IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY **NO A15 OF 2011**

On appeal from
Full Court of the Supreme Court of Queensland

BETWEEN: **P, GA**
Appellant

AND: **THE QUEEN**
Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

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PART I FORM OF SUBMISSIONS

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

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes under s 78A of the *Judiciary Act 1903* (Cth) in support of the Respondent.

PART IV LEGISLATIVE PROVISIONS

3. The Commonwealth does not wish to add to the list of provisions referred to in Pt VII of the Appellant's submissions.

PART V ARGUMENT ON ISSUES PRESENTED BY THE APPEAL

10 4. On the assumption that the elements of "rape" in s 48 of the *Criminal Law Consolidation Act 1935* (SA) were in 1963 supplied by the common law definition of rape,[1] the Commonwealth submits:

4.1. The common law was never that a husband could not commit an offence of raping his wife: *R v L*[2] should be understood as stating the correct position as it had always been. In the alternative, if *R v L* turned

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1 In 1963, s 48 of the 1935 SA Act provided "[a]ny person convicted of rape shall be guilty of felony, and liable to be imprisoned for life, and may be whipped". The opening phrase is substantially identical to s 48 of the *Offences against the Person Act 1861* (24 & 25 Vic, c 100), which appears to have been the model for s 60 of the *Criminal Law Consolidation Act 1876* (SA). The effect of s 48 of the *Offences against the Person Act* was that "[t]he offence is a felony at common law, but the punishment is statutory": *Archbold's Pleading, Evidence & Practice in Criminal Cases* (32nd ed 1949), p 1058.

There would be no difficulty in construing s 48 of the 1935 SA Act (from its enactment until 1963) as attaching punishment to the common law offence of rape, as developed from time to time. See *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 549 [23] (the Court): "Where statute picks up as a criterion for its operation a body of the general law [in *Aid/Watch*, the equitable principles respecting charitable trusts] then, in the absence of a contrary indication in that statute, the statute speaks continuously to the present, and picks up the case law as it stands from time to time".

2 (1991) 174 CLR 379.

on changed circumstances, the relevant change occurred by the end of the 19th century.

4.2. It is not open to declare that a common law rule will apply with prospective effect only: a necessary incident of the exercise of judicial power in Australia is that the common law is clarified or developed by reference to past events and circumstances.

THE COMMON LAW WAS IN 1963 THAT A HUSBAND COULD BE GUILTY OF RAPING HIS WIFE

10 5. It was not necessary in *R v L* to determine whether the proposition that by marriage a wife gave irrevocable consent to sexual intercourse by her husband had ever formed part of the common law. It was sufficient for the decision in that case that by 1991 the proposition was certainly no longer the common law.[3] Four members of the High Court pointedly left open whether this proposition had ever been the common law.[4] The better view is that the true common law position had never been to that effect.

6. The proposition that a husband could never be guilty of raping his wife derived from a statement by Sir Matthew Hale which was based on a fiction of irrevocable "consent" and which rested on nothing more than assertion.[5]

20 7. In Australia, there were a number of decisions by first instance and intermediate appellate courts, after 1963 but before *R v L*, that appeared to accept this proposition; however, the issue was not essential to the decision in any of those cases.[6]

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3 See (1991) 174 CLR 379 at 390 (Mason CJ, Deane and Toohey JJ); see also 405 (Dawson J): "Hale's view can no longer represent the common law, if it ever did".

4 See (1991) 174 CLR 379 at 390 (Mason CJ, Deane and Toohey JJ), 405 (Dawson J). Brennan J held that Hale's proposition did represent the common law (at 402) but that it was fundamentally wrong (at 401).

5 Hale, *The History of the Pleas of the Crown* (1736) Vol 1 at 629. It was accepted, before Hale made his assertion, that a husband could be guilty as a principal of the rape of his wife, by aiding and abetting her rape by another man: *Lord Audley's Case* (1631) 3 State Trials 401.

6 See the cases collected by Gray J: *R v P, GA* (2010) 109 SASR 1 at 23-26 [109]-[121].

8. In England, arguably a majority of the Court of Crown Cases Reserved accepted in *R v Clarence*[7] that a husband could not be guilty of raping his wife. However, these statements were obiter dicta (because the case did not involve a charge of rape), and the Court was closely divided on this point. Of the judges who accepted the proposition, some accepted it only with qualifications,[8] or in elliptical terms.[9] Four judges either doubted Hale's proposition,[10] or flatly rejected it as ever having been the law of England.[11] There are statements by single judges in *R v Clarke*[12] and *R v Miller*[13] that arguably do accept Hale's proposition but both judges qualified that

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7 (1888) 22 QBD 23.

