THE LAW REFORM COMMISSION

AN COIMISIÚN UM ATHCHOÍRIÚ AND DLÍ

(LRC 11- 1985)

REPORT ON VAGRANCY AND RELATED OFFENCES

IRELAND
The Law Reform Commission,
Ardilaun Centre, 111 St Stephen's Green, Dublin 2

154

© Copyright The Law Reform Commission 1985

First Published 1985

LAW REFORM COMMISSION

REPORT ON VAGRANCY AND RELATED MATTERS

CHAPTER 1 INTRODUCTION

1.1 In its First Programme[1] for the examination of certain branches of the law with a view to their reform the Law Reform Commission indicated that it proposed to examine the law relating to minor offences concerned with public peace and order. The Commission's view was that the existing statutory law in this area (e.g. the Vagrancy Acts and the Dublin Police Acts) required to be amended and consolidated or replaced.

1.2 This Report deals with that part of paragraph 10(5) of the First Programme which refers to the Vagrancy Acts. The Report also covers a small number of provisions of legislation other than the Vagrancy Acts which are so closely related to certain provisions of those Acts as to warrant review in conjunction with them. It does not, however, attempt to review the provisions generally of such other legislation.

1.3 It is proposed to examine other minor offences concerned with public peace and order, such as those created by the Dublin Police Acts, in a separate Report.

---

1 Prl. 5984.

CHAPTER 2 HISTORICAL BACKGROUND

2.1 The Vagrancy Acts applying in Ireland had their origins in the statutes of the Westminster Parliament regulating the activities of vagabonds, beggars and idle persons in England. The English legislation dealing with vagrants was linked with the law regulating poverty and paupers. In Ledwith v Roberts[2] Scott, L.J. summarised the background to the English vagrancy laws as follows:

> "These laws were framed exclusively in relation to [a] particular class of the community, and had three purposes. The class consisted of the hordes of unemployed persons, many of them addicted to crime, then wandering over the face of the country; and the purposes were: (a) settlement of the able bodied in their own parish and provision of work for them there; (b) relief of the aged and infirm, i.e., those who could not work; (c) punishment of those of the able-bodied who would not work.
>
> The early Vagrancy Acts came into being under peculiar conditions utterly different to those of the present time. From the time of the Black Death in the middle of the 14th century, till the middle of the 17th century, and indeed, although in diminishing degrees, right down to the reform of the poor law in the first half of the 19th century the roads of England were crowded with masterless men and their families who had lost their former employment through a variety of causes, had no means of livelihood and had taken to a vagrant life.

---

[1] For fuller treatment see, for example, W. Chambliss, "The Law of Vagrancy" in Crime and the Legal Process (ed. Chambliss, 1969); Stephen, 3 History of the Criminal Law of England (1883), pp. 266-275; C.J. Ribton-Turner, History of Vagrants and Vagrancy and of Beggars and Beggary (1887); Blackstone, 4 Commentaries 169; J. Bellamy, Crime and Public Order in England in the Later Middle Ages (1973); Webb, English Poor Law History (1927); Report of the Departmental Committee on Vagrancy (Cd. 2852, 1906); Home Office Working Party on Vagrancy and Street Offences, Working Paper (1974), pp. 97-101.

[2] [1936] 3 All E.R. 570, at 593.

> The main causes were the gradual decay of the feudal system under which the labourinig classes had been anchored to the soil, the economic slackening of the legal compulsion to work for fixed wages; the breakup of the monasteries in the reign of Henry VIII, and the consequent disappearance of the religious orders which had previously administered a kind of "public assistance" in the form of lodging, food and alms and lastly the economic changes brought about by the Enclosure Acts. Some of these people were honest labourers who had fallen upon evil days, others were the "wild rogues" so common in Elizabethan times and literature who had been born to a life of idleness and had no intention of following any other. It was they and their confederates who formed themselves into the notorious "brotherhoods of beggars" which flourished in the 16th and 17th centuries. They were a definite and serious menace to the community, and it was chiefly against them and their kind that the harsher provisions of the vagrancy laws of the period were directed."

Scott, L.J. went on to outline the history of the statutory attempts to deal with this class of persons in England, from the Statute of Labourers in 1349 down to the Vagrancy Act 1824, which repealed all previous statues on the subject.

2.2 In Tudor times in England able-bodied vagrants were subject to very severe punishments such as whipping, having part of the ear burnt off and branding. During the seventeenth and eighteenth centuries these harsh punishments were gradually modified.

2.3 In Ireland there was no organised system for helping the destitute poor until the Poor Relief (Ireland) Act, 1832. However, over the years various statutes had been passed by the Irish Parliament which did provide for some facilities for the poor, such as free schools, workhouses, and corporations in the cities and towns for the relief of the poor. These poor law measures were accompanied by legislation similar to that obtaining in England for the suppression of vagrancy.

2.4 In 1542 a statute of the Irish Parliament[3] applied to Ireland an English statute of 1530[4] "for ordering beggars

[3] 33 H. 8, C. 15, Irish.

[4] 22 H. 8, C. 12.

and punishing vagrants". Aged and impotent poor were to be authorised to beg within certain limits and unauthorised beggars to be punished by whipping and being put in the stocks. An able-bodied beggar or vagrant was, "by discretion of the justices", to be whipped and sworn to return straight to the place where he was born or lived for the previous three years and there "to put himself to labour as a true man ought to do". If the offender did not return straight home he was liable to further whipping. The statute also provided for the punishment of persons practising certain deceits such as unlawful games or palmistry or fortune telling. Such persons were liable to whipping and pillorying and, if the offence were repeated, to having one or both ears cut off.

2.5 In 1635, a statute "for the erecting of Houses of Correction and for the punishment of rogues, vagabonds, sturdy beggars and other lewd and idle persons"[5] was passed. A House of Correction was to be erected in each county in Ireland "to set the said rogues and other idle and disordered persons on work". Persons liable to punishment under this Act of 1635 were:

(i) "all persons calling themselves scholars, going about begging";

(ii) "all idle persons going about in any county either begging or using any subtle craft, or unlawful games or plays, or feigning themselves to have knowledge in physiognomy, palmistry, or other like crafty science, or pretending that they can tell destinies, fortunes, or such other like fantastical imaginations";

(iii) "all persons that be to utter themselves to be proctors, procurers, patent-gatherers, or collectors for gaols, prisons or hospitals";

(iv) "all fencers, bear wards, common players of interludes, and minstrels wandering abroad";

(v) "all jugglers, wandering persons, and common-labourers, being persons able in body using loitering and refusing to work for such reasonable wages as is taxed and commonly given in such parts where such persons do or shall happen to abide or

---

[5] 10 & 11, Car. 1, C. 4, Irish.

dwell, not having living otherwise to maintain themselves;

(vi) "all persons delivered out of gaols that beg for their fees or otherwise travel begging;

(vii) "all such as shall wander abroad pretending loss by fire or otherwise";

(viii) "all such as wandering pretend themselves to be Egyptians or wander in the habit, form or attire of counterpart Egyptians".

These were to be deemed to be rogues, vagabonds and sturdy beggars, and to sustain such punishments as had been ordered by the statute of 1542 referred to in the preceding paragraph.

2.6 In 1707 a statute[6] provided "for the more effectual suppressing tories, robbers and rapparees and for preventing persons becoming tories or resorting to them". This statute directed that "all loose, idle vagrants and such as pretend to be Irish gentlemen and will not work, or betake themselves to any honest trade or livelihood, but wander about demanding victuals and coshering from house to house amongst their fosterers, followers and others, and also loose persons of infamous lives and characters" were to be imprisoned until "sent on board Her Majesty's fleet, or to some of Her Majesty's plantations in America", where the justices were empowered to send them unless sufficient security for their good behaviour was given. The statute was not repealed until 1865. A statute of 1735[7] made similar provision in relation to the city and county of Dublin.

2.7 During the eighteenth century a number of statutes made provision for workhouses and enabled various officials to apprehend beggars and vagrants and set them to hard labour or useful employment for specified periods. For exmaple, in 1772 an act was passed[8] which repealed the statutes of 1542 and 1635 referred to in paras 2.4 and 2.5

---

[6] 6 Ann, C. 11, Irish.

[7] 9 Geo. 2, C. 6, Irish.

[8] 11 and 12 Geo. 3, C. 30, Irish.

above. It provided for the setting up in every county and every county of a city or town, of a corporation for the relief of the poor and punishing vagrants. The corporations were enabled to grant a licence to beg to the helpless poor and to build "hospitals, to be called workhouses or houses of industry" for the relief of the poor. Persons found begging without a licence were to be put in the stocks (or, if female, confined in custody) for up to three hours in the case of a first offence or for up to six hours in the case of a subsequent offence. "Old, persevering" offenders were to be indicted and if convicted could be imprisoned for up to two months. The corporations were authorised to "seize every strolling vagrant capable of labour, who hath no place of abode, and who doth not live by his or her labour or industry", and every person over 15 years of age begging publicly without a licence and "every strolling prostitute capable of labour" and commit them to the workhouse and there "to keep them to hard labour, and to compel them to work, maintaining them properly", and in case of refusal or ill behaviour to inflict reasonable corporal punishment on the offenders. The maximum periods of committal ranged from two months to four years depending on whether and how often the offender had been committed previously.

2.8 An Act of 1795,[9] which applied to the Dublin area only, included a provision extending the scope of the vagrancy laws to what might be termed "intending criminals". It provided that "all night-walkers, all suspicious persons in the day-time, loitering about, without any visible means of maintaining themselves, and all persons not giving a satisfactory account of themselves, all persons notoriously suspected of being thieves, and all persons gaming or tippling in the public streets, by-places or fields, shall or may be apprehended by any petty constable" etc. "and carried before a justice of the peace; and if such person shall not give sufficient surety for his or her good behaviour, he, she or they shall be adjuged, deemed and taken to be a rogue and vagabond ....".

2.9 By the nineteenth century, as in England, laws for the relief of the poor and for the punishment of vagrants were coming to be enacted in different statutes. The major enactment in the former category was the Poor Relief (Ireland) Act 1838 (which was amended and updated by the Public Assistance Act 1939 and the Social Welfare

---

[9] 35 Geo. 3, C. 36, Irish.

(Supplementary Welfare Allowances) Act, 1975 - see now the Social Welfare (Consolidation) Act 1981).

2.10 The oldest Act still in force which was passed specifically to deal with the punishment of vagrants in Ireland is the Vagrancy (Ireland) Act 1847, which recited that it was "expedient to make further provision for the punishment of beggars, vagrants and persons offending against the laws enforced for the relief of the destitute poor in Ireland".

2.11 The Vagrancy Act 1824 originally applied only to England. The Prevention of Crimes Act 1871 extended to Ireland and Scotland the application of section 4 of the 1824 Act, which provided for the punishment of certain classes of persons as "rogues and vagabonds". The Vagrancy Act 1898, which was brought in to amend the 1824 Act and also applied only to England originally, was amended and extended to Ireland and Scotland by the Criminal Law Amendment Act 1912. The core of the existing vagrancy legislation is contained in the 1824 Act. The English Home Office Working Party on Vagrancy and Street Offences[10] described the general effects of that Act as follows:

> "This Act included not only the traditional offences committed by vagrants, previously contained in Tudor legislation (such as begging and sleeping in outhouses), but quite different categories such as offences against the Poor Law; offences of a kind which professional criminals might commit (such as loitering with intent to commit an arrestable offence); and those offences against public decency and morality (such as offensive behaviour by prostitutes and indecent exposure) which were of relatively recent origin."

The Working Party characterised the Act thus:[11]

> "Although in the penalties which it prescribed the 1824 Act seemed to humanise the legislation a little it was nonetheless basically a repressive measure."

---

[10] Working Paper (1974) para. 4.

[11] Ibid., para. 13.

CHAPTER 3 THE VAGRANCY ACTS AND RELATED PROVISIONS

The Vagrancy Act 1824

3.1 It should be noted at the outset that only one section of this Act, section 4, applies to Ireland. Originally the entire Act applied to England only but section 4 was extended to Ireland and Scotland by section 15 of the Prevention of Crimes Act 1871.

3.2 The 1824 Act made various classes of persons punishable as either 'idle and disorderly persons' or 'rogues and vagabonds' or 'incorrigible rogues'. The persons covered by the first category were those guilty of vagrancy offences of a more trivial kind, the second consisted of those guilty of more grave forms of vagrancy, while 'hardened' offenders such as those resisting arrest or convicted twice as rogues and vagabonds were in the third category. Offenders in the first category were liable to a less severe maximum penality than those in the second, while those in the third category were liable to the most severe maximum penalty.

3.3 Section 3 of the Act provided that persons convicted of certain offences were to be deemed idle and disorderly persons and liable to a month's imprisonment or a fine not exceeding £5. This section was never extended to Ireland.[1]

3.4 Section 4, which does apply to Ireland, provides that

---

[1] But the expression "idle and disorderly persons" is not unknown to Irish law. Section 7 of the Dublin Police Act 1836 and section 27 of the Dublin Police Act 1842 provide for a power to arrest without warrant "loose, idle and disorderly persons" in certain circumstances - see para. 18.1 below.

the following classes of persons[2] shall, on conviction, be deemed to be rogues and vagabonds:

(i) every person pretending to tell fortunes or using any subtle craft, means or device by palmistry or otherwise, to deceive or impose upon any person;

(ii) every person wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or wagon, not having any visible means of subsistence and not given a good account of himself or herself;

(iii) every person wilfully exposing to view in any street, road, highway, or public place any obscene print, picture, or other indecent exhibition;

(iv) every person wilfully, openly, lewdly, and obscenely exposing his person in any street, road, or public highway or in the view thereof or in any place of public resort with intent to insult a female;

(v) every person wandering abroad and endeavouring by the exposure of wounds or deformities to obtain or gather alms;

(vi) every person going about as a collector or gatherer of alms or endavouring to procure charitable contributions of any nature or kind under any false or fraudulent pretence;

---

[2] Section 4 as it applies to England includes two classes of persons additional to those listed here, viz. "every person committing any of the offences herein-before mentioned, after having been convicted as an idle and disorderly person" and "every person apprehended as an idle and disorderly person, and violently resisting any constable or other peace officer so apprehending him or her, and being subsequently convicted of the offence for which he or she shall have been apprehended." The portions of section 4 which refer to these two classes of persons presuppose the application of section 3 of the 1824 Act. Since this section was never extended to Ireland, those portions of section 4 are of no effect in Ireland. See O'Connor, The Irish Justice of the Peace (2nd ed., 1915), vol. II, pp. 1275-1276.

(vii) every person running away or leaving his wife or his or her child chargeable, or whereby they or any of them may become chargeable to any parish, township, or place;

(viii) every person playing or betting in any street, road, highway, or other open and public place at or with a table or instrument for gaming at any game or pretended game of chance;

(ix) every person having in his or her custody or possession any picklock, key, crow, jack, bit, or other implement with intent feloniously to break into any dwelling house, warehouse, coach-house, stable or outbuilding;

(x) every person being armed with any gun, pistol, hanger, cutlass, bludgeon or other offensive weapon, or having upon him or her any instrument with intent to commit a felonious act;

(xi) every person being found in or upon any dwelling house, warehouse, coach-house, stable or outhouse or in any enclosed yard, garden, or area for any unlawful purpose;

(xii) every suspected person or reputed thief frequenting or loitering about or in[3] any river, canal, or navigable stream, dock or basin, or any quay, wharf or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, or any highway or any place adjacent to a street or highway with intent to commit a felony. In proving the intent to commit a felony it shall not be necessary to show that the person suspected was guilty of any particular act or acts tending to show his purpose or intent, and he may be convicted if from the circumstances of the case, and from his known character as proved to the justice of the peace or court before whom or which he is brought, it appears to such justice or court that his intent was to commit a felony.[4]

---

[3] As amended by section 7 of the Penal Servitude Act 1891.

[4] As amended by section 15 of the Prevention of Crime Act 1871.

The effect of the decision in King v The Attorney General[5] is that the part of section 4 contained in (xii) above is no longer in force, as being inconsistent with the Constitution. The case is discussed at more length in Chapter 4.

3.5 Persons convicted as rogues and vagabonds are liable to a maximum penalty of 3 months' hard labour. Section 4 provides that conviction is to be "by the confession of such offender or by the evidenc on oath of one or more credible witness or witnesses". It also provides for forfeiture on conviction of any implement or weapon such as is referred to at (ix) and (x) of para. 3.4 above. There is no provision for the imposition of a fine for offences under section 4, so that imprisonment is the only penalty available.[6] In England provision has been made for the imposition of a maximum fine of £200.[7]

3.6 In England section 5 of the 1824 Act (which never applied to Ireland) provided that certain classes of persons might be deemed to be incorrigible rogues and committed for trial before a court of quarter sessions, which could impose a sentence of up to a year's imprisonment.

3.7 Section 6 of the 1824 Act provided for a power of arrest without warrant of persons found offending against the Act, exercisable by any person. It is important to note that this provision, the operation of which proved so controversial in England, particularly in recent times, in the context of relations between the police and the black community, never applied to Ireland. There is, therefore, no specific power of arrest without warrant available in Ireland in respect of offences under section 4 of the 1824

---

5 [1981] I.R. 233.

6 Section 9(3) of the Criminal Justice Bill 1967 contained a general provision enabling imposition of a fine not exceeding £50 in all cases of summary conviction of any offence. However, the Bill was not enacted into law.

7 See section 34 of the Magistrates Courts' Act 1980 replacing section 27(3) of the Magistrates Courts Act 1952 and section 93 of the Criminal Justice Act 1967.

Act.[8] That is not to say, however, that there are not any powers of arrest without warrant which may be applicable in Ireland in situations of the kind covered by section 4. The common law powers of arrest on reasonable suspicion in connection with the commission of a felony or breach of the peace may have application in some situations. So may a Garda's powers of arrest without warrant under certain statutory provisions such as section 104 of the Larceny Act 1861, section 41 of the Larceny Act 1916, section 61 of the Malicious Damage Act 1861 and section 66 of the Offences Against the Person Act 1861. Section 7 of the Dublin Police Act 1836, confers powers of arrest without warrant on Gardai in the Dublin area in respect of "loose, idle and disorderly persons" found in certain circumstances and section 27 of the Dublin Police Act 1842 confers similar powers which are applicable to the offence of loitering or soliciting on the part of a common prostitute in a public place. While these latter two provisions are not part of the vagrancy legislation as such, their subject matter is so closely related to it that they warrant review in this Report.

3.8 In England section 8 of the Vagrancy Act 1824 provided for powers of search of a person convicted under the Act and for the application of any money found towards meeting the cost of his arrest and imprisonment. In England section 13 also enabled warrants to be issued authorising the search of lodging houses suspected of concealing offenders. These provisions never applied in Ireland.

The Vagrancy (Ireland) Act 1847

3.9 Section 2 of this Act, which was repealed by the Public Assistance Act 1939,[9] made it an offence for any

---

[8] See Supple, The Irish Justice of the Peace (1899), pp. 547-549 and Sandes, Criminal Law and Procedure in the Republic of Ireland (3rd ed., 1951) p. 44. In Ledwith v Roberts [1936] 3 All E.R. 570, at 574 Greer, L.J., seems to have been of the view that there was a power of arrest without warrant on the part of a constable under section 4 itself but this view would appear to have been based upon a misreading of the section.

[9] Section 4 and 1st Schedule.

person to desert or wilfully neglect to maintain his wife or any child whom he was liable to maintain. Section 3 of the 1847 Act, as amended by the 1939 Act, provides that any person wandering abroad and begging or placing himself in any public place, street, highway, court or passage to beg or gather alms, or causing or procuring or encouraging any child or children to do so, commits an offence. The maximum penalty is one month's imprisonment. Section 4 of the 1847 Act authorises any person to arrest without warrant any person whom he shall find offending against the Act and section 5 empowers any Justice of the Peace, on proof that any person has committed an offence against the Act, to issue a warrant for the arrest of that person. Section 6 provides that no proceedings under the Act are to be quashed for want of form or shall be removable into any superior court by writ of certiorari and provides for the form of conviction. In as much as this provision might be thought to oust the jurisdiction of the High Court it would appear to be inconsistent with the Constitution.

The Vagrancy Act 1898

3.10 This Act originally applied to England only but was amended and extended to Ireland and Scotland by section 7(3) of the Criminal Law Amendment Act 1912. Section 1(1) of the 1898 Act, as amended, provides that every male person who

(a) knowingly lives wholly or in part on the earnings of prostitution; or

(b) in any public place persistently solicits or importunes for immoral purposes,

shall be deemed a rogue and vagabond within the meaning of the Vagrancy Act, 1824, and may be dealt with accordingly. Subsection (2) of section 1 provides for the issue of warrants of entry, search and arrest in specified circumstances where an offence of living on the earnings of prostitution is suspected.

Subsection (3) of section 1 provides that, where a male person is proved to live with or to be habitually in the company of a prostitute or is proved to have exercised control, direction or influence over the movements of a prostitute in such a manner as to show that he is aiding, abetting, or compelling her prostitution with any other person or generally, he shall, unless he can satisfy the court to the contrary, be deemed to be knowingly living on the earnings of prostitution.

Section 7(4) of the 1912 Act provides for an offence on the part of a female of exercising control, direction or influence over the movements of a prostitute etc. for the purposes of gain. Subsection (5) of section 7 enables trial on indictment of a person charged with any of the above offences. The maximum penalty on conviction on indictment is imprisonment for a term not exceeding two years. Subsection (6) of section 7 enables the spouse of a person charged with any of the above offences to be called as a witness either for the prosecution or defence without the accused's consent. The effect of this provision would appear to be to make a spouse a competent but not compellable witness for the prosecution or the defence[10], which is an exception to the general rule that a spouse is not a competent witness for the prosecutiion, or for a co-accused except with the consent of the accused spouse.

Certain Other Offences Related to Prostitution

3.11 It would be beyond the scope of this Report to attempt a general review of offences related to prostitution. However, since the Vagrancy Act 1898 includes provision relating to soliciting for immoral purposes by males in a public place, it is proposed to review provisions in legislation other than the Vagrancy Acts that refer to soliciting by prostitutes in a public place since these offences are so closely related to the 1898 Act offence. In reviewing these offences it is also appropriate to consider whether an offence of "kerb-crawling" should be created to deal with the nuisance that can be caused by male "clients" seeking prostitutes. It is not proposed to widen the scope of the review of this area of the law beyond these matters, to, say, offences relating to brothels or encouragement of prostitution, an examination of which should await a review of sexual offences generally. Roughly speaking, the present Report will cover only offences related to "street" aspects of prostitution.

3.12 Section 14(11) of the Dublin Police Act, 1842 provides that every common prostitute or night-walker loitering or being in any thoroughfare or public place for the purpose of prostitution or solicitation, to the annoyance of the inhabitants or passengers shall be guilty of an offence and liable to a penalty not exceeding £2.

---

[10] See Leach v R. [1912] A.C. 305.

Section 72 of the Towns Improvement (Ireland) Act 1854 includes provision that every common prostitute or night-walker who in any street to the obstruction, annoyance or danger of the residents or passengers, loiters and importunes passengers for the purposes of prostitution or is otherwise offensive is guilty of an offence and is liable to a fine not exceeding £2. Section 28 of the Town Police Clauses Act 1847[11] includes an almost identical proivsion. Finally, section 16(1) of the Criminal Law Amendment Act 1935 provides that every common prostitute who is found loitering in any street, thoroughfare or other place and importuning or soliciting passers-by for purposes of prostitution or being otherwise offensive to passers-by shall be guilty of an offence and liable on summary conviction, in the case of a first offence, to a fine not exceeding £2 or, in the case of a second or any subsequent offence, to imprisonment for a term not exceeding 6 months.

Section 118 of the Children's Act 1908

3.13 This section concerns an offence committed by a person who habitually wanders from place to place and prevents a child from receiving education. It is essentially a provision designed to secure enforcement of school attendance. Its repeal is proposed in the children (Care and Protection) Bill 1985.

---

[11] This Act applies only to towns to which it has been applied by a special Act.

