THE DEMISE OF EQUALITY BEFORE THE LAW: THE PERNICIOUS EFFECTS OF POLITICAL CORRECTNESS IN THE CRIMINAL LAW OF VICTORIA

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ABSTRACT

The Crimes Amendment (Sexual Offences and Other Matters) Act 2014 (Vic) ushered in profound changes to the statutory offence of rape in Victoria. In particular, it replaced it with a new version that added a hybrid subjective/objective mens rea of the offence. The discussion to follow will examine the extent to which this legislation is consonant with the most rudimentary notions of fairness, common sense and the cardinal tenet that all persons are equal before the law. Further, this discussion will be undertaken against the backdrop of the High Court's decision in Zecevic v The Queen, s 3B of the Crimes (Homicide) Act 2005 (Vic) and ss 3(2) and 3(3) the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic) which, collectively, abolished the provocation and excessive force limbs of the offence of voluntary manslaughter in Victoria. Finally, the article will focus on the stated objectives of the forgoing changes and, perhaps more importantly, the extent to which gender based considerations provided the impetus for the same.

I INTRODUCTION

In *Zecevic v Director of Public Prosecutions*,[1] the High Court of Australia confronted the issue of whether the excessive force manslaughter rule[2] should be retained or abolished as part and parcel of the Australian common law doctrine.[3] In addressing this question, the Court began by formulating a general common law rule of self-defence in which Wilson, Dawson and Toohey JJ, with whom Mason CJ and Brennan J concurred,[4] posited the rule to be 'whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did'.[5] The Court then focused on the common law excessive force manslaughter rule under which an accused can be acquitted of murder and convicted instead of the lesser offence of voluntary manslaughter, provided the jury is not only persuaded that reasonable doubt exists as to whether the accused genuinely believed that it was necessary to resort to deadly force in order to protect himself or herself against the deceased's unlawful use of the same, but also convinced

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1 *Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645 *('Zecevic')*.

2 Also referred to as the rule of imperfect or excessive self-defence: *People v Gott*, 117 Cal.App.3d 125, 173 Cal.Rptr. 469, 472 (1981); Rollin Morris Perkins and Ronald N Boyce, *Criminal Law* (Foundation Press, 3rd ed, 1982) 1142; N C O'Brien, 'Excessive Self-Defence: A Need for Legislation' (1982-83) 25 *Criminal Law Quarterly* 441, 449–55; Stanley Yeo, 'The Demise of Excessive Self-Defence in Australia' (1988) 37 *International and Comparative Law Quarterly* 348; P Fairall, 'The Demise of Excessive Self-Defence Manslaughter in Australia: A Final Obituary' (1988) 12 *Criminal Law Journal* 24.

3 *Zecevic* (1987) 162 CLR 645, 651–3.

4 Ibid 656 (Mason CJ); at 670 (Brennan J).

5 Ibid 661 (Wilson, Dawson and Toohey JJ); at 666 (Brennan J); at 683 (Gaudron J).

beyond reasonable doubt that such belief was not based upon reasonable grounds.[6]

It is important to emphasise that the underpinning of the excessive force manslaughter rule, as with the offence of *voluntary manslaughter* generally,[7] is that the accused has committed what would otherwise

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6 *R v Howe* (1958) 100 CLR 448, 460–1 (Dixon CJ); at 464 (McTiernan J); at 464 (Fullagar J) ('*Howe*'); *Viro v R* (1978) 141 CLR 88, 146–7 (Mason CJ) ('*Viro*'). Although in *Palmer v R* [1971] AC 814 the Privy Council declined to follow *Howe*, it was unanimously held in *Viro* that the High Court was no longer bound by decisions of the Council: *Viro* (1978) 141 CLR 88, 93 (Barwick CJ); at 121–2 (Gibbs J); at 129–30 (Stephen J); at 135 (Mason J); at 150–2 (Jacobs J); at 166 (Murphy J). Although the Court's decision in *Viro* followed the principles enunciated in *Howe*, Wilson, Dawson and Toohey JJ were of the opinion that in *Viro*, Gibbs, Jacobs and Murphy JJ concurred with the views of Mason J 'only for the purpose of achieving a measure of certainty in a situation of diversity of opinion': *Zecevic* (1987) 162 CLR 645, 661.

7 The common law offence of voluntary manslaughter is a killing that would otherwise constitute murder, except for the fact that it is reduced to the former offence due to extenuating circumstances that the law regards as sufficient to warrant the reduction. Further, voluntary manslaughter at common law is divided into two categories. In the first, the accused causes the death of another person with a requisite *mens rea* and temporal coincidence required for the offence of murder, but is induced into killing because of provocative conduct on the part of the deceased which the law regards as a sufficient mitigating circumstance to negate the requisite malice or forethought for murder and reduce the conviction to voluntary manslaughter: *Parker v the Queen* (1963) 111 CLR 610, 624–5; *Parker v the Queen* (1964) 111 CLR 665, 676–7; *Moffa v the Queen* (1977) 13 ALR 225, 230–1 (Barwick CJ); at 233 (Gibbs J); *Stingel v the Queen (*1990) 97 ALR 1, 12; *Masciantonio v the Queen* (1995) 129 ALR 575, 580; *Green v the Queen* (1997) 148 ALR 659, 660–1. The second category of voluntary manslaughter also involves a killing that would otherwise constitute murder, but it too is reduced to the offence of voluntary manslaughter due to the fact that the accused genuinely believed that he or she was acting in self-defence or the defence of another, albeit a belief that is later determined to have been objectively unreasonable under the circumstances: *Zecevic* (1987) 162 CLR 645, 650–3 (Barwick CJ); at 683–5 (Gaudron J). This belief can relate to the necessity to resort to the use of force in self-defence or the defence of another, the extent of force required to defend oneself or another, or both: ibid. In each category, the mitigating circumstances under which the killing occurred are regarded in law as sufficient to negate the requisite malice of aforethought to convict for the offence of murder at common law: *Parker v the Queen* (1963) 111 CLR 610, 624, 626–7; *Zecevic* (1987) 162 CLR 645, 683–5; *United States v Paul* 37 F 3d 496, 499 (9th Cir 1994) 'Manslaughter is distinguished from murder by the absence of malice, one of murder's essential elements'; Eric J

constitute murder, save for the fact that the killing occurred under circumstances which the law regards as sufficiently mitigating to negate the malice aforethought requirement of murder.[8] This underpinning is further buttressed by the fact that convictions for voluntary manslaughter which emanate from the successful interposition of the provocation defence are commonly regarded as concessions to human frailty; specifically, the law's longstanding recognition that when confronted by extremely provocative conduct on the part of the deceased, ordinary persons might be provoked into acting in the same manner as the accused and resort to the use of deadly force.[9] Thus, the continued vitality of provocation as a partial defence to murder (and certain statutory variations of murder such as, for example, attempted murder and

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Edwards, 'Excessive Force in Self-Defence: A Comment' (1964) 6(4) *University of Western Australia Law Review* 457, 458. For a discussion of the elusive concept of 'malice of aforethought', see below footnote 8.

8 For a succinct discussion of the term 'malice aforethought', see L Waller and C R Williams, *Criminal Law, Text and Cases* (LexisNexis, 10th ed, 2005) 160–2; KJ Arenson, M Bagaric and P Gillies, *Australian Criminal Law in the Common Law Jurisdictions: Cases and Materials* (Oxford University Press, 4th ed, 2015) 30:

> '[T]he presence or absence of malice aforethought does not depend on whether the accused acted with actual malice or prior design … suffice it to say for present purposes that malice aforethought is nothing more than a term of art that is used to depict the overall conduct of one who kills under any of the circumstances amounting to murder at common law. Conversely, if the accused's conduct does not amount to any form of murder at common law, s/he has not acted with malice aforethought.'

The term was discussed in *Parker v R* (1963) 111 CLR 610, 626–8 (Dixon CJ) (in so far as the partial defence of provocation was deemed to negate the malice aforethought component of murder and thereby reduce the conviction to that of voluntary manslaughter rather than murder). Similarly, see *Zecevic* (1987) 162 CLR 645, 675–6, 679–81 (Deane J); at 684–7, (Gaudron J) (an accused's genuine belief that it was necessary to resort to the use of deadly force in self-defence was deemed to negate the malice aforethought element of murder under the excessive force manslaughter doctrine).

9 *Curtis* (1756) Fost 137; 168 ER 67, 68. For a thorough exposition of provocation as a partial defence to the crime of murder, both statutorily and as a matter of common law doctrine, see P Fairall and S Yeo, *Criminal Defences in Australia* (LexisNexis 4th ed, 2005) 188–218.

wounding with intent to kill)[10] is not only steeped in longstanding common law and statutory precedent throughout the modern world,[11] but supported by considerations of logic, fairness and compassion. Is it logical, fair or compassionate to treat persons who kill for reasons of revenge, hire or thrill, for example, in the same manner as those who kill in response to severe provocation or under a genuine, albeit objectively unreasonable belief, that deadly force is required in self-defence or the defence of others? In the view of many, the answer is self-evident. For centuries, therefore, the law in many jurisdictions has opted to draw an important distinction between these two categories by classifying the former as murder and the latter as voluntary manslaughter.[12] This raises

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10 *Thompson* (1825) 168 ER 1193; *Bourne* (1831) 172 ER 903; *Thomas* (1837) 173 ER 356*; Hagan* (1837) 173 ER 445.

11 See, for example, *Crimes Act 1900* (NSW) s 23; *Crimes Act 1900* (ACT) s 13; *Criminal Code 1899* (Qld) s 304; *Criminal Code* (NT) sch 2, s 158. In the UK, the term provocation is no longer used, but the defence remains under the *Coroners and Justice Act 2009* (UK) s 54 (referred to as 'Loss of Control'). In South Australia, the defence remains viable as a matter of common law doctrine: *R v Lindsay* [2014] SASCFC 56.

12 Hemming puts the development of the doctrine in the 17th century while Edwards traces its development back to the removal of the benefit of the clergy from cases of 'murder of malice prepensed' in the early-16th century; see Andrew Hemming, 'Provocation: A Totally Flawed Defence that has no Place in Australian Criminal Law Irrespective of Sentencing Regime' (2010) 14 *University of Western Sydney Law Review* 1, 2; Edwards, above n 7. In Victoria, Tasmania, Western Australia and New Zealand, the defence of provocation has been abolished: *Crimes Act 1958* (Vic) s 3B; *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas); *Criminal Law Amendment (Homicide) Bill 2008* (WA); *Crimes (Provocation Repeal) Amendment Act 2009* (NZ). In the Second Reading Speech in New Zealand, three factors were cited for the abolition of this defence: (1) the fact that a conviction for murder no longer carried a mandatory life imprisonment or death sentence; (2) the fact that provocation didn't reduce culpability in less serious crimes than murder; and (3) that the defence was most often being used in cases of 'gay panic', meaning heterosexual men killing homosexual men who made advances on them.

the question of why the High Court in *Zecevic* chose to abolish the excessive force manslaughter category of voluntary manslaughter.[13]

II ZECEVIC REVISITED

As the *Crimes Amendment (Sexual Offences and Other Matters) Act* 2014 (Vic) will be examined against the backdrop and analysis of the High court's decision in *Zecevic v Director of Public Prosecutions,*[14] s 3B of the *Crimes (Homicide) Act 2005* (Vic) and ss 3(2) and 3(3) of the *Crimes Amendment (Abolition of Defensive Homicide) Act* 2014 (Vic), it is appropriate to examine the justifications enunciated by the High Court in *Zecevic* for dispensing with the excessive force manslaughter rule. One such justification proffered by the majority in *Zecevic* was its unsubstantiated belief that abolishing the rule would rarely affect the outcome of cases because a jury's finding that the accused lacked reasonable grounds for his or her belief that deadly force was necessary in self-defence or the defence of others would inexorably lead to the conclusion that the accused acted without a genuine belief in the necessity to resort to deadly force, thus resulting in a conviction for

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13 By virtue of statutes in South Australia and New South Wales, the excessive force manslaughter doctrine has now been reinstated: *Criminal Law Consolidation Act 1935* (SA) s 15; and *Crimes Act 1900* (NSW) s 421. Victoria had also reinstated the doctrine by virtue of the *Crimes (Homicide) Amendment Act 2005* (Vic) ss 9AC and 9AD that must be read together. Section 9AD referred to the lesser crime as 'defensive homicide' rather than voluntary manslaughter, although there is no substantive difference between the two offences insofar as the way they apply to the excessive force manslaughter rule. See also P Fairall and S Yeo, *Criminal Defences in Australia*, (LexisNexis, 4th ed, 2005) 178–9; S Yeo, 'The Demise of Excessive Self-Defence in Australia' (1988) 37 *International and Comparative Law Quarterly* 348; S Yeo, 'Revisiting Excessive Self-Defence (2000) 12 *Current Issues in Criminal Justice* 39; S Yeo, 'Excessive Self-Defence, Macauley's Penal Code and Universal Law' (1991) 7 *Australian Bar Review* 223. The rule was again abolished by the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (No. 63 of 2014)* (Vic) s 3.

14 *Zecevic* (1987) 162 CLR 645.

murder.[15] This comes perilously close to asserting that the excessive force manslaughter rule is nearly always superfluous because with or without its application, juries are all but certain to arrive at the same verdict; that is, if the accused can satisfy both the subjective and objective tests of self-defence or the defence of others, the verdict will be an acquittal on the charge of murder. If, on the other hand, the accused cannot satisfy the objective test, then the accused is all but certain to be convicted of murder on the basis that the jury would almost always find that the accused had also failed to satisfy the subjective test.

