



COMMENTS

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SEXUAL OFFENCES

THE NATURE OF A SEXUAL OFFENCE

SEXUAL assaults fall into two broad categories: rape and other related sexual offences.¹ However, one needs to take a step back from this and ask what we mean by 'sexual offence'? What, for example, turns assault² into a sexual assault?³ It has been pointed out that the acts constituting a sexual assault do not have to be of the indecent kind.⁴ In *R v Leeson*⁵ the defendant had kissed the victim, and had made indecent suggestions while doing so. The Court held that the kiss was not indecent, but that the suggestions were, a finding which made this an indecent assault. To prove an indecent assault the prosecution, therefore, has to show that there was an assault, and also that there were circumstances of indecency on the part of the accused towards the person assaulted.⁶

Two questions arise as a consequence. First, what is a circumstance of indecency? Secondly, is it something quite separate from the assault? On

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1 Fisse (1990) *Howard's Criminal Law* (Law Book Co, Sydney, 5th ed 1990) pp168-169.

2 Sections 39 and 40 *Criminal Law Consolidation Act* (1935) SA.

3 Section 56.

4 Waller & Williams, *Brett, Waller and Williams: Criminal Law Text and Cases* (Butterworths, Sydney, 6th ed 1989).

5 (1968) 52 Cr App Rep 185.

6 Waller & Williams, *Brett, Waller and Williams: Criminal Law Text and Cases*.

one level, interpretation of the words can be common-sensical, for example, an adult asking a child to masturbate them commits an act of indecency, though not necessarily an assault if the action is consensual.⁷

Obviously though, failure to convict in such a circumstance would create public outrage, so the legislature has acted to ensure such a result does not occur.⁸ However, while common-sense may dictate that such an action with a child is indecent, would a similar consensual act with an adult be classed in the same way, if it occurred in a public place, at a time of night when the likelihood of a member of the public being present was minimal?⁹ It is submitted that a fundamentalist preacher, for example, may view such an activity in quite a different light from a liberal thinking person.

These examples demonstrate that the word indecency, notwithstanding strict dictionary and legal definition, has social and moral connotations as well. It might also be asked whether it also carries ideological and political connotations. For example, the various States have different legislation covering consensual homosexual relationships, which range from the activity being legal to illegal.¹⁰ Another example: two school-age teenagers, a girl 15 and a boy 17, have sexual relations. Under the *Criminal Law Consolidation Act 1935* (SA), the boy is liable for a prison term of 7 years.¹¹ Technically, these activities are sexual offences. Yet the defendant so convicted does not fit the traditional 'sex offender' category. In today's society such behaviour would be regarded by many as quite natural. Nevertheless the justice system reacts as if it were both deviant and aberrant. It is submitted that we need to clarify definitions of what constitutes a sexual offence, in order that we may be able to respond to them appropriately.¹² The problem with loose or overly technical definitions is that they tend to limit the kinds of responses the justice system can make, and as such may encourage, albeit unconsciously, the commission of a worse offence.¹³

It is submitted that another reason why the area of sexual offences creates so many problems, not only for legislatures, but also for both victims and offenders, is that people tend to have a lot of difficulty in both

7 *DPP v Rogers* [1953] 1 WLR 1017.

8 See discussion in *Sarawasti v R* (1991) 65 ALJR 402.

9 *R v Ghik* [1984] Crim LR 110.

10 Waller & Williams, Brett, Waller and Williams: *Criminal Law Text and Cases* p4.

11 Section 49 *Criminal Law Consolidation Act 1935* (SA).

12 See *Sarawasti v R* (1991) 65 ALJR 402.

13 For example, see the dissent of Stout CJ in *R v Blight* (1903) 22 NZLR 837 at 844.

acknowledging and understanding not only their own sexuality, but also that of others.¹⁴

If we accept the term 'sex offence', then it is necessary to ask whether or not our reference has to do with our own attitudes to sex, openness notwithstanding. This is all the more important in the court-room situation. Whether one is prosecuting or defending in a so-called 'sex-crime', the job one does may be either aided or hindered by the attitude one has towards sex and sex crimes. A strident prosecutor runs the risk of making fundamental mistakes which will allow an offender to go free, with no check on future behaviour. A defender unable to acknowledge their feelings/attitudes towards sex-crimes/sex runs the risk of putting up a poor defence which may begin a cycle of conviction, appeal, re-trial. In both situations there will likely be a negative impact on others, thus creating a new class of victim.

