Feminist Legal Studies (2019) 27:57–78
https://doi.org/10.1007/s10691-018-9382-3

# Marital Rape and the Marital Rapist: The 1976 South Australian Rape Law Reforms

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Published online: 28 August 2018


## Abstract

This article charts a genealogy of marital rape law reform in South Australia in the 1970s, arguing that the new laws were based on constructing the marital rapist as a certain kind of man. South Australia is a significant case study, as it was one of the first Western jurisdictions to attempt to criminalise marital rape. Despite South Australia's generally progressive politics, the legislation was highly contested, and resulted, in the end, only in a partial criminalization. To overcome the strident opposition to rape law reform, we show that supporters explicitly developed a discourse focusing on concepts of sexual normativity and deviance. The marital rapist, it was argued, had deviated from patriarchal standards of masculine decency: this, not the rape itself, was crucial to determining whether his conduct was unlawful.

**Keywords** Rape · Rape in marriage · Rape law reform · Sexual assault · Marriage · Australia

On 30 November 1976, the progressive state of South Australia passed legislation that enacted a suite of substantive and procedural reforms to the law of rape.[1] The reforms were intended to modernise the state's rape laws, which had been the subject of little statutory amendment since the turn of the twentieth century, and were increasingly perceived as antiquated and sexist (Sallman and Chappell 1977, 7–13; Treloar 1980, 191–198). The majority of the reforms were uncontroversial, receiving strong bipartisan political support and favourable media coverage. There was one change in the reform package, however, that proved to be divisive, dominating

[1] Enacted through the Criminal Law Consolidation Act Amendment Act 1976 (SA), the Justices Act Amendment Act 1976 (SA) and the Evidence Act Amendment Act 1976 (SA).

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media coverage of the legislation and sparking a prolonged and partisan public debate that consumed South Australia in the months leading up to the legislation's passing. This change, introduced by section 12 of the *Criminal Law Consolidation Act Amendment Act 1976*, was the abolition of 'marital rape immunity', a centuries-old common law doctrine that exempted men from prosecution for raping their wives.[2] With the passing of section 12, South Australia, a small and progressive state, became the first Australian jurisdiction to challenge and curtail the marital rape immunity doctrine, signaling the beginning of a wave of reforms that saw marital rape criminalised throughout Australia by 1992.

This article traces the genealogies of the marital rape law reforms in South Australia, revealing complex and often heated debates around marriage, violence and spousal rights. We also consider the limitations of the new reformed laws. As will be shown, the new legislation enacted in South Australia remained grounded in patriarchal ideas of marriage and marital obligation. When the Dunstan Labor Government had announced its intention to introduce legislation reforming the law of marital rape on 8 August 1976, its aim was to criminalise all rape in marriage, and to thus collapse entirely the legal distinction between marital and non-marital rape.[3] By the time the reforms were passed by parliament at the end of November, however, they allowed for the prosecution of a man for the rape of his wife, but only if circumstances of aggravation existed, additional to the act of penetration without consent.[4] The marital rape immunity was displaced, but marital and non-marital rape remained conceptually distinct.

The legislation—and the debates that surround it—raised powerful questions about the way that a society could construct the parameters of permissible intercourse and delineate the line between legitimate and illegitimate marital sexual behaviour. We argue that the 1976 reforms in South Australia focused, not on consent, but on the husband's deviation from marital normativity. In a society where intercourse was understood to be a central component of the 'institution of marriage', married men were seen as entitled to sexual access to their wives. As such, the husband rapist did not deviate from the marital norm simply by forcing his wife into intercourse against her will. Rather, his conduct only became problematic and disturbing when it affronted the patriarchal narrative of family, which painted marriage as an institution in which 'decent' husbands protected and respected their 'vulnerable' wives. Thus, the primary basis of whether a crime had taken place was whether a man's conduct was so brutal and inhumane that it appalled all contemporary notions of decency. Here, we argue that the patriarchal decency paradigm implicitly underpinned the approach of the courts to the marital rape immunity at common law prior to the 1976 reforms, pervaded the public and parliamentary

[2] The question of whether 'marital rape immunity' actually formed part of the Australian common law has been problematised by the High Court decision in *PGA v The Queen* [2012] 245 CLR 355. For our purposes, it is sufficient to note that there is an overwhelming body of evidence to suggest that it was widely understood, by both the legal community and society more generally at the time of the reforms, that the common law functioned to provide men immunity from prosecution for rape in marriage.

[3] Steele, Ian. 1976. Wives Can Claim Rape Under Planned Law. *Adelaide Advertiser*, 6 August.

[4] Criminal Law Consolidation Act Amendment Act 1976 (SA) s 12.

debates on the reforms, and was explicitly codified in the legislation passed by the South Australian parliament.

This article offers a specific case study in rape law reform, with a tight focus on the one jurisdiction of South Australia. Yet, it has wider implications for understandings of violence against women. The micro-history of one set of reforms, in one Australian state, reveal the broader parameters of thinking about marriage and sexual entitlement, and help build a picture of the ways a culture could construct (and sideline) problems of sexual violence.

Feminist historians have, from the 1970s, published pioneering works that challenged the dominant socio-legal discourses on rape, reconceptualising rape as a pervasive and masculinist "weapon" of gendered violence, which functioned to terrorise and subordinate women. Rape was reimagined, not as an inexplicable aberration from the social norm, but rather as a cornerstone of patriarchal society, inextricably interconnected with a broader worldview that taught all men that they were entitled to women's bodies (Brownmiller 1975; Barry 1979; Morgan 1978; Summers 1975).

Building on these early theoretical foundations, academic feminist historians and feminist legal theorists have examined the complex ways that the crime of rape was and is socially and legally conceptualised. Though these scholars have tended to depart from the universalising and essentialist dimensions of the early radical feminist literature, their work has continued to locate sex and gender as a significant source of power, illustrating the multitudinous ways that social and legal rape narratives have been shaped by, and in turn proliferate, inequality between the 'sexes'.[5] These scholars note the way that these reforms have reconfigured the legal definition of 'criminal rape', expanding the types of non-consensual intercourse that are officially criminalized (including rape in marriage).[6] Also crucial is the idea that the judicial development of the law, and its practical application, have continued to be warped by implicit social and judicial acceptance of masculinist rape myths, with a fundamental distinction existing between the law as passed and the law as applied (Graycar 1995; Heath and Naffine 1994; Allen 1990; Stevenson 2000; Larcombe 2002; Mack 1998; Newby 1980; O'Grady and Powell 1980).

