supreme Court majority believed the lower courts were bound, following *Farah*, to apply the dicta from *R v L* to offences committed before 1976, the High Court judgments are silent on *Farah* and cautious in their treatment of *R v L*. The minority judges on the High Court found that *R v L* was not binding: it involved dicta about an immunity which had been abolished by statute in all Australian jurisdictions by 1991⁵¹ and could

⁴⁵ Ibid 36 [145].

⁴⁶ Ibid 21 [99]. Gray J regarded it as a 'basic human right that a person should not face imprisonment with respect to conduct that was legal when undertaken': ibid 23 [104].

⁴⁷ Gray J also notes that the absence of authority may reflect the view that marital rape was not an offence known to the common law during the early 20th century: ibid 22 [109].

⁴⁸ Bray CJ became a member of the Supreme Court in 1967 when he was appointed Chief Justice.

⁴⁹ *R v P, GA* (2010) 109 SASR 1, 29 [132]. Historical dicta from other jurisdictions were drawn on to confirm long-standing judicial acceptance of a common law marital exemption.

⁵⁰ Ibid 37 [149].

⁵¹ *PGA* (2012) 245 CLR 355, 424 [193].

have no practical effect in relation to acts alleged to occur from 1991 onward.⁵² The majority did not depart from that view. Thus, the High Court judgments undertake a fresh analysis of the existence and basis of the marital exemption in Australian law. In determining whether the immunity was part of the common law in 1963, three significant issues are considered: the status and authority of Hale's proposition; the basis of the marital immunity; and the implications of stating the common law in 2012 in terms that differ from understandings of the law that prevailed in 1963.

A *The Majority (French CJ, Gummow, Hayne, Crennan and Kiefel JJ)*

Chief Justice Sir Matthew Hale's *Pleas of the Crown* was identified as the source of the proposition that 'a husband cannot be guilty of a rape committed by himself upon his lawful wife'.⁵³ Was this extra-judicial text an authoritative statement of the common law? The majority explain that 'common law' (in the relevant sense) refers to the body of law and the judicial method by which particular cases are adjudicated, commonly referred to as 'case law' or 'law made by judges'.⁵⁴ On this definition, there was:

a difficulty in the appellant's reliance ... upon a principle of the common law based upon a statement in a text published in 1736, many years after the death of the author, without citation of prior authority and lacking subsequent exposition in cases where it has been repeated.⁵⁵

The majority accept that Hale's proposition was reproduced in criminal law treatises and textbooks and included in the Australian and Canadian criminal codes, however, those sources are not considered to be authoritative statements of the common law. Case law itself is found to be extremely limited and inconclusive on the issue of a marital exemption. Thus, for the majority, the rule affording a marital exemption from rape prosecution was at best an untested proposition, by no means a 'settled rule'.⁵⁶

Even if it were accepted that Hale had correctly stated the law for his time, the majority reason that the common law has the capacity to adapt to changed circumstances.⁵⁷ A particular aspect of that creative capacity is found to be 'determinative of the present appeal':

where the reason or 'foundation' of a rule of the common law depends upon another rule which, by reason of statutory intervention or a shift in the case law, is no longer maintained, the first rule has become no more than a legal fiction and is not to be maintained.⁵⁸

⁵² On the accounts provided by Heydon J and Bell J, *R v L* can have no impact prior to those reforms either. Moreover, in Bell J's view, *R v L* can be read down on the basis that the spouses were no longer cohabiting: *ibid* 425 [195].

⁵³ *Ibid*, citing Hale, above n 2, 629.

⁵⁴ *Ibid* 370 [22].

⁵⁵ *Ibid*.

⁵⁶ *Ibid* 369 [18].

⁵⁷ *Ibid* 372 [29].

⁵⁸ *Ibid* 373 [30].

No authority is offered for this proposition, only an example.⁵⁹ However, the majority proceed on this basis to consider whether the foundational ‘rule’ that deemed that wives gave irrevocable consent to sexual intercourse by their husbands is ‘no longer maintained’. If not, they reasoned, the rule affording marital immunity would have ‘become no more than a legal fiction’.⁶⁰

The majority thus frame the issue before the court very narrowly as:

whether the appellant is correct in his contention that, as a matter of the common law, upon their marriage in 1962 his wife had given her consent to sexual intercourse and thereafter could not retract her consent, at least while they remained lawfully married, with the result that he could not be guilty of raping her as charged.⁶¹

This particular framing of the issue means that the majority does not consider whether the marital immunity was independent of the reason stated by Hale, namely: ‘*for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.*’⁶² In addition, the focus on marital consent directs the majority’s attention to the law governing marriage, rather than to legal precedents governing judicial development of the criminal law.⁶³

The majority consider that Hale may have believed the implied consent to marital intercourse was irrevocable because marriage itself was irrevocable in Hale’s time.⁶⁴ However, they state that ‘[t]he rule, formulated under vastly different conditions, need not prevail when those conditions have changed.’⁶⁵ The passage of the *Matrimonial Causes Act 1857* (UK) ensured access to divorce for those who could not afford a private Act of Parliament.⁶⁶ In the Australian colonies, equivalent legislation was introduced between 1858 and 1873.⁶⁷ The availability of divorce, combined with reforms to enable married women to maintain some control of their property and the extension of the suffrage to women around the turn of the 20th century were considered by the majority to have fundamentally altered the nature of marriage and the legal relations between husbands and wives.⁶⁸ The majority thus found that:

⁵⁹ Ibid [31].

