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TEACHING THE UNTHINKABLE: APPROACHES TO EFFECTIVE / PROTECTED LEARNING IN THE AREA OF SEXUAL OFFENCES

WENDY BALL & JACQUELIN MACKINNON*

INTRODUCTION

Teaching “sensitive” topics at tertiary level can be described as a “minefield” of potential problems; for example teachers and students may experience feelings of exposure, vulnerability, hurt or offense. The likelihood of encountering problems such as these grows with the size of the group. These problems prevent effective learning. Teachers of sensitive topics need to anticipate such problems and adopt approaches to teaching that minimise the problems: learners are thus protected from the problems that may block effective learning.

In the discipline of law there are many topics which are “sensitive”; such topics include cultural legal dynamics, domestic violence law and the law of sexual violation. At the University of Waikato School of Law, the convenor and principal lecturer in the Crimes course took the decision in 1995 to include the law of sexual violation as an optional topic for the first time. This paper engages in the debate regarding the teaching of sensitive topics, and describes and analyses one teacher’s experiences in teaching the law of sexual violation to a large group at tertiary level. The paper identifies barriers to teaching sexual violation, and the approaches adopted to remove the barriers and minimise the problems. The authors contend that the law of sexual violation should be part of the LLB curriculum provided that the topic is taught in a way

which ensures effective/protected learning.

SHOULD THE LAW OF SEXUAL VIOLATION BE AN
INTEGRAL PART OF THE LAW CURRICULUM?

*The Law of Sexual Violation and Crimes Courses
Taught in New Zealand*

The law of sexual violation is a part of the criminal law in New Zealand. It is contained in statute. The offences relating to unlawful sexual connection with both adults and children created by the *Crimes Act* 1961 are wide ranging and detailed, with specific offences created for each age category.

In New Zealand, in common with many other legal jurisdictions, Crimes is a compulsory course which must be taken towards the LLB qualification; law schools must teach it and students must take it. Parts of the content of a Crimes course are prescribed by the New Zealand Council of Legal Education; students must learn the basic elements of criminal offences (*mens rea* and *actus reus*), the main defences available to those persons charged with an offence, and basic criminal procedure. The content of the rest of the course is at the discretion of the course teachers. The Crimes course would appear to be a natural “home” for this topic, but it is not the only course to which the law of sexual violation is relevant. The authors recognise the relevance of the topic to other courses in the LLB curriculum: at the University of Waikato School of Law, aspects of sexual violation are covered in the context of optional courses in Family Law, Property Issues in Family Law, and Women, Society and Domestic violence.¹ The authors support an approach which seeks to place the teaching of the law of sexual violation in relevant courses across the LLB curriculum.

The Law of Sexual Violation and the Need to Know

Law Students as People

Legislative amendments to the criminal law in New Zealand in 1985² were followed by an increase in the reporting of sexual violation offences³ Many commentators view this as a positive response resulting from the creation (by the amendments) of greater safety for victims.⁴ People commit sexual violation offences and

people are victims of unlawful sexual violation: law students, as members of society, benefit from, and can benefit others if they have a knowledge of the law in this area and if the myths and prejudices in society are exposed and challenged. It has been stated in relation to another legal jurisdiction that “until the myths and prejudices within our society surrounding rape were ‘fundamentally challenged’... the situation would not change.”⁵ The authors submit that the teaching of the law of sexual violation provides a means of challenging the myths and prejudices within our society for the benefit of that society.

Law Students as Potential Lawyers

Society benefits from having lawyers who can give high quality professional advice on this topic with sensitivity and understanding. Such sensitivity and understanding is required by criminal lawyers who deal with the Crimes Act 1961, but the need is much wider. Sexual violation offences are part of the criminal law, but the area of domestic violence also involves a large number of sexual violation offences against women and children as a form of power and control. The offences are tried in the criminal courts, but can involve the Family Court in the context of applications for custody of and access to children.⁶ The writers, from their own experiences in legal practice, know that lawyers are likely to deal with domestic violence and sexual violation cases early in their careers. The need to educate lawyers about the dynamics of domestic violence is discussed by Nan Seuffert in her article which proposes a pedagogy for such an education on the basis that “[l]awyers understandings and analysis of domestic violence may affect their legal representations of targets of domestic violence”.⁷ In addition to criminal and family lawyers, a number of students will become involved in law reform. The authors submit that the law of sexual violation is an essential component of the LLB degree, but should be an optional component of a compulsory law course.