In analyzing the court's reasoning on this point, the first and most poignant question that arises is why the court would undertake to abrogate the excessive force manslaughter rule if it was sincere in its stated credo that doing so would have little or no impact on the verdicts that would be reached if the excessive force manslaughter rule were to remain in effect? Indeed, the court's putative belief on this question is belied by numerous instances in which juries have found the accused not guilty of murder, but guilty of voluntary manslaughter on the basis of the excessive force manslaughter rule.[16]

The High Court further opined that other considerations militating in favour of eradicating the common law excessive force manslaughter rule were respect for the tenet of doctrinal consistency as well as the doctrine

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15 Ibid 669.

16 Edwards, above n 7; Hemming, above n 8; *R v Scully* 171 ER 1213; *R v Patience* (1837) 173 ER 383; *R v Whalley* (1935) 173 ER 108; *Viro* (1978) 141 CLR 483; *Howe* (1958) 100 CLR 448; *State v Jones* 8 P 3d 1282 (1287) (Kan Ct App 2000); *People v Deason* 148 Mich App 27 31 384 NW 2d 72 (1985); *State v Falkner* 483 A 2d 759 (Md 1984). The statutory revival of the defence in jurisdictions such as South Australia and New South Wales further emphasizes the continuing importance of the doctrine; see above n 13.

of stare decisis.[17] In particular, the Court emphasized that with the exception of the excessive force manslaughter rule that applies only in cases in which self-defence is asserted in response to a charge of *murder*, the doctrine of self-defence applies to *all other alleged assaults and unlawful homicides* in exactly the same manner; namely, that aside from the contingency of a hung jury, the only two available verdicts in respect of the offence or offences to which self-defence is raised are 'guilty' and 'not guilty'.[18] Thus, the court stressed that the interest of doctrinal consistency is best served by abolishing a rule that permits a jury to render a third verdict that allows it to find an accused not guilty of murder, but guilty of the lesser offence of voluntary manslaughter.[19]

Without calling into question the salutary nature of doctrinal consistency in the law or the importance of the doctrine of stare decisis, careful analysis leads to the conclusion that neither represents a persuasive justification for eradicating the excessive force manslaughter rule. As the excessive force manslaughter rule had been applied for centuries,[20] is it not fair to characterize the rule as one that prior to the decision of the Privy Council in *Palmer v R,*[21] had been consistently affirmed and reaffirmed by the High Court of Australia and appellate courts in other jurisdictions?[22] If so as the case law suggests, it is ironic indeed that the High Court would seize upon the doctrine of stare decisis as a

17 *Zecevic* (1987) 162 CLR 645, 653–4 (Mason CJ); at 664–5 (Wilson, Dawson and Toohey JJ).

18 Ibid 677–80.

19 Ibid 653–4 (Mason CJ); at 664–5 (Wilson, Dawson and Toohey JJ).

20 See above n 12.

21 *Palmer v R* [1971] AC 814 ('*Palmer*').

22 See, for example, *R v Howe* (1958) 100 CLR 448; *Viro v R* (1978) 141 CLR 88. It was not until the High Court's decision in *Zecevic* (1987) 162 CLR 645 that its earlier decisions in Howe and *Viro* were overruled as a result of the impetus of *Palmer* [1971] AC 814.

justification for its decision in *Zecevic*, a case in which the court departed from the very doctrine that it purported to treat with such reverence.

The Court's reliance on the need for doctrinal consistency in the law as a justification for abolishing the excessive manslaughter rule is similarly misplaced. While there is much to be said for simplicity in the law, simplicity for its own sake is not necessarily a salutary objective. In fact, the evolution of the common law as well as the constant proliferation of legislative enactments are replete with important, albeit esoteric rules and concepts, some of which have long endured even though they are sometimes laden with intractable problems.[23] More importantly, the mere pursuit of simplicity in the law fails to take into account the special relationship that has long existed between the crimes of murder and voluntary manslaughter. As noted earlier, murder is a unique offence in that it requires the presence of malice aforethought.[24] As murder was a capital offence in the UK for centuries, not to mention other jurisdictions such as Australia until it was finally abolished,[25] the availability and successful interposition of the excessive force manslaughter rule was often the difference between life and death. In countries such as the

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23 See, for example, the various attempts to formulate a line of demarcation between mere preparation as opposed to satisfying the so-called proximity rule in the law of attempt: see KJ Arenson, 'The Pitfalls in the Law of Attempt: A New Perspective' (2005) 66 *Journal of Criminal Law (UK)* 146, 156–61; see also the chaotic state of the criminal law relating to causation: *Royall v The Queen* (1991) 172 CLR 378, 381–97 (Mason CJ); 197–405 (Brennan J); 405–17 (Deane and Dawson JJ); 417–33 (Toohey and Gaudron JJ); 433–59 (McHugh J).

24 See above n 8.

25 *The Murder (Abolition of Death Penalty) Act 1965* (UK). The final Australia jurisdiction to abolish the death penalty completely was NSW in the *Crimes (Death Penalty Abolition) Amendment Act 1985* (NSW) which removed capital punishment for the crimes of treason and piracy. The *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth) prevents any Australian state or territory passing future legislation allowing the death penalty.

United States in which the ultimate penalty is still invoked with alarming regularity,[26] the vital and longstanding relationship between the two offences remains intact. For those who subscribe to the notion that the extenuating circumstances that attend the excessive force manslaughter rule and the provocation defence are a sufficient justification to retain the distinction between the two offences (even in jurisdictions such as the UK and Australia where murder is not a capital offence),[27] the practical abolition of the rule cannot be predicated on the vacuous rationale that considerations of simplicity require that the doctrine of self-defence must be applied in exactly the same manner irrespective of the offence(s) with which the accused stands charged.

Finally, the Court intimated that a final justification for abolishing the excessive force manslaughter rule is that juries may be incapable of understanding the courts' directions in relation thereto.[28] There appears to be little or no validity in this argument as evidenced by the fact that for centuries, jurors have demonstrated that they are possessed of the requisite common sense and intellect to understand and correctly apply such directions to the facts at hand.[29]

As none of the justifications put forth in *Zecevic* can withstand careful analysis, a question arises as to whether the High Court's decision was based on a hidden agenda. If so, what provided the impetus for the abolition of the excessive force manslaughter rule in both *Zecevic* and

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26 Tex Code Ann §19.03; Ga Code Ann §16-5-1, §16-5-40 (2007); Fla Stat §775.082; Okla Stat §21-701-9; La Rev Stat Ann §14.30, §14.113; NC Gen Stat §14-17, §15A-2000; SC Code Ann §16-3-20; Ark Code Ann §5-10-101.

27 This assumes that those who support the distinction believe that one who is convicted of manslaughter rather than murder should receive a lesser and commensurate sentence.

28 *Zecevic* (1987) 162 CLR 645, 653 (Mason CJ); at 659–60 (Wilson, Dawson and Toohey JJ).

29 See above n 16.

Victoria?[30] In exploring this thorny question, it serves well to remind readers that jurists, like parliamentarians, are often susceptible to considerations of political correctness that are brought to bear by special interest groups that are organized, well-financed, inordinately influential and most importantly within the context of this article, inimical to fundamental rights and core societal values. As the writer has pointed out:

> It is important to stress, however, that the very nature of lobbying is such that it involves alliances, bargaining and even political blackmail that occur under a cloud of secrecy. It would be extraordinary, for example, to expect any parliamentarian to provide direct evidence of its existence by confessing that he or she supported legislation solely because of pressure brought to bear by a well-organized and very committed group such as the feminist lobby. There are no doubt many instances in which a special interest group's views and political influence are so obvious as to obviate the need for it to make an express or implied threat that failure to support or oppose certain legislation could well cost a parliamentarian his or her seat in a marginal district. Yet the existence and influence of special interest groups is so widely known and accepted that a court would probably be remiss in failing to take judicial notice of these facts.[31]

The task, therefore, becomes one of demonstrating that a rather compelling case can be made that a particular special interest group has provided the impetus for what appears to be the High Court's indefensible decision in *Zecevic* and, more recently, the statutory abolition of the excessive force manslaughter rule in Victoria just nine years after it was reinstated by the *Crimes (Homicide) Act 2005* (Vic).[32]

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30 *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic).

31 KJ Arenson, 'When Some People are More Equal Than Others: The Impact of Radical Feminism in Our Adversarial System of Criminal Justice' (2014) 5 *Western Australian Jurist* 213, 257–8 ('*When Some People*').

32 See above n 13. Although the rule was reinstated in 2005, the lesser offence was termed as 'defensive homicide' rather than voluntary manslaughter: ss 9AC and 9AD of the Crimes Act 1958 (Vic). Substantively, the excessive force

III THE ABOLITION OF THE OFFENCE OF VOLUNTARY MANSLAUGHTER

A *The Abolition of Provocation as a Partial Defence of Murder*

During the period in which the *Crimes (Homicide) Act 2005* (Vic) was being considered by the Victorian Law Reform Commission ('VLRC'), the writer had a most informative, yet profoundly unsettling telephone conversation with a woman who was then the Chairperson of the VLRC and then became a Justice of the Supreme Court of Victoria before resigning from the court in order to chair a Royal Commission that was tasked by its Terms of Reference with finding the most effective methods of preventing family violence, improving early intervention to identify and protect those at risk, supporting victims and making perpetrators accountable.[33] As we were both law professors at the time, the conversation was undertaken in the spirit of a collegial and candid interchange of contrasting views concerning a major law reform proposal that the Honourable Rob Hulls, then the Attorney-General of Victoria, had similarly tasked the VLRC[34] with studying in 2004 and making appropriate recommendations concerning the defence of provocation.

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manslaughter rule operated in exactly the same manner despite this change in vernacular.

33 Premier Daniel Andrews announced the creation of this Royal Commission and its Terms of Reference on 19 January 2015; Premier of Victoria, *Nothing off Limits in Family Violence Royal Commission* (19 January 2015) <http://www.premier.vic.gov.au/nothing-off-limits-in-family-violence-royal-commission>.

34 See 'Review of Family Violence Laws: Terms of Reference Victorian' available at Law Reform Commission, *Family Violence* (23 March 2015) <http://www.lawreform.vic.gov.au/all-projects/family-violence>.

It became immediately apparent that the VLRC had already resolved to recommend that the partial defence of provocation be abolished. When the writer asked the Chairperson for the underlying rationale for this recommendation, she stated that the defence was being misused in the sense that generally speaking, it was commonly invoked by men who murder their wives and girlfriends.[35] The obvious rejoinder was to remind the Chairperson that the provocation defence is predicated on the rationale noted above and that it, as with nearly all recognized common law or statutory defences known to the criminal law (with the exception of infanticide),[36] is facially devoid of gender bias. It was additionally pointed out to the Chairperson that as of the time of our conversation, a Melbourne based woman who was accused of murdering her husband was relying on the defence. When it was further noted that the provocation defence would have been unavailable to the woman if the VLRC's recommendation had become law prior to the alleged incident, the Chairperson's only response was that in comparative terms, women rarely murder their husbands or boyfriends. When the writer then asked whether she was implying that the VLRC would have supported the retention of the defence if the available data had shown that women invoked the defence with greater frequency than men, she refused to give a direct response to the question and merely reiterated that women rarely kill their husbands and boyfriends.

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35 See above n 7.

36 Infanticide is a defence that originated in the UK: *Infanticide Act 1938* (UK). It has also been recognized in other jurisdictions such as Victoria and New South Wales: *Crimes Act 1958* (Vic) s 6; *Crimes Act 1900* (NSW) s 22A. This defence is unique in that it is only available to women who kill their children under circumstances that would constitute murder, save for the fact that the killing occurred under mitigating circumstances that consist of some type of mental disorder emanating from the adverse psychological effects of having given birth within a prescribed period of time following the birth of the deceased child.

Under the circumstances, the only logical inference to be drawn is that had an answer been forthcoming, it would have been a resounding 'yes'. Was it a mere coincidence that no other factors were mentioned in support of the VLRC's recommendation? For those who remain skeptical that gender bias was a predominant factor in the Victorian Parliament's decision to eradicate the provocation defence by enacting s 3B of the *Crimes (Homicide) Act 2005* (Vic),[37] it is noteworthy that Rob Hulls, the Attorney-General of Victoria at the time, commented that 'the partial defence condones male aggression towards women and is *often* relied upon by men who kill partners or ex-partners out of jealousy or anger (emphasis added)'.[38] Similar gender bias was expressed in the Second Reading Speeches of the Parliaments of Tasmania, Western Australia and New Zealand where the provocation defence has also been abolished.[39] In expressing its reasons for abolishing the defence, the Tasmanian Parliament commented that

> [t]he defence of provocation is gender biased and unjust. The suddenness element of the defence is more reflective of male patterns of aggressive behavior. The defence was not designed for women and it is argued that it is not an appropriate defence for those who fall into the "battered women syndrome".[40]

Although Western Australia was less explicit than Victoria or Tasmania, their cursory reference to the proposed abolition of the defence emphasized the need to address issues confronted by women in domestic violence situations. In short, the provocation defence was seen as

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37 Which is now s 3B of the *Crimes Act 1958* (Vic).

38 Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005, 1349 (Rob Hulls, Attorney-General).

39 *Criminal Code* (Tas) s 160*; Criminal Code* (WA) s 245*; Crimes (Provocation Repeal) Amendment Act 2009* (NZ) s 5–4.