⁶⁰ Ibid.

⁶¹ Ibid 364 [3].

⁶² Ibid 375 [39] (italics in original) citing Hale, above n 2, 629.

⁶³ After reviewing 17th century matrimonial law, the majority concluded that Hale was likely incorrect in his understanding of the nature of the matrimonial contract: ibid 383 [60].

⁶⁴ Dissolution of marriage required an Act of Parliament and only five such divorces were granted before 1714.

⁶⁵ *PGA* (2012) 245 CLR 355, 382 [59], citing *State v Smith* 426 A 2d 38 (NJ, 1981) 42.

⁶⁶ The legislation enshrined a gendered ‘double standard’. While adultery was a sufficient ground for a husband to seek divorce under the 1857 Act and its colonial equivalents, a wife seeking divorce would need to establish her husband’s desertion and/or cruelty; adultery alone was insufficient.

⁶⁷ *PGA* (2012) 245 CLR 355, 381 [57]. Grounds for divorce were further liberalised in Victoria in 1889 and NSW in 1892, giving colonial women greater access to divorce than their English contemporaries. See J M Bennett, ‘The Establishment of Divorce Laws in New South Wales’ (1963) 4 *Sydney Law Review* 241.

⁶⁸ The majority reasoned that if the marriage contract itself were now revocable, it made no sense to maintain that a ‘term’ of that contract — consent to sexual intercourse — may not be revoked.

if the 'marital exemption' ever was part of the common law of Australia, it had ceased to be so by the time of the enactment in 1935 of s 48 of the CLC Act, before the date of the commission of the alleged offences.⁶⁹

Once the proposition that wives gave irrevocable consent to sexual intercourse with their husbands was found to be without foundation, the proposition that husbands were exempt from criminal liability for rape was not to be maintained. The majority do not inquire into professional or popular understandings of the law or the likelihood of prosecution at the time of the alleged offences. Having found that any common law rule affording spousal immunity from rape prosecution was contradicted by statutory changes to the law before 1935 they conclude that: 'at all times relevant to this appeal, and contrary to Hale's proposition, at common law a husband could be guilty of a rape committed by him upon his lawful wife.'⁷⁰

This conclusion meant that no issue arose for the majority of criminalising conduct which was legal when it was undertaken. Having determined that the rule did not exist by 1963, they state that their decision 'does not involve any retrospective variation or modification ... of a settled rule of the common law.'⁷¹ The dissenting judges, by contrast, found that the marital rape exemption *was* a settled rule of the common law of Australia in 1963. Further, to abolish that exemption in 2012 with retrospective effect would represent the creation of a new offence (Heydon J) or the criminalisation of conduct that was not subject to criminal punishment at the time it was committed (Bell J), in contravention of a fundamental principle of criminal law.

B *The Minority Judgments (Heydon J and Bell J)*

The majority ask whether there is legal authority to support a presumption of wives' marital consent that would continue to justify an immunity for husbands from rape prosecution. Heydon J and Bell J in dissent effectively reverse the burden of persuasion. The minority judges ask whether the submission should be accepted that either the immunity was never part of the common law of Australia or, if it was, it had ceased to be so before 1963.

For both Heydon J and Bell J, the improbability that PGA would have been prosecuted for marital rape in 1963 is critical. Bell J states that:

It cannot be sensibly suggested that the appellant would have been prosecuted for those [rape] offences, had the allegations come to the attention of the authorities in 1963. This is because at that time it was understood that the crime of rape could not be committed by a husband against his wife with whom he was living (the immunity).⁷²

The existence of the marital exemption or immunity as a feature of legal practice in 1963 is thus not an open legal question for the dissenting judges.

⁶⁹ *PGA* (2012) 245 CLR 355, 369 [18].

⁷⁰ *Ibid* 384 [64].

⁷¹ *Ibid* 369 [18].

⁷² *Ibid* 415 [164].

Nor is Hale's authority in doubt. For the dissentients, the evidence that Hale's statement became a substantive rule of English common law, received into the common law of Australia, 'is compelling.'⁷³ Bell J notes that Hale's analysis of rape has been widely cited and it formed the basis for the exclusion of marital rape from criminal codes in the Australian states and Canada. Further, she notes that Brennan J in *R v L* considered the elements of the offence of rape at common law to have been fixed by Hale's statement.⁷⁴ Heydon J similarly argues that it is 'utterly incorrect' to claim that Hale's proposition was not supported in subsequent legal thinking and commentary.⁷⁵ All leading criminal law commentators cite Hale and the limited case law that established 'exceptions' to the marital immunity left the rule itself intact, thereby, for Heydon J, showing 'the enduring toughness of Hale's proposition in legal thought.'⁷⁶ He also maintains that even the superior court decisions that sought to abolish the rule in 1991 — in *R v R*⁷⁷ and *R v L*⁷⁸ respectively — proceeded on the basis that 'a substantive rule of the common law was established by [Hale's] declaration.'⁷⁹

Having found that the immunity had become a settled rule of the common law of Australia, the dissentients find unconvincing the submission that any marital immunity had ceased to be part of the common law by 1963. For Heydon J the proposition that a rule of law can cease to exist because it is without 'foundation' misunderstands the mechanisms by which the common law is developed:

South Australia contended that before 1963 the law had changed so as to nullify Hale's proposition, even though no case had stated this before 1991. This is an unusual invocation of the judicial process.⁸⁰

Even if social circumstances change so that the reason for a rule no longer exists, Heydon J argues, 'it does not follow from anachronism that a rule simply dissolves without any court ruling at the time it dissolved, leaving its dissolution to be detected by a court many years or decades later.'⁸¹

More creatively, Bell J argues that even if the fiction of deemed consent 'fell away' that would not necessarily abolish the immunity. She explains that the operation of the marital immunity, and Hale's statement of the law, can be analysed in either of two ways. In both, 'the offence comprises two elements: (i) carnal knowledge of a female (involving some degree of penetration); (ii) without her consent.'⁸² On the first analysis the marital immunity 'arises by the operation of an irrebuttable presumption of law [regarding marital consent]'.⁸³ The

⁷³ Ibid 437 [223].

