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THE 'AGE OF STATUTES' AND ITS INTERSECTION WITH FUNDAMENTAL PRINCIPLES: AN ILLUSTRATION

I Introduction

The half-century or so since the first edition of the *Adelaide Law Review* coincides with what has come to be known as the 'age of statutes'.[1]

Notwithstanding their volume and reach, however, they require to be applied in the context of curial procedures which are grounded in common law traditions.[2] And whenever a statute adds to, or alters, the substantive or procedural law, a question may arise as to the extent of the change intended or permitted. A recent series of cases concerning statutory reform to substantive and procedural aspects of a particular aspect of the criminal law in South Australia illustrates the way in which litigants (and courts) resort to fundamental concepts sourced in the common law, and aspects of the judicial process entrenched by the *Constitution*, in understanding the reach and limits of the statutory law.

The cases highlight that the 'age of statutes' has also coincided in Australia with an era that has seen emphasis upon a 'principle of legality', one aspect of which is a working hypothesis that Parliament will be taken not to have abrogated fundamental common law rights or freedoms in the absence of express words or necessary implication.[3] This era has also been marked by the emergence of two constitutional doctrines which mark out limits upon the otherwise plenary power of state parliaments (which are separate and distinct from limitations necessitated by the existence of a federal polity).[4]

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1 Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982).

2 It is the duty of courts to give effect to the will of Parliament. 'But they must do so in a trial process which ensures, so far as they can, fairness to the accused': *KBT v The Queen* (1997) 191 CLR 417, 432.

3 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492.

4 *Kable v DPP (NSW)* (1996) 189 CLR 51; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

II Persistent Sexual Offending

In the application of the substantive and procedural criminal law, it is possible to identify a number of principles and norms that have developed. Whilst not all of them are as ancient as they are often perceived to be, they are regarded as important aspects of the accusatorial system of criminal justice inherited and developed by Australian courts.

So, for example, an accused is entitled to proper particulars of the charged offending.[5] Generally, an accused's conduct will only merit punishment if it contravenes the law in force at the time of the conduct.[6] The court has a duty to ensure, and the accused has a correlative right not to be convicted other than following, a fair trial[7] and his or her guilt is to be proved beyond a reasonable doubt.[8] The focus of the trial is upon the evidence of the charged offending, and whilst evidence of wrongdoing on another occasion may exceptionally be admitted if it is sufficiently probative to outweigh the danger of unfair prejudice, an accused is not to be convicted for something he or she did on a different occasion, or because he or she is of bad character.[9] If convicted, the accused is to be punished and sentenced for the offence of which he or she has been found guilty and not for other acts that are not the subject of the verdict.[10] The punishment is to be proportionate to the offending.[11]

The application of these norms,[12] which to a large extent are concerned with ensuring the protection of citizens from punishment by the State without proper cause and due process, can have the consequence that it is difficult to secure convictions for particular types of criminal conduct.

A paradigm example of this is sexual offending of a repetitive kind, particularly where children are involved. The insidious nature of the offending, and the power and age imbalance that can be involved, can mean that the offending is perpetrated over a long period, and not reported — let alone tried — until much later. This, together with the trauma of the conduct, may make it difficult for victims to make complaints which permit a particular act (as distinct from the outline of a pattern of

5 *Johnson v Miller* (1937) 59 CLR 467; *S v The Queen* (1989) 168 CLR 266; *KRM v The Queen* (2001) 206 CLR 221.

6 *DPP (Cth) v Keating* (2013) 248 CLR 459, 479.

7 *Jago v District Court of New South Wales* (1989) 168 CLR 23; *Dietrich v The Queen* (1992) 177 CLR 292.

8 *Woolmington v DPP* [1935] AC 462.

9 *HML v The Queen* (2008) 235 CLR 334.

10 *R v De Simoni* (1981) 147 CLR 383, 389, 392 ('*De Simoni*'); *Kingswell v The Queen* (1985) 159 CLR 264, 280.

