

CODIFYING THE LAW ON SEXUAL OFFENCES: CHALLENGES AND OPPORTUNITIES

Tom O'Malley

The Commission's Fifth Programme, adopted earlier this year, includes a project on "Review and Consolidation of the Law on Sexual Offences." The project will include an examination of various procedural and evidential matters, as suggested by consultees. These include sexual history evidence, the discretionary corroboration warning and separate legal representation for complainants. However, in this presentation I want to concentrate solely on issues connected with codifying the substantive law. The objective, in short, is to produce a draft statute that will set out and define, in a logical and structured fashion, all sexual offences as they now exist. Although I am dealing here with the substantive law only, it is envisaged that the draft statute will cover some procedural law as well.

Why consolidate?

The main justification for this exercise is that the criminal law should be clear and accessible to all. Ideally, the substantive criminal law, or most of it, should be contained a relatively small number of statutes dealing with cognate offences. This has already been done with assault offences and property offences. The Non-Fatal Offences Against the Person Act 1997 and the Criminal Justice (Theft and Fraud Offences) Act 2001 have proved to be remarkably resilient, even with some amendments, though we need a system which allows for amended versions of core statutes to be promulgated as soon as amendments are made. It should be possible to go on to the Internet and get an official version of, say, the Criminal Justice (Theft and Fraud Offences) Act as it is now, and not as it was in 2001 (though, of course, it should be possible to track amendments as well). The New Zealand Crimes Act 1961 is effectively a criminal code consisting of 415 sections. Yet, if you consult it online today you will find the version of the Act as it stood on 1 July 2019, with brief annotations indicating repeals and amendments. As it happens, the Commission has an ongoing project on this more general question of updating legislation. The law relating to sexual offences is a matter of particular concern to many people, and we have therefore decided to undertake this review and consolidation exercise.

The substantive law on sexual offences is currently dispersed over more than a dozen statutes dating from the mid-nineteenth century. For example, the maximum sentence for rape (life imprisonment) is still governed by s. 48 of the Offences Against the Person Act 1861. A few provisions of the Criminal Law Amendment Act 1885 remain in force, though seldom prosecuted. Indeed, it is not all that long ago since we had a prosecution for an indecency offence under s. 4 of the Vagrancy Act 1824.¹ Having said that, most of our law on sexual offences is fairly modern, dating predominantly from the early 1980s, but a significant volume of legislation has been enacted since then. This alone provides a good reason for consolidation.

¹ *Cox v DPP* [2015] IEHC 642.

Secondly, there is some overlap in offence definitions. For instance, the offence of incest overlaps to a considerable extent with what are now commonly known as defilement offences, which consist of certain sexual acts with persons under the age of consent. In practice, both offences can overlap with rape. For example, a man who has sexual intercourse with his 16-year-old daughter may be prosecuted for incest, defilement or rape, all of which carry different maximum sentences, though the prosecution would have to prove absence of consent in the case of rape. I am not suggesting that this is a significant problem, but it points to the value of undertaking a full and systematic review of all sexual offences, rather than adopt a piecemeal approach through episodic amendments.

Repealed offences and amended definitions

Consolidating the law on sexual offences poses a particular challenge because of issues connected with the prosecution of so-called historic child abuse offences. As we now know from experience, many years or even decades may elapse before abuse experienced during childhood is formally reported. This has a number of implications for the consolidation exercise we are about to undertake.

Under the Interpretation Acts a prosecution may be brought for a repealed offence provided the alleged conduct was committed while the offence existed.² This does not, of course, apply if the statutory provision creating the offence in question has been found unconstitutional, as happened with the unlawful carnal knowledge offences under sections 1 and 2 of the Criminal Law Amendment Act 1935.³ Otherwise, a prosecution may be brought for a repealed offence. Recently, for example, the Supreme Court rejected a challenge to the constitutionality of s. 11 of the Criminal Law Amendment Act 1885 which created the offence of gross indecency between males, although that section was in fact repealed by the Criminal Law (Sexual Offences) Act 1993.⁴ This offence may therefore still be prosecuted, at least in some circumstances, in respect of conduct alleged to have occurred prior to the entry into force of the 1993 Act.

