Dob in a prostitute

coercing co-operation

Graeme Orr

Queensland's prostitution laws bring back the Inquisition!

You are a sex worker – or client. You are arrested under s.229I of *The Criminal Code* (Qld) and face up to three years gaol for being 'without reasonable excuse ... in a place suspected ... of being used for the purposes of prostitution by two or more prostitutes'. The police point to s.229J. If you agree to give evidence, under cross-examination, about anything relevant to any criminal activity on those premises, you might get off with a certificate of discharge. No conviction, no penalty, just lots of questions asked.

What do you do? Do you thank the Goss Government's *largesse* in offering an alternative to imprisonment, or do you curse the law that says to you: dob or we'll wield a big stick?

Much, mostly negative, has been written and said about the *Prostitution Laws Amendment Act* 1992 (Qld).[1] Primarily this criticism has been aimed at the substantive framework of regulation that the new law embodies, and the morality and workability of this system. However, there has been little focus on s.229J.[2] Yet this provision, in the guise of a procedural escape for defendants, introduces into our criminal law a dangerous precedent that runs contrary to basic judicial principles.

Judges and juries are meant to reason about particular fact situations – they determine whether X did Y, and if so, what consequences should flow for X. To this end, we have adversarial advocacy, particularly in criminal trials. The state is put to a high standard of proof on the assumption that before we deprive someone of their money or liberty for some alleged past action, we want to be sure that they indeed did the deed. Courts are thus backward looking institutions, in the sense of examining and evaluating past conduct of individuals, who are charged with specific offences and given a right to counsel to defend them.

In contrast, the certificate of discharge process creates an inquisition in the courtroom. The executive government – the police force – is able to extract information from a defendant, fearful of punishment, which will incriminate others in separate offences.

Precedents?

This is without precedent. The closest analogy would seem to be public examinations conducted under the federal bankruptcy and insolvency regimes. In a public examination, bankrupts or officers of companies being wound-up may be required to answer such questions about their 'examinable affairs' as the court thinks appropriate.[3] But while the privilege against self-incrimination is expressly nullified, the evidence elicited is not tenderable in criminal proceedings.[4] The point of this process is to enable creditors and trustees to gather information to trace and recover money owed to them. Compare this to s.229J, whose purpose seems to be to create a coercive star chamber to uncover criminal activity by unrepresented third parties.

The real analogy for s.229J is not to be found in any provisions governing court procedures and powers. Rather, it is reminiscent of the recent use of executive fiat in this State, particularly the granting of indemnities

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against prosecution. Commissioner Fitzgerald and his Royal Commission advised the State Attorney-General to grant a number of indemnities, as incentives to encourage crucial witnesses to co-operate. Yet, while the sight of corrupt police officers and politicians rolling over in that inquiry and implicating their colleagues may have been edifying to the public, Fitzgerald recognised that there were dangers inherent in the indemnity process.[5]

We lived with that practice, mostly because the gravity of the issues being uncovered justified it. A magistrates court dealing with people caught on prostitution premises is not in the same league. Despite the potential severity of s.229I prostitution offences, these defendants are not engaging in serious crime or public corruption – they are the participants in consensual sexual and economic activity.

More fundamentally, the institutions involved are distinguishable. The primary purpose of a Royal Commission is to expose, in a rational way, problems in the law and its enforcement, and make well-informed recommendations for reform, not to pass judgement on individuals who breach the law. A court, on the other hand, is not a place for investigating issues broader than simple forensic and retributory questions: did X do it? If so, what should be done to X in return?

In their more frank moments, police might say: 'But we engage in plea bargaining with arrested people. A certificate of discharge simply formalises the process of informing.' This misses one of the fundamental lessons of the Fitzgerald Report. We live in a parlous state when we allow basic institutions like courts to be (further) corrupted.

The comparison with copping a plea also misconstrues the motives of those judges who give lighter sentences for a guilty plea. Nominally they do it to reward the remorse or contrition that lies behind a true confession; in reality they do it to save court time. In a s.229J plea, judges register no conviction, but only because the Code directs them to do so, after having first co-opted them to become intimately involved with the coercive extraction of information about the activities of non-defendants. Perhaps the only true similarity between s.229J and copping a plea, is the negative practical consequence that some innocent people with potentially good but not watertight defences, may on a cost benefit analysis, be goaded into a guilty plea. This currently happens with plea bargaining, as defendants threatened with a serious offence choose to cop a plea on a lesser charge, not as an admission of guilt but to minimise the risk of incurring a graver penalty.