CHAPTER 4 THE CONSTITUTION: KING v ATTORNEY GENERAL AND DIRECTOR OF PUBLIC PROSECUTIONS

4.1 In King v The Attorney General and the Director of Public Prosecutions[1] a declaration was sought that section 4 of the Vagrancy Act 1824, section 15 of the Prevention of Crime Act 1871 and section 7 of the Penal Servitude Act 1891 were inconsistent with the Constitution and on that account did not form part of the law of the State. The plaintiff in the case had been convicted on two charges of loitering with intent to commit a felony and on one charge of being in possession of housebreaking implements with intent to commit some felonious act. As O'Higgins, C.J. said:[2]

> "The aim of the Plaintiff's proceedings was to establish the inconsistency with the Constitution of the portion of section 4 of the 1824 Act as amended that relates to the offence of loitering with intent. This would result, it was hoped, in the invalidating of the two convictions for loitering with intent. The Plaintiff also hoped by establishing the inconsistency of the questioned provision to have section 15 which applied it and all of section 4 to Ireland also declared inconsistent with the Constitution. This would have resulted in the invalidating of the conviction of being in possession of housebreaking implements because the statutory basis for that conviction would have disappeared. Alternatively and in any event the Plaintiff sought to argue that other provisions of section 4 were inconsistent with the Constitution and that because this was so the whole section should be declared inoperative."

4.2 The Supreme Court held that the plaintiff had not the necesary locus standi to seek a declaration that the whole of section 4, as applied to Ireland and amended, was unconstitutional. All offences under that section other than that of 'loitering with intent'[3] were outside the scope of the constitutional argument in the case. Henchy, J., giving the judgment of the majority of the court, concluded

---

[1] [1981] I.R. 233. See T.A.M. Cooney, "Due Process and a Crime of Condition", (1980) XV (n.s.) Ir. Jur. 289.

[2] Ibid, at 247.

[3] See item (xii) on p. 10 above.

as follows on the question as to the constitutionality of the 'loitering' provision:[4]

> "In my opinion, the ingredients of the offence and the mode by which its commission may be proved are so arbitrary, so vague, so difficult to rebut, so related to rumour or ill-repute or past conduct, so ambiguous in failing to distinguish between apparent and real behaviour of a criminal nature, so prone to make a man's lawful occasions become unlawful and criminal by the breadth and arbitrariness of the discretion that is vested in both the prosecutor and the judge, so indiscriminately contrived to mark as criminal conduct committed by one person in certain circumstances when the same conduct when engaged in by another person in similar circumstances would be free of the taint of criminality, so out of keeping with the basic concept inherent in our legal system that a man may walk abroad in the secure knowledge that he will not be singled out from his fellow-citizens and branded and punished as a criminal unless it has been established beyond reasonable doubt that he has deviated from a clearly prescribed standard of conduct, and generally so singularly at variance with both the explicit and implicit characteristics and limitations of the criminal law as to the onus of proof and mode of proof, that it is not so much a question of ruling unconstitutional the type of offence we are now considering as identifying the particular constitutional provisions with which such an offence is at variance.
>
> I shall confine myself to saying, without going into what would be unnecessary detail, that the offence, both in its essential ingredients and in the mode of proof of its commission, violates the requirement in Art. 38, s.1, that no person shall be tried on any criminal charge save in due course of law; that it violates the guarantee in Art. 40, s.4, subs. 1, that no citizen shall be deprived of personal liberty save in accordance with law - which means without stooping to methods which ignore the fundamental norms of the legal order postulated by the Constitution; that, in its arbitrariness and its unjustifiable discrimination, it fails to hold (as is required by Art. 40, s.1) all citizens to be equal before the law; and that it ignores the guarantees in Art. 40, s.3, that the

---

[4] [1981] I.R. 233, at 257.

personal rights of citizens shall be respected and, as far as practicable, defended and vindicated, and that the State shall by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

4.3 A majority of the Supreme Court[5] rejected a submission by counsel for the Director of Public Prosecutions and the Attorney General that only the words "suspected" and "or reputed thief" should be deleted from the impugned portion of section 4, so that it would have simply read "Every person etc." and thereby not be inconsistent with the Constitution. Henchy, J. said:[6]

"I do not accept that such verbal amputation would necessarily cure the unconstitutionality alleged against the section as amended,[7] but in any event I am satisfied that the suggested rewriting of this phrase would not be within the judicial power of leaving part of a statutory provision intact after another part of it has been severed as unconstitutional in pursuance of Art. 50, s.1."

4.4 The effect of the decision of the majority of the Supreme Court in King's case is that all that portion of section 4 of the 1824 Act, as amended, which relates to the offence of loitering with intent is no longer part of Irish law. O'Higgins, C.J. dissented on this point. He was somewhat concerned at the wide nature of the declaration given in the High Court, which the majority in the Supreme Court upheld.

"The effect of this declaration is to remove from section 4 of the Vagrancy Act (as amended) and from the statute books the offence known as 'loitering with intent'. The conduct proscribed in such an offence is, in my view, not only a serious and persistent social

---

[5] O'Higgins, C.J. dissenting.

[6] [1981] I.R. 233, at 258.

[7] It would seem that at least the amendment relating to proof of intent made by the Prevention of Crimes Act 1871 would have to be deleted as well.

> evil but also one which, in all ages and seasons, has, in its intimidation of law-abiding citizens, facilitated the commission of serious crime. To remove such an offence from the statute book merely because the provisions creating it or providing for its prosecution contain elements of inconsistency with the Constitution, is, in my view, far too sweeping an exercise of the power of judicial review."[8]

He had no difficulty in concluding that the features of section 4 that were inconsistent with the Constitution were severable and was of the view that the following part of section 4 survived and remained in force as a law:

> "Every person frequenting or loitering about or in [the named places] with intent to commit felony shall be deemed a rogue or vagabond within the true intent and meaning of this Act and it shall be lawful for any Justice of the Peace to commit such offender (being thereof convicted before him by the confession of such offender or by evidence on oath of one or more credible witness or witnesses) to the House or Correction, there to be kept to hard labour for any time not exceeding three calendar months."[9]

4.5 It is also interesting to note that O'Higgins, C.J. could not see[10] that any inconsistency with the Constitution was or could be suggested in relation to the provision in section 4 of the 1824 Act creating the offence of being in possession of housebreaking implements with a felonious intent (the majority expressed no opinion on this point, which was not directly at issue in the case). He was also of the view[11] that not all of the rest of section 4 was consistent with the Constitution but, because of the plaintiff's lack of *locus standi* in relation to the other provisions of the section, he did not pursue the question of what the other inconsistent provisions might be.

---

[8] [1981] I.R. 233, at 250.

[9] *Ibid*., at 253.

[10] *Ibid*., at 249.

[11] *Ibid*., at 250.

CHAPTER 5 FORTUNE TELLING

Present Law

5.1 Section 4 of the Vagrancy Act 1824, as applied to Ireland by section 15 of the Prevention of Crimes Act 1871, provides that any person pretending or professing to tell fortunes, or using any subtle craft, means or device, by palmistry or otherwise, to deceive and impose upon any person commits an offence and is liable to a maximum of three months' imprisonment.

5.2 There have been a number of English decisions on the interpretation of this provision. In Penny v Hanson,[1] where the defendant had advertised in the newspapers offering to tell persons' fortunes by astrology, it was held that it was not necessary to prove that the defendant had told anybody's fortune - he had pretended or professed to tell fortunes by offering to do so. In Barbanell v Naylor,[2] on the other hand, a newspaper article addressed to the public generally and purporting to forecast the future for all persons born on a particular day was held to be too vague and uncertain to amount to professing to tell the fortune of any individual and was not within section 4. In Stonehouse v Masson[3] it was held that an offence is committed even though the defendant believes that he has the power to tell fortunes - an intention to deceive is not a necessary ingredient of the offence.[4] Johnson v Fenner[5] decided that the reference to 'device' in section 4 must be read ejusdem generis with that to palmistry and that accordingly the section does not cover a trick of sleight of hand.

---

[1] (1887) 18 Q.B.D. 478.

[2] [1936] 3 All E.R. 66.

[3] [1921] 2 K.B. 818, overruling Davis v Curry [1918] 1 K.B. 109 and following R v Entwistle, ex parte Jones [1899] 1 Q.B. 846.

[4] The Scottish courts have diverged from the English courts on this point, holding that an intent to deceive is necessary: Smith v Nelson (1896) 23 R. (Ct. of Sess.) 77 and Farmer v Mill 1948 J. C. 4.

[5] (1869) 34 J.P. 471.

Policy arguments on reform of the law

5.3 Should the 1824 Act provision be simply repealed or should it be replaced by a more modern provision? In favour of out-and-out repeal it can be argued that fortune-telling, palmistry etc. are in nearly all instances relatively harmless activities in present-day conditions, are very rarely prosecuted and should be removed from the scope of the criminal law. Furthermore, it seems unfair to penalise fortune telling in a situation where horoscopes and astrology have attracted a wide measure of social acceptability, not to say respectability. The difference in kind between purported forecasting of events in a general way for persons born between certain dates and that related to individuals does not seem so crucial as to warrant the application of criminal sanctions in the one case but not in the other. Besides, the telling of individual fortunes on the basis of horoscopes by interested 'amateurs' seems to be a not uncommon and socially acceptable activity nowadays.

5.4 As against this, there is the argument that, while fortune-telling is not taken seriously by the great majority of people, it is precisely in those cases where clients do believe in it that it can cause harm. Credulous or gullible people can be exploited, frauds can be perpetrated and, even where no exploitation or fraud is involved, distress can be caused to individuals. The removal of the possibility of criminal sanctions could lead to an increase in the activities of 'professional' fortune-tellers and abuses might increase.

5.5 Any blanket prohibition on fortune-telling (such as the present provision, as interpreted by the English courts, entails) should be ruled out in any event as being liable to catch too many activities of an innocent or harmless nature. Various offences of a more narrowly drawn nature are possible. The English Home Office Working Party on Vagrancy and Street Offences considered the possibility of an offence which would be committed by any person who with intent so to do caused mental or physical harm or distress to any other person by purporting to foresee, disclose or influence events by the exercise of occult powers.[6] The English Working Party did not favour a provision of this kind:

---

[6] Such an offence had been suggested by the English Law Society in a Memorandum on Vagrancy published in 1968.

> "Although we recognise that confining an offence to cases where there is an element of intentional 'harm or distress' would have the merit of keeping wholly innocent activities outside the criminal law, we do not consider this alternative acceptable, for two main reasons. In the first place we consider that it would be extremely difficult for the prosecution to prove intent to cause harm or distress under such circumstances. The intent, if the fortune-teller believes in his powers, may be entirely well-meaning; or it may be simply to make money. Secondly, we see no reason to single out an intent to cause harm or distress on the part of a fortune-teller as the gravamen of a criminal offence; harm or distress may be brought about with intent by other categories of person, e.g. the malicious gossiper, and we do not think there is a case for a general offence of this kind."[7]

These arguments are weighty and besides, intent to cause harm or distress is not likely to feature commonly in fortune telling cases. It is more likely arise in the context of witchcraft or 'pishoguery' which purport to influence future events, rather than simply to foretell them. These activities are outside the scope of this Report.

5.6 Another possibility would be to create an offence aimed at situations where a nuisance was created, such as where fortune tellers called from door to door offering their services or persistently importuned people in a public place to have their fortunes told. The likelihood of any substantial nuisance of this kind arising does not seem very great, however, and the nature of any minor nuisance that might arise would not be such as to warrant the imposition of criminal sanctions.

5.7 A third possible approach would be to have an offence directed at fraudulent fortune telling. Fraud is always a possible concomitant of fortune telling activities. If the offence under section 4 of the Vagrancy Act 1824 were repealed without replacement, would there be sufficient means available elsewhere under the criminal law to deal with such fraud? Under section 32(1) of the Larceny Act 1916 and section 10 of the Criminal Justice Act 1951 every

---

[7] Working Paper (1974), paras 81-82.

person who by any false pretence with intent to defraud obtains from any other person any chattel, money or valuable security, or anything capable of being stolen to be delivered to himself or to any other pereson for the use or benefit or on account of himself or any other person shall be guilty of a misdemenaour and liable to penal servitude for any term not exceeding five years. Under the 1951 Act such an offence may be tried summarily in the District Court provided certain conditions are fulfilled. A false pretence of power to foretell the future would appear to be a false representation of present fact which would come within the section.[8]

5.8 It might be argued, however, that, rather than rely on the application of a general offence such as obtaining by false pretences, it would be preferable to have a specific offence directed at fraudulent fortune telling. An example of such a provision is provided by section 323 of the Canadian Criminal Code:

> "Every one who fraudulently
>
> (a) pretends to exercise or to use any kind of witchcraft, sorcery, enchantment or conjuration,
>
> (b) undertakes, for a consideration, to tell fortunes[9], or
>
> (c) pretends from his skill in or knowledge of an occult or crafty science to discover where or in what manner anything that is supposed to have been stolen or lost may be found,

---

[8] In R. v Stephenson (1904) 68 J.P. 524 the defendants were successfully indicted for attempting to obtain money by falsely pretending that they had power and ability to foretell future events and that the examination of the palms of the hands of persons enabled them to foretell future events which would thereafter happen to such persons. In the South African case of R. v Nothout [1912] C.P.D. 1037 the statement by the accused that she possessed powers which within reason she could not possess and which she must have known she did not possess was held to amount to false pretences for the purpose of committing fraud.

[9] In R. v Glazenbrook (1975) 23 C.C.C. (2d) 252 it was held that the mere telling of a fortune is not *per se* illegal, as an intent to delude or defraud must also be proved.

is guilty of an offence punishable on summary conviction."

An example of a specific provision to deal with frauds in the field of spiritualism is furnished by the English Fraudulent Mediums Act 1951. That Act repealed section 4 of the Vagrancy Act 1824 in so far as it extended to persons purporting to act as spiritualistic mediums or to execise any powers of telepathy, clairvoyance or other similar powers, or to persons who, in purporting so to act, or to exercise such powers, used fraudulent devices. Instead section 1 of the 1951 Act makes any person who, for reward and not solely for the purpose of entertainment, purports with intent to deceive to act as a spiritualistic medium or to exercise any powers of telepathy, clairvoyance or other similar powers, or in purporting to act as a spiritualistic medium or to exercise any such powers, uses any fraudulent device, guilty of an offence. The Home Office Working Party on Vagrancy and Street Offences thought that it could be argued that the Act was intended to protect honest mediums from the provisions of the Vagrancy Act and that with the repeal of those provisions the 1951 Act would become unnecessary. Furthermore, they had some doubt whether the offence under the Fraudulent Mediums Act was to any significant extent wider than the offence of obtaining property by deception under section 15 of the Theft Act 1968. Their inclination was accordingly to suggest that the Act was probably no longer required.[10] It has now been held at Crown Court level in England that fortune-telling can only be considered as falling within the scope of those powers similar to clairvoyance which are referred to in section 2(b) of the 1951 Act and that the fortune-telling provision of the 1824 Act was expressly repealed by section 2(b).[11] This means that fortune-telling can now only be prosecuted in England under the 1951 Act.[12]

Recommendation

5.9 In the Commission's view the choice is between repealing the offence of fortune-telling under section 4 of

---

[10] Working Paper (1974), para. 83.

[11] R. v Martin [1981] Crim. L. R. 109.

[12] Ibid., Commentary by Diane J. Birch, at 110.

the Vagrancy Act 1824, without replacing it, and introducing a new offence in its place along the lines of section 323 of the Canadian Criminal Code. On balance the Commission recommends repeal without replacement in the light of the fact that fortune-telling cases involving serious fraud could be proceeded against under section 32 of the Larceny Act 1916.

CHAPTER 6 WANDERING ABROAD

Present Law

6.1 Section 4 of the Vagrancy Act 1824, as applied to Ireland by section 15 of the Prevention of Crimes Act 1871, provides that every person wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or wagon, not having any visible means of subsistence and not giving a good account of himself or herself is guilty of an offence and is liable to a maximum of three months' imprisonment.

6.2 There are no reported Irish or English cases on the interpretation of this provision. However, doubts have been expressed as to its constitutionality. In King's case[1] mcWilliam, J. in the High Court thought[2] that there was a great deal to be said for the proposition that the 'wandering abroad' offence could not be consistent with the provisions of the Constitution but, as each offence under section 4 stood on its own, he was not concerned in the instant case to decide whether that offence offended against the provisions of the Constitution or not.

6.3 Another provision that is of relevance in the context of persons "wandering abroad" is section 8 of the Summary Jurisdiction (Ireland) Act 1851, which provides for a summary offence of trespass to land by persons. It provides that any person who shall wilfully trespass in any field, garden, pleasure ground, wood, plantation, or other place, and shall neglect or refuse to leave such place after he has been warned[3] to do so by the owner or by the caretaker or servant of the owner, or by any person authorised in that behalf by the owner, or any person who

---

[1] P.16 , fn. 1 above.

[2] P. 14 of his judgment.

[3] There must be a warning to leave followed by a refusal - the posting of a notice by the owner of the land warning off trespassers is not a sufficient warning to secure a conviction. See O'Connor, The Irish Justice of the Peace (1915), vol. II, p. 1263.

shall again trespass in any such place within three months from the time when such warning shall have been so given to him shall be guilty of an offence and shall be liable to a penalty not exceeding fifty pence or in default of payment to imprisonment for a period not exceeding one week. The section contains a proviso that it shall not extend to any case where the party trespassing acted under a fair and reasonable supposition[4] that he had a right to go into or upon any such place.

Policy Arguments on Reform of the Law

6.4 The "wandering abroad" provision in section 4 of the Vagrancy Act 1924 should not be retained in its present form or anything closely resembling it. As has already been mentioned,[5] the consistency of the provision with the Constitution is open to question. The reference to lack of "visible means of subsistence" is vague and capable of giving rise to arbitrariness of application. It also appears to discriminate against the impoverished and to be "out of keeping with the basic concept inherent in our legal system that a man may walk abroad in the secure knowledge that he will not be singled out from his fellow-citizens and branded and punished as a criminal unless it has been established beyond reasonable doubt that he has deviated from a clearly prescribed course of conduct".[6] The reference to "not giving a good account of himself or herself" suffers from the same defects of vagueness and arbitrariness. To simply drop these "offending" elements from the provision as it now stands would result in an offence which would be too wide in scope and capable of applying in perfectly harmless situations. The question,

---

[4] It is sufficient to show that the act complained of was done in the exercise of a supposed right which the alleged trespasser fairly and reasonably believed he possessed. "The Justices should try whether the Defendant entertained an honest and reasonable belief that he had a right to act as he did, and not take upon themselves to decide the question of right, irrespective of the Defendant's belief" (Mathews v Carpenter (1885) 16 L.R.Ir. 420).

[5] Para. 6.2 above.

[6] Per Henchy, J., in King's case in relation to the offence of "loitering with intent" - see para. 4.2 above.

therefore, is not whether the "wandering abroad" offence should be repealed but whether it should be repealed without replacement or be replaced by a more modern provision which would be constitutionally sound. Is there a useful role for the criminal law to play today in relation to persons who live out or sleep rough?

6.5 The only circumstance in which there would appear to be any case for application of the criminal law in present-day conditions would be where persons sleeping out were causing damage to property or interfering with use or enjoyment of property or were otherwise a source of nuisance. An example of a provision directed at situations like these is section 1 of the English Vagrancy Act 1935, which amends the 1824 Act by making it necessary to prove either:

(a) that the person concerned has on the occasion in question been directed to a reasonably accessible place of shelter where accomodation is regularly provided free of charge and has failed to apply for or refused accommodation there; or

(b) that he is a person who persistently wanders abroad and, notwithstanding that a place of shelter is reasonably accessible, lodges or attempts to lodge as provided in the section; or

(c) that by or in the course of such lodging he causes or appears likely to cause damage to property, infection with vermin or other offensive consequence.

The 1935 Act also deleted the phrase "not having any visible means of subsistence" form the provision in section 4 of the 1824 Act.

6.6 The English Home Office Working Party on Vagrancy and Street Offences considered that some provision was still necessary to

> "protect the public against the nuisance which may be cause by persons sleeping roghh and which, in our view, the criminal law cannot ignore. We think that a criminal sanction is still needed against, for example, the verminous tramp who tries to settle down in the hallway of a block of flats; and vagrants who sleep on the steps and along the corridors of pedestrian subways - sometimes using them as toilets - or who occupy shop

> doorways in public streets and create the same health problem; the group of 'hippie' vagrants which arrives in a seaside resort, spoiling its amenities for others, or the man who sleeps in a farmhouse barn after having been repeatedly told to leave."[7]

They did not think that a new offence should be limited to vagrants in the true sense; it should be capable of applying to anyone who sleeps rough and causes a nuisance by doing so.[8] A new enactment might combine the existing provision in section 1(3)(c) of the Vagrancy Act 1935 relating to infection with vermin and other offensive consequences of sleeping rough, with a more general offence of lodging, in circumstances such as to cause a nuisance in a public place, or, without the consent of the owner or occupier, on private premises or land. The English Working Party did not, however, think that it would be appropriate to attempt to deal, by such an offence, with the difficult and complex social problem of 'squatters' and accordingly they suggested that the offence should not apply to persons who have entered into a settled occupation of a dwelling house.[9] A maximum penalty of a fine of £50 and/or one month's imprisonment was suggested.[10] In May 1981 a Select Committee of the house of Commons[11] recommended that the sleeping rough offence should be retained but should cease to be imprisonable. Effect was given to this recommendation by section 70 of the Criminal Justice Act 1982 so that the maximum penalty in England is now a fine of £200 (see para. 3.5 above).

6.7 In this country the Oireachtas Select Committee on Crime, Lawlessness and Vandalism in its Third Report[12] considered the decriminalisation of certain offences under the Vagrancy Acts, including that of sleeping rough. The Committee decided that it should await the outcome of the

---

7 Working Paper (1974), para. 33.

8 Ibid., para. 34.

9 Ibid., para. 37.

10 Ibid., para. 41.

11 Third Report from the Home Affairs Committee, Vagrancy Offences, H.C. 271, 19 May 1981.

12 Pl. 2697, presented on 16 October 1984.

Working Paper/Report of the Law Reform Commission and any other views that might be submitted before taking a final decision on a proposal by the Simon Community to decriminalise sleeping rough.[13] Nevertheless, the members were concerned that, while there was often a need to remove persons for sleeping rough, there should be an alternative to imprisonment. Some intermediate facilities, such as a hostel, should be available and only in the event of failure to avail of such facilities should resort be had to imprisonment.[14]

6.8 The question of provision of hostel facilities is outside the ambit of the Law Reform Commission's functions. The Commission notes that the introduction of a new scheme of assistance in the form of loans to voluntary groups providing accommodation for homeless persons, among others, was announced by the Minister for the Environment on 29 February 1984. As regards the commission of an offence, or imprisonment for an offence, being made dependent on failure to avail of hostel accommodation, it should be noted that such a position would be difficult to justify if sufficient facilities were not available to meet the actual numbers of homeless persons in a given area and if the provision of acommodation in such hostel were not free of charge (in this latter regard, see section 1 of the English Vagrancy Act 1935[15]). Provided that these conditions were met an offence dependent on a prior failure to avail of hostel accommodation would be feasible and if a sleeping rough offence is to be retained it would be desirable that it should take some such more limited form.

6.9 However, the Law Reform Commission is not convinced of the need for enactment of a modern and more limited provision to replace the "wandering abroad" provision of the Vagrancy Act 1824. The Malicious Damage Act 1861 would cover some situations where actual damage to property was being caused (this Act is, admittedly, in need of modernisation and is on the Commission's First Programme[16]). In so far as vagrant persons who are verminous are concerned, there are in existence the provisions of sections

---

[13] Ibid., para. 4.3.

[14] Ibid., para. 4.4.

[15] See para. 6.5 above.

[16] Prl. 5984, para. 10(7).

46-50 of the Health Act 1947 relating to precautions to be taken by verminous persons and in relation to verminous articles and the disinfestation of verminous persons or buildings. In certain situations where nuisance is caused, the provisions of the Public Health (Ireland) 1878 regarding abatement of nuisance would apply.[17] Those provisions might be in need of modernisation but this would not warrant the retention of a criminal offence to meet the problem of verminous vagrants.

6.10 As far as interference with enjoyment or use of, or creation of a nuisance upon, property are concerned, the position in Ireland differs from that obtaining in England in that there is a summary offence of trespass to land provided for by section 8 of the Summary Jurisdiction (Ireland) Act 1851.[18] The scope of this provision would appear[19] to be limited to "land" in the popular sense, i.e. not including buildings. The appplication of the provision in the present context, though substantial, is nevertheless limited by this fact. Should the provision, therefore, be replaced by a more modern one which would apply to all kinds of property? The difficulty about this course is that such an amendment would have important repercussions in contexts other than that of vagrancy, e.g. in relation to squatting in premises where the entry and the remaining in occupation were not forcible.[20] Any question of extending the scope of section 8 in this way would need to be considered as part of a general examination of offences of entering and

---

[17] By virtue of section 27 of the Local Government Act 1925 any tent, van, shed, etc. used for human habitation which is in such a state or so overcrowded as to be a nuisance or injurious to health is deemed to be a nuisance for purposes of the 1878 Act.