Though this existing body of literature is extensive and wide-reaching, it pays surprisingly little attention to the narratives that underpin how the crime of marital rape has historically been socially and legally constructed in Australia.[7] The existing historiography of course acknowledges that the reforms that occurred in the 1970s and 1980s expanded the legal definition of 'criminal rape' to include 'rape in marriage'. However, the literature largely leaves open the question of *how* the contours of the crime that these reforms were intended to police were actually understood. To show the changes and continuities implicit in the 1976 reform legislation, we begin

[5] On the move towards intersectionality in feminist histories of sexual assault, see Walker (2013, 7–11) and Freedman (2013, 2).

[6] In Australia, see Mason (1995), McSherry (1998, 27–30), Henning and Bronnitt (1998), Featherstone (2017), Kaladelfos (2012), Backhouse (2000a, b, 2001), Mack (1998). On sexual 'reputation', see Bavin-Mizzi (1995a, b), Stevenson (2000).

[7] An important exception is Bourke (2008), though this work provides a broader overview rather than a close examination.

with an examination of the law itself. Drawing on domestic and international case law, legislation and academic commentary, we detail the legislative reform that took place in South Australia in this period.

We then consider the public debates around the legislative reform, and the ways marital violence was discussed in the mainstream media, in particular in the *Adelaide Advertiser*, the major daily broadsheet newspaper in South Australia at this time.[8] Finally, we explore the ways the Parliamentary process transformed the *Criminal Law Consolidation Act* (*Amendment*) *Bill 1976* into a statute that explicitly codified an approach to marital rape that focused on the offender's deviation from patriarchal sexual normativity. We show that the Parliamentary debates illustrate the solidification of a tacit archetypal image of the problematic husband rapist, that of the 'beast'. The beast in these debates was a demonic, perverted and sub-human figure who assaulted his wife for sadistic gratification. As the parliamentary debates progressed, the image of the beast came to be conceptualised as representative of the husbands who should be policed and prosecuted by the rape in marriage reforms. It will be argued that the increasing dominance of this beast discourse, which emphasised the 'otherness' of the husband rapist and his inherent aberrance from the marital norm, shaped the amendments into their final form.

## A Prehistory to Reform: Common Law Discourses on Marital Rape to 1976

Prior to the 1976 reforms, the question of whether a man could be prosecuted for raping his wife in South Australia was understood to be governed by common law (Sallmann and Chappell 1977, 52). There were no recorded Australian judgments delivered before 1976 that engaged directly with the issue.[9] However, juridical scholarship (Lanham 1983; Sallmann and Chappell 1977, 22; Morris and Turner 1954, 247–263) and cursory non-binding comments[10] made in judgments during the period illustrate a widely held and foundational belief that Australia's common law provided men with immunity from prosecution for rape within marriage.

In the absence of domestic authority, the period's legal scholars traced the roots of Australia's 'marital rape immunity' to the British common law, inherited at the time of colonisation under the doctrine of reception (Morris and Turner 1954; Sallmann and Chappell 1977, 23; Sallman and Chappell 1982, 51–69). These scholars conceptualised the immunity as a "long-standing Anglo-Saxon doctrine" (Geis 1978, 284) implicitly enshrined in all Commonwealth common law systems, including that of Australia. They further looked to a body of case law that had developed in Britain in the late nineteenth and twentieth centuries, which was understood to

[8] This newspaper is not yet digitized for this timeframe, and microfilm research was utilised to uncover relevant articles and letters.

[9] See for example *PGA v The Queen* [2012] 245 CLR 355; *R v McMinn* [1982] VR 53.

[10] *R v Brown* [1975] 10 SASR 139, 141, 153; *R v Wozniak & Pendry* [1977] 16 SASR 67, 71; *R v Sherrin* (No 2) [1979] 21 SASR 250, 252.

have developed the contours of the immunity (Sallman and Chappell 1982, 52; Scutt 1980, 257–268). While these cases were not technically binding, they were treated as highly persuasive explications of the law on rape in marriage, and likely to be authoritative if the issue was ventilated in an Australian appellate court (Scutt 1980, 257–268).

The jurisprudential foundations of 'marital rape immunity' in Australia can be traced to British jurist Lord Matthew Hale's 1736 volume, *History of the Pleas of the Crown*. Hale infamously claimed:

> [a] husband cannot be guilty of rape upon his wife for by their mutual matrimonial consent and contract the wife hath given up herself in this kind to her husband which she cannot retract. (629)

Though Hale himself cited no authority in support of this proposition, British and Australian courts treated his writings on the common law of crime with great reverence. As one late nineteenth-century judge explained, "[t]he authority of Hale CJ on such a matter is undoubtedly as high as any can be".[11] Over time, Hale's statement had come to be accepted as an authoritative statement on the common law's treatment of rape within marriage.

Hale's proposition proliferated a technical discourse on the nature and interplay of 'rape', 'consent' and 'marriage'. Hale did not position marriage as a formal 'defence' to a *prima facie* case of rape, necessitated by social morality or public policy. Rather, he mounted a dispassionate, definitional argument, concluding that it was inherently impossible for intercourse between a husband and wife to satisfy the elements of rape. For Hale, an essential part of the marital 'contract' was the imputing by the wife of an irrevocable right of sexual access onto her husband. Through marriage, the wife thus effectively contracted away control of her right to consent, relinquishing that power to her husband. This meant that, for Hale, 'marital rape' was a legal oxymoron, as intercourse within marriage could not occur 'without consent'. Even if the wife had not actually consented to the individual act of intercourse, she had pre-emptively 'consented' to a forfeiture of her right to assert her refusal. This idea formed the theoretical bedrock of the string of British cases that subsequently developed the immunity.[12]

Yet the principles invoked by these cases held deep internal contradictions and inconsistencies. For example, the principle that a husband could not assault his wife was well engrained at common law before the turn of the twentieth century.[13] If the husband had an unqualified right of sexual access to his wife, then how could he simultaneously be prohibited at law from using 'necessary' and 'reasonable' force to vindicate that right? Similarly, there were no grounds upon which an express or

[11] *R v Clarence* [1888] 22 QBD 23, 57.

[12] *R v Clarence* [1888] 22 QBD. 23, 64; *R v Clarke* [1949] 33 Cr App R 216, 217–218; *R v R* [1973] 3 All ER 663; *R v Miller* [1954] 2 Q.B. 282, 290.

