

7. Retrospective Laws

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The common law

7.1 People should generally not be prosecuted for conduct that was not an offence at the time the conduct was committed. If on Wednesday it is not an offence to go fishing at Bondi Beach, then people will usually expect that a law will not be enacted on Thursday making it an offence to have gone fishing the day before. But this principle does not only apply to criminal laws. More generally it might be said that laws should not retrospectively change legal rights and obligations.¹

7.2 This chapter discusses: the source and rationale of limiting retrospective laws; how the principle is protected from statutory encroachment; and when retrospective laws may be justified. The ALRC calls for submissions on two questions.

Question 7–1 What general principles or criteria should be applied to help determine whether a law that retrospectively changes legal rights and obligations is justified?

Question 7–2 Which Commonwealth laws retrospectively change legal rights and obligations without justification? Why are these laws unjustified?

7.3 The common law on the subject of retrospective law making was influenced by Roman law. It may also be reflected in cl 39 of the *Magna Carta* (1215), which

¹ The Terms of Reference refer both to laws that ‘retrospectively change legal rights and obligations’ and to laws that ‘create offences with retrospective application’. These are treated together in this chapter.

prohibited the imprisonment or persecution of a person ‘except by the lawful judgement of his peers and by the law of the land’.²

7.4 In *Leviathan* (1651), Thomas Hobbes wrote that ‘harm inflicted for a fact done before there was a law that forbade it, is not punishment, but an act of hostility: for before the law, there is no transgression of the law’.³ William Blackstone wrote in his *Commentaries on the Laws of England* (1765):

Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law: he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All laws should be therefore made to commence in futuro, and be notified before their commencement.⁴

7.5 Retrospective laws are commonly considered inconsistent with the rule of law. In his book on the rule of law, Lord Bingham wrote:

Difficult questions can sometimes arise on the retrospective effect of new statutes, but on this point the law is and has long been clear: you cannot be punished for something which was not criminal when you did it, and you cannot be punished more severely than you could have been punished at the time of the offence.⁵

7.6 Retrospective laws make the law less certain and reliable.⁶ A person who makes a decision based on what the law is, may be disadvantaged if the law is changed retrospectively. It is said to be unjust because it disappoints ‘justified expectations’.⁷

7.7 The criminal law ‘should be certain and its reach ascertainable by those who are subject to it’, the High Court said in *Director of Public Prosecutions (Cth) v Keating* (2013).⁸ This idea is ‘fundamental to criminal responsibility’ and ‘underpins the strength of the presumption against retrospectivity in the interpretation of statutes that impose criminal liability’.⁹ The Court then quoted *Bennion on Statutory Interpretation*, 5th ed (2008):

A person cannot rely on ignorance of the law and is required to obey the law. It follows that he or she should be able to trust the law and that it should be predictable. A law that is altered retrospectively cannot be predicted. If the alteration is

2 Ben Juratowitch, *Retroactivity and the Common Law* (Bloomsbury Publishing, 2008) 28. Juratowitch notes however, that this clause is more concerned with placing limits on the exercise of *executive* power.

3 Thomas Hobbes, *Leviathan* (Oxford University Press 1996, 1651) 207.

4 William Blackstone, *Commentaries on the Laws of England* (15th ed, 1809) vol 1, 46.

5 Tom Bingham, *The Rule of Law* (Penguin UK, 2011).

6 Lord Diplock said: ‘acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it’: *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg* [1975] AC 591.

7 HLA Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 276. (‘retrospective law-making is unjust because it ‘disappoints the justified expectations of those who, in acting, having 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’)

8 *Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459, 479 [48] (French CJ, Hayne, Crennan, Kiefel, Bell And Keane JJ).