40 Tasmania, *Parliamentary Debates*, Legislative Council, 20 March 2003, 30–108 (Judy Jackson, Minister for Justice and Industrial Relations).

inadequate to effectively address this problem.[41]

In New Zealand, the Second Reading Speech cited three factors in support of abolishing the defence: (1) the fact that a conviction for murder no longer carried a mandatory sentence of life imprisonment or death; (2) the fact that provocation did not reduce culpability in crimes less serious than murder; and (3) that the defence was most often interposed in cases of 'gay panic', meaning heterosexual men killing homosexual men who made advances on them.[42]

In examining these three factors, it appears that only the third rings true. In many jurisdictions, for example, the death penalty and mandatory life sentences for the crime of murder have been abolished.[43] Moreover, murder is still considered a more serious crime than voluntary manslaughter - and for all of the reasons noted earlier. It is simply illogical and unfair to equate a person who commits murder with someone who commits what would otherwise have been murder, save for the fact that the killing occurred under circumstances that the law has long regarded as sufficiently mitigating to negate the malice aforethought aspect of murder and permit the fact-finder to convict on the alternative and less serious offence of voluntary manslaughter.[44] As for the second justification, the defence of provocation has only been applied as a partial defence to the crime of murder, despite some occasional aberrations.[45]

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41 Western Australia, *Parliamentary Debates*, Legislative Council, 17 June 2008, 3845b–3855a (Simon O'Brien).

42 (17 November 2009) 659 NZPD 77555.

43 See e.g. *Crimes (Life Sentences) Amendment Act 1989* (NSW); *Crimes (Amendment) Act 1986* (Vic) pt 3; *Criminal Code Amendment (Life Prisoners and Dangerous Criminals) Act 1994* (Tas) s 4.

44 See above n 12.

45 See, for example, *Criminal Code* (Qld); ss 268–269; *Criminal Code* (WA) ss 245–246. These provisions allow provocation to operate as a complete defence to certain non-fatal assaults. Traditionally, however, the defence has been

Can one assume that it is merely fortuitous that the third justification happens to be gender based in much the same manner as that advanced by the VLRC Chairperson and the Second Reading Speeches in Tasmania and Western Australia? If the provocation defence, though previously available to both genders, was abolished solely because 'the defence was most often being used in cases of "gay panic", meaning heterosexual men killing homosexual men who made advances on them', one can only conclude that its abolition in these four jurisdictions was predicated mostly, if not solely, upon the fact that one gender appears to have invoked the defence with greater frequency than the other.

The implications of this are as ominous as they are far-reaching. Is it not a cardinal precept of our criminal justice system that we are all regarded as equal before the law?[46] If so, how can this precept be reconciled with the notion that even though a defence is supported by logic, fairness and a long line of precedent, it should be discarded if it can be demonstrated that statistically, one gender has invoked it more often than the other? If that is a defensible rationale upon which the defence of provocation can be discarded, then perhaps others such as self-defence, duress, necessity, insanity and diminished capacity should be subjected to a similar statistical breakdown and discarded accordingly if one or more have been invoked with greater frequency by men than women. What is particularly alarming about the Chairperson's remarks is that they did not dispute that women have and would continue to benefit from the availability of the

confined to being interposed as a partial defence to the crime of murder: see above n 11; see also P Gillies, *Criminal Law* (Law Book Co, 4th ed, 1997) 384. For excellent commentaries on the defence of provocation generally, see Ashworth, 'The Doctrine of Provocation' (1976) 35 *Criminal Law Journal* 292; Victorian Law Reform Commissioner, *Provocation as a Defence to Murder*, Working Paper No 6 (1979); Fairall and Yeo, above n 9, 188–218.

46 See e.g. Judicial Commission of NSW, *Equality Before the Law Bench Book* (8 June 2014) <http://www.judcom.nsw.gov.au/publications/benchbks/equality>.

provocation defence. In light of the aforementioned incident involving a Melbourne based woman who was relying on the defence at the time, it would have been impossible for the Chairperson or the VLRC to have made a credible denial to that effect. If the viability of provocation or any other defence can be made to depend on which of the two genders invokes it with greater frequency, there can be no pretense of equality before the law and, consequently, neither can there be any pretense of fairness or the appearance thereof in the law. The implications of such a state of affairs are unthinkable to decent and fair-minded persons and wholly insufferable in any society that regards itself as a representative democracy.

B The Abolition of the Excessive Force Manslaughter Rule

Paragraphs 3-5 of the Second Reading Speech for the *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014*(Vic) state as follows:

> At the same time as recommending the abolition of provocation, it recommended in balance the introduction of a partial defence to murder to provide a "halfway house" for women who kill in response to family violence who were unable to successfully argue self-defence (and thereby obtain an acquittal).
>
> However, since its introduction, defensive homicide has predominantly been relied upon by men who have killed other men in violent confrontations, often with the use of a weapon and often involving the infliction of horrific injuries. This has caused justifiable community concern that the law, like provocation once did, is allowing these offenders to "get away with murder".
>
> Abolishing defensive homicide follows recommendations made by the Department of Justice in its 2013 consultation paper on *Defensive Homicide* -

Proposals for Legislative Reform.[47]

Without belabouring the explanation and rationale that have served as the underpinnings of this rule for centuries,[48] suffice it to say that once again, parliamentarians have openly identified gender bias as the predominant motive for dispensing with yet another version of voluntary manslaughter.[49] For all of the same reasons that gender bias could not withstand careful analysis or serve as adequate justification for flouting the cardinal precept of equality before the law in the context of eradicating the alternative offence of voluntary manslaughter in cases involving the defence of provocation, neither can it withstand similar scrutiny or provide the necessary justification for infringing the principle of equality in abrogating the alternative offence of voluntary manslaughter in the context of the excessive force manslaughter rule.

If gender bias is a justification for the abolition of both forms of voluntary manslaughter as an alternative offence to murder in Victoria and other jurisdictions, the question to be asked is who has provided the impetus for these changes, and why? Even if one accepts that men have invoked the provocation and excessive force manslaughter limbs of voluntary manslaughter with greater frequency than women, it has not, nor could it be argued, that women have derived little or no benefit from the alternative offence of voluntary manslaughter. As noted earlier, such inane reasoning has the clear potential to result in the abolition of such defences as duress,[50] necessity,[51] diminished capacity,[52] insanity,[53] self-

47 Victoria, *Parliamentary Debates,* Council, 25 June 2014, 2128 (E J O'Donohue).

48 See above n 12.

49 See above n 47.

50 See, for example, *R v Hurley and Murray* [1967] VR 526, 529; *R v Dawson* [1978] VR 536; *Crimes Act 1958* (Vic) s 9AG.

defence and related defences such as the defence of others,[54] defence of property[55] and the right to use lawful force in order to effectuate a lawful arrest or prevent the commission of a crime.[56] There is no reason in logic or principle to believe that the trend toward stripping both genders of a defence on the basis that it is invoked more often by one than the other would not lead inexorably to the abolition of most, if not all of the other defences that the law has long recognized as beneficial. Even more disturbing and foreboding is the tacit implication in all of the second reading speeches that both limbs of voluntary manslaughter would have been retained had the statistical analysis shown that this partial defence to murder was being invoked with greater frequency by the female as opposed to the male gender. One might ask what interest is so paramount that it should be permitted to trump the sacrosanct tenet that all persons stand on equal footing before the law? Apparently there are many who no longer subscribe to the notion that justice is blind, irrespective of gender or other factors such as race, ethnicity and political persuasion. What special interest group would favour such a perverse transformation of the law?

IV THE EVOLUTION OF THE LAW OF RAPE IN VICTORIA

In order to place the purpose and effect of the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) in proper perspective, it is

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51 *R v Loughnan* [1981] VR 443; *R v Rogers* (1996) 86 A Crim R 542; *Crimes Act 1958* (Vic) s 9AI.

52 See, for example, *Crimes Act 1900* (NSW) s 23A; *Crimes Act 1900* (ACT) s 14; *Criminal Code* (Qld) s 304A.

53 *R v Porter* (1933) 55 CLR 182.

54 *Zecevic* (1987) 162 CLR 645.

55 *Crimes Act 1958* (Vic) s 322K; *Criminal Code 1995* (Cth) s 10.4(2)(c)–(e); *Crimes Act 1900* (NSW) s 418(2)(c); *Criminal Law Consolidation Act 1935* (SA) s 15A.

56 See, for example, *Crimes Act 1958* (Vic) s 462A; *Crimes Act 1914* (Cth) ss 3W, 3Z, 3ZC.

necessary to examine the evolution of the law of rape in Victoria, commencing with its common law formulation and rules and concluding with the Victorian Parliament's decision in 1980[57] to codify rape into a statutory regime that has undergone many changes over the past thirty-five years.[58] At common law, rape was defined as carnal knowledge[59] of a woman against her will.[60] As that definition eventually morphed into 'carnal knowledge of a woman without her consent',[61] there remained

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57 *Crimes (Sexual Offences) Act 1980* (Vic).

58 *Crimes (Sexual Offences) Act 2006* (Vic); *Crimes (Sexual Offences) (Further Amendment) Act 2006* (Vic); *Crimes Amendment (Rape) Act 2007* (Vic).

59 At common law, carnal knowledge denotes any amount of penile penetration of the vaginal cavity, however slight, and regardless of whether there is emission of seminal fluid: *Holland v The Queen* (1993) 67 ALJR 946. It is important to note that at common law, acts of forcible sodomy do not fall within the classification of rape for the reason that they involve penetration of orifices other than the vaginal cavity. Therefore, by definition, they do not constitute carnal knowledge of a woman, the very essence of the offence of rape at common law. Instead, acts of forcible sodomy were encompassed by the less serious offence of buggery that was punishable by a lower maximum period of imprisonment and/or fine: see the *Sexual Offences Act 1956* (UK) s 1(1) which specified a maximum penalty of life imprisonment for rape while forced buggery (s 12(1)) attracted as little as ten years as a maximum penalty where the victim was an adult male. Because acts of forcible sodomy and rape are regarded as equally invidious, all Australian jurisdictions have now repealed the crime of buggery and enacted legislation extending the ambit of rape to all forms of non-consensual penetration: see, for example, *Criminal Code* (Qld) s 349; *Criminal Code* (WA) s 319 (which defines sexual penetration) and s 325 (which makes sexual penetration without consent a crime); *Crimes Act 1900* (NSW) ss 61H–61I.

60 *Hales's Pleas of the Crown*, vol 1, 626. With the passage of time, however, it became more appropriate to replace the words, 'against her will' with the words, 'without her consent': L Waller and CR Williams, *Criminal Law: Text and Cases* (LexisNexis, 9th ed, 2001) 89–90. As Waller and Williams explain, 'Were it otherwise any woman who was unconscious, for example from excessive drinking, would be at the mercy of any man who chose to take advantage of her condition, for it would be impossible to say that the penetration occurred against her will in such a case … In the ordinary case, however, where the woman is fully conscious and her mental capacity is not in doubt, it is important that the jury should be made aware that she must be an unwilling victim of the accused': ibid. Moreover, the words 'against her will' falsely implied in order to satisfy this criterion, a woman is required to partake in some overt act of resistance when, in fact, none is required.

61 At common law, consent denotes free and conscious permission*: R v Wilkes and Briant* [1965] VR 475 at 480 ('*Wilkes and Briant'*). Thus, if one accedes to

some troubling common law aspects of the offence that were ultimately eradicated in Victoria and elsewhere as they justifiably came to be viewed as anachronistic and sexist relics of the common law. These antiquated relics include: the common law rule that unless a husband and wife are living apart pursuant to a court order, a husband cannot be convicted (at least as a principal in the first degree) of raping his lawfully wedded spouse;[62] a conclusive presumption that boys under the age of fourteen are incapable of committing the crime of rape;[63] and that once given, a woman's consent to penile penetration of the vaginal orifice cannot thereafter be revoked until such time as the accused has voluntarily terminated the same.[64]

Insofar as the *mens rea* for rape at common law is concerned, it was held by the House of Lords in *DPP v Morgan*[65] that an accused must act with an intention to have carnal knowledge of the complainant without her consent.[66] This was construed by the court as denoting that the accused intended to have carnal knowledge of the woman without her consent while aware that she was not or might not be consenting to the penetration at issue.[67] The holding of *DPP v Morgan*, however,

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sexual intercourse out of force or fear of force or other harm of any type, there is no consent.

62 Repealed in Victoria by the *Crimes Act 1958* (Vic) s 62(2). This did not, however, preclude a husband from being convicted as an accomplice to the rape of his lawfully wedded spouse, whether as an accessory before the fact or as a principal in the second degree: Arenson, Bagaric and Gillies, above n 8, 32–5, 299.

63 Repealed in Victoria by the *Crimes Act 1958* (Vic) s 62(1).

64 Repealed in the relevant jurisdictions by *Kaitamaki v The Queen* [1984] 2 All ER 435; *Crimes Act 1961* (NZ) s 128(5)(c); *Crimes Act 1900* (NSW) s 61H(1)(d); *Criminal Law Consolidation Act 1935* (SA) s 5; *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) ss 34C, 38, subs 37D(1)(d).

65 *DPP v Morgan* [1976] AC 182 ('*Morgan*').

66 Consent having the meaning of free and conscious permission: *Wilkes & Briant* [1965] VR 475, 480.

67 *Morgan* [1976] AC 182, 208–9.

encompassed far more than an exposition of the requisite *mens rea* for the common law offence of rape.