[18] See para. 6.3 above.

[19] There is no reported authority on the point but the section refers to trespass "in any field, garden, pleasure ground, wood, plantation, or other place" and it would seem, on ordinary principles of construction, that the words "or other place" would require to be construed eiusdem generis with "field, garden, etc." and would not include buildings.

[20] If either the entry or the remaining in occupation were forcible, there would be an offence under section 2 or section 3 of the Prohibition of Forcible Entry and Occupation Act 1971.

remaining on property. It would widen the scope of the present Report too much to exmaine this question. It is considered, however, that the maximum penalty provided for under section 8 should be increased to a fine of £500 and/or six months' imprisonment. In addition, a new offence of trespassing on residential premises in a manner which causes or is calculated to cause nuisance or annoyance or fear to another person is proposed in paragraph 14.11 below.

6.11 The non-application of section 8 to trespass in buildings does not, in any event, leave the owner of a building in which a vagrant is lodging and interfering with the enjoyment or use of the property or causing a nuisance entirely helpless. He can eject the trespasser and any physical resistance constitutes an offence of forcible occupation of land, under section 3 of the Prohibition of Forcible Entry and Occupation Act 1971. Situations where vagrants lodge and cause a nuisance in public places such as subways, porticos of public buidings, roadside or seaside shelters or tents, might still present problems where no appropriate local bye-laws exist to prohibit their doing so. The Law Reform Commission's view, however, is that neither the nature nor the scale of the nuisance that might be presented by such situations is likely to be such as to warrant the application of a specifically designed criminal sanction against such socially maladjusted persons.

6.12 There is a specific problem associated with trespass to land involving persons "wandering abroad", viz. that of itinerants' animals trespassing on farmers' lands and causing damage to crops, meadowland, etc. This has been a cause of tension between the settled community and itinerants for many years now. In 1963 the Commission on Itinerancy had this to say on the matter:

> "It cannot be too strongly emphasised that due to the increasing value of both crops and animals and to the cost of repairs and the scarcity of labour a continuing disregard by itinerants for the rights of owners of land, and of farm lands in particular, can lead only to an evergrowing and justifiable resentment by the owners against the itinerants and the danger of acts of violence taking place. It does not require great imagination to understand the feelings of the farmer who ovenight sees a field of promising crops reduced to ruin, finds his valuable animals have strayed out through his damaged fences, and the woodwork of his fences and out-buildings stolen or wrecked. Apart altogether from the question of the proper protection which the farmer is entitled to receive it is to the

> ultimate benefit of the itinerant population itself that every practicable step should be taken to prevent the commission of acts of damage of the type described and punish it with the full severity of the law."[21]

The Law Reform Commission considers that, while the scale of this problem may not be as great as it once was, it is still sufficient to warrant a provision to the effect that any person who, without the permission of that other person, by negligence or otherwise causes or permits any horse, ass or other animal or any vehicle to be on the land of another person or lights any fire thereon or interferes with fences or gates to facilitate such acts or who commits any nuisance on the lands of another shall be guilty of an offence. There should be a burden on the accused person to adduce evidence (which would be sufficient to raise an issue on the matter) that:

(i) he had the permission of the owner of the land for his acts, and

(ii) once it is established that he was the owner of any animal or vehicle found trespassing, that he did not cause or permit the trespass.

It should be provided also that any act of ownership or control over an animal or a vehicle would be evidence of ownership or of the right to custody. The maximum penalty for the offence should be a fine of £500 and/or six months' imprisonment.

6.13 This proposal is a modification of part of the proposals of the Commission on Itinerancy[22] which related to acts done by "a person of no fixed abode". In the light of the Supreme Court's strictures in King's case[23] on status-related offences, the proposed offence should be widened to cover all persons doing any of the specified acts. This would extend the scope of the offence considerably - e.g. to trespass by a farmer's animals on the

---

[21] Report of the Commission on Itinerancy (1963, Pr. 7272), Chapter XIV, para. 10.

[22] Report, Chapter XIV, para. 14.

[23] Chapter 4 above.

land of a neighbouring farmer. However, the requirement that the animals have been "caused or permitted" to trespass on the other person's land should obviate any danger that the offence might apply to cases where animals trespass without negligence on their owner's part.

Recommendation

6.14 The offence of "wandering abroad" under section 4 of the Vagrancy Act 1824 should be repealed and not be replaced by any corresponding provision and the maximum penalty for an offence of trespass to land under section 8 of the Summary Jusisdiction (Ireland) Act 1851 should be increased to a fine of £500 and/or imprisonment for six months. There should be a new offence, similarly punishable, of negligently or otherwise causing or permitting animals to trespass on another person's land etc. or committing any nuisance on the lands of another.

CHAPTER 7 INDECENT EXHIBITION

Present Law

7.1 Under section 4 of the Vagrancy Act 1824 it is an offence, punishable with three months's imprisonment, for any person to wilfully expose to view in any street, road, highway or public place any obscene print, picture or other indecent exhibition.[1]

7.2 There are cognate provisions in other statutes. Section 14(12) of the Dublin Police Act 1842 provides that every person who within the limits of the Dublin police district in any thoroughfare or public place shall sell or distribute, or offer for sale or distribution, or exhibit to public view, any profane, indecent or obscene book, paper, print, drawing, painting or representation, or sing any profane, indecent or obscene song or ballad or write or draw any indecent or obscene word, figure, or representation, or use any profane, indecent or obscene language, to the annoyance of the inhabitants or passengers is guilty of an offence and liable to a penalty not exceeding £2. Section 72 of the Towns Improvement (Ireland) Act 1854 contains a similar provision, making every person who, in the towns to which the Act applies, in the street, publicly offers for sale or distributes or exhibits to the public view any profane, indecent, or obscene book, paper, print, drawing, painting or representation or sings any profane or obscene song or ballad, liable to a penalty not exceeding £2. Also, section 28 of the Town Police Clauses Act 1847 contains a provision indentical to that contained in section 72 of the 1854 Act. Section 3 of the Indecent Advertisements Act 1889, as amended by section 17(2) of the Censorship of Publications Act 1929, makes guilty of an offence (maximum penalty a fine of £10 or three months' imprisonment) anyone who

---

[1] In England section 2 of the Vagrancy Act 1838 (which never applied to Ireland) extended this offence to any person wilfully exposing or causing to be exposed to public view in the window or other part of any shop or other building in any street, road, highway or public place, any obscene print, picture or other indecent exhibition.

> "affixes to or inscribes on any house, building, wall, hoarding, gate, fence, pillar, post, board, tree, or any other thing whatsoever so as to be visible to a person being in or passing along any street, public highway, or footpath, and whoever affixes to or inscribes on any public urinal, or delivers or attempts to deliver, or exhibits, to any inhabitant, or to any person being in or passing along any street, public highway or footpath, or throws down in the area of any house, or exhibits to public view, in the window of any house or shop, any picture or printed or written matter which is of an indecent or obscene nature."

Section 17(1) of the Censorship of Publications Act 1929, as amended by section 12(2) of the Health (Family Planning) Act 1979 provides that the reference contained in section 3 of the 1889 Act to printed matter which is of an indecent or obscene character shall be deemed to include

> "advertisements which relate or refer or may be reasonably supposed to relate or refer to any disease affecting the generative organs of either sex, or to any complaint or infirmity arising from or relating to sexual intercourse, or to the prevention or removal of irregularities in menstruation, or to drugs, medicines, appliances, treatment, or methods for procuring abortion or miscarriage."

7.3 At common law "[e]xhibitions of an obscene, indecent, or grossly offensive and disgusting character .... are regarded as indictable misdemeanours, such as the performance of an obscene or indecent play."[2] This common law offence covers the public exhibition of indecent acts as well as indecent things.[3] The offence of indecent exhibition under section 4 of the Vagrancy Act 1824, on the other hand, does not cover an exhibition of indecent human behaviour. In McWhirter v I.B.A.[4] Lawton, L.J. in the English Court of Appeal appears to have been of the view that such an exhibition would be an offence under that section. The better view, however, would seem to be that

---

[2] Russell on Crime (12th ed., 1964), p. 1758, cited with approval in A.G. v Simpson, 93 I.L.T.R. 33.

[3] See the English Law Commission's Report on Conspiracy and Criminal Law Reform (Law Com. No. 76), paras. 3.27-3.28.

[4] [1973] 1 All E.R. 689, at 695.

the reference to "other indecent" exhibition in that section must be read ejusdem generis with "print, picture" and so is confined to indecent material. So far as is known no prosecution has ever been taken either in Ireland or in Great Britain under the Vagrancy Act in respect of a live show. The other offences referred to in para. 7.2 above would also apply only to material. The scope of the present review of the law is confined to the public display of indecent material and does not cover the public exhibition of indecent or obscene performances.

7.4 It is the offences outlined in the preceding two paragraphs that are subject to review in this Report. However, it is necessry by way of background to refer to a number of other statutory provisions that have a bearing on this review, though they are not themselves part of the subject matter of it. Section 42 of the Customs Consolidation Act 1876 prohibits the importation of indecent or obscene prints, paintings, photographs, books, cards, litographic or other engravings or any other indecent or obscene articles. Under section 63 of the Post Office Act 1908 it is an offence to send or attempt to send a postal packet which either encloses any indecent or obscene print, painting, photograph, lithograph, engraving, book, or card, or any indecent or obscene articles, whether similar to the above or not, or has on the packet, or on the cover thereof, any words, marks or designs of an indecent, obscene or grossly offensive[5] character.

7.5 The provisions of the Censorship of Publications Acts and the Censorship of Films Acts also have to be borne in mind. By section 18 of the Censorship of Publications Act 1929 it is an offence punishable with a fine of £100 or six months' imprisonment to sell or offer, expose or keep for sale, or import for sale any indecent picture. Section 19 of the 1929 Act provides for the issue of search warrants in respect of premises where there is reasonable ground for suspecting that any indecent pictures are kept for sale. Under section 14 of the Censorship of Publications Act 1946 it is an offence punishable with a fine of £50 and/or imprisonment for 6 months to sell, or expose, offer, advertise or keep for sale or distribute or offer or keep for distribution any prohibited book or any prohibited publication. Indecency or obscenity are among the grounds on which, under sections 7 and 9 of the 1946 Act, a

---

[5] See Dillon v Minister for Posts and Telegraphs, unreported, Supreme Court, 3 June 1981 (142/81).

prohibition order may be made by the Censorship Board in respect of a book or publication. Under section 5 of the Censorship of Films Act 1923 it is an offence to exhibit in public by means of a cinematograph or other similar appparatus any picture which has not been certified by the Official Censor to be fit for exhibition in public. Under section 7 of the 1923 Act the Official Censor may refuse a certificate where he is of opinion that a picture is "unfit for general exhibition in public by reason of its being indecent, obscene or blasphemous or because the exhibition thereof in public would tend to inculcate principles contrary to public morality or would be otherwise subversive of public morality." As far as television broadcasts are concerned, section 11 of the Wireless Telegraphy Act 1926 makes it an offence to send any indecent, obscene or offensive message or communication by wireless telegraphy (which would cover television transmissions).

7.6 The word 'indecent', as used in section 4 of the Vagrancy Act 1824 and the other provisions of nineteenth century legislation referred to in para. 7.2 above, is not defined. The Censorship of Publications Act 1946[6] does define the word as including "suggestive of, or inciting to, sexual immorality or unnatural vice or likely in any other similar way to corrupt or deprave". The word 'obscene' is not defined in any Irish legislation. In R. v Hicklin,[7] a case concerning a common law misdemeanour of obscene or indecent exhibition, it was held that the test for obscenity is whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. In Attorney General v Simpson[8] this definition was adopted, as was also that given in an American case[9] to the effect that obscene material is material which deals with sex in a manner appealing to prurient interest (which is not synonymous with material having a tendency to arouse lustful thoughts or desires).

---

[6] Section 1 of the 1946 Act, repeating a definition given in the 1929 Act.

[7] (1868) L.R. 3 Q.B. 360.

[8] (1959) 93 I.L.T.R. 33.

[9] Roth v United States, 354 U.S. 476 (1957).

7.7 In R. v Stanley[10] the Court of Appeal in England held that the words "indecent or obscene" in section 11(1)(b) of the English Post Office Act 1953 conveyed one idea, namely, offending against the recognised standards of propriety, indecent being at the lower end of the scale and obscene at the upper end of the scale. The Court agreed with what had been said in the Scottish case of M'Gowan v Langmuir:[11]

> "I do not think that the two words 'indecent' and 'obscene' are synonymous. The one may shade into the other but there is a difference of meaning. The matter might perhaps be roughly expressed thus in the ascending scale: Positive-Immodest; Comparative-Indecent; Superlative-Obscene. These, however, are not rigid categories. The same conduct which in certain circumstances may merit only the milder description, may in other circumstances deserve a harder one. 'Indecent' is a milder term than 'obscene' ...."

The Home Office Working Party on Vagrancy and Street Offences summarised the position obtaining in English law as follows:[12]

> "Although there is not complete consistency in the choice between the standards of obscenity and indecency in the relevant provisions, the broad distinction which can be extracted from the present law appears to be to apply the narrow standard of obscenity to every situation, including private transactions, while confining the use of the wider standard of indecency to material placed on public display. The general effect, therefore, is to place the minimum restrictions on the freedom of the individual to read such material as he may choose, but to afford some protection to the public from gratuitous affront."

Such a broad distinction can scarcely be extracted from existing law in this country in view of the fact that the definition of indecency in the Censorship of Publications

---

10 [1965] 1 All E.R. 1035, at 1038.

11 1931 S.C. (J.) 10, at 13.

12 Working Paper (1974), para. 120.

Act 1929 is very similar to the common law test of obscenity and that in Simpson's case no distinction appears to have been drawn between indecency and obscenity.

Policy Arguments on Reform of the Law

7.8 Is there is a need to replace the existing provisions by a modern provision creating an offence of public exhibition of indecent matter? To answer this question it is necessary to consider what, if any, are the areas in which a problem might arise from the public display of indecent material. The Censorship of Publications Acts and the Censorship of Films Acts have a large bearing here. The provisions of the latter Acts would apply to the public exhibition of a film. The English Home Office Working Party on Vagrancy and Street Offences recommended that there should be a new offence to prevent peep show machines (i.e. machines which produce moving pictures on the insertion of a coin or token) being used in public places to show indecent material.[13] Pictures shown on such machines in this country would be covered by the Censorship of Films Acts and would require a certificate from the Official Censor. It is understood that successful prosecutions have been brought on the basis that video recordings being exhibited in public are also covered by those Acts.[14] Even if they were not, any measure that might be taken in relation to public showing of indecent or obscene video films would need to be considered in the context of the censorship legislation because of the interrelationship between the public showing of such films through the video medium and the showing of the same films in commercial cinemas where they would be subject to the provisions of that legislation. Public

---

13 Report (1976), para. 26. The English Indecent Displays (Control) Act 1981, which replaced the indecent exhibition provision of the Vagrancy Act 1824 by a new offence of public display of indecent matter, did not make any specific provision in relation to peepshow machines.

14 These prosecutions were brought under section 5 of the 1923 Act which prohibits the exhibition of a picture in public without a certificate by means of a cinematograph or other similar apparatus. On the other hand section 9 of the Act speaks of exhibition of a picture "by means of a film" which might not cover video-tape playback machines.

showing of video films ought, therefore, to be left out of account for the purpose of determining whether a new offence of public display of indecent matter should replace the existing indecent exhibition offences.

7.9 Books and periodicals are covered by the Censorship of Pulications Acts. Nevertheless there it a difficulty that a book or periodical which has not been prohibited under those Acts may be regarded by many people as being unsuitable, because of its sexual content, for public display in such a way that it could readily catch the eye of and be inspected by children - e.g. a magazine displayed low down in a rack in a newsagents which was also a sweet shop. The English Home Office Working Party on Vagrancy and Street Offences adverted to the problem[15] of such display and proposed a new offence of exposure to view of indecent material which would "extend to such places as (a) the street (including privately owned shopping arcades and access ways thereto); (b) shop windows or other parts of shops or buildings visible from the street; and (c) displays inside shops and other premises to which the public have free access."[16] This proposal, insofar as it was intended to cover books and periodicals, was clearly aimed at material whose sale would be prohibited in this country under the Censorship of Publications Acts. A provision of this sort would not be appropriate here because it would apply to all displays, not just those to which children might have access, and because it would be directed at books and periodicals whose sale was not prohibited under the Censorship of Publications Acts. Since prohibitions under these Acts can be imposed on grounds of indecency or obscenity, it would be undesirable that a publication which had not been prohibited should be capable of being the subject matter of an offence of public display of indecent material, at least in so far as display to adults is concerned. It is difficult to envisage how a workable

---

[15] Working Paper (1974), para. 135.

[16] In England the Indecent Displays (Control) Act 1981 which was a Private Member's Bill prohibits display of indecent matter in any place to which the public have or are permitted to have access (whether on payment or otherwise) except a shop or any part of a shop to which the public can only gain access by passing beyond an adequate warning notice which must indicate that persons passing beyond the notice will find material on display which they may consider indecent and that persons under 18 are not admitted.

offence could be devised to cover public displays of "immodest"[17] publications in such a manner that children could have ready access to them. There would be difficulties with definition of the kind of publications to be covered - the term "indecent" could scarcely be used since if the material were indecent it should presumably have been banned under the Censorship of Publications Acts. Besides, whatever definition was used, there would be difficulties for shopkeepers in identifying what material was covered and what was not. There would be a problem in realtion to limits on the age of peresons to whom the material should not be displayed, as is evidenced by experience in other areas where such limits apply. Most importantly, the publications in question would have to be capable of being displayed for adults to see but in such a way that children could not reach or inspect them. It would be very unsatisfactory that the commission or otherwise of a criminal offence should depend upon whether a shopkeeper's conduct had fallen on one side or the other of such a necessarily fine and vague line.

7.10 The conclusion would seem to be that, given the existence of the Censorship of Publications Acts, the creation of a criminal offence relating to display would not be the appropriate way to deal with exposure of children to publications with a sexual content in shops. The prohibition of the sale of indecent or obscene publications is provided for by the Censorship of Publications Acts. As far as material with a "milder" sexual content is concerned, public opinion, expressed through direct representations to newsagents and other shopkeepers in particular instances, should provide a reasonably effective means of ensuring that, so far as possible, responsible display practices vis-a-vis children are in general adhered to. Criminalising the conduct of shopkeepers in displaying material which is already subject to the provisions of the Censorship of Publications Acts would not seem to be the answer.

7.11 Films and publications are, then, subject to the consorship legislation and a specific offence of indecent exhibition would not be necessary where they are concerned. This leaves public display of indecent pictures, photographs, signs, advertisements and objects, none of which is covered by the censorship legislation (there is the

---

[17] The first step on the ascending scale "immodest/indecent/ obscene" referred to in <u>M'Gowan v Langmuir</u> - see para. 7.7 above.

offence of sale etc. of indecent pictures under section 18 of the Censorship of Publications Act 1929[18] but, of course, pictures could be displayed otherwise than for sale). The public display of indecent material of this kind, which would be offensive to most people, should continue to be an offence. Besides, it would scarcely be defensible that display of such material would not be an offence, while similar material contained in a film or publication could be banned under the censorship legislation. The matter to be covered by the offence should include all matter other than what is covered by the Censorship of Films Acts and the Censorship of Publications Acts.

7.12 As regards the places to be covered by the offence, the present Vagrancy Act provision covers an indecent exhibition exposed to view "in any street, road, highway or public place". No definition of "public place" is given in the Vagrancy Acts. In O'Connor v Synnott[19] it was held that "public place" (as used in the Licensing Act 1872) meant a place to which the public have a right to resort and not a place to which they may resort by permission. If this interpretation were applied to the Vagrancy Act provision relating to indecent exhibition that provision would not apply to material exposed to view in any building to which the public did not have a right to resort. The position would be otherwise, however, if an interpretation similar to that given by section 2 of the Gaming and Lotteries Act 1956 were applied. It defines "public place" as "any place to which the public have access whether as of right or by permission and whether subject to or free of charge". The proposed new offence should extend to all places (including streets and roads) to which the public have access, whether on payment or otherwise. An exception for exhibitions, inside premises, of works of art might be considered. There would be very great difficulties of definition involved, however, and the provision of such an exception would be likely only to substitute the question whether a particular picture or whatever was a work of art for the question whether it was indecent. In any event the courts would be unlikely to interpret the term "indecent" over-widely so as to cover genuine works of art. Public museums and art galleries should be exempted anyway. Television broadcasts should also be exempted.[20]

---

18 Para. 7.5 above.

19 (1902) 36 I.L.T.R. 239.

20 See para. 7.5 above.

7.13 Should the test to be applied for the purpose of the proposed new offence be indecency of the matter displayed or its obscenity or should both be referred to? As we have seen,[21] the censorship legislation uses both terms, "indecent" and "obscene", and does not draw any clear distinction between them and in Simpson's case[22] the two seem to have been treated as if they were virtually synonymous. If the distinction drawn between the two terms in the English and Scottish cases is accepted, then the wider standard, that of indecency, would be the appropriate one to be applied to material placed on public display. The distinction is a useful one and accordingly the proposed new offence should refer to indecent matter and omit any reference to obscenity. Should the term "indecent" be defined? A definition similar to that given in section 1 of the Censorship of Publications Act 1946[23] would not be suitable because it is too close to what a definition of "obscene" should be. No satisfactory definition of "indecent", which would not suffer from at least the same degree of imprecision as the term itself, readily suggests itself and the best course would be to use the term undefined in the hope that the courts would interpret it as conveying the same idea as "obscene" but as being a rather milder term.[24]

7.14 Section 14(12) of the Dublin Police Act 1842, which it is proposed should be repealed, in addition to providing for an offence of indecent exhibition also makes it an offence to "sing any profane, indecent or obscene song or ballad or write or draw any indecent or obscene word, figure, or representation, or use any profane, indecent or obscene language" in any thoroughfare or public place to the annoyance of the inhabitants or passengers. Section 72 of the Towns Improvement (Ireland) Act 1854 and section 28 of the Town Police Clauses Act 1847 also make it an offence to sing any profane or indecent song or ballad in the street. The proposed new offence of public display of indecent material would cover the writing or drawing of any indecent word, figure or representation in a public place. Serious

---

21 Paras 7.4-7.5 above.

22 Para. 7.6 above.

23 M'Gowan v Langmuir, para. 7.7 above. The English Indecent Displays (Control) Act 1981 does not define "indecent".

24 Section 12 of the Licensing Act 1872.

instances of profanity in public would be capable of being dealt with under other headings, such as drunkenness and disorderliness[25] or conduct likely to lead to a breach of the peace.[26] There would not appear to be much point in applying the sanctions of the criminal law in present-day conditions to profane singing or language in public per se.

7.15 As we have seen,[27] advertisements relating to sexual diseases, regulation of menstruation and methods for procuring abortion or miscariage are deemed to be indecent advertisement. Control of the advertising and display of contraceptives is now provided for by section 7 of the Health (Family Planning) Act 1979. Advertisements relating to sexual diseases and menstruation should no longer be deemd to be indecent of their very nature but their indecency or otherwise should be judged by their content like any other matter on public display. Advertisements advocating the procurement of abortion or miscarriage or relating to any drugs, medicines, appliances or methods for procuring abortion or miscarriage should, however, be deemed to be covered by the proposed new offence of display of indecent matter.

Penalties and Procedure

7.16 The proposed new offence of indecent display should be triable summarily only and carry a maximum penalty of a fine of £500 and/or six months' imprisonment. Section 6 of the Indecent Advertisements Act 1889 enables a member of the Garda Siochana to arrest without warrant any person whom he finds committing any offence against the Act. It is considered that such an outright power of arrest without warrant would not be necessary in relation to the proposed new offence of indecent display but that the power should be confined to situations where a Garda has demanded his name and address of a person whom he reasonably suspects of committing or having committed an offence and that person refuses to give his name and address or gives a name and address which the Garda reasonably believes to be false or

---

[25] Section 14(13) of the Dublin Police Act 1842.

[26] Section 14(13) of the Dublin Police Act 1842.

