SEXUALITY AND THE LAW

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1. John Stuart Mill in his essay "On Liberty" 100 years ago wrote: "The only purpose for which power can rightly be exercised over any member of a civilised community against his will is to prevent harm to others".

2. This doctrine was in effect accepted by the Wolfenden Committee in Britain when it said in its report: "There must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business". Mr. Trudeau the Canadian Prime Minister has reflected upon this in his observation that what takes place in private bedrooms is not the business of the State.

3. What is the business of the State is sexual activity which the community regards as harmful to others.

4. In some countries such as France, the criminal code, being a statutory code, lays down the law which a person infringes at his jeopardy.

5. Under the Australian Federal system, as in the United States of America, criminal law is primarily a matter for the States. Penal offences can be created by the Commonwealth only as an incident to the exercise of some other power, including the governance of the Federal territories, reserved to the Commonwealth by the Constitution (Wynes Legislative, Executive and Judicial Powers in Australia (3rd Edition) 167-170.) In form therefore, Australian criminal law derives from State statutes, from Commonwealth statutes and ordinances, and from decisions of the Courts.

6. The substantial derivation of Australian criminal law is from the Common Law of England, but the two are not identical. This may be just as well for a distinguished scholar (Professor Cross) has said: "I yield to none in my admiration of the achievements of the Common Law in many spheres, but the substantive criminal law is not one of them. After all it is the common law which has saddled us with such things as the definition of larceny and the concept of malice aforethought. The basic trouble is, I believe, the complete unsuitability of the substative criminal law as a subject for development, either by way of addition, alteration, or abrogation, through the medium of case law."

7. Australia has to some extent anticipated the point of view expressed in this passage, for three of the States, Queensland, Western Australia and Tasmania have codified their criminal law and thereby departed from the antecedent common law as a source of reference, the results have not been happy in every respect but the definition of larceny and concept of malice aforethought have been improved upon. The other three States, New South Wales, Victoria and South Australia, have extensive statutes on the subject but have not yet undertaken the wholesale restatement of the law required by a codification. The Federal jurisdictions do not follow a uniform pattern, the Commonwealth Crimes Act itself, which creates certain defences affecting Commonwealth power personnel and property anywhere in Australia, presupposes and to some extent duplicates local laws. The Australian Capital Territory is governed largely by the law of New South Wales and therefore ranks as a common law jurisdiction.

8. Howard has observed in his second edition of Australian Criminal Law that "the difference between the code jurisdictions and the others is more than a matter of form, codification is usually accompanied by, and in Australia has been accompanied by, some degree of renovation of the law by way of redefinition of basic concepts and abandonment of terms of art which have outlived their usefulness. It so happens that the Australian code States are not the most populous and are therefore of secondary importance in terms of national law enforcement. Nevertheless the codes themselves have considerable theoretical interest.".

THE JUVENILE

1. Carnally knowing a girl under 10 - penal servitude for life (Section 67).

   Carnal knowledge is defined under our Crimes Act as being deemed complete upon proof of penetration only. The penetration of the male organ into the female genitalia may be very small indeed. It is not necessary to prove that the hymen was ruptured nor that emission could or did take place.

2. Section 68 provides that anybody attempting to carnally know a girl under 10 or assaulting her with intent to carnally know her shall be liable to penal servitude for 14 years. Alternative verdicts may be brought in.

3. Under Section 71, anyone carnally knowing a girl between the ages of 10 and 16 years shall be liable to 10 years gaol. Consent is no defence, although Section 77 provides that if the girl is in fact over the age of 14 at the time of committing the offence and consented to it and was either a common prostitute or the person charged at the time believed on reasonable grounds that she was over 16, then such combination of conditions may be a defence.

4. There are special provisions for cases such as -

   (a) Anyone having carnal knowledge or attempting to have carnal knowledge with a woman or girl who is an idiot or imbecile shall be liable to penal servitude for 5 years.

