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MY BRUSH WITH CRIME

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The Honourable Michael Kirby AC CMG is one of Australia's foremost and respected jurists. Formerly Justice of the High Court of Australia (1996-2009); President of the NSW Court of Appeal (1984-1996); Chairman of the Australian Law Reform Commission (1975-1984); and President of the International Commission of Jurists (1995-1998). He is recognised also as a prolific speaker and writer on a whole range of socio-legal issues. Controversial but always entertaining, Michael Kirby writes and speaks with ease, fluency and authority.

In the tradition of English law, when sitting in crime in the highest courts judges normally wear a robe of bright scarlet silk. When, in 1984, I was appointed President of the New South Wales Court of Appeal, it was anticipated that I would sit from time to time, and preside, in the Court of Criminal Appeal. This is the highest court of the state concerned with appeals against the convictions and sentences of persons found guilty of criminal offences.

Even if I say so myself, the sight of three learned judges, bewigged and sitting in the lovely wood-lined panelling of the Banco court in Sydney, was pretty magnificent. It was designed to frighten the life out of the trembling prisoners, brought into court to sit in the dock awaiting the hearing and determination of their appeals. Court hearings are dramas. The judges and barristers are the leading actors. The script keeps changing. The silent prisoners, watching on, are normally passive observers of performances that profoundly affect their lives, liberty and reputations.

When I was elevated to the High Court of Australia (notice that word 'elevated', a kind of bodily assumption into the judicial heaven) red robes were

out. Plain black garments made of tough Australian cotton were in. Yet even then, the sight of three, or sometimes five or seven Justices of the High Court in plain outfit, seemed to symbolise the special gravity of the occasion and the seriousness with which the actors took it.

Donning the robe and walking into court, I could never forget the solemnity of the moment and the responsibilities which the Constitution and the law gave to me, a mere mortal, over the life and freedom of other human beings. Some judges have difficulty in keeping awake during criminal and other proceedings.[1] For me, the emotion that such proceedings invoked was quite different: a kind of hyperventilation deriving from a realisation of the responsibility to get the decision right. The risk of error has been brought home to me personally.[2] It is individual and always worrying.

Against this background, it may seem a trifle strange to postulate my brush with the criminal law. Yet so it was many years ago. My purpose is to describe it and its impact on my life and feelings at the time.

Several lawyers, even some judges, meet the criminal law when they breach motor traffic regulations or fail a breathalyser test. It does not happen often; but it tends to be a scandal when it is reported. I know of some distinguished lawyers, now grey in years, who, in university days, were arrested for offensive behaviour, protesting against the Vietnam War, or against discrimination against Aborigines or for some other worthy student cause. As a young lawyer, I defended many of them with brilliant success. A conviction against their names might have made it difficult for them to gain admission to the legal

profession as a person of ‘good fame and character’. Yet my contact with the criminal law was not of this kind. It was more personal; nothing heroic about it.

Long before my birth, going back to medieval times, English law had ordained criminal offences against male homosexual acts. The English blamed such offences on the influx of the effete Frenchmen who had arrived with the Normans. The Irish blamed them on the corrupt English. The Church blamed them on deviation from the instruction of the prophets of Israel. Some of the offences attracted the death sentence. William Blackstone in his *Commentaries on the Law of England* said that the crime was so ‘unnatural’ and offensive to decent people that it was ‘not fit to be named’.[3] Thus arose the laws prohibiting ‘crimes against the order of nature’.

Occasional critics would lift their voices, suggesting that things were going overboard when (as happened in the 1830s) more people were hanged in London for ‘unnatural offences’ than for murder. Jeremy Bentham in his *Theory of Legislation* (1821) roundly criticised Blackstone for unquestioningly repeating the old English offences and thereby ensuring that they would find their way into the criminal codes and statutes of the American settlements and the ever-expanding British Empire. Bentham declared that the law had no part to play in prohibiting conduct simply because it offended the taste of some people in society. The sole province of criminal law, declared Bentham, was regulatory.

Bentham’s earnest disciple, John Stuart Mill, in his essay *On Liberty* (1859), urged that the only proper foundation for criminal law was if the conduct of others was actually harming people in society. Mill affirmed Bentham’s

observation that over-reaching criminal laws had been the source of the oppression against the Jews and Moors during the Inquisition. Nevertheless, these theorists and the early psychologists like Havelock Ellis and Freud who followed,[4] had at first little impact on the blind adherence of the English law to the enforcement of 'sodomy' offences. To this day, such offences exist in most of the countries of the old British Empire. For a very long time, the French, Portuguese and Netherlands Empires had abandoned the same crimes.

In Australian law schools, criminal law used to be taught in first year. So it was with me, fifty years ago, in 1958. At that time, the *Crimes Act* of New South Wales still contained heavy penalties for 'unnatural offences' and 'crimes against the order of nature'. Coming to puberty in the early 1950s, and realising that my attractions led me to danger of bumping into such laws, I naturally played the closest attention to the lecturer when he came to that part of his course. The urgency of hormones suddenly confronted the perils of criminal punishment. The latter was drawn to notice in various ways.