This means that a consolidated statute which sets out all the sexual offences that now exist with their current definitions will reflect the *present* law, but not necessarily all the *applicable* law. Prosecutions may still be brought under certain repealed laws, though these are progressively few in number.

On the other side of the coin, statutory provisions creating new criminal offences may not operate retrospectively. For example, the Criminal Law (Sexual Offences) Act 2017 created six new child sexual exploitation offences (as well as amending many others). A person may not be prosecuted for any of those offences in respect of conduct alleged to have occurred before 27 March 2017, the date on which those sections of the Act entered into force. It is a fundamental principle of legality that conduct cannot be retrospectively criminalised, nor can a heavier penalty be imposed than the maximum that applied when the offence was committed. This principle is protected by the Constitution and article 7 of the European Convention on Human Rights. Article 7 states:

² Interpretation Act 2005, s. 27(2). The same applies to repealed common-law offences by virtue of the Interpretation (Amendment) Act 1997.

³ *C.C. v Ireland* [2006] 4 I.R. 1; *Z.S. v DPP* [2011] IESC 49.

⁴ *P v Judges of the Circuit Court* [2019] IESC 26.

“No one shall be held guilty of a criminal offence on account of any act or omission that did not constitute a criminal offence under national or international law at the time when the offence was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”

The European Court of Human Rights went further in *Scoppola v Italy (No.2)*⁵ and held just as a more severe criminal law cannot be applied retrospectively, a more lenient criminal law should be applied retrospectively. It has said that “where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the court must apply the law whose provisions are most favourable to the defendant.”⁶ In an Irish context, this might apply in future prosecutions for incest. Since 1995, incest by a male has been punishable with a maximum sentence of life imprisonment.⁷ However, under the Criminal Law (Sexual Offences) (Amendment) Act 2019, the maximum sentence for incest by a male has been reduced to 10 years and the maximum sentence for incest by a female has been increased from seven years to 10 years. If therefore, a male were now convicted of incest committed in, say, 2016, he would, under the *Scoppola* principle, be subject to a maximum sentence of 10 years, even though the maximum was life when the offence was committed. Conversely, a female convicted of incest committed in 2016 would be subject to a maximum sentence of seven years, because a heavier penalty cannot retrospectively be applied under either the Constitution or the European Convention on Human Rights.

Further, as reflected in Article 7 of the European Court of Human Rights and as implicitly provided for in our Constitution, a convicted person may not be subject to a heavier penalty than applied when the offence was committed.⁸ This become particularly relevant in the sentencing of sexual assault offences committed in the past. Between 1935 and 1981, the maximum sentence for indecent assault, as it was then called, on a first conviction, was two years’ imprisonment; between 1981 and early 1991, it was 10 years’ imprisonment; between 1991 and 2001, it was five years’ imprisonment; since 2001 it was been 10 years’ imprisonment or 14 years where the victim was under 17 years of age at the time of the assault. Careful attention must be paid to these maxima when sentencing historic child abuse cases.

All these factors pose challenges to consolidating the law on sexual offences. However, it should be possible to produce a draft statute setting out the current law with cross references to relevant repealed provisions and indications of commencement dates. Richard Susskind, one of the great prophets of the impact of technology on law, used to draw a distinction

⁵ (2010) 51 EHRR 12, p. 323.

⁶ *Scoppola v Italy (No. 2)* (2010) 51 EHRR 12, p. 323, para. 109. See Susana Sanz-Caballero, “The Principle of Nulla Poena Sine Lege Revisited: The Retrospective Application of the Criminal Law in the Eyes of the European Court of Human Rights” (2017) 28:3 *European Journal of International Law* 787. In *Berlusconi and others*, Case 387/02, 391/02 and 403/02 [2005] ECR I-3565, the European Court of Justice held that the same principle (often known as *lex mitior* or *in mitius* principle) applied under EU law.

