

The Research Director  
Legal Affairs and Community Safety Committee  
Queensland Parliament

**Submission for the inquiry on strategies to prevent  
and  
reduce criminal activity in Queensland**

**Sex-related Crimes**

Paris, 9 July 2014

Dear Sir,

It is an established fact that sex crimes are usually perpetrated in the intimacy and tranquility of the homes of either the victim or the aggressor at a moment when they are alone together, with no witnesses and no risk of them being disturbed. They are often members of the same family, more or less closely related, or friends or acquaintances. In most cases the victim and the aggressor know each other personally.

An obvious reason for many sex crimes not being reported to the police stems from the private context in which most sex crimes occur and the fact that most victims are sexually assaulted by somebody they know. Also, police vetting of sex crimes results in many of those which are reported, not being officially recorded, or later classified as “no-crime”.

In its report dated 18 December 2007, the Australian Institute of Criminology estimated that :

- 70% or more of all victim incidents were not reported to the police
- no criminal proceedings were instigated for 80% of all victim incidents reported to police
- between 25% and 33% of cases which get to court are dismissed without a hearing

- the conviction rate is about 10% of the victim incidents which had been reported to the police

As only 30% of sex crimes are reported to the police, the conviction rate of all sex crimes estimated to have occurred is 3%.

That is a poor performance to say the least. It is consistent with the conviction rate in the UK which was 2.6% in 2013 (cf., The Independent, Sunday 29 December 2013, “100,000 assaults, 1,000 rapists sentenced. Shockingly low conviction rates revealed”).

It is a clear indication that the adversarial criminal justice system is incapable of dealing effectively with sex-related crimes.

This is because of the unique features of sex crimes which render them almost impossible to prove :

- lack of material evidence
- lack of credible eye witnesses
- impossibility for the victim to prove use of force, psychological coercion, intimidation or sexual grooming (in the case of young children)
- impossibility for the victim to prove lack of consent.

In addition, the victim is often loathe to bring legal action against an offender who is a member of her family or with whom she has close ties for some reason. Others simply wish to avoid the shame they fear it would bring on themselves and their families.

For all intents and purposes, the perspectives of a satisfactory issue to the problem are practically nil. In any event, in most cases, it all boils down to a question of “my word against yours”.

A classical example is Shakespeare’s tragedy, King Lear, in which Gloucester’s bastard son, Edmund, quotes Edgar, Gloucester’s legitimate son as having replied when he (Edmund) threatened to expose him (act 2, scene 1): “You penniless bastard ! Do you really think that if it came down to my word against yours, anyone would believe you? No. I’d deny whatever evidence you had against me - even if it were in my own handwriting - and turn it all into evidence against you and your plans for treachery”.

“*My word against yours*” has always been and continues to be the nemesis of justice. Nothing has changed since Shakespeare wrote that dialogue over four centuries ago, in 1606.

In his *magnum opus*, “A Theory of Justice” (1971), The American political philosopher, John Rawls, defines justice as “fairness”. Justice, as it is delivered today under the adversarial system for sex-related crimes can hardly be considered fair or equitable. It is totally unjust.

A possible solution would be to reverse the onus of proof from the plaintiff to the defendant for sex crimes, at least in the case of children under the age of the legal majority who are easy prey and the prime target of sex offenders.

While children under the age of the legal majority must be considered highly vulnerable and unable to defend themselves, this is not true of adults. It would seem reasonable to consider that adult victims are better equipped to defend themselves than children and this should be taken into account in the design of their protection. It may be more appropriate, in the case of adult victims, for the reversal of the burden of proof not to be automatic but triggered only when it has been clearly established that there is significant circumstantial evidence, as, for example, in the case of Dominique Strauss-Khan, the ex-managing director of the IMF who was accused of rape by a housemaid of the Sofitel Hotel in New York in 2011.

Unfortunately, the transfer of the burden of proof from the plaintiff to the defendant would inevitably result in the transfer of injustice to a certain number of defendants among the accused who are innocent and wrongly condemned. A judicial error in respect of an innocent person will have replaced the denial of justice to a bona fide victim. The former is wrongly punished once, by justice. The latter is wrongly punished twice, by the aggressor and by justice. Whichever way it goes, there will always be a risk of error. The huge mountain of injustice accumulated by the current system has, nevertheless, attained such vertiginous proportions that any reasonable person can only admit that it is the victim who should receive the “benefit of the doubt”, not the accused.

Reversal of the onus of proof would have the advantage of repairing the gaping holes in the net of justice, through which the quasi-totality of sex offenders currently escape, enabling most of them to be hauled-in. Instead of being declared innocent, they would be declared guilty.

In exchange, it would be judicious to concomitantly implement a considerable reduction in the scale of sanctions for sex-related crimes, with the exception, of course, of the most serious ones involving violence, torture, sequestration, etc. Graduated suspended jail sentences should probably be the rule except for recidivists and the more important first offences. This would also have the advantage of attenuating the adverse effects of judicial errors.

If successful, the justice system could subsequently be made to evolve gradually away from its present retributive or punitive form towards a more restorative type of justice

whereby sex offenders are encouraged to admit to their crimes instead of denying them, assuming responsibility for their acts, requesting and receiving pardon from their victims, providing compensation wherever appropriate, and laying the foundations for pacification and reconciliation of those concerned.

The necessary steps should also be taken to seriously reduce, if not totally eliminate, abusive vetting by the police of sex incidents which victims have the courage to report.

I am by no means an expert on such matters and I do not pretend to know all the answers. I am conscious of the complexity of the matter and the difficulty many of my compatriots would have in accepting some of the concepts I evoke in this paper.

Before such radical reform as the reversal of the onus of proof could be implemented, a large consensus would have to be established within society. For it to be accepted, society would have to understand the need for it. If government were to contemplate its implementation it would have to be preceded by a vast campaign of communication and information. Government would have to state its case and explain why it considered reversal of the onus of proof could produce a more equitable result than the current ideology of presumption of innocence.

I feel confident my fellow Queenslanders are not only capable of understanding something which is clearly explained to them but, also, of weighing-up the individual rights of sex offenders against those of their victims and deciding which of the two weighs more heavily in the balance.

The reorientation of justice in favour of the victim, already initiated by the Government, is an important step in the right direction. Hopefully, it will help "kick-start" the process of restoring confidence in our system of justice.

Establishing the truth can be greatly facilitated by the active cooperation of both offender and victim. Unfortunately, under the current system, justice rarely gets the cooperation it should from either - though not for the same reason. Reversal of the onus of proof would be a powerful incitation for both.

Yours sincerely,



Rodney Crisp

