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Rape in Victoria as a Crime of Absolute Liability: A Departure from Both Precedent and Progressivism

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Abstract In recent decades, a disturbing trend has emerged in Victoria and elsewhere that has witnessed the emergence of statutory rules that accord preferential treatment to prosecutors and complainants in instances where allegations of rape are made. This article examines not only the manifestations of such treatment in the form of Victorian crime legislation, but the means by which the statutory crime of rape in Victoria has been transformed into an offence which, though technically one of mens rea, can effectively be prosecuted as an offence of absolute liability. The piece concludes with a discussion of the likely reasons for this trend as well as the implications of allowing such a serious offence to be prosecuted as one of absolute liability.

Keywords Sexual assault; Preferential treatment; Strict and absolute liability; Presumption of innocence; Legislative reform

Although reasonable minds may differ on the question of which crimes are amongst the most heinous on the criminal calendar, there are few who would dispute that aside from murder or perhaps treason, rape is very near the top of the list. In fact, there may be no crimes, with the possible exception of those that deal with the sexual abuse of children, which engender more opprobrium upon conviction than the crime of rape.

Notwithstanding the seriousness of the crime or crimes with which an accused is charged, and subject to some rare exceptions such as offences relating to terrorism and national security,¹ the adversarial system of justice has adhered to the notion that considerations of fairness, decency and the desire to avoid wrongful conviction require that an accused be accorded certain procedural and substantive safeguards which include, but are not limited to the following: the right to trial by jury in instances

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¹ See, e.g., the Terrorism (Commonwealth Powers) Act 2002 (Cth); the Anti-Terrorism Act 2004 (Cth); Anti-Terrorism Act (No. 2) 2005 (Cth). Persons held on suspicion of these types of crimes can be held in custody for longer periods of time without trial.

where indictable offences are alleged;\^2 that both the evidential and legal burdens of proof be reposed on the prosecution with regard to the constituent elements of the offence or offences as well as the identity of the accused as the perpetrator;\^3 the presumption of innocence that exists until such time, if ever, as it is overcome by evidence that satisfies the fact-finder that the constituent elements of the crime or crimes and the accused's complicity therein have been proved beyond reasonable doubt;\^4 and the right of an accused to cross-examine the witnesses against him or her and/or challenge various other forms of evidence tendered by the prosecution.\^5 Succinctly stated, the common law and the various legislative bodies who enact crime legislation have generally eschewed the notion that these and other rights should either be expanded or contracted, depending on the seriousness or degree of opprobrium associated with any particular crime.\^6 Accordingly, an accused charged with relatively minor offences such as theft or malicious mischief has been accorded the same procedural and substantive rights as an accused charged with the most serious offences such as rape, kidnapping, arson, robbery, drug trafficking, treason, voluntary manslaughter and murder.

Though the introductory comments above carefully enumerated the purposes sought to be achieved in this article, it is equally important to emphasise what this piece will not endeavour to achieve. First, it will not address any statistical compilations concerning the percentage of convictions in prosecutions for rape or other sexual assault crimes, and the same is true of any statistical compilations regarding the percentage of cases in which evidence of past sexual conduct is ruled admissible notwithstanding the existence of ss 339-352 of the Criminal Procedure Act 2009 (Vic), often referred to as 'rape shield' provisions. Moreover,

\^2 See, e.g., s. 80 of the Commonwealth Constitution which mandates that all Australian Commonwealth indictable offences be adjudicated by a jury (emphasis added). Although s. 80 applies only to Commonwealth indictable offences, there are laws which require that state and territorial indictable offences must also be adjudicated via trial by jury in the absence of legislation permitting the accused to waive his or her right to a jury trial in favour of a bench trial: Juries Act 1927 (SA), s. 6; Supreme Court Act 1933 (ACT), s. 68A; Criminal Procedure Act 1986 (NSW), s. 131; Criminal Code 1899 (Qld), s. 604 and District Court of Queensland Act 1967 (Qld), s. 65; Criminal Code 1924 (Tas), s. 361; Criminal Procedure Act 2004 (WA), s. 92; Criminal Code (NT), s. 348; Juries Act 2000 (Vic), s. 22(2).

\^3 K. J. Arenson and M. Bagaric, Rules of Evidence in Australia: Text and Cases, 2nd edn (LexisNexis; 2007) 14-15, 21, 26 ('Rules of Evidence in Australia').

\^4 Momdlovic v The Queen [2011] 280 ALR 221; [2011] HCA 34; Packet v The Queen (1937) 58 CLR 190 (the first case where the presumption of innocence was applied in Australia). See also A Ligertwood, Australian Evidence, 4th edn (LexisNexis; 2004) 86-8, 102; J. D. Heydon, Cross on Evidence, 8th edn (LexisNexis; 2010) 293 (hereafter 'Cross').

\^5 See generally Cross, above n. 4 at 511-661; see also R v Chin (1985) 157 CLR 673 at 678 (Gibbs CJ and Wilson J); J. L. Glissan, Cross-examination: Practice and Procedure, 2nd edn (LexisNexis; 1991) 75: 'Prima facie any witness may be cross-examined by any party against whom he has testified'.

\^6 This is not to say that it is only in regard to crimes of sexual assault that special rules apply. See, e.g., Terrorism (Commonwealth Powers) Act 2002 (Cth); Anti-Terrorism Act 2004 (Cth); Anti-Terrorism Act (No. 2) 2005 (Cth). These Acts provide for special rules that the Commonwealth Parliament deemed necessary to deal with crimes of terrorism or threats to national security.
Rape in Victoria as a Crime of Absolute Liability

while this article is keen to acknowledge the indescribable physical and mental anguish that are visited upon the unfortunate victims of rape and other sexual assaults, it is not intended as a forum in which to stress either the various ways in which this anguish is manifested or the inappropriate manner in which the alleged victims of rape and other forms of sexual assault are often treated by law enforcement officials. In addition, though the 'rape shield' laws and various others are noted as a means of illustrating that rape and other sexual assault crimes are in many ways governed by a different set of rules than nearly all other types of offences, this article is not intended as an exhaustive exposition of the operation, scope and legislative purpose and history of the examples provided. Finally, the discussion will not concern itself with estimates of what percentage of rapes and other sexual assaults go unreported or why, nor will it address any proposals for reform that might encourage more victims of sexual assaults to report them to the appropriate authorities.

1. The trend toward enacting special rules in prosecutions for rape and other sexual assault crimes

The foregoing notwithstanding, a disturbing trend has emerged in Victoria when an indictment includes an allegation of rape or other sexual offence. This trend is exemplified in many ways. At committal hearings, for example, a person accused of rape or any other sexual offence is statutorily barred from seeking leave of court to cross-examine the complainant provided that he or she 'was a child or a person with a cognitive impairment when the criminal proceeding was commenced . . . and made a statement a copy of which was served in the hand-up-brief of whose evidence-in-chief or examination at a compulsory examination hearing was recorded and a transcript of the recording was served in the hand-up-brief'.

In stark contrast, an accused who is charged with a non-sexual offence or offences is not only permitted, but typically granted leave to compel witnesses who have provided written statements contained in the prosecution’s hand-up-brief to be brought into court and tendered for cross-examination by the accused or his or her legal representative.

Similar disparities exist between rape (and other sexual assaults) and non-sexual offences in regard to the time limits for filing indictments and the commencement of trial; in both instances the time for filing the indictment and commencing trial is significantly truncated where one or more counts of sexual assault are alleged in the indictment.