11 *Veen v The Queen (No 2)* (1988) 164 CLR 465.

12 Not all of the norms may be strictly founded in logic, but rather in experience, as Oliver Wendell Holmes famously observed: Oliver Wendell Holmes, *The Common Law* (Harvard University Press, 1881) 1.

conduct) to be particularised and then proved beyond reasonable doubt. The perverse result may be that the more egregious the offending, the less likely the offender is to be convicted of any single act.

III Legislative Reform

South Australia, like other jurisdictions, has responded to this dilemma with legislative reform. Initially, in 1994, an offence of persistent sexual abuse of a child was introduced as s 74 of the *Criminal Law Consolidation Act* 1935 (SA).[13] The offence was defined to consist of a course of conduct involving the commission of a sexual offence (defined by reference to other offences in the Act) against a child on at least three separate occasions, so long as the occasions fell on at least three days.

Subsequently, in 2007, s 74 was replaced with s 50,[14] which provided that an adult person who, over a period of not less than three days, commits more than one act of sexual exploitation of a particular child under the prescribed age was guilty of an offence. The section went on to stipulate that a person commits an act of sexual exploitation of a child if the person commits an act in relation to the child of a kind that could be the subject of a charge of a sexual offence if it were able to be properly particularised (again, defined by reference to other offences in the Act).

Section 50(4) provided that despite any other Act or rule of law, the information was required to allege with sufficient particularity the period during which the acts of sexual exploitation allegedly occurred, and the alleged conduct comprising the acts of sexual exploitation. The information was required to allege a course of conduct consisting of acts of sexual exploitation, but needed not allege particulars of each act with the degree of particularity that would be required if the act were charged as an offence under a different section of the Act. Nor did the information need to identify particular acts of sexual exploitation or the occasions on which, places at which, or order in which acts of sexual exploitation occurred.

Both s 74 and its successor s 50 carried a maximum of life imprisonment, and were retrospective in the sense of applying to acts committed prior to the introduction of the relevant sections.

The evident purpose of the creation of the offence was to permit the prosecution of offenders in cases in which the pattern of abuse was such that the child was unable to differentiate one act of sexual exploitation from another.[15] It has been accepted,

13 *Criminal Law Consolidation (Child Sexual Abuse) Amendment Act 1994* (SA).

14 *Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2007* (SA).

15 *Chiro v The Queen* (2017) 260 CLR 425, 453 ('*Chiro*'). As the Court noted in *Hamra v The Queen* (2017) 260 CLR 479, 490, when s 74 had been introduced, the Attorney-General referred to the difficulties confronting the prosecution in historical, persistent child sexual abuse cases arising from the application of the principles in *S v The Queen* (n 5).

however, that neither s 74, nor its successor s 50, created a 'relationship' offence.[16] Proof of the offence still required proof of unlawful sexual acts, rather than proof at a generic level of sexual interest, an illicit relationship, or a particular disposition.[17]

While reform to address the difficulties attending the charging and proof of offending of the kind under consideration may have understandable and necessary, because the actus reus of the offence consists in a number of individual acts, the drafting of s 74 and s 50 produced a tension between the objective of the reform and the application of the norms earlier identified to the elements of the offence.

If a complainant cannot differentiate one act from another, how can an accused understand the case he or she has to meet, how are the jury to distinguish evidence of the putative offending from prejudicial evidence of surrounding misconduct, and how is the jury's verdict to be understood so that the judge can ensure that the punishment fits the crime? In a trial by judge alone, to what extent does the judge's obligation to give reasons require an identification or differentiation of the particular acts. And what of a case where a credible complainant cannot identify any particular acts but gives evidence which if accepted must lead to the conclusion there were at least two sexual offences committed over the prescribed period?

