# 'OFFENCES AGAINST MORALITY'

## Law and male homosexual public sex in Australia

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Australia and the UK share a similar historical trajectory with regard to the legal regulation of male homosexual sex: the partial decriminalisation of 'homosexual acts' in England and Wales in 1967, and in South Australia in 1972, has since been followed by the removal of all male homosexual specific offences from the criminal law of both countries. For instance, the *Sexual Offences Act 2003* in England & Wales, which repealed all male homosexual offences from English law, mirrored the *Crimes Amendment (Sexual Offences) Act 2003* in New South Wales which removed seven remaining homosexual specific offences from the *Crimes Act 1900*. Notwithstanding the higher age of consent for sodomy in Queensland,[1] all Australian states and territories have now repealed their male homosexual specific offences.

Whilst Australia has now equalised its sexual offences provision there remains one key area of the criminal law through which inequities may arise in relation to gender and sexual orientation. As Dalton argues:

> The final area of concern for the law pertaining to homosexual sex that has not been addressed by the legislative reforms [...] is the vexatious issue of homosexual sex in public spaces.[2]

In this article I want to think through this 'vexatious issue' by examining the public sex laws of Australian states and territories to consider how they may discriminate against those engaged in male homosexual public sex.

To do this, it is necessary to consider the social, cultural and historical contexts from which these laws arise and in which they are enforced. It is fruitful to use a comparison with the UK because England & Wales recently introduced a new offence formulated specifically to target men engaged in homosexual sex in public lavatories (what is referred to in the UK as 'cottaging' and in Australia as 'beats'). Section 71 of the *Sexual Offences Act 2003* makes it a criminal offence for a person to intentionally engage in sexual activity in a lavatory to which the public or a section of the public has access and on summary conviction carries the maximum penalty of a term of imprisonment of 6 months. This is in contrast to other sexual activities in public regulated by section 5 of the *Public Order Act 1986* where no term of imprisonment is prescribed. What may be relevant about section 71 to Australia is that the context of its enactment and subsequent enforcement illuminate differing standards of regulation in relation to male homosexual public sex that might also underpin the enforcement of Australian law.

### Homosexuality, law and 'public morality'

Australia and the UK both continued to legislate against homosexual acts in public after decriminalising them in private. The *Sexual Offences Act 1967* in England & Wales which decriminalised buggery and gross indecency between men over 21 years specified that such acts must be conducted in private. The Act regarded homosexual acts not to be private 'when more than two persons take part or are present' or when they take place 'in a lavatory to which the public have or are permitted to have access, whether on payment or otherwise'.[3] Furthermore, homosexuality continued to be regulated by the offence of 'male soliciting' that could be applied to a wide range of activities in public, including sexually suggestive talking.[4] Australian Capital Territory, Northern Territory, Queensland, Tasmania, and Western Australia had similar legislation that criminalised homosexual behaviour in public that was legal in private.

The argument for the criminalisation of male homosexual activity in public in both the UK and Australia was that male homosexual behaviours offended public morality. In other words, whilst such behaviours became decriminalised in private they continued to be regulated by the criminal law to protect a public that (it was argued) regarded them as offensive and indecent. Homosexuality has long been a battleground for differing views regarding the appropriate relationship between public morality and law and has provoked a number of questions about both the influence of morality upon law and the extent to which private morality should be free from legal regulation.[5] The 1957 Wolfenden Report,[6] which guided decriminalisation in both Australia and the UK, formulated a framework through which to distinguish between the right to a private (homo)sexual morality and a public disapproval of homosexual acts.

Whilst no Australian state or territory now makes a statutory distinction between homosexual and heterosexual sex in public, it is important to note that every state and territory has laws that regulate obscene or indecent public behaviour. What makes these laws problematic for men engaging in homosexual sex is that their enforcement may be shaped by heteronormative conceptions of public decency.[7] Because sexual indecency is interpreted in Australian law as that which is 'contrary to the ordinary standards of morality of respectable people in the community'[8] homosexual sexual activity has always been more vulnerable to

REFERENCES

1. Sections 208 and 209 of the *Criminal Code 1899* prohibit 'unlawful sodomy' and 'attempted sodomy' with a person under 18 years, in contrast to an age of consent of 16 years for all other sexual acts.