Another illuminating example of treating rape and other sexual assaults as an entirely different genre of offences with special rules

7 Criminal Procedure Act 2009 (Vic), s. 123(a)–(c).
9 Criminal Procedure Act 2009 (Vic), s. 163.
10 Criminal Procedure Act 2009 (Vic), s. 211.
11 Criminal Procedure Act 2009 (Vic), ss 163, 211.
The Journal of Criminal Law

consists of what is commonly referred to as the 'rape shield' laws. As will be discussed below, these laws attenuate the right of the accused to adduce all legally admissible and exculpatory evidence on his or her behalf. Rape shield' laws are now extant in all Australian jurisdictions as well as other democratic societies that employ an adversarial system of criminal justice. Though these provisions are often referred to as 'rape shield' laws, it is important to emphasise that they are far from limited to prosecutions for rape; rather, they typically apply in all proceedings in which an accused is charged with any type of sexual assault, and this is so irrespective of whether other types of offences are also joined in the charge sheet or indictment. For example, an accused charged with non-sexual offences is generally permitted to adduce character evidence (also referred to as 'propensity' evidence) or similar fact evidence (a species of character evidence) relating to a co-accused or complainant in support of his or her defence. Thus, in instances where self-defence is interposed as a defence to a charge of non-sexual assault, there is generally no obstacle to an accused adducing evidence of the complainant’s bad reputation in the community for violence or even specific instances of the complainant’s violent conduct in order to substantiate the accused’s claim that it was the complainant rather than

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


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

15 See above, n. 14.

16 Ligertwood, above n. 4, 102-4.

17 Arenson and Bagaric, above n. 3 at 193. For a comprehensive discussion of similar fact evidence, see generally Cross, above n. 4 at 709-61.


19 Re Knowles [1984] VR 751 at 765-6. In Re Knowles, the petitioner was convicted of the murder of his de facto wife by stabbing her to death. He claimed that the killing had occurred accidentally as he attempted to dispossess her of the knife in order to protect both her and their two children from harm after she had consumed alcohol and became belligerent. In reversing the conviction on appeal, the Full Court of the Supreme Court of Victoria held that a miscarriage of justice had occurred due to a gross neglect of duty on the part of defence counsel in failing to adduce evidence from two of the deceased's former lovers that they had ended their relationships with her because she had become aggressive and violent on several occasions after consuming moderate amounts of alcohol. In so holding, the court reaffirmed the common law rule that an accused is generally permitted to adduce all relevant and exculpatory evidence on his or her behalf, including, as in
the accused who initiated the unlawful use of force or the threat thereof.20

The ‘rape shield’ provisions now in effect in Victoria are encompassed in ss 339–352 of the Criminal Procedure Act 2009 (Vic), which are in large measure a re-enactment of s. 37A of the Evidence Act 1958 (Vic), the predecessor to ss 339–352. Consonant with the provisions of s. 37A, s. 341 of the Criminal Procedure Act 2009 (Vic) prohibits an accused from adducing evidence of the complainant’s general reputation for chastity, whether by way of cross-examination or adducing it as part of an accused’s case-in-chief. Although ss 339–352 must be read in their entirety to fully understand their effect, the overall effect of these and similar provisions in other jurisdictions is to require the accused to first obtain leave of court as a precondition to adducing evidence relating to the complainant’s past sexual conduct (meaning sexual conduct other than that which is the subject of the current prosecution), whether by way of cross-examination of the complainant or otherwise.21 Section 349 then provides:

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

(a) whether the probative value of the evidence outweighs the distress, humiliation and embarrassment that the complainant may experience as a result of the cross-examination or the admission of the evidence, in view of the age of the complainant and the number and nature of the questions that the complainant is likely to be asked; and

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

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

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

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

this case, similar fact evidence relating to specific instances of past conduct on the part of the alleged victim or a third party. In the five Australian jurisdictions that have adopted the Uniform Evidence Legislation, reputation or similar fact evidence relating to a third-party or a co-accused is not admissible unless the court finds that it has significant probative value to an issue in the case: Evidence Act 1995 (Cth), ss 97, 98; Evidence Act 2011 (ACT), ss 97, 98; Evidence Act 1995 (NSW), ss 97, 98; Evidence Act 2001 (Tas), ss 97, 98; Evidence Act 2008 (Vic), ss 97, 98.

21 Criminal Procedure Act 2009 (Vic), s. 342.
propensity to behave in a manner that is consistent with the evidence of past sexual history, from which a further inference can be drawn that the complainant is likely to have consented to the activity which is the subject of the prosecution.\textsuperscript{22}

This is what is commonly referred to as a propensity chain of reasoning\textsuperscript{23} which, for obvious reasons, has justifiably caused the courts to view it with such suspicion that the prosecution is generally precluded from utilising it as a basis for reasoning towards guilt.\textsuperscript{24} Simply stated, the accused is on trial for whatever offence(s) he or she is currently charged with committing—and not for any crimes or conduct for which he or she has been previously convicted or suspected of committing. Moreover, it is an extremely presumptuous and dangerous leap for a fact-finder to infer, assuming it accepts the evidence of past sexual conduct as truthful, that because the accused has acted in a certain manner or with a particular state of mind in the past, he or she has a propensity to behave in such a manner or with that state of mind, from which a further inference can be drawn that he or she is likely to have acted in a similar manner or with a similar state of mind on the occasion which is the subject of the prosecution at hand.\textsuperscript{25}

This is not to suggest that the prosecution is always forbidden from adducing evidence of past conduct or even evidence of the accused's general reputation in the community for whatever character trait is involved in the offence or offences with which he or she is presently charged. The circumstances under which such evidence can be adduced, even by way of the infamous propensity chain of reasoning, is an extremely complex and controversial topic that is well beyond the scope of this article.\textsuperscript{26} Where s. 349 is concerned, the determinative factor in the admissibility of such evidence will depend, subject to the limitations of ss 343 and 352(a), on whether it is in the interest of justice to admit it having regard to the factors enumerated in s. 349(a)–(d).\textsuperscript{27} Finally, s 349 is further limited by s. 352(b) which provides that '[s]exual history evidence is not to be regarded ... as being proper matter for cross-examination as to credit unless, because of special circumstances, it would be likely materially to impair confidence in the reliability of the evidence of the complainant'.\textsuperscript{28}

Rape shield laws similar to ss 339–352 of the Criminal Procedure Act 2009 (Vic) are now extant in all Australian jurisdictions.\textsuperscript{29} Thus, throughout Australia rape and other sexual assault offences may be seen


\textsuperscript{23} Ibid.; Ligertwood, above n. 4 at 104, 108–40; Cross, above n. 4 at 714–29.

\textsuperscript{24} Arenson, above n. 22.

\textsuperscript{25} Ibid. at 269.

\textsuperscript{26} For a comprehensive discussion of the rules and rationale governing the admissibility of a accused's past conduct in each of the Australian jurisdictions, see K. J. Arenson, 'The Propensity Evidence Conundrum: A Search for Doctrinal Consistency' (2006) 8 University of Notre Dame Australia Law Review 31–63.

\textsuperscript{27} Criminal Procedure Act 2009 (Vic), s. 349(a)–(d).

\textsuperscript{28} Criminal Procedure Act 2009 (Vic), s. 352(b).

\textsuperscript{29} See above n. 14.
as a special class of offences in which disparate rules apply which arguably accord enhanced protection to the accuser and attenuated protection to the accused. This is accomplished in two ways: (1) unlike an accused who is charged with only non-sexual assault offences, an accused who is charged with one or more sexual assault offences must first seek and obtain leave of court in order to cross-examine the complainant on or otherwise adduce evidence of the complainant's past sexual conduct; and (2) in order to obtain leave, an accused must demonstrate not merely that the complainant's past sexual conduct is relevant to an issue in the case or to impeaching the complainant's credit, but 'substantially' relevant in this regard.  

