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A CHANGING LANDSCAPE

The sex instinct is said to be "one of the three or four prime movers in all that we do and are and dream, both individually and collectively"[1]. Changing social values, stimulated in turn by changing technology, have altered the relationship between the law and sex, even in my lifetime. In every society, because of the energy which sexual desires can unleash, the law has a function to impose sanctions on sexual activity deemed unacceptable to that society. The unwanted sexual invasion of another person's space and human dignity is an affront to that person's human rights. This is why, increasingly in recent years, human rights activists have portrayed rape and other sexual liberties in war and civil conflict as

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1 P Wylie, *Generation of Vipers* (1942) 6.

potentially an act of genocide or some other crime against humanity[2].

On a more modest scale, in national and subnational law, remedies against the affront of rape (or equivalent offences) are features of every civilised legal regime. The common law defined rape as having carnal knowledge of a woman without her consent. In recent years, in many jurisdictions of Australia, "rape" as a crime has been replaced by statutory offences expressed in more general terms, viz having sexual intercourse without consent[3]. The existence of male victims of rape has been recognised by the adoption of gender neutral definitions which allow for rape of male as well as female subjects. Moreover, the legal definitions now include various forms of penetration of the body (and hence of the dignity and privacy) of another person. Different orifices may be involved. Different penetrators may be used. Different genders may be perpetrators or victims[4]. In addition to offences involving sexual penetration of the body of another person, the law provides a

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2 C MacKinnon, "On Torture: A Feminist Perspective on Human Rights" in K E Mahoney and P Mahoney, *Human Rights in the 21st Century* (1993) 21 at 26ff. See also J A Scutt, *Women and the Law* (1990) 465 ff; R Graycar and J Morgan, *The Hidden Agenda of Law* (1990) 327ff.

3 Eg *Crimes Act* 1900 (NSW), s 61I.

4 Eg *Crimes Act* 1958 (Vic) s 38.

graduated response to various other acts involving indecency, whether by exposure of the genitals in public or unwanted indecent acts, words or depictions in private or otherwise.

The essence of the original crime of rape, as of its modern statutory progeny, is the want of consent on the part of the victim. Consent to sex obtained by fraud or mistake is not a true consent. It will amount to no defence[5]. Similarly, a person below the lawful age of consent can give no concurrence to the sexual act so far as the law is concerned. The age at which young persons can give consent to sexual activity varies as between different jurisdictions of the world. In nearly all European states there are equal ages for legal heterosexual and homosexual activity. In Spain, for example, it is 12 years. In Slovenia it is 14 years. In Sweden and in most states of Europe it is 15 years. In Switzerland it is 16 years. That is what it is for male/female or female/female sex in the United Kingdom, although in Northern Ireland the age of consent in such cases is 17 years. For male/male sexual activity the age of consent in Britain is 18 years. The House of Lords chamber of the British Parliament has resisted attempts to lower this age to bring it into line with the general standard of 16 years[6]. However, by the insistence of the

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5 *Papadimitropolous v The Queen* (1957) 98 CLR 249.

6 R Wintemute, *Sexual Orientation and Human Rights* (1997) 270-271 (Appendix IV).

House of Commons and by involving the rarely used *Parliament Act* it is expected that by the end of 2000 the age of consent in England will be equalised - 16 years[7].

In Australia we have had similar debates about the age of consent. In most Australian jurisdictions the age at which a person may give consent for sexual activity is 16 years. A vast literature exists to show that the age of first sexual activity in Australia has been steadily dropping in recent times. It now commonly takes place at about the age recognised by Spanish law for this purpose. In some Australian jurisdictions, such as New South Wales and Western Australia, there are significant disparities in relation to the lawful age for sexual activity. Thus in New South Wales the age of consent for homosexuals is 18 and in Western Australia 21 years - amongst the highest in the world.

It is unthinkable that the law would be silent about unconsensual sexual intrusion by one human being upon another. Or an invasion of children or mentally incompetent persons who cannot give a true consent. Involved is not just the privacy and safety of the victim. It is the peace of society, the exertion of unwanted power by one person over another and the prevention of

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7 Sexual Offences (Amendment) Bill 2000 (UK).

humiliation and indignity which unconsensual sexual conduct can cause. Nevertheless, having regard to the realities of sexual conduct in society today, legitimate debates arise about matters such as the minimum age of consent. As well, a reflection on the past fifty years shows how different topics can assume importance in the legal regulation of sex for a time, only to be replaced by other topics which capture the political agenda. In the 1950s, the law on prostitution loomed large. In the 1960s the move towards partial decriminalisation of homosexuality was the big theme. In the 1970s there was a growing awareness of the prevalence of rape involving women. In the 1980s the problems of child sexual abuse captured attention. In the 1990s a considerable focus on paedophilia attracted political and legal concern[8]. In the wake of such changing issues have followed new laws and new policies designed to abate community anxiety and to respond to the perceived needs of the victims of sexual affront and of the public who share that affront.

