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## *"Social values and the criminal law's adaptability to change"*


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The theme of this Conference, "Populism, Power and Privilege", looks principally to how lawyers engaged in the criminal justice system might respond to changing social values, needs and expectations whilst at the same time retaining the central tenets of that system. My discussion today focusses upon the courts and looks to examples of changes made to common law offences and defences to reflect changes in social values or attitudes.

As you would appreciate, generally speaking, the courts are cautious about change. Especially is this so in the area of criminal law. The courts may not readily accept assertions about currently held societal views, at least until they may be seen to have acquired some degree of permanency. When change or adaptation of the law is thought to be necessary, judicial views may differ about whether the courts should effect the change or whether it is a matter proper for the legislature. They will not often differ about the need for certainty in criminal law. A recognition that there is a need for certainty in the criminal law may tend to disincline the courts to change.

When in 1920 Justices Isaacs and Rich said, in *Hicks v The King*[1], that "[c]ourts administering the criminal law are not impervious to the general sentiment of the community they represent", they did not add that Australian courts, including the High Court, were rather restricted in the changes that could be made to the law to adapt it to the needs and values of Australian society. The High Court, largely for the sake of certainty, had determined to follow decisions of the House of Lords and the Privy Council. The doctrine of precedent is one of the most important mainstays of certainty in the law. It is therefore somewhat ironic that the task that the High Court was later to undertake - independently to develop the common law of Australia - came about because of the Court's refusal to continue to follow decisions of the English courts.

The flag for this change of direction went up in 1963 in *Parker v The Queen*[2]. Referring to the decision of the House of Lords in *Director of Public*

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[1] (1920) 28 CLR 36 at 48; [1920] HCA 26.

[2] (1963) 111 CLR 610 at 632; [1963] HCA 14.

*Prosecutions v Smith*[3], that a person is criminally responsible for murder if his unlawful act was of such a kind that grievous bodily harm was the natural and probable result, Chief Justice Dixon, speaking for the Court, said that the proposition was fundamental; it was misconceived and should not be followed.

Fifteen years later, in *Viro v The Queen*[4], the High Court held that it was no longer bound by decisions of the Privy Council. On this occasion the Court declined to follow *Palmer v The Queen*[5] holding instead that a verdict of manslaughter may be available where the accused used excessive force in self-defence. Justice Gibbs noted[6] that:

> "Part of the strength of the common law is its capacity to evolve gradually so as to meet the changing needs of society. It is for this Court to assess the needs of Australian society and to expound and develop the law for Australia in light of that assessment."

In *R v O'Connor*[7] the Court again departed from a decision of the House of Lords in *Director of Public Prosecutions v Majewski*[8]. The House of Lords in *Majewski* decided to retain the rule that in the case of self-induced intoxication the mental element of an accused's crime is to be disregarded when that crime does not involve a "specific intent". The case furnishes an interesting example of how courts in different countries can have different ideas about public reaction. It may confirm what Justice Gibbs had implied, namely, that Australian society might have a different viewpoint.

Amongst the reasons given by their Lordships in *Majewski* was that the rule was of such long-standing that a departure from it in favour of strict logic would "shock the public" and bring the law into contempt. It was thought that the exoneration of a person who had committed a violent crime on account of his intoxication would cause public outrage[9]. Members of the High Court were unpersuaded. Justice Stephen[10] said that "[c]onsiderations turning upon a concern for public order, coupled with forecasts of public outcry" were answered for him by the fact that for some time people in Victoria had lived with a view of the law which held that evidence of self-induced intoxication was relevant and admissible in determining whether an accused had the prescribed mental element. "[O]rdinary

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3 [1961] AC 290.

4 (1978) 141 CLR 88; [1978] HCA 9.

5 [1971] AC 814.

6 *Viro v The Queen* (1978) 141 CLR 88 at 120.

7 (1980) 146 CLR 64; [1980] HCA 17.

8 [1977] AC 443.

9 *Director of Public Prosecutions v Majewski* [1977] AC 443 at 484, 495.

10 *R v O'Connor* (1980) 146 CLR 64 at 99.

notions of what is fair and just" would be "offended" by the rule propounded in *Majewski*[11], he said.