In writing for the majority, Lord Hailsham further opined that an accused's genuine belief that the complainant is consenting is, by definition, dissonant with the above *mens rea*, and this is so irrespective of whether the belief was predicated upon reasonable grounds or would have been held by a reasonable person in the same position as the accused.[68] This is not to say that the reasonableness of the putative belief or the lack thereof is devoid of relevance in rape prosecutions. To the contrary, his Lordship stressed that this is an important evidentiary factor to be considered by the fact-finder in determining whether such a belief was truly held by the accused.[69]

Though the *Morgan* principle was generally accepted as a matter of common law doctrine in both the UK and Australia for twenty-seven and[70] thirty-six years respectively,[71] it was not received uncritically.[72] On

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68 Ibid.

69 Ibid 214.

70 It should be noted that England and Wales have now resiled from the *Morgan* principle by virtue of s 1 the *Sexual Offences Act 2003* (UK). In order to prove rape under s 1, the prosecution must prove, as a constituent element, that the accused did not reasonably believe the complainant was consenting.

71 See for example, *Crimes Act 1900* (NSW) s 61H(1); *Criminal Law Consolidation Act 1935* (SA) s 5(3). The *Morgan* principle was adopted by the Victorian Court of Appeal in *R v Saragozza* [1984] VR 187 and reaffirmed by the court in a more recent series of decisions: *R v Zilm* [2006] VSCA 72 (5 April 2006) ('*Zilm*'); *Worsnop v The Queen* [2010] VSCA 188 (28 July 2010) ('*Worsnop*'); *Getachew v The Queen* [2011] VSCA 164 (2 June 2011) ('*Getachew*'); *Roberts v The Queen* [2011] VSCA 162 (2 June 2011) ('*Roberts'*); *Neal v The Queen* [2011] VSCA 172 (15 June 2011) *('Neal'*); and *Wilson v The Queen* [2011] VSCA 328 (27 October 2011) ('*Wilson'*). The *Morgan* principle was reaffirmed by the High Court's decision in *R v Getachew* [2012] HCA 10 (28 March 2012) [21]–[25] ('*Getachew 2'*). These Victorian Court of Appeal decisions, unlike *Morgan*, dealt with the statutory crime of rape under s 38 of the *Crimes Act 1958* (Vic) which supplanted the common law crime of rape that existed in Victoria prior to 1981. While the basic principle of *Morgan* was reaffirmed in each of these decisions, it should be noted that unlike

one view, for example, carnal knowledge of a woman without her consent, if proven, should warrant a conviction for rape regardless of whether an accused is aware that the alleged victim is not or might not be consenting. This view is predicated on the notion that the complainant has been irrevocably violated and, therefore, it is of no significance to the question of criminal liability that the accused acted with an honestly held, albeit not necessarily reasonable belief, that the complainant was consenting to the relevant sexual act.

A *Rethinking the Morgan Honest Belief Defence*

As a result of the *Crimes (Sexual Offences) Act 1980* (Vic), *Crimes (Sexual Offences) Act 2006* (Vic) and *Crimes (Sexual Offences) (Further Amendment) Act 2006* (Vic), the law of rape in Victoria, prior to the enactment of the *Crimes Amendment (Sexual Offences and Other Matters) Act* 2014 (Vic), was comprised of ss 35(1)(a) and (b), 36, 37, 37A, 37AA, 37AAA, 37B and 38. For present purposes, however, it is only necessary to extract ss 35(1)(a) and (b), 36, 37, 37AA and 38. These provisions state as follows:

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the general common law definition of consent or the lack thereof as set out in above n 61, s 36 of the *Crimes Act 1958* (Vic) appears to provide a finite list of circumstances in which consent is deemed to be lacking: Victoria, *Parliamentary Debates*, Legislative Assembly, 26 November 1991, 1998 (Jim Kennan, Attorney-General); Victoria, *Law Reform Commission*, *Rape: Reform of Law and Procedure, Report No. 43* (1991) 6 [12]. As will be discussed below, however, the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) has effectively supplanted what had been Victoria's statutory offence of rape that was collectively set out under ss 35–38 of the *Crimes Act 1958* (Vic).

72 See H Power, 'Towards a Redefinition of the Mens Rea of Rape' (2003) 23 *Oxford Journal of Legal Studies* 379 (arguing that those who make unreasonable mistakes in the context of sexual crimes are morally culpable); S Leahy, 'When Honest is not Good Enough: The Need for Reform of the Honest Belief Defence in Irish Rape Law' (2013) 23 *Irish Criminal Law Journal* 2.

Section 35

(1) In Subdivisions (8A) to (8G)—

…

"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 …

Section 36

Meaning of consent

For the purposes of Subdivisions (8A) to (8D) "consent" means free agreement. Circumstances in which a person does not freely agree to an act include the following—

(a) the person submits because of force or the fear of force to that person or someone else;

(b) the person submits because of the fear of harm of any type to that person or someone else;

(c) the person submits because she or he is unlawfully detained;

(d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;

(e) the person is incapable of understanding the sexual nature of the act;

(f) the person is mistaken about the sexual nature of the act or the identity of the person;

(g) the person mistakenly believes that the act is for medical or hygienic purpose …

Section 37

Jury directions

(1) If relevant to the facts in issue in a proceeding the judge must direct the jury on the matters set out in sections 37AAA and 37AA.

(2) A judge must not give to a jury a direction of a kind referred to in section 37AAA or 37AA if the direction is not relevant to the facts in issue in the proceeding …

Section 37AA

Jury directions on the accused's awareness

For the purposes of section 37, if evidence is led or an assertion is made that the accused believed that the complainant was consenting to the sexual act, the judge must direct the jury that in considering whether the prosecution has proved beyond reasonable doubt that the accused was

aware that the complainant was not consenting or might not have been consenting, the jury must consider—

(a) any evidence of that belief; and

(b) whether that belief was reasonable in all the relevant circumstances having regard to—

> (i) in the case of a proceeding in which the jury finds that a circumstance specified in section 36 exists in relation to the complainant, whether the accused was aware that that circumstance existed in relation to the complainant; and
>
> (ii) whether the accused took any steps to ascertain whether the complainant was consenting or might not be consenting, and if so, the nature of those steps; and
>
> (iii) any other relevant matters
>
> …

Section 38

Rape

(1) A person must not commit 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, irrespective of whether the person who has been sexually penetrated consents to the act.

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

(a) without the victim's consent; and…

(b) while—

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

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

Readers will note that ss 38(3) and (4) expanded the definition of rape to include, for example, situations in which the accused compels another person to sexually penetrate the offender or another person in accordance with the definition of sexual penetration as set forth in ss 35(1)(a) and (b). Prior to the addition of these sections, for instance, a woman who forced a man to sexually penetrate her at gunpoint would not have committed rape because the constituent element of sexual penetration as defined by ss 35(1)(a) and (b) would have been lacking; specifically, 35(1)(a) would not have been applicable because it requires penile penetration of the vaginal, anal or oral cavity by the perpetrator which, in this scenario, is impossible because a woman is incapable of penile penetration of any orifices. Section 35(1)(b) would similarly be inapplicable because in the situation postulated, the woman has not inserted an object or a part of her body into the V's anal (or vaginal, because V has no vagina) cavity. Although the postulated fact pattern is most improbable, there are countless homosexual encounters in the prison milieu that, but for the addition of ss 38(3) and (4), would not constitute rape. Also noteworthy is that under subss 38(2)(a)(ii) and 38(4)(b)(ii), a person can be convicted of rape despite the absence of proof that he or she acted with an awareness that the complainant was not or might not be consenting. Rather, these subss allow the fact-finder to convict if it is satisfied beyond reasonable doubt that the accused gave no thought as to whether the complainant was not consenting or might not have been consenting. It appears, therefore, that subss 38(2)(a)(ii) and 38(4)(b)(ii) fall short of any *mens rea* known to the criminal law[73] and provide an attractive alternative for the prosecution

[73] For a well-articulated and thorough discussion of the topic of *mens rea*, see Gillies, above n 45, 46–75. According to Gillies, there are four types of *mentes reae* known to the criminal law in Australia and presumably the UK: intention, knowledge (or awareness), belief and recklessness. Gillies stresses the importance of the distinction between a voluntary act or omission to act where

where there is insufficient proof that the accused was aware that the complainant was not or might not have been be consenting.

Although it was noted earlier that the Victorian Court of Appeal had consistently affirmed the *Morgan* principle that an honestly held belief that the complainant was consenting, whether based on reasonable grounds or not, is mutually exclusive with the *mens rea* for rape under any of the provisions of s 38,[74] this principle has now fallen into disrepute as a matter of Australian common law doctrine.[75] As noted in *The Queen v Getachew*, [76] s 37AA of the *Crimes Act 1958* (Vic) (above) was enacted into law in Victoria by virtue of the *Crimes Amendment (Rape) Act 2007* (Vic). As the accused in *Getachew* did not assert or lead evidence that he acted with a belief that the complainant was consenting,[77] the High Court's observations concerning s 37AA(b)(i) were merely *obiter dicta*. Nonetheless, the High Court's comments on the effect of an accused's honest belief in consent are most illuminating. In addressing this point,

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the law imposes a duty to act and the concept of *mens rea:* at 28–32 Though Gillies explains that the former is generally a component of the *actus reus* which must be proved beyond reasonable doubt in all but the most exceptional cases, he points out that as with the concept of *mens rea*, it too has a minimal mental component, but one that falls short of a *mens rea*: at 29. As Gillies explains:

> Because this basic mental state, that associated with voluntariness of conduct, is ascribed to the *actus reus*, it follows that the *mens rea* will need to be defined as consisting of that mental element required by the definition of the crime, over and above that which is needed to engage in the physical conduct prescribed by the definition of the crime.

74 See above n 71.

75 *The Queen v Getachew* [2012] 286 ALR 196 ('*Getachew 2*'); *NT v The Queen* [2012] VSCA 213 (6 September 2012) *('NT'*).

76 *Getachew 2* [2012] 286 ALR 196.

77 In this regard, s 37(2), which was also introduced by the *Crimes Amendment (Rape) Act 2007* (Vic), specifically provides that a 'judge must not give to a jury a direction of a kind referred to in section 37AAA or 37AA if the direction is not relevant to the facts in issue in the proceeding'. Section 37AA is consonant with s 37(2) in that it requires that a 37AA instruction must be given if 'evidence is led or an assertion is made that the accused believed that the complainant was consenting to the sexual act …'.

French CJ, with whom Hayne, Crennan, Kiefel and Bell JJ joined, opined:

> Reference to an accused holding the belief that the complainant was consenting invites close attention to what was the accused's state of mind. It was said in the Explanatory Memorandum accompanying the Bill for the 2007 Act that "belief in consent and awareness of the possibility of an absence of consent are not mutually exclusive". So much may be accepted if "belief in consent" is treated as encompassing a state of mind where the accused accepts that it is possible that the complainant might not be consenting.
>
> For present purposes, it is enough to notice that, if an accused asserted, or
>
> gave evidence at trial, that he or she thought or "believed" the complainant was consenting, the prosecution may yet demonstrate to the requisite standard either that the accused was aware that the complainant might not be consenting or that the asserted belief was not held. It is to be recalled that, since the 2007 Act, the fault element of rape has been identified as the accused being aware that the complainant was not or might not be consenting or the accused not giving any thought to whether the complainant was not or might not be consenting. The reference to an accused's awareness that the complainant might not be consenting is, of course, important. An accused's belief that the complainant may have been consenting, even probably was consenting, is no answer to a charge of rape. It is no answer because each of those forms of belief demonstrates that the accused was aware that the complainant might not be consenting or, at least, did not turn his or her mind to whether the complainant might not be consenting (citations omitted).[78]

As the *mes rea* relating to the lack of consent element of rape at both common law and s 38 requires an awareness (or knowledge)[79] as opposed

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78 *Getachew 2* [2012] 286 ALR 196, [26]–[27].

79 The *mentes reae of* 'knowledge' and 'awareness' are used synonymously at common law with each denoting that the accused acted or omitted to act while holding certain facts or circumstances that make his or her act criminal to be true: Gillies, above note 45, 67–70.

to a mere belief[80] that the complainant is not or might not be consenting, it follows that the forgoing *obiter dicta* cannot be reconciled with the *Morgan* defence of honest belief. Thus, a clear understanding of the distinction between the *mentes reae* of knowledge and belief is essential to an understanding of the above-quoted passages from *Getachew*. This vital distinction is explained by Professor Peter Gillies:

> There is a clear conceptual distinction between knowledge and belief. "Belief" as opposed to "knowledge" may be used to refer to that state of mind in which D holds a fact to be true, but is not entirely free from doubt, while knowledge strictly . . . denotes the situation where D does not, having regard to the facts known to D, have any doubts as to the existence of the fact in issue. In many instances it will be difficult to have knowledge in its strictest sense, as opposed to belief—D cannot even be absolutely confident, for example, that D was born on the day shown on D's birth certificate. Nevertheless, D will regard herself or himself as 'knowing' this date . . . In practice, therefore, there will frequently be little difference between situations of "knowledge" and "belief". [81]

This writer expounded further on this distinction and its impact on the *Morgan* defence of honest belief:

> Thus, by definition the *mens rea* of belief denotes a state of mind in which the accused entertains some measure of doubt as to the existence of whatever fact or circumstance that he or she is required to believe by the common law or statutory definition of the offence. If a person acts or omits to act (where there is a legal duty to act) with an honest belief as contrasted with actual knowledge or awareness concerning the existence of a fact or circumstance that makes the

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80 The *mens rea* of 'belief', on the other hand, while akin to 'knowledge' or 'awareness', denotes that the accused acted or omitted to act while believing that certain facts or circumstances that make his or her act criminal existed, albeit with some degree of doubt as to their existence: Gillies, above note 45, 72–3. This stands in contrast to 'knowledge' or 'awareness' where the accused acts or omits to act while holding such facts or circumstances to be true without any room for doubt other than a mere theoretical possibility: at 72.