WHY IS THE LAW OF SEXUAL VIOLATION NOT AN INTEGRAL PART OF THE LAW CURRICULUM?

At the second Feminist Legal Academics Workshop (held at the Australian National University, February 1995), Hilary Astor⁸ highlighted

the resistance to covering violence in the law curriculum, identifying the risk (or fear) that recognising the prevalence of violence could overwhelm the curriculum, together with the widespread unwillingness (in academia and the wider community) to take responsibility for violence, embodied in the well-known public/private dichotomy⁹

In addition to these reasons, the authors recognise a number of other “barriers” to the teaching of the law of sexual violation.

Barriers to Teaching the Law of Sexual Violation

Budgetary Constraints to Small Group Teaching

The law of sexual violation should ideally be taught to small groups. On average, the number of students enrolled in the Crimes Course at the University of Waikato School of Law is 170. The course is taught by one full-time lecturer, one associate lecturer, and two tutors. Course delivery is by way of two hours of lectures per week throughout the academic year. However, the authors recognise that the benefits for learners in small group teaching are particularly important when teaching sensitive issues:

communication about contrary perceptions of the same phenomena is facilitated [and] [d]ifferences are better appreciated and reconciliation attempted; quiet students, who might not be willing to speak in front of an entire class, are drawn out; students are provided with an opportunity to satisfy emotional needs which are not normally catered for in legal education, particularly the need for social belonging [which] in turn can promote student motivation and commitment to learning.¹⁰

Small group teaching should also provide an opportunity for reflection through debriefing.

Even if it were accepted by tertiary institutions that learning in the area of the law of sexual violation would be more effective and students protected if the topic were taught in small groups, it is unlikely, in the present economic climate in New Zealand and in other developed countries, that further funding would be made available to allow more staff with the appropriate teaching skills to teach in this area.

Lack of Experienced and Skilled Staff

It is unusual to have law teaching staff who are well versed in criminal law, have experience in the practice of criminal law, are skilled in the area of education theory and practice, and who understand the psychology of sexual abusers and victims. To teach the law of sexual abuse in an effective/protected way, the teacher

can be required to draw on this experience and skill.

Perceptions of Vulnerability and Harassment

Most of the teachers in Crimes courses in New Zealand are men.¹¹ At a time of resurgence of a feminist theory focus and heightened awareness of sexual harassment issues, the male teacher may feel more exposed, and students feel threatened, when the topic being taught requires the use of sexually explicit language and graphic case law. In addition, most reported legal cases have fact situations where men are the sexual abusers/offenders and women and children are the victims/complainants.

Necessity for the Use of Sexually Explicit Language

The law of sexual violation in New Zealand comprises criminal offences contained in the Crimes Act 1961. This Act uses explicit language to denote the mental ingredients and action necessary for the commission of the offence. In teaching the law, it is necessary to look at the language, the court's interpretation of the language and the fact situations to which the courts have applied the language.¹² The use of sexually explicit language by any teacher in a group of people of mixed gender, age and social experience can block effective learning. As previously mentioned, the use of sexually explicit language by male teachers may be misconstrued by some students, although this could equally apply to female teachers.

Personal Histories of Teachers and Students

In any class, abusers/offenders and victims/complainants will make up some proportion of people attending. Feelings of hurt or anger can be triggered by reading or hearing the facts of a sexual violation case, or by reading or hearing the words of the offences, or by delivering the facts or words to a class. It should be recognised that effective/protected learning is possible only where students and teachers feel safe. It should also be recognised that some men (either students or teachers) may have feelings of guilt and shame related to their gender identity triggered by the fact that most of the reported legal cases deal with male abusers/offenders and female or child victims/complainants. In teaching the law of sexual violation at the University of Waikato School of Law, Wendy Ball acknowledged in class that such feelings could exist

and was available to discuss such feelings privately with individual students. On three occasions she listened to and acknowledged the reality of the feelings of guilt and shame experienced by young male students who were satisfied with having been heard.

The Law of Sexual Violation as a “Women’s Issue”

In any drive to amend or create new law in the area of sexual violation, a considerable part of that drive comes from individual women or women’s groups.¹³ It is not difficult (although it is mistaken) to see the law of sexual violation as a “women’s issue” and to regard it as a topic suitable for inclusion within an optional course rather than a resource heavy compulsory course.

If material of concern to women appears only in an optional course in law and feminism (or, worse still, nowhere at all), women are marginalised or “otherised.”¹⁴

Even if the law of sexual violation were to be a “women’s issue”, the authors would still argue that the topic be taught in at least one compulsory course.