8 (1888) 22 QBD 23 at 51 (Hawkins J): the marital privilege "does not justify a husband in endangering his wife's health and causing her grievous bodily harm", so that "a wife would be justified in resisting by all means in her power".

9 (1888) 22 QBD 23 at 46 (Stephen J, with Mathew, Grantham, Huddleston JJ agreeing): "I wish to observe on a matter personal to myself that I was quoted as having said in my Digest of Criminal Law that I thought a husband might under certain circumstances be indicted for rape of his wife. I did say so in the first edition of that work, but on referring to the last edition [...], it will be found that the statement was withdrawn".

Pollock B accepted the Hale proposition: at 64. Manisty J did not express any opinion on this point: see 55-56.

10 (1888) 22 QBD 23 at 57 (Field J, with Day J agreeing): "The authority of Hale CJ, on such a matter is undoubtedly as high as any can be, but no other authority is cited by him for this proposition, and I should hesitate before I adopted it"; see also 37 (AL Smith J) (observing that consent given at marriage "stood unrevoked").

11 See particularly (1888) 22 QBD 23 at 33 (Wills J): it was "a proposition to which I am certainly not prepared to assent, and for which there seems to me to be no sufficient authority".

12 [1949] 2 All ER 448. Byrne J stated at 448 "**[a]s a general proposition** it can be stated that a husband cannot be guilty of a rape on his wife", because "on marriage the wife consents to the husband's exercising the marital right of intercourse **during such time as the ordinary relations created by the marriage contract subsist between them**". However, Byrne J held at 449 that the Hale proposition of irrevocable consent did not apply (that is, a husband could be guilty of raping his wife) in circumstances where a court had ordered that the wife was not bound to cohabit with him. Several cases expanded the qualification noted in *Clarke*, holding that a husband could be charged with rape of his wife once a decree nisi had been granted for a divorce; or when the spouses were living apart and the husband had given an undertaking not to molest his wife; or where there was a formal separation agreement: see *R v R* [1992] 1 AC 599 at 619, referring to *R v O'Brien* [1974] 3 All ER 663, *R v Steele* (1976) 65 Cr App R 22 and *R v Roberts* [1986] Crim LR 188. But see *R v Sharples* [1990] Crim LR 198.

13 [1954] 2 QB 282. Lynskey J observed at 286 that, in the time when Hale asserted the proposition of irrevocable consent, a valid marriage could not be dissolved except by death and could only be avoided by an Act of Parliament and that although "there [had since] been numerous departures from that view of marriage", the Hale proposition "[had] never in terms been overruled". Lynskey J held at 290 that "the law implies consent to what took place so far as intercourse is concerned **(but only to that extent)**" with the result at 291-292 that the husband could be charged for an assault that occurred as part of a rape of his wife, even if he could not be charged for the rape itself. Several cases expanded the qualification noted in *Miller*, holding that a wife's imputed consent to sexual intercourse would cover some, but not all, sexual acts that were preparatory to intercourse: *See R v R* [1992] 1 AC 599 at 620, referring to *R v Caswell* [1984] Crim LR 111, *R v Kowalski* (1987) 86 Cr App R 339 and *R v H* (unreported, 5 October 1990).

proposition in ways that "seriously undermined" its validity.[14] In 1991 in *R v R*,[15] the House of Lords held that in modern times the supposed marital exemption in rape forms no part of the common law of England. The rule in *R v R* has been applied to events in 1970 that were alleged to be marital rapes.[16]

9. The proposition asserted by Hale has always been both anomalous and "offensive to human dignity".[17] As noted by the English Court of Appeal in *R v C*,[18] the effect of Hale's proposition is that the law protects a woman from rape, "with the solitary and glaring exception of rape by the man who had promised to love and comfort her". Even if it might have been said that entering into marriage amounted to "consent" to sexual intercourse in the sense of a promise to engage in sexual intercourse, that is far from an irrevocable consent, amounting to an absolute conferral of an immunity, applicable to all future acts, at times and places and in circumstances unknown at the time of the supposed consent.[19] Moreover, if a woman was taken to have given irrevocable consent, then it would seem to follow that she could not lawfully resist her husband. Would that mean that a wife could be guilty of an assault in resisting her husband?