⁷ Criminal Law (Incest Proceedings) Act 1995, s. 5.

⁸ There is no express provision to this effect in the Constitution of Ireland, but it has been held that the retrospective application of heavier penalties is implicitly prohibited by the Constitution: *Enright v Ireland* [2003] 2 I.R. 321.

between automation and innovation.⁹ Automation occurs when technology is used to perform tasks in much the same way as they were previously performed by humans (an ATM machine being a good example). So far, legal technology has been largely about automation. This, at least, is true of legal documentation. Statutes, law reports and other legal materials appear online in the same way as in the traditional hard copy, and there are certainly advantages to this. Innovation, on the other hand, is about exploiting technology to do things differently, and hopefully better, than before. Online versions of statutes can benefit from various technological innovations which allow for the unobtrusive inclusion of cross-references and other annotations.

Values that should inform consolidation

When any exercise in statutory codification or consolidation is being undertaken, three key values should be to the fore: economy, clarity and comprehensiveness. Economy entails an effort to include all of the conduct which it is desired to prohibit in as few offences as possible. An unnecessary multiplicity of offences with overlapping definitions serves to obscure the law and make it less accessible. The English Sexual Offences Act 2003 is not necessarily a good model in this regard, as the first 71 sections are devoted to the creation of criminal offences, and there is often considerable overlap between them.¹⁰ The Sexual Offences (Scotland) Act 2009 is perhaps a better model in this regard. Criminal offences should also, of course, be clearly defined. This is an element of the principle of legality as protected under both the Constitution and the European Convention on Human Rights.¹¹ This, in turn, derives from the more fundamental principle that, as a matter of basic fairness, people should be able to discover exactly what is prohibited by the criminal law and what is not. Thirdly, a codified or consolidated statute should be comprehensive and coherent, by including all necessary offences defined in such a way that they overlap as little as possible. Maximum sentences should be determined according to the principle of ordinal proportionality, with the heaviest reserved for the most serious offences and commensurately lower maximums for less serious offences.¹²

Having said this, no statute, however comprehensive, can be guaranteed to remain adequate to deal with all eventualities that may arise. This is particularly true at a time when the Internet and the social media are being used in ever more creative ways for the purpose of engaging in abusive and exploitative practices, especially against children. Even with a modern codified or consolidated statute, Parliament must remain ready to engage in interstitial law-making to fill in any gaps that emerge in existing legislation. For instance, the Criminal Law (Sexual Offences) 2017 created several new criminal offences outlawing the sexual exploitation of children. Section 7 of the Act makes it an offence to travel to meet a child for the purpose of sexually exploiting that child. A child for this purpose is a person under the age of 17 years. Yet, no sooner was the ink dry on the paper when a new problem

⁹ Richard Susskind, *The Future of Law: Facing the Challenge of Legal Technology* (Oxford University Press, 1996), 49-50. The topic is revisited in Richard Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (Oxford University Press, 2015), 109 *et seq.*

¹⁰ See, for example, the comments of John Spencer, “The Sexual Offences Act 2003 (2): Child and Family Offences” [2004] Crim. L.R. 347.

¹¹ *King v Attorney General* [1981] I.R. 233; *Sunday Times v United Kingdom* (1979) 2 EHRR 245.

¹² Rory Kelly, “Reforming maximum sentences and respecting ordinal proportionality” [2018] Crim. L.R. 450.

came to light. This related to persons who were subject to sting operations by vigilante groups. They believed they were communicating with a child and travelling to meet a child, only to discover when they arrived at the arranged location that they had been set up. There can be no doubt about the moral guilt of such a person. He firmly believes that he is about to meet a child with whom he intends to engage in sexual activity. But is s. 7 sufficient to cover this situation? Probably not as it is now written, although arguably such a person may be convicted of attempting to commit the offence, even though it would be a case of attempting the impossible.