2. The concept and justification of crimes of strict and absolute liability

An offence of strict liability is one in which, according to its statutory definition, 31 does not require proof of 'fault' on the part of the accused. In this context, the term 'fault' denotes one or more of the mens reas recognised under Australian common law doctrine or, at a minimum, some form of negligence. 32 An example of an offence of strict liability would be the regulatory traffic offences that exist in all jurisdictions that make it an offence to drive a motor vehicle on a public road in excess of the prescribed speed limit. These statutory offences rarely, if ever, require the prosecution to prove as a constituent element of the offence that the accused acted with knowledge that he or she was or might have been exceeding the speed limit at the time in question, nor do they require proof that the accused acted negligently in so doing. One's visceral reaction to crimes that permit conviction without proof of fault may be that such offences are unfair, unnecessary, and contravene the common law presumption that all offences are rebuttably presumed to be ones of mens rea 33 in the absence of a clear parliamentary intention to the contrary, either expressly or by necessary implication. 34

There are several countervailing considerations that provide an adequate response to, or at least serve to assuage this type of reaction. The first is that the overwhelming majority of strict liability crimes are

30 See above n. 14. In Australia, the only jurisdiction that does not mandate 'substantial' relevance to an issue in the case or the credit of the complainant is New South Wales: Criminal Procedure Act 1986 (NSW), s. 293.
31 He Kaw Teh v R (1985) 157 CLR 523 at 533, 590. All strict liability offences are statutory as there is none recognised at common law.
33 He Kaw Teh v R (1985) 157 CLR 523 at 528-9 (Gibbs CJ); at 552 (Wilson J); at 565-7 (Brennan J); at 590-1 (Dawson J). A crime of mens rea is one which, by definition, requires proof or one or more of the mens reas recognised by law in order to convict: DPP (Northern Ireland) v Lynch [1875] AC 653 at 690 (Lord Simon); He Kaw Teh v R (1985) 157 CLR 523 at 533-4 (Gibbs CJ), quoting The Queen v Sault Ste Marie [1978] 2 SCR 1299 at 1325-6; at 565 (Brennan J), quoting The Queen v O'Connor (1980) 146 CLR 64 at 96-7. For a thorough discussion of the types of mens reas that are recognised under Australian common law doctrine, see Gillies, above n. 32 at 46-75.
34 This presumption was reaffirmed by the High Court in He Kaw Teh v R (1985) 157 CLR 523; see also Cameron v Holt (1980) 142 CLR 342 and the leading English case of Sherras v de Rutzen (1895) 1 QB 918, 921 (Wright J).
summary offences that, in the event of a conviction, impute only the
most minor penalties and social stigma to the accused.\textsuperscript{35}

A second mitigating factor was touched upon in the English case of
Sherras v de Rutzen.\textsuperscript{36} In \textit{Sherras}, Wright J opined that offences of strict
liability are concerned with ‘the regulation of a particular activity in-
volving potential danger to public health, safety or morals . . .’.\textsuperscript{37} Thus,
offences of this type are often referred to as regulatory or welfare
offences.\textsuperscript{38} Such offences include, among others, driving on a public
road in excess of the prescribed speed limit (noted above), placing
contaminated food in the stream of commerce,\textsuperscript{39} riding on public trans-
port without paying the prescribed fare,\textsuperscript{40} selling alcoholic beverages to
under-age children\textsuperscript{41} and driving a vehicle on a public road that exceeds
the maximum weight prescribed by law.\textsuperscript{42} It requires little imagination
to realise that requiring proof of a \textit{mens rea} (for example, guilty knowl-
edge) as an element of these offences would, for practical purposes, have
the effect of rendering them ‘nugatory’.\textsuperscript{43}

How likely is it, for example, that the prosecution could prove that an
accused acted with knowledge or even recklessness that he or she
exceeded the speed limit? The same could be said for the difficulty in
proving guilty knowledge or recklessness that food was contaminated
when it was sold, that a person to whom liquor was sold was under age,
or that a vehicle driven on a public road weighed in excess of the
amount prescribed by law. Moreover, even if sufficient evidence of
guilty knowledge or recklessness were readily available to the prosecu-
tion, the vast number of prosecutions for these types of offences would
require so much of the prosecution’s time and resources as to make
enforcement excessively onerous and impractical.\textsuperscript{44} The question,
therefore, becomes one of balancing the salutary effect of these regu-
latory and welfare offences on the public at large against the perceived
injustice of permitting conviction of the morally innocent; that is, per-
mitting conviction without proof of a \textit{mens rea}. As evidenced by the
massive number of prosecutions involving offences of this type, the
various legislatures and courts have tipped the scale in favour of protect-
ing the public and allowing the imposition of strict liability.

Readers will recall that the absence of a \textit{mens rea} requirement does not
necessarily render an offence one of strict liability. As noted above, strict

\begin{itemize}
\item \textsuperscript{35} \textit{Cameron v Holt} (1980) 142 CLR 342 (Mason J), citing \textit{Sweet v Parsley} [1969] 2 WLR 470 at 487.
\item \textsuperscript{36} \textit{Sherras v de Rutzen} (1895) 1 QB 918.
\item \textsuperscript{37} \textit{Cameron v Holt} (1980) 142 CLR 342 at 348 (Mason J), citing \textit{Sweet v Parsley} [1969] 2 WLR 470, 487.
\item \textsuperscript{38} \textit{He Kwai Teh v R} (1985) 157 CLR 523 at 533.
\item \textsuperscript{39} \textit{Hobbs v Winchester Corp.} [1910] 2 KB 417 at 479–80; \textit{Lim Chin Aik v R} [1963] AC 160 at 174.
\item \textsuperscript{40} \textit{Phipps v State Rail Authority (NSW)} (1986) 4 NSWLR 444 at 451.
\item \textsuperscript{41} \textit{Woolworths Ltd v Luff} (1988) 77 ACTR 1 at 9.
\item \textsuperscript{42} \textit{Binskin v Watson} (1990) 48 A Crim R 33 at 42–3.
\item \textsuperscript{44} \textit{Gleeson v Hobson} [1907] VLR 148 at 156.
\end{itemize}
liability denotes liability without proof of fault in the form of one or more *mens reas* or at least some form of negligence. Thus, a crime is technically classified as one of strict liability if, and only if, it requires neither proof of one or more of the *mens reas*, nor proof that the accused was in any way negligent in bringing about one or more of the *actus reus* elements of the offence. Although this narrows the scope of strict liability crimes which arguably attenuates the risk of convicting the morally blameless, the High Court's decision in *He Kaw Teh v R*, though reaffirming the rebuttable presumption that all offences are of the *mens rea* genre, emphasised that legislatures often create offences with the intention, among others, of having them aid in their own enforcement by coercing the public into taking preventive measures that will prevent the *actus reus* elements from occurring. The court further opined that such a legislative intent is to be gleaned from both the severity of the possible penalty upon conviction and the availability, or the lack thereof, of reasonable preventive measures through which an accused could have prevented the *actus reus* elements from coming into existence. If reasonable preventive measures are available to an accused, the presumption in favour of a *mens rea* (irrespective of whether it was expressed in the definition of the offence) is thereby rebutted. On the other hand, there is no reason in logic or principle to dispense with the presumption in favour of a *mens rea* in instances where the statutory offence was not intended to aid in its enforcement as evidenced by a lack of preventive measures through which an accused could have precluded the occurrence of the *actus reus* elements. Accordingly, the presumption is not rebutted in such cases.