LAW'S OVERREACH

Whilst the provision of legal sanctions against unconsensual or immature sexual activity are essential to a civilised society, the foregoing list showing the changes in the political agenda of the

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8 K Soothill and B Francis, "Reviewing the Pantheon of Sexual Offending" (1999) 17 *Amicus Curiae* 4.

Western world since the Second World War, the difficulty of asserting with confidence the point at which the line of sexual protection must be drawn and the reasons for drawing it. Thus, although in the 1950s (and still in some parts of the world) attempts were made to eliminate entirely all paid sex work (prostitution), in many societies, including Australia, the hopelessness, and possible undesirability of attempting to do so has increasingly been recognised. This has led to attempts to regulate rather than outlaw such activities. The basis of this change of attitude is an appreciation that what adults do together consensually in private is their own concern. So far as the law attempts to intervene it over-reaches its proper function. It is likely to be ineffective, oppressive and to result in corruption and abuse of state power.

It was the call for reform of the law on prostitution and homosexual offences that produced the Wolfenden Report in England in 1957[9]. That report addressed the gross injustices which the law had inflicted in Britain (and in most English-speaking jurisdictions and beyond) on homosexuals who engaged in sexual activity: even if adults, by consent and in private. The report of the Wolfenden Committee led to a major debate in England and elsewhere about the limits of criminal law in the enforcement of the

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9 *Homosexual Offences and Prostitution,* CMND 247, HMSO (1957).

sexual morality supported by the majority of the community[10]. Some defenders of the old laws argued for the legitimacy of the community's right to impose its moral views about sexuality on everyone in society. Others contended for a more limited function of the criminal law and legitimacy of the state in enforcing moral precepts about which there were strongly different views.

In the forty years since the debates on homosexual law reform, the latter school has gained notable successes. In Australia, this has led to the gradual abolition of the criminal offences which applied to the adult private sexual conduct of homosexuals. By 1994, only one Australian jurisdiction (Tasmania) retained laws imposing criminal sanctions on homosexual conduct for which consent was no defence[11]. In consequence, a Tasmanian gay activist, Mr Nicholas Toonen, brought proceedings against Australia in the Human Rights Committee of the United Nations. The Committee upheld his complaint[12]. This led to federal legislation

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10 See generally P J Fitzgerald, *Criminal Law and Punishment* (1962) 78-81; B Wootten, *Crime and Criminal Law* (1963) 41-57.

11 Criminal Code (Tas), ss 122(a), (c), 123.

12 *Toonen v Australia* (1994) 1 *Int Hum Rts Reports* 97. See H J Steiner and P Alston, *International Human Rights in Context* (1996), 545. For decisions of the European Court of Human Rights see *Dudgeon v United Kingdom* (1981) 4 EHRR 149; *Norris v Ireland* (1991) 13 EHRR 186; and *Modinos v Cyprus* (1993) 16 EHRR 483. See also now *Lustig-Prean v United Kingdom,* unreported, 27 September 1999 striking down the exclusion of gays and lesbians from the British armed forces and

Footnote continues

designed to override the Tasmanian laws[13]. After a challenge was mounted in the High Court[14], Tasmania capitulated. Its laws were changed. A new non-discriminatory law was adopted which treats in identical ways unlawful sexual conduct, including with minors, whether of a heterosexual or homosexual character. Mr Toonen's case is a singularly vivid illustration of the practical way in which, today, international law can sometimes be brought to bear upon domestic law, including in the field of criminal law and even in the sensitive area involving sex.

Sometimes, such international law proves incapable of providing relief against what some would regard as the excessive intrusion of the criminal law into private adult sexual activity. This was shown in an English case decided at about the same time as Mr Toonen's claim.

Whilst conducting a search for other purposes, police in England found evidence that a group of adults had been engaged in sado-machoistic sexual conduct. None of the participants had complained. All fully consented to the conduct concerned. None of

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ADT v The United Kingdom, unreported, 31 July 2000 accessible: http:www.echr.co.int

13 *Human Rights (Sexual Conduct) Act* 1994 (Cth).

