

# HIGH COURT OF AUSTRALIA

KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ

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PETER LEONARD STEPHENS

APPELLANT

AND

THE QUEEN

RESPONDENT

*Stephens v The Queen*

[2022] HCA 31

*Date of Hearing: 16 June 2022*

*Date of Judgment: 7 September 2022*

S53/2022

## ORDER

1. *Appeal allowed.*
2. *Set aside order 1 of the orders of the Court of Criminal Appeal of New South Wales and, in its place, order that:*
  - (a) *the appeal against conviction on counts 6, 7, and 13 be allowed; and*
  - (b) *the verdicts of guilty on counts 6, 7, and 13 be quashed and acquittals be entered on those counts.*
3. *Set aside order 3 of the orders of the Court of Criminal Appeal of New South Wales and, in its place, order that the sentence imposed on 13 November 2019 be set aside.*
4. *Remit the matter to the Court of Criminal Appeal of New South Wales for re-sentencing on counts 1, 2, and 3 only.*

On appeal from the Supreme Court of New South Wales



**Representation**

O P Holdenson QC with J P O'Connor for the appellant (instructed by Macedone Legal)

D T Kell SC with M W R Adams for the respondent (instructed by Office of the Director of Public Prosecutions (NSW))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

### Stephens v The Queen

Criminal law – Sexual offences against child – Presumption against retrospective operation – Where appellant pleaded not guilty on 29 November 2018 to sexual offences against complainant – Where Crown was uncertain whether alleged conduct occurred when s 81 of *Crimes Act 1900* (NSW) in force, or when s 81 repealed but s 78K in force – Where s 80AF of *Crimes Act* came into force on 1 December 2018, allowing prosecution to rely, in relation to entirety of period, on whichever offence carried lesser maximum penalty – Where Crown was granted leave after appellant's trial had commenced to amend indictment to take benefit of s 80AF – Whether s 80AF could apply after an accused's trial had commenced.

Words and phrases – "arraignment", "change in the law", "commencement of a trial", "historic sexual offences", "indictment", "presumption against retrospective operation", "reasonable expectations", "retroactive", "retrospective", "sexual offence", "textual indications".

*Crimes Act 1900* (NSW), ss 78K, 80AF, 81.

*Criminal Procedure Act 1986* (NSW), ss 20, 130.

*Interpretation Act 1987* (NSW), ss 5, 30.



## Introduction

1       The appellant, Mr Stephens, was convicted in the District Court of New South Wales of seven of 14 counts charged on an amended indictment concerning sexual abuse of a child. Mr Stephens appealed to the Court of Criminal Appeal of New South Wales from his convictions on four of those seven counts. The Court of Criminal Appeal set aside his conviction on one of those counts<sup>1</sup>. Mr Stephens appeals to this Court in relation to the dismissal of his appeal on the other three counts.

2       The issue on this appeal concerns the scope of operation of s 80AF of the *Crimes Act 1900* (NSW), a provision intended to facilitate the prosecution of historic sexual offences in cases of uncertainty about when the relevant offence was committed. Specifically, the question is whether s 80AF, without any clear words or any expression of intention to do so, goes so far as to have the remarkable effect, in its field of application, of expanding the scope of the accused's potential criminal liability after their trial has commenced following the first arraignment by extinguishing the force of legal authorities in support of a path of acquittal. For the reasons below, the legislation does not have that effect. The appeal must be allowed.

## The trial, the change in the law during the trial, and the convictions

3       On 29 November 2018, Mr Stephens was arraigned before a judge in the District Court on an 18-count indictment. The indictment alleged offences by Mr Stephens against a complainant from the time that the complainant was ten years old until the complainant was approximately 15 years old. The indictment charged Mr Stephens with eight counts of conduct contrary to s 81 of the *Crimes Act*, and ten counts of conduct contrary to s 78K of the *Crimes Act*.

4       Section 81 of the *Crimes Act* was in force from the time of the enactment of the *Crimes Act* in 1900 until 8 June 1984<sup>2</sup>. It relevantly provided that it was an offence to commit "an indecent assault upon a male person of whatever age, with

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1     *Stephens v The Queen* (2021) 290 A Crim R 303.

2     *Crimes (Amendment) Act 1984* (NSW), s 3, Sch 1, item 8, repealing s 81; *New South Wales Government Gazette*, No 90, 8 June 1984.

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or without the consent of such person". The maximum penalty was five years' imprisonment.

5 Section 78K of the *Crimes Act* was in force from 8 June 1984<sup>3</sup> until 13 June 2003<sup>4</sup>. It relevantly provided that an offence is committed by a "male person who has homosexual intercourse with a male person of or above the age of 10 years, and under the age of 18 years". The maximum penalty was ten years' imprisonment.

6 In respect of four instances of alleged conduct, the Crown was uncertain whether the alleged conduct by Mr Stephens occurred either (i) before 8 June 1984, when s 81 was in force, or (ii) on or after 8 June 1984, when s 81 had been repealed but s 78K was in force. As Simpson A-JA explained in the Court of Criminal Appeal, these four instances were formulated in pairs of alternative counts under ss 81 and 78K (namely counts 5 and 6, counts 7 and 8, counts 9 and 10, and counts 11 and 12) "to provide the best possible chance of bringing the conduct (if proved) within one of the offence-creating provisions". But her Honour also observed<sup>5</sup>:

"The strategy was not foolproof; if the evidence given at trial failed ... to bring the conduct on one side of the cut off date or the other, the Crown would fail to prove either offence."

7 On his arraignment on 29 November 2018, Mr Stephens pleaded not guilty to each count on the indictment. Although the question of when a trial begins may have a different answer for different purposes<sup>6</sup>, in this context the Court of Criminal Appeal held<sup>7</sup>, and in this Court there was no dispute, that the arraignment on 29 November 2018 relevantly marked the commencement of Mr Stephens' trial.

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3 *Crimes (Amendment) Act 1984* (NSW), s 3, Sch 1, item 4, introducing s 78K; *New South Wales Government Gazette*, No 90, 8 June 1984.

4 Repealed by *Crimes Amendment (Sexual Offences) Act 2003* (NSW), s 3, Sch 1 [18]; *New South Wales Government Gazette*, No 97, 13 June 2003.

5 *Stephens v The Queen* (2021) 290 A Crim R 303 at 310 [26], referring to *R v Page* (unreported, New South Wales Court of Criminal Appeal, 25 November 1991).

6 *R v Gilham* (2007) 73 NSWLR 308 at 325 [78].