As Prins has commented:¹⁵

I would wish to emphasise once again that in work with such persons we need to try to be aware of our blind-spots, to examine our feelings and to try to respond as dispassionately as possible to what is sometimes bizarre and sickening behaviour. The capacity to listen and to respond non-judgmentally in these situations is crucial for success. Despite some appearances to the contrary, a number of sexual offenders are distressed and disturbed by their behaviour and its effect upon others. Only when they discern a dispassionate and compassionate recipient for their feelings can they begin to unburden themselves; by so doing, this may help to ease some of the tensions that may have contributed to their offending. Others are of course quite unmotivated for change and are therefore untreatable.

This implies not only that practitioners have to be aware of their own feelings,¹⁶ but also that the elimination of such responses is only going to come when the justice system learns the correct response to such crimes.¹⁷

14 For a summary of some of the studies on this, see Prins, *Offenders, Deviants or Patients: An Introduction to the Study of Socio-Forensic Problems* (Tavistock, New York 1980) especially Ch 8.

15 At 256.

16 It is currently being discussed, for example, whether lawyers and judges working in the field of child sexual abuse should be specially trained. See *The Advertiser*, Adelaide, 10 October 1991.

17 See for example, Fugler, "Community Treatment of Sex Offenders: Then, Now and in the Future" (1990) 12 *Law Society of SA Bulletin* 300.

It has been the argument of this section that such a response will only come when adequate definitions of sexual offending have been formulated and when those involved in the area are adequately trained to deal with the feelings such work engenders. Such formulations and responses will be particularly important in dealing with the victims of sexual offences and with those who perpetrate such offences.

THE VICTIMS OF SEXUAL OFFENCES

Much has been written about victims of sex offences, and the legal system, until recently,¹⁸ has not been greatly supportive of victims of sex offences. But, what is actually known?

Ngairé Naffine, in the Naffine Report¹⁹ summarizes some of the problems:

One problem for the victim is that in a society which has inherited notions of seduction - where it is unseemly for the female to manifest too clearly her interest in sexual relations and where the male is expected to take the initiative, to play a dominant role - her passivity is easily interpreted as eagerness or as a display of feminine wiles. Accordingly, the strict legal definition of consent - as simply an indication by the victim that she does not wish to engage in sexual intercourse - is resisted by juries, and by judges, holding preconceived ideas of the nature of consenting relations.²⁰

Wooten J put the matter even more strongly in *R v Fraser*:²¹

There is, if anything, an increasing revulsion towards the offence [of rape]. Of course, the nature of the attitudes to it has changed. Victorian mumbo-jumbo, secrecy and repressive attitudes about sex have largely been discarded... [However] there is an uninformed and bigoted minority which regards every attack as being partly the woman's fault. But these very changes have brought with them a greater appreciation of, and increased sensitivity to, the terrible affront to human dignity, and the cruel invasion of human privacy, which is involved in the rape of a woman. The recognition of a woman's right to sexual freedom and sexual equality, which largely underlay the dropping of oppressive attitudes to sex, has brought even

18 See for example s34i of the Evidence Act 1929 (SA) as amended.

19 Naffine, *An Inquiry into the Substantive Law of Rape* (Women's Advisor's Office, Department of the Premier and Cabinet, Adelaide 1984).

20 At 23.

21 [1975] 2 NSWLR 521 at 524-525.

stronger revulsion against the humiliating element of that freedom and equality which is involved in rape.

I will add that that is also true for men who are raped too, and some studies would support that men take even longer than women to 'recover', if recover is the correct word.²² One of the reasons I say this is that if we make the mistake of defining sexual offences solely as offences against women, then we are probably helping to ensure that they continue. Brownmiller²³ identifies the ability of men to rape women as the beginning of male oppression, though how she would have described the recent Queensland vampire case provides an inherent area for speculation!

I start with these points, because I submit that there is a danger that victims can become even greater victims because of the interference of professionals, family and friends, particularly those with certain political/ideological agendas, and those with ambivalent or unresolved attitudes towards sex and relationships. The professional ought to be there for the victim, *not* the victim for the professional.²⁴ If, for example, a rape crisis centre is only there for women, then that is an affront to males who have been raped and makes one wonder if it is really there for victims, or just for political reasons.