Views about the state of society's thinking might also differ within a court. In *R v Hyam*[12], a minority in the House of Lords had said that a different view of "concepts of what is right and what is wrong that command general acceptance in contemporary society" should now be taken because the age of our ancestors was so much more violent than our own. In *R v Cunningham*[13], Lord Hailsham was inclined to disagree. He was able to point out that:

> "In the weeks preceding [this appeal] both the Pope and the President of the United States have been shot in cold blood, a circuit judge has been slain, a police officer has given evidence of a deliberate shooting of himself which has confined him to a wheeled chair for life, five soldiers have been blown up on a country road by a mine ..., the pillion passenger has been torn from the back of a motor bicycle and stabbed to death by total strangers apparently because he was white, and another youth stabbed, perhaps because he was black ...".

(His Lordship went on; but I think I can leave the list there.)

*Parker's Case*, which heralded the independence of the High Court, was largely concerned with the law relating to provocation. Over 20 years later the Court would revisit that topic and bring the law into conformity with how the reality of the life of some accused persons is now understood.

The law of provocation is from another age. It developed in the late 17th and early 18th centuries in what was described by Lord Hoffmann as "a world of Restoration gallantry in which gentlemen habitually carried lethal weapons, acted in accordance with a code of honour which required insult to be personally avenged by instant angry retaliation and in which the mandatory penalty for premeditated murder was death."[14] The decision of the High Court in *Van Den Hoek v The Queen*[15] acknowledged that the old view of provocation was too narrow. There could now be no convincing reason for confining the doctrine to loss of self-control arising from anger or resentment. It must be understood to extend to a sudden or temporary loss of self-control due to an emotion such as fear. Understandably that was what Mrs Van Den Hoek felt after her husband threatened to kill her and came towards her with a knife.

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11 *R v O'Connor* (1980) 146 CLR 64 at 101.

12 [1975] AC 55 at 90, 94.

13 [1982] AC 566 at 580-581.

14 *R v Smith* [2001] 1 AC 146 at 159.

15 (1986) 161 CLR 158; [1986] HCA 76.

In *Osland v The Queen*[16] some members of the Court accepted that expert evidence of "battered woman syndrome" might be admissible as relevant to issues of provocation or self-defence. It could be seen as necessary to explain to a jury the circumstance of a woman in this situation and in particular "her heightened perception of danger, the impact of fear on her thinking, her fear of telling others of her predicament and her belief that she can't escape from the relationship"[17].

It is perhaps unsurprising that changing social attitudes were to be reflected in decisions in the latter part of the 20th century concerned with offences by or against women. This is most obvious in what was said in *R v L*[18] in 1991, which concerned rape in marriage.

You may recall that in that case the husband was charged with two counts of the rape of his wife. He challenged the validity of the statute creating the offences. The proposition for which he contended was that all Commonwealth legislation relating to marriage, and conjugal rights in particular, preserved the view of the common law that there was a continuing obligation on the part of the spouse to consent to sexual intercourse. This was said to be a legal consequence of marriage. In rejecting that argument the Court did not need to change the common law because it did not accept that earlier courts had ever expressed such a view, even if some commentators had. Nevertheless it said[19]:

> "In any event, even if the respondent could, by reference to compelling early authority, support the proposition that is crucial to his case, namely, that by reason of marriage there is an irrevocable consent to sexual intercourse, this Court would be justified in refusing to accept a notion that is so out of keeping with the view society now takes of the relationship between the parties to a marriage."

There could be little doubt that this reflected the view of most people in our society. Perhaps more controversial were some later decisions of the Court which recognised that in some cases homosexual advances might amount to provocation. In *Green v The Queen*[20] Justice Kirby, in dissent, emphatically rejected the idea that this accorded with contemporary views. He said[21] the ordinary person in Australian society today is not so homophobic as to respond to a non-violent sexual advance in this way.

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16 (1998) 197 CLR 316; [1998] HCA 75.

17 *Osland v The Queen* (1998) 197 CLR 316 at 337 [57] per Gaudron and Gummow JJ.

18 (1991) 174 CLR 379; [1991] HCA 48.

19 *R v L* (1991) 174 CLR 379 at 390 per Mason CJ, Deane and Toohey JJ.

20 (1997) 191 CLR 334; [1997] HCA 50.

21 *Green v The Queen* (1997) 191 CLR 334 at 408-409.

