

CRIMINAL LAW JOURNAL

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ARTICLES

Marital rape: Retrospectivity and the common law – Kellie Toole

The principle against retrospectivity is fundamental to legal systems across the world and is of particular importance in criminal prosecutions. Australia has a body of common law regarding the retrospective application of statutory criminal provisions, but has rarely considered retrospectivity in the common law itself. The 2012 marital rape case of *PGA v The Queen* offered an opportunity to consider how the principle against retrospectivity applies in the Australian common law to the prosecution of historical criminal offences. This article contends that the High Court missed the opportunity that *PGA* presented, by taking an unnecessarily narrow view of the principle against retrospectivity. The result of the High Court's approach is that a significant gap still exists in our jurisprudence and the case declined to address the moral dilemma of balancing the principle against retrospectivity with the implications of upholding a marital rape immunity.

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Divergent approaches to the admissibility of tendency evidence in New South Wales and Victoria: The risk of adopting a more permissive approach – David Hoitink and Anthony Hopkins

An apparent divergence has emerged between New South Wales and Victorian Courts of Appeal concerning the assessment of the probative value of tendency evidence, as a condition of admissibility and as a precursor to weighing the probative value of that evidence against the risk of unfair prejudice. The divergence touches upon a fundamental conflict in the criminal justice system between the public interests of pursuing conviction of the guilty and of avoiding conviction of the innocent. This tension plays out most notably in the prosecution of historical child sex offences. Consideration of psychological research reveals that, while there is strong evidence of the prejudicial potential of tendency evidence, there is no clear support for the probative value of some evidence that may be admitted under the more permissive New South Wales approach. Accordingly, the risk of convicting the innocent is of enough importance to tip the balance between these two approaches in favour of the restrictions applied in Victoria.

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