[13] See especially *The Queen v Jackson* [1891] 1 QB 671 and the strong analysis on this point in Lesses (2014, 808–809). The principle had become firmly engrained by the mid-twentieth century: see especially *R v Miller* [1954] 2 Q.B. 282, 292.

implied conferral of unfettered sexual access could be read into the marriage contract. In fact, such a reading was inimical to both the ecclesiastical and statute law governing marriage and divorce that had developed during the late eighteenth and nineteenth centuries.[14] Clearly then, as juridical commentators had been arguing since the late nineteenth century, the legal reasoning deployed to justify marital rape immunity was profoundly incoherent.[15]

## Lead-Up to Reform

Though first-wave feminists had raised the problem of rape in marriage (Hasday 2000, 1373–1505; Genovese 2000, 115–129), there was little appetite for sustained debate, and a husband's immunity from prosecution remained intact until the mid-twentieth century. In Britain, in the wake of World War II, divorce became more common, and this led to a more complicated social and legal view of marriage and sex. But precisely when did a husband retain his right to sexual access to his wife? In case law, it had to be decided when a couple might be understood as separated, and what this might mean for a wife who was sexually assaulted by her spouse after separation (Mitchell Report 1976, 13). Yet in Britain, the United States and Australia, the fundamental sanctity of a husband's right to sexual access to his wife remained largely unchallenged until the 1970s.[16]

The first significant sign of reform occurred in the state of Michigan in 1975, and is generally seen as the beginning of feminist re-workings of marital rape law. The Michigan reforms were partial and tentative, applying only when a wife was separated from her husband. Nonetheless, it was a starting point in the legislation, and Nebraska would shortly follow, criminalizing rape in marriage even for spouses who lived together (McMahon-Howard 2009, 505–31). Australian feminists closely watched these reforms in progressive American states, including the leading feminist lawyer Jocelynne Scutt, who spent 6 months in Michigan after the laws came into effect.

Australian feminists were, by the 1950s, well informed of international influences, and Women's Liberation was self-consciously transnational, engaging with smuggled in books on feminist theory and practices from the United States and the United Kingdom in particular (Lake 1999, 221–222, 232). Brownmiller's manifesto on rape was influential, including her powerful critique of marital rights, obligations and expectations:

[14] This inconsistency is thoroughly explored in the majority judgment of *PGA v The Queen* [2012] 245 CLR 355 at 375–382. See also the devastating critique of Brennan J in *R v L* [1991] 174 CLR 379, 396 and the New Jersey Supreme Court in *State v Smith* [1981] 426 A (2d) 38, 42.

[15] *R v Clarence* [1888] 22 QBD 23, 33–34 (per Wills J); Morris and Turner [1954, 258–259).

[16] In a very small number of countries, rape in marriage had previously been criminalized in the legislation, including the USSR, Czechoslovakia and Poland. Sweden also criminalized marital rape in 1965, but it remained as a lesser crime (Freeman 1981, 26–27).

> In the cool judgment of right-thinking women, compulsory sexual intercourse is not a husband's right in marriage, for such a "right" gives the lie to any concept of equality and human dignity. Consent is better arrived at by husband and wife afresh each time, for if women are to be what we believe we are – equal partners – then intercourse must be constructed as an act of mutual desire and not as a wifely "duty", enforced by the permissible threat of bodily harm or of economic sanctions (Brownmiller 1975, 381).

Other important feminist works from the United States also dealt with rape in marriage, pointing to the problems of marriage within a patriarchal culture, highlighting the necessity of consent by all women including wives and forming an intellectual and activist culture where ideas of women's rights were constantly upheld by a feminist agenda (Connell and Wilson 1974, 128; Russell 1974, 71–81, 117–128).

Feminist activism was further stimulated by the case of *Morgan v DPP* (1975) in Britain, which highlighted the extreme protection offered to husbands when charged with rape. In this high-profile trial, Morgan had invited three friends home to have sex with his wife: he had told them that she liked rough sex, and so would likely struggle, but that this was part of the game. But his wife had not ever consented to the sex. The three men were charged with rape, but Morgan, as her husband, could be charged only as an accessory (Hinchliffe 2000, 57–63). The case drew widespread condemnation across many nations including Australia. The time was right for change.

## The South Australian Situation

South Australia was the first Australian state to attempt legislation. The origins of marital rape law reform in South Australia can be located in Attorney-General Peter Duncan's brief to the Penal Methods Reform Committee in December 1975, instructing them to examine the State's sexual assault laws. This move was predominantly motivated by two factors. First, the Labor Government, led by Premier Don Dunstan, was socially progressive, even radical, for its time (Hodge 2011). Heavily influenced by feminist advisers, there was a strong desire within the Dunstan Cabinet to reform and modernise the existing legislative scheme governing rape and sexual assault, which was perceived as an antiquarian product of the turn of the century context in which it was forged. Second, the move was a response to increasing anxiety within the South Australian electorate about the perceived prevalence of rape in the community and the method of its prosecution (Sallman and Chappell 1982, 53).[17]

The Committee, headed by Justice Roma Mitchell, delivered its report (the 'Mitchell Report') to the Attorney-General in late May 1976, with the report made publicly available in early June of that year. Though the Report proposed a sweeping

[17] See also Anon. 1976. Increase of Rape Alarming—Judge. *Adelaide Advertiser*, May 9; Mackay, Ian. 1976. Legalities and Humanity Behind Report on Rape. *Adelaide Advertiser*, 17 June.

range of reforms, including some radical changes to the law of incest and age of consent, the Committee took a conservative stance on marital rape. The Report advised that spousal rape immunity should be pared back but retained, with the rule no longer applying to cases where the husband and wife were living separately at the time of the rape (Mitchell Report 1976, 14–5). In other words, the Committee recommended the abolition of a legal technicality that gave husband's immunity from rape in the period between separation and legally recognised divorce, with spousal immunity otherwise maintained.

The Committee rejected the idea that spousal rape immunity could be justified through a theory of marital contractual consent, suggesting that this approach was "anachronistic". However, it argued that spousal rape immunity could be justified on broader public policy grounds, as abolition would put "a dangerous weapon into the hands of the vindictive wife" and see "the criminal law… invade the bedroom", an incursion that should only occur "in exceptional circumstances" (Mitchell Report 1976, 14–15). In the relatively limited press the commentaries on spousal rape received, the Committee's suggestions were largely greeted positively, as an obvious, reasonable modernisation of the existing approach at common law.[18]

On the 5th of August 1976, the Attorney-General announced his vision of the legislation to be introduced in light of the Mitchell Report. On the issue of rape in marriage, he had decided to exceed the Committee's recommendation, and abolish spousal rape immunity entirely.[19] In stark contrast to the reaction accorded to the Mitchell Committee's recommendation, this proposal was met with an immediate and vocal backlash, which remained consistently fervent in the months leading up to the Bill being debated in parliament. A variety of interest groups and commentators came out against the reforms, and they released statements, published articles and letters in newspapers, appeared on television programs, organised protests and disseminated leaflets setting out their opposition (Sallman and Chappell 1982, 56; Treloar 1980, 193–194). In spite of the diversity within this 'campaign', several overlapping anxieties dominated public discussion, and these anxieties were consistently portrayed as the central arguments against the reforms in media coverage of the issue (Sallman and Chappell 1982, 56; Treloar 1980, 193–194).