   (b) Whoever being a schoolmaster or teacher or father or stepfather has carnal knowledge with a girl above the age of 10 and under the age of 17 being his pupil, daughter or stepdaughter shall be liable to 14 years gaol. Similar provisions for attempts at such offences. Consent is no defence.

5. Section 76 provides for indecent assault upon a woman of any age rendering the accused liable to 3 years gaol and if the female is under 16 years to 5 years gaol.

6. Section 78(a) and 78(b) provides for the offence of incest or incest attempts against a male having carnal knowledge of his mother, sister, daughter or granddaughter or being a female above the age of 16 years with her consent permitting her grandfather, father, brother or son to have carnal knowledge with her.

7. Section 78(d) provides that on the conviction of a father or stepfather for such an offence the Court may divest the offender of all authority over the female with whom the offence has been committed and if the offender is the guardian of such female, may remove the offender from such guardianship and in any such case may appoint any person or persons to be the guardian or guardians of such female during her minority or for any greater period or less period.

UNNATURAL OFFENCES

1. Section 78 provides for the offence of buggery or bestiality.

2. Section 81 provides "whoever commits an indecent assault upon a male person of whatever age with or without the consent of such person shall be liable to penal servitude for 5 years. The elements of this crime are the act of indecency upon the male person by the accused and (b) irrespective of whether such act was consented to by such male person. The offence may be committed by a woman who induces a boy under 16 to have intercourse with her.

3. Section 81(a) provides that whosoever being a male person in public or private commits or procures the commission by any male person of an act of indecency with another male person shall be liable to imprisonment for 2 years.

4. Section 81(b) makes it an offence for a male person to solicit in a public place. This is soliciting of another male for the purpose of indecent assault or buggery and the Section specifically provides a requirement for corroboration by some other material evidence implicating the accused.

AS TO CORROBORATION

1. The sworn evidence of a child need not be corroborated as a matter of law but a jury should be warned not that they must find corroboration but that there is a risk in acting in the uncorroborated evidence of young boys or girls although they may do so if convinced that the witness is telling the truth. This warning should also be given where the witness of tender years is called to give sworn evidence in corroboration of the evidence (sworn or unsworn) or another child or the testimony of an adult.

   Children may give sworn evidence in civil and criminal cases providing the Judge is satisfied that they understand the nature of an oath. Great caution is required in accepting their evidence because although children may be less likely to be acting from improper motives than adults, they are more susceptible to the influence of third persons and may allow their imaginations to run away with them. All the authorities on warning the jury in the terms indicated above are decisions in criminal cases.

2. In cases where corroboration is required in law or practice, it must take the form of a separate item of evidence implicating the accused against whom the testimony is given in relation to the matter concerning which corroboration is necessary. This means that many things that show or might be thought to show that a witness is speaking the truth do not corroborate him in law. Evidence of mere opportunity without more cannot amount to corroboration. It has been said by Lord Hewart C.J. in R. -v- Whitehead "In order that evidence may amount to corroboration it must be extraneous to the person who is to be corroborated".

IRREBUTABLE PRESUMPTIONS OF LAW

Irrebutable presumptions of law are rules of substantive law or procedure expressed in presumptive form, for example, it is conclusively presumed that no child in this State under the age of 8 years can be guilty of an offence (N.S.W. Child Welfare Act Section 126). Other States, e.g. Queensland and Tasmania, make the presumption when the child is under 7 years. The common law rule that a boy under 14 cannot be guilty of rape as a principal in the first degree is also sometimes stated as an irrebutable presumption.

RAPE

1. Section 63 of the Crimes Act provides for the offence or rape and further provides "the consent of the woman, if obtained by threats or terror, shall be no defence to a charge under this Section".

2. It has been suggested that there is an increasing incidence of pack rape. It is unreal to suggest that it is some present-day phenomenon. See for example Thrasher's book in 1927 "The Gang" in Chicago concerning what were then called gang shags and are known colloquially called gang bangs. No doubt the motor car is contributing to the incidence of it.