⁷⁴ The fact that there is no ratio on point is not conclusive, Bell J argues: 'The absence of a binding decision does not mean that a rule stated in authoritative texts and accepted and acted upon by the legal profession over many years may not acquire status as law': ibid 437 [222].

⁷⁵ Ibid 389 [90].

⁷⁶ Ibid 391 [98].

⁷⁷ *R v R* [1992] 1 AC 599.

⁷⁸ (1991) 174 CLR 379

⁷⁹ *PGA* (2012) 245 CLR 355, 392 [100] citing Brennan J in *R v L* (1991) 174 CLR 379.

⁸⁰ Ibid 397 [115].

⁸¹ Ibid 401 [126] citing *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617.

⁸² Ibid 431 [212].

⁸³ Ibid.

alternative analysis, however, is that the first element requires ‘unlawful’ carnal knowledge, where ‘unlawful’ means ‘outside marriage’. On this analysis, the question of consent does not arise when the parties are married.⁸⁴ When the offence of rape is limited to ‘unlawful’ carnal knowledge, the abolition of a presumption of marital consent will not remove or disturb the marital immunity. The legislation passed in 1976 in South Australia makes this point vividly: as Bell J notes, ‘the Parliament of South Australia abolished that presumption while maintaining the immunity save for offences committed in circumstances of aggravation.’⁸⁵

The alternative constructions Bell J identifies strengthen her argument that a rule of law can have different rationales, and that these can change or erode without dissolving the rule itself.⁸⁶ Bell J considers that by the 1960s the immunity was likely supported on the basis that the criminal law should only ‘invade’ the marital bedroom in exceptional circumstances.⁸⁷ Further evidence that the immunity persisted beyond the advent of divorce law at the turn of the 20th century was found in the passage of the *Criminal Code* in Tasmania in 1924 and in New Zealand in 1961 retaining the immunity. Additionally, in cases decided after 1963, in England and Australia, the immunity is recognised as a settled rule of the common law.⁸⁸ Consequently, for Bell J, ‘[t]he proposition that by the mid-20th century or earlier the immunity had fallen into desuetude’ as the result of changes in married women’s legal status and the availability of divorce ‘is without support.’⁸⁹

Having found that the immunity remained a part of the common law in 1963, the minority judges consider whether the immunity should now be abolished by restating the law with retrospective effect. Both are concerned that this would impose criminal liability for acts which did not attract criminal punishment when they were committed. Heydon J makes it evident that he would regard abolition of the immunity by the courts as an inappropriate act of ‘judicial legislation’. In his opinion, the judicial creation of crimes — which necessarily operate with retrospective effect — offends fundamental rule-of-law principles because ‘it criminalises conduct which, if it took place, was lawful at the time it took place.’⁹⁰ Bell J acknowledges that this is the effect of the decisions of the appellate courts in Scotland and England in *S v HM Advocate* and *R v R* respectively. However she notes that those cases concerned conduct in the immediately preceding years, and

⁸⁴ Bell J notes that the latter construction ‘accords with the treatment of the offence by text-writers’ and the ‘analysis adopted by the Supreme Court of South Australia’ (in cases such as *R v Brown* (1975) 10 SASR 139): *ibid*.

⁸⁵ *Ibid* 425 [197]. Bell J considers that the reserved question does not require tracing the immunity to one construction or the other, as ‘[a] husband could not be convicted as principal ... on either analysis’: at 432 [214].

⁸⁶ *Ibid* 441 [236].

⁸⁷ *Ibid* 442 [239] citing the Mitchell Committee report that initiated the 1976 legislative reforms in South Australia: Criminal Law and Penal Methods Reform Committee of South Australia, *Special Report: Rape and Other Sexual Offences* (1976) 14.

⁸⁸ See, eg, *R v Cogan* [1976] QB 217; *Steele* (1976) 65 Cr App R 22; *R v McMinn* [1982] VR 53; *Bellchambers v The Queen* (1982) 7 A Crim R 463.

⁸⁹ *PGA* (2012) 245 CLR 355, 441 [235].

⁹⁰ *Ibid* 414 [159]. The view that it was not the role of the courts to widen serious criminal offences so as to ‘make punishable conduct of a type hitherto not subject to punishment’ was ‘well-entrenched among judges, practising lawyers and academic lawyers’ in 1963: at 407 [141] (Heydon J).

that the decisions also had prospective effect. In Australia, by contrast, the legislative reforms of the 1980s mean that any statement of the common law on rape in marriage in 2012 ‘could only apply to offences alleged to have been committed before the enactment of the statutory reforms’⁹¹ — more than a quarter of a century earlier.