The reasoning of the court is entirely consonant with the view that in regard to regulatory and welfare type offences that are pervasively prosecuted and designed for the protection of the public at large, it would only serve to further that interest by creating offences that are construed as rebutting the presumptive *mens rea* because the courts have found a legislative intent to make them self-enforcing in the manner

45 Gillies, above n. 32 at 80–1.
46 Ibid.
48 Ibid. at 528–9 (Gibbs CJ); at 552 (Wilson J); at 565–7 (Brennan J); at 590–1 (Dawson J).
49 Ibid. at 530 (Gibbs CJ); at 546 (Mason J); at 567 (Brennan J); at 595 (Dawson J). *He Kaw Teh* involved charges under s. 233B(1)(b) and (c) of the Customs Act 1901 (Cth). The sections made it an offence to import a prohibited substance into Australia and to be in possession of a prohibited substance. The court held 4 to 1 (Wilson J dissenting) that the presumption of *mens rea* was not displaced in relation to the offences charged and that the prosecution needed to prove that the defendant knew he was importing a prohibited substance and, in relation to sub-s. (c), that the defendant knew the goods were in his or her possession where intention to possess the prohibited substance cannot be proved: at 523–4.
50 Ibid. at 530 (Gibbs CJ); at 556 (Wilson J); at 566–7 (Brennan J); at 597 (Dawson J). This not to say, however, that crimes carrying severe penalties have never been construed as ones of strict liability: see, e.g., *R v Karaiskakis* (1957) 74 WN (NSW) 457 (procuring girl under 21); *R v Kennedy* [1981] VR 565 (abducting girl under 18).
51 *He Kaw Teh v R* (1985) 157 CLR 523 at 530 (Gibbs CJ).
52 Ibid. at 530 (Gibbs CJ); at 546 (Mason J); at 567 (Brennan J); at 595 (Dawson J).
described. Again, to the extent that permitting conviction without a mens rea seems to punish the morally blameless, the courts have made a determination that this is outweighed by both the need to protect the public as well as the obstacles that make proving a mens rea exceedingly onerous and impractical.

While this arguably serves to assuage concerns about the tendency of strict liability crimes to ensnare the morally blameless for want of proof of a mens rea, it does not necessarily address these concerns when one considers that a strict liability offence not only dispenses with the requirement of proving a mens rea, but also the need to prove that an accused acted with any form of negligence in performing the requisite criminal conduct. It should be emphasised that there are various forms of negligence that, depending on the likelihood and severity of the risk involved and whether the conduct of the accused was engaged in with or without advertence to the risk(s) involved, are termed as 'ordinary', 'criminal' or 'gross', and recklessness. With that observation aside, the question is whether the balancing test outcome should be the same when strict liability is imposed in criminal prosecutions without so much as a requirement of proving some form of negligence on the part of an accused. If one accepts that the courts have correctly balanced the competing policy considerations in favour of permitting the imposition of strict liability, then it is difficult to construct a cogent argument that a different result should obtain merely because the prosecution has been absolved of the responsibility of proving another, albeit lesser degree of fault than a mens rea. Whether one is prepared to take issue with this observation or not, those who believe that strict liability crimes offend the cardinal tenets of fairness and natural justice by punishing the morally blameless must confront another cogent argument; namely, that given the nature and availability of what is often termed the Proudman defence, the very existence of so-called strict liability offences may be called into question.

53 For a clear and thorough discussion of these types of negligence, see Gillies, above n. 32 at 39–42, 58–66. Recklessness, unlike ‘criminal’ or ‘gross’ negligence, involves advertence to a known risk and a willingness to proceed despite that awareness. Thus, recklessness is not merely a form of negligence that involves advertent risk-taking conduct, but a mens rea in that the accused must act with a state of mind that involves advertence to the risk(s) involved.

54 It is noteworthy that merely because a crime is defined or construed so as to make it one of strict liability, this does not lead inexorably to the conclusion that an accused who is convicted of such a crime has acted without ‘fault’ in the sense of a mens rea or some form of negligence.

55 Royall v The Queen (1991) 172 CLR 378. In commenting upon the underlying rationale for the general requirement of causation in the context of criminal prosecutions, McHugh J opined, at 450, ‘As I have already pointed out, however, for the purposes of the criminal law, causation cannot be separated from questions of moral culpability. And a person should not be regarded as morally culpable in respect of harm which he or she did not intend and which no reasonable person could foresee’. Thus, McHugh J’s conception of fault or moral blameworthiness in the context of causation seems to comport with the notion of fault in the context of strict liability offences.

56 The Proudman defence was recognised by the High Court in the case of Proudman v Dayman (1941) 67 CLR 536.
In *Proudman*, the essence of this defence was expressed by Dixon J: 'As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence'. Dixon J's formulation, which has been accepted by the Australian courts as a defence to strict liability offences both before and after *Proudman*, contains a subjective as well as an objective component; that is, the accused must not only hold an honest belief (subjective) in the existence of the type of facts described, but must have reasonable grounds (objective) for the belief. In the absence of some form of negligence on the part of the accused, it would be difficult to envisage a situation in which an accused could commit a strict liability offence while holding an honest, yet unreasonable belief in the existence of such exculpatory facts. Though the authorities have not been totally harmonious on the question of which parties bear the evidential and legal burdens of proof on this defence, it is now well settled that the accused bears the evidential burden, which presumably means that the accused must satisfy the court that a jury could reasonably find that the prosecution has failed to prove beyond reasonable doubt that either the belief was not honestly held or, if it was, that it was not based on reasonable grounds. If the accused satisfies the evidential burden, the prosecution then assumes the legal burden of ultimately negating the defence by persuading the jury beyond reasonable doubt that the subjective or objective elements of the defence, or perhaps both, have not been satisfied. It is apparent, therefore, that when the *Proudman* defence is

57 *Proudman v Dayman* (1941) 67 CLR 536 at 540.
58 The defence which came to be known as the *Proudman* defence following *Proudman v Dayman* (1941) 67 CLR 536 was recognised as a defence to strict liability offences in *Maher v Musson* (1934) 52 CLR 100 at 104-5 (Dixon J); at 109 (Evatt and McTiernan JJ); *Thomas v R* (1937) 59 CLR 279.
60 *Stingel v The Queen* (1990) 171 CLR 312 at 336. This formulation of an accused evidential burden was adopted by all seven justices of the High Court in *Stingel*. Although *Stingel*’s enunciation of the accused’s evidential burden related to the partial defence of provocation rather than the *Proudman* defence, in substance it is the formulation that is applied to all defences, with the exceptions of insanity and diminished capacity, that are characterised as ‘secondary’ or ‘affirmative’ defences: K. J. Arenson, M. Bagaric and P. Gillies. *Australian Criminal Law in the Common Law Jurisdictions: Cases and Materials*, 3rd edn (Oxford University Press: Melbourne, 2011) 30-1. A ‘secondary’ or ‘affirmative’ defence is one that does not necessarily deny that the prosecution has proved the elements of the crime(s) and the accused’s complicity therein beyond reasonable doubt; rather, it is a defence that absolves the accused of liability irrespective of whether the prosecution has met its legal burden of proving both the elements of the offence(s) and the accused’s complicity therein beyond reasonable doubt (at 36-7). The insanity and diminished capacity exceptions repose both the evidential and legal burdens on the accused. This requires the accused first to satisfy the trial judge that a jury could reasonably find, on the balance of probabilities, that the elements of these defences have been proved. Assuming the accused meets this burden, in order to succeed in this defence, the accused must convince the jury, on the balance of probabilities, that the elements of these defences have been proved.
interposed as a defence to a strict liability crime as it typically is, fault in the form of negligence is thereby transformed into a constituent element of the offence; that is to say that in order to obtain a conviction, the prosecution must prove beyond reasonable doubt that, *inter alia*, the Proudman defence is unsustainable for want of an honest belief in exculpatory facts, reasonable grounds for such a belief, or both. Thus, while it may appear that a crime is one of strict liability because neither a *mens rea* nor negligence constitutes an element of the crime according to its statutory definition, the reality is that invoking the Proudman defence has the practical effect of instituting negligence as a constituent element of the offence. For all practical purposes, therefore, the very existence of this defence raises a serious question as to whether there is such a thing as an offence of strict liability.