81 Ibid 72.

relevant conduct criminal, he or she is acting with an acceptance that there is a degree of doubt with regard to the existence of that fact or circumstance. In legal parlance, that acceptance constitutes a *mens rea* that is commonly referred to as recklessness. It is therefore apparent that an accused's mere belief that the complainant was consenting will not necessarily preclude the prosecution from proving that *mens rea.*

Several months subsequent to the High Court's *obiter dicta* comments in *Getachew*, the Victorian Court of Appeal elevated that *obiter dicta* to binding precedent by rejecting the applicant's claim, based upon the *Morgan* precept, that if the jury accepted his claim that he had acted in the belie that the complainant was consenting to the sexual penetration, this would have precluded it from finding that the *mens rea* for rape had been proven. Citing the High Court's *obiter dicta* in *Getachew*, the Court of Appeal reaffirmed the High Court's view that an honestly held belief in consent and an awareness that the complainant was not or might not be consenting, or gave no thought whatever to the same, are not mutually exclusive of one another. In *NT*, Nettle, Redlich and Osborn JJA opined:

> Directions along those lines may well have been desirable to provide the jury with further assistance. We note that, since the Victorian Criminal Charge Book was revised following the High Court's decision in Getachew, it has included the following suggested directions concerning an accused's belief in consent:
>
> > There is a difference between a belief in consent which [the accused] relies upon and an awareness that [the complainant] was not or might not be consenting, which is what this element is about. That is because there are different strengths of belief.
> >
> > • At one end of the scale, I might have a belief as to something and the strength of that belief leaves no possibility for error.
> >
> > • At the other end of the scale, I can have a belief as to something while being aware that I might be mistaken. For example, I might believe that I parked my car on the fourth level of a car park, but I'm aware that it might be on the third level. I then go to the fourth level to find my car, even though I'm aware it might not be there.

> In order to prove this element of awareness, the prosecution must prove to you that [the accused] did not have such a strong belief that [the complainant] was consenting that he did not think of the possibility that she might not be consenting. In determining the strength of [the accused's] belief in consent, you should consider the matters I just mentioned that are relevant to whether the belief was held. This includes any evidence of the belief, whether the accused was aware that [describe relevant s. 36 or s. 37AAA(d) or (e) circumstances], whether the accused took steps to find out whether the complainant was consenting and any other relevant factors (citations omitted) ...[82]

Though the Court of Appeal made reference to what it termed as 'belief' at opposite ends of a scale that is based on the degree of conviction with which it is held, a belief held so strongly as to exclude any possibility of doubt is tantamount to a convoluted description of a *mens rea* that is commonly referred to as knowledge or awareness.[83] Regardless of whether one chooses to characterize such a state of mind as knowledge/awareness or the genre of belief depicted above by the Court of Appeal, it is apparent that either state of mind, if found by the fact-finder to have been held by the accused at the time of the sexual act in question, would preclude a finding that the accused acted with the requisite *mens rea* for rape at common law or under the now repealed version of s 38 of the *Crimes Act 1958* (Vic).

On the other hand, if the accused's state of mind contemplates a real as opposed to a mere a theoretically possibility of error, however slight, this is descriptive of the *mens rea* that is typically termed as 'belief'. A mere 'belief', therefore, falls short of knowledge/awareness that the

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82 KJ Arenson, The Chaotic State of the Law of Rape in Victoria: A Mandate for Reform' (2014) 78 *The Journal of Criminal Law* 326, 331–33 (quoting *Getachew 2* [2012] 286 ALR 196, [26]–[27] and *NT v The Queen* [2012] VSCA 213 (6 September 2012) at [15]) ('*NT*')).

83 See above notes 79 and 80.

complainant is not or might not be consenting. Is it not correct to state that a belief in consent which, by definition, contemplates the possibility or perhaps an even greater likelihood that the complainant might not be consenting, is actually descriptive of the *mens rea* required for rape at both common law and under the now repealed s 38? If so, it follows that the clear wording of the above-quoted passages from *NT*, when read in conjunction with *Getachew*, have overruled the *Morgan* honest belief precept that had served as an important staple in the law of rape under the Australian common law doctrine for the previous thirty-six years. While an honest belief in consent, if accepted by the fact-finder, was once a complete defence to rape at both common law and under the now repealed version of s 38, in the post-*Getachew/NT* era an assertion of or evidence led that the accused acted with such a belief is now the equivalent of direct or circumstantial evidence of the *mens rea* that was required at common law and under the repealed version of s 38.

It was earlier stated that the sweeping changes to the law of rape instituted by the *Crimes Amendment (Sexual Offences and Other Matters) Act* 2014 (Vic) are a result of pressure brought to bear by special interest groups. This fact and the unnecessary, ill-advised nature of this new legislation will be dealt with below. One would have thought, however, that those who believed that conviction rates for rape were inordinately low, thereby necessitating a drastically different definition of rape and major substantive and procedural reform in the rules governing the investigation and prosecution of rape and other sexual assaults,[84] would have rejoiced in the degree of progress that was reflected in the litany of progressive changes in the repealed version of s 38.

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84 For examples of such changes for which these people have presumably provided the impetus, see When Some People, above n 31, 214–58.

Indeed, readers are now aware that rape was no longer restricted to mere carnal knowledge of a woman, but was rightfully extended in the repealed s 38 to include non-consensual sexual penetration of all body orifices. Although there are numerous provisions in the repealed Victorian rape regime (which consisted of ss 35-38) that even the most ardent feminists would have viewed as progressive and giant steps toward achieving fairness to rape complainants and prosecutors, it is worth noting some of the most momentous: boys under the age of fourteen were no longer conclusively presumed to be incapable of committing the crime of rape;[85] husbands no longer enjoyed any form of spousal immunity for the rape or other forms of sexual assault of their wives;[86] a woman's consent to sexual penetration of any orifice, once given, was no longer regarded as incapable of being revoked;[87] either gender was capable of committing rape against the other as opposed to rape being limited to acts of rape committed solely by men against women;[88] the purview of rape was extended to persons who compel the complainant to sexually penetrate the offender or another person without the complainant's consent or by compelling the complainant to acquiesce in sexually penetrating the offender or another person without the complainant's consent; [89] and in the case of subss 38(2)(a)(ii) and 38(4)(b)(ii), by allowing for conviction upon mere proof that the accused gave no thought to whether the person was not or might not have been consenting.[90] It is important to stress that the final subsections have effectively dispensed with the only meaningful *mens rea* in the repealed s 38 by reason of the fact that the second *mens rea* requirement of s 38, an intention to sexually penetrate, is rarely (if

85 *Crimes Act 1958* (Vic) s 62(1).
86 *Crimes Act 1958* (Vic) s 62(2).
87 *Crimes Act 1958* (Vic) s 38(2)(b).
88 See ss 35(1)(a)–(b), 38(2)(a)–(b), 38(3)–(4).
89 *Crimes Act 1958* (Vic) ss 38(3)–(4).
90 *Crimes Act 1958* (Vic) sub-ss 38(2)(a)(ii), 38(3), (4)(b)(ii).

ever) committed accidentally. Thus, while it is never a live issue at trial, its mere presence had the effect of technically rendering s 38 as a crime of *mens rea*, thus precluding the accused from interposing the *Proudman* defence and effectively converting prosecutions in which subss 38(2)(a)(ii) and 38(4)(b)(ii) are alleged into offences of absolute liability.[91]

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[91] The House of Lords construed the *mens rea* for rape at common law to also include an *intention* to have carnal knowledge with a woman without her consent: *Morgan* [1976] AC 182, 191, Thus, in addition to the requirement that the accused must act with an awareness that the complainant is not or might not be consenting, there must also be an intention to effect penile penetration of the vaginal cavity. Though this entails that the accused must possess both *mentes reae*, the reality is that penile penetration of the vaginal cavity (as well as the anal and oral cavities) rarely, if ever, occurs accidentally; at 191–2. Thus, the requisite *mens rea* of an intention to effect penile penetration of the vaginal orifice is really not a live issue in rape prosecutions, although the requirement that the accused must have acted with such an intention effectively precludes the common law offence of rape from being classified as one of strict liability even if the offence were to be redefined to dispense with the additional *mens rea* of knowledge that the complainant is not or might not be consenting. This also has the effect of preventing an accused from interposing the *Proudman* defence: The defence which came to be known as the *Proudman* Defence following *Proudman v Dayman* (1941) 67 CLR 536 was recognized as a defence to strict liability offences in cases such as *Maher v Musson* (1934) 52 CLR 100, 104–5 (Dixon J); at 109 (Evatt and McTiernan JJ); *Thomas v R* (1937) 59 CLR 279. To succeed in this defence, the accused must meet the evidential burden of showing that he or she acted with an *honest and well founded* belief in the existence of facts which, had they been true, would have rendered his or her conduct entirely lawful: *Proudman v Dayman* (1941) 67 CLR 536, 540. An offence is classified as one of strict liability if it is defined in such a manner that the prosecution need not prove any type of 'fault' on the part of the accused: Arenson, Bagaric and Gillies, above n 8, 31–2; Gillies, above n 45, 81–5, 97–106. In this context, 'fault' denotes one or more *mentes reae* or any degree of negligence: at 43, 46, 80–2. A crime of absolute liability is one in which Parliament has expressly, or by necessary implication, barred the accused from raising the *Proudman* defence despite the fact that the offence does not require proof of 'fault' on the part of the accused: at 107–8. For a thorough discussion of strict and absolute liability offences and the significance of including the *mens rea* of an intention to sexually penetrate under the now repealed s 38 of the *Crimes Act 1958* (Vic) and, by implication, the common law as well as s 38 of the recently enacted *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic), see KJ Arenson, 'Rape in Victoria as a Crime of Absolute Liability: A Departure from Both Precedent and

Despite the progressive reforms instituted under the repealed s 38 that were brought about by the *Crimes (Sexual Offences) Act 1980* (Vic), *Crimes (Sexual Offences) Act 2006* (Vic) and *Crimes (Sexual Offences) (Further Amendment) Act 2006* (Vic), these changes fell short of what those aspiring to reform the law of rape had envisaged. That brings us to the question of whether the new definition of rape, introduced through the *Crimes Amendment (Sexual Offences and Other Matters) Act* 2014 (Vic), represents an improvement over the repealed version of s 38.

V THE CRIMES AMENDMENT (SEXUAL OFFENCES AND OTHER MATTERS) ACT 2014 (VIC)

The *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) introduced an entirely different regime of rape and other forms of sexual assault in Victoria. Most pertinent for present purposes is s 38 of the *Act* that now defines rape as follows:

> (1) A person (A) commits an offence if—
>
> (a) A intentionally sexually penetrates another person (B); and
>
> (b) B does not consent to the penetration; and
>
> (c) A does not reasonably believe that B consents to the penetration.
>
> (2) A person who commits an offence against subsection (1) is liable to level 2 imprisonment (25 years maximum).
>
> (3) A person does not commit an offence against subsection (1) if the sexual penetration is done in the course of a procedure carried out in good faith for medical or hygienic purposes.

Progressivism' (2012) 76 *The Journal of Criminal Law* 389, 395–400. For an explanation of the concept of absolute liability, see Gillies, above n 45, 97–108.

This version of s 38, as with its repealed predecessor, must be read in conjunction with other sections that define its constituent elements such as, for example, ss 34C (consent), 37D (sexual penetration) and 37G (reasonable belief). Although changes have been made to the definitions of consent and sexual penetration under ss 34C and 37D respectively, a completely new section defining reasonable belief (as to whether another is consenting to sexual penetration) has been added in order to accommodate the newly defined elements of rape and sexual assault which now include a *mens rea* that consists of both an objective and a subjective component. For present purposes, however, it is sufficient to focus exclusively on the new definition of rape.

In Part 4, the distinction between the *mentes reae* of knowledge/awareness and belief was explicated in the above passages from *Getachew* and *NT.* Readers will recall that belief, unlike knowledge or awareness, denotes a *mens rea* in which the accused's voluntary act or omission to act (where there is a legal duty to act) is accompanied by the accused's belief in certain facts or circumstances that render his or her conduct criminal, albeit with some degree of doubt as to their existence that transcends a mere theoretical doubt emanating from the maxim that 'anything is possible'. This was contrasted with the *mens rea* of knowledge/awareness in which the accused acts or omits to act while holding certain facts or circumstances to be true without allowing for any doubt as to their existence, save for a mere theoretical possibility of the same. As the *mens rea* for rape at common law as well as the repealed version of s 38 required the accused to act with knowledge/awareness that the complainant is not or might not be consenting to the relevant sexual penetration, *Getachew* and *NT* clearly enunciated that an accused's belief

that the complainant is consenting and such a *mens rea* are not mutually exclusive.