7 *Stephens v The Queen* (2021) 290 A Crim R 303 at 315 [48], 320 [88].



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8 Section 130 of the *Criminal Procedure Act 1986* (NSW), introduced in 1997<sup>8</sup>, relevantly provides in s 130(2) that the court has jurisdiction with respect to the conduct of proceedings on indictment as soon as the indictment is presented and the accused person is arraigned and, in s 130(3), that if (as here) proceedings are held for the purposes of making orders after the indictment is presented and before the jury is empanelled, those proceedings are part of the trial and "the accused person is to be arraigned again on the indictment when the jury is empanelled *for the continuation of the trial*" (emphasis added). As Howie J said in *R v Janceski*<sup>9</sup>, an arraignment before the jury panel is not a necessary step to commence the trial; rather, when the accused is first arraigned and pleads "not guilty" they are "taken to have put [themselves] on the country for trial". That is, "answering to the indictment on arraignment has that effect, whether the arraignment takes place before the jury panel or not"<sup>10</sup>. Thereafter, the court has jurisdiction to make orders with respect to the conduct of the proceedings under s 130 of the *Criminal Procedure Act*.

9 On 1 December 2018, s 80AF of the *Crimes Act* came into force<sup>11</sup>. As explained below, one practical effect of s 80AF was to enlarge the period during which s 81 was in force for indecent assaults that also involved an offence under s 78K. That period was enlarged from one that ended on 8 June 1984 to one that ended on 13 June 2003. By enlarging this period, s 80AF removed what was, at least, uncertainty concerning whether Mr Stephens could be convicted of an offence under s 81 or s 78K if the Crown could not prove beyond reasonable doubt either (i) that the alleged conduct occurred during the period in which s 81 was in force, or (ii) that the alleged conduct occurred during the period in which s 78K was in force.

10 On 5 February 2019, the Crown was granted leave to amend the indictment under s 20(1) of the *Criminal Procedure Act* in order to take the benefit of s 80AF. The Crown substituted an indictment with the following features relevant to the three counts that are the subject of this appeal (counts 6, 7, and 13). Count 6

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8 *Crimes Legislation Amendment (Procedure) Act 1997* (NSW), Sch 2, item 2, introducing s 19. Compare *R v Nicolaidis* (1994) 33 NSWLR 364 at 367.

9 (2005) 64 NSWLR 10 at 42 [219]. See *Criminal Procedure Act 1986* (NSW), s 154.

10 *Amagwula v The Queen* [2019] NSWCCA 156 at [30].

11 *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW), Sch 1 [46]; New South Wales, *Commencement Proclamation*, 2018 No 671, 28 November 2018.

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replaced the alternative counts 7 and 8 on the original indictment. Count 7 replaced the alternative counts 9 and 10 on the original indictment. The new counts 6 and 7 relied only upon s 81, and the extended time period for s 81 as a consequence of the new s 80AF. Count 13 replaced, without substantive amendment, count 17 of the original indictment.

11 There were further amendments to the indictment during the course of the trial. On 11 February 2019, after the jury had been empanelled, the Court granted leave for the Crown to amend the date range for the offending conduct to commence a year earlier in respect of count 14.

12 On 19 February 2019, after the close of the Crown case, the trial judge granted leave to the Crown to amend counts 8, 11, 13, and 14 on the indictment to conform with the evidence that had been given during the trial and for the Crown to rely upon s 80AF. The charged offence in count 13 of conduct contrary to s 78K between 6 July 1985 and 6 July 1986 (when s 78K was in force) was replaced with a charge of an act of indecency contrary to s 81 between 6 July 1983 and 6 July 1986 (which included periods when each of ss 81 and 78K was in force).

13 Mr Stephens was convicted on counts 1, 2, 3, 6, 7, 13, and 14. He was sentenced to an aggregate term of imprisonment of seven years and nine months with a non-parole period of four years and nine months. He appealed to the Court of Criminal Appeal from his convictions on counts 6, 7, 13, and 14. The Court of Criminal Appeal quashed his conviction on count 14 only and re-sentenced Mr Stephens to an aggregate term of imprisonment of six years with a non-parole period of three years and nine months. Mr Stephens, by grant of special leave, appeals to this Court in relation to his convictions on counts 6, 7, and 13.

### **Section 80AF of the *Crimes Act***

14 Section 80AF was a direct response to the criminal justice recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse and a Departmental Review conducted on the recommendation of a Joint Select Committee of the New South Wales Parliament<sup>12</sup>. The Departmental Review made reference to the very difficulty that arises on this appeal, saying<sup>13</sup>:

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12 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 June 2018 at 3, 6.

13 New South Wales, Department of Justice, *Child Sexual Offences Review Discussion Paper* (2017) at 30 [6.9].

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"When looking at historic offences, the date range can coincide with a change of legislation and the same elements may constitute different offences. For example, fellatio was previously considered to be an indecent act but since legislative change in 1991 it is now considered to be sexual intercourse. There are no legislative provisions as to how the prosecution should proceed in these matters."

- 15 The Departmental Review observed that "[c]ase law provides some guidance on this issue, however, it has not been satisfactorily resolved", and, after referring to the decision of this Court in *Gilson v The Queen*<sup>14</sup>, proposed an option for reform by which<sup>15</sup>:

"A legislative provision could be introduced to allow the prosecution to rely on the offence with the lowest maximum penalty where there is uncertainty about the age of the victim at the time of the offence and the date range falls into more than one offence. This would be consistent with the decision of *Gilson v The Queen*".

- 16 In *Gilson*, the police found stolen property in the applicant's flat. The applicant was charged with alternative counts of (i) shopbreaking and larceny, and (ii) receiving goods stolen from the shop. The jury convicted the applicant of the count of receiving stolen goods. Although ultimately dismissing an appeal and upholding the applicant's conviction, four members of this Court said in a joint judgment that the trial judge should have directed the jury that if they were satisfied beyond reasonable doubt that the accused either stole the property or received it knowingly, but were unsure which, then they should return a verdict of guilty of the less serious offence. Although the seriousness of an offence will prima facie reflect the maximum penalty attached to it, the circumstances of the particular case might mean that the less serious offence carries the greater maximum penalty, and so the trial judge should have directed the jury as to which of the offences was the less serious<sup>16</sup>.

- 17 As can be seen, the option proposed by the Departmental Review was in fact different from the approach in *Gilson*: the former provided for an accused to be found guilty of the offence carrying the lowest maximum penalty, rather than

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14 (1991) 172 CLR 353.