[27] Para. 7.2 above.

misleading. In order to prove the indecent nature of the material displayed, the Gardai would also require power to seize and retain articeles found which would be evidence of the commission of an offence of indecent display. Common law powers of seizure of matter that appears to be evidence of a crime might be relied upon, but it would be as well to explicitly cover the point by a provision along the lines of section 9 of the Criminal Law Act 1976. Provision should also be made for the issue by District Justices and peace commissioners of warrants to search buildings, etc. where it is reasonably suspected that indecent matter is kept which has been used in the commission of an offence.[28]

Recommendations

7.17 The common law offence of indecent exhibition should be repealed in so far as it applies to exhibition of indecent matter. So should the following provisions: the indecent exhibition provisions in section 4 of the Vagrancy Act 1824, section 72 of the Towns Improvement (Ireland) Act 1854 and section 28 of the Town Police Clauses Act 1847; section 14(12) of the Dublin Police Act 1842; and the whole of the Indecent Advertisements Act 1889. A new provision should be enacted making it an offence to display indecent matter in any place to which the public have access, whether as of right or by permission and whether on payment or otherwise. The provision would not apply to "pictures" within the meaning of the Censorship of Films Acts, to books or periodical publications within the meaning of the Censorship of Publications Acts, to public museums or art galleries or to television broadcasts. Advertisements advocating the procurement of abortion or miscarriage or relating to drugs, medicines, appliances or methods for procuring abortion would be deemed to be covered by the provision. The new offence would be triable summarily only and would carry a maximum penalty of a fine of £500 and/or 6 months' imprisonment. The Gardai would have power to demand name and address of suspects and to arrest without warrant in default. They would also be empowered to seize

---

28 See, for example, section 19 of the Censorship of Publications Act 1929 and section 17 of the Censorship of Publications Act 1946.

articles found which would be evidence of the commission of an offence and District Justices would be enabled to issue warrants to search buildings etc. where a member of the Garda Siochana not below the rank of superintendent is satisfied that there is reasonable ground for believing that indecent matter is kept which has been used in the commission of an offence.

CHAPTER 8 INDECENT EXPOSURE

Present Law

8.1 Under section 4 of the Vagrancy Act 1824 every person "wilfully, openly, lewdly and obscenely exposing his person in any street, road or public highway, or in the view thereof, or in any place of public resort, with intent to insult any female" is guilty of an offence punishable with a maximum of three months' imprisonment. This offence is confined to exposure by a male to a female and requires an intent to insult. In the English case of Evans v Ewals[1] it was held that "person" means "penis" and does not refer to other parts of the body.

8.2 Offences of a similar kind are provided for in other legislation. Section 5 of the Summary Jurisdiction (Ireland) (Amendment) Act 1871 makes any person "who within the limits of the police district of Dublin Metropolis, in any thoroughfare or public place, shall wilfully and indecently expose his person or commit any act contrary to public decency", liable to a fine not exceeding five pounds or imprisonment for a period not exceeding two months. Section 72 of the Towns Improvement (Ireland) Act 1854 and section 28 of the Town Police Clauses Act 1847 make provision for an almost identical offence, punishable by a fine not exceeding two pounds. Intent to insult a female is not a necessary ingredient of these offences.

8.3 The offences considered in the preceding two paragraphs may in general be said to be directed at the sexually motivated male exhibitionist. This is not the only kind of sexual behaviour or exposure of the body in public that comes within the ambit of the criminal law. There is also a wider offence of indecent exposure at common law. It is a misdemeanour at common law to do any act in public in such a way as to offend modesty or cause scandal or injure the morals of the community.[2] Following recent

---

[1] [1972] 2 All E.R. 22.

[2] O'Connor, The Irish Justice of the Peace (1915), Vol. II, p. 242.

cases,[3] the tendency in England now is to express the conduct covered by this misdemeanour as being to commit an act in public which outrages public decency. Smith and Hogan[4] put the matter thus:

> "It is a common law misdemeanour to commit an act outraging public decency in public and in such a way that more than one person sees, or is at least able to see, the act. The most common way of committing this offence is by indecently exposing the body."

Acts covered by the offence include the following: exposure of the naked body or the sexual organs,[5] bathing in the nude,[6] sexual intercourse in public[7] and homosexual conduct in public.[8] An indecent exposure seen by one person only, and capable of being seen by one person only, is not an offence at common law.[9] It is not clear whether two persons must actually have seen the act or whether it is sufficient that the act was done in a place where two or more persons might have been expected to pass by and see it.[10] The requirement that the act occurs in public has been given a wide interpretation. It has been held, for example, that an act committed in a field out of sight of a

---

3 Mayling [1963] 1 All E.R. 687; Knuller [1972] 2 All E.R. 898.

4 Criminal Law, 4th ed. (1980), p. 436.

5 Sedley's Case (1663) 1 Sid. 168; R. v Reubegard (1839), cited in T. & M. 25; R. v Holmes (1853) 6 Cox C.C. 216; R. v Thallman (1863) 9 Cox C.C. 388.

6 R. v Crumden (1809) 2 Camp. 89; R. v Reed (1871) 12 Cox C.C.

7 R. v Elliot (1861) Le. & Ca. 103.

8 R. v Bunyan and Morgan, (1844) 1 Cox C.C. 74; R. v Harris and Cocks (1871) 11 Cox C.C. 659.

9 R. v Reubegard, fn. 5 above; R. v Watson (1847) 2 Cox C.C. 376; R. v Webb (1848) 3 Cox C.C. 183; R. v Farrell (1862) 9 Cox C.C. 446 (Irish case).

10 Smith and Hogan, op. cit., p. 437; R. v Mayling [1963] 1 All E.R. 687.

public footpath was covered because the place in question was one to which the public habitually went without hindrance although they had no strict legal right to do so.[11] The common law offence is not confined to exposure by males and it is not necessary that there be exposure to a person of the opposite sex or any intent to insult or annoy. Smith and Hogan[12] submit that it must at least be proved that the defendant intended that, or was reckless whether, the exposure might be seen by two or more persons who do not consent to see it.

8.4 Section 18 of the Criminal Law Amendment Act 1935 provides for a statutory offence that is very similar to the offence at common law. The section provides that every person who shall commit, at or near and in sight of any place along which the public habitually pass as of right or by permission, any act in such a way as to offend modesty or cause scandal or injure the morals of the community shall be guilty of an offence and liable on summary conviction to a fine of two pounds or imprisonment for a period not exceeding one month. It is noteworthy that the section does not contain any requirement that the act should have been seen or been capable of being seen by more than one person or that it should in fact have been seen at all by anybody.[13] A great variety of behaviour is covered by the section, ranging from "streaking" to sexual intercourse or other overt sexual behaviour in public. In terms the section would cover sexually motivated indecent exposure by a male to a female but it was not in fact introduced with

---

[11] R. v Wellard (1884) 14 Q.B.D. 63. Other places held to be covered include: a public omnibus (R. v Holmes (1853) 6 Cox C.C. 216); a public urinal (R. v Harris and Cocks (1871) 11 Cox C.C. 659; contra R. v Orchard and Thurtle (1848) 3 Cox C.C. 248); the locked parlour of a public house where the act was seen through the window of another room (R. v Bunyan and Morgan (1844) 1 Cox C.C. 74); the roof of a private house which could be seen only from other houses (R. v Thallman (1863) 9 Cox C.C. 388). Smith and Hogan (op. cit., p. 436) conclude that it is doubtful if "in public" adds anything to the requirement that two or more persons must have been able to see the act.

[12] Op. cit., p. 437.

[13] But, of course, in practice it would be necessary that there have been at least one witness for a charge to be brought at all.

that purpose in mind. At the time of the introduction of the provision the reason given in the Dail for it was that prosecutions for unseemly conduct could not be taken summarily in the District Court and it was thought undesirable to have to proceed by way of indictment.[14] Indecent exposure was alredy triable summarily under the Vagrancy Act, so the new provision clearly was not directed at that type of conduct.

Policy Arguments on Reform of the Law

8.5 The existing offences in this area overlap each other considerably and need to be rationalised. Three distinct forms of conduct need to be considered

(i) sexually motivated indecent exposure by males to females,

(ii) nudity in public (including "streaking"), and

(iii) sexual intercourse and other overt sexual behaviour in public.

The first of these kinds of conduct is in a different category from the other two. It constitutes a sexual offence rather than an offence in the nature of public nuisance.

8.6 The three kinds of conduct referred to must now be considered in turn, beginning with sexually motivated male exhibitionism. The existing offence under the Vagrancy Act 1824 suffers from a number of defects.

> "The language used in the Vagrancy Act is archaic and tautologuous. Advocates, appearing for offenders charged with the offence have occasionally been known to declaim impressively that the exposure 'must not only be done wilfully, but openly and lewdly and obscenely and with intent to insult and lay benches have sometimes been so intimidated by this list of

---

[14] Dail Debates, vol. 53, col. 1248.

> essentials that they have found the offence not proved. The wording of the Town Police Clauses Act, 1847, s. 28, 'wilfully and indecently exposes his person', seems preferable and little would be lose by the omission of the element of 'intent to insult a female'."[15]

We do not, of course, have 'lay benches' in this country but the multiplication of modiying adverbs in the Vagrancy Act provision unnecessarily complicates it. The requirement of intent to insult a female should be removed because very often the existence of such intent will be debatable, the offender's motivation being sexual gratification. The presence or absence of the intent does not affect the garvity of the conduct once consent on the part of the other person is absent. The English Home Office Working Party on Vagrancy and Street Offences, while considering that the exact form of words was a matter for the draftsman, did not commend a definition of the offence that would involve use of the concept of "indecently" but suggested that the essence of the offence should be exposure of the genital organs in circumstances such that the exposer knew or ought to have known that his exposure was likely to be seen by persons to whom the exposure was likely to cause offence.[16] This is a very wide definition,[17] which would cover male nudity in public where there was no sexual motivation.

8.7 In England section 42 of the Criminal Justice Act 1925 removed the limitation of the provision in section 4 of the Vagrancy Act 1824 to acts committed in "any street, road or public highway, or in the view thereof, or in any place of public resort". Such an extension of the scope of the offence has much to recommend it. Once the exposure is sexually motivated and there is lack of consent on the part of the person to whom it is made, the place where it occurs is not relevant. As the Home Office Working Party put it: "A man should not be immune from prosecution if he exposes himself to, say, a fellow visitor in an hotel rather than in the street".[18] In a number of other common law

---

[15] Sexual Offences, Radzinowicz (1957), p. 428.

[16] Working Paper (1974), para. 161.

[17] See Leigh, "Indecency and Obscenity" [1975] Crim. L. R. 413, at 414.

[18] Working Paper (1974), para. 161.

jurisdictions the offence of indecent exposure is not confined to public places but may be committed in any place.[19]

8.8 Should the offence continue to be confined to exposure by a male to a female? An argument might be raised that there would be discrimination against male "exhibitionists" if the offence were not to apply to exposure by females as well.[20] However, it can be argued that the existing offence takes account of acknowledged differences in sexual behavioural tendencies th t exist as between men and women. The English Law Commission in their Report on Conspiracy and Criminal Law Reform[21] considered the question of exposure by females:

> "Upon consultation a considerable number, although by no means all, of our commentators took the view that female exposure should be penalised in the same way as male exposure, and that this should be accomplished by extending the offence proposed by the Home Office Working Party to the female. However, no comment was made upon the difficulties of definition this would inevitably entail. Furthermore, we were given no indication of why such an offence was thought to be necessary, and no evidence was brought to light which demonstrates that female exposure at present constitutes any kind of social problem. Accordingly, notwithstanding the comments we have received on this problem, we adhere to the provisional view in our working paper that no offence should be created specifically to penalise female exposure. We have pointed out (and having regard to our consultation, it is a factor requiring emphasis) that, so far as exhibitionism is concerned, the male behaviour has no counterpart in the female, and corresponding criminal sanctions are therefore not required."

---

[19] See: Canadian Criminal Code, section 169(b); New Zealand Crimes Act 1961, section 126; American Law Institute's Model Penal Code, Art. 213.5.

[20] It might be noted that the provisions referred to in fn. 19 above are not confined to male offenders.

[21] Law Com. No. 76 (1976), para. 3.106.

8.9 "Streaking", "toplessness" and other instances of nudity in public should continue to constitute an offence. Such nudity is offensive to the great majority of people as being contrary to public decency and order and arguments that it is harmless, as being mere unconventional behavour or little more than a prank are not convincing. As regards sexual intercourse or other overt sexual behaviour in public, the English Law Commission in their Report on Conspiracy and Criminal Law Reform[22] recommended that a new offence be created penalising any person who has sexual intercourse or engages in sexual behaviour in such circumstances that he knows or ought to know that his condict is likely to be seen by other persons and is likely to cause them serious offence. It seem that the reference to "serious" offence was designed to exclude the "courting couple" from the ambit of the provision.[23] It was not thought possible to define the conduct to be penalised in terms of acts of "indecency", whether or not qualified by the adjective "gross" because some of the acts concerned, such as sexual intercourse itself, only become offensive by reason of the circumstances in which they take place.[24] The proposed offence was not confined to conduct in a public place. The maximum penalty proposed was a fine of £100.

8.10 The Criminal Law Revision Committee in England have also made proposals for an offence to deal with sexual acts in public.[25] They recommended that it should be an offence for two or more persons to have sexual intercourse or perform an act of gross indecency -

(a) in a public place, or

(b) in a place visible from a public place or from other premises,

in circumstances where the act is likely to be seen by members of the public, inlcuding occupiers of those other premises. A person would not be liable for the offence unless he knew that his conduct was likely to be seen or was

---

[22] Law Com. No. 76, para. 3.111.

[23] Ibid., paras 3.107 and 3.109.

[24] Ibid., para. 3.108.

[25] Fifteenth Report, Sexual Offences (1984), Part X.

reckless as to that fact.[26] The Committee considered that the offence should not contain a requirement that the acts would be likely to cause serious offence because this would add little to what would, broadly speaking, be an offence of taking part in sexual intercourse or gross indecency where it is likely to be seen by strangers.[27] The Committee recommended that the proposed new offence should be triable either on indictment or summarily and should carry a maximum penalty of twelve months' imprisonment.[28]

Recommendations

8.11 The provisions relating to indecent exposure contained in section 4 of the Vagrancy Act 1824, section 5 of the Summary Jurisdiction (Ireland) Act 1871, section 72 of the Towns Improvement (Ireland) Act 1854 and section 28 of the Town Police Clauses Act 1847 should be repealed. The common law offence of indecent exposure and section 18 of the Criminal Law Amendment Act 1935 should also be abolished. Two possible alternative approaches to replacement of these offences by a more modern provision suggest themselves.

(1) First Alternative

Specific offences could be created to cover the three different categories of conduct already referred to (sexually motivated exposure by males to females, sexual acts in public, nudity in public). These offences would be committed by

(i) any male person who intentionally and indecently exposes his genital organs to a female person, or a person of either sex of 16 years of age or under, in a public place or in a place visible from a public place or from other premises;

---

26 Ibid., para. 10.15.

27 Ibid., para. 10.12.

28 Ibid., para. 10.25. Some members of the Committee, as well as the Policy Advisory Committee on Sexual Offences, favoured a lower maximum penalty.

(ii) any person who has sexual intercourse or performs an act of gross indecency in a public place or in a place visible from a public place or from other premises in such circumstances that his conduct is likely to be seen by members of the public (including occupiers of those other premises) and he knows or is reckless as to that fact; and

(iii) any person who, without lawful excuse, is nude in a public place or intentionally exposes himself to view from a public place while nude, in circumstances such that he is likely to be seen by members of the public and knows or is reckless as to that fact - the term "nude" to be defined as including being so clad as to offend against public decency.[29]

(2) Second Alternative

A general offence might be created which would cover all the three categories of conduct in question. This offence would be committed by any person who intentionally commits any indecent act (including indecently exposing his or her person)

(a) in a public place or within view of the public, in circumstances such that the act is likely to be seen by another person, or

(b) in circumstances such that the act is seen by another person and that person does not consent to seeing it and the accused knows that that person does not so consent or is reckless as to whether he or she so consents.

---

[29] See section 170 of the Canadian Criminal Code which reads:

"(1) Every one who, without lawful excuse,

(a) is nude in a public place, or

(b) is nude and exposed to public view while on private property, whether or not the property is his own, is guilty of an offence punishable on summmary conviction.

(2) For the purposes of this section a person is nude who is so clad as to offend against public decency or order."

The Law Reform Commission's preference is for the second of these alternatives. It is a less complex provision and it would not leave gaps which the three specific offences provided for under the first alternative might leave. At the same time the offence would not be too wide. It also has the advantage that it contains no elements of invidious sex discrimination. The maximum penalty should be a fine of £500 and/or six months' imprisonment.

CHAPTER 9 BEGGING

Present Law

9.1 Section 4 of the Vagrancy Act 1824 provides for two offences of begging:

(i) wandering abroad and endeavouring by the exposure of wounds or deformities to obtain or gather alms, and

(ii) going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fruadulent pretence.

The maximum penalty for these offences is three months' imprisonment.

Section 3 of the Vagrancy (Ireland) Act 1847[1] also provides that any person wandering abroad and begging or placing himself in any public place, street, highway, court, or passage to beg or gather alms, or causing or procuring or encouraging any child or children to do so shall be liable on conviction to imprisonment for a period not exceeding one month. Section 4 of the 1847 Act enables any person to arrest without warrant a person whom he finds offending against the Act and section 5 provides for the issue of warrants for the arrest of any person who has committed an offence under the Act.

9.2 In Smith v McCabe[2] it was held that the words "wandering abroad and begging" in section 3 of the 1847 Act are not governed by "in any public street" etc., so that the defendant, a vagrant who had entered an office and begged there, was held guilty of an offence under the section. In effect this means that begging even in a private place is punishable under section 3. There have also been English cases on the interpretation of section 3 of the Vagrancy Act

---

[1] As amended by the Public Assistance Act 1939, s. 4,sch.1.

[2] (1912) 12 Q.B.D. 306.

1824 which never applied to Ireland but contains provision for an offence identical to that provided for by section 3 of the 1847 Act. In Pointon v Hill[3] a minor on strike who had a wife and family had gone from house to house with others with a wagon inscribed 'Children's Bread Wagon' asking for assistance. They were not disorderly but their begging was reported to be a recurrent activity and frequent complaints had been made. His conviction was held to be bad because the Vagrancy Act 1824 was directed against a particular habit and mode of life and if persons making it their habit and mode of life to wander abroad or place themselves in public places to beg did wander abroad and beg and gather alms, they fell within the words of the statute, but if a person, not as a regular mode of living, but for some object not in itself unlawful, went from house to house and solicited subscriptions, that was not within the meaning of the Act. Mathers v Penfold[4] concerned a trade unionist on strike who sold tickets in the street as part of a scheme for the collection of funds for distribution equally among members of the union who were on strike. It was held that he was not begging within the meaning of section 3 of the Vagrancy Act 1824, in as much as a person who is found in the street making or assisting to make a bona fide collection for a charitable object is not within either the mischief or the language of the statute. It was also held that, in order to establish that a person has committed an offence within the section, it is not necessary to prove that he has before the particular occasion been in the habit of begging, nor that he intends in the future to follow the habit of begging. He may adopt the calling for one day only and may by his conduct on the particular occasion complained of so behave himself as to afford evidence, either by the nature of his request, the persistence or importunity of his manner, the whining tone adopted, or the deceptive devices employed, upon which a magistrate may be satisfied that the act is not merely an isolated act, but is such an act of begging, within the meaning of the statute, as to prove that he placed himself in a public place, etc. to gather alms. In R. v Dalton[5] defence counsel, referring to Pointon v Hill and Mathers v Penfold, submitted that section 3 of the 1824 Act was directed against a particular habit or mode of life. It was therefore necessary to show that the defendant had definitely come to the conclusion that he did not wish to work and that he had

---

[3] (1884) 12 Q.B.D. 306.

[4] [1915] 1 K.B. 514.

[5] [1982] Crim. L. r. 375.

adopted the calling of a beggar. Proof of the begging on an isolated occasion, without more, was insufficient to raise a prima facie case. These submissions were accepted.

9.3 In the light of the Supreme Court's decison in the King case[6] an offence is of doubtful constitutionality if it is "related to rumour or ill-repute or past conduct" or is "indiscriminatetly contrived to mark as criminal conduct committed by one person in certain circumstances when the saee conduct when engaged in by another person in similar circumstances would be free of the taint of criminality". If the interpretation of the offence of begging adopted by the English Courts (see preceding paragraph) is applicable here, then the consistency of section 3 of the 1847 Act with the Constitution is in doubt.

9.4 Procuring a child to beg is also an offence under certain prevention of cruelty to children provisions. Section 2 of the Prevention of Cruelty to Children Act 1904 makes guilty of an offence any person who causes or procures any child, being a boy under the age of fourteen years, or being a girl under the age of sixteen years, or having the custody, charge, or care of any such child, allows that child to be in any street, premises or place for the purpose of beggin or reciiving alms, or of inducing the giving of alms, whether under the pretence of singing, playing, performing, offering anything for sale, or otherwise. The maximum penalty is a fine of £25 and/or three months' imprisonment. Section 14(1) of the Children's Act 1908 makes identical provision in relation to any child (defined by the Acts as meaning a person under the age of fourteen years) or young person (defined as a person who is fourteen or over and under sixteen).

9.5 As we have seen, the effect of the decisions in Pointon v Hill and Mathers v Penfold is that a bona fide collection for a charitable object is not within either the mischief or the language of the Vagrancy Act. However, such collections are quite clearly open to abuse and could constitute a nuisance if they were allowed to be held at will and accordingly their regulation is provided for in the Street and House to House Collections Act 1962. The Act enables the Chief Superintendent of the Garda Siochana for

---

[6] [1981] I.R. 233. See Ch. 4 above.

any locality, on the application of any person who proposes to hold a collection in that locality, to grant a permit authorising the holding of the collection in the locality. The holding of unauthorised collections is prohibited, as is acting as a collector in a collection without a written authorisation from the holder of a collection permit. The Act also imposes certain other duties and obligations in relation to the conduct of collections and the furnishing of information in certain circumstances about the proceeds of collections. Offences under the Act are punishable on summary conviction with a fine not exceeding £50 and/or imprisonment for a term not exceeding six months.

9.6 At the time when the Vagrancy (Ireland) Act 1847 was enacted begging was much more common than it is today. In Famine times it was particularly prevalent for obvious reasons. In more recent times, with the advent of greater general prosperity and better social welfare provision, the incidence of begging has fallen considerably. The average annual number of prosecutions for begging has been falling in the recent past - in the nineteen-seventies it was 303, as compared with 424 in the nineteen-sixties. This is not to say, however, that begging is a negligible social phenomenon in Ireland today. Street begging is fairly common and door-to-door begging for food, clothes or other "help" is not unknown. Sometimes money is sought in return for small objects of little or no value or for a street performance of some kind, such as "busking" or pavement "painting". In Gray v Chief Constable of Greater Manchester[7] it was held that a professional "busker" was offering something in return for the money given by passers-by and could not, therefore, be regarded as "begging or gathering alms".

Policy Arguments on Reform of the Law

9.7 Should begging continue to be subject to criminal sanctions in present-day conditions? There are a number of arguments for retention of an offence of begging. First, it can be argued that the existence of the offence serves as a worthwhile deterrent to a socially undesirable activity, which would be likely to increase if that deterrent was

---

[7] [1983] Crim. L. R. 45.

removed, so that unreasonable nuisance and annoynace would be caused to the public.[8] In an address to the Dublin Chamber of Commerce on 2 December 1982 the Director General of Bord Failte referred to begging as one of the chronic problems of Dublin city. Furthermore, justification of the nuisance involved in begging on the grounds of deprivation or real need may be questionable nowadays, given the scope of the social welfare system. There is also the consideration that begging is often detrimental to the best interest of the people who engage in it in as much as it militates gainst their adopting a more settled and less feckless way of life and delays their integration into "normal" society. To the extent that the existence of a criminal sanction might deter people like itinerants from begging, it would serve as an agent towards their settlement. Finally, the complete abolition of the offence of begging would cause problems in connection with the regulation of bona fide charitable collections - the controls on charitable collections which are necesary to prevent abuse would be more easily evaded in a situation where there was no restriction at all on begging.[9]

9.8 As against all this it can be argued that to penalise begging is to penalise poverty and social inadequacy and that an englightened society would not do this, even if some nuisance is caused by begging. Besides, it could be argued taht a serious nuisance is not caused to the person accosted by beggars in the great majority of cases and that, if it were desired to cover cases where a nuisance was caused by aggressive or abusive begging, an offence specially tailored to such cases could be provided for. There is the further consideration that it may seem ludicrous in many instances to impose a fine where the offender is destitute and that, if the law is to have any teeth, the only alternative will be to impose a sentence of imprisonment, which in may cases will only serve to work further hardship on the family of the accused. As regards homeless persons who beg, the Simon Commmunity in a submission to the Law Reform Commission in September 1983 argued that there are some good reasons why they do so - the inadequate levels of social welfare in relation to hostel accommodation charges and the difficulty homeless people have in getting welfare entitlement because of lack of an address. (The Oireachtas

---

[8] See further para. 70 of the Working Paper (1974) of the English Home Office Party on Vagrancy and Street Offences.