## The Vindictive Wife and Other Concerns

Perhaps the most frequently cited concern drew on the Mitchell Committee's observation that criminalisation of marital rape would supply weaponry to the 'vindictive wife'. References to the vindictive wife were almost ubiquitous in the articles and letters opposing criminalisation published by the *Adelaide Advertiser* in the lead

[18] See Anon. 1976. Women's Groups 'Surprise' Judge'. *Adelaide Advertiser*, 2 June; Anon. 1976. Sex Law Reform. *Adelaide Advertiser*, 2 June. There was some biting feminist critique, but this was not widely reported; McMahon, Dawn. 1976. Plea for Protection of Wife's Human Rights, *Adelaide Advertiser*, 5 June.

[19] Steele, Ian. 1976. Wives Can Claim Rape Under Planned Law. *Adelaide Advertiser*, 6 August.

up to the reforms entering parliament.[20] The vindictive wife was broadly drawn as an archetypal manipulative woman who would wield her newfound legal rights to blackmail, control and imprison her innocent husband. This imaginary of the vindictive wife drew on the long-standing fallacy that women routinely fabricated rape, making false allegations against blameless men (Brownmiller 1975, 22). The paradigm thus acted as rhetorical surrogate for the fear that criminalisation would result in the prosecution of 'decent' men. One letter to the editor in the *Adelaide Advertiser* expressed anxiety at the "grave possibility of some women taking advantage" of the provisions.[21] Another suggested that husbands would be forced to cease intercourse with their wives, as the "only sure defence" to a vindictive charge of marital rape would be that "relations ceased before the alleged event".[22]

Another commonly cited concern was that the reforms would undermine the sanctity of marriage as the law inevitably and unceremoniously invaded the privacy of the marital bedroom. One letter to the editor expressed concern at the way that husbands were portrayed as "villains" by the reforms, fearing that this undermined the image of marriage as a "sacred event" for young girls.[23] Others still suggested a potential link between the prosecution of marital rape and the growth of adultery, in particular patronage of "massage parlors" by married men, as husbands sought alternative paths of sexual gratification.[24] Perhaps the strongest incarnation of the argument was that extolled in an article written by "an Adelaide lawyer" and published on 23 September 1976.[25] The lawyer described the ways that a wife who alleged rape would be subjected to intrusive medical and scientific examination, and would in turn subject her children to being "searchingly interrogated" by the police. He then invoked the "frightening" image of "the bedroom itself" being subjected to "minute scientific examination". This powerful and disturbing image of heteronormative marital domesticity disrupted by forensic investigation suggested that the reforms could see countless marital homes transformed into literal crime scenes. This article in particular was widely read and cited in the period following its publication (Treloar 1980, 193).

The final major argument deployed against the reforms was that rape within marriage would be a crime that was impossible to police and prosecute. It was suggested that the reforms could not provide practical protection to vulnerable wives, as these wives would not report their suffering to the authorities. Women were regularly reluctant to report crimes, or prosecute their spouse: a vulnerable wife could be afraid to press charges for multiple reasons, including fear of further abuse; marital

[20] See for example; Anon. 1976. Think Again on Rape Law. *Adelaide Advertiser*, 7 August 1976; Anon. 1976. Rape by Husbands. *Adelaide Advertiser*, 9 August; St C, RR. 1976. Rape of Wives by their Husbands. *Adelaide Advertiser*, 29 August.

[21] Griffiths, V. 1976. Rape in Marriage. *Adelaide Advertiser*, 30 September.

[22] Watson, Ed. 1976. Rape in Marriage. *Adelaide Advertiser*, 27 September.

[23] Tanner, Kate. 1976. Love in Marriage. *Adelaide Advertiser*, 14 September.

[24] Raduntz, H. 1976. Rape in Marriage. *Adelaide Advertiser,* 24 August.

[25] Cockburn, Stewart. 1976. Difficulties of Dealing with Rape in Marriage. *Adelaide Advertiser*, 23 September.

breakdown; or poverty, if the offender was jailed. The reforms should not occur then, as one letter to the editor glibly put it, as "an unenforceable law is a bad law".[26]

Further, it was suggested that, even if wives reported the crime to the authorities, it would be impossible to prove that rape had actually occurred. How would the courts differentiate between aggressively coercive 'habituated' intercourse, and intercourse that was 'rape'? As one letter put it, "the line between yielding to bad temper… and being actually forced will almost always be impossible to draw".[27] In the rare instances where a man was violent, defenders of the marital rape immunity argued that existing legal protections, provided by the divorce courts and the law of assault, were sufficient to safeguard women. As one letter put it, "physical abuse is abhorrent in any circumstances, but doesn't the law cover this?"[28]

The public sentiment against the reforms, we argue, was predicated on a discourse that assumed coercive and unwilling intercourse could be an acceptable and natural part of marriage, as long as the conduct of the man did not exceed the parameters of patriarchal decency. The Mitchell Committee's recommendation had been uncontroversial as it did not offend this worldview, with husbands who raped estranged wives clearly acting outside the patriarchal norm. The proposed reforms, on the other hand, were particularly problematic as they went beyond this point and criminalised conduct that potentially fell within the parameters of patriarchal heteronormativity, resulting in the possible prosecution of 'sympathetic' and 'sexually normative' husbands.

This pattern is perhaps most evident in the argument that criminalisation would undermine the sanctity of marriage. This fear was to some extent reflective of broader conservative anxieties prevalent in the period about the declining role of marriage and the 'traditional family' in Australian society (Featherstone 2017, 12–18, 2013, 349–363). Ironically, however, fears over the 'family' provided a powerful argument for a husband's immunity. Underlying this was a tacit assumption that non-consensual intercourse could be part of a 'healthy' and sexually normative marriage, as well as a fear of what the scrutiny of families might bring. Thus, the aforementioned article by "an Adelaide Lawyer" drew on the imagery of a marital home disrupted by criminal investigation, suggesting that invasion would happen "every time a wife picked up the phone to complain she had been raped."[29] Implicit within this narrative was the assumption that it was the intervention of the justice system, not the act of rape, which had disrupted the family unit.

Further, we see a profound concern that marital rape would lead to a disruption of the public/private divide, where the lines drawn between the private world of home and family, and the public worlds of law and policing, would be blurred

[26] Raduntz, HT. Proving Rape. *Adelaide Advertiser*, 10 August. See also Anon. 1976. Liberals to Oppose Law Change. *Adelaide Advertiser*, 10 September; Roberts, Judith. 1976. Mitchell Report. *Adelaide Advertiser*, 17 August.