To the contrary, the *mens rea* of belief is tantamount to the *mens rea* of recklessness in which the accused, though not intending to cause damage to persons or property through his or her conduct, adverts to an unreasonable risk of harm[92] associated with that conduct and nonetheless elects to proceed despite that awareness.[93] Depending upon whether the accused adverts to a real possibility or even a probability that the risk will come to fruition, his or her conduct is properly characterised as possibility or probability type recklessness respectively, both of which are forms of negligence as well as *mentes reae*.[94] With regard to the *mens rea* for rape at common law and under the repealed version of s 38, one who acts with a *belief* that the complainant is consenting is also acting with knowledge/awareness that there is a real possibility that the complainant is not consenting, otherwise known as recklessness of the possibility genre.[95] Though the strength of the accused's belief may vary as indicated in *NT*, this does not alter the fact that this is the same *mens rea* that would be sufficient to convict for rape at common law and under the previous version of s 38. Indeed, it was for this reason that the High Court's *obiter*

92 Arenson, Bagaric and Gillies, above n 8, 238.

93 Gillies, above n 45, 58–67.

94 Ibid. See also *Pemble v the Queen* (1971) 124 CLR 107, [18], [22]. *R v Crabbe* (1985) 58 ALR 417, [7]–[10]. In *Boughey v The Queen* (1986) 65 ALR 609 the High Court held that probability type recklessness entails advertence to a real and substantial as opposed to merely a remote risk that one or more of the facts or consequences rendering the accused's conduct criminal would exist or ensue: at 616–7. If the accused adverts to a real as opposed to a mere theoretical possibility of the same, this is referred to as probability type recklessness: *Pemble v the Queen* (1971)124 (CLR) 107 [23]. *Boughey* further held that one can act with probability type recklessness without contemplating that the chance the risk occurring is fifty percent or higher: ibid 615. The Court did not specify how much lower than fifty percent the accused can contemplate and still be regarded as acting with this type of recklessness.

95 Gillies, above n 45, 58–67, 596–97.

dicta in *Getachew* and the Court of Appeal's decision in *NT* were of the view that the *Morgan* defence was no longer viable. Succinctly stated, what had been a longstanding and accepted defence has been transformed into an admission of sorts that the accused possessed the *mens rea* for rape as a matter of common law doctrine as well as under the previous version of s 38.

With the *Morgan* defence of honest belief having been overruled in 2012, one would have thought that those advocating sweeping reforms in the law of rape in Victoria and jurisdictions with similar statutes[96] would have been overjoyed. It appeared as though this development, combined with the others previously noted, would be viewed as a major victory in the quest to achieve a proper balance in ensuring fairness for rape complainants and, at the same time, respect for an accused's right to a fair trial. The remaining problem, however, was the jury direction mandated by s 37AA of the *Crimes Act 1958* (Vic) (above) that was introduced into law as part of the *Crimes Amendment (Rape) Act 2007* (Vic), particularly subs 37AA(b)(i). The nonsensical and circular wording of this subsection effectively states that whenever an accused asserts or otherwise leads evidence that he or she believed that the complainant was consenting, the trial judge must direct the jury that in determining whether the accused possessed the *mens rea* for rape (under the repealed version of s 38), they

96 For other jurisdictions with rape statutes similar to the recently enacted s 38 of the *Crimes Amendment (Sexual Offences and Other Matters) Act* 2014 (Vic), see *Sexual Offences Act 2003* (UK) c 42, s 1 ('rape'); *Crimes Act 1961* (NZ) s 128 ('sexual violation defined'). In the Australian code jurisdictions an almost identical effect is created by the rape statutes of those jurisdictions together with a general defence of mistake of fact; see *Criminal Code Act Compilation Act 1913* (WA) sch ('*The Criminal Code*') ss 325 ('sexual penetration without consent') 326 ('aggravated sexual penetration without consent') 24 ('mistake of fact'); *Criminal Code Act 1924* (Tas) ss 185 ('rape') 14 ('mistake of fact') 14A ('mistake as to consent in certain sexual offences'); *Criminal Code Act 1899* (Qld) ss 349 ('rape') 24 ('mistake of fact').

'must consider… in the case of a proceeding in which the jury finds that a circumstance specified in section 36 exists in relation to the complainant, whether the accused was aware that that circumstance existed in relation to the complainant …'.[97]

Readers will recall s 36 (above) which enumerates several factors that, if found to be operating at the time of sexual penetration, are deemed to negate the complainant's consent. When the effect of s 36 is considered in conjunction with the *mens rea* required for rape under the common law and the repealed s 38, it is clear that anytime an accused is aware that a s 36 circumstance is operating, it not only follows that the complainant's consent is lacking, but that the accused is acting with the *mens rea* required by s 38; namely, an awareness that the complainant is not or might not be consenting. Thus, the wording of subs 37AA(b)(i) cannot be reconciled with that of s 38 and is circular in declaring, in effect, that a factor the jury must consider in determining whether the prosecution has proven the requisite *mens rea* for s 38 is whether the accused was in fact possessed of that *mens rea* at the time of the relevant penetration. Notwithstanding the unfortunate language of subs 37AA(b)(i), there were a series of Court of Appeal decisions subsequent to its enactment in 2007[98] that rejected informative comments contained in the Second Reading Speeches[99] and Explanatory Memorandum relating to s 37AA of

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97 *Crimes Act 1958* (Vic) subs 37AA(b)(i).

98 See *Worsnop v The Queen* [2010] VSCA 188 (28 July 2010) ('*Worsnop*'); *Getachew v The Queen* [2011] VSCA 164 (2 June 2011) ('*Getachew*'); *Roberts v The Queen* [2011] VSCA 162 (2 June 2011) ('*Roberts'*); *Neal v The Queen* [2011] VSCA 172 (15 June 2011) *('Neal'*); and *Wilson v The Queen* [2011] VSCA 328 (27 October 2011) ('*Wilson'*).

99 Victoria, *Parliamentary Debates*, Legislative Assembly, 22 August 2007, 2858 (Rob Hulls); Victoria, *Parliamentary Debates*, Legislative Assembly, 18 September 2007, 3034 (Judith Maddigan):

the *Crimes Amendment (Rape) Bill 2007* (Vic). In confirming that the *mens rea* element for rape under the now defunct s 38 was an awareness of the possibility of the complainant's non-consent rather than the absence of an accused's genuine belief in consent, the Explanatory Memorandum stated:

> The directions make it clear that evidence or an assertion of a belief in consent is to be taken into account when determining whether the prosecution has proven beyond a reasonable doubt that the accused was aware that the complainant might not be consenting. Evidence of, or an asserted belief in, consent, even if accepted by the jury, is not necessarily determinative of whether the prosecution has met this burden. That is to say, belief in consent and awareness of the possibility of an absence of consent are not mutually exclusive. In circumstances where the prosecution has satisfied the jury beyond a reasonable doubt that an accused person was aware that the complainant might not be consenting, if the jury are equally satisfied in relation to the other elements, then they should convict irrespective of whether they accept the evidence or assertion that the accused believed the complainant was consenting.[100]

Despite the import of the Second Reading Speeches, Explanatory Memorandum and even the Charge Book, all of which were subsequently vindicated by the decisions in *Getachew* and *NT*, the Court of Appeal continued to apply the *Morgan* precept in the period between the enactment of the *Crimes Amendment (Rape) Act 2007* (Vic) and the above-mentioned 2012 decisions of the High Court and Court of Appeal.

> The bill seeks to address the confusion caused by the terms "belief in consent" and "awareness of lack of consent". Trying to define the difference between those terms is quite difficult and obviously has been for the people drawing up the bill. Whilst there are many ways to describe "belief" and "awareness", "belief" is essentially a state of mind which can exist both when supported by evidence and without any evidence to support it. On the other hand, "awareness" is more akin to perception, observation or consciousness' at 3034.

100 Explanatory Memorandum, Crimes Amendment (Rape) Bill 2007 (Vic) 4.

In *Worsnop v The Queen*,[101] the Court of Appeal even went so far as to state that the Explanatory Memorandum and Charge Book were incorrect insofar as they strayed from the *Morgan* belief defence.[102] In fairness to the Court of Appeal, however, it found itself in the untenable position of being duty bound to give effect to the egregious language of subs 37AA(b)(i) which, even prior to the repudiation of the *Morgan* belief defence in 2012, could not be reconciled with ss 36 and 38 of the *Crimes Act 1958* (Vic) as they existed prior to their repeal via Part 2, Section 4 of the *Crimes Amendment (Rape) Act 2007* (Vic).[103]

Although the frustrations of those seeking massive reform of the substantive and procedural rules governing the prosecution of rape and other sexual assaults were quite understandable, the most simple, effective and obvious remedy would have been for Parliament to either amend or repeal subs 37AA(b)(i) or, alternatively, enact the provisions relating to jury directions that are now set out in the *Jury Directions Act 2013* (Vic).[104] Although the *Crimes Amendment (Rape) Act 2007* (Vic) should be commended for its retention and expansion of the progressive measures contained in ss 35(1)(a) and (b), 36, 37 and 37AAA of the *Crimes Act 1958* (Vic) under the previous statutory regime of rape and other sexual assaults, there is an intractable problem with the hybrid fault element of the newly constituted statutory offence of rape; specifically, the element which requires the prosecution to prove that 'A does not

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101 *Worsnop* [2010] VSCA 188 (28 July 2010).

102 Ibid 192–5.

103 For an example of a decision in which the Court of Appeal went to extreme lengths to give effect to subs 37AA(b)(i), see *GC v The Queen* (2013) 39 VR 363 ('*GC*'). In *GC*, the Court held, albeit unpersuasively, that ss 36(a), (b) and (c) were somehow distinguishable from ss 36(d)-(g) of the *Crimes Act 1958* (Vic) because only the former employed the words, 'submits because' or 'submits because of': at [20].

104 *Jury Directions Act 2013* (Vic) ss 60, 61.

reasonably believe that B consents to the penetration (emphasis added)'.[105]

A *Why s 38(1)(c) is an Oxymoron*

The critical distinction between the *mentes reae* of belief and awareness/knowledge was explained in the aforementioned passages from *Getachew* and *NT*. As those decisions made clear, the former denotes one who acts or omits to act with an acceptance that there is genuine doubt as to whether a relevant fact or circumstance exists. While a belief that the complainant was consenting, if accepted by the fact-finder, was once regarded as a complete defence to an accusation of rape on the basis that it could not be reconciled with the *mens rea* for rape at common law or the repealed s 38,[106] *Getachew* and *NT* correctly concluded that such a belief denotes exactly the opposite. That is to say that a belief in the existence of a fact or circumstance that is held with an acceptance that there is a real, as opposed to a mere theoretical doubt as to its existence, is but another means of stating that the accused acted with an awareness that there was a real possibility (or perhaps greater) that the complainant was not consenting. In legal parlance, this state of mind is referred to as possibility type recklessness of the type required for rape at both common law and under the repealed s 38.[107]

Though s 38 did not expressly employ the word recklessness, it is now well settled that an awareness that the complainant might not be consenting is synonymous with the possibility type recklessness that will satisfy the *mens rea* for rape at common law and under the repealed s

105 *Crimes Amendment (Rape) Act 2007* (Vic) s 38(1)(c).

106 *Morgan* [1976] AC 182, 208–9.

107 Gillies, above n 45, 62–67, 596–7; see above n 95.

38.[108] Moreover, as recklessness is regarded as an aggravated form of *negligence* in which the accused *adverts* to the fact that his or her conduct involves an unreasonable risk of harm to another or others and nonetheless elects to proceed despite that awareness,[109] it is apparent that the newly constituted s 38 is inherently contradictory and, therefore, irretrievably flawed insofar as it requires the prosecution to prove beyond reasonable doubt that the accused did 'not reasonably believe' that the complainant was consenting to the sexual penetration at issue.

Parliament's attempt to create a hybrid *mens rea* element of rape that includes a subjective as well as an objective element constitutes an oxymoron that is all but certain to lead to unnecessary and costly litigation that will eventually expose it for what it is. The paradoxical nature of this hybrid *mens rea* is predicated on the fact negligence denotes conduct that falls below an objective standard required by law to which all persons must conform their conduct: the standard of the hypothetical reasonable person.[110] As recklessness is an undeniable form of negligence, the hybrid *mens rea* under the newly constituted s 38 is functionally equivalent to stating that the prosecution must prove that the accused did not act with reasonable recklessness regarding the complainant's lack of consent. If one accepts the reasoning of the High Court and Court of Appeal in *Getachew* and *NT* respectively, then by definition it is impossible for an accused to act with reasonable recklessness in relation to the complainant's lack of consent. It therefore follows that it is impossible for the prosecution to prove beyond

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108 Ibid.

109 Ibid. See also JG Fleming, *The Law of Torts* (Thomson Reuters, 8th ed, 1992) 103.

110 Ibid. For a discussion of this standard, what determines whether a risk is an unreasonable one and the attributes that are imputed by law to the hypothetical reasonable person, see Arenson, Bagaric and Gillies, above n 8, 26, 238–9.

reasonable doubt that the accused did not *reasonably believe* that the complainant was consenting to the relevant penetration. By enacting the hybrid version of s 38 and abolishing the purely subjective *mens rea* for rape required at common law and the previous s 38, the Victorian Parliament has revived the confusion spawned by the House of Lords' folly in *Morgan* by failing to draw the distinction between the *mentes reae* of belief and knowledge/awareness. There is much to be said for the aphorism that those who do not study history are doomed to repeat it. Why did Parliament fail to draw this distinction just two years after the decisions in *Getachew* and *NT* eliminated the confusion emanating from the House of Lords' folly in failing to do so in *Morgan*?