Just as there is a privilege against self-incrimination in court proceedings, there should also be no forced incrimination of others. This is not just an abstract principle of justice, it reflects a traditional (Australian?) proscription against dobbing in your mates.

Operation of Section 229J

If these arguments against provisions like s.229J aren't compelling, then consider the actual operation of that section. It is available to those charged with s.229I offences of being found on premises. So it is directed at a relatively defenceless group – sex workers, their clients, and even friends who visit and suppliers of ancillary goods and services.

The section, in the words of a SQWISI[6] representative, is a 'mixed blessing' to sex workers. It offers some hope of avoiding an unfair penalty, but at the cost of dobbing in not just fellow workers and clients (both valued and unvalued), but most of all their bosses. For most sex workers, their bosses are not ogres, but simply administrators who give them the ability to work in an organised and relatively protected environment.

Of course, the relationships between sex workers and their employers are not always rosy. As one former Madame noted, whilst most workers are friendly with their bosses, they often harbour a degree of latent resentment that transcends that which, say, an ordinary manual worker is likely to feel to her superiors. This resentment often manifests itself in a feeling that the bosses think they 'own' the worker's body, because they have some power over its direction and how it is used in this fairly intimate practice. Such feelings are likely to be aggravated where bosses are removed from the day to day concerns of the business, and especially if they have never been sex workers themselves.

This latent resentment only makes it easier for police to 'sell' s.229J to some sex workers. To the Madame in question, the section was the straw that broke her back. The risk of a disgruntled, arrested employee informing on her through s.229J, encouraged her to disband her business and return to individual practice. In a sense, this was a victory for the overall purpose of the legislation, which is to scale down the industry, leaving only solo cottage-style and street workers, regardless of the security risks in these practices.

Sex workers are being placed in an invidious position, having to choose between saving their skins, and informing on their employers and fellow workers. There is no guarantee that the proceedings will occur in camera, so an additional problem for some sex workers is that their evidence is given in a courtroom open to the very people it implicates. The prostitution business is susceptible to instances of violent retribution and standover tactics. A defendant's moral dilemma may then further be aggravated by the practical threat of an employer's reprisals, as occurred in at least one recent case cited to this writer. The sex worker may find herself faced with coercion both from the police, and her employer. The problems that whistle-blowing employees face generally are exacerbated greatly in this situation.

There is no comparable moral dilemma for clients who are charged for their involvement. Clients tend to treat prostitutes as just that – prostitutes. They tend not to develop a sense of loyalty, even to their favoured prostitutes, because the transaction for them is the purchase of an individual sexual act. Easy gratification is unlikely to breed loyalty, and clients are unlikely to see the prostitute as a sex worker who is part of a wider organisation. A certificate of discharge is thus an easier escape for a client. This is especially so for, say, married clients, desperate to preserve their anonymity. Under s.229J(2)(b), a non-publication order may be sought to protect the defendant's identity.

The fear of reprisals will be less real to clients who are apprehended as they leave the premises. Unless they are very regular clients, the brothel's staff will be unlikely to know of the charges and hence of the possibility that the client will spill the beans. Given the history of prostitution legislation and law enforcement, it should come as no surprise that a provision like s.229J, in practice, favours clients over sex workers.

Additionally, sex workers are likely to be asked in court whether they will co-operate with police prosecutions flowing from the evidence they give. This is technically an irrelevant question, going only to the credit of the accused in the eyes of the court. Yet it highlights the defendants' plight: they are not merely being offered a 'get out of gaol free' card, nor are they simply being asked to play Iscariot. They are being required to work with the police to secure the conviction of people just like themselves.

What to do?

What, ultimately, can be done with this mixed blessing of a section? Its repeal, on its own, would simply expose more people to punishment under the Code. Yet if this section were to prosper in practice, it could become the blueprint for similar provisions, turning the courts into inquisitorial tools for police. This sort of legislative provision should attract the wrath of not just those sympathetic to sex workers, but even conservative lawyers concerned with the integrity of judicial process.