[27] St C, RR. 1976. Rape of Wives by their Husbands. *Adelaide Advertiser*, 29 August.

[28] Raduntz, HT. 1976. Rape in Marriage. *Adelaide Advertiser*, 24 August.

[29] *Supra* n 25.

and unsustainable.[30] Indeed, this fracture of the public/private divide was exactly what second wave feminists demanded, in their calls for state intervention into both domestic violence and sexual assault (Genovese 1998). Yet conservatives aimed to solidify this boundary, and were alarmed at the intervention of the criminal justice sector into the private space of the family home. Further, it was noted that policing the bedroom would be impossible: police were already reluctant to intervene in domestic violence: how would they feel about investigating allegations of marital rape?[31]

The argument that rape in marriage would be impossible to prove, given the inherently blurred line between coercive marital intercourse and rape, belied a similar premise. Inherent within this logic was the idea that it was "obvious" that marital intercourse would "sometimes happen against the protests of the wife," given that "most husbands and wives are habituated in sexual intercourse".[32] This argument invoked images of faithful husbands in long-lasting marriages, prosecuted for acting on impulses that were the product of years of habituation. A rhetorical distinction was thus drawn between permissible marital 'disagreements' resulting in forced intercourse and what Susan Estrich termed 'real rape', with the delineating factor the extent to which the husband's situational sense of entitlement to intercourse could be conceptualised as reasonable (Estrich 1988).

The vindictive wife paradigm was to some extent a manifestation of centuries-old legal patriarchal discourses fixated on the danger posed by rape law to innocent men.[33] However, where these fears had traditionally been used to justify the incorporation of a complex and taxing web of substantive and procedural safeguards into the criminal law of rape, they were here used to suggest that rape within marriage should not be criminal at all. This disjunction suggests that fears surrounding malicious prosecutions by wives were considerably more potent and disturbing than those surrounding such prosecutions outside of marriage. We suggest that the reason for this fear was that the vindictive wife paradigm conjured images of long-suffering husbands accused of rape by their sexually withholding spouses. These women were not just using the criminal law to ruin their innocent husbands; they were making the law complicit in their malicious refusal to provide marital intercourse. The husband accused of rape was thus simultaneously denied a central component of his marital heteronormativity and punished for any attempt to fulfill his marital role. It would be intolerable for such sympathetic men, who were holding their families together "despite such women", to be at risk of punishment, when they were simply attempting to maintain 'normal' marital intimacy (Watson 1976).

[30] On the complexities of protective intervention in the family, see the classic article by Francis Olsen (1985). For broader ideas on marriage and the public sphere see Pateman (1988).

[31] Anon. 1976. Violence in Marriage and the Law. *Sydney Women's Liberation Newsletter*, November.-December, 5.

[32] St C, RR. 1976. Rape of Wives by their Husbands. *Adelaide Advertiser*, 29 August.

[33] On the extent to which rape laws have historically been shaped by these masculinist anxieties, see for example Backhouse (2001, 301–304) and Klein (2008, 985–990).

## Navigating Responses

Perceiving a need to educate the electorate on the need for reform in the face of such strong opposition, the State Labor Government ran an aggressive campaign to justify the abolition of marital rape immunity (Treloar 1980, 192–194). This campaign received public support from prominent women's groups, welfare organisations, women's shelters and feminist commentators more broadly (Treloar 1980, 192–194; Sallmann and Chappell 1977, 11, 19). These groups agreed that the criminalisation of rape in marriage was a critical vindication of the human rights of all married woman.

As the Attorney-General argued, marital rape immunity was the relic of a legal system that treated "marriage as a contract of ownership" (Steele 1976), If it was accepted that the marriage contract was not possessory in nature, then it was incoherent for the married man to be able to rely on that contract to justify his violation of his wife's right to self-determination. Further, in the absence of a possessory view of marriage, it was unprincipled and abhorrent for the law to arbitrarily accord married women fewer rights than unmarried women. Thus, reform was a humane exercise in common sense.[34]

At this point, a key issue emerged. The arguments in favour of criminalisation, as outlined by the Attorney-General, focused squarely on the impact of rape on the female victim. The arguments for change were thus predicated on a vision of rape that located the 'harm' of the crime in the way that it violated the victim's inalienable right to consent. Within this view, a man who intentionally forced himself on a woman was therefore committing an intrinsically wrongful act, regardless of whether it occurred inside or outside of marriage, and no matter how sympathetically he could otherwise be conceptualised.[35]

Feminists were integral in both developing and buttressing this reconceptualisation of rape. Debates in South Australia were part of a host of feminist interventions across Australia in the mid-to-late 1970s, highlighting the need for reforms in all states. Feminist individuals and groups carefully articulated the necessity of understanding marital rape as a violent and criminal act, which impinged on the personal

[34] See for example Howell-Price, Michelle, 1976. Concept of Rape Gets Blessings, *Adelaide Advertiser*, 11 August; Crosby, Heather. 1976. Wife's Right to Protection of the Law, *Adelaide Advertiser*, 19 August; Yeatman, Betty. 1976. Rights of Wife in Rape within Marriage, *Adelaide Advertiser*, 28 September; Levy, Anne. 1976. Rights of Wife in Rape within Marriage, *Adelaide Advertiser*, 28 September; Tidswell Jillian and Corich Mary, 1976. Debate Challenge. *Adelaide Advertiser*, 25 August.

[35] See for example Michelle Howell-Price, "Concept of Rape Gets Blessings," *Adelaide Advertiser*, 11 August 1976; Heather Crosby, "Wife's Right to Protection of the Law," *Adelaide Advertiser*, 19 August 1976; Betty Yeatman, "Rights of Wife in Rape within Marriage," *Adelaide Advertiser*, 28 September 1976; Anne Levy, "Rights of Wife in Rape within Marriage," *Adelaide Advertiser*, 28 September 1976; Jillian Tidswell and Mary Corich, "Debate Challenge," *Adelaide Advertiser*, 25 August 1976; Peter Duncan, "Wife's Right to Protection of the Law," *Adelaide Advertiser*, 19 August 1976; Rosemary Burden, "Rape Law Objection," *Adelaide Advertiser*, 4 October 1976; MA Oliver, "Rape in Marriage," *Adelaide Advertiser*, 17 August 1976.

autonomy of women and wives.[36] As Joan Russell, the publicity officer of the Women's Electoral Lobby (WEL) suggested: "The fact that a woman is married to a man does not invalidate her right to reserve her sexual access. If he uses any violent or non-violent means of forcing her involuntarily, she needs the cover of the law, which will uphold her right to self-determination."[37]

