

WHEN SOME PEOPLE ARE MORE EQUAL THAN OTHERS: THE IMPACT OF RADICAL FEMINISM IN OUR ADVERSARIAL SYSTEM OF CRIMINAL JUSTICE

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ABSTRACT

There is no doubt that in decades past, gender neutrality was certainly lacking in various aspects of our adversarial system of criminal justice, especially where allegations of rape and other sexual assaults were made. However, the reality is that most of these antiquated and unfair rules have now been legislated or construed out of existence. This article will examine several areas in which the Victorian Parliament has arguably accorded preferential treatment to one gender at the expense of the other. In particular, the discussion will focus on how this preferential treatment has egregiously affected our system of criminal justice, especially such sacrosanct tenets as the presumption of innocence and that all persons are regarded as equal before the law.

I INTRODUCTION

If the word ‘feminist’ denotes a person or organization that favors equality between the two genders in terms of equal pay for equal work as well as voting and other matters in which there is no rational basis to discriminate on the basis of gender, this writer has no qualms with characterizing himself as an ardent feminist. However, even the most

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strident advocates of equal rights for both genders would readily concede that there are obvious anatomical differences between men and women that cannot be gainsaid. Though there are always statistically insignificant segments of the population that may cavil with that or any other notion, it is fair to say that the overwhelming majority of rational thinking people would not favor gender-neutral rest rooms in areas open to the general public, nor would they advocate gender-neutrality in certain sporting events such as rugby, football, boxing and the like. It is an incontrovertible fact that the anatomical differences between the two genders are such that in these and similar instances, it would be neither fair nor practical to force or even allow the two sexes to compete against one another. Also emanating from the obvious anatomical differences that inexorably lead to these observations, and depending in large measure upon the extant cultural mores that prevail in various parts of our planet, there are traditional advantages and disadvantages in being a person of either gender.

Though there are those who might quibble with the following examples in modern western societies, many would argue that men have traditionally had an advantage in heterosexual relations in that it is they who are expected to initiate a verbal exchange in which the woman is asked if she is interested in spending time with the male in some sort of social setting in which a friendship, whether platonic or heterosexual, may develop. To some, this is seen as an advantage for men because it places them in a position to be the one who initiates such an exchange with a woman of their choice. Under this view, despite the concomitant risk that the woman may spurn such an expression of interest, it is still better to be in a position to choose rather than passively wait until such time as a suitable male fortuitously initiates an exchange. On the other

hand, there are many who see this arrangement as a disadvantage for men who, by taking the initiative, are the only gender that is forced to incur the risk that their offer will be flouted. Regardless of how one perceives the relative advantages or disadvantages of each gender in this process, it is apparent that there are cultural expectations as to how men and women should behave in the incipient stages of heterosexual relationships.

Similarly, many men regard it as customary to open doors for women, to always allow them to enter cars, homes, flats, restaurants or other establishments first, and typically assume full responsibility for the costs associated with most or all social engagements. Moreover, it is only in recent years and in some western countries that women are permitted to partake in combat while serving in the military. During the very unpopular Viet Nam War, for example, it was quite common for men to resist conscription. Women, on the other hand, were not liable to being conscripted at all, let alone expected to risk their lives in combat. Depending upon one's perspective, of course, this serves as another illustration of an advantage that inures to members of one gender as opposed to the other. Readers are also reminded of the tragedy of the Titanic in which, save for some exceptions involving sophistry, women and children were given preferential access to an inadequate number of lifeboats while adult males were consigned to suffer a horrible death in the icy waters of the Atlantic Ocean.

The point of noting that the two genders have always received disparate treatment, sometimes justified and other times not,¹ is to reinforce the

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¹ For example, there were common law rules that conclusively assumed that: males under the age of 14 were incapable of committing rape: *R v Waite* [1892] 2 QB

point that some have sought far more than equal pay for equal work and general equality in instances where fairness and common sense dictate that there is no sound justification for disparate and unfair treatment of women.² Rather than embracing the reality that there are very real

600; a married man cohabitating with his wife was conclusively deemed to be incapable of raping her: Matthew Hale, *1 Historia Placitorum Coronae: The History of the Pleas of the Crown* (1778) 628; and that consent given by a woman to sexual penetration was irrevocable until such time as the man completely withdrew his genitalia from the vaginal cavity: *Kaitamaki v The Queen* [1984] 2 All ER 435.

² This article does not challenge the various rules that have been developed to equalise the position of women who are victims of sexual assault. Many of these developments are legitimately directed towards correcting an existing imbalance and are necessary and welcome. Examples of such outdated rules include that in sexual assault prosecutions the accused was permitted to adduce evidence on all matters relating to the complainant's past sexual conduct, including her general reputation in the community for chastity, whether on cross-examination or as part of his case-in-chief: James J Wesolowski, 'Indicia of Consent – A Proposal for Change to the Common Law Rule Admitting Evidence of a Rape Victim's Character for Chastity' (1976) 7 *Loyola University of Chicago Law Journal* 118; Melanie Heenan, 'Reconstituting the 'Relevance' of Women's Sexual Histories in Rape Trials' [2003] (13) *Women Against Violence: An Australian Feminist Journal* 4. In addition, and unlike prosecutions for other offences, a rape complainant's testimony was deemed as insufficient to convict unless it was corroborated by independent [external] evidence: Constance Blackhouse, 'The Doctrine of Corroboration in Sexual Assault Trials in Early Twentieth-Century Canada and Australia' (2001) 26(2) *Queen's Law Journal* 297. Finally, 'Juries were reluctant to convict "upstanding" young men who were accused of raping "loose" women (often defined as unmarried non-virgins). Moreover, being "dressed for sex" was considered a form of consent by some courts, and prostitutes could not be raped because they were in the "business" of consenting': A Dershowitz, *Taking The Stand* (Crown Publishers, 2013) 322. Over the past three or four decades, however, all of these common law rules have been abrogated by legislation or construed out of existence by the courts as part and parcel of their inherent power to incrementally develop the common law. In Australia, see *Crimes Act 1958* (Vic) ss 62(1), (2); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 48–53; *Crimes Act 1914* (Cth) ss 15YB–15YC; *Criminal Procedure Act 1986* (NSW) s 293; *Evidence Act 2008* (Vic) ss 97, 98, 101; *Criminal Procedure Act 2009* (Vic) ss 339–352; *Evidence Act 2001* (Tas) s 194M. The statutory analogues in the jurisdictions which have thus far rejected the Uniform Evidence legislation are: *Evidence Act 1929* (SA) s 34L; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4; *Evidence Act 1906* (WA) ss 36A–36BC; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4. For examples of rape shield provisions outside Australia, see, eg: NY Criminal Procedure Law § 60.42 (2011); Ga Code Ann (LexisNexis 2011) § 24-2-3; Wyo Stat Ann § 6-2-312 (2011); Colo Rev Stat 18-3-407 (2011); Ohio Rev Code Ann 2907.02 (LexisNexis 2011); *Criminal Code*, RSC 1985, c C-46, s 276; *Youth Justice and Criminal Procedure Act 1999* (UK) ss 41–43; *Evidence Act 2006* (NZ) s 3. Perhaps just as importantly, societal attitudes are far more enlightened in

anatomical differences and cultural norms that serve to create what many see as a beautiful dynamic between the two genders, there are some who seek to retain all the real or perceived advantages of one gender and, at the same time, augment them by demanding that they likewise receive the real or perceived advantages of the other. In the writer's view, therefore, this is tantamount to a declaration that what is mine is mine - and what is yours is mine.

In Victoria, the most insidious consequences of the radical feminists' quest for preferential treatment have been those relating to both the substantive and procedural rules that govern our adversarial system of criminal justice. The balance of this article will focus on these rules and why they are inimical to what have been long regarded as the cardinal tenets of the right to a fair trial in *all* criminal prosecutions; namely, that all people are equal before the law irrespective of race, ethnicity or gender, the presumption of innocence, and that the prosecution bears the onus of satisfying the fact-finder of all essential elements of its case beyond reasonable doubt.

II SUBSTANTIVE REFORMS THAT ACCORD SPECIAL DISPENSATION TO WOMEN

Though many examples could be noted, considerations of convenience dictate that only three of the most flagrant and foreboding rules will be examined: the crime of infanticide;³ the abolition of provocation as a

regard to the notions of 'dressed for sex' and the protection of prostitutes from rape: Barbara Sullivan, 'Rape, Prostitution and Consent' (2007) 40(2) *Australian and New Zealand Journal of Criminology* 127.

³ *Crimes Act 1958* (Vic) s 6.

partial defence to the crime of murder;⁴ and allowing rape to be prosecuted as a crime of absolute liability.⁵

A *The Crime of Infanticide*

The *Crimes (Homicide) Act 2005* (Vic) ushered in many important changes to the law of homicide in Victoria, one of the most notable being the creation of the offence of infanticide that is now set out in s 6 of the *Crimes Act 1958* (Vic). That section provides as follows:

Infanticide

(1) If a woman carries out conduct that causes the death of her child in circumstances that would constitute murder and, at the time of carrying out the conduct, the balance of her mind was disturbed because of—

(a) her not having fully recovered from the effect of giving birth to that child within the preceding 2 years; or

(b) a disorder consequent on her giving birth to that child within the preceding 2 years—

she is guilty of infanticide, and not of murder, and liable to level 6 imprisonment (5 years maximum)...

(2) On an indictment for murder, a woman found not guilty of murder may be found guilty of infanticide.

Three important factors are readily apparent from the definition of infanticide. The first is that this form of unlawful homicide applies only to women who commit what would otherwise constitute the murder of

⁴ *Crimes Act 1958* (Vic) s 3B.

⁵ See *Crimes Act 1958* (Vic) ss 35, 36, 38. See also K J Arenson, 'Rape in Victoria as a Crime of Absolute Liability: A Departure from Both Precedent and Progressivism' (2012) 76(5) *Journal of Criminal Law* 389.

their children, provided the conduct causing death occurs within the two-year statutory period. The second is that the conduct resulting in death must also occur at a time when the balance of the woman's mind was disturbed, either because she had not fully recovered from the effect of giving birth or due to a disorder resulting from the same. Thus, while the rather controversial diagnosis known as post partum depression is never expressly mentioned in the definition of the offence, the expressions 'effect of giving birth' and 'disorder consequent on...giving birth' would undoubtedly encompass the term. Finally, readers will note that in Victoria, the common law offence of voluntary manslaughter has been abolished in name.⁶ The *Crimes (Homicide) Act 2005* (Vic), however, has now substantively reintroduced the excessive force manslaughter doctrine through the creation of the offence of 'defensive homicide'⁷ which, in this context, operates in exactly the same manner as the common law offence of voluntary manslaughter prior to the High Court's decision in *Zecevic v DPP*.⁸ For present purposes, however, it is important to understand that the offence of voluntary manslaughter is actually the same offence as murder, save that the accused's conviction is reduced to the former due to the fact that the killing occurred under extenuating

⁶ See, eg, *Crimes Act 1958* (Vic) s 9AB (expressly abolishing the common law defence of provocation insofar as it applies cases in which a killing that would otherwise constitute murder is reduced to the lesser offence of voluntary manslaughter due to the mitigating circumstance that the accused was induced to kill by provocative conduct on the part of the deceased which does not operate to completely excuse or justify the killing). See also *Zecevic v DPP* (1987) 71 ALR 641 ('*Zecevic*') (abolishing the excessive-force-manslaughter doctrine, also known as the 'excessive' or 'imperfect' self-defence doctrines in which a person could be convicted of voluntary manslaughter rather than murder, provided that the accused was found to have acted with an honest, albeit objectively unreasonable belief, that his or his use of deadly force was necessary in self-defence or the defence of another or others).

