

First, the legal response is examined as a point to begin this review, acknowledging that women campaigners two decades ago first turned to lawmakers for protection. The task for reformers was specific. Instead of creating new laws on sexual assault, the goal was to advocate for removing common law that protected men from crimes based on not what they did, but to whom they did it. One by one, states removed a husband's immunity from being prosecuted for rape in marriage, providing to married women the same legal status afforded to independent citizens.

However, the personal stories and the studies of legal practice that follow show the law's continuing reluctance to protect women. We find evidence of the gap between legislation and outcomes. We see that decades after the parliaments took action, the influence and authority of the abolished laws on rape continue to dominate.

The law and legal treatment

Judith's story

For 43 years Judith Arnott and her two children "lived in fear every day" of her husband's brutality. On 31 May 1996, she left him. During the marriage she had her nose broken several times, lost her sense of smell and was subjected to constant beatings, verbal abuse and threats to her life. Her sons were also physically abused and shot at. For most of the time, Judith thought "everybody lived the way we did". She heard differently from a domestic violence outreach worker who ultimately supported Judith through a court case that resulted in her husband being charged and convicted of several counts of physical assault. He served 15 months in prison.

For Judith the convictions for the physical assaults were significant – not only as a symbol of justice for herself and children, but as a call to other women, that they will survive, and that they will be believed. However, it was also a time of revelation. After the court case, Judith was exposed to more information about the law. And what she learned was that it was also a crime for a husband to rape his wife.

Judith made a police statement in 2001 detailing many episodes of rape and sexual assault that spanned her marriage. The police told her she should have disclosed the rapes earlier, preferably at the time of making her original statement in relation to the physical assaults that she and her sons endured. But like many women, Judith didn't identify her experience as rape:

"I didn't know that [rape in marriage was illegal]. I thought that if they were married to you they could do what they liked."

Judith's husband was interviewed in relation to the specific occasions where Judith could particularise an incident, nominate a date and year, or remember other details such as what she was wearing, or what else had happened on that day. Soon after, the police notified Judith that, given the historical nature of the offences, no charges would be laid. The Office of Public Prosecutions concurred after reviewing the decision, suggesting that a conviction would be unlikely, given the case depended entirely on Judith's "unsupported" testimony. Moreover, Judith learned that many of incidents she nominated occurred when husbands were immune from prosecution for raping their wives.⁹

Judith's story speaks to many features of the historical, social and legal fabric that have allowed few instances of male partner rape to be formally sanctioned or culturally recognised. The timeless right of men (or more particularly, husbands) to access their wives sexually has been traced by legal commentators to the centuries-old authority of British Chief Justice, Sir Matthew Hale, whose words on "wives as property" set the common law scene for the right to rape in marriage:

"But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract" (History of the Pleas of the Crown 1736: 629).

Brownmiller (1975) and others (Clark and Lewis 1977; Clark 1987; Bergen 1996) have detailed the historical context in which rape laws were originally enacted to protect men's property. The offence of rape lay in the damage caused to the investments of husbands and fathers who would otherwise have materially and socially benefited from bartering virginal daughters as prospective wives. Further, "once married, a wife's identity became legally merged with her husband's; she was not able to own property, have custody of children, or file charges against him" (1996: 3). According to Rathus (1995: 14): "In the same way that a person cannot be charged with the offence of wilful damage to their own property, a man could not be charged with violating his own woman."

The traditional importance of preserving the spousal immunity in rape law was twofold. Removing the exemption would either contribute to family breakdown in discouraging women from persevering with marriage "difficulties", or worse, would result in scores of women making false allegations against their husbands (Russell 1990). According to Scutt (1977), the position reflected how the prevailing culture, public policy and legal frameworks were more attuned to tolerating a husband's sexually aggressive behaviour towards his wife than they were to thinking about how to create a more equitable marriage or sexual relation between men and women, even if it meant accepting that the man, if he were not the husband, was engaging in a criminal act (Scutt 1977: 273).

Advocating for reforms that would abolish the marital rape exemption was therefore seen by many feminists as a critical step toward achieving women's equality (Smart 1989; Tarrant 1990). This would not only offer statutory protection to women who were raped by their husbands but would symbolically dismantle the traditional cultural and legal framework that viewed a woman's consent as perpetual if there had been a prior sexual, social, or intimate relationship with the accused man. However, according to MacKinnon (1983) and Harris (1996), the legacy left by Hale and his legal dictum meant the bar for distinguishing consenting from non-consenting sex was principally set by the nature of a woman's relationship to her offender, and by social norms that ensured an element of force and resistance continued to structure our understanding of normal sexual relations (or intimacy) between men and women.