Prins comments that one study has pointed out that the reaction of family and friends (and so-called professionals) to victims of sexual offences had been more distressing to the victim than the episode itself.²⁵ This has certainly been my observation, particularly amongst victims of child sexual abuse: the emotional abuse, intended or otherwise, often plays greater havoc with the victim. One male patient I treated some years ago told me of his rape by a male relative when he was 13; the rapist was 19. When he told his parents, he was whipped and berated. Little wonder that a pattern of self-destructive behaviour began to develop! Many of the adults I have had in groups, females and males, have expressed their anger/distress at remembering the reaction of adults, professional and otherwise, when they told of incidents of sexual assault when they were children.

In this context, then, it is important to consider what victims feel later, when they are paraded on current affairs programmes and covered in a shower of pseudo-sympathy as some reporter or other person attempts to get higher ratings, or advance some personal political agenda. The stress and trauma that victims of any crime experience do not need to be compounded and

22 See, for example, Spencer & Dunklee, "Sexual Abuse of Boys" (1986) 78 *Pediatrics* 133; Rowan, Rowan & Langhe, "Women Who Molest Children" (1990) 18 *Bulletin of the American Academy of Psychiatry and the Law* 79.

23 *Against Our Will: Men, Women and Rape* (Simon & Schuster, New York 1975).

24 Prins, *Offenders, Deviants or Patients*.

25 As above, fn24.

extended by the ineptness, selfishness and neurotic ideology of those with whom they come in contact. Ineptness, victims can in the main, forgive and recover from. But they eventually see selfishness and neurotic ideologues for what they are, and many of them become very angry.²⁶

We have to constantly reassess our attitudes and behaviour when we are dealing with victims.²⁷ Mezey and Taylor have studied the psychological reactions of women who have been raped.²⁸ In that study, 12 women reporting rape to the police were interviewed on three occasions over a four month period. Their psychological and behavioural experiences during that time were compared with those of 12 controls: women who were attending a Family Planning Clinic and *without* a history of such trauma, and small numbers of victims of non-sexual assault. All victims showed, initially, high levels of distress or some psychopathology but only the rape victims were reliable in attending follow-up appointments. In all but one case the acute, intense symptoms of distress resolved, but other substantial changes in life-style had taken place. The particular difficulties in counselling and research in this area were highlighted. A warning is given that *people should be cautioned about taking on this kind of work unless considerable practical and emotional support is available to them.*²⁹

The setting up of *pecially trained*, and I emphasize *pecially trained*, groups to deal with this, that is, in the police force and hospitals, is an important step in the helping of victims of these assaults.³⁰

Two points will end this section:

a) The Mezey and Taylor study would seem to be confirmed by the studies on Post Trauma Stress Disorder, which, in general, have shown that persons with existing psychopathology and with poor social/professional support tend to be more affected by a severe trauma, and take a lot longer to recover, than do those without existing psychopathology, and with good social and

26 See, for example Notman & Nadelson, "The Rape Victim: Psychodynamic Considerations" (1976) 133 *American Journal of Psychiatry* 408.

27 At 412.

28 "Psychological Reactions of Women who have been Raped: A Descriptive and Comparative Study" (1988) 152 *British Journal of Psychiatry* 330.

29 At 337-338.

30 See, for example *The Advertiser*, Adelaide, 10 October 1991; Mezey and Taylor, "Psychological Reactions of Women who have been Raped: A Descriptive and Comparative Study" (1988) 152 *British Journal of Psychiatry* 330.

professional support.³¹ All victims of trauma, however, will have some initial psychopathology.

b) The question of *consent* is a vexed one. The issue is well discussed in the literature. Marsh, quoting Estrich's study, states that *no means no* ought to be regarded as the rule of law.³² Similarly, *recklessness* as to consent needs to include such matters as emotional blackmail, and the inherent threat that it carries. Recently, in the South Australian Supreme Court, a man was convicted of rape, even though he argued that the woman *eventually* consented. It was the 'eventuality' that was a feature of the case. The judge said that emotionally wearing a person down, so that they eventually give in, was actually non-consent.³³ That however can be viewed in two extreme ways. One analysis might be that a woman needs the protection of the strong *male* justice system, as it must be recognised that she does not know her mind, and the justice system will make her decisions for her. The other extreme is to say, well she said yes. The defendant could not be expected to read her mind, persistence is not a crime, therefore the mens rea of the offence is not present, therefore non-conviction. Both views are extremes.