This conceptualisation was foundationally inconsistent with the understanding of rape at the heart of the 'no' campaign, obsessed as it was with the extent to which the husband rapist was a sympathetic figure, with right of access to his wife's body. The difference in focus produced a rhetorical stalemate. Perhaps recognising this impasse, the Government ran a further campaign against those opposed to the reforms. From an early stage in the public debates, the Attorney-General stressed that criminalisation would only result in the prosecution of the vilest forms of sexual violence in practice. Thus, the reforms would only punish those men who perpetrated "gross sexual abuse" on their wives, as "a woman is hardly likely to charge her husband with rape except in the most extreme and harrowing circumstances".[38]

In many ways, then, the reforms continued to (ironically) support a series of rape myths that had developed across common law jurisdictions cultures. Since Brownmiller in the 1970s, feminists have articulated a series of rape myths that endure, including the ideas that rapists were strangers, and that 'real rape' always included violent physical assault (Spohn et al. 2015, 96). The proposed reforms in South Australia continued to imagine rape in these terms. While the reforms were theoretically important as they sent a potent educative message to all men about the role of consent, they would only operate to sanction the most aberrant and violent men. To deny the reforms was therefore to oppose tougher laws for punishing these offenders and, by extension, to condone extreme violence within the marital home.

The rhetorical strategy came to be employed by the campaigners in favour of the reforms more broadly, and reached its zenith with the publication of an article in the *Advertiser* at the end of September.[39] This widely read article, entitled 'Women Tell of Rape in Marriage', detailed five particularly disturbing cases of sexual abuse within marriage from the Naomi Women's Shelter. Each of these cases involved particularly sadistic and deviant husbands, and included extreme physical violence in addition to the act of rape. The women all suffered serious physical injuries as well as psychological trauma. The article stressed that reform was necessary to repudiate the conduct of these men, and that of "hundreds more" like them in the community.

By suggesting that the reforms would only punish behaviour that clearly offended patriarchal decency, the argument transcended the problems raised by the more complex meta-debates about the parameters and nature of rape, and presented a message consistent with the patriarchal conception of sexual violence. Reform could

[36] See Scutt (1977, 288); Anon. 1980. Both Men and Women Should Enjoy the Full Protection of the Law' *Australian Women's Weekly*, 13 Augustt, 15; Sexual Offences Law Reform Action Group. 1978–1979. Annual Report. *WEL Informed*, December 1978-January 1979, 18–19.

[37] Howell-Price, Michele. 1976. Concept on rape gets blessings. *Adelaide Advertiser*, 11 August.

[38] Duncan, Peter. 1976. Wife's Right to Protection of the Law. *Adelaide Advertiser*, 19 August.

[39] Cockburn, Stewart. 1976. Women Tell of Rape Within Marriage. *Adelaide Advertiser*, 25 September.

be justified on the grounds that the existing law was not unequivocal enough in its rejection of such conduct. This created a space for potential compromise, proliferating a vision of the reforms consistent with the patriarchal construction of marital rape.

## Introducing 'The Beast'

The *Criminal Law Consolidation Act* (*Amendment*) *Bill* entered Parliament on 19 October 1976, following months of fervent public discussion. The tabling of the Bill ushered in a new phase of extended debates, as the proposed reforms slowly made their way through Parliament. By the time the Bill was passed into law on 30 November 1976 it had undergone a number of amendments, with the theoretical merits and practical functionality of the Bill having been extensively scrutinised by both Houses. Like the public discussion just considered, these Parliamentary debates focused almost exclusively on the issue of marital rape.

The Parliamentary debates witnessed the solidification of an archetypal image of the problematic husband rapist, that of the 'beast'. The beast was a demonic, perverted and sub-human figure who assaulted his wife for sadistic gratification. The idea of the 'beast' corresponded to a further rape myth: that the rapist was an exceptional and rare man, deviant and pathological. This served to distance rape from ordinary men. As the parliamentary debates progressed, the image of the beast came to be conceptualised as representative of the husbands who could and should be policed and prosecuted by the rape in marriage reforms. It will be argued that the increasing dominance of this 'beast' discourse, which emphasised the otherness of the husband rapist and his inherent aberrance from the marital norm, shaped the amendments into their final form.

The roots of the beast discourse emerged in the initial debates surrounding the *Criminal Law Consolidation Act* (*Amendment*) *Bill* in the House of Assembly. At the time of these debates, clause 12 of the Bill provided for the total abolition of marital rape immunity, a proposal that had polarised the Members of the Lower House. All Labor Party Members supported the reform, with the abolition of the immunity party policy. All conservative parties, including the Liberals, Nationals and Liberal Movement Parliamentarians opposed the reform, arguing that marital rape should only be prosecutable in cases where the married couple had ceased cohabitation.[40] As the Labor Government held a slim majority of seats in the House of Assembly, the reforms were guaranteed to pass to the Legislative Council from the outset of the debates.

Perhaps because of this certainty, the only Lower House Member who spoke in favour of the reforms was Attorney-General Peter Duncan.[41] The other fifteen Members who spoke on clause 12 were all opponents of the Bill. The primary argument cited against the reforms in the Lower House was that clause 12 would irreparably

[40] South Australia, *Parliamentary Debates*, House of Assembly, 1976, 1821–1822, 1829, 1834.
[41] *Supra* n 40 1611–1613, 1836–1838.

undermine the so-called institution of marriage. This argument was predicated on a romanticised vision of the 'institution', constructed using evocative and emotive language. Thus, the opposition speakers described marriage as a "beautiful union", founded on "Christian Principles" and anchored by reciprocal "respect, love and concern".[42] It was a "contract of heart and head"[43] rather than a strict legal contract, and intercourse within the 'institution of marriage' was more than just sexual activity; it was a manifestation of the "mutual love and respect"[44] at the core of the marital relationship. Intercourse was conceptualised as a fundamental pillar of the 'institution of marriage', and the marriage contract was in turn understood to connote mutual and irrevocable consent. The reforms, which were anathema to this principle, were thus positioned as a "radical attack on the basic precepts of marriage", which would "devalue" and "destroy" both marriage itself and the social influence of the Church more generally.[45]

Though this language powerfully exploited the moral panic surrounding marital rape reform that had developed in the pre-parliamentary phase, it was problematic in isolation. The period prior to the tabling of the reforms in parliament had witnessed extensive and graphic media coverage of extreme examples of sexual violence within marriage.[46] This coverage had made clear that some marital relationships deviated radically from the idyllic vision of marriage painted by the Liberal-National opposition.

