Retrospectivity and reasonable expectations

Stephens v The Queen (2022) 96 ALJR 871, [2022] HCA 31

By Ann Bonnor

In *Stephens v The Queen*, the High Court considered procedural legislation, introduced in response to the Royal Commission into Institutional Responses to Child Sexual Abuse and related inquiries, which permits conduct that was unlawful under different laws at different times to be prosecuted as a contravention of the law with the lowest maximum sentence.

The court held that the underlying principle concerning how to interpret the temporal operation of legislation is based on reasonable expectations of the public, giving rise to a presumption against an interpretation that would conflict with recognised principles that Parliament would be prima facie expected to respect.

The force of the presumption against retroactive operation depends upon the circumstances. The more fundamental the rights and the greater the extent to which they would be infringed, the less likely that such an intention will be ascribed to Parliament.

Background

On 29 November 2018, Mr Stephens was arraigned before a judge in the District Court of NSW, on an indictment containing 18 counts of historical sexual offences against a child. He pleaded not guilty to each count.

Relevantly until 7 June 1984, s 81 of the *Crimes Act 1900* (NSW) proscribed an offence of indecent assault upon a male of whatever age, with or without consent, with a maximum penalty of five years' imprisonment. From 8 June 1984 until 13 June 2003, s 78K provided that an offence is committed by a male person who has homosexual intercourse with a male person aged 10 or older and under the age of 18 years, with a maximum penalty of 10 years' imprisonment.

In relation to four of the counts on the indictment, the Crown was uncertain whether the alleged conduct occurred before, or on or after, 8 June 1984.

Section 80AF of the *Crimes Act* came into force two days after Mr Stephens was arraigned and entered his pleas, on 1 December 2018. Section 80AF relevantly

applies if it is uncertain as to when during a period sexual conduct constituting an offence against a child occurred and if, because of a change in law or in the age of the child during that period, the alleged conduct would have constituted more than one sexual offence during that period. If s 80AF applies, a person may be prosecuted in respect of the conduct under whichever of the sexual offences has the lesser maximum penalty. Any requirement to establish that the offence charged was in force, or the victim was a particular age, is satisfied if the prosecution so establishes sometime during the period.

There was no transitional provision for s 80AF to cover proceedings that had already commenced, nor such an intention expressed in extrinsic material.

Subsequently, the Crown sought and was granted leave to amend the indictment to take account of s 80AF. Mr Stephens was arraigned a second time on the newly constituted indictment, prior to the empanelment of the jury. After the jury was empanelled, a further amendment to one of the counts was made.

The jury convicted Mr Stephens of 14 counts, including the four amended counts. Mr Stephens appealed his convictions in respect of the four amended counts.

The Court of Criminal Appeal quashed only the conviction on the count which was amended after the empanelment of the jury. Mr Stephens appealed the remaining three convictions to the High Court.

The High Court

A majority of the High Court, comprising Keane, Gordon, Edelman and Gleeson JJ, allowed Mr Stephens' appeal. Steward J was in dissent.

Both judgments consider the purpose of s 80AF, which was a direct response to the criminal justice recommendations of the Royal Commission and a Departmental Review conducted on the recommendation of the Joint Select Committee of the New South Wales Parliament: at [14], [58].

The majority observed that the Review made reference to the very difficulty in Mr Stephens' appeal, saying '[w]hen looking at historic offences, the date range can coincide with a change of legislation and the same elements may constitute different offences…': at [14]. Section 80AF was to 'facilitate prosecutions for child sexual offences' to address complexities due to changes to the child's age or amendment to the law during the period of offending: at [18].

Upon the commencement of s 80AF, for persons in Mr Stephens' position, the change was not merely a matter of the evidence that was required to be led: at [22]. The immediate effect of s 80AF was to extend the period that s 81, the offence provision, was in force, for conduct that constituted an offence under both ss 81 and 78K, from 8 June 1984 until 13 June 2003: at [22]. The possibility of a path to acquittal based upon uncertainty concerning the period of offending was thereby removed: at [22].