**Absolute liability offences**

An offence of absolute liability is one that is defined, whether expressly or by necessary implication, as one of strict liability, but the legislature has expressly or by implication excluded the Proudman defence. Though there are a number of decisions in which the courts have excluded the Proudman defence by implication, the more recent trend has been to construe strict liability offences so as not to exclude the defence. In *Kain and Shelton Pty Ltd v McDonald*, for example, Bray CJ opined that 'Parliament can exclude this defence if it wants to, but, extraordinary and unusual cases apart, I see no reason why it should be presumed to have excluded it unless it expressly says so [emphasis added]'. Although the courts have yet to enunciate a clear guiding principle for determining whether Parliament intended to exclude the defence by necessary implication, the paramount consideration appears to be that exclusion should be implied only in instances where allowing the defence would significantly detract from the efficacy of the offence.

For present purposes, however, what is important to emphasise is that

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


63 Most of which have been decided by the Supreme Court of South Australia: *August v Fingleton* [1964] SASR 22 at 25; *Norcock v Bowey* [1966] SASR 250 at 266 (Napier CJ); at 267 (Hogarth J); *Samuels v Centofanti* [1967] SASR 251 at 260; *Kain and Shelton Pty Ltd v McDonald* [1971] 1 SASR 39 at 53 (Hogarth J); at 61 (Sangster AJ); *Franklin v Stacey* (1981) 27 SASR 490; *O'Sullivan v Fisher* [1954] SASR 33. For cases in other jurisdictions see *Lipshut v McKay* [1950] VLR 57 at 58; *Bergin v Stack* (1953) 88 CLR 248 at 261 (Fullagar J); at 273 (Kitto J); *Welsh v Donnelly* [1983] 2 VR 173 at 185, 191, 198, 200.

64 *Kain and Shelton Pty Ltd v McDonald* [1971] 1 SASR 39 at 44 (Bray CJ).

65 Ibid.

66 Ibid.

67 *Lipshut v McKay* [1950] VLR 57 at 58–9. For a concise discussion of other factors that militate in favour of a legislative intent to exclude the Proudman defence, see Gillies, above n. 32 at 100–3.
unlike offences of strict liability, the legitimacy of the very existence of
offences of absolute liability is not open to question. Thus, offences of
absolute liability truly permit conviction without proof of ‘fault’ in
the relevant sense.

3. Is rape under s. 38 the Crimes Act 1958 (Vic) really an
offence of mens rea?

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

38. Rape

(2) A person commits rape if—
   (a) he or she intentionally sexually penetrates another person without
      that person’s consent—
      (i) while being aware that the person is not consenting or might not
          be consenting; or
      (ii) while not giving any thought to whether the person is not
          consenting or might not be consenting; or
   (b) after sexual penetration he or she does not withdraw from a person
      who is not consenting on becoming aware that the person is not
      consenting or might not be consenting.

(3) A person (the offender) also commits rape if he or she compels a
person—
   (a) to sexually penetrate the offender or another person, irrespective of
      whether the person being sexually penetrated consents to the act; or
   (b) who has sexually penetrated the offender or another person, not to
      cease sexually penetrating the offender or that other person, irrespec-
      tive of whether the person who has been sexually penetrated consents
      to the act.

(4) For the purposes of subsection (3), a person compels another person
(the victim) to engage in a sexual act if the person compels the victim (by
force or otherwise) to engage in that act—
   (a) without the victim’s consent; and
   (b) while—
      (i) being aware that the victim is not consenting or might not be
          consenting; or
      (ii) not giving any thought to whether the victim is not consenting
          or might not be consenting.

Technically speaking, the Victorian statutory offence of rape is a crime of
mens rea in that it requires proof of one or more mens reas in order to
obtain a conviction. Under s. 38(2)(a)(i) and (ii), the accused must, at
a minimum, intentionally sexually penetrate another person without

68 DPP (Northern Ireland) v Lynch [1875] AC 653 at 690 (Lord Simon); He Kaw Teh v R
(1985) 157 CLR 523 at 533-4 (Gibbs CJ), quoting The Queen v Sault Ste Marie
[1978] 2 SCR 1299 at 1325-6; at 565 (Brennan J), quoting The Queen v O’Connor
(1980) 146 CLR 64 at 96-7.

69 Crimes Act 1958 (Vic), s. 35(1)(a) and (b) define ‘sexual penetration’ in very
broad terms to include all forms of non-consensual penetration, whether via
penile penetration of the oral, anal and vaginal orifices (s. 35(1)(a)) or via
penetration of the anal or vaginal orifices (s. 35(1)(b)) with a part of one’s body
(other than a penis) or an object; in the later case, the penetration must have
been for a purpose other than to receive legitimate medical or hygienic treatment.
his or her consent. Section 38(2)(a)(i) then provides that this must occur while the accused is aware that the other person is not or might not be consenting. Section 38(2)(a) (ii), inserted by way of the Crimes Amendment (Rape) Act 2007, permits the prosecution to prove as an alternative to s. 38(2)(a)(i) (i), that the non-consensual sexual penetration occurred without the accused having given any thought as to whether the other person was not or might not have been consenting. Therefore, despite the clear import of s. 38(2) (a)(ii), which is to make it possible to convict without proof of what amounts to knowledge or recklessness concerning the victim's lack of consent, the requirement that one must have intentionally sexually penetrated another person represents an unmistakable mens rea element in the crime of rape under s. 38(2)(a).

A mens rea must also be proved when rape is prosecuted under s. 38(2)(b). Under this provision it is necessary to prove that following sexual penetration, the accused failed to withdraw from another person who was not consenting 'upon becoming aware that the other person [was] not consenting or might not [have been] consenting'. It is noteworthy, however, that under s. 38(2)(b), there is no analogue to s. 38(2)(a)(ii) whereby a conviction can be obtained by proving that the accused failed to withdraw from a person who was not consenting without having given any thought as to whether the other person was not or might not have been consenting; rather, s. 38(2)(b) expressly requires, as an essential element, that the accused failed to withdraw upon becoming aware that the other person was not or might not have been consenting. Thus, s. 38(2)(b) is also an offence of mens rea.

Finally, s. 38(4)(b)(ii) is to the same effect as s. 38(2)(a)(ii) in that these subsections, which were also added via the Crimes Amendment (Rape) Act 2007, allow for conviction upon proof that the accused gave no thought whatever to whether the victim was not or might not have been consenting. Section 38(4)(b)(iii), however, must be read in conjunction with s. 38(3)(a) and (b). Though these particular subsections employ the word 'compels' which is defined in s. 38(4) as compelling the victim '[by force or otherwise]' to sexually penetrate the offender or another person, ss 38(3) and (4) do not expressly refer to the mens reas of intention, knowledge (also used interchangeably with the word 'awareness') belief, or recklessness. It is the writer's view, however, that one cannot compel a person to sexually penetrate another '(by force or otherwise)' without an intention to do the same.