These and other issues emerged in a recent series of cases, leading ultimately to the repeal and retrospective substitution of a new s 50,[18] which in terms now proscribes 'unlawful sexual relationship'.[19] The application of the transitional provisions of the amending legislation has also led to a question of constitutional validity.

IV South Australian Decisions

Shortly after s 74 was introduced, in *R v D*[20] the question arose whether the stipulation of a life sentence as the maximum punishment meant that a sentence imposed under s 74 would normally be heavier than it would have been had the underlying sexual offences been charged and proved. The Court of Criminal Appeal decided that s 74 was concerned with certain procedural difficulties, but there was nothing in the provision that suggested Parliament intended that the courts should change the approach that they had taken when sentencing in respect of a course of conduct comprising specific offences. In reaching that view, the Court was plainly motivated by what might be identified as another norm: equality before the law.[21] The Court

16 *Chiro* (n 15) 436.

17 *R v Little* (2015) 123 SASR 414, 420; *Chiro* (n 15) 438, 452.

18 *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA).

19 The offence may be proved without the trier of fact being satisfied of the particulars of any sexual act, so long as they are satisfied of the general nature or character of the acts. There is no requirement for unanimity as to which sexual acts constitute the relationship.

20 (1997) 69 SASR 413, 419.

21 See, eg, *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1, 23.

thought it unlikely that Parliament intended that a person charged with the s 74 offence should be dealt with more severely for the very same conduct as a person charged with a series of offences.

Following the introduction of s 50, a number of South Australian decisions explored the implications arising from the fact that the actus reus was defined as comprising a minimum number of acts of sexual exploitation, but the information was not required to particularise each act individually. In particular, the decisions explored the requirement for an extended unanimity direction in a jury trial, and the safety of a verdict resulting from a trial in which the evidence was of a kind that may not readily have permitted agreement in the jury room upon particular incidents or episodes of offending.[22]

Importantly, in *R v Little,*[23] the South Australian Court of Criminal Appeal comprising five Judges held that in a case where multiple acts of sexual exploitation are alleged, it is an error of law to fail to direct the jury that they must agree unanimously, or by majority after four hours, that a 'prescribed pair' of the same two acts has been proved beyond reasonable doubt. In doing so, the Court held that s 50 was to be treated in the same way as a Queensland provision considered in *KBT v The Queen.*[24] The Court held that a so-called 'extended unanimity direction' is required because the offence comprises two or more acts of sexual exploitation about which the jury were required to be unanimous.

In the subsequent decision in *R v Johnson,*[25] the Court allowed an appeal against conviction pursuant to s 50 following a trial before a jury because the way in which the complainant had given evidence meant that there was nothing to sufficiently differentiate one occasion of abuse from another.

V Three High Court Decisions

In 2017–18, the High Court granted special leave to appeal in relation to three matters involving different, but related, issues arising out of s 50. These concerned the intersection between the reforms worked by that section and the basic norms and principles conventionally applying in criminal proceedings.

In *Chiro v The Queen* ('*Chiro*')[26] the issue was essentially whether in sentencing a person convicted of persistent sexual exploitation the judge was constrained to sentence by reference to the actus reus agreed upon by the jury (who had been given

22 See, eg, *R v N, SH* [2010] SASCFC 74; *R v Warsap* (2010) 106 SASR 264; *R v M, BJ* (2011) 110 SASR 1; *R v C, G* (2013) 117 SASR 162.

23 *R v Little* (n 17).

24 *KBT v The Queen* (n 2).

25 [2015] SASCFC 170. The case was also appealed to the High Court on a different ground: *Johnson v The Queen* (2018) 360 ALR 246.

26 *Chiro* (n 15).

an extended unanimity direction), or whether, a general verdict of guilty having been returned, the judge could sentence according to the acts he or she considered were proved beyond reasonable doubt (even though the jury might not have been persuaded of the full range of offending alleged by the complainant).