2. Derek Dalton (2008) 'Gay Male Resistance in "beat" spaces in Australia: a study of *outlaw* desire'. *Australian Feminist Law Journal*, Vol 28 (in press).

3. *Sexual Offences Act 1967* s 1(2).

4. Section 32 of the *Sexual Offences Act 1956* made it 'an offence for a man persistently to solicit or importune in a public place for immoral purposes'.

5. See, for example, the significant dispute between Hart and Devlin in relation to law, morality and sexuality: Patrick Devlin (1965) *The Enforcement of Morals* and Herbert LA Hart (1963) *Law, Liberty and Morality*.

6. Report of the Committee on Homosexual Offences and Prostitution, 1956, Cmnd.247.

7. To talk of 'heteronormative conceptions' of public decency is to recognize that the regulation of public sex is significantly shaped by the way in which sexual practices and sexual identities are conceived within, and framed by, normative ideas about sex and sexuality. The fact that the police are more likely to receive complaints about homosexual public sex from members of 'the public', and more likely to engage formal regulation around such activities, is often driven by ideas about homosexual sex as something that is 'dirty' or 'dangerous'. For a longer discussion of this, see: Paul Johnson (2007) 'Ordinary Folk and Cottaging: Law, Morality, and Public Sex' *Journal of Law and Society*, Vol. 34, Issue 4, pp 520–543. See also: Derek Dalton (2007) 'Policing Outlawed Desire: "Homocriminality" in Beat Spaces in Australia'. *Law Critique*. 18: 375–405.

8. R v Harkin, 1989, 38 A Crim R per Lee J.

classification as indecent activity. This is because 'ordinary standards of morality' have often been conceived in diametric opposition with homosexuality and, vice versa, homosexuality has often been regarded as a de facto infringer of the moral standards of 'respectable people'.

## Section 71 in England & Wales: 'Sexual activity in a public lavatory'

This view of homosexuality as antithetical to public morality was made explicit during consultation and debates about what became section 71 of the *Sexual Offences Act 2003* in England & Wales. I have discussed the formulation of section 71 in detail elsewhere[9] but, in order to consider the relationship between the criminal law, homosexuality and public morality here, it is important to outline the background to this offence.

When the UK government first proposed to repeal the offences regulating male homosexual sex (in a consultation document, *Setting the Boundaries*, published in 2000) it also recommended the creation of a new offence to deal with sexual behaviour in public.[10] This new statutory provision should, it was argued, 'protect members of the public from being unwilling witnesses to sexual behaviour', or from being 'harassed or intimidated in their use of public space and facilities', but ensure that the 'criminal law should apply to all sexual behaviour in public and not in particular to same sex behaviour'.[11] The government stated that it was 'unnecessary and disproportionate to prohibit all sexual activity in public' because 'the nuisance [is] not the sexual activity itself but the fact that it is seen by others' and, therefore, a 'discreet couple should not be penalised' by the criminal law.[12]

What followed this proposal was a small amount of coverage in the mass media that discussed the 'dangers' of a law that might legalise sexual activity in a lavatory if individuals could claim that such activity was conducted in private and not witnessed by others. *The Express*, for example, in its leader 'This is a Freedom too far' argued:

> What individuals do in the privacy of their own home is not our concern and homosexuals should be allowed the same freedom in this regard as heterosexuals. However, to allow gay men to have sex in public toilets simply because there is not a law to stop mixed sex couples from doing so is as preposterous as it is dangerous.

Much of the mass media coverage, such as Melanie Phillips' article in *The Sunday Times* in July 2000, made moral claims about this 'unpleasant and offensive' activity as an 'affront to human dignity'. And The Christian Institute argued that there are 'moral differences' between homosexual and heterosexual sex that 'have long been recognized in law, and by the majority of people'.[13]

During the parliamentary reading of what became the 2003 Act these arguments found direct expression in the House of Lords. Peers argued for specific legal regulation of public lavatories because of the 'offensive public nuisance of homosexuals'[14] that threatens 'decent, law-abiding communities'[15] and creates 'the most appalling possibilities'.[16] These 'appalling possibilities' were discussed in terms of the impact that witnessing homosexual acts might have upon 'the public' and children in particular were invoked as emblematic of those requiring protection from this: 'What mother' asked one peer, 'would want to send her young child into a public lavatory if she believed that homosexual activity might take place there?'[17]. The invocation of children in these debates can be seen as a potent vehicle for making claims about homosexual public sex as antithetical to public morality. This was not a debate about the *potential* for public sexual activity to cause offence and harm but an assertion that homosexual public sex is *in principle* an offensive activity. As one peer argued:

> activity that takes place in a public lavatory, that is not witnessed and that does not outrage public decency when the event takes place, is still an offensive activity.[18]

In discussing this 'seedy and, frankly, disgusting'[19] activity, that comprises the most 'unsafe and dangerous behaviour',[20] and exists as an 'awful evil' in society,[21] peers argued that, contrary to the view expressed in *Setting the Boundaries*, the nuisance *is* the sexual activity *itself* rather than any impact caused by it.

As a result of section 71, England & Wales now has a legislative framework that effectively discriminates against men engaged in homosexual sex in public. Since the offence came into force it has been used almost exclusively to prosecute men (between May and December 2004, 17 male defendants were proceeded against resulting in 15 guilty verdicts whilst in 2005 a further 46 males were prosecuted and 34 found guilty. Furthermore, between 2004 and 2005, 28 males and 1 female had been cautioned).[22] Section 71 contains a clear difference in the standard of complaint required to prosecute public sex in a lavatory compared to public sex elsewhere since the wording of the statute allows any activity to be considered sexual 'if a reasonable person would, in all the circumstances but regardless of any person's purpose, consider it to be sexual' (which therefore means activity such as kissing and hugging can be deemed 'sexual'). Furthermore, section 71 carries a significantly more severe penalty upon conviction than other acts in public. Finally, section 71 affords the police a wide range of powers to detect suspects who are causing no harm to the public. There is a long history of policing gross indecency in this manner where men have been entrapped by undercover police officers acting as *agents provocateurs*.[23]

## Public sex laws in Australia

The relevance of section 71 to Australia is that it makes explicit a distinction between types of public sex that may be implicit in the enforcement of Australian law. It may be that the principles that underpin the enactment of this legislation in England & Wales (to continue a long standing desire to enclose homosexuality in 'private' and to censure it from public view, to encourage the policing of homosexual acts in public, and to subject men engaged in homosexual acts to

9. Johnson, above n 7.

10. Home Office (2000) *Setting the Boundaries: Reforming the Law on Sex Offences*.

11. Ibid, 124.

12. Ibid, 125.

13. The Christian Institute, in asserting that the 'right place for sex is in the bedroom, not a public lavatory', presented a moral view of sex as that which takes place in the homes of monogamous, procreative, heterosexual couples. The Christian Institute (2003) *Legalising sexual activity in public toilets: how the Sexual Offences Bill effectively legalizes a major public nuisance*.

14. HL Debate 13 Feb 2003 c.789.

15. HL Debate 9 June 2003 c.69.

16. HL Debate 9 June 2003 c.70–71.

17. HL Debate 13 Feb 2003 c.789.

18. HL Debate 19 May 2003 c.585.

19. HL Debate 9 June 2003 c.68.

20. HL Debate 13 Feb 2003 c.807.

21. HL Debate 9 June 2003 c.72.

22. Home Office, RDS – Office for Criminal Justice Reform. Personal correspondence.

23. For a discussion of the policing of gross indecency see: Leslie J Moran (1996) *The Homosexual(ity) of Law*.

*The argument for the criminalisation of male homosexual activity in public in both the UK and Australia was that male homosexual behaviours offended public morality.*

harsher penalties) also underpin the application of current laws in Australia. Whilst no Australian state or territory now has a specific piece of legislation which focuses upon men engaged in homosexual sex in public it may be that current laws still affords the potential to subject such men to more extensive regulation and harsher punishment. There are no available data on this in Australia since no nationwide socio-legal research has been carried out on the relationship between the law and homosexual public sex. However, in the remainder of this article I want to consider, on a state-by-state basis, how the criminal law might allow an unfavourable distinction to be created between the regulation of heterosexual and homosexual sexual activity in public. Such distinctions show, I think, a need for research that considers the enforcement of these laws in relation to gender and sexual orientation.