[9] See further ibid., paras. 60-61.

Select Committee on Crime, Lawlessness and Vandalism[10] decided that it should await the outcome of the Working Paper/Report of the Law Reform Commission and any other views that might be submitted before taking a final decision on the Simon Community proposal to decriminalise begging). It might also be said that the objection that decriminalisation of begging would have unacceptable effects on the system of control of charitable collections is not a fatal one. There is a difference in kind between soliciting subscriptions on behalf of oneself or one's dependants (begging) and on behalf of some other person or cause (charitable collections) and it would not necessarily be inconsistent to have controls on the latter but not the former because of the greater frequency of the latter activity and the greater danger of fraud that it might entail.

9.9 The offence of causing or procuring children to beg should certainly be retained in any event because of the element of cruelty to children that it involves. Section 14(1) of the Children's Act 1908 is sufficient provision in this regard and section 2 of the Prevention to Cruelty to Children Act 1904 and the portion of section 3 of the Vagrancy (Ireland) Act 1847 that relates to procuring children to beg should be repealed. Section 14(2) of the 1908 Act provides that if a person having the custody, charge or care of a child or young person is charged with an offence under the section, and it may be proved that the child or young person was in any street, premises, or place for the purpose of begging, and that the person charged allowed the child or young person to be in the street, premises or place, he shall be presumed to have allowed him to be in the street, premises, or place for that purpose unless the contrary is proved. This provision should be amended so that where it is shown that a child was found begging there should be an evidential burden on its parent to show that he or she did not send the child to beg. For this purpose the words "and that the person charged allowed the child or young person to be in the street, premises or place" should be deleted from section 14(2) of the 1908 Act.[11] A new offence along these general lines is provides for in clause 84 of the Children (Care and Protection) Bill 1985. The provision in section 4 of the Vagrancy Act 1824

---

[10] Third Report, "The decriminalisation of certain offences under the Vagrancy Acts" (16 October 1984; Pl. 2697).

[11] See Report of the Commission on Itinerancy (1963, Pr. 7272), para. 30.

about endeavouring by exposure of wounds or deformities to obtain or gather alms can also be repealed without replacement because there is no essential difference in kind between such begging and begging generally. The provision in section 4 about collecting alms under any false or fraudulent pretence could also be simply repealed because section 32 of the Larceny Act 1916 and section 10 of the Criminal Justice Act 1951 (obtaining by false pretences) would sufficiently cover the matter.

9.10 What about a general offence of begging to replace section 3 of the 1887 Act? The Law Reform Commission considers that some such general offence should be retained as a prohibition on a form of conduct which constitutes a kind of public nuisance, though it should be taken out of the context of the Vagrancy Acts with their pejorative terminology of "rogues and vagabonds" etc. The Commission's view is that a distinction should be drawn between begging in a public place and begging from door to door on private property. In the case of begging in a public place the prohibition should be unqualified, whereas begging from door to door should be prohibited only where it is done in an aggressive manner or in a manner likely to cause fear or annoyance (circumstances where fear or annoyance would be likely to be caused would include situations where a number of beggers called to a house). The manner in which some collectors in authorised street collections sometimes solicit contributions can constitute a nuisance also. There should be a new provision whereby it would be an offence for a collector in a collection within the meaning of the Street and House to House Collections Act 1962 to obstruct passersby or to act in a manner likely to cause fear or annoyance.

9.11 One of the major defects of the present offence of begging is that the only penalty available in respect of it is imprisonment (3 months' maximum). A fine should clearly also be available as a penalty. In England begging has ceased to be imprisonable by virtue of section 70 of the Criminal Justice Act 1982. The Law Reform Commission is of opinion that imprisonment should continue to be available as a penalty for begging because a fine is not likely to be an effective deterrent against the 'professional' beggar. Clearly, however, imprisonment is undesirable in many cases of begging and the Commission considers that the possibility of imposing a fine should also be available. The Commission considers that the appropriate maximum penalty for the new begging offence proposed above would be a fine of £300 and/or three months' imprisonment. A similar maximum penalty should apply to the proposed new offences relating to street collections. The maximum fine for

offences generally under the Street and House to House Collections Act 1962 should also be increased to £300.

9.12 It sometimes happens that a convicted person will refuse to pay a fine and "opt" for imprisonment in default. the criminal justice system should be geared to the greatest extent possible towards the discouragement of such a course of action. In the case of an offence such as begging most if not all of the money found in an accused's possession at the time of his arrest is likely to be the proceeds of his offending conduct. In order to ensure as far as possible that any fine ultimately imposed will be paid, the Gardai should be enabled following arrest of a person on reasonable suspicion of a begging offence, to take possession of any money found in his possession subject to the following limitations:

(a) the amount taken should not in any circumstances exceed the maximum fine which could be imposed for the offence (i.e., under the proposals made above, £300);

(b) in the event of the person being acquitted of the offence charged the entire sum so taken should be returned to him; and

(c) in the event of his conviction, if a fine is imposed the sum which was taken should be applied for the payment of the fine, unless the Court is satisfied that the money in question does not represent the proceeds of begging and if the amount of the fine is less than the sum taken the balance should be returned to the person.

Recommendations

9.13 The following provisions should all be repealed: the entire Vagrancy Act 1847, section 2 of the Prevention of Cruelty to Children Act 1904 and those parts of section 4 of the Vagrancy Act 1824 that concern obtaining alms by exposure of wounds and gathering alms etc. under any false or fraudulent pretence. A new provision should be enacted making it an offence to beg (i) in a public place or (ii) from house to house in a manner likely to cause fear or annoyance. The maximum penalty for this offence should be a fine of £100 and/or one month's imprisonment. The offence under section 14(1) of the Children's Act 1908 of causing or prcuring a child to beg should be retained but there should be an evidential burden on the parent of a child found begging to show that he or she did not cause or

220

procure the child to beg. It should be made an offence for a collector in a collection within the meaning of the Street and House to House Collections Act 1962 to obstruct passersby or to act in a manner likely to cause fear or annoyance. The maximum penalty for this offence too should be a fine of £300 and/or three months' imprisonment and the maximum fine for other offences under the 1962 Act should be raised to £300.

CHAPTER 10 DESERTION

Present Law

10.1 Under section 4 of the Vagrancy Act 1824 every person running away and leaving his wife or his or her child chargeable or whereby they may become chargeable to any parish, township or place is guilty of an offence punishable with imprisonment for a term not exceeding three months. It also used to be an offence similarly punishable under section 2 of the Vagrancy (Ireland) Act 1847 for any person to "desert or wilfully neglect to maintain his wife or any child whom he may be liable to maintain, so that such wife or child shall become destitute and be relieved in or out of the workhouse of any Union in Ireland". Section 2 was repealed by the Public Assistance Act 1939 and replaced by section 83 of that Act. Liability to maintain one's dependants and recovery of amounts paid by way of supplementary welfare allowances from persons liable to maintain beneficiaries are now provided for by sections 214 and 215 of the Social Welfare (Consolidation) Act 1981 (No. 1).

Recommendations

10.2 The 1939 Act did not repeal the desertion offence in section 4 of the Vagrancy Act 1824 but that offence is now redundant in view of the 1981 Act and should be repealed witout replacement.

CHAPTER 11 GAMING IN A PUBLIC PLACE

Present Law

11.1 Section 4 of the Vagrancy Act 1824 provides that every person playing or betting in any street, road, highway or other open and public place at or with a table or instrument for gaming at any game or pretended game of chance shall be lilable to imprisonment for a term not exceeding three months. This part of section 4 was repealed by the Statute Law Revision (No. 2) Act 1888 but still appears to be in force in Ireland becuase section 1 of the 1888 Act provided that "the repeal by this Act of any enactment or schedule shall not affect any enactment in which such enactment or schedule has been applied, incorporated or referred to" and the whole of section 4 of the 1824 Act had been applied to Ireland by section 15 of the Prevention of Crimes Act 1871.[1]

11.2 There are a few provisions of a related kind in nineteenth-century legislation. Section 7 of the Dublin Police Act 1842 makes it an offence for a person who shall have or keep any house, shop, room, or place of public resort within the Dublin police district wherein provisions, liquors or refreshments of any kind shall be sold or consumed, inter alia to knowingly suffer any unlawful games or any gaming whatsoever therein. Section 76 of the Towns Improvement (Ireland) Act 1854 provides that all thimblers, loaded dice-players, and other swindlers of that or any similar description who shall be found in possession of implements or articles for practising games of hazard, or who shall exhibit such implements or articles in order to induce or who shall induce any person to play at any game of hazard or who by any fraudulent art or device shall cozen, cheat or attempt to cozen or cheat any person, shall be guilty of an offence.

11.3 The principal statute regulating gaming is the Gaming and Lotteries Act 1956. The Act[2] defines "gaming" as playing a game (whether of skill or chance or partly of

---

[1] See O'Connor, The Irish Justice of the Peace (1915), Vol. II, p. 1276.

[2] Section 2.

skill and partly of chance) for stakes hazarded by the players. It prohibits[3] the promotion etc. of any kind of gaming in which, by reason of the nature of the game, the chances of all the players, including the banker, are not equal, or in which any portion of the stakes is retained by the promoter or is retained by the banker otherwise than as winnings on the result of the play. Special provision is made[4] for gaming at circuses or travelling shows and carnivals and for the licensing of amusement halls and funfairs for gaming.[5] Section 9 of the Act makes it an offence for the licensee of premises licensed for the sale of intoxicating liquor to permit gaming on the premises.[6] Offences under the Act are punishable with a fine not exceeding £100 and/or imprisonment for a term not exceeding three months.[7] Section 11 provides that every person who by any fraud or cheat in promoting or operating or assisting in promoting or operating or in providing facilities for any game or in acting as banker for those who play or in playing at, or in wagering on the event of, any game, sport, pastime or exercise wins from any other person or causes or procures any person to win from another anything capable of being stolen shall be deemed guilty of obtaining such thing from such other person by a false pretence, with intent to defraud, within the meaning of section 10 of the Criminal Justice Act 1951 and on conviction shall be punished accordingly (on conviction on indictment a maximum of five years' penal servitude or two years' imprisonment, on conviction summarily a fine not exceeding £100 and/or imprisonment for a period not exceeding twelve months).

---

[3] Section 4.

[4] Sections 6 and 7.

[5] Sections 12-20.

[6] The section does not prohibit the licensee or his private friends from playing cards for stakes in a part of the premises other than that in which the sale of intoxicating liquor generally takes place if the friends are being entertained by him at his own expense. Neither does it apply to the playing of a game where no stake is hazarded by the players other than a single, uniform charge for the right to take part in the game and the promoter (if any) derives no personal profit from the promotion of the game.

[7] Section 44.

Policy Arguments on Reform of the Law

11.4 It should not be necessary to have an offence to cover instances of gaming in a public place which are not prohibited by the 1956 Act. Any behaviour which amounts to obtaining money by false pretences or to fraud is caught by the 1956 Act, as is the promotion of gaming for profit save in specified circumstances. The mere playing of a game of chance in a public place in circumstances other than those regulated by the 1956 Act should not be an offence. It is outside the scope of the present Report to consider what, if any, changes should be made in the regulatory regime provided for in the 1956 Act.

Recommendations

11.5 All the provisions referred to in paragraphs 11.1 and 11.2 above should be repealed without replacement.

CHAPTER 12 POSSESSION OF HOUSEBREAKING IMPLEMENTS

Present Law

12.1 Section 4 of the Vagrancy Act 1824 makes it an offence for a person to have in his or her custody or possession any picklock, key, crow, jack, bit, or other implement with intent feloniously to break into any dwelling house, warehouse, coach-house, stable or outbuilding. The maximum penalty for the offence is three months' imprisonment and section 4 also provides that every such picklock, key, crow, jack, bit and other implement shall by the conviction of the offender become forfeited.

12.2 Under section 28(1) of the Larceny Act 1916 every person found by night having in his possession without lawful excuse (the proof whereof shall be on such person) any key, picklock, crow, jack, bit or other implement of house-breaking is guilty of a misdemeanour and liable to penal servitude for any term not exceeding five years or, if previously convicted of any misdemeanour under section 28 or any felony, to penal servitude for any term not exceeding ten years. There are two important differences between the ingredients of the offence under section 28(1) and that under the Vagrancy Act:

(i) section 28(1) requires that a person be found in possession by night,[1] whereas there is no limitation upon the time of possession under the 1824 Act, and

(ii) under the Vagrancy Act there must be an intent feloniously to break into any dwelling house etc., while the Larceny Act requires only that the possession be without lawful excuse, the proof of which shall be on the accused.

---

[1] Defined by section 46(1) of the 1916 Act as meaning the interval between 9 p.m. and 6 a.m. on the next day.

Policy Arguments on Reform of the Law

12.3 In King v The Attorney General[2] O'Higgins, C.J. said obiter that he could not see that any inconsistency with the Constitution was or could be suggested in relation to the provision in section 4 of the Vagrancy Act 1824 creating the offence of being in possession of housebreaking implements with a felonious intent.[3] This provision should be repealed, however, in order to take it out of the vagrancy context and should be replaced by a more modern provision. It would not be sufficient to repeal the Vagrancy Act provision and rely on the offence under the Larceny Act because that offence is confined to situations where a person is found by night. Any new offence should not be confined to nighttime situations. It should also cover going equipped preparatory to offences other than burglary.[4] Possession of implements for the purpose of theft which does not involve burglary, such as theft from a vehicle, should also be covered. So should possession for the purpose of "stealing" the vheicle itself (i.e. the offence under section 112 of the Road Traffic Act 1961 of taking a vehicle without authority). The range of articles whose possession would constitute an offence should also be widened. The existing provision under the Vagrancy Act 1824 lists various specified implements of housebreaking. The new offence should relate to any article in a person's possession for the purpose of burglary, theft or taking a vehicle without authority. This would cover, for example, car keys and masks as well as actual housebreaking implements.

12.4 The existing offence under the Vagrancy Act 1824 seems to cover possession in any place, including for instance the accused's own home, provided the requisite intent is present. Section 28(1) of the Larceny Act 1916, on the other hand, refers to a person being "found" having an implement in his possession, which is understood to

---

2 [1981] I.R. 233.

3 Ibid., at 249.

4 There should no longer be any reference to house-breaking since sections 24-27 of the Larceny Act 1916, which provided for offences relating to breaking and entering various buildings, were repealed by section 21(1) of the Criminal Law Jurisdiction Act 1976 and replaced by new offences of burglary and aggravated burglary.

exclude possession at his home.[5] Should a new offence be confined to possession out of the home? Section 25(1) of the English Theft Act 1968 is so confined - it refers to possession by a person "when not at his place of abode". The underlying rationale of this limitation is as follows:[6]

> "We considered whether to make the new offence extend to possession at the offender's home. This would have the advantage of catching criminals at an earlier stage. On the other hand it would change the character of the offence. The present offence is a preparatory one in contemplation of a particular crime; the change would make it one of mere possession for use at some time for the purpose of any of the specified crimes generally. It is only exceptionally that the criminal law extends to possession of articles in a person's own home. We came to the conclusion that there was no sufficient reason to justify so large an extension."

However, it seems strange to insist on the preparatory nature of this offence when it applies to having the articles at the offender's place of employment[7] and when the burglar who keeps his housebreaking equipment in his car commits the offence every time he drives the car even though he is not starting out to commit crime but, for example, going to church.[8]

12.5 In the Law Reform Commission's view the proposed new offence should apply to possession anywhere of an article for the purpose of burglary etc. The onus of proof of the offence, including the requisite intent, will be on the prosecution, so that if the article is of such a kind that possession of it is as consistent with an innocent as a guilty explanation, then it will be very difficult indeed to prove *mens rea*, in the absence of accompanying suspicious circumstances. Such circumstances are unlikely to exist where such an article is found in a person's home. On the

---

[5] See the English Criminal Law Revision Committee's Eighth Report, *Theft and Related Offences* (1966, Cmnd. 2977), para. 150.

[6] *Ibid*.

[7] *Ibid*.

[8] Smith, *The Law of Theft* (4th ed., 1979), para. 375.

other hand if the article is one made or adapted from use for the purpose of burglary, theft or taking a vehicle without authority, there should be a burden on an accused to give an explanation of his possession - i.e. he should be under an "evidential" burden to adduce sufficient evidence to raise an issue as to the innocence of his possession but he should not be under a "persuasive" burden to prove his innocent intent (the burden of provinig guilty intent would remain on the prosecution). If the article is one so made or adapted it is difficult to see why possession of it, even at a person's home, should not be an offence in the absence of an innocent explanation.

12.6 The appropriate maximum penalty for the proposed new offence would be:

(i) on summary conviction, a fine of £500 and/or six months' imprisonment, and

(ii) on conviction on indictment, a fine and/or five years' imprisonment.

Following a conviction the court should also have a discretion to order forfeiture of the article or articles in question.

Recommendation

12.7 The provision in section 4 of the Vagrancy Act 1824 about possession of any implement with intent feloniously to break into any dwelling house etc. should be repealed, as should section 28(1) of the Larceny Act 1916. A new provision should be enacted making it an offence to be in possession of any article for the purpose of burglary, theft or taking a vehicle without authority. Proof of possession of an article made or adapted for use in committing burglary etc. would be evidence of possession for that purpose. The maximum penalty for the offence should be

(i) on summary conviction, a fine of £500 and/or six months' imprisonment, and

(ii) on conviction on indictment, a fine and/or five years' imprisonment.

The court would also have a discretion to order forfeiture of the article in question.

CHAPTER 13 BEING ARMED WITH AN OFFENSIVE WEAPON

The Present Law

13.1 Section 4 of the Vagrancy Act 1824 provides that every person being armed with any gun, pistol, hanger, cutlass, bludgeon or other offensive weapon, or having upon him or her any instrument with intent to commit a felonious act is guilty of an offence. The maximum penalty is three months' imprisonment and upon conviction any such gun etc. is to become forfeited.

13.2 By section 28(1) of the Larceny Act 1916, as amended by section 21(3) of the Criminal Law (Jurisdiction) Act 1976, every person found by night armed with any dangerous or offensive weapon or instrument, with intent to commit any burglary is guilty of a misdemeanour and liable to penal servitude for a term not exceeding five years or, if previously conviced of any misdemeanour covered by the section or of any felony, to penal servitude for any term not exceeding ten years. This offence differs from the Vagrancy Act offence in that it is confined to being found by night and the intent required is to commit burglary as opposed to any felonious act. Various offences involving possession of firearms are provided for in the Firearms Acts 1926 and 1971, as amended by the Criminal Law (Jurisdiction) Act 1976.

Policy Arguments on Reform of the Law

13.3 The part of the Vagrancy Act provision that covers possession of any gun or pistol does not need replacement in view of the provisions of the Firearms Acts. The position is different as regards other offensive weapons. Section 28(1) of the Larceny Act 1916 would not fill the gap left by a repeal of the Vagrancy Act provision because of its limitations as to time and intent. A new offence of possession of offensive weapons other than firearms would, therefore, need to be created if that provision were to be repealed.

13.4 In England section 1(1) of the Prevention of Crimes Act 1953 provides that any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive

weapon shall be guilty of an offence. Section 1(4) defines "offensive weapon" as "any article made or adapted for use for causing injury to the person, or intended by the person having it with him for such use by him". Smith and Hogan[1] comment on this definition:

> "There are three categories of offensive weapon: (i) Articles made for causing injury would include a service rifle or bayonet, a revolver, a cosh, knuckle-duster, dagger or flick-knife. (ii) Articles adapted for causing injury would include razor blades inserted in a potato or cap-peak, a bottle broken for the purpose, a chair-leg studded with nails and so on. 'Adapted' probably means altered so as to become suitable. It is not certain whether the intention of the adaptor is relevant. Is an accidentally broken milk bottle "adapted for use for causing injury to the person"? It is submitted that it is not and that if the article was not adapted with intent, it can only be an offensive weapon in category (iii) below. It has been held that a bottle broken for the purpose of committing suicide is adapted for causing injury to the person; but since the question is whether it is an offensive weapon and 'offensive' implies an attack on antoher, the 'injury' which (it is submitted) the adaptor must contemplate, must be injury to another. (iii) It is very important to distinguish the third category of articles which are neither made nor adapted for causing injury, but are carried for that purpose. Whether D carried the article with the necesasry purpose is essentially a question of fact. Articles include a sheath-knife, a shot-gun, a razor, a sandbag, a pick-axe handle, a stone, and a drum of pepper. Any article is capable of being an offensive weapon; but if it is of such a nature that it is unlikely to cause injury when brought into contact with the person, then the onus of proving the necessary intent will be very heavy.
>
> The importance of the distinction is that, in the case of articles 'made or adapted', the prosecution have to prove no more than possession in a public place. D will then be convicted unless he can prove, on a balance of probability, that he had lawful authority or reasonable excuse. But if the article falls into the third category the onus is on the prosecution to show that it was carried with intent to injure."

---

[1] Criminal Law (5th ed., 1983), pp. 397-398.

13.5 Clause 22 of the Criminal Justice Bill 1967, which never became law, contained a proposed provision similar to section 1 of the 1953 English Act. Subclause (2) of clause 22 proposed to provide that where a person, without reasaonable excuse (the onus of proving which shall lie on him), has with him in any public place any flick-knife, or any other article whatsoever made or adapted for use for causing injury to the person, he shall be guilty of an offence. Subclause (3) proposed to provide that where a person has with him in any public place any article intended by him unlawfully to cause injury to or intimidate any person either in a particular eventuality or otherwise, he shall be guilty of an offence. "Public place" was defined in clause 2(1) of the Bill as any place (including a building) to which the public have access whether as of right or by permission and whether subject to or free of charge. A person guilty of an offence under the proposed clause 22 was to be liable on summary conviction to a fine not exceeding £100 and/or imprisonment for six months, on conviction on indictment to a fine not exceeding £200 and/or two years' imprisonment.

13.6 The ingredients of the proposed offences under subclauses (2) and (3) of clause 22 of the 1967 Bill differed in four respects from those of the offence under clause 1 of the English Prevention of Crimes Act 1953:

(i) No reference was included to the possession being "without lawful authority". Presumably this was because of the difficulties inherent in the concept in the present context. As Smith and Hogan say:[2]

> "'Lawful authority' presents difficulties. Before the Act, it was presumably generally lawful to be in possession of an offensive weapon in a public place - otherwise there would have been no neceessity for the Act. Now it is generally unlawful. 'Lawful authority' postulates some legal exception to the general rule of the Act; yet none is provided for and the words themselves are certainly not self-explanatory."

In Bryan v Mott[3] it was said that "lawful authority"

---

[2] Op. cit., p. 399.

[3] (1976) 62 Cr. App. Rep. 71, at 73.

covers "people who from time to time carry an offensive weapon as a matter of duty - the soldier with his rifle and the police officer with his truncheon". "Reasonable excuse" might not adequately cover the situation referred to, and it would seem desirable to include a reference to "lawful authority" as well.

(ii) The defence of reasonable excuse was not to be available in respect of possession of articles intended by the defendant unlawfully to cause injury, presumably on the basis that, once that intent was present, there could not be any question of a reasonable excuse.

(iii) Specific reference to possession of articles intended unlawfully to intimidate any person was included. This formulation would have the advantage of clarifying a question that has given rise to difficulties of interpretation in England. In Woodward v Koesslar[4] it was held that the accused, who had gone up to an elderly caretaker holding a knife in a threatening attitude as if to strike with it and said to him "can you see this?", has intended to cause injury - frightening or intimidating a person is causing injury. In R. v Edmonds[5] a narrower view of the meaning of the expression "intended for use for causing injury to the person" was taken, where it was said that it was unsafe and undesirable that directions to juries based on clause 1(4) of the 1953 Act should include any references to intent to frighten unless it be made clear that the frightening must be of a kind for which the term "intimidation" is far more appropriate and of a sort which is capable of producing injury through the operation of shock.

(iv) Possession of a flick-knife per se was made unlawful. This was equivalent to specifying that a flick-knife is an article "made for .... use for causing injury", so that mere possesion of it in a public place without reasonable excuse would be an offence, even if there was no accompanying intention to use it to cause

---

4 [1958] 3 All E.R. 466.