⁷ *Crimes Act 1958* (Vic) ss 9AC, 9AD.

⁸ *Zecevic* (1987) 71 ALR 641. For a brief discussion of the excessive-force-manslaughter doctrine, see above n 6.

circumstances that the law regards as sufficient to warrant a reduction.⁹ At a time when there were a litany of capital offences, particularly murder, a reduction to the non-capital offence of voluntary manslaughter was literally a matter of life and death.

Though the common law was quite limited in terms of the circumstances that were regarded as sufficiently extenuating to warrant such a reduction,¹⁰ there are currently other unlawful homicides in Victoria (and elsewhere),¹¹ including infanticide,¹² that are equally deserving of the voluntary manslaughter epithet because they too involve killings that would otherwise constitute murder were it not for mitigating circumstances that parliament regards as sufficient to warrant a reduction to some lesser offence. What is astonishing, however, is that unlike

⁹ *Parker v The Queen* (1963) 111 CLR 610, [46] ('*Parker 1*'); *Parker v The Queen* (1964) 111 CLR 665, [37] ('*Parker 2*'). For a thorough discussion of the defence of provocation that operates to reduce what would otherwise constitute murder to the lesser crime of voluntary manslaughter, see P Gillies, *Criminal Law* (LBC Information Services, 1997, 4th ed) 363–95.

¹⁰ See above n 6.

¹¹ *Crimes Act 1900* (NSW) ss 23(1)–(5); *Crimes Act 1900* (ACT) ss 13(1)–(6); *Criminal Code Act 2013* (NT) ss 158(1)–(8); *Criminal Code Act 1899* (Qld) ss 268(1)–(5); *Homicide Act 1957* (UK) s 3; *Criminal Code*, RSC 1985, c C–46, s 232(1)–(3). Every American state recognizes provocation as an extenuating circumstance that reduces what would otherwise constitute murder to the lesser offence of voluntary manslaughter. See, for example, Mass Gen Laws ch 265 § 1; John R Snowden 'The Case for a Doctrine of Precedent in Nebraska' (1982) 61 *Nebraska Law Review* 565; La Stat Rev Ann 14:31 § 31 (1973).

¹² See also *Crimes Act 1958* (Vic) s 6B (survivor of a suicide pact). This too involves a killing that would otherwise constitute murder were it not for the extenuating circumstance that it was carried out as part of a suicide pact among persons thought to be so mentally impaired that a conviction for manslaughter is deemed more appropriate. Readers should note that the crime of infanticide can be traced back to the *Infanticide Act 1938* (UK): G Williams, *The Criminal Law: General Part*, 557, n 20. It was later adopted in Victoria and as a result of the *Crimes (Homicide) Act 2005* (Vic), it was later amended into its current form. The Act departed from English law in many respects, most notably by recognizing both duress and necessity as complete defences to murder in ss 9AG and 9AI respectively. One has to question, therefore, why parliament gave no consideration to fathers suffering from similar 'disorders' consequent to the birth of their children. Was this obvious omission permitted by mere coincidence? If not, what, aside from the influence of a special interest group, would explain such an inequitable statutory offence?

voluntary manslaughter which is a level 3 offence punishable by a maximum term of twenty-five years imprisonment,¹³ infanticide is a mere level 6 offence that carries a maximum term of only five years imprisonment.¹⁴ The relatively minor offence of common assault,¹⁵ for example, is also a level 6 offence.¹⁶ Further, it is regarded as the least serious of the numerous non-sexual assault offences that currently exist in Victoria. It would encompass, for example, *any degree* of direct¹⁷ intentional or reckless touching of another person without their consent, including via the use of an instrumentality or an innocent agent such as young child or an attack dog.¹⁸ Slapping another person in the face because of an inability to control one's anger in response to harsh criticism, for example, would constitute an example of a common assault.¹⁹

¹³ *Crimes Act 1958* (Vic) s 5. Although this section uses the generic term 'manslaughter' without drawing a distinction between voluntary and involuntary manslaughter, it has always been construed as encompassing both genres of manslaughter: G Nash, *Annotated Criminal Legislation Victoria*, (LexisNexis, 2012) 97–106.

¹⁴ *Crimes Act 1958* (Vic) s 6.

¹⁵ In this context, the offence of common assault can consist of either the 'psychic' or 'battery' genre: *R v Lynsey* [1995] 3 All ER 654, 654. It is now well settled that both limbs are offences of *mens rea*; that is, 'psychic' type common assault requires, as a constituent element, that the accused must intentionally or recklessly place the victim in apprehension of an immediate and unlawful touching of his or her person without consent: *MacPherson v Brown* (1975) 12 SASR 184, 190 (Bray CJ); *R v Bacash* [1981] VR 923, 935 ('*Bacash*'); *R v Williams* (1990) 50 A Crim R 213, 220; *R v Venna* [1975] 3 WLR 737 ('*Venna*'). 'Battery' type common assault, on the other hand, requires as an essential element that the accused must intentionally or recklessly touch the victim without his or her consent: *Venna* [1975] 3 WLR 737; *R v Williams* (1983) 78 Cr App R 276 at 279. For a thorough discussion of both limbs of the common law offence of common assault, see K J Arenson, M Bagaric and P Gillies, *Australian Criminal Law in the Common Law Jurisdictions: Cases and Materials* (Oxford University Press, 3rd ed, 2011) 261–4.

¹⁶ *Crimes Act 1958* (Vic) s 320.

¹⁷ *R v Salisbury* [1976] VR 452, [2]; *R v Sherriff* [1969] Crim LR 260.

¹⁸ *Bacash* [1981] VR 923, 932 (19 December 1980); *Venna* [1975] 3 All ER 788. See also Gillies, above n 9, 552–8.

¹⁹ Gillies, above n 9, 552–8.

Whether it is justifiable to allow a mother to escape a murder conviction under the circumstances set forth in s 6 is certainly open to debate. Even assuming that it is, one has to question why these particular extenuating circumstances are also sufficient to warrant the same level 6 maximum sentence that can be imposed for offences as minor as common assault. If one who killed in response to adequate provocation was subject to level 3 punishment of a maximum of twenty years imprisonment,²⁰ how does one justify a maximum of five years imprisonment for a mother who, without lawful justification or excuse, deliberately or recklessly causes the death of her child within two years of birth because she suffers from some ‘effect’ or ‘disorder’ arising from that birth?

Moreover, s 6 does not require the mother to demonstrate that she was suffering from post partum depression or any recognized psychiatric condition at the time of the conduct causing death. In the view of many, such broad and undefined mitigating circumstances can amount to most anything, including a mere inability to cope with the sudden responsibilities of motherhood or, if you will, buyers’ regret. This may be viewed as extending a modified license to kill any baby of two years of age or less, provided the mother is willing to run the risk of a maximum custodial sentence of five years. One might legitimately ask whether fathers who also experience negative effects or some form of mental disorder from the birth of their child should be treated with any less compassion? As the ambit of s 6 extends only to mothers, fathers who kill their children under similar circumstances are left to face murder charges, a level 1 offence punishable by a maximum of life imprisonment. On what rational basis can such blatantly disparate and unfair treatment of men be justified? The writer believes that the answer lies in identifying

²⁰ *Crimes Act 1958 (Vic)* s 5.

which voting demographic is not only the largest, but stands to gain the most from the offence of infanticide.

B *The Abolition of Provocation as a Partial Defence to Murder*

It was earlier noted that although the common law offence of voluntary manslaughter has been abolished by name in Victoria,²¹ it was reinstated in substance via ss 9AC and 9AD of the *Crimes Act 1958* (Vic) which codified the excessive-force-manslaughter doctrine and substituted the offence of ‘defensive homicide’²² for what was previously the offence of voluntary manslaughter.²³ Section 3B of the *Crimes (Homicide) Act 2005* (Vic), later inserted as s 3B of the *Crimes Act 1958* (Vic), however, expressly provides that ‘[t]he rule of law that provocation reduces the crime of murder to manslaughter is abolished’.²⁴ The word ‘manslaughter’ in this quotation denotes a killing that would otherwise constitute murder, except that it is reduced to the lesser offence of voluntary manslaughter due to the mitigating circumstance that the accused was induced to kill by provocative conduct on the part of the deceased.²⁵ The provocation defence is regarded as a reasonable concession to human frailty in that those who kill under sufficient provocation to succeed in the defence are deemed as less morally culpable than those who kill for hire, thrill, revenge, jealousy or other reasons that the law does not regard as sufficiently mitigating to warrant a reduction to voluntary manslaughter.²⁶ As this form of

²¹ See above n 6. Although the common law offence of voluntary manslaughter that was based on provocative conduct of the deceased as a mitigating circumstance is expressly set forth in s 9AB of the *Crimes Act 1958* (Vic), s 9AB was actually introduced as part of the *Crimes (Homicide) Act 2005* (Vic).

²² *Crimes Act 1958* (Vic) ss 9AC, 9AD.

²³ *Zecevic* (1987) 71 ALR 641, [13].

²⁴ *Crimes Act 1958* (Vic) s 3B.

²⁵ See above n 9.

²⁶ *Parker I* (1963) 111 CLR 610, [26].

voluntary manslaughter exists in all American and Canadian jurisdictions, the UK, and every Australian jurisdiction with the exceptions of Western Australia, Tasmania and Victoria,²⁷ what has provided the impetus for its

²⁷ See *Crimes Act 1958* (Vic) s 3B; *Criminal Code Act 1924* (Tas) s 160; *Criminal Code Act Compilation Act 1913* (WA) s 245. The Victorian Parliament has stated its reasons for the abolition of provocation. Rob Hulls, who was then the Attorney-General of Victoria, stated that ‘the partial defence condones male aggression towards women and is often relied upon by men who kill partners or ex-partners out of jealousy or anger’: Victoria, *Second Reading Speech*, Legislative Assembly, 6 October 2005, 1349 (Rob Hulls, Attorney-General). ‘The attorney-general further added that ‘[t]his is a reform that is aimed at removing entrenched bias and misogynist assumptions from the law to make sure that women who kill while genuinely believing it is the only way to protect themselves or their children are not condemned as murderers.’ See Victoria, *Second Reading Speech*, Legislative Assembly, 26 October 2005, 1844 (Rob Hulls, Attorney-General).