10. As noted by Brennan J in *R v L*, the understanding of marriage implicit in the assertion by Hale (that by marriage a wife gave irrevocable consent), "is not and never has been the law of marriage".[20] The law of marriage as stated by the ecclesiastical courts was:

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14 See *R v L* (1991) 174 CLR 379 at 390 (Mason CJ, Deane and Toohey JJ). Although this passage does not refer to the qualification described in footnote 13, that qualification additionally undermined Hale.

15 [1992] 1 AC 599 at 623.

16 *R v C* [2004] 1 WLR 2098 at 2105 [25]. The events are described in [5].

17 See *R v L* (1991) 174 CLR 379 at 402 (Brennan J).

18 [2004] 1 WLR 2098 at 2105 [24].

19 Consent to sexual intercourse, such as to negative a charge of rape, "demands a perception as to what is about to take place", and the consent must be "comprehending and actual": *Papadimitropoulos v The Queen* (1956) 98 CLR 249 at 261 (the Court).

20 (1991) 174 CLR 379 at 391.

> ... each spouse has a mutual right to sexual intercourse **provided the right be exercised reasonably,** subject to the health of the spouses and the exigencies of family life. **It is a right to be exercised by consent.**[21]

11. The law of marriage did provide remedies if one party refused conjugal relations;[22] however, a decree of restitution requiring a party to a marriage to perform conjugal rights simply required the husband and wife to live together under the same roof in the normal relationship of husband and wife. It said nothing about sexual intercourse.[23] Why should a husband, by virtue only of marriage, be entitled to obtain by force from his wife something that the law would not grant to him?

12. It would seem to be a necessary corollary of the Hale proposition (that by marriage a wife has given irrevocable consent) that a husband could require intercourse whenever he wants, by force if necessary. However, as Gleeson CJ stated in *R v Chhay*,[24] "[t]he law is not intended to encourage resort to self-help through violence". In particular, it has been clear since the decision in *R v Jackson*[25] in 1891 that a husband is not entitled to use force against his wife to enforce marital duties. In *Jackson,* the English Court of Appeal held that a husband could not imprison his wife to enforce restitution of conjugal rights. Lord Esher stated that, although the husband had obtained a decree for restitution of conjugal rights, "that gives him no power to take the law into his own hands and himself enforce the decree of the Court by imprisonment".[26] To similar effect, Lord Halsbury rejected any notion "of the absolute dominion of the husband over the wife", and stated that a husband had no right to seize his wife and imprison her until she consents to restore

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21 (1991) 174 CLR 379 at 396 (emphasis added).

22 *R v L* (1991) 174 CLR 379 at 393-394 (Brennan J); *Synge v Synge* [1900] P 180, see especially 194-195.

23 *Bartlett v Bartlett* (1933) 50 CLR 3 at 15 (Dixon J), quoting *Fielding v Fielding* (1921) NZLR 1069 at 1070-1071 (Salmond J). See also *Forster v Forster* (1790) 1 Hagg Con 144 at 154 [161 ER 504, 508].

24 (1994) 72 A Crim R 1 at 13 (discussing the law of provocation). See also *Southwark London Borough Council v Williams* [1971] Ch 734 at 745 (Edmund Davies LJ) (discussing the defence of necessity): the law "regards with the deepest suspicion any remedies of self-help, and permits those remedies to be resorted to only in very special circumstances".

25 [1891] 1 QB 671.

26 [1891] 1 QB 671 at 684.

conjugal rights.[27] Accordingly, since at least *Jackson* in 1891, a husband has had no right to use physical coercion upon his wife. There is no reason to exclude sexual matters from this principle. Once this is recognised, the Hale proposition cannot stand – whatever "consent" is imputed to a wife by entering into marriage, the husband has no right to require sexual intercourse by force.