5 [1963] 1 All E.R. 828. See also R. v Rapier (1979) 70 Cr. App. Rep. 17.

injury. In England it has now been held[6] that a flick-knife is an offensive weapon per se for the purposes of clause 1(1) of the Prevention of Crime Act 1953 because it is to be regarded as an article "made .... for use for causing injury to the person" within the definition of an "offensive weapon" in clause 1(4) of that Act. This might suggest that the specific reference to flick-knives proposed in clause 22(2) of the Criminal Justice Bill 1967 might no longer be necessary. However, it is by no means self-evident that a flick-knife is necessarily made for the purpose of causing injury and the English decision just mentioned has been criticised.[7] It would be better, therefore, to retain the specific reference to flick-knives.

13.7 Subclause (5) of the proposed clause 22 of the 1967 Bill provided that, in a prosecution for the offence of carrying any article with intent to injure or intimidate, it would not be necessary to allege or prove that the intent was to injure a particular person, and that it would be open to the Court, on the basis of the facts of the case as a whole, to regard possession of the article in the particular circumstances as sufficient evidence of an intention to misuse it, in the absence of any adequate explanation by the defendant. Subclause (4) of clause 22 proposed to prohibit the import, manufacture, sale etc. of flick-knives and subclause (7) contained a definition of "flick-knife".

13.8 The provision in clause 4 of the Vagrancy Act 1824 should be replaced by provisions similar to those contained in subclauses (2), (3), (4), (5) and (7) of clause 22 of the Criminal Justice Bill 1967. It is considered that these provisions should cover not only possession in a public place but also possession in the course of the commission of any trespass to land. The requirement in subclause (2) that the onus of proving reasonable excuse shall lie on the accused should be removed. The nature of the provision is such that, once possession of an offensive weapon in a public place has been established, an evidential burden will rest on the accused in any event to show that he had a reasonable excuse. It would not be desirable that a

---

[6] Gibson v Wales [1983] 1 All E.R. 869.

[7] See Commentary by Professor J.C. Smith, [1983] Crim. L. R. 113.

persuasive burden to this effect should be placed on him. Appropriate maximum penalties under the proposed new provision would be as follows:

(a) on summary conviction, a fine of £500 and/or six months' imprisonment, and

(b) on conviction on indictiment, a fine and/or five years' imprisonment.

Following a conviction the court should have a discretion to order forfeiture of the weapon in question.

13.9 Clause 22(1) of the 1967 Bill also provided for a general prohibition on the carrying of any knife, other than an ordinary pocket knife, in places where people congregate (e.g. dance halls, sports fixtures etc.). Also clause 23 of the Bill proposed to provide for an offence of producing, in a manner likely unlawfully to intimidate, any knife or any article capable of inflicting serious injury. Legislation to implement the proposals made in this chapter should include provisions of this kind as well.

13.10 The provision in clause 4 of the Vagrancy Act refers to possession of "any instrument" as well as any offensive weapon. This term is of course, wider than the range of weapons covered by the Firearms Acts and the new provision proposed here. However, this difference in scope is not significant having regard to the fact that an intent to commit a felonious act is required under the Vagrancy Act and in view of the new offence of possession of any article with intent to commit burglary etc. proposed in the preceding chapter.

Recommendation

13.11 The provision in clause 4 of the Vagrancy Act 1824 about possession of any offensive weapon etc. with intent to commit a felonious act should be repealed. A new provision should be enacted in its place making it an offence for a person

(i) without lawful authority or reasonable excuse to have with him in any public place any flick-knife, or any

other article whatsoever made or adapted for use for causing injury to the person, or

(ii) to have with him in any public place any article intended by him unlawfully to cause injury to or intimidate any person, either in a particular eventuality or otherwise.

It should be specified that in a prosecution for an offence at (ii) it shall not be necessary for the prosecution to allege or show that the intent to cause injury or intimidate was intent to cause injury to or intimidate a particular per son and if, having regard to all the circumstances (including the type of the article alleged to have been intended to cause injury or intimidate, the time of the day or night, and the place), the court thinks it reasonable to do so, it may regard possession of the article as evidence of intent. A person guilty of an offence under (i) or (ii) should be liable on summary conviction to a fine not exceeding £500 and/or imprisonment for a term not exceeding six months, on conviction on indictment to a fine and/or imprisonment for a term not exceeding two years. Following conviction the court would have a discretion to order forfeiture of the weapon in question. There should also be an offence of producing, in a manner likely unlawfully to intimidate, any knife or any article capable of inflicting serious injury. This offence should be subject to the maximum penalties proposed above for the possession offence.

CHAPTER 14 BEING FOUND ON CERTAIN PRIVATE PREMISES

Present Law

14.1 Under section 4 of the Vagrancy Act 1824 every person being found in or upon any dwelling house, warehouse, coach-house, stable, or outhouse, or in any enclosed yard, garden, or area for any unlawful purpose is guilty of an offence.

14.2 The accused must be found on the premises - i.e. it would not be sufficient if, for example, his fingerprints were found, showing that he had been there. But actual arrest on the premises is not necessary in order to constitute the offence.[1] A number of English cases have considered the kind of premises that are covered by the provision. Williams[2] summarises the main points of these decisions as follows:

> "The words 'in or upon' include persons found on the roof of one of the specified buildings.
>
> A 'dwelling-house' probably means a house or flat in which somebody habitually sleeps as his home, though he may be sleeping elsewhere at the time in question.
>
> A 'warehouse' probably includes a part of a shop used for the storage of goods and not open to the public,[3] but not the part of the shop that is open to the public. It does not include a building where goods are kept temporarily while something is done to them (e.g. mail being sorted).[4]
>
> Whether a 'coach-house' now includes a garage is undecided. An 'outhouse' must be closely connected with a house (and, it seems, must be physically

---

[1] Moran v Jones (1911) 27 T.L.R. 421.

[2] Textbook of Criminal Law (1978), p. 816.

[3] R. v Hill (1843) 2 M. & Rob. 458.

[4] Holloran v Haughton [1976] Crim. L. R. 270.

> connected with it, as by a wall); a building in a field is not an outhouse.[5]
>
> Then as to the words 'inclosed yard, garden or area,' they do not include a very large area, even though enclosed, but do cover an area of the size usually described as a yard, within the precincts of a building like a house or an inn, and enclosed to a substantial degree (even though some permanent openings are left for access)[6]. The words do not cover a tract of ground merely because it is called a 'yard', as in 'railway yard', 'shipyard' and 'vineyard'."[7]

The unlawful purpose referred to in section 4 is not a merely immoral purpose but a purpose to commit some definite criminal offence.[8] However, it has been decided at Circuit Court level that a "peeping Tom" is in an enclosed area for an unlawful purpose.[9] The purpose may be to commit an offence at some future date.[10]

14.3 There are other statutory provisions that have a bearing on this part of section 4 of the 1824 Act. Section 23A of the Larceny Act 1916, as inserted by section 6 of the Criminal Law (Jurisdiction) Act 1976, provides that a person is guilty of burglary if he (a) enters a building, or part of a building, as a trespasser with the intention of stealing or of committing certain other specified offences in it or (b) steals or commits any of these other offences, or attempts to do so, in the building or part after having entered it as a trespasser. The offences other than stealing that are specified in the section are: inflicting grievous bodily harm, rape or doing unlawful damage to the building or anything in it. A building is defined as

---

[5] R. v Borley (1844) 8 J.P. 263.

[6] Goodhew v Morton [1962] 2 All E.R. 771.

[7] Quatromini v Peck [1972] 3 All E.R. 521.

[8] Hayes v Stevenson (1860) 3 L.T. 296.

[9] See the Irish Times, 10 April 1981, p. 13 . In reaching this conclusion Judge Gleeson in the Dublin Circuit Court referred to invasion of privacy and lack of consent on the part of the girls spied upon.

[10] Re Joy (1853) 22 L. T. Jo. 80.

including a caravan or houseboat which is regularly inhabited. The maximum penalty for the offence is fourteen years' imprisonment. Also, section 28(4) of the Larceny Act 1916 makes it an offence punishable with a maximum of two years' imprisonment to be found by night in any building with intent to commit any felony therein.

14.4 Under section 7 of the Prevention of Crimes Act 1871, where any person is convicted on indictment of a crime,[11] and a previous conviction of a crime is proved agisnt him he shall, at any time within seven years immediately after the expiration of the sentence passed on him for the last of such crimes, be guilty of an offence inter alia if he is "found in or upon any dwelling-house, or any building, yard or premises being parcel of or attached to such dwelling-house, or in or upon any shop, warehouse, counting-house, or other place of business, or in any garden, orchard, pleasure ground or nursery ground, or in any building or erection in any garden, orchard, pleasure ground or nursery ground, without being able to account to the satisfaction of the court before whom he is brought for his being found on such premises. The maximum penalty for an offence under section 7 is one year's imprisonment. In cases under that section the previous convictions are essential ingredients of the offence charged and therefore must be proved to the jury before verdict.[12] In view of the decison of the Supreme Court in King's case[13] the consistency of section 7 with the provisions of the Constitution must be open to serious question.

Policy Arguments on Reform of the Law

14.5 Is a provision of the kind contained in section 4 of

---

[11] The expression 'crime' is defined by section 20 of the Act as meaning any felony, or the offence of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud.

[12] R. v Penfold [1902] 1 K.B. 547; Faulkner v R. [1905] 2 K.B. 76.

[13] See Chapter 4 above, especially the passage from Henchy, J.'s judgment quoted in para. 4.2.

the Vagrancy Actr 1824 still necessary in view of the Larceny Act offences and the law on attempts? The scope of section 23A of the Larceny Act 1916 is not as wide as the Vagrancy Act provision -

(i) it applies only where a person is found in a building, as distinct from on the walls or roofs of buildings or in enclosed yards, gardens or areas;

(ii) it applies only where there is intent to commit one of a limited range of offences and would not cover, for instance, intent to commit indecent assault or indecent exposure; and

(iii) it covers entry as a trespasser and so would not cover a situation where a person entered a building lawfully and while there formed the intention of, say, stealing something. The offence under section 28(4) of the 1916 Act also applies only where a person is found in a building and is further limited by the fact that the person must be found by night (i.e. between 9.00 p.m. and 6.00 a.m.).

14.6 Williams[14] summarises the distinctions between attempt and the section 4 offence as follows:

> "(1) Entering premises, though an offence under section 4, may be held to be 'mere preparation ' and so not an attempt. This is particularly likely if the entry is into a yard and the intent is to steal in the building.
>
> (2) It may not be clear what crime the defendant intented; this would preclude a charge of attempt."

What if the scope of the law on attempts were to be widened? The law on attempts has been amended in England recently by the Criminal Attempts Act 1981 but acts which are merely preparatory to the commission of an offence have not been brought within the scope of attempt. Even if the law on attempts were to be widened in such a way as to cover such acts, the second difficulty referred to by Williams would still remain (though it should be remarked that a charge of

---

[14] Textbook of Criminal Law (1978), p. 817.

attempt would not necessarily be precluded).[15] It is noteworthy that the Home Affairs Committee of the House of Commons, despite the fact that the Criminal Attempts Bill was about to be passed, considered that "it would be inadvisable at this stage to alter, still less do away with" the section 4 offence which "the police find valuable in dealing with a particular type of criminal activity, and which in any case is scarcely ever applied to vagrants."[16]

14.7 It would seem, therefore, that while there is some area of overlap between the offence under section 4 of the Vagrancy Act 1824 on the one hand and the Larceny Act offences and attempt on the other, there is nevertheless a residual area that is covered by the former but not by the latter. It would appear desirable to cover this residual area by a new offence on the lines of that contained in the Vagrancy Act. It is not clear whether a person who has unlawfully entered a building with intent to commit an offence other than one covered by section 23A of the Larceny Act 1916 would be guilty of attempt. A person found having entered a yard or garden with an intent to commit an offence almost certainly would not be. In the particular context of unlawful entry upon property, these acts are sufficiently proximate to the completed offence to warrant their punishment by law, though it might be undesirable, in view of its application in other contexts, to draw the definition of attempt so wide as to cover them. A specific offence to cover these acts would, then, appear to be appropriate.

14.8 As the Home Office Working Party on Vagrancy and Street Offences noted,[17] "the essence of the offence is that the presence of the defendant in a particular place and at a particular time raises the reasonable suspicion that he is there for a criminal purpose". The Working Party thought that the list of places in the 1824 Act provision was unsatisfactory and recommended[18] that a new offence should extend to buildings, partially completed buildings, the land immediately surrounding buildings and any land which is

---

[15] See Smith and Hogan, Criminal Law (5th ed., 1983), pp. 258-259, on "conditional intent" in attempt.

[16] Third Report, Vagrancy Report (HC 271, May 1981), para. 31.

[17] Working Paper (1974), para. 173.

[18] Ibid., para. 182.

being used for the storage of property (whether or not it is enclosed or used in connection with a building). It should also cover caravans and boats which are used as dwellings. A general definition satisfying these requirements would include private roads but the Working Party considered that there should be an exclusion for persons using a right of way.

14.9 The difficulty in trying to define the places to be covered by a new offence is to strike a balance between covering all the places that are appropriate to be covered under modern conditions and avoiding the creation of an offence that would be too wide in scope and would cover casual and harmless encroachments on unenclosed property. The Home Office Working Party's proposal to cover "any land which is being used for the storage of property (whether or not it is enclosed or used in connection with a building)" could be very far-reaching indeed. It has to be acknowledged, of course, that the reference in the 1824 Act provision to "enclosed area" has given rise to technicality and somewhat capricious results in some English cases. Nevertheless to drop the concept altogether might produce unfairness - if there is no immediately adjoining building to which a piece of ground is obviously annexed, the only clear way that a stranger will be adequately "warned off", so as to justify a reasonable suspicion of criminal intentions if he enters, is if the ground is enclosed in some way. Yards and gardens should be covered, however, even if they are not enclosed.

14.10 The requirement that the accused should be "found" on the premises in question should be retained as conveying the idea that his presence on the premises must have been witnessed by somebody in whose mind it raised a suspicion as to his intentions. As far as the nature of those intentions is concerned, the existing reference to "any unlawful purpose" is potentially too wide. As we have seen,[19] it has been held that the unlawful purpose must be to commit a criminal offence and the wording of any new provision should embody this interpretation expressly.[20] It would, of course, be very difficult for the prosecution to prove an intent to commit a specified offence - very often there would be no way of discovering much less proving

---

19 Para. 14.2 above.

20 The activities of a "peeping Tom" would be covered by the additional new offence proposed in the next paragraph.

what the intended offence was unless the accused himself volunteers the information. One way around this problem would be that there should not be a requirement to prove an intent to commit a specified offence and that there should be an evidential burden on an accused who was found on premises of the kind in question to adduce evidence showing the non-criminal nature of his intentions.[21] It would be preferable, however, that the conviction should specify the offence which the accused intended to commit. It would be possible to lay charges, in separate counts in the alternative, specifying intent to commit a number of different offences and to convict on one of those charges. There would be an evidential but not a persuasive burden on the accused in respect of those charges - if the explanation given by the accused might be true then the burden of proof would be on the prosecution to negative it.

4.11 The new offence proposed above would require proof of intent to commit a specified offence. Even with the suggested provision for the placing of an evidential burden on an accused to offer an explanation of his presence on the premises in question, there would still be situations where proof of intent to commit a particular type of offence would be very difficult. Also there would be cases where a person would enter premises without any intent to commit an offence but in circumstances where his intrusion would be very alarming to the occupants or their neighbours - for example, a person entering a building at night to "doss" in it. Accordingly, the Commission considers that it should also be an offence to trespass on residential premises in a manner which causes or is calculated to cause nuisance or annoyance or fear to another person.

14.12 The appropriate maximum penalty for the two new offences proposed above would be a fine of £500 and/or six months' imprisonment.

Recommendation

14.13 The provision in section 4 of the Vagrancy Act 1824 relating to persons found on enclosed premises should be repealed, as should the similar provision in section 7 of

---

21 See the English Home Office Working Party on Vagrancy and Street Offences, Working Paper (1974), para. 179.

the Prevention of Crimes Act 1871. These should be replaced by a new provision making it an offence to be found in or upon any building or in any yard or garden or in any enclosed area with intent to commit an offence. The reference to any building should be specified as applying also to any inhabited vehicle or vessel and as applying to any such vehicle or vessel at times when the person having a habitation in it is not there as well as at times when he is there.[22] It should be further provided that where a person is found on premises of the kind in question in circumstances giving rise to a reasonable suspicion that he is there with intent to commit a particular offence, this would be evidence that he was there with such intent. It should also be an offence to trespass on residential premises in a manner which causes or is calculated to cause nuisance or annoyance or fear to another person. The maximum penalty for both the proposed new offences should be a fine of £500 and/or six months' imprisonment.

---

[22] See Section 23A (3) of the Larceny Act 1916, as inserted by section 6 of the Criminal Law (Jurisdiction) Act 1976.

CHAPTER 15 LOITERING WITH INTENT

The Present Law

15.1 Section 4 of the Vagrancy Act 1824, as amended by section 15 of the Prevention of Crimes Act 1871, provided that every suspected person or reputed thief, frequenting or loitering about or in any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit a felony was to be guilty of an offence and liable to three months' imprisonment. In proving the intent to commit a felony it was not to be necessary to show that the person suspected was guilty of any particular act or acts tending to show his purpose or intent, and he might be convicted if from the circumstances of the case, and from his known character as proved to the court before whom or which he was brought, it appeared to the court that his intent was to commit a felony. As has already been seen,[1] in King's case[2] the Supreme Court found this provision to be inconsistent with the Constitution.

15.2 Section 7 of the Prevention of Crimes Act 1871 provides inter alia that, where any person is convicted on indictment of a crime,[3] and a previous conviction of a crime is proved against him he shall, at any time within seven years immediately after the expiration of the sentence passed on him for the last of such crimes, be guilty of an offence if he is found in any place, whether public or private, under such circumstances as to satisfy the court that he was about to commit or to aid in the commission of any offence, or was waiting for an opportunity to do so. Proof of a previous conviction is a necessary ingredient of this offence and in the light of the Supreme Court's finding in King's case the consistency of the provision with the Constitution must be in serious doubt.

---

1 Chapter 4 above.

2 [1981] I.R. 233.

3 See fn. 11 on p. 84 above.

Policy Arguments on Reform of the Law

15.3 The fact that the existing provision in section 4 of the Vagrancy Act 1824 has been declared to be inconsistent with the Constitution does not, of course, preclude the possibility of devising a new provision to replace it which would accord with the Constitution. Indeed, as has already been seen,[4] in King's case itself O'Higgins, C.J., who was in a minority on this point, thought that the offending protions of section 4, as amended by section 15 of the Prevention of Crimes Act 1871, should be severed and the remainder of the provision retained on the statute book as a law in operation in the State.

15.4 In Britain the Home Office Working Party on Vagrancy and Street Offences took the view[5] that an offence on the lines of the existing 1824 Act offence was still necessary to deal with behaviour which fell short of any other criminal offence or of an attempt to commit an offence but which the public interest nevertheless required to be punishable. Such an offence was likely to be necessary even if the scope of the law on attempts was widened. The offence should, in the Working Party's view, be limited to the case of a person whose antecedent conduct in a public place revealed his intent to commit an arrestable offence: 'antecedent conduct' should, as under the existing law, include at least one suspicious act before and distinct from the act which caused him to be charged with the offence. Following publication of the Working Party's report the "sus" offence as it came to be known gave rise to increasing controversy in Britain in the context of relations betwen the police and the black community. In 1980 a Select Committee of the House of Commons recommended the abolition of "sus".[6] Section 8 of the Criminal Attmepts Act 1981 implemented this recommendation and section 9 of the Act created a new offence of interference with vehicles, which was designed to cover one of the situations that the "sus" offence had catered for.

---

[4] Para. 4.4 above.

[5] Working Paper (1974), paras. 202-203.

[6] Second Report from the Home Affairs Committee of the House of Commons, Race Relations and the "Sus" Law, (HC 559, 21 April 1980).

15.5 The difficulty about any new offence of "loitering with intent" that might be devised is that one ingredient of the offence would have to be the antecedent conduct of the accused. The reason for this is that an offence that did not contain this ingredient would be too open-ended, as is clear from the following passage from an English decision:[7]

> "In my judgment, the special powers given to constables are confined to a class of persons described as 'suspected persons' or 'reputed thieves'. They can only be apprehended without warrent if they already are at the time of their arrest and imprisonment suspected persons or reputed thieves. I do not think this means that if the constable suspects the person whom he apprehends he is entitled to arrest and imprison him without warrant. The person so apprehended must be some person who has become suspect, that is to say, some person who belongs to the class of suspected persons by reason of his antecedent conduct. I think 'suspected person' means a person who has acquired the character of a suspect and does not mean whom the apprehending constable suspects to be loitering with intent to commit a felony. It appears to me very difficult to think that the legislature intended to leave it to a constable to arrest without a warrant any citizen whom he found loitering in a street, if on what he deemed to be reasonable grounds he suspected that he was loitering for the purpose of committing a crime. In my judgment the powers of a constable to arrest without warrant are confined to cases in which he finds frequenting or loitering, etc., a person who has by his previous conduct become a suspected person. Any other view would put a reasonable person loitering in a street for a reasonable cause at the mercy of any constable who knew nothing about him except that he was loitering, and therefore chose to suspect him of loitering for the purpose of committing a felony or misdemeanour. I think the exceptional powers conferred on the police by the Vagrancy Act were so conferred with respect to a class of persons who were, apart from the particular occasion, within the description of suspected persons."

Even if the accused's criminal record were excluded from consideration as part of his antecedent conduct, an offence

---

[7] Ledwith v Roberts [1936] 3 All E.R. 570, per Greene, L.J., at 575.

containing as an ingredient an element of suspicion engendered by the accused's antecedent conduct would probably suffer from many of the defects identified by the Supreme Court as attaching to the existing "loitering with intent" offence - arbitrariness, vagueness, difficulty of rebuttal, relation to past conduct, ambiguity in failing to distinguish between apparent and real behaviour of a criminal nature, etc.[8]

15.6 Could the element of antecedent conduct not be omitted and an offence be created applying to any person found loitering about or in or frequenting any public place with intent to commit a felony, with an evidential burden being placed on the accused to raise a sufficient issue as to the innocence of his intent, as was suggested above[9] in relation to being found on enclosed premises? Such a provision is justified where the place where the person is found is private property, where there is an element of trespass in the first instance giving rise to a suspicion about the accused's intent. It would not be acceptable, however, that such a provision should apply where the accused is found in a place to which the public have lawful access.

15.7 Another possible approach would be to create an offence directed at situations where the accused's conduct contains specific suspicious elements additional to the mere fact that he is loitering. For example, section 250.2 of the American Law Institute's Model Penal Code provides as follows:

> "A person commits a violation if he loiters or prowls in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor takes flight upon appearance of a peace officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight by the actor or other circumstance makes it impracticable, a peace officer

---

[8] See the passage from the judgment of Henchy, J. in King's case quoted at para. 4.2 above.

[9] Para. 14.10.

> shall prior to any arrest for an offense under this section afford the actor an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this section if the peace officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the actor was true and, if believed by the peace officer at the time, would have dispelled the alarm."

It would seem, however, that even an offence along those lines would suffer to an appreciable degree from vagueness and potential arbitrariness of application and would in practice almost certainly involve some consideration of antecedent conduct in some cases.[10] The same objection could be made to an offence on the lines of section 28(1) of the New Zealand Summary Offences Act 1981 which provides that every person commits an offence who is found in any public place behaving in a manner from which it can be reasonably inferred that he is preparing to commit a crime.[11] In the light of King's case the Law Reform Commission does not recommend a new "loitering with intent" offfence of a general nature to replace that in section 4 of the Vagrancy Act 1824.

15.8 This would almost certainly mean that some forms of

---

[10] For example the commentary on section 259.6 envisages that:

> "Typical situations covered would be the following: a known professional pickpocket is seen loitering in a crowded railway station; a person not recognized as a local resident is seen lurking in a doorway and furtively looking up and down the street to see if he is being watched; an unknown man is seen standing for some time in a dark alley where he has no apparent business."

[11] Section 25(3) provides that in determining for the purposes of a prosecution under the section whether it can reasonably be inferred from anything proved to have been done by the defendant at the material time that he was preparing to commit a crime, the Court may have regard to his previous convictions of a similar nature (if any), and for that purpose evidence of any such conviction shall be admissible accordingly.

conduct which were covered by the section 4 provision would no longer be punishable. It seems unlilkely that the gap left by the non-replacement of the section 4 offence would be filled by the law on criminal attempts. It is difficult to make categorical statements about what precise kinds of conduct the law of attempt would extend to because there is considerable uncertainty about the scope of that law. As the English Law Commission has said:[12]

> ".... no abstract test has ever been evolved for determining whether an act is sufficiently proximate to the offence to be an attempt, and it is difficult to know with any precision when there is that proximity which is required."