3. It has been suggested by G.D. Woods a lecturer in law at the University of New South Wales in an article entited "Some Aspects of Pack Rape in Sydney" published in 1969, that the offence occurs mostly in fringe urban areas of new working class housing settlements to the west and south-west of Sydney such as Blacktown, Green Valley, Cabramatta etc. which have grown up since the war as part of a substantial population expansion and movement. "It is suggested the correlation between the incidence of the offence and the population growth in these areas would indicate that a general pattern of social disorganisation is the basic factor in its occurrence. Woods notes that the census figures for Sydney showed in 1954 the population of the metropolitan area to be 1,932,159. Seven years later in 1961 this had grown to 2,293,756 and by 1966 it had reached 2,529,919.

4. Overwhelmingly the majority of offences are reported from the west and south-west even though this area has only 2 to 2½ times the growth rate of the area to the north of the harbour. Woods suggests that the most obvious explanation is that the western suburbs of Sydney are predominantly working class and the northern suburbs are predominantly middle class. He suggests as to the actual occurrence of pack rapes, there are alternative possibilities; on the ~~one~~ hand it may be that they do occur, i.e. in the northern suburbs, proportionally as much as in the western suburbs but they are hushed up. Discretion is a traditional middle class characteristic, and it may be that the parents of a girl subjected to a pack rape be less willing than their working class counterparts to report the matter to the Police, such an action necessarily involving a further emotional trauma for the girl and a social trauma for the parents. On the other hand it may be that there are (as the figures for convictions would indicate) very few (if any) pack rape offences committed in middle class areas, despite a certain amount of social disorganisation resulting from the population increase.

5. Woods suggests "Principally it is suggested that the delinquent and criminal behaviour which is associated with movement of population at root derives from social disorder, although there may be other contributing and precipitating factors. When working class people move there is a maximum of disorder. When middle class people move there is a minimum of disorder". With regard to the actual way in which the population has moved, it is significant to note that Rutherford et al. described the west and south-west shift as "expansion on a broad front" a phrase for overtones of military disorganisation and characterised the movement in the north and north-west as "infilling and backfilling to produce a more compact urban metropolis"; certainly a more orderly sounding process.

6. Woods also acknowledges there are other factors such as the tendency in working class areas for children to leave school at the minimum statutory age whereas their middle class counterparts are pressed to continue their education (and therefore a regine of relative subjection to authority) for as long as possible; and again, the high proportion of children in working class areas (and therefore a higher population of youths at risk) as against middle class areas where parents tend to limit the size of their families. It is important to remember the part played by the girls in the gang setting. Whilst the number of girls involved in the gangs are much fewer than the number of boys, those who are, are almost invariably more delinquent, more emotionally disturbed and more difficult to handle than the boys. On many occasions it has been suggested they are of low intelligence, plain or unattractive in appearance and seem to seek the gang affection and recognition of which they have been deprived in their home relationships.

7. Woods suggests in conclusion "There would seem to be no alternative to gaol sentences, but, because the crime is a group one, sentences need only be long enough to ensure that the particular group will be broken up by the time the offender is released".

8. A New South Wales Legislative Council Select Committee reported on violent sex crimes in N.S.W. in 1969. The following represents a precis of some extracts from the report relating to rape:

   a. That the Committee was informed that the opinion of some criminologists is that in most cases harsh sentencing policies for mass rape and rape have little general deterrent effect and the statistics provided to the Committee supported that view.

   b. Criminologists are increasingly sceptical about the effectiveness of long prison terms as a general deterrent to community crime. They maintain that the effective deterrent is not severity of punishment as much as the certainty of conviction.

   c. A general study of the analysis of Courts' statistics relating to convictions for mass rape do show a marked increase in the percentage of persons prosecuted who were found guilty between 1964 and 1968. One member of the judiciary has stated that it was his impression "that very few juries now will convict for pack rape. Once upon a time it was almost impossible for a jury to get a conviction but now it is very rare that they acquit."

d. The Committee also states "it was also stated that if these crimes are to be prevented then you have to start with action in the home, the schoolroom, the Churches and through the agencies of trained social workers."