VI THE IMPETUS FOR THE CRIMES AMENDMENT (SEXUAL OFFENCES AND OTHER MATTERS) BILL 2014 (VIC)

In order to answer the question posed at the conclusion of Part 5, readers should be reminded of the Second Reading Speeches in Victoria, Western Australia, Tasmania and New Zealand which all contained comments to the effect that gender bias provided the predominant or perhaps sole justification for abolishing one or both limbs of the alternative offence of voluntary manslaughter in murder prosecutions. Readers should also remind themselves of a conversation that the writer had with a woman who was then the Chairperson of the VLRC, subsequently a Justice of the Supreme Court of Victoria and, following her recent resignation from the Court, the person who was appointed to chair a Royal Commission tasked with examining a broad range of issues and proposals for reform concerning domestic violence. The conversation occurred just prior to the enactment of the *Crimes (Homicide) Act 2005* (Vic) which adopted the VLRC's recommendation to abrogate the provocation limb of voluntary

manslaughter.[111] During that conversation, the VLRC Chairperson stated that the impetus for this recommendation was a statistical analysis which demonstrated that the male gender had derived more benefit from the offence than the female gender. The Chairperson readily agreed, however, that women have in fact benefited from the availability of voluntary manslaughter as an alternative to murder in instances where the provocation offered by the deceased was legally sufficient to warrant a verdict of not guilty of murder, but guilty of the lesser offence of voluntary manslaughter. Was gender bias an equally important factor in Parliament's decision to affect the massive reform of Victoria's statutory regime of sexual assault, most notably its decision to discard the traditional subjective *mens rea* element of rape and replace it with the hybrid subjective/objective *mens rea* mandated by s 38(1)(c) of the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic)?

In a case note authored by Associate Professor Wendy Larcombe in 2011, [112] the year before *Getachew* and *NT* overruled *DPP v Morgan* on the basis that it failed to draw the distinction between belief as opposed to knowledge/awareness, she correctly concluded that the import of the Second Reading Speeches[113] and Explanatory Memorandum[114] relating to the *Crimes Amendment (Rape) Bill 2007* (Vic)[115] was consonant with the *obiter dicta* and decision that would later ensue in *Getachew* and *NT* respectively; in particular, the manner in which these cases related to the

111 *Crimes (Homicide) Act 2005* (Vic) s 3B. Though this case note was revised on 24 May 2012, the revision preceded the High Court and Court of Appeal decisions in *Getachew* and *NT* that were handed down in March and September of 2012 respectively.

112 W Larcombe, 'Worsnop v The Queen: Subjective Belief in Consent Prevails (Again) in Victoria's Rape Law' (2011) 35(2) *University of Melbourne Law Review* 697 ('*Larcombe case note*').

113 See above n 99.

114 See above n 100.

115 Ibid.

distinction between belief and knowledge/awareness and its impact on the *Morgan* honest belief defence.[116] Professor Larcombe should be highly commended for her intuitive construction given the fact that neither the Second Reading Speeches nor the Explanatory Memorandum explicitly articulated why an accused's belief in consent is not mutually exclusive with the *mens rea* for rape at both common law and the repealed s 38. Professor Larcombe also correctly noted the nonsensical and circular wording of (now repealed) subs 37AA(b)(i) insofar as it declared that an accused's awareness that one or more of the consent negating factors enumerated in s 36 is operating was merely a factor for the jury to consider in its determination of whether the accused was aware that the complainant was not or might not be consenting.[117] Had Professor Larcombe's case note been limited to these particular points, there would be no reason to take issue with various other points raised in her case note and other writings, nor to question whether they were intended to serve as a foundation for a broader agenda that is laden with gender bias and repugnant to the inviolable precept that in our adversarial system of justice, all persons are regarded as equal before the law.

In her case note, for example, Professor Larcombe states that in *Worsnop v The Queen*,[118] the Court of Appeal held that unless the Crown is able to prove beyond reasonable doubt that there is *no possibility* that the accused acted in the belief that the complainant was consenting, the 'fault'[119] or *mens rea* element required under s 38 as it was constituted prior to the enactment of the *Crimes Amendment (Sexual Offences and*

116 Larcombe case note, above n 112, 706–9.
117 Larcombe case note, above n 112, 707.
118 *Worsnop* [2010] VSCA 188.
119 Larcombe case note, above n 112, 714.

Other Matters) Act 2014 (Vic) cannot be established.[120] Aside from the fact that the judgment in *Worsnop* is devoid of such an assertion, anyone of average intellect is aware that save for the axiomatic principles of disciplines such as mathematics or physics, for example, there are relatively few facts that are capable of satisfying a standard of proof of this magnitude. Could it ever be proved beyond any possibility that the sun will rise on the following day, or that an ostensibly healthy young man or woman will not die of a vascular incident before he or she awakens the following day? Irrespective of whether this rather obvious misstatement of the judgment in *Worsnop* was the result of a purposeful embellishment or a misunderstanding of the principle that proof beyond reasonable doubt does not require proof beyond all doubt, such a palpable misstatement does little to inspire confidence in Professor Larcombe's credibility, much less her familiarity with the black letter law principles of the Criminal Law.

Professor Larcombe then adds another observation concerning *Worsnop*. She states in pertinent part:

> Although the Court of Appeal considered that '[b]elief', in the event, was a sideshow to the only issue which was raised ... consent in fact', there was no suggestion in this case that the direction was improperly given because it was not relevant to the facts in issue or because there had been no evidence led or assertion made about honest belief.
>
> On the basis of *Worsnop*, we can conclude that an assertion of belief in consent can be inferred from an assertion of consent, such that it is not improper to give the s 37AA direction even when the only real issue at trial is

120 Ibid.

> "consent in fact". In these circumstances, any distinction between "honest belief" cases and "straight consent" cases remains highly dubious…[121]

Although it is difficult to argue with her conclusion that 'an assertion of belief in consent can be inferred from an assertion of consent' and that 'any distinction between 'honest belief' cases and 'straight consent' cases remains highly dubious', her analysis fails to take into account that s 37AA refers generically to the word 'evidence' and its failure to refer only to direct evidence militates against Professor Larcombe's apparent hostility to the notion that the word 'evidence', as used in s 37AA, is not limited to direct as opposed to direct as well as circumstantial evidence of consent.[122] Perhaps even more destructive to the professor's overt hostility to the notion that an accused who adduces evidence of a complainant's actual consent has, by way of inference, also led to evidence of his or her honest belief in the same, is s 37AA's reference to both an accused's assertion of his or her belief in the complainant's consent as well as leading evidence of that belief. An assertion of belief in consent would, if accepted as truthful, constitute direct evidence that the belief was in fact held. In contrast, an assertion of or leading evidence of the complainant's actual consent would, if accepted as truthful, qualify as direct or circumstantial evidence of the accused's belief in such consent respectively; that is, it would constitute a circumstance from which the fact-finder could find or reasonably infer that the accused

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121 Ibid 709–10.

122 A Ligertwood and G Edmond, *Australian Evidence: A Principled Approach to the Common Law and the Uniform Acts* (LexisNexis, 5th ed, 2005) 114–27; KJ Arenson and M Bagaric, *Rules of Evidence in Australia: Text and Cases* (LexisNexis, 2nd ed, 2007) xiii, xiiii. Succinctly stated, direct evidence is evidence, which if accepted as truthful, automatically resolves a disputed fact or facts. A good example would be a full confession of guilt to the offence(s) charged. Circumstantial evidence, on the other hand, is evidence which, if accepted as truthful, will not automatically resolve a disputed fact or facts at issue, but gives rise to one or more inferences that point to the conclusion that the disputed fact or facts did or did not exist.

entertained a bona fide belief that the complainant was consenting.[123] Thus, the professor's apparent displeasure with the manner in which the jury was directed in *Worsnop* is unwarranted and amounts to much ado about nothing of any real substance.

In addition, the following passages from Professor Larcombe's case note afford readers with valuable insights into her general attitude toward the male gender as well as her intention to lay a foundation for the hybrid subjective/objective *mens rea* that would eventually become the focal point of the law of rape in Victoria:

> Immunity should no longer be provided for an *accused whose belief in consent is the result only of distorted views of female sexuality*; or false *assumptions about sexual entitlement*…The serious consequences of sexual assault require a higher standard. Serious harm can easily be avoided by legally requiring that a person who seeks to sexually penetrate another takes reasonable steps to ascertain that the other person freely agrees. As the communicative model of consent has attempted to explain, it is not appropriate to engage in sexual penetration *assuming* consent *and only desist once lack of consent has been forcefully communicated.* Under the communicative model of sexual conduct, if affirmative consent has not been communicated, the initiator of sexual penetration is expected before proceeding to take reasonable steps to ascertain whether the other person is consenting.
>
> That expectation, and the communicative model of consent more generally, can be given effect in a range of legislative forms. For example, a number of domestic and international jurisdictions, including Western Australia, Tasmania, Queensland, the United Kingdom and New Zealand, have now reformed their rape laws to institute an "objective" fault element. In these jurisdictions, the accused can only rely on an honest belief in consent if that belief was also "reasonable". This is variously framed as a defence of "honest and reasonable belief", or as an element of the offence so that the prosecution must prove that

123 Arenson and Bagaric, above n 122.

> the accused did not believe on reasonable grounds that the complainant was consenting. In the United Kingdom, for example, the mental element for rape is established if the prosecution proves beyond reasonable doubt that A did not "reasonably believe" that B was consenting. The legislation provides further that "[w]hether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents (emphasis added) (citations omitted)".[124]

It is ironic that Professor Larcombe shows no reluctance to make an assumption (or draw a conclusion) when she feels it is beneficial to one or more of her arguments. In her case note, however, she excoriates men (but not women) 'whose belief in consent is the result only of distorted views of female sexuality' or make 'assumptions about sexual entitlement' in the context of rape.[125] In the context of sexual relations, both men and women routinely make assumptions or draw conclusions, most of which are quite well founded and particularly so depending upon the tenor of the relationship. In relationships where it is customary for either party to initiate a sexual encounter without incident, it is ludicrous to suggest, as Professor Larcombe does, that the initiator (who she insinuates will be the male) should be required to take affirmative steps of an unspecified nature to ensure that the woman is consenting.[126] To recommend such a practice in cases of this sort is ill-advised and as potentially destructive to the relationship as it is impracticable. To recommend that the government foist such a requirement on persons in these and similar situations in which consent is obvious and a lack thereof could be just as easily communicated by the non-initiator, is outlandish. In scenarios in which consent is always forthcoming in the absence of some extraordinary or exigent circumstance, what is the justification for

124 Larcombe case note, above n 112, 712–3.
125 Ibid 711.
126 Ibid 712.

reposing the entire onus solely upon one gender to take affirmative steps to ensure that consent is present? Is it any more onerous to place the burden of communicating a lack of consent on the non-initiating party? Should the parties take a mandatory time out and have a discussion that has the clear capacity to destroy one or both parties' desire to proceed with what would otherwise have been a normal and pleasurable sexual encounter? Because people sometimes prevaricate, should the initiating party be legally bound to tape record such discussion or, better yet, have printed consent forms readily available for both parties to sign in the presence of a justice of the peace? One cannot envisage a more effective means of birth control, save for the obvious exceptions of abstinence, vasectomies, hysterectomies and birth control pills.

For present purposes, however, it is the second of the above-quoted passages from Professor Larcombe's case note that is most significant. It is therein that she strenuously advances the most insidious of the numerous reforms in the law of sexual assault, particularly rape, that were enacted into law as a result of the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic); namely, the hybrid subjective/objective *mens rea* as expressed in s 38(1)(c) of the *Act*. Lest there be any doubt that her case note was intended to serve as the foundation for the eventual adoption of this *mens rea*, readers should be aware that Professor Larcombe made an identical recommendation in her submission to the Victorian Department of Justice's (DOJ) Review of Sexual Offences Consultation Paper.[127] Is it purely coincidental that the hybrid subjective/objective *mens rea* advanced in both her case note and submission to the DOJ is now expressed verbatim in subs 38(1)(c) of the

[127] Federation of Community Legal Centres, Victorian Centres Against Sexual Assault and Wendy Larcombe, Submission to the Department of Justice, *Review of Sexual Offences*: *Consultation Paper*, 8.

Crimes Amendment (Sexual Offences and Other Matters) Act 2014 (Vic)? This raises a question as to which persons or organizations are so influential that Parliament opted to adopt their recommendation without changing a single word? That this occurred despite the lessons of *Getachew*, *NT* and the reservations expressed by the Law Institute of Victoria (LIV)[128] is indicative of the degree of influence and power that these persons and organisations wield. In its overall response to Professor Larcombe's submission, the LIV stated:

> [T]he LIV submits that the rights of an accused to trial fairness must also be significantly considered by this review. The focus of this submission will be to draw the Department's attention to the effect of its proposals upon existing rights. The LIV submits that proper balance must be accorded to the defendant's rights as well as those of the complainant. The LIV remains committed to its position in that the presumption of innocence remains paramount in all cases, especially those where consent or fault is an issue, or there may be a risk of seeing an increase in appeals for wrongful convictions in the future.[129]

Also significant is that despite the DOJ's original recommendation that the elements of belief and reasonableness (which now comprise the hybrid *mens rea* of subs 38(1)(c)) should constitute separate and distinct elements of the recently enacted s 38, Professor Larcombe opposed this recommendation on the grounds that doing so would create an unacceptable risk that a jury's finding that the accused acted with a belief in consent would lead to a further finding that there were reasonable grounds for entertaining the same.[130] Again, despite the concerns expressed by the LIV, Professor Larcombe's recommendation has now been codified into law in Victoria.

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128 Law Institute of Victoria, Submission to the Department of Justice, *Review of Sexual Offences: Consultation Paper*, 6.