The notorious remarks made by a South Australian Supreme Court judge in a rape trial held in 1992 provided the perfect case in point for those who had remained suspicious of the law's capacity to understand rape from a woman's (a wife's) point of view (MacKinnon 1983; 1987). In attempting to assist the jury to distinguish a true lack of consent from acts of mere "persuasion", Justice Bollen said:

"There is, of course, nothing wrong with a husband, faced with his wife's initial refusal to engage in intercourse, in attempting, in an acceptable

way, to persuade her to change her mind, and that may involve a measure of rougher than usual handling. It may be that handling and persuasion will persuade the wife to agree. Sometimes it is a fine line between not agreeing, then changing of the mind, and consenting ...” (*R v Johns*, Supreme Court, SA No. SCCRM/91/452, 26 August 1992).

According to Easteal (1998: 115), “the ability to construct rape within cohabitation will remain highly problematic” for the law unless the line between rape and acceptable levels of “rougher than usual handling” becomes less ambiguous. While state legislatures have now fully reversed the marital exemption¹⁰, the concept of rape in marriage or established intimate relationships, as far as the courts are concerned, remains virtually rhetorical. Very few prosecutions proceed where the victim and the offender are living in a marital or established relationship at the time of the offences.

The *Heroines of Fortitude* report produced by the New South Wales Department for Women (hereafter DFM) found that in their prosecution sample of 150 adult sexual assault cases¹¹, 33 offenders were either current (10 per cent) or previous partners (12 per cent) of the woman-complainant (DFM 1996: 57).¹² As will become apparent in the next section, these figures appear negligible against what the true incidence of male violence against their women partners is likely to be. What these findings do indicate, however, is an increase in the *numbers of rape prosecutions* involving victims and offenders who have been in an established relationship. The study undertaken by the Law Reform Commission of Victoria (LRCV 1991: 66) examined eight cases involving current or former partners (spouses and de factos) which represented just 5 per cent of the total number of prosecutions that proceeded during 1989. By the early 1990s, the figure had increased to 26 or 9.3 per cent of Victorian cases (Heenan and McKelvie 1996: 36; see also Spohn and Holleran 2001 for a United States comparison).

Notwithstanding these increases, securing convictions in male partner rape cases remains difficult for prosecutors. Like most rape trials, the defence is likely to devote considerable attention to attacking the victim’s character and credibility. Where there has been a relationship history, the defence has a greater pool of information about the complainant to draw on in reconstructing a version of events set on undermining what she alleges happened. At best, the approach is designed to raise a reasonable doubt about her veracity in the minds of the jury. At worst, she will be exposed to a gruelling process of cross-examination that will remain transfixed on the detail of previous consensual sexual activity she once engaged in with her partner – the man she now accuses of rape (Adler 1987; Henning 1996; DFM 1996).

Case-file studies have shown how defence barristers often draw on a host of motives to explain why a woman might make such allegations against her partner (DFM 1996; Heenan and McKelvie 1996; Young 1998). Drawing on information provided by the accused, the defence may attribute the “falsity” of the charges to her wanting to ensure a favourable property settlement, to secure custody of the children, to continue an affair unobstructed, or as a method of wreaking revenge for her partner’s infidelity. Trying to eliminate any reasonable doubt in the minds of jurors under these circumstances, where the case rests almost entirely on the woman-complainant’s testimony, is a scenario most prosecutors are loathe to pursue.

While legislatures have attempted to curb the admission of sexual history evidence in trials where there has been some prior sexual contact between the

accused and the victim, barristers and judges have continued to thwart their effect (Heenan and McKelvie 1996; DFM 1996; Henning and Bronitt 1998). In my own study of 34 rape trials, I witnessed these tactics first-hand. The accused men in five of the trials I observed during 1996 to 1998 were the current or former partners of the women-complainants who had been living in established relationships either prior to or at the time of the offences (Heenan 2001). Without exception, these women were made to testify about aspects of their prior sexual relationships with the men they said had raped them. The aim of defence barristers in these cases was unashamedly directed at suggesting that consensual sex was more likely to have occurred on the occasion in question, just as it had in the past. Across the five trials, women were asked how often they had sex, when they started having sex, and whether they could speak to the general health of their sexual relationships. They were challenged about their versions of the regularity of sex, their alleged refusals to engage in sex, and their claims to often appease their male partners through submitting to sex.