PROSTITUTION

1. Prostitutes may be charged with a variety of offences under the Vagrancy Act; vagrancy as such (i.e. having insufficient lawful means of support); soliciting for immoral purposes in a public place; or offensive behaviour. The first two of these offences may be punished by imprisonment whereas offensive behaviour generally results only in a fine and/or a bond. In practice the Police much prefer the offensive behaviour charge; in 1966 more than 11,000 such charges were made against prostitutes in Sydney compared with only 19 charges of soliciting in the whole State.

2. In Britain the Wolfenden Committee aimed at clearing the streets of prostitutes. However they rejected the suggestion of legal regulated brothels because this would entail recognition of prostitution by the State.

3. It has been suggested that proposed legislation to try and suppress prostitution generally will have the effect of driving prostitution underground which will strengthen both the criminal element and the corruption in the Police Force. There are some who suggest that the time involved by members of the Vice Squad and otherwise in arresting prostitutes may more effectively be applied to general beat work and to the primary concern with offences such as assault and robbery.

4. Mr. Barbour in an article entitled "Prostitution and the Increasing Number of Convictions for Rape in Queensland" published in 1969 concludes with the following summary:

   a. Convictions for rape and attempted rape have rapidly increased in Queensland during the past 10 years.

   b. This increase has been much greater than that for offences against the person generally and for offences against the person by males only.

   c. The increase in convictions for rape and attempted rape is greater than the population increase over this same period.

   d. The type of male who frequents a brothel has similar characteristics to those taking part in "pack" rapes in Queensland.

   e. "Pack" rapes and brothels provide similar sources of satisfaction to the male participant.

   f. The increase in the number of convictions for rape and attempted rape since the closing of the brothels in Queensland has been significantly greater than the increase in convictions against the persons by males generally.

HOMOSEXUALITY

1. The sexual offences of assault between adult males are based more on moral considerations than the need for protection from homosexuals. Section 81 referred to above provides that the elements of the crime of indecent assault on a male provided under the statute are -

   a. An act of indecency upon a male person by the accused.

   b. Irrespective of whether such act was consented to by such male person.

2. The question which a recent bill before the State Parliament raised was whether homosexual activity between consenting adult males in private should be a criminal offence.

ABORTION

1. Section 82 provides that whosoever being a woman with a child unlawfully administers to herself any drug or unlawfully uses any instrument or other means with intent to procure her miscarriage shall be liable to penal servitude for 10 years.

2. Section 83 provides that whosoever unlawfully administers to a woman any drug or unlawfully uses any instrument or other means with intent to procure such miscarriage shall be liable to penal servitude for 10 years.

3. The famous case of R. -v- Bourne (1939) 1 K.B. 687 said that an operation performed in good faith by a qualified medical practitioner to preserve the mother's life is not an offence. The onus of showing lack of good faith is on the Crown.

   This of course has been the subject of widespread public discussion and in the Commonwealth Parliament during recent months.

CENSORSHIP

1. Obscene and Indecent Publications Act provides in the interpretation that "without prejudice to the generality of the meaning of the word 'obscene' any publication or advertisement shall be deemed to be obscene if it unduly emphasises matters of sex, crimes of violence, gross cruelty or horror".

2. It further provides that in determining for the purpose of the Act whether any publication is obscene the Court shall have regard to -

   a. The nature of the publication or advertisement; and

   b. The person, classes of person and age groups to or amongst whom the publication or advertisement was or was intended or likely to be published, distributed, sold, exhibited, given or delivered; and

   c. The tendency of the publication or advertisement to deprave, corrupt or injure the morals of any such person, class of persons or age group, to the intent that the publication or advertisement shall be held to be obscene when it tends or is likely in any manner to deprave, corrupt or injure the morals of any such person or the persons in any such class or age group, notwithstanding that persons in other classes or age groups may not be similarly affected.

3. Section 16 provides for the offence of printing or publishing obscene publications with a penalty on first offence of not exceeding $250 or imprisonment for not exceeding six months.

4. A more repressive statutory provision was passed in the lower house of the State earlier this year but the Legislative Council has buried it by referring it to committees.