The Tasmanian Parliament expressed their reasoning behind the removal of the defence: ‘The defence of provocation is gender biased and unjust. The suddenness element of the defence is more reflective of male patterns of aggressive behaviour. The defence was not designed for women and it is argued that it is not an appropriate defence for those who fall into the “battered women syndrome”’. See Tasmania, *Second Reading Speech*, Legislative Council, 20 March 2003, 30–108 (Judy Jackson, Minister for Justice and Industrial Relations).

Western Australia was not as explicit as Tasmania or Victoria; in particular, their glancing reference to the amendment emphasises the need to address issues faced by women in domestic violence situations. The provocation defence was seen as insufficient to address the issue: Western Australia, *Second Reading Speech*, Legislative Council, 17 June 2008, 3845b–3855a (Simon O’Brien, Member for South Metropolitan Region).

The reader should be aware that Queensland has not abrogated the defence in its entirety. For example, see *Criminal Code Act 1899* (Qld) s 304. Changes summarized as: a reversal of the onus of proof onto the accused; provocation cannot be based upon the deceased’s choice to change the status of his or her relationship; the defence cannot be based on words alone; and when the victim and the accused were in a relationship, the provocation defence cannot be based on what the accused mistakenly believed the deceased had done to damage the relationship.

New Zealand abrogated the defence in 2009, removing provocation as a partial defence and amending s 169 in the *Crimes Act 1961* (NZ). In the UK the ‘loss of control defence’ was introduced in 2009 in response to concerns in relation to the defence of provocation: *Coroners and Justice Act 2009* (UK) s 54. The defence of provocation proved problematic and was subject to much consideration by the appellate courts due to inconsistencies in the interpretation and application of s 3 of the *Homicide Act 1957* (UK). The new ‘defence of loss of control’ is broadly similar to the defence of provocation in its requirements. It is, however, far more restrictive in its application.

abolition in these three jurisdictions? The unofficial and de facto answer in Victoria and probably Tasmania and Western Australia is both shocking and antithetical to the cardinal precept that irrespective of race, ethnicity or gender, all accused persons are regarded as equal in the eyes of the law.

In 2004 the writer became aware that the Victorian Law Reform Commission (VLRC) had recommended that Parliament abolish provocation as a partial defence that reduces murder to the lesser crime of voluntary manslaughter. Alarmed by this development, the writer contacted the VLRC chairperson and inquired as to the reasons for its recommendation which, regrettably, became law as part and parcel of the *Crimes (Homicide) Act 2005* (Vic). The chairperson informed the writer that this defence was no longer viable because it was a defence ‘used by men who murder their wives and girlfriends’. When the writer reminded the chairperson that a Melbourne based woman who was charged at the time with the murder of her husband was relying on that particular defence, she responded that the scenario to which the writer referred ‘doesn’t happen very often’ – meaning that it is highly uncommon for women to kill their husbands or boyfriends. Though the woman offered no statistics in support of her argument, the writer then asked whether the VLRC’s recommendation would be the same if it could be demonstrated that women who are charged with the murder of their husbands or boyfriends invoke the defence with the same or greater frequency than

In Canada, see *Criminal Code*, RSC 1985, c C-46, s 232; *R v Thibert* [1996] 1 SCR 37, [4]; *R v Hill* [1986] 1 SCR 313; *R v Angelis* [2013] ONCA 70, [36]. In the United States, all states have adopted some form of the provocation defence, whether at common law or in statutory form. Some examples include: 2 Alaska Stat § 11.41.115 (1978); 720 Ill Comp Stat 5/9-2 (2010); 15 Tex Code Ann § 9.31 (2007); Cal Penal Code 192 (2006); Mass Gen Laws ch 265 § 1; John R Snowden ‘The Case for a Doctrine of Precedent in Nebraska’ (1982) 61 *Nebraska Law Review* 565; La Stat Rev Ann 14:31 § 31 (1973).

men who are accused of murdering their wives or girlfriends. When the woman refused to provide an unequivocal yes or no answer and merely reiterated that the postulated scenario rarely occurs, the writer inferred that her answer was yes; the chairperson was apparently reluctant to make such an outrageously ludicrous and sexist comment.

Nonetheless, the implications of the conversation are clear. If the viability of provocation or any other defence such as self-defence, duress, necessity, insanity or diminished responsibility, for example, is made to depend upon which of the two genders invokes it with greater frequency, then what remains of the sacrosanct tenet that all persons are regarded as equal before the law? It is frightening to even contemplate that we may be moving down a foreboding path in which the retention or abolition of any particular defence²⁸ will ultimately depend upon whether it is viewed as favouring one gender more than the other. Perhaps even more foreboding is that the chairperson with whom the writer spoke is now a sitting Justice of the Supreme Court of Victoria.

C *Charging Rape as a Crime of Absolute Liability*

The *Crimes Amendment (Rape) Act 2007* affected significant changes to the law of rape in Victoria. The most notable for present purposes is that rape can now be prosecuted as a crime of absolute liability.²⁹ In order to fully comprehend the subtlety and sophistry through which this change was implemented, it is appropriate to provide an explanation of what constitutes offences of strict and absolute liability.

²⁸ Gillies, above n 9, 203-4.

²⁹ *Crimes Amendment (Rape) Act 2007* (Vic) ss 35-38 collectively govern the law of rape in Victoria. The offence itself is encompassed in s 38, although the definitions of sexual penetration and consent are set out in ss 35 and 36 respectively.

An offence of strict liability is one that, by definition, does not require the prosecution to prove “fault” on the part of the accused. In this context, the term “fault” denotes any one or more of the *mens rea* recognised under Australian common law doctrine or, alternatively, some form of negligence.³⁰ An example of an offence of strict liability would be the regulatory traffic offences that exist in all jurisdictions that make it an offence to drive a motor vehicle on a public road in excess of the prescribed speed limit. These statutory offences rarely, if ever, require the prosecution to prove as a constituent element of the offence that the accused acted with knowledge that he or she was or might have been exceeding the speed limit at the time in question, nor do they require proof that the accused acted negligently in so doing. Thus, a crime is technically classified as one of strict liability if it requires neither proof of one or more of the *mens reas*, nor that the accused was in any way negligent in bringing about one or more of the *actus reus* elements of the offence.

It is important to note that there are various forms of negligence that, depending on the likelihood and severity of the risk involved and whether the conduct of the accused was engaged in with or without advertence to the risk(s) involved, are termed as ordinary, criminal or gross, and recklessness.³¹ Given the nature and availability of what is often termed the *Proudman* defence, the very existence of so-called strict liability offences may be called into question.

In *Proudman*, the general nature of this defence was expressed by Dixon J: ‘As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant’s act innocent affords

³⁰ Gillies, above n 9, 46, 80–2.

³¹ Ibid 39–41, 59.

an excuse for doing what would otherwise be an offence'.³² Absent some form of negligent conduct on the part of the accused, it would be difficult to envision a situation in which an accused could commit an offence of strict liability while holding a bona fide, yet unreasonable belief, in the existence of such exculpatory facts. Though the authorities have not been totally consonant on the question of which parties bear the evidential and legal burdens of proof on the *Proudman* defence,³³ it is now well settled that the accused bears the evidential burden, meaning that he or she must satisfy the court that a jury could reasonably find that the Crown has failed to prove beyond reasonable doubt that the belief was not honestly held or, if it was, that it was not based on reasonable grounds.³⁴ Assuming the accused satisfies the evidential burden, the prosecution then bears the legal burden of negating the defence by ultimately persuading the jury beyond reasonable doubt that the subjective or objective element of the defence, or perhaps both, have not been satisfied. Thus, when the

³² *Proudman v Dayman* (1941) 67 CLR 536, 540.

³³ *McCrae v Downey* [1947] VLR 194, 203; *Gherashe v Boase* [1959] VR 1; *Mayer v Marchant* (1973) 5 SASR 567, 579.

³⁴ *Stingel v The Queen* (1990) 171 CLR 312, 336. This formulation of an accused's evidential burden was adopted by all seven justices of the High Court in *Stingel*. Although *Stingel's* enunciation of the accused's evidential burden related to the partial defence of provocation rather than the *Proudman* defence, in substance it is the formulation that is applied to all defences (with the exceptions of insanity and diminished capacity) that are characterised as 'secondary' or 'affirmative' defences: Arenson, Bagaric and Gillies, above n 15, 30–1. A 'secondary' or 'affirmative' defence is one that does not necessarily deny that the prosecution has proved the elements of the crime(s) and the accused's complicity therein beyond reasonable doubt; rather, it is a defence that absolves the accused of liability irrespective of whether the prosecution has met its legal burden of proving both the elements of the offence(s) and the accused's complicity therein beyond reasonable doubt; at 36–7. The insanity and diminished capacity exceptions repose both the evidential and legal burdens on the accused. This requires the accused first to satisfy the trial judge that a jury could reasonably find, on the balance of probabilities, that the elements of these defences have been proved. Assuming the accused meets this burden, in order to succeed in this defence, the accused must convince the jury, on the balance of probabilities, that the elements of these defences have been proved.

Proudman defence is interposed as a defence to a strict liability offence,³⁵ fault in the form of negligence is thereby transformed into a constituent element of the offence; that is, in order to obtain a conviction, the prosecution must prove beyond reasonable doubt that the *Proudman* defence is unsustainable for want of a genuine belief in exculpatory facts, a well-founded belief in such facts, or both. While it may appear, therefore, that a crime is one of strict liability because neither a *mens rea* nor negligence constitutes an element of the crime according to its statutory definition, the *Proudman* defence has the practical effect of instituting negligence as a constituent element of the offence. From a practical standpoint, therefore, the very existence of the defence raises a legitimate question as to whether there is such a thing as an offence of strict liability.

An offence of absolute liability is one that is defined, whether expressly or by necessary implication, as one of strict liability, but the legislature has expressly or by implication excluded the *Proudman* defence.³⁶ For present purposes, however, it is important to emphasise that unlike offences of strict liability, the legitimacy of the very existence of offences of absolute liability is not open to question. Offences of absolute liability truly permit conviction without proof of “fault” in the relevant sense.