14 *Croome v Tasmania* (1997) 191 CLR 119.

them was seriously or permanently injured. Yet prosecutions were brought. The participants were convicted and sentenced to extended periods of imprisonment. They appealed. But, by majority, the House of Lords[15] upheld their convictions. Only the terms of their imprisonment were moderated[16]. One of the dissentients in the House of Lords, Lord Slynn of Hadley remarked: "It is not for the courts in the interests of 'paternalism' ... or in order to protect people from themselves, to introduce into existing statutory crimes relating to offences *against* the person, concepts which do not properly fit there."

The prisoners involved in this complaint then took their case to the European Court of Human Rights. They submitted that the English law under which they had been convicted and sentenced breached their right to privacy under the *European Convention on Human Rights* to which the United Kingdom is a party. Their case

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15 *Reg v Browne* [1994] 1AC 212. Contrast *Reg v Kiccarelli* (1989) 54 CCC (3d) 121; *Rex v Donovan* [1934] 2 KB 498 and *Reg v Wilson* (1996) 3 WLR 125.

16 One defendant was sentenced at trial to imprisonment for four years and six months. A second to imprisonment for three years. The third was sentenced to imprisonment for two years and nine months. These sentences were reduced on appeal to 18 months, 6 months and 3 months imprisonment respectively, apparently on the footing that the defendants did not appreciate that their actions in inflicting injuries were criminal. See [1992] QB 491.

was dismissed[17]. Most of the judges of the European Court contented themselves with saying that this was a measure of legal regulation that was within the discretion of United Kingdom law. However, one of the judges, Judge Pettiti of France held: "The dangers of unrestrained permissiveness ... can lead to debauchery, paedophilia ... or the torture of others ... The protection of private life means the protection of a person's intimacy and dignity, not the protection of his baseness of the promotion of criminal immoralism"[18]. Strong words.

Whereas the law on sexual matters has been in retreat in issues such as the age of consent, the regulation of the sex industry and erotic fantasy in books, films and electronic messages, new forms of regulation are now being introduced in several countries to meet new problem areas. These include the sexual abuse of minors in overseas countries[19], the introduction of persons from overseas

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17 *Lasky, Jaggard and Brown v United Kingdom* (1997) 24 EHRR 39. For United States law and commentary see W N Eskridge and N D Hunter, *Sexuality, Gender and the Law* (1997) 257 and 1015. The English Law Commission has proposed decriminalisation of consensual S & M sexual activity. See *ibid*, 1010.

18 (1997) 24 EHRR 39 at 61.

19 *Crimes Act* 1914 (Cth), Pt IIIA "Child sex tourism".

into a form of slavery involving prostitution[20] and the publication of violent or under-aged sexual images on the Internet[21].

So far as the Internet is concerned, the difficulty of regulating its content has been noted many times[22]. It has even been acknowledged by the Australian Minister who proposed new federal legislation on the topic[23]. To some extent it was the First Amendment to the United States Constitution, and the way in which it protected the right of adults in the United States to obtain erotic publications stimulating sexual fantasy, that broke down the old codes of sexual censorship which formerly applied in Australia, Britain and other like countries. Once such sexual images became available in a large market economy such as the United States, and won substantial profits because of a big consumer demand, it became extremely difficult for the law in other similar jurisdictions to prevent such materials from gaining entry. In this sense, in what is

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20 *Criminal Code Amendment (Slavery and Sexual Servitude) Act* 1999.

21 *Broadcasting Services Amendment (On Line Services) Act* 1999 (Cth).

22 K M Doherty, "www.obscenity.com: An Analysis of Obscenity and Indecency Regulations of the Internet", 32 *Akron Law Rev* 259 (1999). See eg *Reno v American Civil Liberties Union* 521 US 844 (1997) noted in *Computer Law and Security Reports* 13: 5, (1997) at 371 and Eskridge and Hunter, 1999 Suppl, 116.

23 "We can't clean up net: Alston" in *Australian Financial Review,* 28 May 1999, 8.

now the huge business of adult erotic publications, consumers are all children of the First Amendment and of the first generation of electronic communications.