CHALLENGES IN TEACHING THE LAW OF SEXUAL VIOLATION

The challenges in teaching the law of sexual violation arise out of the barriers previously described. The authors regard the challenges as:

- making the classroom a safety zone for effective learning;
- ensuring that the teaching staff have appropriate skills and experience;
- putting in place “safety nets” for teachers and students, for example, teachers should have colleagues who act in a supportive role and students should be able to talk to the topic teachers outside of class time and should be referred to properly trained counsellors (if appropriate).

If these challenges are met, students are protected from identified potential problems and an environment for effective learning is created.

MEETING THE CHALLENGES: STEPPING OVER THE BARRIERS

The following paragraphs outline Wendy Ball's methods and experiences in teaching the law of sexual violation at the University of Waikato School of Law in 1995/1996.

Teaching Methods

Delivery of content was by way of three two hour lectures all taught by Wendy Ball.¹⁵ Attendance at the lectures was optional, and an optional question on this topic formed part of the final examination. Sexual violation was made an optional component of the Crimes course because of the recognised potential problems and because the approaches to teaching had not been "tested" in this particular context. Student appraisals indicated that there is a tension between the "need to know" the topic and the impact of the topic on individual learners. One hundred and sixty-five students were enrolled in the Crimes course in 1996, and one hundred and fourteen students attended at least one lecture on the law of sexual violation.¹⁶ The student/staff ratio made it impossible to schedule tutorials on this topic.

At the beginning of the first lecture on the law of sexual violation, ground rules were established and information was given in order to create the "safety zone" deemed necessary for effective/protected learning.

- The names and telephone numbers of organisations working in the area of sexual abuse or student counselling were shown on an overhead transparency which remained visible for the remainder of the lecture time.
- Students were advised of times, other than the lecture times, when the lecturer would be available to discuss the topic.
- The lecturer stressed that the lectures were for students enrolled in the Crimes course and that guests and observers would not be invited.
- Students who were experiencing difficulties with the topic content were entitled to leave the class, signal that a break should be taken, "zone out" or "tune out" of the lecture/discussion/activity.
- The class was reminded that the primary goal of the lectures on

the law of sexual violation was the effective learning of the law and that personal histories can displace objectivity and inhibit effective learning: students were to maintain their roles as law students to distance themselves from the topic and refer to “victims” and “offenders”, rather than “men” or “women” or “children”.

In this, and the subsequent two lectures, teaching was mainly by way of straight lecturing. However, student discussion and brainstorming were used where appropriate. For example, in the first lecture (having set up the safety zone) the lecturer asked the class to brainstorm some beliefs and attitudes about rape which were either personal beliefs and attitudes or were felt to be society’s beliefs and attitudes about rape. The students called them out, the lecturer recorded them on the blackboards and students noted them. The exercise took around 20 minutes as the beliefs and attitudes engendered discussion which the lecturer facilitated. Some of the beliefs and attitudes brainstormed were referred to in the subsequent lectures in the context of challenging the students to critically examine the validity of such myths and beliefs in the light of the legislation and case law examined.

Objectives and Topic Content

The objectives of the component were:

- to promote the effective learning of the law of sexual violation;
- to challenge students to think critically about the law of sexual violation in the context of New Zealand society;
- to give students some understanding of the dynamic between lawyer and offender and lawyer and victim and the need for sensitivity.

Students examined the legislation and cases on child and adult sexual violation. Critical thinking was encouraged through examination of the brainstormed beliefs and attitudes and through legal analysis of the case law in New Zealand. Some understanding of the dynamic between lawyers and offenders and lawyers and victims could be achieved through the presentation of the role and perceptions of each in the context of the New Zealand legal system and its values.

EVALUATING THE EXPERIENCE

In August 1996, at the first compulsory Crimes lecture after the law of sexual violation component, students who attended one or more of the three lectures were invited to complete an appraisal which the authors drafted in conjunction with the Appraisals Officer of the University of Waikato. The appraisal covered both course content and teaching methods. There were both “open” questions where students were invited to make comments and rating questions where students indicated responses using a scale of 1–5.

Appraisal and Analysis

Around 170 students were enrolled for Crimes in 1996 and 114 students completed the appraisal on the basis that they had attended one or more of the lectures on sexual violation. Analysis of the appraisal results revealed the following:

Attendance

A high number of students attended the lectures on the law of sexual violation, relative to other topics within the Crimes course, and there was no significant drop off as the lectures progressed. There was no gender difference in the attendance patterns.