### *New South Wales*

Since the partial decriminalisation of homosexual acts in 1984, New South Wales has not made a legal distinction between homosexual acts in public or private. Sexual activity in public is regulated by section 4 ('Offensive conduct') and section 5 ('Obscene exposure') of the *Summary Offences Act 1988*. However, the lack of a specific statutory provision for regulating homosexual sexual activity in public should not be seen as the sign of an absence of regulation of homosexual public sex. Dalton's recent work provides an important insight into how the *Summary Offences Act 1988* has been used to frame various policing practices (including covert surveillance of beat spaces by plain-clothed officers) in order to detect and prosecute men engaged in homosexual acts in public.[24] Dalton illuminates the long history of police practices directed against homosexual activities in New South Wales that was earnestly encouraged by superintendent of police, Colin Dalaney, who cited homosexuality in 1958 as the 'greatest social menace'.[25]

As with other states and territories, the wide definition of what constitutes 'public'[26] activities by the Act captures virtually all public sex environments used by men for the purposes of sexual activity outside of the home. Yet, the limited research we have of 'beat' sexual activity shows that most male homosexual activity is conducted in public by participants who seek to limit the visibility of their encounters to non-participants.[27] Public lavatories, in particular, are chosen not for their 'publicness' but because of the very privacy that they offer. Public lavatories are complex social spaces since they routinely bring individuals together and, in the process, make their bodies and body parts visible to each other, whilst, at the same time, offering high degrees of privacy for those seeking to engage in sexual acts (inside a cubicle with a locked door, for instance). As Dalton's work shows, the *Summary Offences Act 1988* has often been used as a basis to penetrate these 'private' encounters in beat spaces, allowing the police to employ protracted arrangements and techniques to detect suspects.[28] In this sense, it is often the law, and its enforcement, that transforms what might otherwise be private encounters into publicly visible ones.[29]

In similar fashion to the other states and territories discussed below, there have been significant changes in the culture of policing with regard to homosexuality in New South Wales. The publication of the 'NSW Police Policy Statement on Gay and Lesbian Issues (2003–2006)', the recent commitment as a key partner to the 'New South Wales Government Strategic Framework 2007–2012, Working Together: Preventing violence against gay, lesbian, bisexual and transgender people', and the introduction of Police Gay and Lesbian Liaison Officers, shows evidence of policing which aims for an inclusive and partnership approach with the 'gay community'. Nevertheless, there are no available data to show how often, and to what extent, public sex laws are currently used to regulate the activities of men engaged in homosexual public sex in New South Wales — men who may not identify as gay or be part of a gay community. Tomsen's work has provided a much-needed insight into policing in New South Wales in terms of the regulation of violence against men in beat spaces.[30] However, no data exists to show how sections 4 and 5 of the *Summary Offences Act 1988* may continue to be applied differentially in respect of gender and sexual orientation.

### *Victoria*

Victoria, like New South Wales, has not made a formal distinction between public and private homosexual acts since partial decriminalisation in 1980. It regulates public sexual activity through section 17 ('Obscene, indecent, threatening language and behaviour etc. in public') of the *Summary Offences Act 1956*. Iveson has written on the regulation of homosexual public sex in Melbourne and on the changing nature of police practice which, he argues, now favours discouraging men from engaging in sex in beat spaces rather than detecting offenders.[31] Such changes in policing followed a 1992 ruling by a magistrate that actions witnessed as a result of unusual or abnormal behaviour (in this case, police officers

24. Dalton, above n 2 and n 7.

25. Graham Willett, *Living Out Loud: A History of Gay and Lesbian Activism in Australia* (2000).

26. 'Public' means a place 'that is open to the public, or is used by the public whether or not on payment of money or other consideration, whether or not the place or part is ordinarily so open or used and whether or not the public to whom it is open consists only of a limited class of persons'.

27. For example, see: Henning Bech, *When men meet: Homosexuality and Modernity* (1997). Frederick Desroches, 'Tearoom trade: A research update' (1990) 13(1) *Qualitative Sociology* 39–61. Frederick Desroches, 'Tearoom Trade: A law enforcement problem' (1991) 33(1) *Canadian Journal of Criminology* 1–21. Laud Humphreys, *Tearoom Trade: A Study of homosexual encounters in public places* (1970).