The better view, it is submitted, might be a recognition that people who *abuse* the freedom of others will pay the penalty (and abuse of freedom takes many forms) such that the wearing away of the will invalidates any consent resultant from it.

However, it must be stressed that the issue of *consent* is not as simple as it seems. When someone says no, then that is straight forward enough. However, studies have shown that both men and women can set themselves up in imprudent situations.³⁴ While that does not excuse the consequent behaviour of the perpetrator, nonetheless it may be an issue for dealing with the victim, in order that the victim does not become a victim again. If we argue that we have to be free to make our own choices and decisions, then that has to be a true freedom. Consequently we have to take responsibility for our actions.

While a lawyer may not be the first port of call for a victim, they may be the second. The lawyer may need to address themselves to the issue of the further help the victim might need. Most lawyers are not therapists, and

31 See, for example, Tennant, Streinem, Templar, "Memories of Vietnam: Post-Traumatic Stress Disorder in Australian Veterans" (1990) 24 *Aust & NZ Journal of Psychiatry* 29.

32 Marsh, "What Have We Learnt About Legislative Remedies for Rape?" (1988) 528 *Annals of the New York Academy of Sciences* 396.

33 *R v Curtis* (1991) Supreme Court of South Australia, per Millhouse J. This case has not yet been reported, except in *The Advertiser*, Adelaide, 26 July 1991.

34 Prins, *Offenders, Deviants or Patients*.

even if they were, it would be ethically and therapeutically improper for them to carry out treatment. But they should be able to recommend to the client the services of another professional who deals with the kinds of problems that the victim has.³⁵ Sometimes victims do have to make substantial changes to their lifestyles,³⁶ and to assume automatically that they do not, is I submit, an example of emotional oppression.

As a final point, it is necessary to note that some people do concoct stories for various reasons. This fact has been substantiated empirically in both legal and psychiatric literature.³⁷ Dealing with concoction, too, requires great sensitivity.

OFFENDERS AND TREATMENT

Dealing with offenders is probably one of the more controversial areas for professionals. Society now tends to pour great opprobrium upon sex offenders, especially those who offend against children. Sexual abusers of children are particularly unsafe in prison.³⁸ A greater part of this comes from our own attitude towards sex, and the experiences we have had.³⁹ One thing is certain, knee-jerk responses to the sexual offender will achieve absolutely nothing good; in some cases they may ensure that offending will continue, but at a worse level than previously. In some cases jail will be the very worst option available when it comes to punishment, because the impact will reach further than the offender.⁴⁰

There is no doubt that the victim is entitled to justice, and there is no doubt that the community's disapproval has to be expressed strongly. But method and purpose remain important: the aim must be to ensure that re-offending does not occur. At present, I believe, a lot is being done, albeit unconsciously, to ensure that re-offending does occur.

Just as we have to think seriously about how we classify a sexual offence, so too do we have to consider very carefully the way in which we deal with

35 See Marsh, "What Have We Learnt About Legislative Remedies for Rape?" (1988) 528 *Annals of the New York Academy of Sciences* 396 at 398 on the need for a multi-disciplinary approach.

36 Mezey & Taylor, "Psychological Reactions of Women who have been Raped: A Descriptive and Comparative Study" (1988) 152 *British Journal of Psychiatry* 330.

37 For example, see Wilson, "False Complaints by Children of Sexual Abuse" (1986) *April Legal Service Bulletin* 11.

38 Marshall, Laws, Barbaree (eds), *Handbook of Sexual Assault* (Plenum Press, 1990).

39 Prins, *Offenders, Deviants or Patients*.

40 Fugler, "Community Treatment of Sex Offenders: Then, Now and in the Future" (1990) 12 *Law Society of SA Bulletin* 300.

offenders. This involves social, legal, psychological and economic considerations.