The High Court held, by majority, that it was for the jury, and the jury alone, to decide the actus reus, and that in the absence of the judge having exercised his or her discretion to ask 'special questions' of the jury as to which acts they unanimously agreed had been committed, the court would have to sentence conservatively to avoid manifest excess. The plurality observed that although it was true that an offence under s 50 was but one single offence, if the accused was convicted, the sentence to be imposed should be determined by reference to each sexual offence which the alleged acts of sexual exploitation would constitute if charged separately, as if the accused had been convicted of each of those offences.[27] For that reason, the principle laid down in *R v De Simoni* ('*De Simoni*')[28] was instructive: 'Plainly, an accused is not to be sentenced for an offence which the jury did not find the accused to have committed'.[29] The consequence was that the appeal was allowed and, it now being too late to ask the jury which offences they found proved, the Court of Criminal Appeal was required to re-sentence Mr Chiro on a basis which was effectively the minimum content of the jury verdict.[30]

In *Hamra v The Queen,*[31] there had been a trial before a judge alone. Applying *R v Little* and *R v Johnson*,[32] the judge accepted at the close of the prosecution case that there was no case to answer, and directed a verdict of not guilty. Taking the complainant's quite generalised evidence at its highest, it was non-specific as to times and dates, making it impossible (in the view of the trial judge) to identify two or more acts of sexual exploitation. The Court of Criminal Appeal allowed the appeal, and the defendant then appealed to the High Court, contending that the trial judge had been correct to hold that if the evidence was not capable of delineating particular sexual offences one from the other, there was no process of reasoning that could satisfactorily lead to a verdict of guilty.

The defendant argued on appeal that notwithstanding its alteration to the permissible form of the information, s 50 did not ameliorate the requirement that the State must prove, and therefore that the evidence must ultimately be capable of particularising, a 'distinct occasion' or 'distinct transaction' constituting each alleged sexual offence, relying on *Johnson v Miller*[33] and *S v The Queen.*[34]

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27 *Chiro* (n 15) 447.

28 *De Simoni* (n 10).

29 Ibid 448–9.

30 *R v Chiro* [2017] SASCFC 144.

31 *Hamra v The Queen* (n 15).

32 *R v Little* (n 17); *R v Johnson* (n 25).

33 *Johnson v Miller* (n 5).

34 *S v The Queen* (n 5).

Whilst acknowledging that this was the position at common law, the High Court unanimously rejected the contention, holding that the plain terms of s 50(4) modified the common law by providing that although the information must allege a course of conduct consisting of acts of sexual exploitation, it need not identify particular acts of sexual exploitation or the occasions on which, places at which or order in which acts of sexual exploitation occurred. The Court acknowledged that while a lack of specificity might create difficulties for a jury in agreeing on two or more of the same acts, the possibility that they might agree that all the alleged acts occurred meant there would still be a case to answer in a situation of that kind.

Finally, in *DL v The Queen,*[35] the High Court was called upon to consider whether (and if so to what extent) the difficulties created by vagaries in the complainant's evidence had to be addressed by a trial judge sitting without a jury in the reasons for verdict. The essential issue was whether the trial judge's reasons failed to identify the two or more acts of sexual exploitation upon which the conviction was based and to disclose the process of reasoning leading to that finding.[36] The Court accepted that the reasons would need to address the elements of the offence and therefore the actus reus, but divided on whether, properly construed, the reasons achieved that.[37]

The minority considered that the reasons had to identify the acts of sexual exploitation comprising the actus reus and the process of reasoning that led to those findings and that, the judge having suggested some but not all of the alleged acts were proved, but without explaining which and why, the reasons were deficient.[38] The majority construed the reasons as amounting to a finding that all of the alleged acts had been committed.[39] On that basis, the reasons for so finding, whilst expressed at a high level, were acceptable, because they essentially involved an acceptance of the complainant's evidence as to all of the substantive allegations.