9 *Ibid* [48] (French CJ, Hayne, Crennan, Kiefel, Bell And Keane JJ).

substantive it is therefore likely to be unjust. It is presumed that Parliament does not intend to act unjustly.¹⁰

7.8 In *Polyukhovich v Commonwealth* (1991), Toohey J said:

All these general objections to retroactively applied criminal liability have their source in a fundamental notion of justice and fairness. They refer to the desire to ensure that individuals are reasonably free to maintain control of their lives by choosing to avoid conduct which will attract criminal sanction; a choice made impossible if conduct is assessed by rules made in the future.¹¹

7.9 The Terms of Reference refer to both laws that retrospectively change legal rights and obligations and laws that create offences with retrospective application. This chapter deals with both of these types of law, but the second type of law is more difficult to justify. In *Retroactivity and the Common Law* (2007), Ben Juratowich writes:

Retroactive creation of a criminal offence is a particularly acute example of infraction by the state of individual liberty ... Holding a person criminally liable for doing what it was lawful to do at the time that he did it, is usually obviously wrong. The retroactive removal of an actual freedom coupled with the gravity of consequences that may accompany a breach of the criminal law mean that retroactive imposition of a criminal liability is rarely justified.¹²

Protections from statutory encroachment

Australian Constitution

7.10 There is no express or implied prohibition on the making of retroactive laws in the *Australian Constitution*. In *R v Kidman* (1915), the High Court found that the Commonwealth Parliament had the power to make laws with retrospective effect.¹³ In that case, which concerned a retrospective criminal law, Higgins J said:

There are plenty of passages that can be cited showing the inexpediency, and the injustice, in most cases, of legislating for the past, of interfering with vested rights, and of making acts unlawful which were lawful when done; but these passages do not raise any doubt as to the power of the Legislature to pass retroactive legislation, if it sees fit. ... The British Parliament, by Acts of attainder and otherwise, has made crimes of acts after the acts were committed, and men have been executed for the crimes; and—unless the contrary be provided in the Constitution—a subordinate Legislature of the British Empire has, unless the Constitution provide to the contrary, similar power to make its Statutes retroactive.¹⁴

10 Ibid.

11 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 608 (Toohey J).

12 Ben Juratowich, *Retroactivity and the Common Law* (University of Oxford, 2007) 52.

13 *R v Kidman* (1915) 20 CLR 425.

14 Earlier in that case: 'No doubt a provision making criminal and punishable future acts would have more direct tendency to prevent such acts than a provision as to past acts; but whatever may be the excellence of the utilitarian theory of punishment, the Federal Parliament is not bound to adopt that theory. Parliament may prefer to follow St Paul (Romans IX 4), St Thomas Aquinas, and many others, instead of Bentham and Mill': Ibid 450.

7.11 The power of the Australian Parliament to create a criminal offence with retrospective application has been affirmed in a number of cases, and is discussed in *Polyukhovich v Commonwealth* (1991).¹⁵ In that case, McHugh J said that ‘*Kidman* was correctly decided’¹⁶ and that

numerous Commonwealth statutes, most of them civil statutes, have been enacted on the assumption that the Parliament of the Commonwealth has power to pass laws having a retrospective operation. Since *Kidman*, the validity of their retrospective operation has not been challenged. And I can see no distinction between the retrospective operation of a civil enactment and a criminal enactment.¹⁷

Principle of legality

7.12 The principle of legality provides some protection from retrospective laws.¹⁸ When interpreting a statute, courts will presume that Parliament did not intend to create offences with retrospective application, unless this intention was made unambiguously clear.¹⁹ For example, in *Maxwell v Murphy* (1957), Dixon CJ said:

the general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to past events.²⁰

7.13 However, this presumption does not apply to procedural (as opposed to substantive) changes to the application of the law. Dixon CJ went on to say:

given rights and liabilities fixed by reference to past facts, matters or events, the law appointing or regulating the manner in which they are enforced or their enjoyment is to be secured by judicial remedy is not within the application of the presumption. Changes made in practice and procedure are applied to proceedings to enforce rights and liabilities, or for that matter to vindicate an immunity or privilege, notwithstanding that before the change in the law was made the accrual or establishment of the rights, liabilities, immunity or privilege was complete and rested on events or transactions that were otherwise past and closed.²¹

15 *Polyukhovich v Commonwealth* (1991) 172 CLR 501. See also *Millner v Raith* (1942) 66 CLR 1.

16 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 721 [30] (McHugh J).

17 *Ibid* 718 [23] (McHugh J).

18 The principle of statutory interpretation now known as the ‘principle of legality’ is discussed more generally in Ch 1.