Moreover, Bell J argues, it is inappropriate to state the common law in a way that would introduce glaring inconsistencies between the rape provisions in the states that retained the common law (which would lose the immunity) and the Australian jurisdictions in which criminal codes were adopted (which retained the immunity until its legislative abolition). For these reasons, Bell J concludes that the fact that ‘[t]he common law was demeaning to women in its provision of the immunity’ is not sufficient reason ‘to permit the conviction of the appellant for an act for which he was not liable to criminal punishment at the date of its commission.’⁹²

V Discussion

A number of issues regarding common law development arise from the judgments in *PGA*. In particular, the Court’s treatment of *R v L* and its silence on *Farah* fail to resolve the question of the authority that intermediate appellate courts should accord to High Court dicta. Further, it is evident that the majority and minority judges disagree about three important issues: the extra-judicial sources that can provide evidence of the common law in the absence of case law; the relation between legal rules and their underlying rationales or foundations; and the considerations that apply when stating the common law in criminal cases. On each of these issues, we suggest that the majority judgment fails to engage with important points of principle and persuasive arguments articulated in the dissents. Finally, to state the common law in the terms that the majority have chosen makes it appear that married women in the Australian common law jurisdictions enjoyed legal protection from spousal rape from at least 1935. This is a blunt denial of the experiences of women subjected to marital rape. These various silences render the decision, in our view, frustrating and unsatisfying.

A *The Status of High Court Dicta*

PGA is unexpectedly silent on the implications of *Farah* for decision-making by intermediate appellate courts. In the South Australian Supreme Court, the majority followed the injunction in *Farah* that appellate courts should follow ‘seriously considered dicta’ of the High Court that reflected ‘long established authority.’⁹³ As outlined above, for the Supreme Court, this principle was determinative of the issue before them. Thus the statements made by four of the five High Court Judges in *R v L* that, by 1991, the immunity was no longer part of the common law of

⁹¹ *Ibid* 443 [243]. Thus, in Australia, the legislative intervention across the 1980s to bring the law of rape into line with contemporary standards makes it unnecessary to modify the common law in 2012 in order to extend justice to married women.

⁹² *Ibid* 445 [247].

⁹³ *Farah* (2007) 230 CLR 89, 151.

Australia, if it ever had been,⁹⁴ led the majority in the Supreme Court to conclude they were bound to find that there was no such immunity in 1963. They found that any statement to the contrary would need to come from the High Court itself. The majority in *PGA* acknowledge early that the High Court's statements in *R v L* have 'been treated by the parties in the present litigation *at least* as having the result that by 1991 it was no longer the common law in Australia that by marriage a wife gave irrevocable consent to sexual intercourse with her husband.'⁹⁵ Yet, from that point onward, the majority makes no substantive reference to *R v L*, referring to it only as a source of commentary on the history of ecclesiastical law drawn from the judgment of Brennan J. Further, the majority makes no reference to *Farah*, despite ongoing debate over the meaning of 'seriously considered dicta' and 'long established authority'.⁹⁶

It is interesting to note that, without the principle articulated in *Farah*, the status of the immunity may not have reached the High Court for determination. The long tradition of marital rape cases failing to reach superior courts, allowing no opportunity for reconsideration of the common law 'marital exemption', might well have continued.⁹⁷ That the High Court granted leave in *PGA* indicates that it wished to address this issue in ratio, rather than dicta, suggesting that the binding nature of High Court ratio differs from that of its dicta. This would have been an ideal opportunity to clarify that distinction and the scope of the perceived obligation on lower courts to follow seriously considered High Court dicta,⁹⁸ yet the High Court maintained silence on the significance of its decision in *Farah*. In dissent, Heydon J contributes to the ambiguity surrounding the scope of the duty to follow High Court dicta by observing that:

South Australia submitted that statements in *R v L* supported its second submission. But it accepted that they were unnecessary to the decision in that case, and hence were dicta only ... For the Court in this appeal the question is whether, as a matter of ratio decidendi, not obiter dicta, South Australia's second submission should be recognised as correct.⁹⁹

The High Court had an opportunity in *PGA* to clarify what intermediate appellate courts could be expected to do when working with dicta of the High Court. The majority declined to take advantage of this opportunity. As a result, this

⁹⁴ *R v L* (1991) 174 CLR 379, 390 (Mason CJ, Deane and Toohy JJ), 405 (Dawson J).

⁹⁵ *PGA* (2012) 245 CLR 355, 369 [16].

⁹⁶ On the debate, see Chappell and Sallmann, above n 3.

⁹⁷ The failure to identify Hale's statement as a fiction and develop the common law accordingly has been described by the English Court of Appeal as 'readily understood':

Faced with a count of rape by a husband on his wife, the court would be invited to quash the count, or to uphold a submission that there was no case for him to answer. If it did, or accepted the submission, the prosecution did not then enjoy any right of appeal. And even if a judge allowed the case to proceed to the jury, it still could not reach the Court of Appeal unless there was a conviction. So, by a series of decisions which did not require the principle to be addressed in this court, a number of exceptions were grafted onto a principle for which Hale provided the untested authority: *R v C* [2004] 3 All ER 1; [2004] 1 WLR 2098 [15] (Judge LJ).

See discussion of the exceptions cases, below.

⁹⁸ The need for such clarification has been identified by Harding and Malkin, above n 32, 267.

⁹⁹ *PGA* (2012) 245 CLR 355, 414 [159] (footnote omitted).

decision only increases the uncertainty surrounding the status of 'seriously considered' High Court dicta in Australian law.