Reasons for Attending

The reasons for attending given by students were diverse, for example “it’s a part of the law that practising lawyers will be faced with” and “it gives another option when answering exam questions” (reflecting information which was given to students during the lectures). Other responses reflected the importance of sexual violation as a social issue.

Continued Inclusion as Part of Crimes

Nearly all students who attended the lectures thought that the law of sexual violation should continue to be part of Crimes: two thirds of the responses to this question indicated that attendance should be optional, one third indicated that it should be compulsory. Those students who thought the law of sexual violation should be a compulsory part of the Crimes course stressed the importance of the topic for practicing lawyers; those who

thought it should be optional stressed the impact that the topic might have on individuals.

Content

Of the 114 students who responded to a question on students' expectations of the content of the law of sexual violation component, 44 stated that the content did not meet their expectations. Analysis of the reasons for this discloses that many of these students wanted more discussion of cases and greater factual detail in relation to cases. This was the students' experience in other courses and in other Crimes topics, and the lecturer's emphasis on the exploration of surrounding issues, rather than analysis of cases, seemed to make the topic, for these students, less valuable.

Presentation Balance

Of particular interest to Wendy Ball was feedback on whether her presentation of the material was seen as balanced. The responses were reviewed on a gender basis. Of the women who responded, a large majority felt the presentation was balanced: those who did not perceived an anti-male bias. An overwhelming majority of men found the presentation balanced, but a significant minority referred to a bias towards the victims of sexual offences rather than an "anti-male" bias.

The Safety Zone

Ninety-nine of the 105 responses received on the question of whether the methods used to create a safety zone were effective concluded that they were. In some of the responses, students referred to the effect the safety zone had on them, for example that at no stage did they feel unsafe. Some students referred to the effectiveness of the safety zone for people who might need it, stating "if anyone felt uncomfortable they had a chance to leave".

Of the students who did not feel a safe environment was created, the responses identified that nothing put in place could work for everyone and that the "going gets tough" options (zoning out, indicating that a break was needed, leaving) could call attention to people who did not want to be identified, or that people's needs could be misunderstood. This is highlighted by a response which drew attention to the fact that students want to

leave class for all sorts of reasons, including going to the toilets and collecting children from childcare, and that this might be a source of embarrassment if the class thinks that it is a reaction to the subject matter.

Changing Views and Attitudes to the Law of Sexual Violation

Students were asked if their views on and attitude to the law of sexual violation had changed as a result of attending classes. The responses recorded included an increased understanding of the law, being better informed about the wider context (including the relationship between victims and the legal system), and becoming more objective and less emotive about the topic.

CONCLUSION

The law of sexual violation is an important topic. Law students benefit from learning about the law and society's beliefs and attitudes, and that benefit flows on to society as a whole. Many of our students will become advocates for victims of sexual violation offences, others will prosecute, or will become involved in law reform, or will defend people accused of sexual violation offences. In all of these areas, it is necessary that high-quality, professional advice is given with sensitivity and understanding. However, it is recognised by both the authors and students that there is a tension between the importance of the topic and the impact of the topic on individual learners. The approaches to teaching described in this paper do not guarantee that every student will be protected from the potential problems raised by the topic. Thus, effective learning is not a guaranteed outcome. In these circumstances, sexual violation should be a compulsory component of the LLB, but attendance by students should be optional.

The learning must take place in a protected environment and teachers must be supported to produce that environment. For Wendy Ball, teaching the law of sexual violation has been both difficult and rewarding. Selection of content and teaching methods required constant sensitivity to possible student and teacher reaction, and a recognition that the personal history of the teacher could result in an unbalanced presentation of the material. The main reward has been that the response from many students, informally and by way of formal appraisal, was so overwhelmingly

positive. The law of sexual violation will be taught again in 1997. The content and teaching methods will be reviewed in the light of the 1996 students' appraisals of this component of the Crimes course. Regarding changes to the law of sexual violation component of the Crimes course for 1997, the University's Appraisals Officer had this to say:

If I have to make one over-riding conclusion about the class — it would be that I can't make one over-riding conclusion ... this class is a classic example of why there is no 'perfect' teaching ... It appears to me that the biggest deciding variable was not gender, but each persons approach/ attitude to Law, and how personally they relate to [the law of sexual violation] ... you will have to [be] careful re. any changes — I sense it is a fine equilibrium.¹⁷

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1 Courses in Family Law and Property Issues in Family Law cover abuse issues in the context of divorce, custody and access, and domestic violence. Women, Society and Domestic Violence is a discussion and research based course which examines issues of power and control in relation to domestic violence of all types.