It must be kept in mind that women too have been convicted of sexual offences.⁴¹ The kinds of offences are similar to those carried out by men, though poor social skills and mental illness have been cited as more common in women offenders than in male offenders. That gives us a hint towards punishment/treatment considerations. However, even that might be looked at differently, now that new material is coming out on female child sex offenders.⁴²

CLASSIFICATION

I want to attempt a classification of sex offenders. Basically I am using Prins typology of rapists,⁴³ though I believe that this can be extended to all offenders.⁴⁴ This classification will then provide a basis for determining sentencing options, and thus reduce re-offending:

- (1) The sexually virile person out for what they can get, whose hedonism is not counterbalanced by finer scruples or caution.
- (2) The inhibited shy younger person, usually male, trying to overcome feelings of sexual inferiority. Such people often misinterpret the signals of a woman as a 'come on'. Into this category we can place males who fear they may be homosexual and whose behaviour is a defence against it.
- (3) "The sexually violent and aggressive. These offenders may have records of other forms of violence and alcohol will play a large part in the commission of their crimes. Most researchers show that alcohol plays a significant part in aggressive sexual criminality. It may be some offenders hold the mistaken belief that alcohol will heighten sexual capacity. The fact of the matter is that, as the Porter says in *Macbeth*, 'it provokes the desire, but it takes away the performance'.⁴⁵"

41 O'Connor, "Female Sex Offenders" (1987) 150 *British Journal of Psychiatry* 615.

42 Spencer & Dunklee, "Sexual Abuse of Boys" (1986) 78 *Paediatrics* 133; Rowan, Rowan & Langher, "Women who Molest Children" (1990) 18 *Bulletin of the American Academy of Psychiatry and the Law* 79.

43 Prins, *Offenders, Deviants or Patients*.

44 A more detailed classification can be found in Knight & Prentky, "Classifying Sexual Offenders" in *Handbook of Sexual Assault* pp23-52.

45 Prins, *Offenders, Deviants or Patients* p250.

- (4) The severely sexually maladjusted: in the main they are men who need to gain reassurance for their masculinity by a show of force. Generally, their feelings of inferiority are quite severe. This group includes those who set out to defile and denigrate their victims. The men are often women haters, and the females men-haters. Such people may move on to become the sadistic sexual murderers we often read about.⁴⁶
- (5) A sub-group of (4) is made up of persons with psychopathic tendencies and whose sexual appetites are insatiable. They may need the resistance of victims to arouse their potency. Men in this category may also indulge in homosexual rape.⁴⁷
- (6) Those who are suffering from some form of mental disorder, such as organic psychosis, brain tumour, hypomania, or from subnormality.⁴⁸
- (7) Finally, there is the category that I think is particular to rape. That is made up of those who rape in groups or packs. In the main, they tend to be younger, and are likely to have previous convictions for violence and sexual offences. Also, like those in category (4), they tend to be persons who want to defile and denigrate their victims.⁴⁹ The recent Queensland vampire case shows that women as well as men can belong to this group.

There is a common misconception that all sex offenders are the same and should be treated similarly. That is a dangerous misconception, and will be likely to ensure recidivism.⁵⁰ The aim of the justice system ought to be to ensure that behaviour of which we disapprove is not repeated. In some instances, because societal mores change and tolerance levels change, offences will be decriminalised and/or legalised (for example, prostitution, homosexuality, abortion). In other instances, means will be sought, through the penalties imposed, to show how thoroughly the community disapproves of certain behaviours. However, disapproval should not be confused with revenge. Revenge achieves nothing, in the long run not even personal satisfaction.

Whatever sentence is imposed must have as its basis the aim of success, which I define in this context as non-recidivism. Classification of offenders may give some clues to the kind of sentence/treatment mode that may be successful. It will also help to discriminate between the transient, fairly

46 As above, fn45.

47 At 251.

48 As above.

49 As above, fn47.

50 Marshall, Laws & Barbaree (eds), *Handbook of Sexual Assault*.

innocuous offender and the offender who is simply dangerous or potentially highly dangerous.⁵¹

The following options have at different times been used with varying degrees of success or failure:⁵²

- Jail
- Group psychotherapy in or outside of an institution
- Individual psychotherapy in or outside of an institution
- Chemical treatments (such as depo-provera and cyproterone acetate which are anti-androgen drugs).