B Reasoning Regarding Development of the Common Law

The majority held that Hale's proposition was never a settled rule of law; that, in any event, its foundations were eroded by statutory changes at the turn of the 20th century inconsistent with a fiction of deemed marital consent; and that, because the rule did not exist at the relevant time, their decision did not constitute retrospective variation or modification of the criminal law. This reasoning is unsatisfying.

Hale's proposition was not a settled rule of law for the majority because extra-judicial writing and academic citations cannot state the common law; case law is the sole authoritative source of common law. Yet their consideration of case law is partial. They find that, after *R v Clarence* in 1888,¹⁰⁰ which was not a rape prosecution, 'there appears to have been no reported case in England in which a husband was prosecuted for the rape of his wife *during their cohabitation*.'¹⁰¹ This latter restriction allows them to ignore the series of cases that established so-called 'exceptions' or limits to Hale's proposition on the basis that the parties were no longer cohabiting. Commencing in 1949 with *R v Clarke*,¹⁰² these cases established the circumstances in which marital consent could be deemed to be revoked and thus rape prosecutions pursued although the parties were technically married. Invariably in these cases, the separation had come about after a long history of the husband's violence.

The English courts began to identify exceptions to the general rule of marital immunity by finding that, while a wife may not be able to revoke consent to sexual intercourse with her husband, orders made by a court could effectively revoke implied marital consent. The orders that had that effect eventually included non-cohabitation orders;¹⁰³ a decree nisi of divorce;¹⁰⁴ a non-molestation undertaking made to a court;¹⁰⁵ an injunction restraining the husband from molesting or having sexual intercourse with the wife;¹⁰⁶ or an expired injunction together with a deed of separation.¹⁰⁷ The Victorian Supreme Court's decision in *R v McMinn*¹⁰⁸ similarly decided that an injunction under s114 (1) *Family Law Act Cth* 1975 revoked matrimonial consent to sexual intercourse. By contrast, an application for divorce was held to be insufficient to revoke marital consent in *R v Miller*.¹⁰⁹ These cases are not considered in the majority judgment.

Judicial acknowledgment of the marital exemption is also found in two related sets of cases that proceed on the basis that the immunity forms part of the

¹⁰⁰ (1888) 22 QBD 23.

¹⁰¹ *PGA* (2012) 245 CLR 355, 366 [7] (italics added).

¹⁰² [1949] 2 All ER 448.

¹⁰³ *Ibid*.

¹⁰⁴ *R v O'Brien* [1974] 3 All ER 663.

¹⁰⁵ *R v Steele* (1976) 65 Cr App R 22.

¹⁰⁶ *Ibid* 25; *R v McMinn* [1982] VR 53.

¹⁰⁷ *R v Roberts* [1986] Crim LR 188.

¹⁰⁸ [1982] VR 53.

¹⁰⁹ [1954] 2 QB 282.

common law. First, the cases prosecuting husbands for indecent assault and false imprisonment of their wives, but not for rape, suggest that courts would not entertain rape prosecutions.¹¹⁰ Second, the cases involving prosecutions where a husband was charged as an accessory to the rape of his wife by another man also appear to proceed on the basis that a husband cannot be convicted of rape within marriage.¹¹¹ *DPP v Morgan*¹¹² is the best known of these cases and, as Heydon J suggests, the public furor it generated, both in England and Australia, was one of the sparks for the first wave of rape law reforms in Australia. The majority does not comment on either of these lines of authority.

This partial consideration of case law is unsatisfactory given that, as Heydon J points out, many of these decisions acknowledge the authority of Hale's proposition even when they also state its inappropriateness or offensiveness.¹¹³ The existence of these cases, dating from 1949 to 1986, and their acknowledgment, if not endorsement, of Hale's proposition as authority for a marital immunity from prosecution for rape, also present a difficulty for the majority's argument that any such rule fell away before 1935. If case law is the premier source and site of common law development, then it is a peculiar twist of reasoning for the majority to propose that inconsistent statutory provisions from the turn of the 20th century undermined the foundations of any common law rule affording marital immunity, despite the rule's subsequent citation in case law.

The majority's treatment of statute law is also partial. Particular statutes — divorce laws, married women's property and the suffrage — are nominated as responsible for undermining the marital consent presumption. By this means, *inconsistent* statute law can effect change in the common law; however *consistent* statute law is disregarded. Bell J offers as an example of consistent statute law the inclusion of the immunity as part of the Tasmanian Code in 1924. It passed into law after the enactment of married women's property reforms, the achievement of the franchise and the removal of legislative double standards in respect of adultery. As Bell J comments, '[t]he significant changes in the legal status of married women which had occurred by 1924 do not appear to have been viewed at the time as inconsistent with the immunity.'¹¹⁴ South Australia's attempt to limit the immunity in 1976 is a further strong example.¹¹⁵ Thus, in Australia, New Zealand and the US the immunity was codified after the early 20th century changes in women's legal status were enacted, strongly indicating that those changes were not perceived at the time as inconsistent with maintenance of the marital immunity for rape.

As outlined above, the majority considers that Parliaments' efforts to codify common law can misstate the law.¹¹⁶ There is no doubt that the High Court is the ultimate authority on the common law, not Parliament. However, as Bell J

¹¹⁰ See *PGA* (2012) 245 CLR 355, 395 [107] (Heydon J); *R v Jackson* [1891] 1 QB 671; *R v Miller* [1954] 2 QB 282; *R v Kowalski* (1987) 86 Cr App R 339.

¹¹¹ It is notable that Hale himself stated that a husband who was present and intended to prostitute his wife to a rape by another man should be found equally guilty. Hale, above n 2, 628.