References

1. For a useful critique: Vann, Megan, 'Prostitution: the Goss Position' (1993) 18 *Alternative Law Journal* 38.
2. In over 140 pages of Hansard, the only (irrelevant) discussion is Denver Beanland's concern that the section might provide an easy out for those involved in child prostitution! On the other hand, the Women's Legal Service in its submission to Parliament of 24 November 1992 noted that the section 'is completely without precedent and likely to prove highly problematical'.
3. *Bankruptcy Act 1966* (Cth) s.81; *Corporations Law 1989* (Cth) s.597.
4. See *Bankruptcy Act* ss.81 (11AA), (17) and *Corporations Law* ss.597 (12), (12A) about self-incrimination and use of evidence respectively.
5. Report of a *Commission of Inquiry Pursuant to Orders in Council* ('Fitzgerald Report') para 1.4.3. Ironically, it was Fitzgerald's inquiry which led to the revamping of prostitution law; although we cannot blame him for the substance of the new law, or the process which created it.
6. SQWISI as it is endearingly called, stands for 'Self-health for Queensland Workers in the Sex Industry'. It is a community-based, government-funded organisation to provide STD education and prevention, and welfare and support to sex workers, their partners and clients.

Letters

Queensland needs a Bill of Rights

Dear Editor,

If Queensland's *Legislative Standards Act 1992*, is, as Spencer Zifcak described it, *the new exemplar of democracy* which amounts to *a mini bill of rights*, then Queensland law reform is in for a lean time indeed.

Mr Zifcak's article, published in Volume 18, No. 6, December 1993 of this Journal, will be handed around the hallowed halls of Queensland parliamentary power with much back-slapping. It will reinforce the claims made by some Goss Government ministers that their Government has been a veritable Vesuvius of human rights initiatives. It will also give credibility to Premier Goss' public contention that the need for a Bill of Rights appears questionable now that Queensland has legislative standards legislation. It will therefore assist in undermining the recommendations made by Queensland's Electoral and Administrative Reform Commission (EARC) in September last year, that Queensland would benefit from the enactment of a Bill of Rights.

There are a host of reasons why a Bill of Rights is preferable to the *Legislative Standards Act 1992*. This letter addresses only two.

First the *Legislative Standards Act* contains a limited array of vague and unenforceable human rights provisions. By contrast, EARC's preferred Bill of Rights for Queensland is modelled on the two international covenants that are a primary source of human rights instruments in the modern world: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. There is nothing vague or limited about these rights. This is meaty stuff with which few could object. The covenants condemn racism; sexism; cruel and unusual punishments; unnecessary interference by state officials with individual privacy; and arbitrary decision-making by bureaucrats and courts. They promote the rights of an individual to an adequate standard of living; to gainful employment with reasonable pay; to freedom of speech and religious choice; to hold and express opinions; to peacefully demonstrate; to vote; and to equal access to and protection of the law.

Second, the standards in the *Legislative Standards Act* are completely unenforceable. Nothing happens if Bills, Acts, amendments or subordinate legislation infringe the so-called fundamental legislative principles listed in the Act. If passed by Parliament, offensive legislation will nevertheless become law. As a consequence, Queensland Parliament has already passed legislation which does not comply with the Act's so-called fundamental legislative standards. (For example, compare s.4(3)(e) *Legislative Standards Act 1992* with s.107 *Art Union and Public Amusements Act 1992.* The latter section allows inspectors monitoring premises, calcutta sweeps, bingo operations and public amusement machines conducted for profit to enter, search and seize without first obtaining a warrant. The former section challenges legislation which gives state officials power to enter premises and to search and seize property without first obtaining a warrant.)

By contrast, a Bill of Rights can be enforced. EARC has recommended that Queensland citizens should be asked in a referendum whether or not they would support the entrenchment of a Bill of Rights in the Queensland Constitution. Once entrenched, government and bureaucrats can be ordered by the courts to act in accordance with an impressive list of civil and political rights. The Bill would also override State-made legislation and regulations that conflict with the civil, political, social, economic and cultural rights that EARC has endorsed for inclusion in the Bill. The rights themselves could only be removed by the people – through another referendum.

Until the election of the Goss Government, the Special Branch was secretly supplying government departments with information about individuals; peaceful street marches were effectively banned; and the value of a council election vote cast in one ward could be worth between 3 and 27.3 times a vote in another ward in 66 local authority regions. Prisoners in Townsville's Stuart Creek gaol sweltered in unsewered, cramped cells, without water, in penal conditions reminiscent of previous centuries. Homosexual activity could land you in gaol. A number of laws passed, and policies made, by the Goss Government reverse these human rights violations. This is laudable. However, the fact remains that the extent to which Queensland law-makers, government officers, bureaucrats and judges are bound to observe those international human rights covenants to which Australia is a signatory, is at present totally reliant upon the goodwill of the government of the day. When comparing the *Legislative Standards Act* to a Bill of Rights, ask yourself which you'd prefer to see on the statute books when a National Party is re-elected in Queensland.

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