70 For purposes of rape, indecent assault, and various other sexual offences contained in subdivisions (8A)-(8D) of the Crimes Act 1958 (Vic), the circumstances under which a person is deemed to have not given consent are set forth in s. 36 of the Act.
71 Arenson, Bagaric and Gillies, above n. 60 at 25.
72 Ibid.
73 Saadv The Queen (1987) 29 A Crim R 2 at 21, 23.
74 One acts with 'actual' intention in regard to a result, fact or circumstance if he or she acts with the subjective intention of bringing about that result, fact or circumstance; Cuncliffe v Goodman [1950] 2 KB 237 at 253. In addition, a person is regarded in law as intending a result, fact or circumstance if he or she engages in an act with knowledge or an awareness that the result, fact or circumstance is
Thus, the crime of rape is technically one of mens rea because irrespective of how the offence is alleged to have been committed under s 38, a mens rea is a constituent element of the offence. As noted previously, any offence that requires proof of one or more mens reas or any form of negligence as a constituent element is regarded as requiring proof of fault and, therefore, is not a crime of strict liability. By definition, therefore, rape is not an offence of strict liability. The more important question, therefore, is whether the advent of the Crimes Amendment (Rape) Act 2007 has, for practical purposes, transformed rape into an offence of absolute liability when the prosecution alleges rape under s. 38(2)(a)(ii) or a combination of s. 38(3) and s. 38(4)(b)(ii)?

We noted earlier that technically, each of the foregoing subsections constitute offences of mens rea by virtue of their requirement that the accused must intentionally sexually penetrate another person. Because the requisite intention is regarded as a mens rea and, therefore, a type of fault, it is also technically correct to say that as none of these offences is of the strict liability genre, the Proudman defence is unavailable to the accused. Consequently, this defence cannot be used as a means of interjecting a negligence fault element into these offences through the back door; that is, it is not open to the accused to satisfy the evidential burden on the Proudman defence, thereby forcing the prosecution to assume the legal burden of persuading the fact-finder, beyond reasonable doubt, that the accused did not hold an honest and well-founded belief in the existence of facts which, if true, would have made his or her

practically certain to result from the act in question: R v Hurley [1967] VR 526 at 540; R v Brown (1975) 10 SASR 139 at 154; Hyam v DPP [1975] AC 55, 74 (Lord Hailsham LC). Although a far less serious form of sexual assault than rape, the offence of indecent assault is also a crime of mens rea in that it requires, inter alia, that an ‘assault’ be proved: Crimes Act 1958 (Vic), s. 39. In this context, ‘assault’ denotes the common law offence of common assault which can consist of either the ‘psychic’ or ‘battery’ genre: R v Lynsey [1995] 3 All ER 654 at 654. Regardless of which of the two limbs is alleged in order to satisfy the ‘assault’ component of indecent assault, it is now well settled that both limbs are offences of mens rea; that is, ‘psychic’ type common assault requires, as a constituent element, that the accused must intentionally or recklessly place the victim in apprehension of an immediate and unlawful touching of his or her person: MacPherson v Brown (1975) 12 SASR 184 at 190 (Bray CJ); R v Bacash [1981] VR 923 at 935; R v Williams (1990) 50 A Crim R 213, 220; R v Venna [1975] 3 WLR 737. ‘Battery’ type common assault, on the other hand, requires as an essential element that the accused must intentionally or recklessly touch the victim: R v Venna [1975] 3 WLR 737; R v Williams (1983) 78 Cr App R 276 at 279. For a thorough discussion of both limbs of the common law offence of common assault, see Arenson, Bagaric and Gillies, above n. 60 at 261-4. Indecent assault is also similar to rape in that a conviction can be obtained without proving that the accused was aware that the victim was not or might not have been consenting; specifically, s. 39(2)(b) provides that ‘[a] person commits indecent assault if he or she assaults another person in indecent circumstances ... while not giving any thought to whether the person is not consenting or might not be consenting: Crimes Act 1958 (Vic), s. 39 (2)(b). As with the various provisions of s. 38 of the Crimes Act 1958 (Vic), this subsection was inserted by way of the Crimes Amendment (Rape) Act 2007.

75 Gillies, above n. 32 at 46, 80-2.
76 Arenson, Bagaric and Gillies, above n. 60 at 31, 503-4.
77 Ibid.
conduct lawful. At first glance, it appears that the foregoing rape provisions represent a simple and straightforward example of offences of \textit{mens rea} that, by definition, preclude the interposition of the Proudman defence.\textsuperscript{79} Upon further analysis, however, a cogent argument can be constructed that s. 38(2)(a)(ii) or a combination of s. 38(3) and s. 38(4)(b)(ii), though offences of \textit{mens rea} in only the most strict technical sense, are effectively offences of absolute liability.

Though it is well settled that an offence which requires an accused to act with an \textit{intention} of bringing about one or more of the consequences of a relevant offence is regarded as one of \textit{mens rea},\textsuperscript{80} in practical terms there has rarely, if ever, been a prosecution for rape in which an accused argued that he or she was entitled to an acquittal on the basis that the Crown failed to meet either its evidential or legal burden of proof on the issue of whether the accused intentionally sexually penetrated the alleged victim.\textsuperscript{81} To be sure, even under the broad definition of ‘sexual penetration’ set forth in s. 35(1)(a) and (b) of the Crimes Act 1958 (Vic),\textsuperscript{82} it would be difficult to envision a circumstance in which an accused sexually penetrated another person or compelled another person to do so by accident or means that were unintentional. Thus, for all practical purposes, the \textit{mens rea} requirement of an intention to sexually penetrate would be all but meaningless were it not for the fact that it technically transforms the various rape offences under s. 38 into ones of \textit{mens rea}—thereby precluding the accused from raising the Proudman defence.\textsuperscript{83}

Moreover, in instances where the accused is charged under s. 38(2)(a)(ii) or a combination of s. 38(3) and s. 38(4)(b)(ii), all of which relieve the prosecution of the burden of proving that the accused was aware that the victim was not or might not have been consenting—a cogent argument exists that for all practical purposes, the Crown is able to procure a conviction without proof of fault. The success or failure of this argument will necessarily depend on whether the accused’s failure to give any thought whatever to the question of whether the complainant was not or might not have been consenting to the alleged sexual penetration amounts to negligence \textit{per se}. Subsections (2)(a)(ii) and

\textsuperscript{79} Above n. 78.
\textsuperscript{81} The writer was unable to find any cases, reported or unreported, in which such an argument was raised. Though a conviction for indecent assault can now be obtained without proof that the accused was aware or at least reckless vis-à-vis the victim’s lack of consent, this crime is distinguishable from rape in that it requires proof of what can be a very problematic \textit{mens rea} of the type set out above, n. 74.
\textsuperscript{82} Section 35(1)(a) and (b) provides: ‘sexual penetration means—(a) the introduction (to any extent) by a person of his penis into the vagina, anus or mouth of another person, whether or not there is emission of semen; or (b) the introduction (to any extent) by a person of an object or a part of his or her body (other than the penis) into the vagina or anus of another person, other than in the course of a procedure carried out in good faith for medical or hygienic purposes’.
(4)(b)(ii) of s. 38 are conspicuously devoid of the word ‘negligence’, and one can envisage circumstances in which a person can act without negligence despite sexually penetrating another without turning his or her mind to the question of whether the complainant was not or might not have been consenting to the same. If, for example, a newlywed couple had experienced several years of uninterrupted nightly sexual encounters in which consent was always given irrespective of which party initiated the activity, one would be hard pressed to argue that either party would have acted negligently if he or she proceeded to sexually penetrate the other in their customary manner without giving any thought as to whether the other was not or might not have been consenting. Although there is little doubt that situations will arise in which a failure to turn one’s mind to the question of consent would amount to ordinary or criminal negligence, suffice it to say for purposes of s. 38(2)(a)(ii) and (4)(b)(ii) that neither criminal nor ordinary negligence is required in order to convict. The practical result is that rape, one of the most heinous crimes in terms of both its potential punishment and the opprobrium it carries upon conviction, can now be prosecuted as an offence of absolute liability, depending upon which of the various provisions it is prosecuted under s. 38.