¹¹² [1976] AC 182; see also *R v Cogan* [1976] QB 217.

¹¹³ *PGA* (2012) 245 CLR 355, 392 [99].

¹¹⁴ *Ibid* 438 [227].

¹¹⁵ *Ibid* 441 [235].

¹¹⁶ *Ibid* 365 [5].

counters: ‘The fact that the parliaments of every Australian jurisdiction enacted legislation upon the understanding that the immunity was a rule of the common law provides some evidence that it was; and is a good reason for this Court not to now declare it to be otherwise.’¹¹⁷ If statute can misstate the common law, it is curious to propose that it can also change it, indirectly, as a result of inconsistency in principle.

It is an important plank of the majority’s reasoning that Hale’s statement was an untested proposition. Had it been a *settled* common law rule, there is established authority that changes in social circumstances or erosion of the reasons for its formulation would not justify disregarding the rule itself.¹¹⁸ The argument that an *unsettled* rule of criminal liability can be treated differently, and regarded as a fiction if its ‘foundational’ reason ceases to hold, is questionable. That it can be so regarded without judicial consideration or declaration of the law is additionally questionable. Moreover, the majority do not consider Bell J’s argument that the immunity is independent of the fiction of marital consent, and may have been supported in the 20th century for other reasons.¹¹⁹ The majority’s reasoning is limited to a review of the consent presumption and its basis in ecclesiastical and matrimonial law; they do not investigate the reasons underpinning the marital immunity in criminal law. This is an important limitation of their judgment, especially given that the case arises in the South Australian context where the 1976 statutory reforms abolished the presumption of marital consent while preserving a limited form of the marital immunity from prosecution.¹²⁰

Even if it is accepted that the majority is correct that the marital immunity rested entirely on the fiction of marital consent and, further, that Hale’s proposition was never a settled rule of law — contra Brennan J in *R v L*, and the judgments in *R v R* and *S v HM Advocate* — the minority judges argue persuasively that particular considerations attach to stating the common law in terms that ‘clarify’ the criminal law with retrospective effect. Those considerations include stating the common law so as to avoid not only extending criminal liability, because that is the role of Parliament, but also to avoid creating inconsistency with statutory frameworks. Both Heydon J and Bell J acknowledge that *R v R* and *S v HM Advocate* stated the common law in terms that abolished the marital immunity with retrospective effect. However, as Bell J emphasises, those decisions also had prospective application whereas the decision in *PGA* can *only* apply to conduct that occurred more than 25 years ago — in *PGA*’s case, 49 years ago. In the opinions of Bell J and Heydon J, this predates the social and legal changes that were the

¹¹⁷ Ibid 443 [244].

¹¹⁸ *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617.

¹¹⁹ The existence of other justifications was well accepted by commentators, even when they did not accept the ‘modern rationales’: see, eg, Susan Estrich, *Real Rape* (Harvard University Press, 1987) 75; Peter Sallmann and Duncan Chappell, ‘Rape Law Reform in South Australia: A Study of the Background to the Reforms of 1975 and 1976 and of their Subsequent Impact’ (1982) 3 *Adelaide Law Review Research Paper* 1, 14, 16; Jocelynn Scutt, *Even in the Best of Homes: Violence in the Family* (McCulloch Publishing, 1983) 142; Michael DA Freeman, ‘“But If You Can’t Rape Your Wife, Who[m] Can You Rape?”: The Marital Rape Exemption Re-Examined’ (1981–82) *Family Law Quarterly* 1, 17–18.

¹²⁰ In other jurisdictions, abolition of the presumption of marital consent was considered sufficient to abolish the immunity.

‘triggers’ for the statutory abolition of the immunity in Australia. The intervention of the legislatures in Australia also makes it problematic for the High Court now to restate the common law in terms that create inconsistency with those statutory frameworks. The curious outcome of the majority’s decision is that married women in South Australia can complain of marital rapes committed between 1935 and December 1976 but only those committed in aggravating circumstances for the period 1976–92 while s 73 (5) *CLC Act* was in force. The decisions in *R v R*¹²¹ and *S v HM Advocate*¹²² in the UK and Scotland respectively created no such anomalies.

We conclude that the reasoning of the dissentients is to be preferred on the issues surrounding development of the common law. The outcomes of rewriting the history of the common law as the majority has done are particularly strange when applied in the South Australian context; a consequence which flows, in part, from stating the law in terms which differ profoundly from legal and extra-legal sources prior to and after the passage of the 1976 statutory reforms. The social changes which led to recognition of marital rape as a social and legal problem from the 1970s onward were closely tied to the sustained feminist activism of this period,¹²³ without which the statutory reforms to the law of rape may not have been adopted. Prior to those reforms, the legal treatment of rape in marriage across Australia, as in other common law jurisdictions,¹²⁴ proceeded on the basis that the marital immunity was part of the law; its existence was accepted both by those who opposed the immunity and those who dignified and defended it. In agreement with Heydon J, we would argue that ‘the crucial triggers that would push Hale’s proposition into disfavour arose in the 1970s’.¹²⁵ Consequently, to maintain as the majority do that in 1963 ‘a respectable challenge to Sir Matthew Hale’s opinion could have been mounted’ is, as Heydon J states, ‘to believe that history can be rewritten in complete defiance of all contemporary evidence.’¹²⁶

C *Implications for the Prosecution of Marital Rape in Australia*

As a result of the decision in *PGA*, unless statute-barred, marital rapes dating back to 1935 — effectively, any marital rape committed against a living adult — are now liable to criminal prosecution in South Australia, Victoria and New South Wales. The jurisdictions that adopted criminal codes are unaffected. In Queensland, Tasmania and Western Australia marital rape remains exempt from prosecution prior to the reforms of the 1980s which removed the immunity from their criminal codes.¹²⁷ In the common law jurisdictions, the legislative reforms of 1976–85 intended to limit or abolish the marital exemption are rendered redundant (Victoria and New South Wales) or restrictive (South Australia). In this respect the decision creates considerable inconsistency regarding access to criminal justice and

¹²¹ [1992] 1 AC 599.

