



## HIGH COURT OF AUSTRALIA

7 September 2022

STEPHENS v THE QUEEN  
[2022] HCA 31

Today, the High Court allowed an appeal from a judgment of the Court of Criminal Appeal of New South Wales. The appeal concerned the scope of operation of s 80AF of the *Crimes Act 1900* (NSW), a provision intended to facilitate the prosecution of historic sexual offences, and whether that provision could apply after an accused's trial had commenced.

On 29 November 2018, the appellant, Mr Stephens, was arraigned in the District Court of New South Wales and pleaded not guilty to each count on an 18-count indictment, which alleged sexual offences by Mr Stephens against a complainant from the time that the complainant was 10 years old until the complainant was approximately 15 years old. In respect of four instances of alleged conduct, the Crown was uncertain whether the alleged conduct occurred (i) before 8 June 1984, at which time s 81 of the *Crimes Act* was in force, or (ii) on or after 8 June 1984, at which time s 81 had been repealed but s 78K of the *Crimes Act* was in force. These four instances were formulated in pairs of alternative counts under ss 81 and 78K.

On 1 December 2018, s 80AF of the *Crimes Act* came into force. It relevantly provided that, in circumstances where it is uncertain as to when during a period conduct is alleged to have occurred and, due to a change in the law, the alleged conduct would have constituted more than one sexual offence during that period, the prosecution can rely, in relation to the entirety of the period, on whichever offence carries the lesser maximum penalty. In Mr Stephens' case, the practical effect of s 80AF was to extend the period during which 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. Section 80AF displaced authority requiring the Crown to prove beyond reasonable doubt, on each count under s 81 or s 78K, that the alleged conduct was committed at a time when the relevant section was in force. On 5 February 2019, the Crown was granted leave to amend the indictment to take the benefit of s 80AF. Following further amendments to the indictment, Mr Stephens was convicted of seven counts of sexual offences against the complainant, four of which he appealed to the Court of Criminal Appeal. A majority of the Court of Criminal Appeal quashed his conviction on one of those counts only, concluding that s 80AF applied retroactively including to trials that had already commenced.

By majority, the High Court held that s 80AF did not operate with respect to trials that had already commenced when the provision came into force and it could not be invoked after the commencement of a trial. To interpret s 80AF as being completely retroactive would significantly disturb reasonable expectations about the manner in which the law is implemented, and retroactively alter the law for extant proceedings where forensic decisions may have been made in reliance upon the previous law. An interpretation of s 80AF which restricted its retroactive effect, by requiring the Crown to elect to take advantage of the provision before the commencement of the trial, was supported by textual indications and reasonable expectations of its operation.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*