28. Dalton, above n 2 and n 7.

29. Moran, above n 23.

30. Stephen Tomsen, *Hatred, Murder and Male Honour: Anti-homosexual Homicides in New South Wales, 1980–2000* (2002) Australian Institute of Criminology Research and Public Policy Series, No 43.

31. Kurt Iveson, *Publics and the City* (2007).

hiding in bushes at a beat to surveil men there) could not be deemed offensive under the *Summary Offences Act 1956*. Yet there are recent examples of 'traditional' policing practices in Victoria. For example, ABC radio reported in 2002 that plain-clothes police officers arrested over 100 men for obscene and indecent behaviour in one public lavatory in Melbourne during the course of two weeks.[32] No data exists to show how section 17 of the *Summary Offences Act 1956* may continue to be applied differentially in respect of gender and sexual orientation.

### *Queensland*

Queensland's criminal law contains a distinction that may discriminate against those engaged in homosexual sex. Section 227 of the *Criminal Code Act 1899* ('Indecent acts') makes it a criminal offence to commit 'any indecent act in any place to which the public are permitted to have access' and carries a sentence of up to 2 years imprisonment. This is in contrast to section 228 of the *Summary Offences Act 2005* ('public nuisance') that legislates against disorderly, offensive, threatening or violent behaviour and carries a prison sentence of up to 6 months. Both sections can be applied to sexual behaviours and, therefore, a significant question is raised in relation to how certain acts are classified by the police and prosecutors as 'offensive' or 'indecent'. If we take the definition of sexual indecency as that which is 'contrary to the ordinary standards of morality of respectable people in the community' then homosexual acts have always been more likely to fall into this category than heterosexual acts. Media releases from Queensland Police Service indicate that men engaged in public homosexual sex are charged with indecency. For example, on the 2nd November 2004 it was reported that:

> Police charged two men this afternoon following reports of inappropriate behaviour in a West Ipswich park. Acting on information [...] officers arrested two men for allegedly performing indecent acts with each other. A 57-year-old from Bundamba was charged with an indecent act and a public nuisance offence. A 35-year-old from East Ipswich was charged with an indecent act.[33]

There are no available data on the differentiation between enforcing public nuisance and indecency offences in Queensland on the basis of gender and sexual orientation.

### *Western Australia*

Until recently, Western Australia retained the offence of 'gross indecency between males in a public place' until it was repealed by the *Amendment (Lesbian and Gay Law Reform) Act 2002*. Sexual activity in public is now regulated by section 202 ('Obscene acts in public') and section 203 ('Indecent acts in public') of the *Criminal Code Act 1913*. Obscene acts are more harshly punished than indecent acts with the former carrying a maximum term of imprisonment of 3 years in contrast to 2 years for the latter. When Western Australia repealed its specific provision covering gross indecency in public places between men it was imagined by the Western Australian Ministerial Committee on Lesbian and Gay Law Reform that such behaviour would become regarded as indecent acts in public under section 203.[34] However, there are no data to show how gender or sexual orientation may determine the differential classification of certain acts as 'obscene' or 'indecent'.

### *South Australia*

South Australia retains a significant distinction in section 23 of its *Summary Offences Act 1953* between 'indecent behaviour' and 'gross indecency' that may discriminate against male homosexual activity in public. A 'person who behaves in an indecent manner' in a public place can be imprisoned for up to three months whilst a 'person who wilfully does a grossly indecent act, whether alone or with another person' in a public place can be imprisoned for up to six months. What constitutes 'gross indecency' is not formally defined and depends upon the circumstances of the sexual act and consideration by a jury, judge or magistrate. In English law indecent acts classifiable as 'gross' have historically been male homosexual genital acts and this has certainly also been the case in Australian jurisdictions. However, there are no data available to show how gender and sexual orientation may currently differentiate between behaviours deemed 'indecent' and 'grossly indecent' in public.