15 New South Wales, Department of Justice, *Child Sexual Offences Review Discussion Paper* (2017) at 30-31 [6.10]-[6.12].

16 (1991) 172 CLR 353 at 364.

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the less serious offence, which the joint judgment in *Gilson* recognised might be different<sup>17</sup>.

18 In the second reading speech of the legislation which introduced s 80AF, the Attorney-General for New South Wales said the provision was a procedural reform to "facilitate prosecutions for child sexual offences". It was said to address "complexities that currently arise for the prosecution" where the applicable offence changes during the period of offending, including because the child's age has changed during that period or the relevant law has been amended. The Attorney-General added that s 80AF "will ensure that the prosecution can rely on whichever offence carries the lesser maximum penalty, and can rely on this offence in relation to the entirety of the period"<sup>18</sup>.

19 As noted above, s 80AF of the *Crimes Act* came into force on 1 December 2018, after Mr Stephens had entered his pleas and, therefore, after his trial had formally commenced. At that time, the section provided:

**"80AF Uncertainty about time when sexual offence against child occurred**

(1) This section applies if:

- (a) it is uncertain as to when during a period conduct is alleged to have occurred, and
- (b) the victim of the alleged conduct was for the whole of that period a child, and
- (c) there was no time during that period that the alleged conduct, if proven, would not have constituted a sexual offence, and
- (d) because of a change in the law or a change in the age of the child during that period, the alleged conduct, if proven, would have constituted more than one sexual offence during that period.

(2) In such a case, a person may be prosecuted in respect of the conduct under whichever of those sexual offences has the lesser maximum

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17 (1991) 172 CLR 353 at 364.

18 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 June 2018 at 7.

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penalty regardless of when during that period the conduct actually occurred, and in prosecuting that offence:

- (a) any requirement to establish that the offence charged was in force is satisfied if the prosecution can establish that the offence was in force at some time during that period, and
- (b) any requirement to establish that the victim was of a particular age is satisfied if the prosecution can establish that the victim was of that age at some time during that period.

(3) In this section:

**child** means a person who is under the age of 16 years.

**sexual offence** means the following offences regardless of when the offence occurred:

- (a) an offence under a provision of this Division or Division 10A, 10B, 15 or 15A,
- (b) an offence under a provision of this Act set out in Column 1 of Schedule 1A,
- (c) an offence (whether under section 344A or otherwise) of attempting to commit any offence referred to in paragraph (a) or (b),
- (d) an offence under a previous enactment that is substantially similar to an offence referred to in paragraphs (a)-(c)."

### The effect of the insertion of s 80AF

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Section 80AF had the effect of displacing the significant body of authority the effect of which was, in the circumstances of this case, that the Crown was required, on each count under s 81 or s 78K, to prove beyond reasonable doubt that the alleged conduct was committed at a time when the relevant section was in force<sup>19</sup>. If the Crown could not prove beyond reasonable doubt that the alleged

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**19** *R v Page* (unreported, New South Wales Court of Criminal Appeal, 25 November 1991); *Question of Law Reserved (No 2 of 1996)* (1996) 67 SASR 63 at 79; *Kailis v The Queen* (1999) 21 WAR 100 at 114 [41], 147 [175]; *Greenaway* (2000) 118

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conduct occurred during the relevant time period, then Mr Stephens was entitled to be acquitted of the counts concerning that alleged conduct. It is at least arguable that this body of authority is inconsistent with *Gilson*, but it is neither necessary nor appropriate to determine the point as it was not the subject of argument and, on any view, s 80AF gives rise to the possibility that a jury might convict an accused person of a more serious offence than the decision of this Court in *Gilson* had permitted.

21 It was on that state of the law that Mr Stephens pleaded not guilty to the counts which, as eventually consolidated and amended, became counts 6, 7, and 13. And it was on that state of the law that forensic decisions were made during the course of Mr Stephens' trial in relation to count 13.

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

### **The decision of the Court of Criminal Appeal**

23 A majority of the Court of Criminal Appeal (Simpson A-JA with Davies J agreeing) held that s 80AF applied retroactively including to trials that had already commenced. In the first strand of her Honour's reasoning, Simpson A-JA considered that the reasoning of this Court in *Rodway v The Queen*<sup>20</sup> was "directly apposite" to the appeal before the Court<sup>21</sup>. In a further strand of reasoning, her Honour held that s 80AF did not alter a pre-existing criminal offence, but instead did "no more than facilitate the proof of criminal conduct as an offence"<sup>22</sup>.

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A Crim R 299 at 300 [5]-[7], [9]; *R v D, WD* (2013) 116 SASR 99 at 109 [37]; *SI v Western Australia [No 2]* [2014] WASCA 44. cf *R v MAJW* (2007) 171 A Crim R 407 at 413 [27]; *MJ v The Queen* [2013] NSWCCA 250 at [46]-[55].

20 (1990) 169 CLR 515.

21 *Stephens v The Queen* (2021) 290 A Crim R 303 at 313 [41].

22 *Stephens v The Queen* (2021) 290 A Crim R 303 at 316 [58].

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24 With great respect, and despite the cogency of other aspects of her Honour's reasons (including that Mr Stephens' trial had commenced before s 80AF came into force), neither of these strands of reasoning is correct.

25 As to the first strand of Simpson A-JA's reasoning, this Court in *Rodway* held that the Tasmanian Parliament had intended what was described as the "retrospective operation" of legislation that abolished a requirement of corroboration of a complainant's evidence for the proof of certain sexual offences. Importantly for this appeal, in *Rodway* the appellant's trial commenced after the Tasmanian legislation had taken effect. And the Tasmanian legislation did not countenance the possibility of the legal or evidential rules changing during the course of the trial. The only question in that case was whether the Tasmanian legislation was purely prospective in its operation. Thus, there was no issue in *Rodway* concerning whether the abolition of the requirement of corroboration applied to trials that were extant such that the requirement could change during the course of a trial.

26 As to the second strand of Simpson A-JA's reasoning, for the reasons in the section above, s 80AF, in its retroactive operation, did alter the law as to pre-existing offences.