To address this issue, the opposition speakers conceded the existence of a "small minority" of "abnormal", violent marital relationships.[47] The husbands in these relationships were conceptualised as "cruel", "drunken" and "aggressive" figures,[48] who inflicted "brutal" physical force on their economically dependent and thus entrapped wives in pursuit of marital intercourse.[49] As these relationships lacked the broader spiritual and emotional attributes that were understood to define marriage as a social institution, they were positioned by the opposition speakers as 'marriages' in only the strictest legal sense.[50] Thus, as the Leader of the Opposition put it, if couples in physically violent marriages had ever enjoyed a relationship congruent with the institution of marriage, the husband's "intentional sexual brutality" signaled the "breakdown" of that relationship, with the act of violence a "manifestation of the loss of love" at the heart of the union.[51] While the Liberal speakers strongly

[42] *Supra* n 40 at 1821–1822, 1829, 1834.
[43] *Supra* n 40 at 1841.
[44] *Supra* n 40 at 1829.
[45] *Supra* n 40 at 1836–1837, 1841–1842.
[46] See for example the extensive reporting of the graphic marital rape in *DPP v Morgan* [1976] AC 182 in Mitchell, Richard. 1975. Lords Support SA Ruling on Rape. *Adelaide Advertiser*, May 8; Mackay, Ian. 1976. Legalities and Humanity Behind Law of Rape. *Adelaide Advertiser*, 16 June. See also Cockburn, Stewart. 1976. Difficulties of Dealing with Rape in Marriage. *Adelaide Advertiser*, 23 September.
[47] *Supra* n 40 at 1821–1822.
[48] *Supra* n 40 at 1834.
[49] *Supra* n 40 at 1820–1825; 1827–1829.
[50] *Supra* n 40 at 1976, 1827–1829, 134–135.
[51] *Supra* n 40 at 1827–1829.

repudiated the conduct of the men in these 'abnormal' relationships, they stressed that their actions did not warrant the criminalisation of marital rape, as they were already prosecutable under the law of assault.[52]

The Liberal Opposition thus positioned problematic marital sexual violence as the exclusive domain of a specific type of archetypal husband figure, who diverged significantly from the masculine norm, and whose conduct took him outside of the 'institution of marriage'. This construct, which stressed the aberrance and otherness of the husband rapist, allowed the Liberal Opposition to acknowledge and condemn extreme violence within marriage, whilst both objecting to the reforms and preserving the patriarchal narrative of marriage as a protective institution. The rest of this article will explore this development of the husband as a potential 'beast', and the implications of this for marital rape law reform.

## Drawing the 'Beast'

Though the original debates in the Lower House shaped the discussion around the 'beast', these ideas were consolidated after the legislation passed into the Upper House. Labor did not hold the balance of power in the Upper House as it did in the Lower, and so Labor had to convince at least one conservative politician to cross the floor to vote with the government if the reforms were to pass successfully into law.

The main speakers for Labor in the Upper House debates were Frank Blevins, the leader of the Labor Party in the House, and Anne Levy, the sole female Labor Senator. The speeches of both Senators devoted considerable time to explicating graphic, real life case studies of domestic violence, drawn from accounts taken at the Naomi Women's Shelter in Adelaide. Senator Blevins took his case studies from those published by Stewart Cockburn in his *Adelaide Advertiser* article, discussed earlier. He focussed in particular on the case of a violent husband who had forced his wife into intercourse by threatening to rape their 12-year-old daughter, emphasising the frighteningly casual nature of the husband's ultimatum, "[i]t's you or her".[53] Senator Levy went further than Senator Blevins and relayed three case studies from the Shelter that Cockburn had chosen not to publish on the basis that they were too confronting. The first involved a man who used a carrot to anally penetrate his wife "until she bled". The second involved a woman who was brutally "belted", "kicked" and then raped repeatedly by her husband in front of their children. The third involved a woman who was beaten, bitten and raped by her husband.[54] All of the case studies chosen by the Senators exemplified sadistic and physically violent husbands, and all were relayed in first person, with the Senators underscoring the horror of the attacks by quoting directly from the harrowing accounts of the women who had experienced them. Both Senators then employed rhetoric that suggested these extremely disturbing examples were intended to be representative of the sort

[52] *Supra* n 40 at 1819, 1821, 1829.
[53] South Australia, *Parliamentary Debates*, Legislative Council, 1976, 2093.
[54] *Supra* n 53 at, 2097.

of behaviour the legislation would cover more generally. As Senator Levy argued, the case studies were indicative of "what goes on in our community", illustrating the need for married women who were raped by their husbands to receive the "protection and consideration… afforded to all other women".[55]

This positioning of marital rape as synonymous with extreme and affronting violence perpetrated by an aberrant husband was reinforced by the broader rhetoric deployed by both speakers. Senator Blevins constructed rape in marriage as a "violent crime of hatred", an "assertion of ownership and domination" by the rapist over both the victim and women generally.[56] For the Senator, this meant that only husbands who were "revolting, brutal and callous" could perpetrate the crime.[57] Senator Levy similarly suggested that "many" husband rapists were so depraved that they lacked "the decency" to rape their wives "behind the closed bedroom door", instead willfully exposing their children to the crime.[58] The husband rapist then, was so dangerous and unfeeling that his victims "would be safer on the streets than in their own home". Both Senators thus constructed the archetypal husband rapist as a particularly cruel and savagely violent figure. This figure willfully inflicted extreme physical and psychological abuse on his wife, using sexual assault as a weapon to cause her humiliation and degradation. By constructing the husband rapist in this way, the Senators stressed his deviation from the "decent and civilised" conduct of "gentlemen",[59] and thus from the masculine and marital norm. As Labor's Senator Dunford would later put it in the debates, he was not so much a man as a "beast".[60]

The solidification of the beast archetype signaled a subtle but important discursive shift in the broader meta-debates surrounding rape in marriage. As we have seen already, the Labor Government ran a two-pronged campaign in favour of marital rape reform during the pre-parliamentary phase. This campaign framed all conduct that encroached upon the married woman's inalienable right to 'consent' as morally problematic, while indicating that in practical terms the proposed reforms would only police husband rapists whose conduct severely offended patriarchal decency. The 'beast' discourse proliferated by the Labor Senators in the Legislative Council collapsed these arguments, constructing all 'husband rapists' as cruel, physically violent and sub-human figures, whose conduct could not be minimised or justified.