It is simply not possible to say with any certainty that acts that would have been covered by the "loitering with intent" provision (such as trying the doors of parked cars or hanging about bus queues in order to spot likely victims of theft from handbags) would be punishable as attempts. There is at least a strong possibility that such acts would be regarded by the courts as being merely preparatory and therefore as not being so punishable. Even if the scope of the law on attempts were to be extended, it would be unlikely that acts of mere preparation would be brought within its scope.[13]

15.9 It might be possible to devise a specific offence or offences to cater for particular situations where the absence of a "loitering with intent" offence would leave an unacceptable hiatus, as has been done in England as reardds interference with vehicles.[14] Because of King's case[15] the

---

[12] Working Paper No. 50, Inchoate Offences: Conspiracy, Attempt and Incitement.

[13] Section 1(1) of the English Criminal Attempts Act 1981 excludes acts which are merely preparatory to the commission of an offence from the definition of attempt.

[14] Section 9 of the Criminal Attempts Act 1981. However, an offence of this kind would appear to be provided for already in this country by section 113 of the Road Traffic Act 1961 (unauthorised interference with mechanism of vehicle).

[15] [1981] I.R. 233.

'loitering with intent' provision of the Vagrancy Act has been inoperative for some time. The existence of any resultant hiatus of the kind just referred to, in regard to specific situations, ought by now to have come to the attention of persons and bodies concerned with the day-to-operation of the criminal law. No such hiatus has come to the attention of the Law Reform Commission. Accordingly, the Commission makes no recommendations for the creation of any specific offence of the kind referred to.

Recommendations

15.10 The 'loitering with intent' provision contained in section 4 of the Vagrancy Act 1824, as amended by section 15 of the Prevention of Crimes Act 1871, while it is no longer in force following King's case,[16] should be removed from the statute book. The corresponding provision in section 7 of the Prevention of Crimes Act 1871 should also be repealed. No new general 'loitering with intent' offence should be enacted to replace these provisions.

---

16 *Ibid*.

CHAPTER 16 SOLICITATION FOR SEXUAL PURPOSES

Introduction

16.1 This Report reviews only those offences related to prostitution that are provided for in the Vagrancy Acts and the Dublin Police Acts and in specific provisions of other legislation that are closely related to the provisions of those Acts. The Report does not attempt a comprehensive review of all offences related to prostitution. It examines three aspects of the criminal law as it affects prostitution:

(a) street offences by prostitutes,

(b) solicitation by males, and

(c) living on the earnings of prostitution.

It does not consider offences related to procuration or the use of premises for prostitution. Any question of what is sometimes inaccurately termed the "legalis ation" of prostitution (i.e. the licensing of brothels and the institution of a system of medical controls etc.) is, therefore, outside the scope of this Report.

Present law

16.2 Under section 14(11) of the Dublin Police Act 1842 every common prostitute or night-walker loitering or being in any thoroughfare or public place for the purpose of prostitution or solicitation, to the annoyance of the inhabitants or passengers, is liable to a penalty not exceeding £2. Section 72 of the Towns Improvement (Ireland) Act 1854 makes identical provision and a similar type of provision is contained in section 28 of the Town Police Clauses Act 1847. Section 16(1) of the Criminal Law Amendment Act 1935 provides that every common prostitute who is found loitering in any street, thoroughfare, or other place and importuning or soliciting passers-by for purposes of prostitution or being otherwise offensive to passers-by shall be guilty of an offence and liable, in the case of a first offence, to a fine not exceeding £2 and in the case of a second or subsequent offence to imprisonment for a term not exceeding six months.

16.3 The term 'common prostitute' is not defined in any of the statutes mentioned but it has been held[1] to include a woman who offered her body commonly for acts of lewdness for payment, although there was no act, or offer of an act, of ordinary sexual connection. In another case[2] it was said that loitering "is just travelling indolently and with frequent pauses" and "involves an idea of a certain persistence or repetition". It was also said in that case that loitering "connotes the idea of lingering". It has also been held[3] that a person may loiter in a vehicle. "Loitering for the purpose of prostitution is an offence even though the prostitute does not actively solicit customers. If she loiters it is enough that she intends them to approach her."[4] Soliciting, on the other hand, is "conduct amounting to an importuning of prospective customers".[5] It requires physical presence on the part of the prostitute.[6] Solicitation may be by gestures or acts, it is not necessary to prove that any words were spoken.[7] Soliciting takes place in a street or public place if it takes effect there, even though the accused may not be in the street or public place but, for example, in a window looking onto a street.[8]

16.4 A significant recent development has rendered inoperative the existing provisions relating to loitering or soliciting by a common prostitute. In practice the

---

[1] R v de Munck [1918] 1 K.B. 635. The interpretation was given in the context of section 2(2) of the Criminal Law Amendment Act 1885 (procuring a woman or girl to become a common prostitute).

[2] Williamson v Wright 1924 J.C. 57. The case concerned the Street Betting Act 1906.

[3] Bridge v Campbell (1947) 63 T.L.R. 470. The case concerned an offence of "loitering with intent" under section 4 of the Vagrancy Act 1824.

[4] Honore, Sex Law (1978), pp. 119-120.

[5] Smith and Hogan, Criminal Law (4th ed., 1978), p. 434.

[6] Weisz v Monahan [1962] 1 All E.R. 664.

[7] Horton v Mead [1913] 1 K.B. 154.

[8] Smith v Hughes [1960] 2 All E.R. 859; Behrendt v Berridge [1976] 3 All E.R. 285.

position was that proof of an accused's being a 'common prostitute' was effected by one of two means - either evidence was adduced that she had been found loitering or soliciting by the Gárdai on more than one occasion previous to that to which the charge related and warned by them or else her previous convictions for loitering or soliciting were put in evidence. The position as regards proof that an accused person was a 'common prostitute' was, therefore, very similar to that obtaining prior to King's case[9] as regards proof that an accused was a 'suspected person' within the meaning of the 'loitering with intent' provision in section 4 of the Vagrancy Act 1824. Among the grounds on which the latter provision was found to be inconsistent with the Constitution was the fact that the ingredients of the offence and the mode by which its commission might be proved were 'related to rumor or ill-repute or past conduct' and were 'indiscriminately contrived to mark as criminal conduct committed by one person in certain circumstances when the same conduct when engaged in by another person in similar circumstances would be free of the taint of criminality'.[10] Following an application in the District Court in 1983 which relied on King's case, charges of loitering or soliciting by a common prostitute are no longer being brought.[11] It is understood that instead, where possible, charges are now being brought against both the prostitute and her client[12] under section 5 of the Summary Jurisdiction (Ireland) Amendment Act 1871[13] (act contrary to public decency) and section 14(13) of the Dublin Police Act[14] ("breach of the peace").

---

[9] [1981] I.R. 233. See Chapter Four above.

[10] [1981] I.R. 233 at 257, per Henchy J.

[11] See The Irish Times of 19 April 1983, p. 1.

[12] See Chapter 17 below.

[13] "Any person who within the limits of the police district of Dublin Metropolis in any thoroughfare or public place, shall wilfully and indecently expose his person or commit any act contrary to public decency shall be liable .... to a fine not exceeding five pounds, or, ... to be imprisoned for any period not exceeding two calendar months."

[14] "Every person who shall use any threatening abusive or insulting words or behaviour, with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned" (maximum penalty a fine of two pounds).

16.5 It should be noted that prostitution itself is not an offence. Rather, the law seeks to curb prostitution in a number of ways, including the penalisation of loitering or soliciting by prostitutes in public places. A woman is not in breach of the criminal law merely because she engages in prostitution as long as she does not commit any of the particular acts that are specified as being an offence. However, in practice it is difficult for many prostitutes to ply their trade without committing those specified acts.

16.6 Solicitation by a man for immoral purposes may also constitute an offence. Section 1(1) of the Vagrancy Act 1898, as amended and extended to Ireland by section 7 of the Criminal Law Amendment Act 1912, provides inter alia that every male person who in any public place persistently solicits or importunes for immoral purposes shall be liable on summary conviction to imprisonment for a term not exceeding six months. Subsection (5) of section 1 enables trial on indictment of this offence, the maximum penalty in this event being two years' imprisonment.[15]

16.7 The side-note to section 1 of the 1898 Act reads "Persons trading in prostitution". One might suppose therefore that the solicitation provision was designed to cover only solicitation by a man of another man on behalf of a prostitute. However, the provision has been interpreted as having a wider scope. The Wolfenden Committee commented on the corresponding provision contained in section 32 of the English Sexual Offences Act 1956:

> "The statute does not specify the sex of the persons solicited, and in addition to its application to the solicitation of males by males for the purposes of homosexual acts .... it would seem to apply also to (a) the solicitation of males by males for the purpose of immoral relations with females (for example 'touting' on behalf of prostitutes) and (b) the solicitation of females by males for immoral purposes."[16]

---

[15] Subsection (5) also refers to whipping but this part of the provision must now be regarded as a dead letter.

[16] Report, para. 238.

As regards (b) however, in Crook v Edmondson[17] it was held that a man does not solicit for immoral purposes within the meaning of the provision by soliciting a woman to have intercourse with himself. The basis of this decision has been criticised[18] and it is a moot point whether the Irish courts would arrive at the same result, though as a matter of practice it seems that in general prosecutions have not been brought under section 1 of the 1898 Act for solicitation of females by males. However, as has already been mentioned,[19] there has been a very recent development whereby both prostitutes and their clients are being charged with offences under section 5 of the Summary Jurisdiction (Ireland) Amendment Act 1871 (public indecency) and section 14(13) of the Dublin Police Act 1842 (using threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned).

16.8 There is no real distinction to be drawn between presistently soliciting and persistently importuning.[20] "Persistently" connotes "a degree of repetition, of either more than one invitation to one person or a series of invitations to different people".[21] It would seem that a single act of "continuing solicitation" would also suffice.[22] In the case of solicitation of males by males for the purpose of homosexual acts, it is not necessary that this be for reward.

Policy Arguments on Reform of the Law

16.9 The existing position whereby the street activities

---

17 [1966] 1 All E.R. 833. See also Dodd (1977) 66 Cr. App. R. 87.

18 See, for example, Smith and Hogan, op. cit., p. 444 and Michael Cohen, "Soliciting by Men" [1982] Crim. L. R. 349.

19 Para. 16.4 above.

20 Field v Chapman [1953] CLY 787.

21 Dale v Smith [1967] 2 All E.R. 1133, at 1136.

22 See Smith and Hogan, op. cit., p. 444.

of prostitutes are being dealt with by way of charges under section 5 of the Summary Jurisdiction (Ireland) Amendment Act 1871 and section 14(13) of the Dublin Police Act 1842 is unsatisfactory. A specific offence of loitering or soliciting by prostitutes in streets and public places is required. There is little or no case to be made for decriminalising the street activities of prostitutes. Freedom of operation for prostiutes on the street would be highly offensive to the great majority of people and would lead to a marked deterioration in the quality of living in cities and towns. The public nuisance that would ensue would be unacceptable and would outweigh other considerations. The nature of the nuisance that arises in an area where prostiutes operate has been well described by the Criminal Law Revision Committee[23] in England:

> "The nuisance arises in various ways. What may have been a quiet street or square becomes frequented, often until the early hours of the morning, by prostitutes looking for clients and clients looking for prostitutes. Noise, arguments, some squabbling and occasionally violence result. When accommodation is not available prostitutes provide the services they are offering in parked cars, front gardens, alleyways or evin in the street itself. Offensive litter is left in the streets. Many clients drive slowly along the street in motor vehicles looking for what they want. When they think they have found a prostitute who is attractive to them, they open negotiations either from their cars or by stopping, getting out and speaking to the woman on the pavement. If their assessment of the woman has been correct, bargaining follows. If it is concluded successfully, the woman usually gets into the vehicle and the man drives away. If no bargain is made, verbal abuse may follow. All this adds to the noise and other nuisance. The slow driving causes traffic problems and makes life difficult for people living in the area. Sometimes a man's assessment of the woman is incorrect. The woman whom he approaches may not be a prostitute. She may be offended, probably annoyed and possibly put in fear."

In the face of such a public nuisance, "the right of the normal, decent citizen to go about the streets without affront to his or her sense of decency should be the prime

---

23 Sixteenth Report, Prostitution in the Street (1984, Cmnd. 9329), para. 8.

consideration and should take precedence over the interests of the prostitute and her customers".[24]

16.10 What change, if any, should be made to the existing, inoperative offences of soliciting and loitering? Much criticism has been levelled at the use of the term "common prostitute" in the present provisions. The expression has derogatory overtones. More importantly, it can be argued "that to define an offence by reference to the category of persons who commit it, while the same act might be commited with impunity by others, is a legal impropriety" and "that the affixing of this designation to any person charged with an offence introduces her to the court from the start as a person of low moral character, with the antecedent presumption of guilt".[25] The Wolfenden Committee dismissed these two arguments as follows:

> "On the [first] point, we would merely observe that in this context the words 'common prostitute' are a description of a trade or calling that is not of itself unlawful, and that there are parallels for prohibiting to members of one trade or calling actions which for other persons are not offences. As regards the [second] point, we feel, ... that this is something which has been suggested rather than proved. It seems to us that the courts are well accustomed to this formula of description and we have no evidence that any injustice results from its use. It is indeed the first fact that has to be established if a charge is to be proved."[26]

16.11 The use of the term "common prostitute" must, of course, be discontinued in the light of the Supreme Court's decision in King's case.[27] In England the Wolfenden Committee,[28] the Home Office Working Party on Vagrancy and

---

[24] Report of the Committee on Homosexual Offences and Prostitution (1957, Cmnd. 247), para. 249.

[25] Ibid., para. 258.

[26] Ibid., para. 259.

[27] See Chapter 4 and para. 16.4 above.

[28] Report, paras. 258-262.

Street Offences[29] and a majority of the Criminal Law Revision Committee[30] favoured the retention of the term. The advantage of the use of the term "common prostitute" is said to be that it imports a requirement of some kind of habitual conduct on the part of the accused so as to protect an innocent woman from prosecution. Rather too much can be made of this argument:

> "[The value of the term] is said to be that it protects from arrest a respectable woman who, through ignorance or indiscretion, loiters, quite innocently but so as to give rise to reasonable suspicion in the mind of a policeman that she is doing so for the purposes of prostitution. But if a policeman reasonably suspects that D is loitering for the purposes of prostitution, does he not thereby necessarily also suspect that she is a common prostitute?"[31]

It may be doubted whether there would be a substantial risk that a woman who is not a prostitute would be mistakenly accused of soliciting if the term "common prostitute" were not used in the definition of the offence.[32] In any event, any argument on the point is academic in an Irish context - in view of the constitutional position the status of the accused as a prostitute cannot constitute an ingredient of an offence of loitering or soliciting.

16.12 The existing offences under the Dublin Police Act, the Towns Improvement (Ireland) Act and the Town Police Clauses Act all require that the conduct of the prostitute should have caused annoyance to the inhabitants or passengers (section 16(1) of the Criminal Law Amendment Act

---

[29] Working Paper (1974), paras. 234-235; Report (1976), paras. 83-89.

[30] Sixteenth Report, Prostitution in the Street (1984, Cmnd. 9329), paras. 15-23.

[31] Smith and Hogan, op. cit., p. 438.

[32] See Criminal Law Revision Committee's Working Paper on Offences Relating to Prostitution and Allied Offences (1982), para. 3.13.

_1935_ does not refer to "annoyance"). In practice this is a rather artificial requirement in view of the reluctance of men solicited by prostitutes to give evidence:

> "The standard of proof of annoyance required by the courts seems to have varied from time to time and from place to place, but at the present time it would appear that the courts are, generally speaking, content to infer from the circumstances of the case that annoyance has been caused. Experience has shown that men solicited by prostitutes almost invariably decline to give evidence. Usually the prostitute pleads guilty, but if she does not the courts are usually prepared to accept the evidence of the police officer who witnessed the offence, to the effect that a person or persons accosted appeared to be annoyed."[33]

Residents of an area frequented by prostitutes are no less reluctant to give evidence of annoyance:

> "The proposition that to require the person alleged to have been annoyed to give evidence would be to enact a dead letter applies to the person annoyed by the loitering of prostitutes no less than to the person annoyed by an act of importuning. It probably applies even more, since it is unlikely that a resident in a neighbourhood where annoyance is caused by the loitering of prostitutes would be prepared to go to the courts day after day to establish the fact that he was annoyed. Indeed it seems to us unreasonable that he should be required to do so. In our view both loitering and importuning for the purpose of prostitution are so self-evidently public nuisances that the law ought to deal with them, as it deals with other self-evident public nuisances, without calling on individual citizens to establish the fact that they were annoyed."[34]

Besides, establishing that specific annoyance was caused by an individual prostitute is not really the core of the matter at all where annoyance to residents is concerned:

---

[33] Report of the Committee on Homosexual Offences and Prostitution (1957, Cmnd. 247), para. 251.

[34] _Ibid._, para. 255.

> ".... in reality it is not so much the conduct of any particular prostitute that causes the annoyance as the presence of numbers of prostitutes in the same place; and this annoyance is to the inhabitants or passengers at large rather than to any individual. That this more general form of annoyance exists, and that it causes no less offence (and may well cause more offence) than individual acts of soliciting is very clear from the evidence we have received. Nevertheless the law must deal with the offenders individually, though the annoyance caused to the inhabitants or passengers in general might be unrelated to and indeed, unrelatable to, any individual prostitute."[35]

All this points up the unreality of any requirement that annoyance or offence or nuisance (either to an individual person accosted or to the residents at large of a locality) must be established. No such requirement should be contained in any new offence of loitering or soliciting for the purpose of prostitution.

16.13 The proposed new offence should not contain any reference, either, to "passers-by", as does section 16(1) of the Criminal Law Amendment Act 1935. It is understood that certain difficulties have arisen in practice as regards interpretation of this term. Is, for example, a man who stops in his car opposite a prostitute and is solicited by her a "passer-by"? The gist of the offence should be simply to loiter or solicit in a public place for the purpose of prostitution. The existing provisions refer to streets or thoroughfares as well as public places. However, as suggested earlier above[36] in another connection, "public place" should be defined as any place (including a street or road) to which the public have access whether as of right or by permission and whether on payment or otherwise.

16.14 The position that has obtained very recently whereby prostitutes' clients are being charged under section 5 of the Summary Jurisdiction (Ireland) Amendment Act 1871 and secction 14(13) of the Dublin Police Act 1842 is unsatisfactory. If the activities of men who solicit women in public places for the purpose of prostitution are a

---

[35] Ibid., para. 253.

[36] Para. 7.12.

sufficient source of public nusiance to warrant the impostition of criminal sanctions, then it would be desirable that a specific offence be created for this purpose. One of the criticisms that is frequently made of the present law is that it discriminates against the prostitute in that it penalises her conduct in loitering or soliciting in public places but does not penalise that of the man who accepts or even goes out to seek her invitation. However, it has to be borne in mind that prostitution in itself is not illegal - it is the act of loitering or soliciting in the street on the prostitute's part that constitutes the offence. It would scarcely be logical, therefore, to penalise the conduct of a man who does not solicit or importune a woman in the street for sexual purposes or loiter there for that purpose, but merely accepts the invitation of a prostitute. In the words of the Wolfenden Committee:[37]

> "The simple fact is that prostitutes do parade themselves more habitually and openly than their prospective customers, and do by their continual presence affront the sense of decency of the ordinary citizen. In doing so they create a nuisance which, in our view, the law is entitled to recognise and deal with."

16.15 Different considerations should apply where the man's conduct in public itself constitutes a nuisance.

> "The customer may, by mistake, invite an ordinary woman to prostitution. Such mistakes occur especially if the woman is loitering aimlessly in the busy hours of the evening (probably waiting for a friend) in an area known by the customer to be one which prostitutes frequent. The customer generally means no harm, genuinely believing the woman to be a prostitute. 'Reports are that most of those mistaking respectable women for prostitutes are themselves very annoyed'. (New Society, 16 January 1969). Nevertheless, the invitation to prostitution, put bluntly to the ordinary woman may be offensive and embarrassing. Consequently, the ordinary woman will have to avoid the area, which may cause inconvenience."[38]

---

[37] Report, para. 25.

[38] Sion, Prostitution and the Law (1972), p. 59.

Perhaps the most common form of solicitation of women by men is what is known as "kerb crawling" - i.e. where a man drives along slowly near the footpath in an area known to be frequented by prostitutes, stopping beside women pedestrians and inviting them either by word or gesture to get into his car, the clear implication being that the invitation is for sexual purposes. It is not necessary to spell out the nuisance that this practice can cause to residents of such areas and to women pedestrians who have to pass through them, say on their way from work.

16.16 This kind of solicitation of women by men should be made an offence. The difficulty is to do this without at the same time penalising other kinds of conduct which it would not be desirable to cover. An offence couched in terms of a man soliciting or importuning a woman in a public place for sexual purposes or immoral purposes would be capable of covering various forms of socially acceptable advances by men to women and would be open to abuse. The English Home Office Working Party on Vagrancy and Street Offences[39] considered that reasonable safeguards for the innocent would be provided if the offence included peresistent accosting and nuisance as elements and suggested "the creation of a new offence on the lines of a man persistently accosting a woman or women for sexual purposes in a street or public place in such circumstance as are likely to cause annoyance to the woman or annoyance to the public, such as residents and users of the street". It was envisaged that the offence would be drafted so as to allow proceedings to be taken against a man who persistently accosted one woman as well as against a man whose persistence took the form of accosting a number of women.[40] The Criminal Law Revision Committee in England also proposed that a man's conduct in soliciting the services of a prostitute on foot should only be treated as a criminal offence if there is a degree of persistence[41] and recommended that it should be an offence for a man in a street or public place persistenlty to solicit a woman or women for the purpose of prostitution.[42] There are difficulties about these suggestions. In the first place, a man who accosts a woman in an area known to be

---

[39] Working Paper (1974), para. 268.

[40] Ibid., para. 266.

[41] Sixteenth Report, Prostitution in the Street (1984, Cmnd. 9329), para. 44.

[42] Ibid., para. 45.

frequented by prostitutes in the belief that she is one, only to find that she is not, is unlikely to be persistent. The annoyance caused to the woman in question is likely to be considerable nevertheless. The Criminal Law Revision Committee argued that the element of public nuisance would be lacking in the proposed male offence of soliciting on foot unless there were a degree of persistence but it is difficult to see why this is so - if the nuisance element is present when a prostitute solicits, even if she does not do so persistently, why is it not present when a man solicits similarly? The element of persistence is designed to ensure against the possibility of a person being arrested by mistake but a requirement that the solicitation must be for the purpose of prostitution (not just an "ordinary" sexual advance) should be a sufficient safeguard. Also, the requirement suggested by the Home Office Working Party that the circumstances be such as are likely to cause annoyance is open to many of the objections discussed earlier[43] in relation to the reference to "annoyance" in the existing provisions about loitering or soliciting by a common prostitute.

16.17 The Criminal Law Revision Committee also recommended a specific offence to deal with "kerb crawling". The Committee proposed that it should be an offence for a man to use a motor vehicle in a street or public place for the purpose of soliciting a woman for prostitution.[44] No requirement of persistence was proposed. The Committee further proposed an offence which would prohibit a man from soliciting a woman for sexual purposes, whether or not he intended to pay, in a manner likely to put her in fear.[45] This latter proposed offence does not find its justification in the avoidance of public nuisance - it is more nearly related to the existing offence of indecent assault.[46]

16.18 The Law Reform Commission considers that in this context any new offence should cover only conduct related to solicitation by men for the purpose of prostitution. Such an offence would deal with what the Commission sees as the core of the problem in this area, namely the nuisance caused

---

[43] Para. 16.18 above.

[44] Sixteenth Report (fn. 41 above), para. 40.

[45] Ibid., para. 46.

[46] Ibid., para. 49.

to residents of or other persons frequenting a neighbourhood that is frequented by prostitutes not alone by the prostitutes themselves but by the male clients who come there to seek prostitutes. This nuisance can take the form of general annoyance to the residents of the neighbourhood by the presence of prostitutes and would-be clients as well as specific annoyance to a particular woman who is not a prostitute and who is solicited by mistake. The Commission also considers that it should be immaterial whether the conduct related to solicitation is engaged in from a motor car or otherwise.

16.19 It is suggested that an appropriate form of offence would be one that would apply to any male person who in any public place

(i) solicits any female to prostitute herself with him, or

(ii) loiters for the purpose of, or with the intention of, soliciting any female to prostitute herself with him, or

(iii) loiters for the purpose of, or with the intention of, being solicited by or on behalf of a prostitute.