Criminalization

During the past decade or so, criminal law scholars, and theorists in particular, have turned their attention to criminalisation. For a long time, the focus of their attention had been on the elements of criminal liability – *actus reus*, *mens rea* and so forth – and those topics remain of critical importance. However, some of the more cutting-edge scholarship of recent times has moved further back to analyse the justifications for criminalising certain kinds of conduct in the first place. Several factors motivated this change of orientation. One was the publication in 2007 of a book on overcriminalization by an American legal theorist, Douglas Husak, which proved to be very influential.¹³ Meanwhile, on this side of the Atlantic, people started to get interested in the rate at which new offences were being created, especially by newly elected governments. For instance, the New Labour Government is estimated to have created 1,235 new offences applicable to England and Wales during its first year in office. By 2006, it was estimated to have created a total of 3,600 new offences, one for every day it was in office.¹⁴ The Conservative-Lib Dem Government was a bit more restrained, because it created a mere 634 new offences during its first year in office.

This trend exists in many countries. Indeed, it would be interesting to count the number of offences created in this country during the past ten years, bearing in mind that many are created here, as in England, by way of delegated legislation. Many new offences created nowadays are “non-consummated offences,” meaning that the conduct element does not, of itself, cause any immediate or tangible harm but it is outlawed because it poses a risk of future harm. A person who possesses drugs or firearms, for example, is not, by virtue of the possession alone, causing any immediate harm, but the possessory conduct is criminalised because of the harm that will or may result if the drugs are distributed or the firearms used. However, the law has gone further in certain areas by creating what have come to be called “pre-inchoate offences” because the prohibited conduct is not sufficiently proximate to a completed offence to constitute even an attempt as now defined. Examples of this are to be found in modern counter-terrorism legislation. Under the (English) Terrorism Act 2000 (s.

¹³ D.N. Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2007). Other leading works, from this side of the Atlantic, include Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford University Press, 2016); Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests and Institutions* (Oxford University Press, 2016); R.A. Duff *et al* (eds), *Criminalization: The Political Morality of the Criminal Law* (Oxford University Press, 2014); R.A. Duff, *The Realm of Criminal Law* (Oxford University Press, 2018).

¹⁴ James Chalmers and Fiona Leverick, “Criminal law in the shadows: Creating offences in delegated legislation” (2018) 38:2 *Legal Studies* 221.

16(2)), for example, it is an offence to possess money with reasonable cause to suspect that it may be used for the purpose of terrorism.¹⁵

Historically, it is probably true to say that, under Irish law at least, there were probably too few sexual offences rather than too many. The new offences created by the Criminal Law (Sexual Offences) Act 2017 were certainly needed, and that was the case long before online abuse and grooming became an issue. The same view has been expressed elsewhere.¹⁶ However, in keeping with the principle of economy as mentioned earlier and its underlying justification, our aim should be to have as many offences as are necessary, but no more than that.

Reviewing and consolidating sexual offence laws: a few specific issues

Rape

At present there are two rape offences known to Irish law – what may be termed common-law rape which is defined exclusively as the rape of female by a male under s. 2 of the Criminal Law (Rape) Act 1981, and rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990 which is largely gender neutral and covers other forms of sexual penetration. There is a strong case to be made for a single rape offence covering all forms of non-consensual sexual penetration. The French Penal Code, for example, provides very simply:

*Tout acte de pénétration sexuelle, de quelque nature qu'il soit, commis sur la personne de'autrui ou sur la personne de l'auteur par violence, contrainte, menace ou surprise, est un viol.*¹⁷

(Every act of sexual penetration, of whatever kind, committed on another person or on the person of the perpetrator by violence, coercion, threat or surprise, is a rape).

The words “on the person of the perpetrator” were included last year as a result of an amendment proposed by Marlène Schiappa and was intended to cover situations in which a man or boy was forced to perform oral sex on the perpetrator of the assault. Likewise, the English Sexual Offences Act 2003 (s.1) defines rape so as to include all forms of sexual penetration. The English Act adopts a rather novel approach to offence definition by referring to the parties as “A”, “B”, “C”, etc. There may be some merit in this approach. It is certainly preferable to Baroness Hale’s choice of terminology in *R v G*,¹⁸ a leading case on child rape, where, for some reason, she insisted on referring to the male as “the possessor of the penis.”