But in *Lindsay v The Queen*[22] the Court was to confirm the direction which was said in *Green* to be necessary to be given to a jury: to have regard to the accused's family circumstances in considering the reaction of an ordinary person in the accused's position. The Court sounded a note of caution about courts determining as a matter of law "that contemporary attitudes to sexual relations are such that conduct is incapable of constituting provocation." The partial defence, it said, recognises human frailty and requires the gravity of a provocation to be assessed from the standpoint of the accused. The outrage which the conduct might have engendered in the accused will usually depend upon a range of possible findings[23].

Technological advances accounted for some important changes of attitude towards the reliability of some evidence and considerations such as fairness. In 1991, in *McKinney v The Queen*[24], the "existence and increasing availability of reliable and accurate means of audiovisual recording" would require reconsideration of the dangers of convicting on the uncorroborated evidence of confessions obtained whilst an accused was in police custody and the need for warnings about doing so.

The decision of the majority in *Dietrich v The Queen*[25], that the courts have power to stay a criminal trial where an indigent accused has no legal representation, was a large step for the Court to take, given that it would almost certainly have an effect on legal aid resources. Justice Deane, who was in the majority, considered that the step was justified on the basis of social need. His Honour acknowledged that the approach to be taken was not one reached by a process of legal reasoning but rather by having regard to underlying notions of fairness and subjective values. In his view such an approach is "an unavoidable concomitant of the judicial function if the law is not to lose contact with the social needs which justify its existence and which it exists to serve."[26]

In a strong dissent, Justice Brennan said changes in the common law are not made whenever a judge thinks change is desirable. There must be constraints on the exercise of judicial power if the courts are not to cross "the Rubicon that divides the judicial and the legislative powers"[27]. And that is so even if legislatures disappoint.

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22 (2015) 255 CLR 272; [2015] HCA 16.

23 *Lindsay v The Queen* (2015) 255 CLR 272 at 284 [28].

24 (1991) 171 CLR 468; [1991] HCA 6.

25 (1992) 177 CLR 292; [1992] HCA 57.

26 *Dietrich v The Queen* (1992) 177 CLR 292 at 329.

27 *Dietrich v The Queen* (1992) 177 CLR 292 at 320.

A similar approach is reflected in judgments in *Johanson v Dixon*[28] where the argument that there might be a defence to a charge of consorting if it were undertaken for an innocent purpose was rejected. The argument required the legislation establishing the offence to be interpreted according to what were said to be "changed conditions or changed attitudes". Justice Mason said[29] that if the policy of a statute is now a matter of controversy, that is no justification for construing it other than in accordance with its terms. If a change in the statute is thought to be desirable on account of changed conditions or changed attitudes, it is for Parliament to decide whether that change should be made.

Justice Lionel Murphy took a different view. He considered that the courts are under a positive duty to effect change and that it is an abdication of their responsibility to maintain an unjust, inhumane rule. He even went so far as to criticise courts and judges that "justify their inaction by the excuse that the legislature can abolish it."[30] He was speaking of a decision which maintained the rule of the common law which disabled a felony prisoner whose death sentence had been commuted to life imprisonment from suing for a wrong such as defamation during the currency of the sentence. His Honour had some academic support for this particular view, but his approach more generally did not find favour with other judges.

The other reason Justice Brennan gave for his dissent in *Dietrich* was the need for certainty in the law which, he said, can only be achieved through the application of judicial reasoning. Change needs to be logically explained and uncertainty in the law avoided. The rejection of the authority of precedent infuses uncertainty into the body of the common law, which needs to maintain "its shape and internal consistency". He said "[t]he tension between legal development and legal certainty is continuous and it has to be resolved from case to case by a prudence derived from experience and governed by judicial methods of reasoning."[31]

It is possible that the need for certainty in the law may outweigh a perceived need to develop a change in the law. It is generally accepted that in the criminal law the need for certainty may be the greatest. Certainty in this connection has more than one meaning. It requires that a law be comprehensible and it requires that a law be applied consistently and predictably. Citizens need to know what conduct is proscribed by the law; trial judges and lawyers need to know what the law is for the conduct of trials. Certainty is necessary for the maintenance of confidence in and respect of the law.

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28 (1979) 143 CLR 376; [1979] HCA 23.

29 *Johanson v Dixon* (1979) 143 CLR 376 at 385.

30 *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 612; [1978] HCA 54.

