

**Legal Studies Association Inc Annual Conference 2006
Parramatta, 31 March 2006**



LEGAL CHANGE FROM CASES

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INTRODUCTION

I have been asked to address at this conference recent criminal cases that have changed the law, by influencing the interpretation of the law or by influencing the development of the law in some aspect.

It should be understood that law is made not only by Parliament and by subordinate legislation (regulations, by-laws and the like) but also by the courts. While they do not have a general law-making power, it happens from time to time that the courts need to qualify or extend the law in some aspect in order to effectively dispose of cases before them. That does not happen often, but it does happen and the limits are clearly set and understood in the tradition of the common law. Some persons may express offence at the idea that courts, with unelected officers who are erroneously said to be unaccountable, should be making law to which everyone becomes subject – but there is no cause for alarm.

More usually, however in applying and enforcing the law as it presently exists, courts prompt consideration of change by Parliament or by regulatory bodies. Sometimes a judge or magistrate may openly recommend a change. In recent times there have been a few examples of those cases and the changes have been or could be quite significant. Again, there is no cause for alarm – the law is a living body that needs to change to adapt to changing circumstances in society (and sometimes simply to correct errors or remove abnormalities).

A. Recent criminal cases that have changed or will change the criminal law

1. *Crimes Amendment (Road Accidents) (Brendan's Law) Act 2005*

This Act commenced on 13 February 2006. Its object to amend the *Crimes Act 1900* and various other Acts with respect to the obligations of drivers to stop and provide assistance where their vehicles are involved in accidents that cause death or injury. This law reform was strongly campaigned for by Kevin Saul, the father of Brendan Saul. Brendan, aged 9, was killed while riding his bicycle in Dubbo as a result of a hit and run accident in January 2004. The accident involved a car driven by a juvenile who did not stop after the accident.

2. *Crimes Amendment (Grievous Bodily Harm) Act 2005 (Byron's Law)*

The Parliament passed the *Crimes Amendment (Grievous Bodily Harm) Act 2005* to ensure that offences under the *Crimes Act* relating to the infliction of grievous bodily harm extent to the destruction by a person of the foetus of a pregnant woman. This Act was promoted by two tragic cases. The first involved the death of Renee Shield's unborn child, Byron in a motor vehicle accident (which led the NSW Attorney General to commission a review by the Honourable Mervyn Finaly); and the second involved Kylie Flick, who lost her unborn child as a result of an assault by Phillip King, the father of the child. The legislation codifies the Court of Criminal Appeal's (CCA) decision in *R v King* [2003] NSW CCA 399.

3. *Impact of highly publicised gang rape trials: Complainant unwilling to testify again in Gang rape trial – Criminal Procedure Amendment (Evidence) Act 2005*

The gang rape trials involving *Bilal Skaf and Others* receives extensive media coverage and heightened public awareness of the difficulties faced by complainants in such cases, the low reporting rate and the difficulties involved in securing convictions. This particular group of cases therefore provides a very fertile environment in which agitation could be made for law reform. The Government introduced standard minimum sentences for sexual offences ranging from 7 to 15 years; increased the maximum penalty for gang rape from 25 years to life; prohibited accused persons from personally cross-examining sexual assault victims; exempted child victims to use alternative arrangements for giving evidence such as video-link; and established a Sexual Offences Task Force to examine alternate models for the prosecution of sexual assault offences and reformed services for victims. (The Task Force), of which I was a member, reported in December 2005 and its recommendations are presently being addressed by the Government.

On 3 February 2005 I announced that the re-trial of two men accused of aggravated sexual assault would not proceed because the complainant was unwilling to testify again and the case was not strong enough to proceed without her evidence. The CCA had earlier quashed the conviction and ordered a retrial.

On March 2005 the Attorney General introduced the *Criminal Procedure Amendment (Evidence) Bill 2005* into Parliament. This Bill amended the *Criminal Procedure Act 1986* to permit the original record of the evidence give by the complainant in the first sexual assault trial to be admitted as the evidence in any new trial ordered following an appeal. It became law on 12 May 2005. (We have since discovered that the legislation had a defect, in that is only applies to retrials after successful appeals. It does not apply where, for example, a trial is aborted and has to start again after the complainant has given evidence.)

In the second reading speech the Attorney foreshadowed a further Bill with more reforms in the area of sexual assault for later in the session. The stated purpose was to improve the process surrounding sexual assault prosecutions for complainants and to encourage them to come forward and report sexual crimes (and to address low reporting and conviction rates).

