Criminalising sexual harm

Focusing upon England and Wales, **Lois S Bibbings** questions the use of criminalisation to address sexual harms.

This article considers some problems with the use of criminal law and the criminal justice system to respond to sexual harms. In doing so it reflects a broadly criminosceptic approach, which calls into question current government policy with its tendency to lean very heavily upon criminalisation as a panacea for a range of increasingly diverse issues. Responses to sexual harms have been no exception to this trend. In particular, there has been the lengthy Sexual Offences Act 2003, with its new and redrafted offences. Alongside this, efforts have been made to address what were perceived to be systemic difficulties (see further HMCPSI/HMIC, 2007).

The impetus behind these changes has included a concern that statute and practice should better reflect respect for bodily autonomy, not least by encompassing a wider range of hurts. At the same time and in order to achieve these goals, there has been a focus upon encouraging victims to report incidents and supporting them in doing so. In addition, efforts have been made to improve police, prosecution service and prosecutors' handling both of victims and cases. These attempts at change have also been driven by an awareness that conviction rates for rape have fallen alarmingly in recent decades; while in the 1970s at its highest point the rate for reported female rape cases was a little over 30 per cent, at its lowest point in 2002 it fell to 5.6 per cent (Home Office, 2005).

However, recent efforts to reform the way in which sexual harms are categorised and dealt with are unlikely to achieve these goals, let alone have any impact upon the incidence of sexual harm, as social attitudes along with a series of myths and stereotypes about sexual matters run counter to the reforming ideals and tend to undermine them. Moreover, the criminal law continues to allow these ideas into the justice system.

What then are these attitudes and myths? They include a range of factors which can lead to people to 'blame' the victim for the sexual harm perpetrated upon them or may be taken to affect the credibility of their story. For a female victim such features may relate to dress, previous sexual behaviour, the choice to walk home alone late at night, the acceptance of an invitation to come up for a coffee, or supposedly flirtatious conduct. In each of these instances, having acted in a way which might be perceived as sexually risky, promiscuous or provocative may, for example, come to be seen as evidence that either there was some degree of fault on the part of the victim or that the lack of consent required for a conviction is not sufficiently clearly evidenced. Similarly gendered attitudes may also mean that a male victim is to some degree 'blamed' for their rape or could lead his truthfulness to be doubted. Thus, a gay man might be assumed to have encouraged or consented to sexual activity with the perpetrator, or a heterosexual man's sexuality along with his lack of consent may be called into question.

It would appear that these kinds of views are held by a significant minority of the population. Thus, a study by Amnesty International UK identified a tendency to 'blame' the female victim in a way that runs counter to what the law of consent defines as criminal conduct. Along with other findings, the resultant report noted that just over a third of respondents believed that a woman was partially or totally responsible for being raped if she had behaved in a flirtatious manner and eight per cent believed that a woman was totally responsible if she had had many sexual partners (AIUK, 2005; for attitudes to male rape, see, for example, Mitchell et al., 1999).

Significantly, such views may be shared by the police, prosecution service, lawyers, judges, and jury members, and may impact upon how they see and treat a complainant and process their case. Thus, a police officer or prosecutor may be less likely to pursue a case because they too to some degree 'blame' the victim. Alternatively, they may not proceed with the case because, although they do not themselves hold such views, they think that some members of a jury will, and thus it may well be assumed that the likelihood of conviction is not sufficiently high to pursue. Defence lawyers also take advantage of such attitudes (whether they share them or not) when presenting a case to a jury in order to discredit the complainant (see further Temkin, 2000). Other professionals involved in building a case, such as doctors carrying out forensic medical examinations, can hold such views and may also influence the process (Temkin, 1998).

Of late, attempts have been made to address some of these systemic issues by, for example, requiring the use of specialist prosecutors in rape trials to counter defence tactics but it seems that, to date, much remains to be done if sexual attitudes are not to continue to be exploited in order to cloud the waters when it comes to issues of consent (for a recent assessment of the treatment of victims see HMCPSI/HMIC, 2007). Again this means that the idea of respecting bodily autonomy and the goal of increasing conviction rates are potentially undermined.

What then of the new law and its relationship with and impact upon

10.1080/09627250802476866

such sexual attitudes? The Sexual Offences Act 2003 applies to offences committed on or after 1 May 2004. One of the most significant changes it introduced related to the meaning of consent. Section 74 defines this in terms of freedom and choice and additional provisions within the statute seek to ensure that this concept is applied in practice. In the case of the offence of rape, the Act states that a person (A—a man) commits the offence 'if he intentionally penetrates the vagina, anus or mouth of another person (B—a woman or man) with his penis', 'B does not consent to the penetration' and 'A does not reasonably believe that B consents'. The Act stipulates that the reasonableness of such a belief 'is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents' (section 1). Now, at first glance, for those keen to boost (rightful) conviction rates this might be taken to be an improvement on the previous test which merely required a defendant to demonstrate that he believed that there was consent in order to prevent a conviction. However, this drafting actually legitimates the bringing of stereotypical attitudes about sex into the courtroom as defence counsel can draw attention to 'all the circumstances', not least the complainant's (alleged) behaviour, and by so doing deflects attention from the reality of non-consent (Temkin and Ashworth, 2004).

Section 75 of the Act also seeks to assist the courts in deciding where consent was not present and, thereby, to increase the conviction rate. It lists circumstances when there is a presumption of no consent but allows for the latter to be rebutted by the defence if they can convince the court that, on balance, consent was probably present. So, for example, where a victim is asleep or unconscious at the time of the alleged offence it is assumed that they did not consent but the defence can attempt to prove otherwise on the balance of probabilities. At the very least this is a backward step in recognising autonomy as before the Act the complainant (rightly) had to have the capacity to consent at the time of the activity (Temkin and Ashworth, 2004). Moreover, the section reinforces the sense that behaviour prior to sleep or unconsciousness may also be relevant here; thus, such things as (alleged) flirtation, dress and sexuality may presumably be raised in this context too. As a result, social attitudes are again seemingly welcomed into the application of the criminal law.

As this brief discussion suggests, in various respects deeply embedded views continue to prevent the achievement of criminal justice system goals in relation to sexual harms. This means that it is unlikely that conviction rates will increase despite recent reforms. Instead, it may well be argued that at the moment the criminal law, along with the system which implements it, are in themselves causes of additional harm to victims.

What then might be done to improve the performance of the criminal justice system in relation to sexual harms? A number of further reforms have and are being mooted, including a suggestion that juries should be given information aimed at dispelling sexual myths. However, these sorts of changes, while they are well-meaning, are likely to have only a limited effect upon criminal justice responses and, in particular, conviction rates. For real change to be effected it is the deep-seated and widespread societal views about sex, along with linked ideas about gender and sexuality, which need to be addressed. Indeed, nothing short of a thoroughgoing cultural shift is required.

While the criminal law and justice system may form a (small) part of efforts to bring about such radical sociocultural change, they can only do so if their reform is very carefully considered and, more importantly, is accompanied by a wide range of other pervasive and long-term social policy initiatives which embody and promote respect for (sexual) autonomy. Beyond this, in such efforts there would also be the hope that there may in the future be a reduction in the incidence of sexual harm—a far more important goal than one that focuses upon the performance of the criminal justice system. Finally, what emerges from this analysis in terms of the theme of this issue is that an over-reliance upon criminalisation as a means of addressing sexual harms is misplaced. ■

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