19 See also, *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ); *WBM v Chief Commissioner of Police* [2012] VSCA 159 (30 July 2012) [67] (Warren CJ with whom Hansen JA expressed general agreement at [133]. Chief Justice Spigelman in *Attorney-General of New South Wales v World Best Holdings Ltd* [2005] enunciated a slightly different test for the principle of legality as it applies to the interpretation of criminal offences which have retrospective effect.

20 *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ). See also *Rodway v The Queen* (1990) 169 CLR 515, 518 (Mason CJ, Dawson, Toohey, Gaudron & McHugh JJ). In that case, the Justices stated, ‘the rule at common law is 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. It is said that statutes dealing with procedure are an exception to the rule and that they should be given a retrospective operation’.

21 *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ).

International law

7.14 There are prohibitions on retrospective criminal laws in international law. Article 15 of the International Covenant on Civil and Political Rights (ICCPR), expressing a rule of customary international law,²² provides:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

7.15 International instruments cannot be used to ‘override clear and valid provisions of Australian national law’.²³ However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia’s international obligations.²⁴

Bills of rights

7.16 In other countries, bills of rights or human rights statutes provide some protection from statutory encroachment. There are prohibitions on the creation of offences that apply retrospectively in the United States,²⁵ the United Kingdom,²⁶ Canada²⁷ and New Zealand.²⁸ For example, the *Canadian Charter of Rights and Freedoms* provides that any person charged with an offence has the right

not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations.²⁹

7.17 The right not to be charged with a retrospective offence is also protected in the Victorian and ACT human rights statutes.³⁰

Justifications for encroachments

7.18 Are retrospective laws necessarily unjust? In *George Hudson Limited v Australian Timber Workers’ Union* (1923) Isaacs J quoted the principle in *Maxwell on Statutes*, 6th ed, that ‘Upon the presumption that the Legislature does not intend what

22 See *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 574 (Brennan CJ).

23 *Minister for Immigration v B* (2004) 219 CLR 365, 425 [171] (Kirby J).

24 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

25 *United States Constitution* art I § 9, 10. (‘No Bill of Attainder or ex post facto Law shall be passed’: § 9).

26 *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 7.

27 *Canada Act 1982 c 11, Sch B Pt 1* (‘*Canadian Charter of Rights and Freedoms*’) s 11(g).

28 *Bill of Rights Act 1990* (NZ) s 26(1).

29 *Canada Act 1982 c 11, Sch B Pt 1* (‘*Canadian Charter of Rights and Freedoms*’) s 11(g).

30 *Charter of Human Rights and Responsibilities 2006* (Vic) s 27; *Human Rights Act 2004* (ACT) s 25.

is unjust rests the leaning against giving certain statutes a retrospective operation' and then said:

That is the universal touchstone for the Court to apply to any given case. But its application is not sure unless the whole circumstances are considered, that is to say, the whole of the circumstances which the Legislature may be assumed to have had before it. What may seem unjust when regarded from the standpoint of one person affected may be absolutely just when a broad view is taken of all who are affected. There is no remedial Act which does not affect some vested right, but, when contemplated in its total effect, justice may be overwhelmingly on the other side.³¹

7.19 After quoting this passage, Pearce and Geddes write that while 'a legislative instrument may take away some rights it may confer others and the overall aggregate justice may indicate that retrospectivity was intended'.³² It may also suggest that the retrospective law was justified. But are there more specific principles that might help determine whether a retrospective law is justified?

7.20 Creating retrospective *criminal* offences may be more difficult to justify than other retrospective laws. Article 4 of the ICCPR provides that some rights may be derogated from in 'times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed'—but this expressly excludes art 15, which concerns the creation of retrospective criminal offences. However, art 15(2) itself contains one specific limitation:

Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

7.21 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and 'demonstrably justified in a free and democratic society'.³³

7.22 Some Australian laws that operate retrospectively may be justified. The ALRC invites submissions identifying those that are *not* justified, and explaining why they are not justified.

31 *George Hudson Limited v Australian Timber Workers' Union* (1923) 32 CLR 413, 434.

32 Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (Lexis Nexis Butterworths, 8th ed, 2014) [10.8].

33 *Canada Act 1982 c 11, Sch B Pt 1* ('Canadian Charter of Rights and Freedoms') s 1. See also, *Charter of Human Rights and Responsibilities 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *Bill of Rights Act 1990* (NZ) s 5.