On 23 March 2005 the Attorney General had introduced the *Criminal Procedure Further Amendment (Evidence) Bill 2005*. This Bill amended the *Criminal Procedure Act* to expand protections provided to sexual assault complainants and was said to be part of the Government's ongoing process of legal reform in sexual assault prosecutions and to fulfil a number of Government's election commitments. At the end of the speech the Attorney

General said: “I know that all members of the House are impressed by the courage shown by those sexual assault complainants who report horrendous crimes and who follow the court process through to its conclusion. And I know that all members wish to assist these complainants to give their evidence free from additional stress, trauma and humiliation. Therefore I am sure that the amendments will be welcomed by all members”.

The act commenced on 12 August 2005 (except for the sensitive evidence and *in camera* provisions which commenced on 25 November 2005). The Act amended the *Criminal Procedure Act* in the following ways.

- It imposed a duty on a court hearing any criminal proceedings to disallow improper questions that are put to witnesses in cross-examination. (the 2005 evaluation of the Child Sexual Assault Pilot also identified complex language and confrontational questioning as one of the difficulties for child witnesses. The questioning was not “child appropriate”.)
- Preventing the circulation and unauthorised copying of “sensitive evidence” – as to which see below.
- Requiring any part of proceeding for a sexual offence in which evidence is given by the complainant to be held *in camera*.
- Conferencing an entitlement on a complaint to have one or more support persons present near the complainant when giving evidence.
- Making it clear that a complainant in a sexual offence proceeding is entitled to give evidence utilising alternative arrangements such as screens instead of closed circuit television, whether or not CCTV facilities are available.

4. Impact of Child Sexual Assault Pilot cases – evaluation of the Child Sexual Assault Pilot

The 2005 evaluation of the Child Sexual Assault Pilot by the Bureau of Crime Statistics and Research in the Attorney General’s Department (BOCSAR) and Dr Judy Cashmore identified delay in the commencement of the trial as one of the major difficulties for child witnesses. One reason for the delay was that pre-trial issues, such as the editing of the child’s recorded interview, had not been settled prior to the trial date.

The Government introduced the *Criminal Procedure Amendment (Sexual Offence Case Management) Bill* which became law on 1 December 2005. This introduced s130A into the *Criminal Procedure Act*, pursuant to which pre-trial orders bind the trial judge in sexual offence proceedings, unless this is not in the interests of justice.

Improvements to facilities for children at court also arise from the recommendations of the evaluation report, as the evaluators emphasised the importance of child-friendly technology and child-sensitive courts.

5. Sensitive Evidence

The passage of the “sensitive evidence” provisions was promoted by a couple of particular cases in which evidence from the prosecution brief was misused by the accused persons they were referred to in the Legislative Assembly debate. One case involved a juvenile in Dubbo who showed an autopsy photograph of his alleged victim in a motor vehicle accident. The debate also referred to the Bill being developed because of reports that photographs of a rape

victim and her private parts were handed over to the defence and finished up in the hands of the alleged rapist. The convicted rapist accessed the photographs and was able to gloat and boast as he passed the photographs around to other prison inmates. (There was a particularly bad case of this kind in Western Australia where the goaled killer showed fellow inmates a crime scene video of the partly naked remains of his female victim. Her family were understandably outraged.

6. The prosecution of *Bruce Burrell* for the kidnapping and murder of Kerry Whelan

The hung jury in the *Burrell* trial on 2 November 2005 (after a 10 week trial) was the final case in a series of high profile cases that led the Attorney General's announcement on 9 November 2005 that the State Government will move to introduce majority verdicts (11 out of 12 or 10 out of 11) for all jury trials in New South Wales in 2006.

The hung juries in the lengthy fraud case of *Nick Petroulias*, a former senior tax officer, in August 2005 and in the *Ngo* prosecution (*re* murder of John Newman) also provided impetus for this change (as did the support of myself and the Chief Justice of the District Court and the NSW Opposition). A Draft Bill is in circulation for comment.

7. The Cronulla Riots

After the Cronulla Riots in December 2005, Parliament was recalled and the police were given greater powers by the *Law Enforcement Legislation Amendment (Public Safety) Act 2005* (which commenced on 15 December 2005). After a more recent stabbing incident at Bondi Beach, the Government has promised even more extended police powers.

B. Other significance cases

There has been some other significant recent cases that are worth considering briefly. They demonstrate that law is ever changing and they highlight the role of the courts – the third arm of government – in the regulation of society.

R v Skaf [2005] NSW CCA 297

Classification of an offence as being in the “worst class”.

Note that the High Court refused the Attorney's application for special leave to appeal on 3 February 2006.