Section 38 of the *Crimes Act 1958* (Vic) provides as follows:

Rape

³⁵ This is not to say that the *Proudman* defence is the only available one in prosecutions for so-called strict liability crimes. In theory, at least, defences such as duress, necessity, and insanity, for example, are also available. Nonetheless, it would be rare indeed to see these defences interposed in prosecutions for putative strict liability offences.

³⁶ *Mayer v Marchant* (1973) 5 SASR 567, 569; *Burnett v LF Jeffries Nominees Pty Ltd* (1983) 33 SASR 124, 134; *Nationwide News Pty Ltd v Bitter* (1985) 16 A Crim R 53, 59; *Lee v Anderson* (1986) 23 A Crim R 68.

...

(2) A person commits rape if—

(a) he or she intentionally sexually penetrates another person without that person's consent—

(i) while being aware that the person is not consenting or might not be consenting; or

(ii) while not giving any thought to whether the person is not consenting or might not be consenting; or

(b) after sexual penetration he or she does not withdraw from a person who is not consenting on becoming aware that the person is not consenting or might not be consenting.

(3) A person (the offender) also commits rape if he or she compels a person—

(a) to sexually penetrate the offender or another person, irrespective of whether the person being sexually penetrated consents to the act; or

(b) who has sexually penetrated the offender or another person, not to cease sexually penetrating the offender or that other person, irrespective of whether the person who has been sexually penetrated consents to the act.

(4) For the purposes of subsection (3), a person compels another person (the victim) to engage in a sexual act if the person compels the victim (by force or otherwise) to engage in that act—

(a) without the victim's consent; and

(b) while—

(i) being aware that the victim is not consenting or might not be consenting; or

(ii) not giving any thought to whether the victim is not consenting or might not be consenting.

As a result of the changes brought about by the *Crimes Amendment (Rape) Act 2007*, sub-ss 38(2)(a)(iii) and 38(4)(b)(ii), readers will note that it is now possible to obtain a conviction under these sub-ss without having to prove what has long been the requisite *mens rea* for rape at common law³⁷ and under s 38;³⁸ that is, that the accused was aware at the relevant time that the complainant was not or might not be (recklessness) consenting to the sexual penetration in question.³⁹ Rather, the aforementioned sub-sections permit the prosecution to wholly circumvent this *mens rea* element by proving instead that the accused sexually penetrated ‘while not giving any thought to whether the victim is not consenting or might not be consenting’. Section 38(4), however, must be read in light of sub-ss 38(3)(a) and (b). Though these sub-ss contain the word ‘compels’ which is defined in s 38(4) as compelling the complainant ‘[by force or otherwise]’ to sexually penetrate the accused or another person, they do not make reference to the recognised *mentes reae* of intention, knowledge (also used synonymously with the word

³⁷ *DPP v Morgan* [1976] AC 182, [192] (*‘Morgan’*). At common law, rape is now defined as carnal knowledge of a female without her consent: Arenson, Bagaric and Gillies, above n 15, 299–300. Carnal knowledge is a far more limited term than sexual penetration in that it denotes any degree of penetration of the vaginal cavity irrespective of whether there was emission of seminal fluid: *Holland v The Queen* (1993) 67 ALJR 946.

³⁸ It should be noted that under the *Crimes Act 1958* (Vic) s 38(2)(b), there is no analogue to ss 38(2)(a)(iii) and 38(4)(iii) under which a conviction may be procured by failing to withdraw from a person who is no longer consenting without giving any thought whatever as to whether the complainant was not or might not be consenting.

³⁹ Under s 35(1)(a) and (b) of the *Crimes Act 1958*, sexual penetration is defined as ‘(a) the introduction (to any extent) by a person of his penis into the vagina, anus or mouth of another person, whether or not there is emission of semen; or (b) the introduction (to any extent) by a person of an object or a part of his or her body (other than the penis) into the vagina or anus of another person, other than in the course of a procedure carried out in good faith for medical or hygienic purposes.’

‘awareness’), belief or recklessness. It appears to be axiomatic, however, that a person cannot be compelled to sexually penetrate another by force or otherwise without an intention to do so.⁴⁰ Though some might take a different view, it is submitted that according to the great weight of authority, not giving any thought as to whether an *actus reus* element existed at the relevant time is *not* a state of mind that would qualify as one of the *mentes reae* recognised by the criminal law.⁴¹

This raises the question of whether sub-ss 38(2)(a)(iii) and 38(4)(b)(ii) of the *Crimes Amendment (Rape) Act 2007* (Vic) have transformed rape into an offence of either strict or absolute liability. Rape is technically a crime of *mens rea* because irrespective of the particular provision of s 38 under which the offence is alleged to have been committed, a *mens rea* is a constituent element of the offence. As noted above, an offence that consists of one or more *mentes reae* or any form of negligence as a constituent element is regarded as requiring proof of fault and, therefore, does not constitute a crime of strict liability.⁴² By definition, therefore, rape is not an offence of strict liability.⁴³ Rather, the important question is whether the advent of the *Crimes Amendment (Rape) Act 2007* has, in practical terms, transformed rape into an offence of absolute liability when the Crown alleges rape under sub-s 38(2)(a)(ii) or a combination of s 38(3) and sub-s 38(4)(b)(ii)?

⁴⁰ One acts with ‘actual’ intention in regard to a result, fact or circumstance if he or she acts with the subjective intention of bringing about that result, fact or circumstance: *Cuncliffe v Goodman* [1950] 2 KB 237, 253. In addition, a person is regarded in law as intending a result, fact or circumstance if he or she engages in an act with knowledge or an awareness that the result, fact or circumstance is practically certain to result from the act in question: *R v Hurley* [1967] VR 526, 540; *R v Brown* (1975) 10 SASR 139, 154; *Hyam v DPP* [1975] AC 55, 74 (Lord Hailsham LC).

⁴¹ For a thorough discussion of the types of *mens reas* that have garnered such recognition, see Gillies, above n 9, 46–72; Arenson, Bagaric and Gillies, above n 15, 25–6.

⁴² Gillies, above n 9 at 46, 80–2

⁴³ Arenson, Bagaric and Gillies, above n 15, 31, 503–4.

It was noted earlier that technically, each of the foregoing subsections constitutes an offence of *mens rea* by virtue of the requirement that the accused must intentionally sexually penetrate another person. As this requisite intention is regarded as a *mens rea* and, consequently, a type of fault,⁴⁴ it is also technically correct to say that as none of these offences are of the strict liability genre, the *Proudman* defence is unavailable. It follows, therefore, that this defence cannot be used as a means of interjecting a negligence fault element into these offences; that is, it is not open to the accused to satisfy the evidential burden on the *Proudman* defence,⁴⁵ thereby forcing the prosecution to assume the legal burden of persuading the fact-finder that the accused did not hold a genuine and well-founded belief in the existence of facts which, if true, would have made his or her conduct entirely lawful. Thus, at first glance it appears that the foregoing rape provisions represent a straightforward example of offences of *mens rea* that, by definition, preclude the interposition of the *Proudman* defence. Upon further analysis, however, a cogent argument can be constructed that sub-s 38(2)(a)(ii) or a combination of s 38(3) and sub-s 38(4)(b)(ii), though constituting offences of *mens rea* in the most strict technical sense, are effectively offences of absolute liability.

Although it is beyond doubt that an offence requiring an accused to act with the intention of bringing about one or more of the consequences of a relevant offence is regarded as one of *mens rea*,⁴⁶ the practical view is that there has rarely, if ever, been a prosecution for rape in which an accused argued that he or she was entitled to an acquittal on the ground that the Crown failed to meet its evidential or legal burden of proof on the

⁴⁴ Ibid.

⁴⁵ *He Kaw Teh v The Queen* (1985) 157 CLR 523, 533–4 (Gibbs CJ), quoting *R v Sault Ste Marie* [1978] 2 SCR 1299, 1325–6.

⁴⁶ *Cuncliffe v Goodman* [1950] 2 KB 237, 253; *Hills v Ellis* [1983] 1 All ER 667, 670.

issue of whether the accused's sexual penetration of the alleged victim was accompanied by an intention to do the same.⁴⁷ Even under the broad definition of 'sexual penetration' enunciated in ss 35(1)(a) and (b) of the *Crimes Act 1958* (Vic),⁴⁸ it would be difficult to envisage a circumstance in which an accused sexually penetrated another person or compelled another person to do so by accident or means that were unintentional. For practical purposes, therefore, the *mens rea* requirement of an intention to sexually penetrate would be all but meaningless were it not for the fact that it technically transforms the various rape offences under s. 38 into crimes of *mens rea*—thereby precluding the accused from raising the *Proudman* defence.⁴⁹

In addition, in instances where the accused is charged under sub-s 38(2)(a)(ii) or a combination of s 38(3) and sub-s 38(4)(b)(ii), all of which relieve the prosecution of the burden of proving that the accused was aware that the victim was not or might not have been consenting—a cogent argument exists that from a practical standpoint, the Crown is able to obtain a conviction without proof of fault. The success or failure of this argument will depend on whether the accused's failure to give any thought to the question of whether the complainant was not or might not have been consenting to the sexual penetration at issue amounts to

⁴⁷ The writer was unable to find any cases, reported or unreported, in which such an argument was raised. Though a conviction for indecent assault can now be obtained without proof that the accused was aware or at least reckless vis-à-vis the victim's lack of consent, this crime is distinguishable from rape in that it requires proof of what can be a very problematic *mens rea* of the type set out above.

⁴⁸ Section 35(1)(a) and (b) provides: 'sexual penetration means—(a) the introduction (to any extent) by a person of his penis into the vagina, anus or mouth of another person, whether or not there is emission of semen; or (b) the introduction (to any extent) by a person of an object or a part of his or her body (other than the penis) into the vagina or anus of another person, other than in the course of a procedure carried out in good faith for medical or hygienic purposes'.

⁴⁹ *He Kaw Teh v The Queen* (1985) 157 CLR 523, 533–4 (Gibbs CJ), quoting *R v Sault Ste Marie* [1978] 2 SCR 1299, 1325–6.

negligence per se. Subsections (2)(a)(ii) and (4)(b)(ii) of s. 38 are conspicuously devoid of the word 'negligence', and one can envision circumstances in which a person can act without negligence despite sexually penetrating another without turning his or her mind to the question of whether the complainant was not or might not have been consenting to the same. For example, if a newlywed couple had undergone many years of uninterrupted daily sexual encounters in which consent was always forthcoming irrespective of which party initiated the activity, it would be difficult to argue that either party would have acted negligently if he or she proceeded to sexually penetrate the other in the customary manner without giving any thought as to whether the other was not or might not have been consenting. Although situations will arise in which a person's failure to advert to the question of consent would amount to ordinary or criminal negligence, it is sufficient to note for purposes of sub-ss 38(2)(a)(ii) and (4)(b)(ii) that neither criminal nor ordinary negligence is required in order to convict. The practical result is that rape can now be prosecuted as an offence of absolute liability under certain provisions of s 38.