27 Button J dissented, and would have quashed Mr Stephens' convictions on counts 6, 7, and 13. His Honour rightly held that the legislation had retroactive effect, but said that although social and political context might suggest that Parliament intended that the legislation apply to proceedings that had already commenced, there was no transitional provision to cover such proceedings, nor was there any extrinsic material setting out such an intention<sup>23</sup>. After observing that the effect of the legislation is that some accused persons who would previously have been acquitted will now be convicted, his Honour said<sup>24</sup>:

"I am not satisfied that Parliament *necessarily* intended that the legislation is to apply to the relatively small subset of criminal proceedings for child sexual assault that had already commenced and that would feature the specific chronological problem of proof to which the legislation is addressed." (emphasis in original)

28 His Honour's conclusion was correct.

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23 *Stephens v The Queen* (2021) 290 A Crim R 303 at 320 [91]-[93].

24 *Stephens v The Queen* (2021) 290 A Crim R 303 at 321 [95], [99].

## Expectations and the temporal operation of legislative provisions

29

There is considerable confusion surrounding the nomenclature of retrospective and retroactive legislative provisions. On one view, they are separate concepts. A retrospective provision "operates for the future only" albeit that it looks backwards and "imposes new results in respect of a past event". Thus, for the future only, it "changes the law from what it otherwise would be with respect to a prior event". By contrast, a retroactive provision operates backwards and has been described as one that "changes the law from what it was"<sup>25</sup>. On another view, there is only one category. All these laws can loosely be described as retrospective, although retroactive laws are the only "true" retrospective laws<sup>26</sup>. Laws that operate for the future only, but impose new results in respect of past events, have been said to be retrospective in an "extended" sense<sup>27</sup>, although that sense has sometimes been described as "misleading"<sup>28</sup>. These debates are not concerned with matters of principle. The distinctions between retrospective and retroactive laws are "terminological, not conceptual"<sup>29</sup>. However described, both are capable of defeating reasonable expectations concerning existing rights, although retroactive laws will generally be more pronounced in this effect. These distinctions should not distract from the underlying principle described below, concerning how to interpret the temporal operation of legislation.

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25 *Benner v Canada (Secretary of State)* [1997] 1 SCR 358 at 381 [39], quoting Driedger, "Statutes: Retroactive Retrospective Reflections" (1978) 56 *Canadian Bar Review* 264 at 268-269; *Canada (Attorney General) v Hislop* [2007] 1 SCR 429 at 482 [127]. See also Juratowitch, *Retroactivity and the Common Law* (2008) at 6.

26 *R v Kidman* (1915) 20 CLR 425 at 443. See also *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 642.

27 *Maxwell v Murphy* (1957) 96 CLR 261 at 285; *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at 133 [26].

28 *Chang Jeeng v Nuffield (Australia) Pty Ltd* (1959) 101 CLR 629 at 637; *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at 133 [26].

29 Juratowitch, *Retroactivity and the Common Law* (2008) at 7.



30 Another distinction is sometimes drawn between substantive and procedural provisions<sup>30</sup>. In *Rodway*, this Court referred to the presumption "that a statute ought not be given a retrospective operation where to do so would affect an existing right or obligation unless the language of the statute expressly or by necessary implication requires such construction". This Court explained that "there is no presumption against retrospectivity in the case of statutes which affect mere matters of procedure" as such statutes "invariably operate prospectively"<sup>31</sup>.

31 This Court in *Rodway* recognised, however, that there was an ambiguity in the categorisation of some laws as procedural, saying that "the difference between substantive law and procedure is often difficult to draw and statutes which are commonly classified as procedural ... may operate in such a way as to affect existing rights or obligations" and, as such, would not be "merely" procedural<sup>32</sup>. But even this distinction, which requires a difference between procedural laws and "merely procedural" laws, is not a stable basis for deciding whether to apply a presumption against retroactivity. The point of principle underlying the distinction is that laws which might be said to be procedural can have such a significant effect in disturbing settled expectations that the presumption will apply, denying an otherwise clear retroactive effect in relation to an extant trial. An example is the law considered by this Court in *Newell v The King*<sup>33</sup> that amended the procedure of conviction by a unanimous jury to permit conviction by a majority of ten jurors. The principle "that a statute is not presumed to be retrospective" was applied because the law was "not a mere matter of procedure"<sup>34</sup>. The words of the legislation that said "on the trial of any criminal issue" were interpreted to mean "on the trial of any criminal issue joined after the commencement of the Act"<sup>35</sup>.

32 The importance of not permitting an artificial distinction between substance and procedure to control the underlying principle was further emphasised in *Maxwell v Murphy* by Dixon CJ, who said that "difficulties have always attended

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30 *Wright v Hale* (1860) 6 H & N 227 at 231-232 [158 ER 94 at 95]; *Maxwell v Murphy* (1957) 96 CLR 261 at 267-268, 285-286; *Yrttiaho v Public Curator (Queensland)* (1971) 125 CLR 228 at 245-246.

31 (1990) 169 CLR 515 at 518.

32 (1990) 169 CLR 515 at 518.

33 (1936) 55 CLR 707.

34 (1936) 55 CLR 707 at 711.

35 (1936) 55 CLR 707 at 712.

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its application"<sup>36</sup>, and by Fullagar J, who described the distinction as one that "does not represent a logical dichotomy"<sup>37</sup>. In another context, it has been said of the distinction that "search as one may, it is very hard, if not impossible, to identify some unifying principle which would assist in making the distinction in a particular case"<sup>38</sup>. Like the distinction between retrospective laws and retroactive laws, the distinction between substance and procedure can also distract from the underlying principle.

33 Shorn of difficult-to-draw distinctions and difficult-to-apply nomenclature, the underlying principle concerning how to interpret the temporal operation of legislation is based on reasonable expectations. As H L A Hart explained, "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"<sup>39</sup>. The reasonable expectations of the public give rise to a presumption against interpreting the enactments of Parliament in a manner "that would conflict with recognized principles that Parliament would be *prima facie* expected to respect"<sup>40</sup>. In this context, 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.

34 The force of this presumption may depend upon the circumstances: "[t]he inhibition of the rule is a matter of degree, and must vary *secundum materiam* [according to the circumstances]"<sup>41</sup>. The more fundamental the rights, and the greater the extent to which they would be infringed by a retrospective or retroactive

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36 (1957) 96 CLR 261 at 267.

37 (1957) 96 CLR 261 at 286.

38 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 542-543 [97]. See also at 553-554 [131].

39 Hart, *The Concept of Law*, 3rd ed (2012) at 276.

40 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 93.