2 *Crimes Amendment (No 3) Act* 1985 (NZ) effected changes to the *Crimes Act* 1961 (NZ) in four major areas: (1) Rape was retained as an offence but new sections were added to expand the concept/definition of rape to include all other forms of sexual violation (digital, object and anal penetration); (2) the language used in the statute is now gender neutral; (3) sexual violation within marriage is now an offence; (4) court hearings are now held in camera. In addition, the *Evidence Act* 1908 (as amended in 1989) (NZ) created further reform and protection in relation to sexual violation offences, inter alia, in relation to the means by which child complainants can present their evidence (s 23D), the process by which complainants' (adult and children) sexual history may be admitted into evidence.

3 New Zealand Police statistics internal report, written in 1994, disclosed that the number of reported adult sexual violation offences had increased in the years 1989–1993 by 32%.

4 Justice EW Thomas, Was Eve merely framed; or was she forsaken? [1994] *NZLJ* Part 1 368–373; Part 2 426–432; V Waye, Rape and the Unconscionable Bargain [1992] *Crim LJ* 94; G Orchard, Sexual Violation: The Rape Law Reform Legislation (1986) 12 *NZULRev* 97.

5 Sexual Assault Legislation in Canada — An Evaluation, prepared for the Department of Justice Prior to Bill c-127, July 1985, at 22.

6 New Zealand National Collective of Women's Refuges 1991 statistics published in 1992 report that 50% of children entering the Women's Refuges in that year were physically abused by a parent and 12% were sexually abused.

Of all matters raised before the Family Court, 40% involve domestic violence and a significant proportion of that 40% involves sexual violation: (private interview between Ruth Busch, Senior Lecturer, School of Law, University of Waikato, and a Family Court Co-ordinator).

7 N Seuffert, Lawyering and Domestic Violence: Feminist Pedagogies Meet Feminist Theories (1994) 10(2) *Women's Stud J* 64.

8 Workshop Presenter and Associate Professor, Faculty of Law, University of Sydney.

- ⁹ (1995) 6 *Legal Educ Rev* 124, as noted by the guest editors in their introduction to this issue.
- ¹⁰ M Le Brun, & R Johnstone, *The Quiet (R)evolution: Improving Student Learning in Law* (Sydney: Law Book Company, 1994) 292.
- ¹¹ Of the five Law Schools teaching the LLB degree in New Zealand there are six male and two female Crimes teachers in 1996.
- ¹² *Crimes Act* 1961 (NZ) s 128: the meaning of “unlawful connection” was examined in the New Zealand case of *R v Accused* [1988] 1 NZLR 422, 425 when the court discussed the prosecution’s contention that “unlawful connection” included penetration of the complainant by both (1) the assailant’s fingers and (2) the assailant’s penis.
- ¹³ Ruth Busch led the Victim’s Task Force and co-authored a major report. Many of the recommendations of this report were incorporated into the New Zealand Domestic Violence Act 1995: R Busch, N Robertson, & H Lapsley, *Protection from Family Violence: A Study of Protection Orders under the Domestic Protection Act 1982* (Wellington: Victims Task Force, 1992); see also The Women’s Refuge Collective report regarding the lobbying for these amendments which is contained as preface in the report: *supra* note 6.
- ¹⁴ R Graycar, & J Morgan, *The Hidden Gender of Law* (Sydney: Federation Press, 1992) 22.
- ¹⁵ Wendy Ball has practiced criminal law, specialising in the area of child sexual abuse. In addition to her LLB, she has a BA (Psych) which has assisted her in identifying the challenges of teaching sensitive topics, in creating the “safety zone”, and to appropriately refer students to counselling and other agencies. She has ten years experience of teaching topics which have often fallen into the “too hard” or “too sensitive” basket.
- ¹⁶ The figure for attendance at the law of sexual violation lectures is taken from the number of course appraisal forms completed by students enrolled in the Crimes course who attended the compulsory Crimes lecture held on 7 August 1996. The appraisal forms were analysed by the Appraisals Officer of the University of Waikato. A copy of the appraisal form may be obtained by contacting the authors.
- ¹⁷ Extract from a memorandum from University Appraisals Officer, D Christianson, to Wendy Ball regarding the 1996 appraisal of the law of sexual violation component of the Crimes course.