"It's . . . like, to them it's just made out that it's only happened just the once, that it's just a one-off thing. And I feel – like, just because he was my partner, [the jury think] it hasn't happened either. It would be different if it was a stranger, but because we've been together for ten years, two kids – well, some people don't know much about marital rape or anything like that, so its really hard." ("Lara", raped and assaulted by her estranged de facto. In August 2002, a jury found him not guilty.)¹³

In this context, it seems unusual that each of the five accused in these cases were convicted. However, only two of the accused were actually convicted of rape. The three remaining accused were convicted of offences not involving sexual assault. Yet, the women in all five of these cases had reported being raped and physically assaulted. They had each sustained visible physical injuries and required at least some medical treatment, and all five women had reported the assaults quickly (three of them had notified police within 12 hours of the assaults).

That jurors were confident enough in these cases to convict male partners accused of assaulting, but not raping their partners, warrants some attention. According to Russell (1990) and Mahoney and Williams (1998), it is only the most extreme cases of marital rape that are likely to be prosecuted in the first place – for example, where the woman has been severely brutalised or there is other evidence of the offender subjecting her to humiliating or unusual sexual practices. However, in the cases I examined, it was the apparent inconsistency in jury verdicts that seemed difficult to explain. On the one hand, jurors in these cases seemed to accept that the women-complainants were physically harmed by their former or

current partners, but on the other hand, were unable to rule out the possibility of consensual sex still occurring in such circumstances.

It seems that the notion of women as autonomous agents, free to participate or decline to engage in sexual activity with the men with whom they live in intimate relationships, even physically violent ones, is a concept on which we have made little ground. That prosecutions involving intimates have increased in numbers may merely suggest that the public is less inclined to view men's use of physical violence in relationships as acceptable; that rape can also occur in such circumstances, remains much less palatable.

The reluctance of law, and of jurors, to criminalise men's sexually violent behaviour is further complicated by broader cultural conditions that allow for the majority of women's unwanted sexual experiences to be considered as *not* rape. The problem, as many commentators see it, is situated in our reluctance to apply a model of consent that is both communicative and mutually participatory

(Pineau 1989; Waye 1992; Harris 1996; McSherry 1998). According to Pineau (1989) and others (MacKinnon 1983, 1987; Gavey 1990; Naffine 1992; Pringle 1993), establishing the point at which rape should be distinguished from “wifely acquiescence” has proved so difficult for the courts and for women, precisely because coercion, pressure, aggression and “seduction” remain culturally acceptable expressions of male sexual behaviour.

Consider Lisa’s and Andrea’s experiences:

“I always gave in. He never forced me; he just expected it every weekend, and I just did it to keep the peace. I just did it to get it over with so he would go to sleep and leave me alone. Then I wouldn’t have to put up with him yelling at the kids and yelling at me.” (“Lisa”, cited in Bergen 1996: 14)

“If I had responded to a survey immediately after the rape I probably would have said I hadn’t been raped, because I wouldn’t have wanted to admit it to anyone else. Although this would have depended on my mood that day or week. If presented with a more behaviourally specific description of rape I may have been more likely to say yes I had been raped, but may not have. It would have depended on the state of relations between Craig and I at the time, and how I felt about that. This varied from hour to hour, day to day, week to week.” (“Andrea”, cited in Gavey 1990: 197)

Finkelhor and Yllö (1985) have distinguished varying levels of coercion and/or force that often characterise women’s experiences of male partner rape over the life of the relationship. These range from the use of social and interpersonal coercion to more direct threats, or use of actual physical force. At one end of this continuum¹⁴, the authors highlighted the cultural expectation of women to fulfil their “wifely duties” or the pressure to provide sexual services to their husbands regardless of their own desires. They also described the degree of emotional manipulation that comes with women feeling obliged to have sex after their partners have threatened to seek sexual satisfaction elsewhere, or more simply, to keep the peace. The use or threat of force women described ranged from being held down, being subjected to degrading, humiliating or painful sexual acts, to being raped in the context of other physical violence and battering.

The difficulty for women lies in trying to reconcile their experiences with a cultural consensus that understands rape as sex that occurs unambiguously without their consent. According to Mahoney and Williams (1998), women know that their rapes have occurred when they have lain silent, where they have “given in”, where they have just “gotten it over and done with”, when violence was no longer necessary. They blame themselves for it. They take responsibility for it. They feel complicit in it.

However, the failure of the law to protect women from rape in established relationships, to alleviate ambivalence and define rape, is a failure of our social institutions at large. It is not only in the legal context that we find a reluctance to act. Indeed, our reluctance is shown to be far more culturally entrenched by our failure to acknowledge the difficulties women face in naming their experience of rape, by services marginalising their responses to rape, and by not identifying the particular health and emotional impacts of rape.

It is this notion of reluctance that structures the remainder of this Issues Paper. First, we consider how little is known about the incidence of male partner rape in the context of survey research.