13. For these reasons, the common law should be understood as never having accepted the Hale proposition, and *R v L* should be understood as stating what the common law position had always been. Alternatively, to the extent that the rejection of the Hale proposition in *R v L* might properly be seen to have depended on changing circumstances, the relevant change in circumstances had occurred by the end of the 19th century. Subsequent changes to the status of women and the accepted nature of marriage only highlighted the unsatisfactory nature of the fiction of irrevocable consent underlying the Hale proposition.[28]

B. NO PROSPECTIVE OVERRULING

14. The difficulties with prospective overruling do not depend on any simple declaratory theory of the law which would say that judges simply declare the law and do not make it and that the law once declared is immutable. It may be accepted, as stated in *Western Australia v The Commonwealth (The Native Title Act Case)*,[29] that the courts "create and define" the common law, and that the content of the common law will "change from time to time according to the changing perception of the courts". Judicial law-making

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27 [1891] 1 QB 671 at 679, 680.

28 The changes in the rights of marriage from Hale's time until 1992 are usefully summarised in Law Commission of England and Wales, *Criminal Law: Rape Within Marriage* (Law Com 205), Appendix B. < http://www.official-documents.gov.uk/document/hc9192/hc01/0167/0167.pdf>

29 (1995) 183 CLR 373 at 485, 486 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

involves gradual change, expressive of improvement by consensus and continuity.[30]

15. However, the making of the common law by courts occurs "under the restraints of traditional judicial method".[31] What is critical is that courts make law only as an incident or by-product of resolving disputes between parties about existing rights, duties or obligations: it is only in the resolution of those particular disputes that courts formulate rules of general application that are subsequently applied by other courts through the doctrine of precedent.[32]

16. As observed in *Ha v New South Wales*,[33] courts adjudicate existing rights and obligations by reference to past events, rather than creating rights for the future. For that reason, if it is necessary to overrule a previous decision, "it would be a perversion of the judicial power to maintain in force that which is acknowledged not to be the law".[34] It is true that *Ha* was a decision about the interpretation of the Commonwealth Constitution. However, the objection to prospective overruling derived from the nature of judicial adjudication, not the subject-matter of adjudication. As Lord Goff stated in *Kleinwort Benson v Lincoln CC*, it is necessary to apply newly-developed principles both to past events as well as future cases if "the law is [to] be applied equally to all and yet capable of organic change".[35] It is also true that *Ha* stated that prospective overruling in that case would have exposed a person to criminal prosecution[36] – however, this was only a point of emphasis, and certainly was not an independent basis for modifying the time from which newly-developed common law principles apply.[37]

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30 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 179 (Gummow J). Dixon, "Concerning Judicial Method" (1956) 29 ALJ 468 at 472; *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 298.

31 *Giannarelli v Wraith* (1988) 165 CLR 543 at 585 (Brennan J).

32 Diplock, "The Courts as Legislators", *The Lawyer and Justice* (1978) at 266-267.

33 (1997) 189 CLR 465 at 504 (Brennan CJ, McHugh, Gummow and Kirby JJ).

34 (1997) 189 CLR 465 at 504.

35 [1999] 2 AC 349 at 379.

36 (1997) 189 CLR 465 at 504.

37 Cf Appellant's submissions, para 6.48.

17. Any attempt to introduce prospective overruling for common law decisions would not only go beyond the adjudication of *existing* rights, duties or obligations but would be beset by practical difficulties. Prospective overruling would only be available if a decision "changes" the law, but would not be available if a decision merely synthesised existing doctrines.[38] That distinction would be at the very least unstable, and is probably untenable.

18. Moreover, prospective overruling would create problems of discrimination that the doctrine of precedent (stare decisis) is designed to prevent[39] – a criminal defendant who brought successful proceedings might take the benefit of the new ruling, but other defendants in the same position could not. This introduces an arbitrary element into the law.[40] The Appellant's argument introduces a different arbitrary element – prospective overruling would be available to protect persons who would be exposed to criminal liability, but not other persons. The Appellant's argument concentrates on one factor (whether a person would be exposed to new criminal liability) to the exclusion of other relevant factors.[41]

19. Decisions from countries such as Canada and New Zealand do not provide a sure guide, because there is no constitutional separation of judicial power.[42] Even in England, where there is no constitutional separation of power, prospective overruling would be reserved for a "wholly exceptional case".[43]

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38 *Torrens Aloha v Citibank NA* (1997) 72 FCR 581 at 597 (Sackville J, with Foster and Lehane JJ agreeing). In that case, the Federal Court rejected an argument that a cause of action for recovery of payment of money under mistake of law accrued when the High Court handed down *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353. Cf the approach in *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349.