31 *Dietrich v The Queen* (1992) 177 CLR 292 at 320-321.

In *Shaw v Director of Public Prosecutions*[32] the appellant was charged with "conspiracy to corrupt public morals" on the basis that he had conspired with others to place advertisements for prostitutes in a magazine. The question was whether such an offence existed at common law. A majority of the House of Lords concluded that it did, on the basis that the courts were the "custos morum of the people" and therefore had residual power, where there was no statute, to superintend those offences which were prejudicial to the public welfare. Their Lordships did not say whether they understood citizens to desire that the courts be the arbiters of their morals.

Lord Reid, who was in dissent, was more concerned with the uncertainty inherent in a law so described. He observed[33] that it has always been thought to be "of primary importance that our law, and particularly our criminal law, should be certain: that a man should be able to know what conduct is and what is not criminal, particularly when heavy penalties are involved." He said[34] that "[i]f the trial judge's charge in the present case was right ... this branch of the law will have lost all the certainty which we rightly prize in other branches of our law."

One of the principal ways that the law may be seen to be predictable and therefore certain is of course by judges adhering to precedent. This may require a judge to follow a decision which she or he regards as wrong. The approach of Lord Reid in *Knuller v Director of Public Prosecutions*[35] furnishes an example.

The background to *Knuller* is *Shaw's Case* and a Practice Statement of the House of Lords published subsequently in 1966. The Practice Statement recognised that a too rigid adherence to precedent may lead to injustice in some cases and unduly restrict the development of the law. Whilst acknowledging that there was a special need for certainty as to the criminal law, the position taken more generally was to propose a modification of the then practice. While treating previous decisions as normally binding, judges could depart from a previous decision when it appears right to do so.

*Knuller's Case* presented an opportunity to overrule *Shaw*. Lord Reid could have invoked the Practice Statement in his decision in that case and rely on his dissent in *Shaw*. He declined to do so. Later, in *Cunningham's Case*[36], Lord Hailsham expressed himself to be impressed by the stance Lord Reid took. Stare decisis, he said, remains the "indispensable foundation" of the normal practice of the House. "Especially must this be so in criminal law, where certainty is indeed a condition of its commanding and retaining respect".

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32 [1962] AC 220.

33 *Shaw v Director of Public Prosecutions* [1962] AC 220 at 281.

34 *Shaw v Director of Public Prosecutions* [1962] AC 220 at 282.

35 [1973] AC 435.

36 *R v Cunningham* [1982] AC 566 at 581.

It is not uncommon for judges to put aside their own views in order that certainty can be attained. They may do so when the law is in a state of confusion. On one such occasion[37] Lord Mustill withdrew his draft speech which contained a detailed historical analysis and a statement of reasons to a conclusion opposite to that reached by the majority. Instead he concurred with the rest of his colleagues. The reason he gave was as follows: "What the trial judge needs is a clear and comprehensible statement of a workable principle ...". The judge's task, he accepted, would not be assisted by "a long exposition of a theory which might have prevailed, but in the event has not."

A similar approach was taken by some members of the High Court recently in *The Queen v Bauer*[38]. The background to that decision was *HML v The Queen*[39], (with which I have no doubt you are familiar) and the state in which it left questions relating to the admissibility of evidence of tendency. Conscious of the unenviable position of trial judges and accepting the need for clarity and certainty, the Court said[40]:

> "The admissibility of tendency evidence in single complainant sexual offences cases should be as straightforward as possible consistent with the need to ensure that the accused receives a fair trial. With that objective, the Court has resolved to put aside differences of opinion and speak with one voice on the subject."

The final aspect of certainty in the law was touched upon by Lord Hailsham. It is that certainty in the law is necessary if respect for and confidence in it are to be maintained. If precedent is not to be followed and the law altered or adapted in some way there should be seen to be an identifiable change in social values or thinking. It is not to be expected that the courts will engineer change to meet a perceived social need. Any development of the law can only be brought about by the application of judicial method and reasoning if the Rubicon of which Sir Gerard Brennan spoke is not to be crossed.

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37 *R v Powell* [1999] 1 AC 1 at 11-12.

38 [2018] HCA 40.

39 (2008) 235 CLR 334; [2008] HCA 16.

40 *The Queen v Dennis Bauer (a pseudonym)* [2018] HCA 40 at [47].