While distinctions have been drawn between 'retrospective' and 'retroactive' legislation, and between substantive and procedural provisions, the majority emphasised the importance of not permitting such distinctions to distract from or control the underlying principle concerning how to interpret the temporal operation of legislation, which is based on reasonable expectations: at [29]-[33]. Their Honours quoted with approval, HLA Hart, that 'the reason for regarding retrospective law-making as unjust is that it disappoints the justified expectations of those who, in acting, have relied on the assumption that the legal consequences of their acts will

be determined by the known state of the law established at the time of their acts': at [33]. What is a 'reasonable expectation' will necessarily be informed by fundamental principles of criminal law, the accusatorial process, and the law in force at the relevant time; the force of the presumption may depend on the circumstances, and it does not apply in an all-or-nothing manner: at [33]-[35].

As s 80AF was enacted to respond to difficulties in prosecuting *historic* sex offences, it is plainly intended to operate retroactively to *some extent*: at [37] (emphasis in original). Further, the definition of 'sexual offence' in s 80AF(3) extends to a list of offences 'regardless of when the offence occurred,' including offences 'under a previous enactment': at [37].

However, their Honours found, to construe s 80AF as being *completely* retroactive would significantly disturb reasonable expectations about the manner in which the law is implemented: at [38]. This would have the effect of changing the law for extant proceedings, where forensic decisions including a plea of guilty or not guilty, or the scope of cross-examination of witnesses, may have been made in reliance upon the previous law: at [38].

In these circumstances, their Honours found that the injustice of displacing the consequences of forensic decisions made in extant proceedings was not ameliorated by the possibility of the Crown being denied leave to amend the indictment (and if that were Parliament's intention, it was hard to see on what basis leave could be refused if that were the only prejudice): at [40]. Further, this interpretation would change the law even for concluded proceedings that were the subject of an appeal, by removing the right to have a conviction set aside in some circumstances: at [41]. Arguments about whether the provision was concerned only with procedure or 'proof' of an offence, rather than 'element,' involved preferring an artificial distinction over the underlying principle that laws which might be said to be procedural can have such a significant effect in disturbing settled expectations that the presumption against retroactivity will apply: at [31], [44]. Such an artificial distinction is eschewed in s 30 of the *Interpretation Act 1987*: at [44].

Their Honours concluded that on its proper interpretation, s 80AF does not operate with respect to trials that had already commenced when the section came into force: at [45].

Importantly for practice, on its terms s 80AF may be invoked only at the commencement of a trial, not after the trial has already commenced: at [45]. Support for this position is found in the phrase in s 80AF(2) 'may be prosecuted,' which is apt to refer to the commencement and not the continuation of the criminal proceedings: at [46]. Also, the 'uncertainty' in ss 80AF(1)(a) and 80AF(2) appears textually expressed as uncertainty prior to the commencement of the prosecution: at [46].

Steward J disagreed that Mr Stephens' 'reasonable expectations about the manner in which the law is implemented' were significantly disturbed by the application of s 80AF to his trial: at [49]. His Honour's reasons included that it was Mr Stephens' third arraignment on 7 February 2019 when the jury was empanelled that the trial relevantly commenced, by which time s 80AF was already law: at [51]-[56]. It would make little sense if s 80AF did not efficaciously address a principal concern of the Review, namely, the difficulty of child sexual abuse victims being able to recall particular dates, which might only emerge after the trial has commenced: at [63]. Given the historical focus and legislative purpose of s 80AF, it would be incongruous to conclude that it could have no application to a pending trial: at [65]-[67]. Steward J found that Mr Stephens' reasonable expectations about what law would apply to his trial were not defeated in circumstances where, when he pleaded not guilty, s 80AF was already a law of NSW: at [68]. As Mr Stephens pleaded afresh on the amended indictment on 7 February 2018, he had an opportunity to re-consider forensic decisions: at [69]. Steward J concluded that application of s 80AF to Mr Stephens' trial avoided an injustice where Mr Stephens was convicted on the relevant counts, and sought to have those convictions quashed and acquittals entered 'merely because he was formally arraigned for the first time two days before s 80AF came into force': at [70]. **BN**