39 *Telstra Corporation Ltd v Treloar* (2000) 102 FCR 595 at 603 [23] (Branson and Finkelstein JJ).

40 See *In re Spectrum Plus Ltd* [2005] 2 AC 680 at 696 [26]-[27] (Lord Nicholls). Admittedly, Nicholls J did leave open the possibility of prospective overruling in rare cases: at 699 [40]. However, there is no constitutional separation of judicial power in England.

41 For a discussion of the relevant factors, see Ben Juratowitch, *Retroactivity and the Common Law* (2008) at 127-138.

42 Cf *Hislop v Canada (Attorney-General)* [2007] 1 SCR 429 and *Chamberlain v Lai* [2007] NZLR 7, discussed by Gray J in *R v P, GA* (2010) 109 SASR 1 at 40-42 [160]-[165].

43 *In re Spectrum Plus Ltd* [2005] 2 AC 680 at 710 [74] (Lord Hope); see also 699 [40] (Lord Nicholls). Cf *Bropho v Western Australia* (1990) 171 CLR 1 at 23 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ) – however, in that case the alteration of the presumption of Crown immunity was akin to changing the common law in light of changed circumstances.

20. In any event, the premise of the Appellant's argument, that a change in the common law would expose him to liability for an offence that did not exist in 1963, is incorrect. In *SW v United Kingdom*,[44] the European Court of Human Rights rejected an argument that to convict a husband of marital rape committed before 1991 (the date of *R v R*) was contrary to Art 7 of the European Convention on Human Rights. Article 7(1) provides:

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

10 21. The majority of the European Court held that there was no breach of Art 7(1).[45] The majority held that *R v R* did not change the basic ingredients of the offence of rape. The offence continued to consist of unlawful sexual intercourse with a woman without her consent. Rather, the decision removed a purported immunity based on a presumption as to consent.[46] Moreover, by 1990, the general immunity had been subject to a number of exceptions, and there was significant doubt as to the validity of the alleged immunity.[47]

22. The English Court of Appeal reached the same conclusion in *R v C*.[48] In rejecting an argument that a husband could not know in 1970 that raping his wife was a criminal offence, the Court set out its view of what appropriate
20 legal advice would have been in 1970:[49]

> The solicitor would have started by pointing out to his client that to rape his wife would be barbaric, and that he would not condone it. He would then have told his client that the courts had developed and could be expected to continue to develop exceptions to the supposed rule of irrevocable consent, and that if ever the issue were considered in this court, the supposed immunity of a husband from successful prosecution for rape of his wife might be recognised for what it was, a legal fiction. He would in any event have also told his client that depending on the circumstances he might be convicted of indecent assault on his wife, punishable with imprisonment, and would be liable to be convicted of offences of violence ranging from common assault, by putting her in fear
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44 (1995) 21 EHRR 363.

45 A concurring judgment held that there had been a breach of Art 7(1), but relied on Art 17 (which provides that the Convention does not give a person a right to engage in activities that are aimed at the destruction of another person's rights and freedoms): (1995) 21 EHRR 363 at 379 [11]-[13].

46 (1995) 21 EHRR 363 at 377 [61].

47 (1995) 21 EHRR 363 at 376 [55], 377 [58].

48 [2004] 1 WLR 2098.

49 [2004] 1 WLR 2098, 2103 [19].

of violence, up to and including wounding or causing grievous bodily harm if he injured her in order to force her to have sexual intercourse. Any such offences, too, would be punishable by imprisonment. What is more, in 1970, the solicitor would have had to advise his client that persistent and unreasonable demands for sexual intercourse, if his wife was unwilling, and a single incident of rape, would have enabled her to found a petition for divorce on the grounds of cruelty, or depending on precisely when the incident occurred, his unreasonable behaviour. This conduct would also have entitled her either to a non-molestation order, or a non-cohabitation clause, depending on the jurisdiction in which she sought relief. The solicitor's advice would be that if he raped his wife after that, the supposed immunity would be gone, and he would then certainly be liable for the specific crime of rape. Before such an order, notwithstanding the repetition of Hale's proposition in the authorities, he might be liable for rape, probably liable for indecent assault, and certainly liable for the appropriate offence of violence. On this view therefore he would have been told that he could not rape his wife with complete immunity.

23. These words apply with equal force in this case.

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