The state police commissioner of the time (Colin Delaney) repeatedly declared that homosexuality was the greatest danger facing Australian society in the 1950s. The afternoon tabloids, *The Sun* and *The Mirror*, regularly reported cases of police entrapment, including visiting artists who were humiliated and bundled out of the Commonwealth for attempting to importune a handsome young police constable, deployed to offer temptation. Fellow students tried to outdo each other in 'poofter' jokes. No-one in Australia in those days seemed to take up Bentham's criticisms. Everyone just accepted that this was the way the criminal law was. Most believed that it was the way it should be.

In the 1960s, when I became involved in the work of the Council for Civil Liberties, I cannot remember a single person addressing the error of these criminal laws. There was no visible local movement for their repeal. It was as if everyone was too embarrassed and disgusted to mention the subject. Presumably many, like Bentham ultimately, were unwilling to be seen publicly calling for reform, lest they should be suspected of being that way inclined themselves (which Bentham probably was).[5]

The result of these criminal laws was to heap upon gay men (in Australia the laws never applied to women) feelings of shame, fear, humiliation and criminality. Those, like me, growing up in the 1950s and 1960s generally thought that this would be their fate in life: a constant peril of prosecution with attendant risks of entrapment, blackmail and humiliation.

Yet even in those days there were occasionally glimmers of light. The report of the gall wasp taxonomist, Professor Alfred Kinsey, in Indiana University on *Sexual Behavior in the Human Male* (1948) and *Sexual Behavior in the Human Female* (1953) gained huge publicity in the United States, Australia, Britain and elsewhere. Kinsey's reports suggested the widespread prevalence of sexual variation in human beings despite the existence and enforcement of harsh criminal laws.

In Britain, the Wolfenden Report[6] recommended decriminalisation of adult consensual private homosexual acts. Eventually, this report led to legal reforms in the form of the *Criminal Offences Act* 1967 (UK). These, in turn, stimulated the movement in the 1970s for reform of Australia's criminal laws on this subject. In 1984, the provisions of the New South Wales *Crimes Act*, that had

struck fear into my heart, were repealed. For decades, those provisions had been only intermittently enforced. Increasingly, with a wink and a nod, they were ignored in a spirit of live and let live. One by one the Australian laws on the subject were removed from the statute book. The last piece of the jigsaw occurred in Tasmania as a result of a decision of the United Nations Human Rights Committee,[7] the enactment of federal legislation[8] and the abandonment of Tasmania's High Court challenge to the power of Federal Parliament to override the Tasmanian *Criminal Code*.[9]

As chance would have it, before my appointment to the High Court in 1996, I had discussed the reform of the Tasmanian law with Nick Toonen and Rodney Croome, who were leading the campaign for gay law reform in that state. I therefore recused myself and took no part in their case. The journey had come full circle. In the end, the Tasmanian Parliament itself repealed the old laws. Now, no such criminal laws exist anywhere in Australia. Sexual offences are now expressed in terms neutral as to the identity and age of the alleged victim and the sexual orientation or inclinations of the alleged perpetrator.

My brush with the criminal law in those far-off days was more theoretical than real. However, the existence of criminal sanctions was certainly a source of stigma. It rendered a group of citizens second class, including often in their own opinion. Two lessons, at least, emerge from this encounter with criminal law. The first is the need for Australians to be involved in the repeal of the equivalent provisions that still operate in most of the developing countries of the Commonwealth of Nations. The English reforms of 1967 have been copied throughout the settler dominions of the former British Empire. Virtually none of the developing countries of the Commonwealth has changed its laws. There

is an irony in the fact such offences did not generally exist in such countries before British rule. And that the laws have long since been repealed in England itself, whose legal tradition was the source of the legal prohibition. It is long since time that this least lovely legacy of British rule was removed from the laws of all Commonwealth countries. Bentham and Mill were right. The time for talking is up. The time for action has arrived.

Secondly, such a brush with the criminal law teaches the need constantly to scrutinise the content of all criminal statutes to ensure that they do not over-reach themselves or pursue unnecessarily punitive objectives that do not really benefit or protect society.[10]

In retrospect, it was, perhaps, a beneficial thing in my life's experience that I had this early encounter with an over-reaching criminal law. It certainly concentrated my mind to reflect on the legitimate purposes of laws involving punishment, including deprivation of liberty and infliction of humiliation and public condemnation. We should now ask ourselves, what are the laws that are presently enforced that are the equivalent of those 'unnatural offences' that oppressed so many citizens in the 1950s, without true justification? Judges, sitting in their crimson robes, and equally in black garments, must of course give effect to the laws as made by parliament. But the judicial responsibility for administering the criminal law naturally directs the attention of judges to the proper boundaries of legal regulation and to the justifiable limits of criminal punishment.

The fundamental lesson I learned as a young man from my ‘brush’ with the criminal law was the need to be vigilant to reform the law and to scrutinise its application to others with an attitude of prudence, scepticism and humanity.

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