41 *Doro v Victorian Railways Commissioners* [1960] VR 84 at 86, quoting *Barber v Pigden* [1937] 1 KB 664 at 678.

law, the less likely it is that such an intention will be ascribed to Parliament<sup>42</sup>. Conversely, the less a provision would defeat reasonable expectations, and the less injustice it would cause, the less force there will be in the presumption against retrospective operation. Thus, the force of the presumption is reduced where the "wrongful nature of the conduct ought to have been apparent to those who engaged in it"<sup>43</sup>. And the presumption will often have little or no force in relation to future trials where the law affects rights and interests only slightly and indirectly, such as by the common iterative process of adjusting legal rules of evidence or procedure in the conduct of trials<sup>44</sup>.

35 The presumption against retroactive operation of a statute does not apply in an all-or-nothing manner. A statute is not to be construed as retroactive "to any greater extent than the clearly expressed intention of the Legislature indicates"<sup>45</sup>. An example of this is the decision of the Court of Criminal Appeal of New South Wales in *Lodhi v The Queen*<sup>46</sup>. The question in that case was whether the primary judge should have quashed counts on an indictment that alleged terrorist offences under ss 101.4, 101.5, and 101.6 of the *Criminal Code* (Cth), as amended by the *Anti-Terrorism Act 2005* (Cth). Section 106.3 was subsequently introduced by the *Anti-Terrorism Act (No 2) 2005* (Cth), and relevantly provided that the amendments applied to "offences committed ... before the commencement of [s 106.3]".

36 Section 106.3 was plainly intended to have retroactive operation. But the issue was whether it applied to the applicant, since the amendments came into force after the applicant had pleaded to the charges against him, and hence after his trial had commenced. Spigelman CJ (with whom McClellan CJ at CL and Sully J

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42 *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at 135 [32], quoting *Attorney-General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557 at 572 [59]. See also *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 623 [159].

43 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 643.

44 *Rodway v The Queen* (1990) 169 CLR 515 at 521. Compare *Newell v The King* (1936) 55 CLR 707.

45 *R S Howard & Sons Ltd v Brunton* (1916) 21 CLR 366 at 371. See also *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at 135 [31].

46 (2006) 199 FLR 303.

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agreed) held that despite the words of s 106.3 the provision nevertheless did not extend to those offences committed before the commencement of s 106.3 "on which criminal issue was joined before the commencement of the section" on the basis that<sup>47</sup>:

"Parliament is 'prima facie expected to respect' the principle that a statute will not retrospectively alter a criminal offence where a trial has commenced".

### **Section 80AF has limited retroactive effect**

37 Section 80AF is plainly intended to operate retroactively *to some extent*. It was enacted to respond to difficulties in prosecuting *historic* sex offences. The very 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".

38 But to construe s 80AF as being *completely* retroactive would significantly disturb reasonable expectations about the manner in which the law is implemented. It would not merely mean that the law concerning s 81 of the *Crimes Act* was altered retroactively for future trials. It would have the effect of changing that law for extant proceedings, including those that commenced before s 80AF came into force such as Mr Stephens' trial, 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. And it would do so without any indication in the text, context, or purpose of s 80AF that this was intended. Indeed, it would do so in the teeth of textual indications to the contrary.

39 In *Zainal bin Hashim v Government of Malaysia*<sup>48</sup>, the Privy Council said that "for pending actions to be affected by retrospective legislation, the language of the enactment must be such that no other conclusion is possible than that that was the intention of the legislature". Such an expression may have been overstated by suggesting a requirement that all other conclusions be impossible, but it is certainly correct to say that "[s]ince the potential injustice of interfering with the rights of parties to actual proceedings is particularly obvious, this ... presumption

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47 (2006) 199 FLR 303 at 314 [49]-[50].

48 [1980] AC 734 at 742.

[against retrospective or retroactive operation] will be that much harder to displace"<sup>49</sup>.

40 The injustice of displacing the consequences of forensic decisions made in extant proceedings is not ameliorated, contrary to the submission of the Crown on this appeal, by the possibility that the Crown might be denied leave to amend the indictment under s 20(1) of the *Criminal Procedure Act*. If Parliament's intention were really that s 80AF should have retroactive application to criminal trials that are already in progress, then it is hard to see on what basis leave could be refused if the only prejudice to an accused person were that very retroactive application that Parliament intended.

41 The injustice of this interpretation in its defeat of reasonable expectations would go even further. There is no reason to doubt that it would change the law even with respect to concluded proceedings that are the subject of an appeal by removing the right to have a conviction set aside in some circumstances. In *Australian Education Union v General Manager of Fair Work Australia*<sup>50</sup>, French CJ, Crennan and Kiefel JJ referred to the observation of the Privy Council that explicit language was required to justify an interpretation that "a legislative body intended not merely to alter the law, but to alter it so as to deprive a litigant of a judgment rightly given and still subsisting". This reasoning applies equally where the legislation would deprive a convicted person of the right to have their conviction set aside.

42 This consequence could arise where, prior to the commencement of s 80AF, a jury was satisfied beyond reasonable doubt of conduct that constituted two offences that applied during different periods, but was uncertain about the time of the conduct and therefore uncertain about which offence had been committed. If the trial judge, intending to give a direction that extended the decision of this Court in *Gilson*, had erroneously directed the jury that in those circumstances they could convict the accused of the offence with the lesser maximum penalty rather than the less serious offence, a fully retroactive application of s 80AF would mean that such a clear error could not be corrected on appeal. The retroactive operation of s 80AF would deem the offender to have committed the more serious offence.

43 Without denying the extreme consequences of this interpretation, on this appeal the Crown submitted that s 80AF should nevertheless be given full

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49 *Attorney-General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557 at 573 [59], quoting *Wilson v First County Trust Ltd [No 2]* [2004] 1 AC 816 at 881 [198].

50 (2012) 246 CLR 117 at 136 [33], quoting *Lemm v Mitchell* [1912] AC 400 at 406.

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retroactive effect because issues such as the date range of alleged offending are concerned only with procedure or "proof" of an offence, rather than the elements of the offence itself. For the reasons already explained, that characterisation is incorrect. Section 80AF changed the law concerning the elements of the offence itself.

44 In any event, such arguments about the characterisation of a law as one of "proof" of an offence rather than one concerning the "elements" of the offence involve preferring the artificial distinction between procedure and substance over the underlying principle. For the reasons expressed above, the distinction should not control the underlying principle. Indeed, such an artificial distinction is eschewed in s 30 of the *Interpretation Act 1987* (NSW). That provision spans matters of proof or procedure and matters of legal right or substance. It instantiates the presumption against retrospective operation so that, subject to contrary intention<sup>51</sup>, the amendment or repeal of an Act does not affect a variety of reasonable expectations, including "the proof of any past act or thing"<sup>52</sup> as well as "any right, privilege, obligation or liability saved by the operation of the Act"<sup>53</sup>.