On another view, it will only be in the most unusual of circumstances that the Crown will be relegated to prosecuting its case on the allegation that the accused gave no thought as to whether the victim was not or might not have been consenting to the alleged sexual penetration. One might ask, therefore, why parliament opted to include these subsections that dispense with the need to prove that the accused was aware that the victim was not or might not have been consenting? It is apparent to this observer that these subsections were enacted in order to ensure convictions in cases where the prosecution may encounter insurmountable difficulty in proving that the accused acted with an

awareness that the victim was not or might not have been consenting.⁵⁰ In any event, parliament's decision to dispense with the need to prove the requisite *mens rea vis-à-vis* consent has effectively, albeit not technically, transformed the crime of rape under s. 38 into one of absolute liability, save for prosecutions under s 38(2)(b) which require proof of a *mens rea* that, far from a meaningless state of mind that is essentially taken for granted, is often a contentious issue in rape trials.⁵¹

If one accepts that parliament has substantively transformed all the provisions of s 38 (save for s. 38(2)(b)) into crimes of absolute liability, then several observations are appropriate. The first is that this offends the common law presumption that all common law and statutory offences are rebuttably presumed to be of the *mens rea* genre.⁵² Secondly, although the High Court's decision in *He Kaw Teh* noted several factors that a court should take into account in determining whether this presumption has been rebutted, all of the justices agreed that the potential severity of the penalty upon conviction is a consideration that militates in favour of the presumption.⁵³ Thirdly, crimes of strict or absolute liability are justified to some extent on the notion that they tend to be offences of a regulatory or welfare nature that typically result in minor penalties and

⁵⁰ Victoria, *Parliamentary Debates*, Legislative Assembly, 22 August 2007, 2859, (Rob Hulls, Attorney-General).

⁵¹ According to the Victorian Law Reform Commission (Law Reform Commission of Victoria, *Rape: Reform of Law and Procedure*, Appendixes to Interim Report No. 42 (1991) 84–7) in 74 per cent of rape trials the defendant argued that the Crown had failed to prove the case either because the victim was consenting, the defendant believed the victim to be consenting or a combination of the two. Of 45 appeals to the Victorian Court of Appeal between 2010 and 2011, 10 were based on issues of consent including, e.g., *Wilson v The Queen* [2011] VSCA 328; *LA v The Queen* [2011] VSCA 293; *Khan v The Queen* [2011] VSCA 286.

⁵² *Hew Kaw Teh v The Queen* (1985) 157 CLR 523, 528–9 (Gibbs CJ); at 552 (Wilson J); at 565–567 (Brennan J); at 590–1 (Dawson J).

⁵³ *Ibid* 530 (Gibbs CJ); at 546 (Mason J); at 567 (Brennan J); at 595 (Dawson J).

little or no opprobrium in the event of a conviction.⁵⁴ In sharp contrast, readers are well aware that few, if any, offences carry more severe penalties or negative social stigmas upon conviction than the crime of rape. Lastly, to permit a conviction for a crime such as rape without requiring any meaningful proof of fault is to trivialise the crime of rape.⁵⁵

These are just three of many examples of how pressure brought to bear on our legislative and judicial branches of government by strident feminists has resulted in deleterious substantive consequences to our adversarial system of justice. Attention will now focus on several procedural and evidentiary consequences of that pressure that have had a similar adverse effect.

III PROCEDURAL REFORMS THAT ACCORD SPECIAL DISPENSATION TO WOMEN

Our adversarial system of criminal justice has long adhered to the precept that subject to rare exceptions such as offences relating to terrorism, for example,⁵⁶ considerations of fairness and the necessity to minimize wrongful convictions require that the accused be afforded various procedural and evidentiary safeguards that include, but are not limited to, the following: the right to a fair and impartial jury in prosecutions for indictable offences;⁵⁷ that the prosecution bears both the evidential and

⁵⁴ *Cameron v Holt* (1980) 142 CLR 342 (Mason J), citing, *Sweet v Parsley* [1969] 2 WLR 470, 487.

⁵⁵ Arenson, *Absolute Liability*, above n 5, 403–6.

⁵⁶ See, eg, the *Terrorism (Commonwealth Powers) Act 2002* (Cth); the *Anti-Terrorism Act 2004* (Cth); *Anti-Terrorism Act (No. 2) 2005* (Cth). Persons held on suspicion of these types of crimes can be held in custody for longer periods of time without trial.

⁵⁷ See, eg, the *Australian Constitution* s 80 that mandates that all Australian Commonwealth indictable offences be adjudicated by a. Although s 80 applies only to Commonwealth indictable offences, there are laws which require that state and territorial indictable offences must also be adjudicated via trial by jury in the absence

legal burdens of proof in regard to the constituent elements of the offense(s) charged as well as the identity of the accused as the perpetrator;⁵⁸ that all accused persons are cloaked with a presumption of innocence that remains with them until such time, if ever, as it is rebutted by evidence that is sufficient to persuade the fact-finder of the existence of each and every element of the offense(s) charged and the accused's complicity therein beyond a reasonable doubt;⁵⁹ the right of an accused to cross-examine all witness against him or her and, if necessary, challenge various other forms of evidence tendered by the prosecution.⁶⁰ Moreover, the common law and the various legislative bodies who are responsible for enacting crime legislation have overwhelmingly rejected the notion that these and other safeguards should be either expanded or curtailed, depending upon the seriousness or opprobrium associated with any particular offence.⁶¹ Thus, an accused is generally accorded the same procedural and evidentiary safeguards irrespective of whether he or she is charged with relatively minor offences such as theft or trespassing or more serious offences as murder, kidnapping, armed robbery and treason.

of legislation permitting the accused to waive his or her right to a jury trial in favor of a bench trial: *Juries Act 1927* (SA) s 6; *Supreme Court Act 1933* (ACT) s 68A; *Criminal Procedure Act 1986* (NSW) s 131; *Criminal Code 1899* (Qld) s 604; *District Court of Queensland Act 1967* (Qld) s 65; *Criminal Code 1924* (Tas) s 361; *Criminal Procedure Act 2004* (WA) s 92; *Criminal Code* (NT) s 348; *Juries Act 2000* (Vic) s 22(2).

⁵⁸ K J Arenson and M Bagaric, *Rules of Evidence in Australia: Text and Cases* (LexisNexis, 2nd ed, 2007) 14–5, 21, 26 ('*Rules of Evidence in Australia*').

⁵⁹ *Momcilovic v The Queen* [2011] 280 ALR 221; *Packett v The Queen* (1937) 58 CLR 190 (the first case where the presumption of innocence was applied in Australia). See also A Ligertwood, *Australian Evidence* (LexisNexis, 4th ed, 2004) 86–8, 102; J D Heydon, *Cross on Evidence* (LexisNexis, 8th ed, 2010) 293 ('*Cross*').

⁶⁰ See generally *Cross*, above n 59, 511–561; see also *R v Chin* (1985) 157 CLR 673, 678 (Gibbs CJ and Wilson J); J L Glissan, *Cross-examination: Practice and Procedure* (LexisNexis, 2nd ed, 1991) 75: 'Prima facie any witness may be cross-examined by any party against whom he has testified'.

⁶¹ See, however, *Terrorism (Commonwealth Powers) Act 2002* (Cth); *Anti-Terrorism Act 2004* (Cth); *Anti-Terrorism Act (No. 2) 2005* (Cth). These Acts provide for special rules that the Commonwealth Parliament deemed necessary to deal with crimes of terrorism or threats to national security.

Notwithstanding the aforementioned precepts, in recent years the writer has witnessed an unsettling trend in Victoria (and other jurisdictions)⁶² whereby prosecutors and *alleged* victims of rape and other sexual assaults have received special dispensation; in particular, when one or more charges of sexual assault are contained in an indictment, the prosecution is now governed by special rules that are not applicable in prosecutions for other offences that the criminal calendar regards as equally, if not more serious, than any form of sexual assault. To illustrate, murder, kidnapping, armed robbery, arson causing death, and aggravated burglary are all levels 1 and 2 imprisonment offences, yet neither they nor any other Victorian or Commonwealth offences are subject to the disparate and overtly preferential rules that apply in sexual assault prosecutions.⁶³

A *Indictments and Time Limits for Commencement of Trials*

Although innocuous at first blush, it is only in sexual assault prosecutions that the time for filing indictments⁶⁴ and the commencement of trials⁶⁵ is substantially truncated. One might query why there is any real or perceived urgency to expedite proceedings in these prosecutions rather than those involving charges such murder, armed robbery, kidnapping, arson causing death and the like? Among the reasons typically proffered in support of such time limits are: the necessity for a speedy trial which becomes paramount when a person who is presumptively innocent is remanded in custody pending trial for want of sufficient assets to post bail; the general consensus among prosecutors, defence attorneys and the general public that a fair and just adversarial system of criminal justice

⁶² *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 3A; *Evidence Act 2001* (Tas) s 168.

⁶³ *Crimes Act 1958* (Vic) s 3; *Crimes Act 1958* (Vic) s 63A; *Crimes Act 1958* (Vic) s 75A; *Crimes Act 1958* (Vic) s 197A; *Crimes Act 1958* (Vic) s 77.

⁶⁴ *Criminal Procedure Act 2009* (Vic) ss 159, 163.

⁶⁵ *Ibid* ss 211, 212.

demands a swift resolution; that is, if the accused is ultimately acquitted, justice necessitates that the inevitable stress, cost and interference with his or her life be minimized to the fullest extent possible, especially if he or she cannot post bail pending the resolution of the case. If, on the other hand, the accused is convicted, then the general feeling appears to be that the shorter the time interval between the commission of the offence and its resulting sanctions, the more effective the punishment will be as a deterrent. Finally, and perhaps most importantly, witnesses' memories normally fade with the passage of time. Thus, although it may be disappointing to many that a criminal trial is not a truth seeking mission, it is difficult to argue with the notion that the interests of justice are best served by having witnesses testify at a time when their recollection of the relevant events is at its best.

If these are the obvious underpinnings of the time constraints for filing indictments and the commencement of trials, there appears to be no reason in logic or principle for imposing stricter time limitations in prosecutions where one or more charges of sexual assault are included in the indictment, but not in prosecutions for offences that are considered to be of equal or greater seriousness than those involving a charge of sexual assault. This argument is further buttressed by the fact that some sexual assaults are relatively minor in comparison to the level 1 and 2 offence examples noted above. Indecent assault, for example, is a sexual assault that is a level 5 offence that carries a maximum term of ten-years imprisonment. Merely touching another person in an indecent manner that would amount to a common assault, as by grabbing a male's buttocks or touching a female's breast, would constitute the statutory offence of

indecent assault in Victoria.⁶⁶ Aside from the desire to be seen as treating sexual assaults as a special genre of offences committed only by men against women that are therefore worthy of being dealt with as a matter of greater urgency than other offences, what possible rationale can justify these divergent time limitations?