The age of consent

Any review of sexual offences must grapple with the difficult question of the age of consent which, in Ireland, is 17 years. In fact, since 2017, it has been 18 years in some circumstances because s. 18 of the Criminal Law (Sexual Offences) Act 2017 makes it an offence for a person in authority to engage in certain sexual acts, including sexual intercourse, with a child aged between 17 and 18 years, and the child’s consent provides no defence. The age of

¹⁵ Rory Kelly, “The Right to a Fair Trial and the Problem of Pre-Inchoate Offences” [2017] *European Human Rights Law Review* 596.

¹⁶ Lindsay Farmer, *Making the Modern Criminal Law* (Oxford University Press, 2016), chap. 9.

¹⁷ Article 222-23 as amended by Law No 2018-703 (3 August 2018).

¹⁸ [2008] UKHL 37.

consent had varied across time and place.¹⁹ We sometimes hear of laws that outlaw sexual relations between teenagers as “Romeo and Juliet laws”. It is not an entirely apt description because in Shakespeare’s play we are told that Juliet is just under 14 years, but at no point are we told what age Romeo is. However, the manner in which we discover Juliet’s age is rather interesting in the present context. In the first Act, her mother, Lady Capulet, is complaining that Juliet is showing no sign of getting married, but she cannot remember Juliet’s exact age. (ladies in those days had more important things to think about), so she calls in the nurse who says:

“Come Lammas eve at night shall she be fourteen”

Lammas was 1 August which Lady Capulet helpfully tells us is about a fortnight away. Then, she remonstrates with Juliet, saying:

“By my count, I was your mother much upon those years

That you are now a maid.”

In other words, by the time she was 14 she already had a child. This would not have shocked Elizabethan audiences because at the time a girl could be married once she reached the age of 12. The age of consent in Ireland is probably high by European standards, although a reform introduced by the Criminal Law (Sexual Offences) Act 2017 (s. 17(8)), the so-called “young person’s defence” mitigates the rigours of the law by exempting from criminal liability a person who is younger or less than two years older than the child, provided the child was aged between 15 and 17 years at the time and consented to act in question.

Incest

Incest is committed by a man who has sexual intercourse with his mother, sister, daughter or granddaughter and by a woman aged 17 years or more who with consent permits her father, grandfather, brother or son to have sexual intercourse with her. Vaginal sexual intercourse is the only sexual act outlawed by incest and the offence may be committed only between blood relatives. It was introduced into our law as late as 1908²⁰ and a question may arise as to whether it is any longer needed. It does not seem to be prosecuted very often nowadays and this is scarcely surprising because, in practice, it overlaps with defilement offences. It will typically be committed by a father against his daughter or a brother against a younger sister (though there has also been a well-known case of incest committed by a mother against her son). The equivalent defilement offences now carry heavier maximum sentences than incest which, as noted, is currently punishable with a maximum sentence of 10 years’ imprisonment.

However, there is no age limit for incest. It may be committed by consenting adults if they are within one of the prescribed degrees of consanguinity. Thus, an adult brother and sister who have sexual intercourse are guilty of incest, even if both are fully consenting and even if there is no risk of pregnancy. One might question if such conduct should be criminal. A virtually identical law as it applied in Germany was upheld by the European Court of Human Rights in *Stübing v Germany*.²¹ Opinions do, admittedly, differ on this question. Some, for

¹⁹ Thomas O’Malley, *Sexual Offences*, 2nd ed. (Dublin, 2013), Chap. 5.

²⁰ Punishment of Incest Act 1908.

²¹ (2012) 55 EHRR 24.

example, support the present law, arguing that many apparently consensual incestuous relationships may have begun earlier on through the sexual exploitation of one party while he or she was a minor by the other. However, this is another question we will have to examine.