Law allied to technology has helped to shatter many of the former attempts to impose a particular sexual morality on the entire community. In Australia today, most citizens would question the right of the state, or of particular religious persuasions or moral beliefs, to impose upon citizens generally, in all of their variety, restrictions upon their access to non-violent erotic materials for use by adults in the privacy of their own homes. If proof is needed of the change of attitudes in this regard, it is only necessary to consult the figures on the growth and present size of the market for explicit adult sexual materials in Australia. Whilst there would be agreement that such materials should not be forced upon unwilling people or involve minors, most Australians today would tell the law to mind its own business in so far as it sought to intrude into their private adult lives. The expulsion of law from the bedrooms of consenting adults is not yet complete. But those who grew up in Australia in the 1950s and 1060s know how far the tide of law has retreated.

THE BURDENS OF SHAME

Change of the law on sex and of common social attitudes is one thing. But change in the lives and self-respect of ordinary people may be quite another. Shame is a common instrument of

social and individual control. The law relies upon shame, which can attach to criminal and civil proceedings, in order to uphold its rules.

Amongst homosexual people, the removal of criminal sanctions has had a salutary effect. It has removed, in part, the inhibitions which formerly required that sexual orientation remain a private or secret matter to the extent that the individual differed from the heterosexual norm. Yet the removal of criminal sanctions leaves in place large areas of the law which still work serious injustices upon gay and lesbian people in every country. The discriminatory provisions on property rights, superannuation entitlements, rights of migrant and refugee entry and otherwise continue to mark out a homosexual and bisexual person as a kind of second class citizen - someone looked down on by political leaders, parliaments, churches and law. Changes are now slowly occurring to repair these injustices[24]. But the changes are slow in coming. They leave many areas of the law as reinforcements for the shame which some people in Australian society would continue to inflict upon people for their sexuality. Indeed new laws are sometimes proposed for this purpose, sadly at the behest of religious groups or others who see a momentary advantage in riding a bandwagon of prejudice and fear.

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24 M D Kirby, "Same-Sex Relationships and the Law" (1999) 18 *Aust Bar Rev* 4; M D Kirby, *Through the World's Eye* (2000), 64. See eg *Property Relationships Act* 1984 (NSW).

In the past there were similar legal provisions and practices which discriminate against women, Aboriginals and other people of colour. It must be hoped that the game of shame is ending. But it will only end if those who are the object of denigration and discrimination stand up and object. They need to do so particularly where the law, which should be the vehicle for equality and justice in society, becomes an instrument to enforce irrational attitudes and low self-esteem. This is as true where the law in question fails to protect women's rights, or Aboriginal or racial dignity as where it discriminates against gays, lesbians, bisexuals and trans-gender people.

Shame about sexual matters also exists in the case of the heterosexual majority. In certain situations, sex remains a matter that dares not speak its name. In a case which was heard by me in the New South Wales Court of Appeal, before my present appointment[25], I saw what I considered to be a fairly typical example of the embarrassment which the legal process in Australia often feels in responding to sex in an affirmative way.

The case was a routine appeal against an award of damages. The appeal was upheld. The two other judges in the Appeal Court

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25 *Knight v Government Insurance Office of New South Wales,* unreported, NSW Court of Appeal, 13 April 1995.

did not find it necessary to refer specifically to the issue of the appellant's loss of sexual function, enjoyment and capacity. However, I took the occasion to outline the rather incompetent way in which the legal system had responded to this aspect of the injured person's significant loss of his sexual life. The appellant concerned was a male aged 26 years who had been seriously injured in a motor vehicle accident. The impact of the accident, and medication taken for various disabilities, had reduced the man virtually to impotence. As documented extensively in the reports of his medical practitioners, he had almost entirely lost interest in a sexual relationship. This had, in turn, produced difficulties with his partner which were well documented. This notwithstanding, his lawyer "passed but lightly over his sexual difficulties [and] ... did so in a manner which", I suggested, was "familiar and typical"[26]. The questioning of the man and of his partner at the trial was conducted "with unhidden embarrassment felt by [the lawyer] but attributed to the witness"[27]. Consequently, the cross-examination for the insurer was equally circumscribed because the subject was "thought too embarrassing for some counsel to press ... upon the male victim of sexual dysfunction"[28]. In my reasons I suggested[29]:

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26 *Ibid*, 2.

27 *Ibid*, 3.

28 *Ibid*, 6-7.

29 *Ibid*, 15.

> "Lawyers have largely conserved their attention to sexual dysfunction to criminal trials in which sexual conduct is examined (as the *Crimes Act* requires) with minute attention to the particularity of the sexual activity. But when it comes to civil trials, and complaints by ordinary people of the impact of accidents upon their sexual lives, the result has been a rather sorry saga of mutual embarrassment. Whereas for the people themselves the issue may loom large (as their reports to their medical practitioners suggest), once they approach lawyers and the courts there is a tendency to retreat to embarrassed silence or reticence"[30].