⁶⁶ See *Crimes Act 1958* (Vic) s 39. Section 39(2) provides that '[a] person commits indecent assault if he or she assaults another person in indecent circumstances— (a) while being aware that the person is not consenting or might not be consenting; or (b) while not giving any thought to whether the person is not consenting or might not be consenting. Thus, in addition to the commission of a common assault in indecent circumstances, the accused must have acted with the *mens rea* described in s 39(2)(a) or at least acted without having given any thought as to whether the victim was not or might not have been consenting as set forth in s 39(2)(b). Indecent circumstances have been defined in various ways, all of which are quite similar. In *R v Court* [1986] 3 WLR 1029, the court opined that indecent assault 'is concerned with the contravention of standards of decent behaviour in regard to sexual modesty or privacy': at 1034. It is noteworthy that for purposes of s 39 and various other statutory sexual assault offences under the *Act*, the presence or lack thereof of consent is governed by s 36 of the *Act* which provides: '*For the purposes of Subdivisions (8A) to (8D) "consent" means free agreement. Circumstances in which a person does not freely agree to an act include the following—(a) the person submits because of force or the fear of force to that person or someone else; (b) the person submits because of the fear of harm of any type to that person or someone else; (c) the person submits because she or he is unlawfully detained; (d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing; (e) the person is incapable of understanding the sexual nature of the act; (f) the person is mistaken about the sexual nature of the act or the identity of the person; (g) the person mistakenly believes that the act is for medical or hygienic purposes (emphasis added).* Thus the deeming provisions set forth in ss 36(a)–(g) must be read in conjunction with the first sentence of s 36; that is to say that although ss 36(a)–(g) appear to be exhaustive of the situations in which consent will be deemed as lacking, these provisions are not exhaustive of all the circumstances in which there is no free agreement and, hence, no consent. For example, if a woman is pulled into a dark alley and forcibly raped by a total stranger despite making every effort to physically resist, no one would have the slightest doubt that a rape occurred. Yet none of the ss 36(a)–(g) deeming provisions would be applicable to negate consent because one who resists does not, by definition, 'submit' for any of the reasons set out in ss 36(a)–(c). Yet one who resists does not freely agree to the sexual penetration. As 'free agreement' is not defined in s 36, we look to the common law to determine what constitutes consent in order to resolve this apparent ambiguity. In *R v Wilkes and Briant* [1965] VR 475, consent was defined as free and conscious permission. In this scenario, consent is patently lacking, but one must rely upon the first sentence of s 36 in order to negate consent for purposes of indecent assault under s 39 of the *Act*.

B *Committal Hearings*

As any criminal law practitioner is acutely aware, a committal hearing⁶⁷ is a critical phase of any criminal prosecution. In fact, the High Court has held that its importance is such that in the absence of compelling circumstances, it would amount to an abuse of process warranting a stay of the proceedings if the prosecution were to directly indict⁶⁸ an accused to stand trial.⁶⁹ A committal hearing is of vital importance for several reasons, one of the most paramount being that a neutral and detached magistrate is duty bound to decide whether the Crown's evidence, looked upon in the light most favorable to the Crown,⁷⁰ is such that a jury could reasonably find that each and every element of the indictable offence(s) charged, as well as the accused's complicity therein, has been proved beyond reasonable doubt. Thus, a committal hearing serves as a neutral buffer between the Crown and the accused for the purpose of extirpating indictable offence prosecutions that are not supported by sufficient evidence to meet this standard.

Another important objective of a committal hearing is to allow the accused to assess the strength of the Crown's case in order to decide whether it is prudent to proceed to a trial by jury in the County or

⁶⁷ See *Criminal Procedure Act 2009* (Vic) s 96, authorizing the conduct of a committal hearing in regard to indictable offences.

⁶⁸ See *Criminal Procedure Act 2009* (Vic) s 161, providing that an accused can be directly indicted to stand trial.

⁶⁹ See *Barton v The Queen* (1980) 147 CLR 75, [3] ('*Barton*').

⁷⁰ The committal proceeding 'constitutes the only independent public scrutiny of prosecutorial discretion. It is intended to be an administrative screen or filter against unjustifiable prosecutions to ensure that no one stands trial for an indictable crime without good reasons': Richard Fox, *Victorian Criminal Procedure* (National Library of Australia, 2005) 198. 'The committal proceeding gives the person accused an opportunity to obtain more precise details of the charges laid and the supporting evidence': at 199. The powers of the magistrate are extended to allow them to order the prosecution to provide further information about the charges brought against the accused': *Summers v Cosgriff* [1979] VR 564, 568.

Supreme Court or, alternatively, obtain a sentencing discount⁷¹ by indicating his or her intention to enter a plea of guilty after being committed to stand trial in one of these courts. If the accused is confronted with overwhelming evidence of guilt, it is likely that he or she will indicate an intention to plead guilty and take advantage of the sentencing discount. This is a boon to all concerned, particularly the courts and taxpayers who would otherwise be inundated with costly, wasteful and time-consuming jury trials.

In addition, if the accused intends to enter a plea of not guilty in the event that the magistrate commits him or her to stand trial in the County or Supreme Court, the importance of the committal hearing cannot be overstated.⁷² While it is true that the vast majority of committal hearings are determined on the contents of a hand-up-brief that must be submitted to both the magistrate and the accused in advance of the committal proceeding,⁷³ this is a reflection of the fact that most prosecutions, including those involving indictable offences, result in guilty pleas as opposed to summary hearings or jury trials following pleas of not guilty;⁷⁴ that is to say that if the prosecution's case is strong as evidenced

⁷¹ *Sentencing Act 1991* (Vic) s 6AAA.

⁷² *Barton* (1980) 147 CLR 75, [5]. In *Barton*, the High Court emphasized the critical importance of the committal hearing as a discovery tool from the standpoint of the accused. In fact, the Court held that in the absence of a very limited number of compelling circumstances such as the availability of other equally effective means of discovery, a direct indictment or any other procedure that would deny or substantially eviscerate the scope of discovery that typically occurs in a committal hearing would amount to an abuse of process giving rise to a temporary or permanent stay of the proceedings.

⁷³ *Criminal Procedure Act 2009* (Vic) ss 107–115. These are the provisions that govern the hand-up-brief procedure. Section 110 sets forth the documents, exhibits and information that must be included in the prosecution's hand-up-brief. It is quite extensive and includes practically every piece of evidence that the Crown intends to rely upon at trial.

⁷⁴ As published by the Australian Bureau of Statistics, 'the majority (92% or 13,193) of defendants whose cases were adjudicated in the Higher Courts in 2009-10 were proven guilty. Of those defendants proven guilty, 89% pleaded guilty and 10%

by the contents of the hand-up-brief, it is nearly always in the accused's best interest to indicate his or her intention to enter a plea of guilty at the earliest possible time in order to obtain the maximum sentencing discount.⁷⁵

Finally, and most importantly from the standpoint of an accused who intends to plead not guilty and have the matter determined before a jury in the County or Supreme Court, the committal affords the accused with an invaluable opportunity to seek leave of court to have prosecution witnesses brought to the hearing and tendered for cross-examination.⁷⁶ Though the presiding magistrate must have regard to the factors set forth in s 124 of the *Criminal Procedure Act 2009* (Vic) in deciding whether leave should be granted, leave is typically granted if the witness' testimony is both relevant to an issue or issues in dispute and allowing cross-examination is necessary to allow the accused to adequately prepare his or her defence at trial. These factors are nearly always satisfied because the Crown would not be permitted to call witnesses unless their testimony is relevant to one or more contested issues at trial, and it is difficult to envisage any scenario in which allowing the accused to cross-examine the witness would not be critical in ensuring that he or she has a full and fair opportunity to prepare for trial.

It is one thing for a potential Crown witness' testimony at trial to be summarized in affidavit form and included, as it must, in the prosecution's hand-up-brief. It is quite another to allow the accused, particularly through the guiding hand of counsel, to cross-examine the

were found guilty following a trial': Australian Bureau of Statistics, *Criminal Courts Australia Snapshot* (1 February 2014) Australian Bureau Of Statistics <<http://www.abs.gov.au/ausstats/abs@.nsf/Products/4513.0~200910~Chapter~Introduction?OpenDocument>>.

⁷⁵ *Sentencing Act 1991* (Vic) s 6AAA.

⁷⁶ *Criminal Procedure Act 2009* (Vic) ss 123, 124.

witness in a courtroom setting in which defence counsel, rather than the witness or prosecutor, is permitted to formulate the questions and probe for information that counsel believes to be essential to the eventual outcome. Subject to some notable exceptions,⁷⁷ the accused is under no obligation to disclose whether it will present a defence or the nature thereof until such time as the Crown rests its case at trial.⁷⁸ Aside from the obvious discovery benefits of cross-examining the prosecution's witnesses, defence counsel also benefits through his or her visual assessment of the witness' demeanor in answering questions. It is often the case that a decision as to whether it is advisable to ultimately take a case to a trial by jury will depend on counsel's assessment of whether a witness' demeanor is such that his or her testimony is likely to be accepted or rejected by the jury.

These considerations notwithstanding, the popular notion held by strident feminists that sexual assaults are a special genre of offences and should be treated as such has again manifested itself in the rules governing committal hearings. When any indictment alleges one or more counts of sexual assault,⁷⁹ a magistrate must not grant leave to cross-examine a complainant⁸⁰ who, at the time when the criminal proceeding was commenced, was 'a child or a person with a cognitive impairment...'⁸¹ and made a statement a copy of which was served in the hand-up-brief or whose evidence-in-chief or examination at a compulsory examination hearing was recorded and a transcript of the recording was served in the

⁷⁷ Ibid ss 189, 190 (relating to the obligation of the accused to provide notice of his or her intention to call expert or alibi witnesses respectively).

⁷⁸ Fox, above n 50, 212.

⁷⁹ *Criminal Procedure Act 2009* (Vic) s 123(a).

⁸⁰ Ibid s 123.

⁸¹ Ibid s 123(b).

hand-up-brief'.⁸² The obvious intent of s 123 is to protect mentally impaired and child complainants from being subjected to the type of cross-examination at committal hearings that is commonplace when leave is sought at hearings that do not relate in whole or part to the prosecution of one or more sexual assault offences.⁸³ To many, this legislation is intended to serve what many believe is the laudable objective of minimizing, insofar as possible, the emotional trauma that naturally attends giving sworn testimony in a court proceeding. As laudable as this may appear, there are overriding considerations that not only outweigh this objective, but which demand that all complainants alleging one or more sexual assaults be subjected to the same cross-examination as any other complainant would be under s 124 of the *Act*.