### *Tasmania*

Until 1997, when Tasmania repealed its male homosexual offences, section 123 of the *Criminal Code Act 1924* criminalised all 'indecent practice between male persons' in both private and public. In Tasmania public sexual activity is now regulated by Section 137 ('Indecency') of the *Criminal Code Act 1924* and by Section 13 ('Public annoyance') of the *Police Offences Act 1935*. No maximum term of imprisonment is set by the *Criminal Code Act 1924* for section 137 but it is an indictable offence. Any person who 'wilfully does any indecent act in any place to which the public have access or in the public view' can be charged with this offence. In contrast, under section 13 of the *Police Offences Act 1935* a person found guilty on summary conviction of behaving 'in a violent, riotous, offensive, or indecent manner' will receive a maximum conviction of 3 months imprisonment. There is are no available data to show how gender or sexual orientation may determine how acts are classified in relation to these legal provisions.

### *Northern Territory*

Section 133 of the *Criminal Code Act* makes 'gross indecency in public' an offence in the Northern Territory and carries a maximum term of imprisonment of 2 years. The offence becomes aggravated and regarded as a 'serious sexual offence' if grossly indecent acts in public are committed in the presence of a child and carries an increased sentence. This is in contrast to section 53 ('Obscenity') of the *Summary Offences Act* that prescribes a maximum term of imprisonment of 6 months on summary conviction for behaviour which 'offends or causes substantial annoyance'. As discussed above, gross indecency legislation has long been used to regulate male homosexual acts and such acts have been more likely to fall under this legal category. The

32. Rafael Epstein, 'Police entrapment warning' *ABC AM* <abc.net.au/am/stories/s539058.htm> at 28 August 2008.

33. 'Indecent act arrests, West Ipswich' (Media Release, 2 November 2004) <police.qld.gov.au/News+and+Alerts/Media+Releases/2004/11/indecentAct02.htm> at 28 August 2008.

34. Christopher Kendall and Mala Dharmananda, 'Report of the Western Australian Ministerial Committee on Lesbian and Gay Law Reform' 8(4) *E Law, Murdoch University Electronic Journal of Law* <murdoch.edu.au/elaw/issues/v8n4/kendall84.html> at 28 August 2008.

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fact that the offence becomes aggravated if witnessed by a child raises an additional concern. During debate of the Evidence of Children Amendment Bill in the Northern Territory Assembly on 21 August 2007 it was suggested that the word 'deliberately' should be included into the definition of 'sexual offence' outlined in the *Sexual Offences (Evidence and Procedure) Act* (section 3e) which reads 'any other indecent act directed against a person or committed in the presence of a child'. Including the word 'deliberately', it was argued, would prevent a person 'doing something which, you might say, comes naturally and is the prerogative of a couple, then being charged with an offence under this section [which covers 'gross indecency in public'] which was not meant to be'. The suggested rewording was not accepted and the statute allows for the prosecution of 'gross indecency in public' as a serious sexual offence if the indecency is within the presence of child but regardless of the intent of the offender(s). It was argued in the Assembly that this provision was important in light of the 'trauma and distress' that witnessing such sexual acts may have upon children. Given the similar discussion in relation to section 71 in England & Wales it is arguable that ideas about 'trauma and distress' are very often framed by heteronormative conceptions of specific sexual acts in particular contexts and, as such, that homosexual acts in public are more likely to fall under this legislation.

### *Australian Capital Territory*

The Australian Capital Territory no longer has specific legislation for homosexual acts in public — although the now repealed *Law Reform (Sexual Behaviour) Ordinance* of 1976 specifically criminalized male sexual activity in public lavatories — and public sexual acts are regulated by sections 392 ('Offensive behaviour') and 393 ('Indecent exposure') of the *Crimes Act 1900*. Section 392 does not prescribe a term of imprisonment whereas section 292 allows for a maximum term of 1 year in prison. A person commits an offence of 'indecent exposure' if he or she:

> offends against decency by the exposure of his or her person in a public place, or in any place within the view of a person who is in a public place.

As with the other states and territory discussed above, there are no data available to indicate how offences may be subject to classification in relation to this legislation on the basis of gender and sexual orientation.

## No conclusions, but more research needed

In outlining the legislative arrangements for regulating sexual activity in public in Australia my aim has been to argue for the need for further research in this area in respect to sexual orientation. It is clear that there is significant scope for the law to be biased towards men engaged in homosexual public sex because of the ways that social and cultural ideas about homosexuality come to bear upon the enforcement of the law. Research should be undertaken to assess the extent to which the enforcement of the law is determined by the sexual orientation of those involved in public sex.

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