On another view, one might argue that it will only be in the most unusual of circumstances that the Crown will be relegated to proving that the accused gave no thought as to whether the victim was not or might not have been consenting to the alleged sexual penetration. It is altogether legitimate to ask, therefore, why Parliament found it necessary to include these subsections that dispense with the need to prove that the accused was aware that the victim was not or might not have been consenting? It is apparent to this observer that these subsections were included to ensure a conviction in cases where the prosecution may encounter insuperable difficulty in proving that the accused acted with an awareness that the victim was not or might not have been consenting. As there is nothing that prevents the Crown from alleging inconsistent theories as to how an offence was committed, the purpose of dispensing with the need to prove that the accused was aware that the victim was not or might not have been consenting can be none other than to ensure that the accused does not escape liability for want of sufficient evidence to prove this particular mens rea. Whatever the reason for dispensing with the need for the Crown to prove the requisite awareness or recklessness vis-à-vis consent, Parliament’s decision to do so has effectively, albeit not technically, transformed the crime of rape under s. 38 into one of absolute liability, save for prosecutions under s. 38(2)(b) which require proof of a mens rea that, far from a meaningless state of mind that is essentially taken for granted, is often the most contentious issue in rape trials.

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

85 According to the Victorian Law Reform Commission (Law Reform Commission of Victoria, Rape: Reform of Law and Procedure, Appendixes to Interim Report No. 42 (1991) 84–7) in 74 per cent of rape trials the defendant argued that the Crown
If one accepts that in substance, Parliament has transformed all the provisions of s. 38 (save for s. 38(2)(b)) into crimes of absolute liability, then several comments are apposite. The first is that this offends the common law presumption that all common law and statutory offences are rebuttably presumed to be of the mens rea genre. Secondly, although the High Court’s decision in Hew Kaw Teh noted several factors that a court should consider in determining whether this presumption has been rebutted, all of the justices agreed that the severity of the possible penalty upon conviction was a paramount consideration militating in favour of a finding that the presumption has not been rebutted. Thirdly, as noted earlier, crimes of strict or absolute liability are justified in part on the basis that they are typically offences of a regulatory or welfare nature that result in very minor penalties and little or no social stigma in the event of a conviction. Readers are well aware that few, if any, offences carry more severe penalties or negative social stigmas upon conviction than the crime of rape. Lastly, to permit a conviction for a crime such as rape without requiring any meaningful proof of fault is to trivialise the crime of rape.

4. Conclusion

The Australian system of criminal justice is an adversarial one that is comprised of certain sacrosanct tenets that include, first and foremost, the presumption that all accused persons are cloaked with a presumption of innocence that remains with them unless and until that presumption is rebutted by evidence sufficient to persuade the fact-finder that each and every element of the offence or offences charged, the accused’s complicity therein and, in many cases, that at least one element which comprises an affirmative or secondary defence, have been proved or negated beyond a reasonable doubt.

Despite a conspicuous lack of authority that this tenet applies in all criminal prosecutions except those in which an accused is charged with one or more sexual assault offences or perhaps an offence that is related to terrorism or national security, a disturbing trend has emerged over

had failed to prove the case either because the victim was consenting, the defendant believed the victim to be consenting or a combination of the two. Of 45 appeals to the Victorian Court of Appeal between 2010 and 2011, 10 were based on issues of consent including, e.g., Wilson v The Queen [2011] VSCA 328; LA v The Queen [2011] VSCA 293; Khan v The Queen [2011] VSCA 286.

86 Hew Kaw Teh v R (1985) 157 CLR 523 at 528-9 (Gibbs CJ); at 552 (Wilson J); at 565-567 (Brennan J); at 590-1 (Dawson J).
87 Ibid, at 530 (Gibbs CJ); at 546 (Mason J); at 567 (Brennan J); at 595 (Dawson J).
89 Arenson, Bagaric and Gillies, above n. 60 at 30-1, 36-7; Arenson and Bagaric, above n. 3 at 15-16, 21.
90 See, e.g., Terrorism (Commonwealth Powers) Act 2002 (Cth); Anti-Terrorism Act 2004 (Cth); Anti-Terrorism Act (No. 2) 2005 (Cth). Persons held on suspicion of these types of crimes can be held in custody for longer periods of time without trial.

416
the past few decades in Victoria and throughout Australia\textsuperscript{91} that has accorded such preferential treatment to sexual assault complainants as to call into question the continued vitality of this tenet in prosecutions for offences of this type. Readers will recall, for example, that the time limitations for filing indictments and commencing trials in Victoria are significantly truncated, thereby evincing a greater sense of urgency when an accused is charged with one or more sexual assault crimes.\textsuperscript{92} Similarly, a distinctly different set of rules applies at committal hearings that involve allegations of sexual assault, one of the most significant being that the accused is barred from so much as seeking leave of court to compel a child or cognitively impaired complainant whose written statement is either contained in a hand-up-brief or has been taken and transcribed as a result of a compulsory examination—to appear for the purpose of being cross-examined by the accused or his or her legal adviser.\textsuperscript{93} In sharp contrast, with all indictable offences other than sexual assaults, the accused is not only permitted to seek, but is typically granted leave of court to compel witnesses who have given written statements contained in the prosecution’s hand-up-brief to be brought to the committal hearing and made available for cross-examination by the accused or his or her legal practitioner.\textsuperscript{94}

Another important example of this disturbing trend is the so-called ‘rape shield’ provisions that exist in every Australian jurisdiction.\textsuperscript{95} As previously noted, while an accused is generally permitted to adduce all exculpatory and legally admissible evidence, a different set of rules applies when an accused seeks to adduce evidence of the past sexual conduct of a complainant in prosecutions where one or more counts of sexual assault are charged. While there is some degree of variance in the obstacles that must be surmounted in order for an accused to either cross-examine the complainant or otherwise adduce evidence of his or her past sexual history,\textsuperscript{96} most of the ‘rape shield’ provisions require the accused to seek and obtain leave of court as a prerequisite to adducing such evidence. More importantly, most of these statutes also require that in order to obtain such leave, the accused must demonstrate not only that the past sexual conduct has some degree of relevance to an issue in the case, the credit of the complainant, or both, but ‘substantial’ relevance to one or the other—or both.\textsuperscript{97}

\textsuperscript{91} See Criminal Procedure Act 1986 (NSW), ss 91–93, Criminal Procedure Act 2009 (Vic), ss 123–124, Evidence Act 1977 (Qld), ss 21AG, 21AI, Summary Procedure Act 1921 (SA), s. 106(3), Magistrates Court Act 1930 (ACT), s. 90AB, Justices Act 1928 (NT), s. 105AA all of which prevent the accused from cross-examining a complainant at a committal hearing; Crimes Act 1914 (Cth), Part IAD, Div 3, Evidence (Miscellaneous Provisions) Act 1991 (ACT), s. 38D, Criminal Procedure Act 1986 (NSW), s. 294A which prevent an unrepresented accused from cross-examining the complainant.

\textsuperscript{92} Criminal Procedure Act 2009 (Vic), ss 163, 211.

\textsuperscript{93} Criminal Procedure Act 2009 (Vic), s. 123; see also Fox, above n. 8.

\textsuperscript{94} Criminal Procedure Act 2009 (Vic), s. 124; see also Fox, above n. 8 at 222.

\textsuperscript{95} Lowery v R [1974] AC 85 at 101–3; Re Knowler [1984] VR 751 at 768.

\textsuperscript{96} Lowery v R [1974] AC 85 at 101–3; Re Knowler [1984] VR 751 at 768.