I proposed that this was something that the law should change[31]:

> "If necessary, the Court should adapt its procedures to permit such evidence to be given with as little embarrassment to the subject and the subject's family and friends as possible. I entertain little doubt that, if the procedures of the courts were less formal and the appellant and his wife were able to speak candidly of the consequences of the accident upon the appellant as a human being, the sexual dysfunction would have loomed much larger than it did either in the conduct of the trial or in [the judge's] reasons and judgment".

Even more astonishing than the case in hand was the review to which that decision took me of judicial opinions in England and Australia which, at least until recently, positively discouraged, in the name of "decency, morality and policy", the exploration of a person's

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30 *Ibid*, 18-19.

31 *Ibid*, 18.

loss of sexual function. This was a matter to be talked of between a patient and a medical practitioner but not to be disclosed in a decent open courtroom[32]. Only quite recently has Australian law begun to accept the legitimacy of claims of sexual injury by people who are not legally married[33]. It was my opinion that it was "not the court's business to make moral judgments in this regard. It must simply compensate people for the damage that is done to them"[34].

Because I regarded the issue raised in the case just described as one significant to the approach to the calculation of damages generally in the courts of Australia, I watched with interest to see whether the law reporters would report the case in the official reports which bring important judicial decisions to the notice of the Australian judiciary and legal profession. When it became clear that the case would not be reported, I contacted the editor of the law reports only for the second time in my career, to ask that the decision to omit the report of the case to be reconsidered. I was sternly notified that my remarks were not central to the decision,

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32 See eg *Goodwright ex Dim Stevens v Moss et al* (1777) 2 Cowp 591, 594; [98 ER 1257 at 1259].

33 *Vassilef v BGC Marine Services (NSW) Pty Ltd* [1980] Qd R 21 per Demack J.

34 *Knight v Government Insurance Office of NSW* above n 24 at 18.

were not joined in by the other judges in the Appeal Court and were therefore not worth reporting.

Fortunately, at least one commentator in a legal journal has shared my opinion on the issue and have noted my remarks[35]. Perhaps some case reporters believe that such issues do not have a place in the respectable pages of court reports. Fortunately, the Internet will once again come to the rescue of rationality. In the future, opinions of this kind will be less easily buried in the pages of unreported legal authority. Published on the Internet and discovered by search engines they will, one hopes, bring unembarrassed commonsense into the law's treatment of sexual questions.

CONCLUSION

So this is the relationship between the law and sex. It is a necessary relationship because no society could tolerate a situation in which authority which stood by whilst one person invaded the sexual privacy of another without the consent of the other or in circumstances that the other was a child or in some other way incapable of giving such consent. Yet once one moves beyond this core function of the law in protecting individuals and thereby

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35 F D McGlone, "Proof and Compensation of Loss of Sexual Function" [1996] *Tort Law Rev* 253.

protecting the society in which individuals live, the role of the law in relation to sex is much more controversial.

Imposing sexual activity or sexual images upon unwilling recipients is unacceptable and the law must provide redress. But in the past, the law has too often over-reacted clumsily. It has busied itself in the bedrooms of adults, trying to impose upon them rigid controls over their sexual expression. A most extreme and sustained form of this intrusion can be seen in the centuries of legal oppression of homosexual conduct. In 1834 more men were hanged in London for sodomy than for murder. It was the realisation that this was a gross folly on the part of law that began the long march to the Wolfenden reforms and to the international standard now found, happily enough, in the case of *Toonen v Australia*[36].

Shame, as I have demonstrated, continues to impose restraints, some useful and some undesirable. Clearly, an individual's sexuality is one of the most important elements in that person's self-image and fulfilment as a human being. To the extent that the law has unreasonably damaged that fulfilment, it has played a negative role. In the last quarter of the twentieth century, in many countries including Australia, the law was sent packing out of the

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36 (1994) 1 *Int Hum Rts Reports* 97.

bedroom of consenting adults. But wrongful legal intrusions and discrimination on sexual grounds remain. And beyond the law, practices and attitudes in society need to change if a new and more harmonious relationship between law and sex is to be secured.

In the enlightenment of the new millennium, I hope that a new consensus will be achieved as to the proper but limited function of law affecting the sexual lives of consenting adults acting in private. The battle for reform is not over. But the direction of reform is clear. And its progress seems unstoppable.