VI The Amending Legislation

The decision in *Chiro* provoked a swift legislative response. The South Australian Parliament legislated not only to replace s 50 with a true 'relationship' offence, but to prevent other offenders — who, like Mr Chiro, had been convicted under the old s 50, but without the jury having been asked to identify the offending they found proved — receiving the benefit of the High Court's ruling and a potentially lenient sentence.

35 (2018) 356 ALR 197.

36 Ibid 198–9.

37 Ibid 209, 219, 237.

38 Ibid 219, 237.

39 Ibid 209.

Section 9(2) of the amending legislation[40] applied to persons who had been found guilty but not yet sentenced, with the sole and specific exception of Mr Chiro. In such cases, the amending legislation purported to require the sentencing court to treat the jury's verdict as finding of guilt with respect to the entire course of conduct alleged. The section then went on to authorise the sentencing court to sentence the offender on the basis of a subset of that course of conduct if the sentencing court was not persuaded of the guilt of *all* of the alleged acts beyond reasonable doubt.

The provision led to a question of the constitutional validity being referred to the Full Court of the Supreme Court of South Australia. In *Question of Law Reserved (No 1 of 2018),*[41] the Full Court unanimously held that the provision was invalid as contrary to the so-called *Kable* doctrine. That doctrine requires that state parliaments may not legislate in such a manner as to confer upon a state court a function or power which substantially impairs its institutional integrity, and which is therefore incompatible with its role, under Ch III of the *Constitution*, as a repository of federal jurisdiction and as part of the integrated Australian court system.

Justice Vanstone held that s 9(2) impermissibly intruded into the processes and decisions of the Court in that it was concerned with the meaning of the jury's verdict and, retrospectively, laid it open to a fresh interpretation and one quite possibly different from the factual basis upon which it originally rested.[42] In that way, it worked an alteration to the division of responsibility between judge and jury with respect to the determination of guilt and sentence, part way through the prosecution, constituting an interference in the process of determination of guilt and sentencing in particular cases. Justice Hinton, with whom Lovell J agreed, held that the section substantially undermined the legitimacy of the judicial process and the exercise of judicial power by directing a Court, that had adjudged a defendant's liability to punishment after a trial by jury, to put that judgment aside and repeat the exercise without a jury and the protections a jury provides in order to determine a different basis for punishment.[43]

VII Observations

The purpose of this brief survey of some of the decisions concerning the introduction and ultimate repeal of s 50 is not to critique the decisions, or to criticise the legislative endeavour, but to observe that legislative action does not occur in a vacuum. Provisions such as s 50 do not take effect like fresh paint on a blank canvas.

Subject to questions of validity, the courts are duty bound to give effect to legislative reforms, but the reforms have to be accommodated within the essential framework of a fair trial, and their proper limits (whether as a matter of construction, or validity)

40 *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA).

41 *Question of Law Reserved (No 1 of 2018)* [2018] SASCFC 128.

42 Ibid [39].

43 Ibid [174].

will always be assessed by reference to fundamental working assumptions of the common law and criminal procedure. This is the fundamental common law doctrine of legality in operation.[44]

The irony, it is suggested, is that the more pervasive and prescriptive the statute law becomes, the greater the need may be for an understanding of the general principles which, to a greater or lesser degree, the statutes set out to operate within or upon.

From the perspective of a student, or a lawyer, it might also be thought that the greater the burden of keeping on top of the growing volume of statutory law, the less realistic is that endeavour, and the more valuable it may instead be to focus upon fundamental concepts rather than obtaining what may be a transient knowledge of the substantive content of an ever changing body of statutory law.

Publications such as the *Adelaide Law Review* continue to perform an important function in extracting and subjecting to critical analysis the overarching general principles, whether they be in the field of criminal, civil, public, substantive or adjectival law. These principles retain their vitality in the age of statutes.

44 Cf Murray Gleeson, 'Legality — Spirit and Principle, the Second Magna Carta Lecture' (Speech, New South Wales Parliament House, 20 November 2003).