¹²² [1989] SLT 469.

¹²³ In the South Australian context, see Chappell and Sallmann, above n 3.

¹²⁴ See, eg, Diana E H Russell, *Rape in Marriage* (MacMillan, 1982); Lorenne M G Clark and Debra J Lewis, *Rape: The Price of Coercive Sexuality* (The Women’s Press, 1977) 40; Susan S M Edwards, *Female Sexuality and the Law* (Martin Robertson, 1981) 31.

¹²⁵ *PGA* (2012) 245 CLR 355, 398 [121].

¹²⁶ *Ibid* 414 [157].

¹²⁷ See *ibid* 419 [176] (Bell J) for the history of statutory reform.

liability to criminal punishment for offences committed prior to the 1980s, dependent on which side of a state border the offence occurred.

Is the decision a positive one for women who were raped by their husbands in the common law jurisdictions prior to the 1976–85 reforms? This decision cannot be regarded as a straightforward advance of women's rights. It only affects offences committed more than a quarter of a century ago. In these circumstances, complaints are not likely to be made to ensure the complainant's present safety. Will older women who learn of the decision now make complaints in hopes of having the offences committed against them recognised and their offenders punished? Such hopes are likely in vain. It is estimated that only around five per cent of all rapes reported to police in Australia currently result in a finding of guilt.¹²⁸ In the case of *PGA*, while the High Court decision clears the way for the prosecution to proceed, the delays that resulted from this point of law being stated and then appealed to High Court will provide grounds to support a fresh application for a permanent stay.¹²⁹ The delays in prosecution which have arisen from the longstanding belief in a marital immunity are also likely to impact on the prospect of conviction for this and similar cases because, as was argued in the District Court in this case, the lapse of time in bringing a prosecution is a 'two-edge sword' that creates difficulties for the complainant as well as the defendant. Evidence to corroborate allegations may be lost and memories will be challenged.¹³⁰ These stark realities suggest that this decision is likely to remain largely symbolic in terms of recognising the criminality of rape in marriage. Having made the complaint that initiated this historic High Court decision, GP is highly unlikely to see *PGA* convicted and punished for the rape offences she alleges he committed against her in 1963.¹³¹

If the decision is likely to have limited practical effect, is it important nonetheless that the common law has now been declared in terms that find the existence of a marital immunity for rape prosecution to have been inconsistent with the status of married women since the early 20th century? South Australia argued that Hale's proposition was abhorrent and offensive to human dignity, but nowhere in these judgments is there a description of the consequences for women of the law's silence and the lack of criminal prosecutions for 'domestic disputes'.¹³² The legal principle may have been unsettled, but the law as practised authorised the subjection and sexual violation of married women until late in the 20th century and feminist critics continue to ask whether the licence to rape conferred by marriage is

¹²⁸ Karen Gelb, 'Recidivism of Sex Offenders Research Paper' (Sentencing Advisory Council, Melbourne, 2007) 4. See also Mary Heath, 'Lack of Conviction: A Proposal to Make Rape Illegal in South Australia' (2007) 27 *Australian Feminist Law Journal* 175.

¹²⁹ See above n 12.

¹³⁰ Transcript of Proceedings, *R v PGA* (District Court of South Australia, 1418/2009, Herriman J, 5 July 2010) 62.

¹³¹ See above n 12. Similarly, no convictions were recorded in *R v R* [1992] 1 AC 599 or in *S v HM Advocate* [1989] SLT 469.

¹³² For a detailed consideration of historical Australian policing and prosecution practices in relation to violence against women see Judith Allen, *Sex and Secrets: Crimes Involving Australian Women Since 1880* (Oxford University Press, 1990). Allen documents criminal justice non-responsiveness to violence against women from 1880.

still valid.¹³³ The decision in *PGA* cannot change the impacts that legal practice in the past has had on women's lives and the majority judgment does not even attempt to acknowledge them. The sole acknowledgment of that legal and social history in these judgments is Bell J's dry remark: '[t]he common law was demeaning to women in its provision of the immunity.'¹³⁴

By contrast, the process of legislatively reforming the law of rape in the 1970s and 1980s with the intention of restricting and then abolishing the marital immunity effectively committed to the public record the humiliation and harm that the immunity caused. For example, during debate over the South Australian reforms in 1976, gruelling personal accounts of marital rape and violence given by women then living in the only women's shelter in the state were read into the public record.¹³⁵ The Hon Member for Sturt, N K Foster, added the story of a woman known to his family. She had left her husband, but he traced her to a country town after four years of separation, subjecting her to 'bestialities' and making her pregnant. Foster continued:

Such a person cannot be charged by the police even upon complaint. No lawyer ... or ... prosecuting police officer, would be willing to stand up, under privilege in this place or outside and say, if a woman had laid a complaint that she had been raped by her husband or subjected to serious bestialities, that the police would prosecute.¹³⁶