45 On its proper interpretation, s 80AF does not operate with respect to trials that had already commenced when the section came into force. Moreover, on its terms, s 80AF may be invoked only at the commencement of a trial, not after the trial has already commenced. Two considerations support this conclusion.

46 First, s 80AF(2) states that a person "may be prosecuted". That phrase is apt to refer to the *commencement*, not the *continuation*, of the criminal proceedings in which an accused is tried<sup>54</sup>. Secondly, ss 80AF(1)(a) and 80AF(2) apply so that "a person may be prosecuted" where, amongst other things, it is "uncertain as to when during a period conduct is alleged to have occurred". That uncertainty appears textually expressed as uncertainty prior to the commencement of the prosecution, rather than an ambulatory concern with uncertainties that arise during trial so that

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51 *Interpretation Act 1987* (NSW), s 5(2).

52 *Interpretation Act 1987* (NSW), s 30(2)(a).

53 *Interpretation Act 1987* (NSW), s 30(2)(b).

54 *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240 at 250 [29], citing *Shepherd v Griffiths* (1985) 7 FCR 44 at 51-53.

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an accused person can *continue to be* prosecuted. It suggests a reference to uncertainty of the Crown prior to the commencement of the prosecution.

47 It is likely that there will be some such uncertainty in a great many historic sex offence prosecutions and it may be that a prosecution in reliance upon s 80AF will become an almost invariable approach in such cases. But an interpretation of s 80AF which restricts its retroactive effect, by requiring that the Crown elect to take advantage of a provision making a change in the law before the trial commences, is supported by textual indications as well as reasonable expectations of such operation. Indeed, those reasonable expectations must be part of the expressed concern for "fairness" to which reference is made in the Departmental Review which was part of the context of the enactment of s 80AF<sup>55</sup>.

## Conclusion

48 Orders should be made as follows:

1. Appeal allowed.
2. Set aside order 1 of the orders of the Court of Criminal Appeal of New South Wales and, in its place, order that:
  - (a) the appeal against conviction on counts 6, 7, and 13 be allowed; and
  - (b) the verdicts of guilty on counts 6, 7, and 13 be quashed and acquittals be entered on those counts.
3. Set aside order 3 of the orders of the Court of Criminal Appeal of New South Wales and, in its place, order that the sentence imposed on 13 November 2019 be set aside.
4. Remit the matter to the Court of Criminal Appeal of New South Wales for re-sentencing on counts 1, 2, and 3 only.

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55 New South Wales, Department of Justice, *Child Sexual Offences Review Discussion Paper* (2017) at 30 [6.10].

49 STEWARD J. I respectfully agree with the majority that the test for ascertaining whether a provision has retrospective or retroactive effect turns upon whether Parliament intended to disappoint and interfere with the "reasonable expectations" of those who assumed that the legal consequences of their actions would be determined in accordance with the law in force at the time of their actions<sup>56</sup>. I also respectfully agree that much will turn upon the degree to which rights that are fundamental have been altered, and the extent of the period of retrospectivity<sup>57</sup>. These principles assist in determining whether a law that operates retrospectively should apply to pending criminal or civil proceedings. However, after some hesitation, I do not, in the unique circumstances of this case, consider that Mr Stephens' "reasonable expectations about the manner in which the law is implemented"<sup>58</sup> were significantly disturbed by the application of s 80AF of the *Crimes Act 1900* (NSW) to his trial.

50 There are four considerations that are relevant to this conclusion.

51 First, the other members of this Court say that s 80AF does not operate with respect to pending criminal proceedings that had already commenced before the section came into force<sup>59</sup>. In this case, Mr Stephens was first arraigned on 29 November 2018. Accordingly, their Honours reason that his trial had already commenced when s 80AF came into force on 1 December 2018. Even assuming the correctness of this construction of s 80AF (as to which see below), this characterisation of what happened is, with very great respect, incorrect. Under New South Wales law, the trial of Mr Stephens did not commence on 29 November 2018; rather it commenced on 7 February 2019, when Mr Stephens was arraigned on an amended 14-count indictment and pleaded not guilty to each count in the presence of the jury. Section 80AF came into force before that time.

52 In this respect, s 130 of the *Criminal Procedure Act 1986* (NSW) ("the Procedure Act") is important. That section relevantly provides as follows:

- "(1) In this section, **court** means the Supreme Court or District Court.
- (2) The court has jurisdiction with respect to the conduct of proceedings on indictment as soon as the indictment is presented and the accused person is arraigned, and any orders that may be made by the court

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56 See [33]; Hart, *The Concept of Law*, 3rd ed (2012) at 276.

57 See [34].

58 See [38].

59 See [45].



for the purposes of the trial in the absence of a jury may be made before a jury is empanelled for the trial.

- (3) If proceedings are held for the purpose of making any such orders after the indictment is presented to commence the trial and before the jury is empanelled –
  - (a) the proceedings are part of the trial of the accused person, and
  - (b) the accused person is to be arraigned again on the indictment when the jury is empanelled for the continuation of the trial."

53 As I have mentioned, the first arraignment of Mr Stephens before a District Court judge took place on 29 November 2018. From that time, pursuant to s 130(2) of the Procedure Act, the Court had jurisdiction in relation to the matter and power to engage in pre-trial processes prior to the empanelment of the jury<sup>60</sup>. On 5 February 2019, Mr Stephens was arraigned for a second time for the purposes of pre-trial argument and re-pleaded to an indictment that had been amended specifically to take account of s 80AF. The Crown's application for leave to amend the indictment was not opposed. Further, between 29 November 2018 and 5 February 2019, no steps were taken in the prosecution or defence of Mr Stephens. Ultimately, on 7 February 2019, Mr Stephens was arraigned for the third time on the amended 14-count indictment before the jury panel.