Some studies have shown that, in a majority of cases, jail does little to deter the offender from re-offending.⁵³ In some instances, it may even ensure that re-offending is severer than the original action. Nonetheless, for some in categories like 3, 4, 5 and 7, it may be the only option. Yet, even some of those in these categories, with perhaps the exception of group 5, may respond positively to some form of treatment process.

Giaretto's work in Santa Clara County, California, has shown that his Child Sexual Abuse Treatment Program, which is a court-ordered diversionary sentence, has been very successful in the treatment of offenders with minimal recidivism rates. There is nothing comparable with those who have been jailed.⁵⁴ South Australia has a similar program being developed.⁵⁵ Obviously, people whose offending is as a result of a mental disorder should not be in jail, though some kind of secure institution, like James Nash House,⁵⁶ might be required.

My own view is that, if we are to maintain the distinction between sexual and other assaults against the person and some form of incarceration is

51 Prins, *Offenders, Deviants or Patients*.

52 Marshall, Laws & Barbaree (eds), *Handbook of Sexual Assault Pt IV*. See also Fugler, "Community Treatment of Sex Offenders: Then, Now and in the Future" (1990) 12 *Law Society of SA Bulletin* 300.

53 As above, fn52. Also Giaretto, *Integrated Treatment of Child Sex Abuse* (Science & Behaviour Books, Palo Alto 1982); Knopp & Wiley, *Retraining Adult Sexual Offenders: Methods & Models* (Safer Society Press, New York 1984); Knoff, *Instead of Prison* (Safer Society Press, New York 1976); Mendelson, "A Community Treatment Service for Sex Offenders" (1988) 18 *Bulletin of the Royal College of Psychiatrists* 416.

54 As above, fn52.

55 Fugler, "Community Treatment of Sex Offenders: Then, Now and in the Future" (1990) 12 *Law Society of SA Bulletin* 300.

56 James Nash House is the South Australian secure Psychiatric Hospital for prisoners with psychiatric disorders.

required, then we need a separate institution for those convicted of sexual assaults. This institution could be divided into two sections: a secure section where offenders would not be allowed to leave, except under the kinds of conditions that presently exist in jails, and a non-secure section for those persons not considered violent or dangerous but who need some kind of treatment. They ought to be able to maintain some form of employment, though with certain kinds of restrictions to ensure that re-offending does not occur.⁵⁷

This is a very brief overview of some of the options available. They need far more analysis than can be given here.⁵⁸ However, the success of any programme, whether custodial or otherwise, will, I submit, depend on the following factors:

- the ability of professionals to deal with these persons in a dispassionate, non-judgmental, compassionate (though not naive) manner, and in a multi-disciplined mode,
- the adequacy and accuracy of the assessment process,
- the ability to give the time required, and to ride with both the ups and downs, and
- the preparedness of the legal system and the government to rise above the sometimes strident and McCarthyist like reference of particular interest groups and sections of the community in general, in order to ensure the welfare of victims and offenders, and future welfare of all persons.

In the medical context, it has been said for years that without accurate diagnosis and careful treatment, a symptom may be treated temporarily, but if the aetiology has not been discerned, then the symptom will reoccur, if not in the same form, in another.⁵⁹ There is no reason why such an approach cannot apply in the legal system.

Finally, I want to return to a theme that has run throughout this comment. How we deal with sex offenders will, ultimately, depend on how we deal with ourselves and the various quirks within our characters which make us interesting persons. In his paper "The Qualities of a Good Psychiatrist", Professor Sir Dennis Hill described such a person in this way:⁶⁰

57 See also, Fugler, "Community Treatment of Sex Offenders: Then Now and in the Future" (1990) 12 *Law Society of SA Bulletin* 300.

58 Marshall, Laws & Barbaree (eds), *Handbook of Sexual Assault*.

59 Marshall & Barbaree, "An Integrated Theory of the Etiology of Sexual Offending" in *Handbook of Sexual Assault*.

60 (1978) 133 *British Journal of Psychiatry* 97.

Personal and emotional maturity, ... means freedom from personal neurotic nostalgia and with one's own past.

It also means that sometimes we need a sense of humour. For all of us, but particularly those of us who will have to deal with sex offenders and their victims, there are lessons to be learned from that description.