\textsuperscript{97} In Victoria, this is the standard of relevance required in order to obtain leave under the Criminal Procedure Act 2009 (Vic), ss 339–352.
If one accepts the practical view that the statutory crime of rape in Victoria as encompassed in s. 38(2)(a)(ii) or a combination of s. 38(3) and s. 38(4)(b)(ii) of the Crimes Act 1958 (Vic) is one of absolute liability, there is a cogent argument to be made that allowing rape convictions to be obtained without proof of fault is inimical to the common law's long-standing rebuttable presumption that all criminal offences are of the *mens rea* type, especially those which are regarded as serious in terms of the possible penalty to be imposed and the degree of opprobrium that is likely to follow upon conviction. Although the writer has expressed the view that the foregoing rape provisions are more accurately depicted as offences of absolute liability, it would serve little or no purpose at this juncture to re-canvass either the underlying justifications for offences of strict or absolute liability or the various factors that are taken into account in determining whether an offence is of the strict or absolute liability genre. Suffice it to say for present purposes that permitting rape to be prosecuted as an offence of strict or absolute liability flies in the face of not only the common law's rebuttable presumption that all criminal offences are of the *mens rea* genre, but also the justifications typically enunciated in support of such offences. This observation, viewed in conjunction with the special provisions that apply at committal hearings and trials that involve charges of sexual assault, raise important questions concerning both the wisdom and putative justification for the blatant preferential treatment that Victoria and other jurisdictions have bestowed on prosecutors and alleged victims in criminal proceedings involving allegations of sexual assault.

In a perfect world, the various legislatures and courts that enact crime legislation and incrementally develop the common law respectively would be comprised solely of well-intentioned and conscientious persons whose sole objective is to act in the best interest of those who will be subject to their actions. While this is undoubtedly true in many instances, one would be naïve to think that pandering to public sentiment for political or other illicit purposes has not been an important factor in their decision-making process. If one accepts this proposition, the question to be asked is which voting demographic is not only the most populous and capable of exerting the greatest influence on those

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98 Hew Kaw Teh v R (1985) 157 CLR 523 at 528–59 (Gibbs CJ); at 552 (Wilson J); at 565–567 (Brennan J); at 590–1 (Dawson J).

99 Sweet v Parsley [1970] AC 132 at 150; Holt v Cameron (1979) 27 ALR 311 at 315; Holt v Cameron (1980) 142 CLR 342 at 345; Gammon (Hong Kong) v Attorney-General (Hong Kong) [1984] 2 All ER 503, 508.

100 Readers may recall that one such factor, and a major one, is the severity of the possible penalty to be imposed in the event of a conviction. Hew Kaw Teh v R (1985) 157 CLR 523 at 530 (Gibbs CJ); at 556 (Wilson J); at 566–7 (Brennan J); at 597 (Dawson J).

101 Hew Kaw Teh v R (1985) 157 CLR 523 at 528–9 (Gibbs CJ); at 552 (Wilson J); at 565–7 (Brennan J); at 590–1 (Dawson J).

102 See above nn. 31–40. In addition, and as noted earlier, the severity of the possible penalty to be imposed upon conviction was cited by several High Court justices as an important factor to consider in determining whether the presumption has been rebutted: Hew Kaw Teh v R (1985) 157 CLR 523 at 530 (Gibbs CJ); at 556 (Wilson J); at 566–7 (Brennan J); at 597 (Dawson J).
Rape in Victoria as a Crime of Absolute Liability

responsible for enacting crime legislation or incrementally developing the common law, but likely to believe that crimes predominantly directed at women are deserving of disparate and special treatment under the law? It appears that the voting demographic most likely to meet these criteria is none other than women. In support of this view, it is accurate to note that although rape falls just short of the very top of the criminal calendar in terms of the seriousness of the possible penalty to be imposed upon conviction, it is fair to say that rape is generally regarded as an offence of violence, and particularly against women. This is not to disparage women who hold this point of view, especially in light of the appalling nature and consequences of the crime of rape and the natural desire of those who are most often victimised by it to seek the maximum protection under the law. That aside, we purport to live in a society in which all persons stand on equal footing before the law. We do a great disservice to this laudable aspiration when one group is more equal than others, and this is so irrespective of the justifications offered in support of the disparate treatment accorded to any particular group.

It should come as no surprise, therefore, that legislators, judges and magistrates are prone to exhibit, or at least appear to exhibit, a special sensitivity to the rules that govern rape prosecutions at both committal hearings and trials. To be sure, one of the most hackneyed clichés known to the criminal law is that ‘she has already been raped once and now she must endure the horror and indignity of being raped again in the witness box on cross-examination’. This cliché is perhaps the most illuminating example of the reality that in criminal prosecutions generally, and particularly those involving allegations of rape, the storied presumption of innocence has been effectively reversed or, at best, eviscerated to the point where it is now viewed as nothing more than a platitude that comports with the oft-stated notion that we are a free, democratic and fair society that abhors wrongful conviction. This reversal or evisceration is especially ominous when one considers the regularity with which convictions for such serious crimes as rape and murder have been overturned in recent decades through the advent of scientific advances such as identifications based on DNA and fibre evidence.

As any experienced criminal law practitioner is acutely aware, and in the opinion of the writer who falls within that category, the natural tendency of jurors is far removed from any assumed proclivity to look at an accused in the prisoners’ dock and silently think, ‘there sits an innocent man or woman’. To the contrary, it has been the writer’s experience that although the storied presumption of innocence exists in theory, jurors often apply the reverse presumption and it is only through effective trial advocacy and the use of illuminating metaphors that one

103 Crimes Act 1958 (Vic), s. 38(1). Rape is a level punishment level 2, punishable by a maximum of 25 years’ imprisonment.
104 See, e.g., http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php, accessed 15 August 2012. This study reveals that there have been 280 post-conviction DNA exonerations in the USA. Seventeen of persons exonerated served time on death row: ibid.
can succeed in appealing to the jurors’ sense of duty and fairness in adhering to a trial judge’s direction that the accused comes into court cloaked with a presumption of innocence that remains with him or her at all times unless and until it is displaced and overcome by evidence that persuades the fact-finder of the accused’s guilt by the requisite standard of proof beyond a reasonable doubt.

In the writer’s view, and for the reasons set out above, far too often the true purpose of a criminal trial has been overlooked, forgotten or ignored by legislators, judges, magistrates and the public at large. More to the point, and consonant with the reversal or evisceration of the presumption of innocence, a criminal trial is often viewed as nothing more than a vehicle through which the formality of convicting those who are guilty of crimes is officially consummated. The fact that rape is generally viewed as amongst the most serious, heinous and appalling of crimes must be seen as a major contributing factor in the preferential treatment accorded to prosecutors and complainants where allegations of rape and other sexual assaults are made. If the genuine purpose of ensuring a fair trial and the concomitant substantive and procedural safeguards accorded to the accused are to serve effectively as a vanguard against the palpable injustice of wrongful conviction, it inexorably follows that all criminal offences must be adjudicated by the same set of rules, none of which is more important than the presumption of innocence.105 If this presumption is to be accorded more than merely lip service and treated with the respect and importance it deserves, there can be no justification for its evisceration of that or any other substantive or procedural safeguard that exists as part and parcel of the notion of a fair trial. To be sure, the more serious the crime insofar as the potential penalty and opprobrium that are likely to follow upon conviction, the greater the need to adhere to the safeguards that are regarded as indispensible to a fair trial and its sacrosanct function as a vanguard against the evil of wrongful conviction.

105 Readers should be aware that the ominous trend that is the subject of this article is by no means limited to Victoria and, in fact, is common to practically every jurisdiction in the Western world that follows the adversarial system of criminal justice. To cover the specific preferential rules that typify rape and other sexual assault prosecutions in other jurisdictions would be so time-consuming and, in many instances repetitious, as to be better suited for a lengthy treatise rather than a journal article of this type.