In addition any new offence should cover "touting" on behalf of prostitutes. It might be argued that this would be unnecessary and that the activities of pimps could be adequately dealt with under the heading of the offence in the next chapter. However, the activity of a pimp in "touting" in public on behalf of a prostitute constitutes a form of wrongdoing distinct from the exploitation involved in his living on her earnings - it is a nuisance of a kind similar to that created by the prostitute herself when she solicits in public. Besides, there are difficulties of proof attached to the offence of living on the earnings of prostitution and it would therefore be desirable that the specifically identifiable and more readily detectable activity of pimps in "touting" should be penalised. Anyway, the activity of "touting" need not be confined to pimps. The present offence of touting is confined to men but there is not any good reason why it should not apply as well to a woman who touts on behalf of a prostitute. The requirement of persistence that is a feature of the present offence should be removed. The conduct of a person who solicits in a public place on behalf of a prostitute is offensive irrespective of whether he is peresistent about it or not. A wider offence of arranging or facilitating the making of a

contract for prostitution[47] might possibly be considered. However, the Commission has not been made aware of the existence in this country of any particular problem calling for the creation of such a wider offence.

Recommendations

16.20 The existing offences in this area draw distinctions based on the sex of the persons concerned. The Commission considers that a modern offence should avoid such distinctions and recommends that there should be a single new offence which would cover solicitation of either a male or a female person by a male or female person for the purpose of prostitution (including male prostitution). This offence should cover solicitation by a prostitute, a "tout" or a client. Loitering should be covered as well. It should therefore be an offence for any person in a public place to solicit another person for the purpose of prostitution or to loiter for the purpose of or with the intention of so soliciting or being so solicited. In order to ensure that the provision would cover "kerb crawling" situations, it would be desirable to specify that "loitering" would include loitering in a vehicle and that soliciting from a vehicle would be soliciting in a public place. This proposed offence would cover solicitation for the purpose of homosexual prostitution. The existing offence under section 1(1) of the Vagracy Act 1898 applies to the solicitation of males by males for the purposes of homosexual acts, irrespective of whether there is prostitution involved. Any new offence to cover this aspect should be confined to solicitation for the purpose of criminal acts and should not be confined to solicitation for the purpose of homosexual acts - for example, solicitation of an act of indecency with a person under the age of fifteen should be covered.[48] It is therefore suggested that, in addition to the new offence proposed above, it should be an offence for any person in a public place to loiter or to solicit another person for the purpose of the commission of a sexual offence.

---

47 See the English Criminal Law Revision Committee's Working Paper on Offences relating to Prostitution and allied Offences (December 1982), paras. 2.13, 2.15.

48 Section 14 of the Criminal Law Amendment Act 1935 provides that consent is not a defence to a charge of indecent assault upon such a person.

Penalties

16.21 The present maximum fine of £2 for an offence under section 14(11) of the Dublin Police Act 1842 or for a first offence under section 16(1) of the Criminal Law Amendment Act 1935 is derisory and can serve no deterrent purpose. For a second or subsequent offence under the 1935 Act the maximum penalty is six months' imprisonment. The trouble about this is that the aternative of a fine is not available so that if an accused is found guilty imprisonment is the only penalty that can be applied. It seems that in practice because of this the courts have been reluctant to convict for a second or subsequent offence under the 1935 Act, so that second or subsequent convictions tended to be for an offence under the 1842 Act. In England the Street Offences Act 1959[49] provided for maximum penalties of £10 on a first conviction, £25 on a second conviction and £25 and/or three months' imprisonment on a third or subsequent conviction. The Wolfenden Committee[50] had recommended a system of graduated fines, to serve as a progressive deterrent, with imprisonment available as a sanction when fines had failed in an individual case. The English Criminal Justice Act 1982[51] has now abolished imprisonment as a penalty for the offenc of loitering or soliciting for purposes of prostitution and provided for a maximum fine of £100 for a first conviction or £400 for a second or subsequent conviction. The 1982 Act abolished differential maximum penalties generally[52] but preserved the difference in maximum penalties for the loitering or soliciting offence pending the completion of the Criminal Law Revision Commiittee's deliberations on prostitution offences. That Committee has now stated that it sees no reason for exempting the 1959 Act from the general principle behind the 1982 Act and has recommended that all offences under the 1959 Act should be punishable with a maximum fine of £400.[53]

---

49 Section 1(2).

50 Report of the Committee on Homosexual Offences and Prostitution (1957, Cmnd. 247), paras. 275-277.

51 Section 71.

52 Section 35.

53 Sixteenth Report, Prostitution in the Street (1984, Cmnd. 9329), para. 32.

16.22 It is suggested that the maximum penalty for the two new offences of loitering or soliciting proposed above should be a fine of £500 and/or imprisonment for a term not exceeding six months. It may be objected by some that imprisonment should not be available at all as a penalty for this offence. Adherents of this view would probably question the rehabilitative value of imprisonment for prostitutes and consider it inappropriate to punish by imprisonment persons whom they would regard as victims of society. Nevertheless, if imprisonment were not available as an ultimate sanction, for persistent offenders the nuisance of street solicitation by prostitutes would be likely to increase considerably. The abolition in England of imprisonment for loitering or soliciting has been criticised by the Prosecuting Solicitors Society on the ground that it has removed the only effective deterrent to the offence.[54] It has also been followed by a sharp increase in the number of convictions - the number for 1983 seems to have been nearly double that for 1982.[55] A number of factors may be involved in these increases but they do raise questions about the advisability of abolishing imprisonment altogether as a penalty for loitering or soliciting. The fact that the alternative penalty of a fine would be available under the proposal made above would enable the courts to exercise discretion as to the circumstances in which the sanction of imprisonment should be applied. The proposal would also enable a progressive deterrent to be applied in the case of second or subsequent convictions.

Recommendations

16.23 The provisions of section 14(11) of the Dublin Police Act 1842, section 72 of the Towns Improvement (Ireland) Act 1854 and section 78 of the Town Police Clauses Act 1847 relating to loitering or soliciting by common prostitutes in public places should be repealed, as should section 16(1) of the Criminal Law Amendment Act 1935. The Vagrancy Act 1898 and section 7 of the Criminal Law Amendment Act 1912 should also be repealed. Instead two

---

[54] See The Times, 18 December 1984.

[55] Criminal Law Revision Committee, Sixteenth Report (supra) para. 16.

[56] Ibid., para. 33.

268

new offences should be created which would be committed by any person who in a public place

(i) solicits another person for the purpose of prostitution or loiters for the purpose or with the intention of so soliciting or being so solicited, or

(ii) loiters or solicits another persons for the purpose of the commission of a sexual offence.

It would be specified that loitering would include loitering in a vehicle. The maximum penalty would be a fine of £500 and/or six months' imprisonment.

CHAPTER 17 LIVING ON THE EARNINGS OF PROSTITUTION

The Present Law

17.1 Section 1(1) of the Vagrancy Act 1898, as amended and extended to Ireland by the Criminal Law Amendment Act 1912, provides *inter alia* that every male person who knowingly lives wholly or in part on the earnings of prostitution shall be liable on summary conviction to imprisonment for a term not exceeding six months. Subsection (3) goes on to provide that where a male person is proved to live with or to be habitually in the company of a prostitute or is proved to have exercised control, direction or influence over the movements of a prostitute in such a manner as to show that he is aiding, abetting or compelling her prostitution with any other person or generally, he shall, unless he can satisfy the court to the contrary, be deemd to be knowingly living on the earnings of prostitution. Section 7(4) of the 1912 Act provides that every female who is proved to have, for the purpose of gain, exercised control, direction or influence over the movements of a prostitute in such a manner as to show that she is aiding, abetting or compelling her prostitution with any person, or generally, shall be guilty of an offence under the Vagrancy Act 1898. Subsection (5) provides for offences being tried on indictment instead of summarily, the maximum penalty in such event being two years' imprisonment, and subsection (6) enables the giving of evidence by the spouse of an accused person without that person's consent.

17.2 The Criminal Law Revision Committee summarised[1] the effect of the English cases on living on the earnings of prostitution as follows:

> "'living on the earnings of prostitution' is a serious misdescription of the offence .... as at present interpreted. It suggests a kept man who supports himself parasitically on the earnings of a woman - a ponce, as he is often called. The present law goes well beyond that. The scope of the offence was considered by the House of Lords in the 'Ladies'

---

[1] Working Paper on Offences relating to Prostitution and allied Offences (1982).

Directory' case,[2] where the conviction of the defendant, who had received payment from prostitutes for publilshing a guide advertising their services, was upheld by the Court of Criminal Appeal and the House of Lords. In the House of Lords a majority considered that the offence would be committed whenever a man received payment from a prostitute in return for premises, goods or services supplied to the prostitute exclusively for the purpose of prostitution. Thus a newsagent who places a prostitute's card in his window, or a mini-cab driver who takes a prostitute to her client, may be liable. The courts have drawn back, however, from holding that whenever a man receives payment from a prostitute, knowing that it has been earned by prostitution, he is guilty of the offence. It is likely, however, that the offence is committed when an exorbitant charge, referable to the prostitute's calling, is made for the provision of premises, goods or services. (In practice, this is most likely to take the form of a demand for a 'prostitute rent' for premises.) We think that this process of interpretation has strained the ordinary meaning of the language of the section and caused difficulties to the police and the courts in deciding where the line should be drawn."[3]

---

[2] Shaw v D.P.P. [1962] A.C. 220.

[3] The Committee also referred to a further complication arising from those cases where the payment to the defendant comes from the client (Ansell [1957] Q.B. 215 and Farrugia (1979) 69 Cr. App. R. 108):

> "In Ansell the defendant supplied the names and addresses of prostitutes to men, who paid him for the information. It was held that where the money came from the men with whom the prostitutes were dealing, that fact did not in law prevent the money being the earnings of prostitution, but that before a jury could find that it was, 'its receipt must be shown to be so closely connected with the exercise by the defendant of directing, influence or control over the movement of prostitutes that it could clearly and fairly be said to be the earnings of prostitution' (at 223). In the absence of such evidence, Ansell's conviction was quashed. In Farrugia the defendant, a mini-cab driver,was engaged on a regular basis by the management of an escort agency to drive prostitutes to their customers, to effect an introduction and to collect the agency fee. Although his reward came from

The Committee went on to consider the possibility of replacing the existing offences of living on the earnings of prostitution and exercising control over a prostitute by four separate offences as follows:

(i) controlling or directing a prostitute or otherwise organising prostitution;

(ii) advertising the services of a prostitute;

(iii) arranging or facilitating the making of a contract for prostitution;

(iv) living on the earnings of prostitution (poncing).

The Committee recommended the created of the first of these offences and invited comment on whether the other three should be created.[4]

17.3 It would apear that the difficulties about interpretation of the existing offence of living on the earnings of prostitution that have arisen in England and have led the Criminal Law Revision Committee to consider the creation of a number of more specific offences have not been paralleled in this country. The statistics for prosecutions for this offence in this country (annual average of about three prosecutions over the past five years) do not indicate that there is any problem arising from the scope of the offence being too wide. Indeed a criticism that is more frequently voiced is that the law does not go far enough towards penalising exploitation of prostitutes by pimps. The Law Reform Commission considers that the existing offences should be replaced by two new offences:

(i) controlling or directing a prostitute or otherwise organising prostitution; and

---

Fn. 3 Cont'd

the customers (and he kept the fares) it was held that 'What [he] got from introducing the girls to their customers came from the intended prostitution and can properly be regarded as the earnings of prostitution" (at 112)."

4 Working Paper, paras. 2.6-2.22.

(ii) living on the earnings of prostitution.

The first of these offences would be the more serious of the two and would cover situations where active "management" of a prostitute or of prostitution is engaged in. It would also get over any difficulties there might be about showing that money received by a person controlling a prostitute or organising prostitution constituted "earnings of prostitution" - in cases where he did not receive payment from the prostitute herself but from the client, for example. The second, less serious offence would be aimed at the person who lives parasitically on a prostitute's earnings but without actively managing or controlling her activities. There should be an exemption under this latter heading for a prostitute's minor child or spouse but so as not to exclude the application of (i) to a spouse.

17.4 The besetting problem as regards successful prosecution of ponces is that there are serious difficulties of proof. However, it is difficult to see how they could be got over by any chage in the formulation of the offence itself which would not entail an unacceptable departure from the normal position regarding burden of proof etc. In fact the existing offence leaves something to be desired in that it places a persuasive burden on an accused to satisfy the court that he is not living on the earnings of prostitution once it has been proved that he lives with a prostitute etc. This persuasive burden should be changed to a merely evidentiary one in view of the general undesirability of imposing persuasive burdens on the defendant in criminal cases.[5] The evidential burden should arise only where it has been shown that the defendant lives with or is habitually in the company of a prostitute - the reference to exercising control, direction or influence over the movements of a prostitute should be dropped in view of the separate offence of controlling or directing a prostitute proposed above.[6] There are a number of anomalies in the existing provisions of the Vagrancy Act 1898 as amended by the Criminal Law Amendment Act 1912. In the first place, only a man can be charged with living on the earnings of prostitution - if the offender is a woman the charge is one of exercising control over a prostitute for gain. It is

---

[5] See Eleventh Report, Evidence (General), of English Criminal Law Revision Committee (1972 Cmnd. 4991), pp. 87-91.

[6] Para. 18.3.

not, therefore, an offence for a woman to live on the earnings of prostitution unless she exercised control etc. over the prostitute's movements. Secondly the offences of living on the earnings of prostitution and of exercising control over a prostitute apply only where the prostitute is female and do not cover male prostitution. The two offences proposed above[7] should be capable of being committed by men and women and should apply to male as well as female prostitution.

17.5 The existing maximum penalties for offences under section 1 of the 1898 Act are six months' imprisonment on summary conviction and two years' imprisonment on conviction on indictment. It might be argued that the maximum penalty should be increased in order to cater for the very worst instances of exploitation of prostitutes by pimps. In England the maximum penalty was raised to seven years by section 4 of the Street Offences Act 1959. The Criminal Law Revision Committee has recommended that its proposed offence of controlling or directing a prostitute should be triable either way and carry a maximum penalty of five years' imprisonment, while the offence of living on the earning should be triable summarily only and carrying a maximum penalty of six months' imprisonment/or a fine substantially above £1000. However, two years' imprisonment is a considerable punishment for an offence of controlling or directing a prostitute or otherwise organising prostitution per se. If there are aggravating circumstances such as the use of violence the appropriate course would be that other charges should be brought as well. For the living on the earnings offence it is considered that the maximum penalty should be six months' imprisonment and/or a fine of £500.

Recommendations

17.6 The Vagrancy Act 1898 and section 7 of the Criminal Law Amendment Act 1912 should be repealed. A new provision should be enacted making it an offence for a person knowingly to live wholly or in part on the earnings of prostitution. The fact that a person lives with or is habitually in the company of a prostitute would be evidence that the person is knowingly living on the earnings of prostitution. The maximum penalty for this offence should

---

[7] Ibid.

274

be a fine of £500 and/or six months' imprisonment. Another new provision should make it an offence to exercise control or direction over a prostitute or to organise prostitution. The maximum penalty for this offence should be a fine and/or two years' imprisonment. References in these provisions to "a prostitute" and "prostitution" should be specified as including respectively a reference to a male or female prostitute and a reference to the prostitution of a male or female person. Provision should also be made similar to that contained in subsection (2) of section 1 of the 1898 Act (issue of warrant to search house and arrest suspect) and in subsection (6) of section 7 of the 1912 Act (evidence of spouses).

CHAPTER 18 POWERS OF ARREST

Present Law

18.1 As has already been mentioned,[1] section 6 of the Vagrancy Act 1824 which provided for a power of arrest without warrant, exercisable by anybody, of persons found offending against the Act, never applied to Ireland, so that there is no specific power of arrest without warrant available in respect of offences under section 4 of the 1824 Act. However, section 27 of the Dublin Police Act 1842 enables a member of the Dublin Police to take into custody without a warrant all loose, idle and disorderly persons whom he shall find disturbing the public peace, or whom he shall have good cause to suspect of having committed or being about to commit any felony, misdemeanour or breach of the peace, and all persons whom he shall find between sunset and the hour of eight in the morning lying or loitering in any highway, yard or other place, and not giving a satisfactory account of themselves.[2] Section 26 of the 1842 Act also provides that it shall be lawful for any constable belonging to the Dublin Police, and for all persons whom he shall call to his assistance, to take into custody without a warrant any persons who within view of any such constable shall offend in any manner against the Act and whose name and residence shall be unknown to such constable, and cannot be ascertained by such constable. This provision is relevant in relation to the offences under section 14 of the 1842 Act (loitering or soliciting by common prostitutes and indecent exhibition) that are considered in this Report. Section 72 of the Towns Improvement (Ireland) Act 1854 and section 15 of the Town Police Clauses Act 1847 contain powers of arrest which are similarly relevant in relation to some offences under those Acts that are discussed in the Report. Section 4 of the Vagrancy (Ireland) Act 1847 provides for a power on the part of any person to apprehend without warrant anyone found offending against the Act (i.e. by begging or causing or procuring a child to beg). Section 6 of the Indecent Advertisements Act 1889 provides for a power of arrest without warrant on the part of the Gardai which would apply in certain cases of indecent exhibition.

---

[1] Para. 3.7 above.

[2] A similar power is provided for in section 7 of the Dublin Police Act 1836.

18.2 The common law powers of arrest on reasonable suspicion in connection with the commission of a felony or breach of the peach might apply in some situations where one of the offences considered in this Report was committed. So might a Garda's powers of arrest without warrant under certain statutory provisons such as section 104 of the Larceny Act 1861, section 41 of the Larceny Act 1916, section 61 of the Malicious Damage Act 1861 and section 66 of the Offences Against the Person Act 1861.

Recommendation

18.3 Section 27 of the Dublin Police Act 1842 and section 4 of the Vagrancy (Ireland) Act 1847 should be repealed. A member of the Garda Siochana should be enabled to arrest without warrant any person whom he reasonably suspects to be committing or to have committed any of the new offences proposed in this Report but in the case of the proposed new offences of public display of indecent matter and of living on the earnings of prostitution or exercising control etc. over a prostitute the power should be confined to situations where a Garda has demanded his name and address of a person whom he reasonably suspects of committing or having committed an offence and that person refuses to give his name and address or gives a name or address which the Garda reasonably suspects to be false or misleading.[3] The more circumscribed power in these cases is justified because of the greater likelihood that the identity of the suspect will be more readily ascertainable or verifiable.

---

[3] See para. 7.17 above.

CHAPTER 19 SUMMARY OF RECOMMENDATIONS

1. The offence of fortune telling and "wandering abroad" under section 4 of the Vagrancy Act 1824 should be abolished. (Para. 5.9, pp.24-25, para. 6.14,p. 34)

2. The maximum penalty for an offence of trespass to land under section 8 of the Summary Jurisdiction (Ireland) Act 1851 should be increased to a fine of £500 and/or imprisonment for six months. There should also be a new offence, similarly punishable, of negligently or otherwise causing or permitting animals to trespass on another person's land etc. or committing any nuisance on the lands of another. (Para. 6.14, p. 34)

3. The existing common law and statutory offences of indecent exhibition should be replaced by a new offence of display of indecent matter in a public place - maximum penalty a fine of £500 and/or six months' imprisonment. (Para. 7.17, pp. 46-47)

4. The existing common law and statutory offences of indecent exposure should be replaced by the following:

   First Alternative

   Three new offences which would be committed by

   (i) any male person who intentionaly and indecently exposes his genital organs to a female person, or a person of either sex of 16 years of age or under, in a public place or in a place visible from a public place or from other premises;

   (ii) any person who has sexual intercouse or performs an act of gross indecency in a public place or in a place visible from a public place or from other premises in such circumstances that his conduct is likely to be seen by members of the public (including occupiers of those other premises) and he knows or is reckless as to that fact;

   (iii) any person who, without lawful excuse, is nude in a public place or wilfully exposes himself to view from a public place while nude in circumstances such that he is likely to be seen by members of the public and knows or is

reckless as to that fact - the term "nude" to be defined as including being so clad as to offend against public decency.

Second Alternative

An offence which would be committed by any person who intentionally commits any indecent act (including indecently exposing his or her person)

(a) in a public place or within view of the public in circumstances such that the act is likely to be seen by another person, or

(b) in circumstances such that the act is seen by another person and that person does not consent to seeing it and the accused knows that that person does not so consent or is reckless as to whether he or she so consents .

The Law Reform Commission's preference is for the second of these alternatives. The maximum penalty should be a fine of £500 and/or six months' imprisonment. (Para. 8.11, pp. 55-57)

5. The existing offences of begging should be replaced by a new offence of begging (i) in a public place or (ii) from house to house in a manner likely to cause fear or annoyance - maximum penalty a fine of £300 and/or three months' imprisonment. The offence under section 14(1) of the Children's Act 1908 of causing or procuring children to beg should be retained. It should be made an offence for a collector in a collection within the meaning of the Street and House Collections Act 1962 to obstruct passersby or to act in a manner likey to cause fear or annoyance - maximum penalty a fine of £300 and/or three months' imprisonment. The maximum fine for other offences under the 1962 Act should be raised to £300. (Para. 9.13, pp. 65-66)

6. The offence of desertion of a wife or child provided for in section 4 of the Vagrancy Act 1824 should be repealed without replacement. (Para. 10.2,p. 67)

7. Certain provisions of the Towns Improvement (Ireland) Act 1854, the Vagrancy Act 1824 and the Dublin Police Act 1842 that relate to gaming should be repealed without replacement. (Para. 11.5, p. 70)

8. The offence under section 4 of the Vagrancy Act 1824 of possession of any implement with intent feloniously to break into any dwelling house etc. should be replaced by a new provision making it an offence to be in possession of any article for the purpose of burglary, theft or taking a vehicle without authority - maximum penalty a fine of £500 and/or six months' imprisonment on summary conviction, on conviction on indictment a fine and/or five years' imprisonment. (Para. 12.7, p. 74)

9. The offence under section 4 of the Vagrancy Act 1824 of possession of an offensive weapon etc. with intent to commit a felonious act should be replaced by a new offence of possession of an offensive weapon in a public place - maximum penalty on summary conviction a fine of £500 and/or six months' imprisonment, on conviction on indictment a fine and/or two years' imprisonment. (Para. 13.11, pp.80-81)

10. The offences under section 4 of the Vagrancy Act 1824 and section 7 of the Prevention of Crimes Act 1871 of being found on enclosed premises should be replaced by a new provision making it an offence to be found in or upon any building or in any yard or garden or in any enclosed area for any criminal purpose. It should also be an offence to trespass on residential premises in a manner which causes or is calculated to cause nuisance or annoyance or fear to another person. The maximum penalty for both offences should be a fine of £500 and/or six months' imprisonment. (Para. 14.13, pp. 88-89)

11. The "loitering with intent" provision contained in section 4 of the Vagrancy Act 1824, as amended by section 15 of the Prevention of Crimes Act 1871, which is no longer in force following successful constitutional challenge, should be repealed, as should the corresponding provision in section 7 of the Prevention of Crimes Act 1871. No new "loitering with intent" provision should be enacted to replace those provisions. (Para. 15.10, p. 96)

12. The existing provisions relating to loitering or soliciting by common prostitutes in public places and to persistent solicitation by a male person in a public place for an immoral purpose should be replaced by two new offences which would be committed by any person who in a public place

(i) solicits another person for the purpose of prostitution or loiters for the purpose or with the intention of so soliciting or being so solicited, or

(ii) loiters or solicits another person for the purpose of the commission of a sexual offence.

The maximum penalty would be a fine of £500 and/or six months' imprisonment. (Para. 16.23, pp. 113-114)

13. The existing offences under the Vagrancy Act 1898 as amended by section 7 of the Criminal Law Amendment Act 1912 relating to a man living on the earnings of prostitution and to a woman exercising control etc. over a prostitute's movements should be replaced by a new provision making it an offence for a person (male or female)

(i) knowingly to live wholly or in part on the earnings of prostitution (maximum penalty a fine of £500 and/or six months' imprisonment); or

(ii) to exercise control or direction over a prostitute or to organise prostitution (maximum penalty a fine and/or two years' imprisonment). (Para. 17.6, pp. 119-120)

14. A member of the Garda Siochana should be empowered to arrest without warrant any person whom he finds in a public place and whom he reasonably suspects to be committing or have committed any of the above new offences but in the case of the proposed new offence of public display of indecent matter and of living on the earnings of prostitution or exercising control etc. over a prostitute the power should be rather more restricted. (Para. 18.3, p. 122)