54 Under the law of New South Wales, a person can be arraigned on more than one occasion before the empanelment of the jury<sup>61</sup>. The trial commences after the last arraignment. So much was made clear by Gleeson CJ (with whom Smart and Studdert JJ agreed) in *R v Nicolaidis*<sup>62</sup>, where his Honour said<sup>63</sup>:

"Notwithstanding the procedure of arraignment that takes place at the commencement of a trial, it is, and was in November 1992, the practice in the District Court for persons charged with indictable offences to be arraigned within a relatively short time after having been committed for trial and sometimes many weeks or even months in advance of the hearing date of the trial. In such cases, assuming the accused adhered to a plea of not guilty, there would thus be at least two, and perhaps more, arraignments,

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<sup>60</sup> *Stephens v The Queen* (2021) 290 A Crim R 303 at 310 [27] per Simpson A-JA. See also *GG v The Queen* (2010) 79 NSWLR 194 at 206 [71] per Beazley JA (Buddin J and Barr A-J agreeing).

<sup>61</sup> *R v Janceski* (2005) 64 NSWLR 10 at 36 [187] per Wood CJ at CL.

<sup>62</sup> (1994) 33 NSWLR 364.

<sup>63</sup> (1994) 33 NSWLR 364 at 367.

*the last being at the commencement of the trial.* There is no reason in law why an accused person may not be arraigned on more than one occasion: *R v Radley* (1973) 58 Cr App R 394; *R v Cicchino* (1991) 54 A Crim R 358 at 363. No doubt one of the reasons for the procedure of early arraignment after committal is to permit the District Court to take early control of cases for the purpose of pre-trial management: cf *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 37 and note the provisions of Pt 53 of the *District Court Rules 1973*." (emphasis added)

55 In *R v Janceski*<sup>64</sup>, Howie J agreed with Gleeson CJ and relevantly added that: "[t]he presentation of an indictment and the arraignment of the accused *before the jury panel* is a step in the proceedings that marks the commencement of the trial" (emphasis added). Here, the actual trial of Mr Stephens thus only became "pending" following his arraignment on 7 February 2019, when the jury was empanelled. The language of s 130(3), directed as it is to issues of procedure, does not justify any contrary conclusion for the purposes of ascertaining the intended scope of application of s 80AF.

56 It follows that when the trial of Mr Stephens commenced on 7 February 2019, s 80AF was already law.

57 Secondly, and in any event, s 80AF was intended to apply to pending criminal proceedings. The extrinsic materials make this clear. Section 80AF was enacted by the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) ("the Amendment Act"). That Act was passed by both houses of the New South Wales Parliament on 20 June 2018 and received royal assent on 27 June 2018. Section 2 of the Amendment Act provided that it was to commence on a day to be appointed by proclamation. By proclamation dated 28 November 2018, the Governor of New South Wales, on advice of the Executive Council, appointed 1 December 2018 as the date on which s 80AF would commence<sup>65</sup>.

58 The Second Reading Speech that introduced the Amendment Act expressly refers to recommendations for reform made by a departmental discussion paper entitled "Child Sexual Offences Review" ("the Review")<sup>66</sup>. The Review had been prompted by recommendations made by the Joint Select Committee on Sentencing of Child Sexual Assault Offenders. Chapter 6 of the Review was entitled

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64 (2005) 64 NSWLR 10 at 42 [219].

65 New South Wales, *Commencement Proclamation*, 2018 No 671, 28 November 2018.

66 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 June 2018 at 3; New South Wales, Department of Justice, *Child Sexual Offences Review Discussion Paper* (2017).

"Addressing difficulties arising from historic child sexual offending" and commenced with the following summary:

"The prosecution of historic child sexual abuse offences frequently raises complex legal and evidentiary issues. There is often a delay in disclosure, lack of physical or forensic evidence and diminished memory. Determining the appropriate charges can be challenging for the prosecution, particularly where the date of the offence cannot be specified. If convicted, sentencing an offender in accordance with historic sentencing principles is often a difficult task for the court."

59 Chapter 6 included a sub-heading entitled "Date of offence can be difficult to pinpoint". It was here observed that a survivor of child sexual abuse may be able to recall a particular offence but be unable to say with accuracy when the offence occurred. At the time, the practice of the Crown in New South Wales was thus to draft indictments by reference to a date range, rather than a particular date. Difficulties could arise, however, where the law had changed during that period. This occurred here when s 78K of the *Crimes Act* relevantly succeeded s 81 of the *Crimes Act*. Paragraph 6.11 of the Review observed that it was common for this problem to emerge "during a trial". It stated:

"It is common *that during a trial* the dates of the alleged offence will be refined or significantly changed. A complainant may recall more details about the time of the offence or it may become apparent that they were mistaken about the time. For example, the complainant may have thought the offence occurred when she was in grade 8 and had just become friends with Sally, however, school records later establish that Sally did not attend the school until grade 9 and thus the offence must have occurred outside of the date range contained in the indictment. The prosecution can make an application to amend the indictment, however, this requires either leave of the court or consent of the defence. Where there is no consent and the application is refused, the accused must be acquitted." (footnote omitted; emphasis added)

60 Given the foregoing, the Review noted that an option for reform would be the introduction of a legislative provision that would permit the Crown to rely on the offence with the lowest maximum penalty where there is "uncertainty about the age of the victim at the time of the offence and the date range falls into more than one offence"<sup>67</sup>.

61 Section 80AF is the enactment of this recommended reform. Given the mischief identified by the Review, and its express reference to "common"

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67 New South Wales, Department of Justice, *Child Sexual Offences Review Discussion Paper* (2017) at 31 [6.12].

problems emerging "during a trial" concerning the recollection of when offending may have taken place, it is very likely that Parliament intended that s 80AF could apply to a criminal proceeding that had already commenced. The means by which it could apply, as mentioned in the Review, would be by way of an amendment to the indictment. Section 20 of the Procedure Act provides that an indictment may be amended after it has been presented, but only with the leave of the Court or with the consent of the accused. That is precisely what happened here. On 5 February 2019, the indictment was amended with the leave of the Court to allow the Crown to rely on s 80AF. There were also further amendments to the indictment on 11 February 2019 (during the course of the trial) and on 19 February 2019 (after the close of the Crown case). None of these amendments were opposed.

62 With very great respect to the majority, textual considerations arising from the language of s 80AF do not support a contrary conclusion. Section 80AF(1) states that the section "applies if" four conditions are satisfied. In effect, the criteria require that it be "uncertain" as to when, within a "period" of time, conduct always constituting a "sexual offence" against a child under multiple provisions is alleged to have occurred. There is no dispute that all four conditions were satisfied in this instance. Section 80AF(2) then states that "[i]n such a case" – and this proceeding was a case of that kind – a "person may be prosecuted" under whichever of the sexual offences had the lesser maximum penalty regardless of when during that period the conduct actually occurred. In the context of the provision's purpose, the phrase "may be prosecuted" does not preclude the Crown from relying on s 80AF after the "commencement" of a proceeding<sup>68</sup>.