In place of acknowledging this painful history of the law's failure to protect married women or recognise their dignity and rights, the majority's decision in *PGA* makes it appear that the common law offered justice to women subjected to spousal rape over a 50-year period in which policing, prosecution and judicial practices did not pretend to offer married women protection or succour.¹³⁷

Legal history has been made with this decision, but it is a decision at odds with the social history of the 20th century and the lived experiences of women subjected to marital rape. As a result of the decision in *PGA*, the common law now appears to have been well in advance of statute law in recognising married women's equality and the harmfulness of rape in all circumstances. However, to clarify in 2012 that married women had a right to complain of spousal rape under the common law from 1935, and that all who thought otherwise were mistaken as to the law, is unlikely to bring redress to women who were subjected to marital rape in the Australian common law jurisdictions. The majority decision in *PGA* may have 'remove[d] a blot on the history of the common law'¹³⁸ but in this

¹³³ Christine Feerick and Patricia Eastale 'Sexual Assault by Male Partners: Is the License Still Valid?' (2005) 8 *Flinders Journal of Law Reform* 185; Melanie Heenan, 'Just "Keeping the Peace": A Reluctance to Respond to Male Partner Sexual Violence', Issues Paper No 1 (Australian Centre for the Study of Sexual Assault, 2004) 26.

¹³⁴ *PGA* (2012) 245 CLR 355, 445 [247].

¹³⁵ South Australia, *Parliamentary Debates*, Legislative Council, 11 November 1976, 2093 (F T Blevins); South Australia, *Parliamentary Debates*, Legislative Council, 11 November 1976, 2097 (Anne Levy).

¹³⁶ South Australia, *Parliamentary Debates*, Legislative Council, 11 November 1976, 2139 (N K Foster).

¹³⁷ See Allen, above n 132, 131 ff; Scutt, above n 119, 157. Some historical studies of sexual violence do not mention rape in marriage, presumably because it was not considered 'rape' in the period studied: see, eg, Jill Bavin-Mizzi, *Ravished: Sexual Violence in Victorian Australia* (UNSW Press, 1995).

¹³⁸ *P,GA* (2012) 109 SASR 1, 17 [85] (Doyle CJ).

rewriting of history the Court has erased the legal condonation of marital rape between 1935 and 1976 and the impacts that had on many women's lives.¹³⁹ The legal fiction of marital consent has thus been replaced by a new fiction — one which similarly obviates women's experiences of gendered violence: namely, that the common law recognised rape in marriage throughout the 20th century.

VI Conclusion

The High Court's decision in *PGA* finds that the marital immunity for rape prosecution did not exist, as a matter of law, from 1935 to 1976 in South Australia. As there is one common law for Australia, this decision also determines the common law position in Victoria and NSW prior to statutory intervention. If not statute barred, marital rapes committed from 1935 are now liable to prosecution in the common law jurisdictions, with the odd proviso that only those marital rapes committed in aggravating circumstances are liable to prosecution in South Australia between 1976 and 1992. This decision does not affect the legal situation in the code states where rape in marriage was not a criminal offence prior to the statutory reforms of the 1980s.

As stated at the outset, the decision in this case was always going to be open to criticism. The contrasting judgments of the majority and minority expose important differences of opinion on questions regarding legal sources, the relation between legal rules and their founding reasons in the common law, and the considerations to be applied when stating the common law in criminal cases. The reasoning of the majority leaves a number of issues unresolved and decides others unsatisfactorily. No guidance is provided to lower courts on how they should work with High Court dicta and when they should regard dicta as 'seriously considered'. Substantively, for the majority, the question of rape in marriage was only approached as a question regarding the incidents of marriage and the law's role in defending and developing that institution. For the dissentients, the question of rape in marriage was a question of criminal liability and the respective roles of the courts and parliament in declaring and extending liability with retrospective effect. The majority reasoning leaves unanswered important challenges offered by Bell J in particular. The fact that 'rape in marriage' necessarily straddles private and public law, and thus requires a consideration and integration of principles from each, was not satisfactorily explored.

It is highly disappointing that this decision simultaneously declares the illegality of rape in marriage from 1935 to 1976 in South Australia and erases the lived experiences of women who were raped by their husbands in this period. These women faced the widespread belief that submission to rape could be part of the legal meaning of marriage for wives. This perception was lent authority by the

¹³⁹ For example, *PGA* is now liable to prosecution for the alleged rapes committed against GP in 1963, but this cannot alter GP's experiences during that decade of reporting to police without effective response: see Transcript of Proceedings, *R v PGA* (District Court of South Australia, 1418/2009, Herriman J, 5 July 2010). As this case demonstrates, married women's lack of access to criminal justice for marital rape and 'domestic violence' from 1935 to 1976 contributed to the prevalence, severity and frequency of the violence many women experienced.

reiteration of Hale's proposition and by the non-prosecution of marital rapes. As the dissentients make abundantly clear, the practices of police, the legal profession and the courts during the historical period this decision affects, and for at least a decade after GP alleges she was raped by PGA, precluded a superior court from recognising marital rape as an offence known to the common law. The majority fail to acknowledge that this was the case, and in doing so, wash away without acknowledging the historical role that the common law played in condoning married women's sexual subjection for most of the 20th century.

In *PGA* the High Court had the opportunity to offer long overdue recognition of the wrong of marital rape. In our view, it is a cruel irony that the legal acknowledgement of the offensiveness of the immunity has been delivered in a form that implicitly denies the law's part in leaving married women for so long without protection, recognition or recourse.