First, as noted earlier, not all sexual assaults are level 2 offences such as rape. In fact, readers are reminded that there are numerous types of sexual assaults, including indecent assault (see above) that is only a level 5 imprisonment offence. Secondly, even if all sexual assaults were level 2 imprisonment offences, it does not inexorably follow that complainants who have made *allegations* of sexual assault should be treated with any greater deference than a complainant who alleges aggravated burglary, arson causing death, kidnapping, armed robbery or any other type of offence. Lest we forget, anyone can make a mere *allegation* against any person and it is the purpose of a trial to determine whether or not that allegation has been proven to the satisfaction of the jury beyond reasonable doubt. That is because a cardinal tenet of our adversarial system of criminal justice is that all accused persons enter the courtroom cloaked with a presumption of innocence that remains with them until

⁸² Ibid s 123(c).

⁸³ Victoria, *Introduction and First Reading*, Legislative Council, 5 February 2009, 194 (Justin Madden, Minister for Planning).

such time, if ever, as the jury finds that it has been rebutted by evidence that persuades them of the accused's guilt beyond all reasonable doubt.⁸⁴ Stating that child or mentally impaired complainants are deserving of special protection in any type of prosecution, much less one particular genre of prosecution, is tantamount to reversing this sacrosanct presumption. Unless it can be assumed before trial that the complainant's allegations are truthful, what is the rationale for protecting them against the rigors of cross-examination which is thought by many to be among the best means ever devised for exposing perjured testimony? As harsh as this may sound, the only alternatives are to eradicate the presumption of innocence altogether - or respect this cardinal tenet of the criminal law.

Secondly, if protecting children or the mentally impaired from being cross-examined at committal hearings is such a laudable objective, then one might ask why there is no comparable protection for complainants who allege offences such as kidnapping or armed robbery at committal hearings? Though rape is a form of sexual assault that is particularly appalling for obvious reasons, it is arguably no more traumatic to complainants than kidnapping, armed robbery and various other offences that are also level 2 imprisonment, but are viewed with less opprobrium than rape. Might the answer be that kidnapping, armed robbery and other equally traumatic crimes are not generally regarded as offences committed by men against women?

Lastly, the testimony given at trial by a child or mentally impaired complainant can and often is just as damaging as that of an adult, non-mentally impaired complainant. Thus, whatever interests are arguably served by protecting those who have made what are mere unproven

⁸⁴ *Momcilovic v The Queen* [2011] 280 ALR 221; *Packett v The Queen* (1937) 58 CLR. See also Ligertwood, above n 59, 86–8, 102; Cross, above n 59, 293.

allegations unless and until a jury convicts, they are outweighed by the need to afford an accused with full discovery of both the identity of his or her accuser(s) and the particulars of the allegations being made against him or her. In fact, for all the same reasons that many believe that child or mentally impaired complainants are deserving of this extraordinary protection, there is a heightened risk that their testimony may be tainted by the suggestions of others or the risk that their mental impairment may adversely affect the veracity of their testimony.

C *Rape Shield Provisions*

The common law has long recognized the right of an accused to adduce all legally admissible and exculpatory evidence on his or her behalf.⁸⁵ An accused that is charged with some form of non-sexual assault and interposes a claim of self-defence, for example, is free to adduce what is commonly referred to as character evidence⁸⁶ relating to the complainant or, in some instances, a third party such as a co-accused.⁸⁷ Character evidence could consist of evidence of the complainant's general reputation within the community for whatever character trait is most relevant to the offence charged which, in this scenario, is one's propensity towards violence.⁸⁸ Similarly, the character evidence could consist of what is known as similar fact evidence, a species of character evidence.⁸⁹ In this fact pattern, an example of such similar fact evidence

⁸⁵ *Lowery v R* [1974] AC 85, 101-3 ('*Lowery*'); *Re Knowles* [1984] VR 751, 768 ('*Knowles*'); see also Ligertwood, above n 59, 86-8, 102.

⁸⁶ Character evidence is often used synonymously with the terms 'propensity' or 'disposition' evidence. These terms denote evidence which shows that a person (or thing such as a corporation or partnership, for example) has a continuing proclivity to behave in a particular manner or act with a particular state of mind: *Rules of Evidence in Australia*, above n 58, 193.

⁸⁷ *Lowery*, [1974] AC 85, 101-3; Ligertwood, above n 39, 102-4.

⁸⁸ *Knowles* [1984] VR 751, 768.

⁸⁹ This type of evidence is 'generally defined as evidence of specific conduct,

would be eyewitness testimony (or conviction documents) showing that on one or more occasions unrelated to the incident in question, the complainant committed assaults on persons other than the accused.⁹⁰ Regardless of whether the accused's character evidence consists of the complainant's general reputation in the community for violence or evidence of the complainant's assaults, either would be admissible under the general common law rule that an accused may present all legally admissible and exculpatory evidence on his or her behalf;⁹¹ that is, either form of character evidence would satisfy the above criteria because the evidence, if accepted as truthful, would tend to support the accused's claim that it was actually the complainant who initiated the unlawful use of force.

In stark contrast, the prosecution is generally prohibited from adducing character evidence of the accused's general reputation in the community

usually criminal or otherwise discreditable in nature, which is of the same general character as or shares some common feature with the conduct which is the subject of the proceeding, and which is tendered as circumstantial evidence of one or more of the constituent elements of that conduct': J D Heydon, *Cross on Evidence*, (LexisNexis, 7th ed, 2004) 596. Though Heydon does not define similar fact evidence in these exact words, the writer believes that the above-quoted definition is both accurate and reflective of the great weight of judicial and academic opinion. In *Knowles* [1984] VR 751, 765–6 the petitioner was convicted of the murder of his de facto wife by stabbing her to death. He claimed that the killing had occurred accidentally as he attempted to dispossess her of the knife in order to protect both her and their two children from harm after she had consumed alcohol and became belligerent. In reversing the conviction on appeal, the Full Court of the Supreme Court of Victoria held that a miscarriage of justice had occurred due to a gross neglect of duty on the part of defence counsel in failing to adduce evidence from two of the deceased's former lovers that they had ended their relationships with her because she had become aggressive and violent on several occasions after consuming moderate amounts of alcohol. In so holding, the court reaffirmed the common law rule that an accused is generally permitted to adduce all relevant and exculpatory evidence on his or her behalf, including, as in this case, similar fact evidence relating to specific instances of past conduct on the part of the alleged.

⁹⁰ *Knowles* [1984] VR 751, 765–6.

⁹¹ *Lowery* [1974] AC 85, 101–3; *Knowles* [1984] VR 751, 765–6.

for the relevant character trait as part of its case-in-chief.⁹² With the exception of the similar fact species of character evidence (discussed below), the prosecution may only adduce this or any other form of character evidence if the accused has placed his or her character in issue.⁹³ This occurs, for example, when the accused calls witnesses to attest to his or her good reputation in the community for the relevant character trait, testifies that he or she has lived a crime free existence, refers to specific incidents which form the basis for his or her good reputation in the community, cross-examines prosecution witnesses with a view toward establishing his or her good character, tenders documents or by any other means reveals information to the fact-finder in an attempt to show that he or she is a person of good character.⁹⁴ This is true even if the information revealed is not technically admissible in evidence, as by merely asking a question of a witness that reveals information that tends to cast the accused's character in a favourable light.⁹⁵

There are instances, however, despite difficult obstacles to surmount, in which the prosecution may adduce similar fact evidence as part of its case-in-chief irrespective of whether the accused has placed his or her

⁹² *Lowery* [1974] AC 85, 101–3; *Knowles* [1984] VR 751, 765–6; *Rules of Evidence in Australia*, above n 58, 195.

⁹³ *Rules of Evidence in Australia*, above n 58, 195.

⁹⁴ See, for example, *R v Perrier (No 1)* (1991) VR 697 ('*Perrier*'). In *Perrier*, it was held that by merely tendering a letter written by a prosecution witness that made reference to the accused's distaste for prohibited substances, the accused had placed his character in issue, thereby opening the door for the prosecution to rebut such evidence of good character, in this instance by adducing evidence of the accused's prior convictions, some of which involved illegal drugs.

⁹⁵ *Rules of Evidence in Australia*, above n 58, 193. The questions of counsel are not considered as evidence. The answers given by the witnesses are regarded as evidence, provided they are not excluded by an evidentiary rule of exclusion or a common law or statutory discretion to exclude: *ibid.*

character in issue.⁹⁶ This is an extremely complex topic and one that is far beyond the scope of this article.⁹⁷ Suffice it to say for present purposes that the common law has long accorded far greater latitude to an accused in adducing all forms of character evidence relating to the complainant or a co-accused.⁹⁸ As one might have expected, however, this is yet another area of the law in which a very different set of rules apply when the accused is charged with one or more counts of any form of sexual assault, and this is true regardless of whether other types of offences are joined in the charge sheet or indictment.⁹⁹ As the discussion to follow will demonstrate, there are now statutes in all Australian jurisdictions and other democratic societies that have significantly truncated the accused's right to adduce all legally admissible and exculpatory evidence on his or

⁹⁶ For an incisive and comprehensive discussion of the Australian common law approach to the admissibility of similar fact evidence, see *Rules of Evidence in Australia*, above n 58, 223–315.

⁹⁷ For a comprehensive discussion of the rules and rationale governing the admissibility of a accused's past conduct in each of the Australian jurisdictions, see K J Arenson, 'The Propensity Evidence Conundrum: A Search for Doctrinal Consistency' (2006) 8 *University of Notre Dame Australia Law Review* 31–63.

⁹⁸ The reason for extending greater latitude to the accused is that given the heavy legal burden of proof reposed on the Crown in criminal prosecutions, the law has opted to accord the accused every opportunity to adduce legally admissible and exculpatory evidence that is capable of creating reasonable doubt: Ligertwood, above n 59, 413–5.