63 It would make little sense for Parliament to have enacted a provision in response to the Review that did not efficaciously address one of its principal concerns, namely the difficulty of child sexual abuse victims being able to recall particular dates, that being an issue which might only emerge after the trial has already commenced. The phrase "a person may be prosecuted" should be construed, consistently with the purpose of s 80AF, as a reference to any stage in the process of prosecution. That conclusion is supported by the language of s 80AF(1)(a), which refers to a moment when "it is uncertain as to when during a period [of time] conduct is alleged to have occurred". As I have mentioned, paragraph 6.11 of the Review specifically referred to such an uncertainty arising "during a trial". Finally, s 80AF(2) refers to, "in prosecuting [an] offence": (a) any requirement "to establish" that the offence had been in force; and (b) any requirement "to establish that the victim was of a particular age". Again, the reference to "prosecuting" here cannot be confined to a time that only arises before a proceeding is commenced.

64 Of course, it must be accepted that if the prosecution seeks to rely on s 80AF for the first time in a trial that is already well advanced, that may potentially give

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68 See [46].

rise to issues of unfairness for a defendant. But a defendant has the protection of s 20 of the Procedure Act. Section 80AF should be read in the context of the Procedure Act, including s 20. No judge would give leave for an indictment to be amended if this would be productive of injustice. For example, an injustice might arise if an amendment would upset or undermine forensic choices made earlier in the trial by a defendant. Here, and inferentially, for the purposes of granting leave to amend the indictment on 5 February 2019, 11 February 2019 and 19 February 2019, the trial judge must have been satisfied that no resultant injustice could thereby arise for Mr Stephens. Certainly, none has been suggested.

65 Thirdly, the foregoing conclusion is consistent with s 80AF's historical focus. The provision is not primarily concerned with prospective offending; it is concerned with past offending. Its aim was to make the prosecution of historical offences more effective, and one of its specific concerns was the frailty of the human mind in recalling the details of past abuse. As the Second Reading Speech makes clear, the Amendment Act not only adopted the recommendation of the Review; it also followed the Royal Commission into Institutional Responses to Child Sexual Abuse. A purpose of the Amendment Act was to provide justice and support for survivors. The New South Wales Attorney-General said<sup>69</sup>:

"The royal commission showed us all the terrible failures of government and non-government institutions to protect children. Survivors' courage in coming forward has given us a unique opportunity to make broad changes to the criminal law, to protect children better and to facilitate prosecutions for child sexual offences so perpetrators can be held accountable.

...

For five years Australians learned about the children in every corner of this country who, over the decades, have been sexually abused while in the care of institutions that should have been keeping them safe. Shockingly, we were also told about the abject failure of these and other institutions, as well as the community, to respond to reports of abuse. The royal commission's final report and its advance volumes bear witness to the stories of survivors of child sexual abuse. The reports provide unparalleled insights into the nature of the problem that must be addressed. Fortunately, the royal commission has provided comprehensive recommendations on how we should go about doing this. One such set of recommendations was in relation to criminal justice and the New South Wales Government is today responding to those by way of this bill.

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69 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 June 2018 at 3-4.

The Government is committed to ensuring that it learns from all the findings of the royal commission. It is determined to make the changes needed to protect children and to provide justice and support for survivors."

66 The Attorney-General specifically described the purpose of s 80AF as follows<sup>70</sup>:

"[T]he bill makes three procedural reforms to facilitate prosecutions for child sexual offences. Schedule 1 [46] inserts a new section 80AF to cover the complexities that currently arise for the prosecution where the offending has taken place during a period and the applicable offence changes during that period. This can happen either because the child's age has changed during the period – meaning that the conduct is covered by a different offence at different times during that period – or because the relevant law has been amended. This can be a problem for the prosecution where it is not clear which offence should apply. Section 80AF will address this. It will ensure that the prosecution can rely on whichever offence carries the lesser maximum penalty, and can rely on this offence in relation to the entirety of the period."

67 It would, with respect, be incongruous to conclude that s 80AF could have no application to a pending trial given the foregoing expressions of legislative purpose.

68 Fourthly, the particular circumstances here confirm that the reasonable expectations of Mr Stephens about what law would apply to his trial were never defeated. When Mr Stephens was arraigned on 29 November 2018, he pleaded not guilty to each count on the original indictment. As the majority explain, that was a "forensic" decision he was able to make having regard to the content of each count at that time<sup>71</sup>. The majority also observe that the decision was made "on [the] state of the law" as at 29 November 2018<sup>72</sup>. That is partly so. But, as already mentioned, by 29 November 2018, s 80AF had already been enacted and was proclaimed to come into force on 1 December 2018. It was thus already a law of New South Wales<sup>73</sup>. Indeed, it had been so for many months. Any competent criminal lawyer

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70 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 June 2018 at 7.

71 See [21].

72 See [21].

73 See *Queensland v Central Queensland Land Council Aboriginal Corporation* (2002) 125 FCR 89 at 101-104 [59]-[71] per Beaumont J; *Campbell v Employers*

would have known of its existence and its content on that day. They would have known that its proclamation into force was also pending. They could not have reasonably expected that any trial, also pending, would necessarily be unaffected by s 80AF. Any "forensic" decision about pleading guilty or not guilty or about the possible course of future cross-examination<sup>74</sup> could not have been made without taking into account the foregoing reality. The elephant in the room could not possibly have been ignored.

69           On 7 February 2019, Mr Stephens was arraigned again in accordance with s 130(3)(b) of the Procedure Act. The indictment had been amended to take account of the effect of s 80AF and Mr Stephens pleaded afresh to the new counts. By this time, s 80AF was unambiguously in force and Mr Stephens had an opportunity to re-consider forensic decisions about how to plead and about what course cross-examination might take. At this stage, there had been no opening addresses and no witness had been called. Thereafter, Mr Stephens could not have reasonably expected that his trial would be immune from the reach of s 80AF.

70           This conclusion also avoids an injustice that arises here. Mr Stephens was relevantly convicted by a jury on counts 6, 7 and 13. He seeks to have these convictions quashed and acquittals be entered instead, merely because he was formally arraigned for the first time two days before s 80AF came into force.

71           I would dismiss this appeal.

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*Mutual Ltd* (2011) 110 SASR 57 at 74 [69] per Gray and Sulan JJ, 96-97 [182] per White J.

74   See [38].