While the Senators still spoke of the married woman's right to "consent" and "self determination",[61] this rhetoric was thus now inextricably interlinked with the imagery of the beast, with only bestial husbands conceptualised as infringing on those rights. The discourse thus implicitly defined marital rape in a way that

[55] *Supra* n 53 at 2097.
[56] *Supra* n 53 at 2092–2095.
[57] *Supra* n 53 at 2095.
[58] *Supra* n 53 at 2097.
[59] *Supra* n 53 at 2097.
[60] *Supra* n 53 at 2135–2136.
[61] See especially *Supra* n 53 at 2096–2098, 2102, 2143–2146.

suggested all 'marital rapists' attacked their victims in a way that was sufficiently sadistic to offend patriarchal decency.

The conservatives in the Upper House were less convinced. As marriage was constructed to connote mutual consent to intercourse, the Liberal Opposition argued that "the evil" of the beast's conduct lay in its physically violent nature "rather than the sexual aspect".[62] The appropriate charge for his actions, they argued, was assault not rape.[63] Further, it was argued that clause 12 provided no practical benefit to compensate for this moral issue, as women trapped in abusive relationships would not have the financial security to charge their husbands with rape. Instead of abolishing marital rape immunity, it was thus contended that the Labor Government should focus on ameliorating the economic dependence of women trapped in abusive relationships by financing more crisis centres and women's shelters.[64]

Nonetheless, ideas of violence in marriage appear to have been persuasive for three Liberal and Liberal Movement Senators, who crossed the floor and spoke at the end of the debates in favour of the reforms. The support of these Senators for marital rape law reform meant that clause 12 was guaranteed to pass in some form. It thus fell to the opponents of the reforms to introduce amendments to the clause, in the hopes of finding a compromise that would gain support from the dissenting Liberal Senators, while remaining commensurate with their interests. The first attempted amendment restricted prosecutable marital rape to cases where the couple involved were not cohabiting at the time of the offence. This amendment was swiftly and decisively rejected, obviously failing to address the concerns of the dissenting Liberal Senators about brutality within cohabiting marriages.[65]

The second amendment limited rape in marriage prosecutions to cases involving threatened or actual bodily harm, or cases where sexual assault had been accompanied with threats of bodily harm against children or relatives of the victim. The amendment further specified that these exceptions did not apply to anal or oral rape, which would be prosecutable in all circumstances. Though strongly objected to by the Labor Government on the basis that the distinction between different orifices was illogical, the amendment received the support of the dissenting Liberals.[66] For these Senators, the amendment covered their desire to police 'sexual brutality' within marriage, while doing so in a manner that clearly assuaged any residual fears about the prosecution of heteronormative men. The Legislative Council thus narrowly passed the amendment on 24 November 1976.[67]

However, the Labor-dominated House of Assembly rejected this amended version of clause 12 when it returned to that House, creating a deadlock on the Bill. In order to break this deadlock, a Special Conference of parliamentarians from both Houses gathered to negotiate a final version of clause 12. This compromise legislation was

[62] *Supra* n 53 at, 2090.
[63] See also the comments made at *Supra* n 53 at 2090, 2100, 2133.
[64] *Supra* n 53 at 2100, 2135–2137.
[65] *Supra* n 53 at, 2348–2352.
[66] *Supra* n 53 at, 2406–2411.
[67] *Supra* n 53 at, 2412.

drafted after several hours of negotiation, and was assented to by the Legislative Council on 30 November 1976. Clause 12 in its final form partially decriminalised marital rape, with the offence only prosecutable when intended to seriously and substantially humiliate the victim, or when accompanied by threatened or actual physical violence against the victim or another person.

For the Liberal Senators who explained the clause to the Legislative Council, the final wording of the statute was a "reasonable compromise".[68] Clause 12 was acceptable as it would criminalise the conduct of "brutal" husbands who inflicted "cruelty and indignity" on their wives, while ensuring that marital rapes involving 'only' "the lack of consent" and "the necessary penetration" were not made subject to the criminal law.[69] The reforms would thus police beasts or "bad husbands" while upholding the "consensual aspect of marriage" by excluding less physically violent husbands from its purview.[70] For the Labor Senators who spoke on the Bill, the wording of the legislation was acceptable as it was conceptualised as covering all cases of marital rape. The beast discourse stressed that all husband rapists were sadistic and violent, and the 'aggravating circumstances' listed by clause 12 represented a codification of these attributes. Thus, though the clause appeared to limit the circumstances in which marital rape could be prosecuted, it was believed that the reforms would have the same practical effect as the complete removal of marital rape immunity.

## Conclusions

The state of South Australia was one of the first jurisdictions to remove the marital rape immunity of husbands within a marriage. This article has explored the social, cultural and legal arguments around criminalization, and why the final legislation enacted only a partial criminalisation of marital rape. The Bill that passed stated that persons could not, by virtue of their marital status, "be presumed to have consented to sexual intercourse" with their spouse.[71] But amendments had considerably watered down the legislation, with a charge of rape requiring that a wife also suffer:

(a) assault occasioning actual bodily harm, or threat of such an assault…
(b) an act of gross indecency, or threat of such an act…
(c) an act calculated seriously and substantially to humiliate….
(d) threat of the commission of a criminal act against any person.[72]

The South Australian situation highlights a number of central and continuing issues with the legislating, policing and prosecuting of violence against women. On one hand, the legislation saw a significant shift in legal thinking about marriage, and

[68] *Supra* n 53 at, 2534.
[69] *Supra* n 53 at 2534–2535.
[70] *Supra* n 53 at, 2534–2535.
[71] *Criminal Law Consolidation Act Amendment Act 1976* (SA) s12.
[72] *Supra* n 71.

non-consensual sex within marriage could now be labeled "rape". This had a critical rolling impact in other Australian jurisdictions, which also sought to criminalise marital rape across the next decade. On the other hand, there were distinct limitations to the South Australian model. The statute did not place issues of consent at the heart of this redefining of rape. Indeed, it is notable that the legislation did not attempt to locate the harm of the act in its violation of the married woman's right to consent. Instead, the key determinant of criminality became whether or not the husband rapist's conduct was so violent, public or sadistic that it offended patriarchal decency. The legislation framed rape within marriage as insufficient to sustain a criminal charge in the absence of aggravating factors, such as violence or humiliation. Physical violence and sadistic intent were positioned as the key delineators of permissible and impermissible marital intercourse, with the husband rapist's incursion on his wife's right to self-determination insufficient in isolation to sustain a criminal charge. This tension had profound implications for emerging discussions about marital rape, and highlights the continuities of various rape myths when dealing with assault within the home. In the case of South Australia, the legislative change was limited, and it was only when a husband became a 'beast' that he might be understood as a rapist.

**Acknowledgements** This research was funded by the Australian Research Council, ARC DP 150101798, 'Sexual Offences, Legal Responses and Public Perceptions: 1880s–1980s.

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