⁹⁹ In Australia, see *Crimes Act 1958* (Vic) ss 62(1) and 62(2); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 48–53; *Crimes Act 1914* (Cth) ss 15YB–15YC; *Criminal Procedure Act 1986* (NSW) s 293; *Evidence Act 2008* (Vic) ss 97, 98, 101; *Criminal Procedure Act 2009* (Vic) ss 339–352; *Evidence Act 2001* (Tas) s. 194M. The statutory analogues in the jurisdictions which have thus far rejected the Uniform Evidence legislation are: *Evidence Act 1929* (SA) s 34L; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4; *Evidence Act 1906* (WA) ss 36A–36BC; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4. For examples of rape shield provisions outside Australia, see: NY Criminal Procedure Law § 60.42 (2011); Ga Code Ann (LexisNexis 2011) § 24-2-3; Wyo Stat Ann § 6-2-312 (2011); Colo Rev Stat 18-3-407 (2011); Ohio Rev Code Ann 2907.02 (LexisNexis 2011); *Criminal Code*, RSC 1985, c C-46, s 276; *Youth Justice and Criminal Procedure Act 1999* (UK) ss 41–43; *Evidence Act 2006* (NZ) s 3.

her behalf. Statutes of this type are often referred to as ‘rape shield’ laws.¹⁰⁰

The ‘rape shield provisions’ now in effect in Victoria are contained in ss 339–352 of the Criminal Procedure Act 2009 (Vic), which are essentially a re-enactment of its predecessor, s. 37A of the Evidence Act 1958 (Vic). Consonant with the provisions of s. 37A, s. 341 of the Criminal Procedure Act 2009 (Vic) prohibits an accused from adducing evidence of the complainant’s general reputation in the community for chastity, and this is true irrespective of whether such evidence is adduced by way of cross-examination or as part of an accused’s case-in-chief. Although ss 339–352 must be read in their entirety to fully understand their effect, the overall impact effect of these and similar provisions in other jurisdictions is to require the accused to first obtain leave of court as a precondition to adducing evidence relating to the complainant’s past sexual conduct (meaning sexual conduct other than that which is the subject of the current prosecution), whether by way of cross-examination of the complainant or otherwise.¹⁰¹ Section 349 then provides:

[t]he court must not grant leave under section 342 unless it is satisfied that the evidence has substantial relevance to a fact in issue and that it is in the interests of justice to allow the cross-examination or to admit the evidence, having regard to—

- (a) whether the probative value of the evidence outweighs the distress, humiliation and embarrassment that the complainant may experience as a result of the cross-examination or the

¹⁰⁰ The term ‘rape shield’ is generally accepted as a reference to any procedural or evidential provision which provides extended protection to victims of sexual assault crimes, but the author was unable to locate the originating source of the term as used in this context. For an example of a treatise that employs the term in the present context, see I Freckelton and D Andrewartha, *Indictable Offences in Victoria* (Thomson Reuters, 5th ed, 2010) 116.

¹⁰¹ *Criminal Procedure Act 2009* (Vic) s 342.

admission of the evidence, in view of the age of the complainant and the number and nature of the questions that the complainant is likely to be asked; and

(b) the risk that the evidence may arouse in the jury discriminatory belief or bias, prejudice, sympathy or hostility; and

(c) the need to respect the complainant's personal dignity and privacy; and

(d) the right of the accused to fully answer and defend the charge.’

Section 349 is limited by ss 343 and 352(a) which respectively provide that ‘[s]exual history evidence is not admissible to support an inference that the complainant is the type of person who is more likely to have consented to the sexual activity to which the charge relates’ and that ‘[s]exual history evidence is not to be regarded . . . as having a substantial relevance to the facts in issue by virtue of any inferences it may raise as to general disposition’. The impact of these sections is to preclude a court from finding that the disputed evidence has substantial relevance to a fact at issue solely by virtue of the fact that the evidence, if accepted by the fact-finder, can found an inference that the complainant has a propensity to behave in a manner that is consistent with the evidence of past sexual history, from which a further inference can be drawn that the complainant is likely to have consented to the activity which is the subject of the prosecution.¹⁰²

This is what is commonly referred to as a propensity or dispositional chain of reasoning which, for reasons that will be discussed (below), has

¹⁰² K J Arenson, ‘Propensity Evidence in Victoria: A Triumph for Justice or an Affront to Civil Liberties?’ (1999) 23(2) *Melbourne University Law Review* 263, 268.

caused the courts to view it with such great suspicion that the prosecution is generally prohibited from utilizing it as a basis for reasoning towards guilt. Stated differently, the accused is on trial for the offence(s) with which he or she is currently charged—and not for any crimes or conduct for which he or she has been previously convicted or suspected of committing. Moreover, it is an extremely presumptuous and dangerous leap for a fact-finder to infer, assuming it accepts the evidence of past sexual conduct as truthful, that because the accused has acted in a certain manner or with a particular state of mind in the past, he or she has a propensity to behave in a similar manner or with that particular state of mind, from which a further inference can be drawn that he or she is likely to have acted in a similar manner or with a similar state of mind on the occasion which is the subject of the current prosecution.¹⁰³

Where s. 349 is concerned, the determining factor in the admissibility of such evidence will depend, subject to the limitations imposed by ss 343 and 352(a), on whether it is in the interest of justice to admit it having regard to the factors enumerated in s. 349(a)–(d). Section 349 is further limited by s. 352(b) which provides that ‘[s]exual history evidence is not to be regarded...as being proper matter for cross-examination as to credit unless, because of special circumstances, it would be likely materially to impair confidence in the reliability of the evidence of the complainant’.

It follows that throughout Australia, rape and other sexual assault offences may be seen as a special genre of offences in which disparate rules apply which, it can be argued, afford enhanced protection to the accuser and attenuated protection to the accused. This is achieved in two ways: (1) unlike an accused who is charged with only non-sexual assault offences, an accused who is charged with one or more sexual assault

¹⁰³

Ibid 26.

offences must first seek and obtain leave of court in order to cross-examine the complainant on or otherwise adduce evidence of the complainant's past sexual conduct; and (2) in order to obtain leave, an accused must demonstrate not merely that the complainant's past sexual conduct is relevant to an issue in the case or to impeaching the complainant's credit, but 'substantially' so.

This raises a question as to why rape and other sexual assaults are treated as a special class of offences in which special dispensation is bestowed upon both the prosecution and accuser and, concomitantly, the common law right of an accused to adduce all legally admissible and exculpatory evidence is attenuated through restrictions that have no application in prosecutions that do not include one or more charges of sexual assault? Though it may be true that restricting an accused's right to adduce evidence of a complainant's past sexual conduct will encourage more allegations of sexual assault to be made, that interest must be balanced against the longstanding common law rule that permits an accused to adduce all legally admissible and exculpatory evidence. Are persons accused of committing sexual assaults any less entitled to the presumption of innocence than those who are charged with other offences? Unless one is prepared to answer in the affirmative, one must query whether it is more important to encourage alleged victims of sexual assault to come forward than those who claim to be victims of other offences? If that question is answered in the affirmative, then the question is why? Readers will recall that several non-sexual assault offences are regarded as equally serious, if not more so, than rape and other forms of sexual assault. Yet it is only with regard to prosecutions for sexual assaults that the law has eviscerated the common law right of an accused to adduce all legally and exculpatory evidence on his or her behalf.

Although it is one thing to seek to protect those who have been traumatized by criminal conduct, it is quite another to presume guilt and dispense with the presumption of innocence before there has been an adjudication of guilt. It is insidious enough to flout the presumption of innocence in any prosecution, but to do so exclusively in sexual assault prosecutions is blatantly sexist and indefensible. Whether strident feminists wish to accept it or not, it is a fact that the law does not consider one who merely makes an accusation to be a victim. Perhaps radical feminists should be reminded that the goal of our criminal justice system is not limited to ensuring that persons accused of sexual assaults receive their just deserts; rather, the overriding objective of our criminal justice system is to protect all persons from the evils of wrongful conviction.¹⁰⁴

IV SHE IS RAPED A SECOND TIME DURING CROSS- EXAMINATION WHEN DEFENCE COUNSEL FORCES HER TO RELIVE THE RAPE AGAIN

This hackneyed cliché, perhaps more than any other, exemplifies the myopic view that has been visited upon our adversarial system of criminal justice. The question to be posed to those who subscribe to this adage is whether they would be comfortable with like-minded people sitting on their jury if they were falsely accused of committing a sexual assault or, for that matter, any crime? The answer is abundantly clear. No rational person would countenance the presence of such a person on his or her jury in such circumstances because it would be obvious that one who subscribes to this expression has rejected the presumption of

¹⁰⁴ See Andrew Sanders and Richard Young, *Criminal Justice*, (Butterworths, 1994) 2 which states that the aims of the criminal justice system are ‘to ensure that those suspected, accused, and convicted of crimes are dealt with fairly, justly, and with a minimum of delay’ and ‘to convict the guilty and acquit the innocent’.

innocence and substituted a strong presumption of guilt in lieu thereof. If one enters the jury box in the belief that the complainant is about to be raped a second time by virtue of being subjected to the most basic right of any accused to confront and cross-examine his or her accuser, the juror has already determined that the complainant was sexually assaulted, and probably by the accused. The sheer frequency with which this cliché is used is indicative of the successes enjoyed by those who seek to emasculate or even abrogate some of the most hallowed tenets of our system of criminal justice.

V CONCLUSION

This article has demonstrated the many ways in which the powerful and strident feminist lobby has adversely affected some of the most sacrosanct rights that the common law has long recognized as essential to the notion of a fair trial. The influence of this voting demographic has provided the impetus for the abolition of the partial defence of provocation in murder prosecutions, an effective reversal of the presumption of innocence by according protections to sexual assault complainants that are not accorded to alleged victims of other crimes, and a flagrant assault on the cardinal tenet that all persons are regarded as equal before the law. This article has also noted the pernicious effects that this formidable demographic has foisted upon other important substantive and procedural rules within our system of criminal justice.

It is important to stress, however, that the very nature of lobbying is such that it involves alliances, bargaining and even political blackmail that occur under a cloud of secrecy. It would be extraordinary, for example, to expect any parliamentarian to provide direct evidence of its existence by confessing that he or she supported legislation solely because of pressure

brought to bear by a well-organized and very committed group such as the feminist lobby. There are no doubt many instances in which a special interest group's views and political influence are so obvious as to obviate the need for it to make an express or implied threat that failure to support or oppose certain legislation could well cost a parliamentarian his or her seat in a marginal district. Yet the existence and influence of special interest groups is so widely known and accepted that a court would probably be remiss in failing to take judicial notice of these facts. That observation aside, there are instances in which circumstantial evidence can be equally, if not more, cogent than direct evidence. In the writer's view, a rather compelling circumstantial case has been made that the specific substantive and procedural rules discussed in this piece are evidence of a disturbing trend that is explicable only on the basis that preferential treatment has been accorded to one gender at the expense of the other. A key link in this circumstantial chain is to infer why this is so and who stands to benefit by this preferential treatment.

To those who hold dear the right to freedom of speech and subscribe to its underlying rationale that in the free marketplace of ideas, the better reasoned ones are likely to gain favor with the masses, there appears to be but one method of curtailing, halting, and eventually reversing the trend toward capitulating to the wishes of those who seek not mere equality between the genders, but what any fair and neutral observer would regard as preferential treatment for one gender; namely, to better inform the public of the arguments put forth in this article. It is only through educating the masses about the issues at hand that public opinion can be transformed to the extent required to halt this trend and reverse the invidious effects of this powerful voting demographic.