129 Ibid 4.

130 Ibid 7.

Any neutral and fair-minded observer might well form the view that Professor Larcombe's case note, submission to the DOJ and other writings were also intended to provide the impetus for a substantial increase in the conviction rate where allegations of rape are made. Although the professor asserts that 'while the current legal impunity for rape cannot be condoned, increasing conviction rates is not itself a valid objective of law reform',[131] her assertion is belied by other statements she made in the same article. In particular, Professor Larcombe states:

> (T)he relative difficulty of securing convictions in sexual assault cases, and the impact of low conviction rates on all stages of rape case attrition, has long been recognised in feminist scholarship as an issue requiring redress. However, recent empirical data has renewed concern about conviction rates. Paradoxically, but consistently across a number of jurisdictions, rape conviction rates have further declined in recent years—that is, following extended periods of law reform that might have been expected to increase the number of rape convictions. As Kelly et al. observe:
>
> > Attrition research identifies a paradox internationally: despite widespread reform of statute law and, in many jurisdictions, procedural rules, the 1990s witnessed declining or static conviction rates. The UK has one of the most pronounced patterns. Remarkably little research or legal commentary has, as yet, attempted to explain these common—and unexpected—international similarities… The same pattern of static or falling conviction rates, post-reform, is observable in Australia, as discussed below. And, partly through feminist activism, the low conviction rates have become a pressing political issue—one requiring redress (citations omitted).[132]

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131 W Larcombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' (2011) 19(1) *Feminist Legal Studies* 27, 29.

132 Ibid 28.

Perhaps the most revealing insight into Professor Larcombe's sexist mindset and its concomitant agenda are a set of recommendations she made in her submission to the DOJ's Consultation Paper, most of which were wisely rejected by Parliament. The recommendations espoused by Professor Larcombe include, *inter alia*, the following:

> While the process of amending the *Crimes Act 1958* (Vic) would go some way to clarifying the law of sexual offences in Victoria, these potential improvements will only be realised if these legislative reforms are implemented in tandem with:
>
> …
>
> • *ongoing education of judges, defence counsel, prosecutors and police about the social context of sexual assault; and associated specialisation*;
>
> • development of clear definitions and examples or explanations, to be included in the *Crimes Act 1958* (Vic) and also used in *training materials for judges, legal officers, police and victim/survivor advocates*…
>
> • greater use of expert witnesses and *specialist decision-makers in sexual offence cases*;
>
> • strong encouragement and support for developing and *providing other forms of assistance to juries in sexual assault trials such as pre-trial education about the social realities of sexual offences, outlines of charges and jury guides, decision flow-charts*;
>
> • empowering judges to disallow questioning of the complainant that is unduly *intrusive, humiliating, intimidating or overbearing;*
>
> • establishing more rigorous processes for auditing and reviewing the handling of sexual offence cases, the decisions regarding charging and the training of personnel;

> • requiring that the views of the complainant are elicited and taken into consideration in decisions to investigate, prosecute, amend or drop charges, change venue or use alternative modes of giving evidence in court;
>
> • requiring that an impact statement is sought from the complainant before the court authorises the admission of sexual history evidence, or medical, counselling or other personal records;
>
> • enabling sexual offence cases to be decided by judge alone if both the accused and the complainant agree;
>
> • ensuring that the complainant's evidence at trial is recorded and, where possible, used in any retrial in preference to requiring the complainant to repeat their evidence and re- submit to cross-examination…
>
> We urge the Victorian Government to undertake further consultation and work to implement the above changes, including funding education and practice change and undertaking further legislative reform where required (emphasis added). [133]

In perusing these recommendations, it is apparent that Parliament was adamant in resisting an obvious attempt to establish a completely different set of substantive and procedural rules that would have applied only in prosecutions for sexual offences to the exclusion, for example, of prosecutions for equally serious crimes such as armed robbery, kidnapping, aggravated burglary and arson. Professor Larcombe apparently subscribes to the credo that judges and legal practitioners, even those who are highly experienced in trying, prosecuting and defending rape and other forms of sexual assault, should undergo some

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133 Federation of Community Legal Centres, Victorian Centres Against Sexual Assault and Wendy Larcombe, Submission to the Department of Justice, *Review of Sexual Offences*: *Consultation Paper*, 5–6.

unspecified type of special training in order to fully comprehend the nature of sexual assault and its full impact on those claiming to be victims of the same. Although this recommendation is devoid of any specificity as to what this training might entail, one can only assume that it will be something along the lines of mandatory courses in women's studies and other forms of curricula that one would normally associate with those professing to be strident feminists.[134] Perhaps the most blatant and audacious attempt to institute a disparate set of rules governing sexual assault prosecutions is the recommendation that sexual assault complainants who give evidence at an earlier trial be exempted from having to do so again in the event of a retrial. This would involve a major amendment to s 66 of the *Evidence Act 2008* (Vic).[135] No rational explanation is provided, nor could it, as to why a whole new hearsay exception should be created solely to accommodate sexual assault complainants, but not complainants of equally traumatic and serious crimes such as those noted above.

In order to place Professor Larcombe's writings in proper perspective, particularly her submission to the DOJ, readers should be aware of the obvious; namely, that there are many avowed feminists and women's rights organisations who zealously endorsed all of the recommendations and assertions advanced in Professor Larcombe's submission to the DOJ

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134 Readers should be aware that in Victoria, there is actually a portfolio over which a Minister for Women presides. If the readers are wondering whether there is a parallel portfolio and a Minister for Men, the answer is a resounding no. The obvious question, therefore, is how did such a glaring and sexist inequality come into existence and why is the majority gender in Victoria and worldwide any more worthy of special protection than the minority gender? See Parliament of Victoria, *Ministers and Members: Current* <http://www.parliament.vic.gov.au/members/ministers>.

135 *Evidence Act 2008* (Vic) s 66, though allowing prior hearsay testimony to be given at a subsequent retrial in some circumstances, places serious restrictions on this practice: at sub-ss 66(2A)(a), (b) and (c).

Consultation Paper. These include the Victorian Centres Against Sexual Assault Forum, Domestic Violence Victoria, Domestic Violence Resource Centre Victoria, In Touch Multicultural Centre Against Family Violence, and the No to Violence Male Family Violence Prevention Association.[136] Also significant in this context is that many avowed feminists have overtly lauded Professsor Larcombe's writings.[137]

A fair reading of Professor Larcombe's case note, writings and the works of others extolling their virtues is cause for much concern. It exposes an unfettered hostility toward the notion that all persons are equal before the law, a willingness to embellish the language of key appellate decisions or an unwitting propensity to misstate well-established legal principles, an attitude towards the male gender that is predicated on overly broad,

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136 Although some of these organisations would not appear to have a strident feminist bent when judged solely by the name of the organisation, the writer is more than content to allow readers to form their own independent judgments as to whether the forgoing groups have been properly characterised as having an agenda that is laden with gender bias.

137 Larcombe's writings have been widely cited by a number of feminist authors; see e.g. Y Russell, 'Thinking Sexual Difference Through the Law of Rape' (2013) 24(3) *Law and Critique* 255; A Powell et al, 'Meanings of 'Sex' and 'Consent': The Persistence of Rape Myths in Victorian Rape Law' (2013) 22(2) *Griffith Law Review* 456 in which the authors note that at 457:

> [o]ver the past four decades, feminist scholars have been instrumental in exposing persistent gendered discourses surrounding so-called "normal sex" "real rape" and "consent" which continue to influence perceptions of rape, victim-complainants and perpetrators, as well as members of the judiciary and jurors in their determinations in rape trials.

A Flynn and N Henry, 'Disputing Consent: The Role of Jury Directions in Victoria' (2012) 24(2) *Current Issues in Criminal Justice* 167: 'we argue that some of the decisions of the appeals courts…send a message that men who rape women can continue to enjoy immunity from conviction in Victoria': at 168; A Powell, 'Seeking Rape Justice: Formal and Informal Response to Sexual Violence through Technosocial Counter-Publics' (2015) *Forthcoming*; K Duncason and E Henderson, 'Narrative, Theatre and the Disruptive Potential of Jury Directions in Rape Trials' (2014) 22(2) *Feminist Legal Studies* 155. For an article that canvases a litany of substantive and procedural rules that are not only limited to prosecutions for sexual assault, but effectively reverse the presumption of innocence, see Arenson, When Some People, above n 31, 213–58.

erroneous and pernicious assumptions, and recommendations that are parochial, unrealistic, ill-advised and, insofar as her support of the current hybrid *mens rea* as set forth in s 38(1)(c) is concerned, contrary to the reasoning advanced in her 2011 case note that was later adopted in *Getachew* and *NT*.

VII CONCLUSION

This article has demonstrated the extent to which a very well organised, vocal and highly influential special interest group has succeeded in abrogating the alternative offence of voluntary manslaughter – and based primarily, if not solely, upon considerations of gender bias. Regrettably, and in order to achieve the related objective of enhancing conviction rates in sexual assault prosecutions, these groups have flouted the very arguments that they themselves advanced in support of the rejection of the *Morgan* principle. As strenuously argued in this piece, the hybrid subjective/objective *mens rea* that has now become law in Victoria is an ill-advised oxymoron that is all but certain to spawn a new generation of unnecessary and costly litigation that is laden with the same flaw that prompted the High Court and Victorian Court of Appeal to overrule *Morgan* in *Getachew* and *NT* respectively. These pernicious reforms are merely the latest volley in a series of reforms that are similarly based upon gender bias as evidenced by the fact that they are applicable only in prosecutions for rape and other forms of sexual assault. Although too complex and lengthy to be examined in great depth in this particular piece, such reforms include, for example: truncated periods in which to commence trials [138] and file indictments [139] in prosecutions involving sexual assaults; the creation of the Victorian offence of infanticide which

138 *Criminal Procedure Act 2009* (Vic) ss 211–212.
139 Ibid ss 159, 163.

allows women, but not men, to commit what otherwise would be murder, save for the fact that the victim is a child of the accused and the killing occurred within twenty-four months of birth and at a time when the 'balance of her mind was disturbed because of…her not having fully recovered from the effect of giving birth...or a disorder consequent on her giving birth…';[140] and the enactment of so-called 'rape shield' laws[141] in Victoria and elsewhere[142] that apply only in prosecutions in which one or more counts of sexual assault are alleged and seriously impinge on the entrenched common law right of an accused to adduce all legally admissible and exculpatory evidence on his or her behalf.[143]

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140 *Crimes Act 1958* (Vic) sub-ss 6(1)(a), 61(1)(b). Incredulously, members of the female gender who are permitted to avail themselves of this offence can receive a maximum sentence of not more than 5 years imprisonment: at sub-s 6(1)(b). Men who experience the same sort of unspecified ill effects or disorders consequent to the birth of their children and kill their children within the same two-year statutory period cannot avail themselves of the infanticide offence and face a charge of murder.

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

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

143 *Lowery v R* (1974) AC 85, 101–3 ('*Lowery*'); *Re Knowles* (1984) VR 751, 768 ('*Knowles*'); see also Ligertwood and Edmond, above n 122, 86, 88, 102.

The question to be asked, therefore, is what can and should be done about the alarming trend as delineated in this article. In addressing this issue, it is important to point out that both the common law of rape as well as the recently repealed s 38 withstood political pressure to stray from the purely subjective *mens rea* that existed in Victoria for decades prior to the enactment of the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic). Moreover, it is also important to note that this *Act* as well as the *Crimes Amendment (Abolition of Defensive Homicide) Act* 2014 (Vic) were ushered into Victoria law in the waning months of the Coalition Government's relatively short tenure that ended in late 2014. Hopefully, the repealed version of s 38 and all its attending progressive features will be revisited and re-enacted by the current Labor Government with the exception, of course, of ss 37, 37AAA, and 37AA which must be amended or replaced with new legislation which is consonant with the *obiter dicta* of *Getachew* and its subsequent adoption by the Victorian Court of Appeal in *NT*.

One would be naïve to believe that the same special interest groups which provided the impetus for most or all of the ill-advised reforms chronicled in this article will somehow abandon their agenda and forebear from attempting to apply the utmost pressure on the current Victorian Government in order to permit the follies of the previous Government to stand. It would likewise constitute the pinnacle of naivety to expect our current Labor Government to eschew the seductive and proverbial path of least resistance and withstand the immense pressure that is certain to ensue.

There is much to be said for the notion that politicians must sometimes compromise and yield to political pressure on matters that they consider to be relatively minor, lest they be voted out of office and thereby

precluded from affecting far reaching and positive changes that they regard as paramount. That consideration aside, there are few who would quibble with the notion that an accused's right to a fair trial, and particularly the cardinal precept of any free society that all persons stand on equal footing before the law, are so fundamental to our adversarial system of criminal justice that they can never be considered as fodder for any type of compromise. Thus, our elected representatives can and must do what is expected of any elective office holder in a society that prides itself on being a representative form of government: reinstate s 38 as well as the provocation and excessive force limbs of the offence of voluntary manslaughter.

There is an old aphorism that 'pacifism in the face of tyranny is no virtue, and extremism in defence of liberty is no vice'.[144] While it would be an overstatement to characterise the reinstatement of both limbs of the offence of voluntary manslaughter and the purely subjective *mens rea* of rape as extremism, it is imperative that the current Labor Government implement the proposals advanced in this article and, in so doing, demonstrate that it is a worthy steward of an accused's right to a fair trial and the hallowed tenet that all people stand on equal footing before the law

144 Senator Barry M Goldwater, Acceptance Speech, Republican National Convention (1964).