The Development of Offensive Language Laws in Nineteenth-Century New South Wales

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This article considers the development of offensive language laws in New South Wales during the nineteenth century. The development of the laws during the nineteenth century is of particular interest because the laws introduced at the turn of the twentieth century were to provide the blueprint for modern offensive language laws. This article deals with the law in two periods: the first, from the establishment of the colony in New South Wales in 1788 to 1835; and the second, from 1835 until 1908.

The argument presented here is that, during the first period, the rhetoric of the law against insulting or offensive language was wholly consistent with the law's effects. The laws were expressly designed to suppress and control the convict population, and this was precisely how they were used. In the second period, that is, from the mid-nineteenth century onwards, the laws continued to operate in a disciplinary fashion but, paradoxically, they were increasingly justified in idealistic terms. In particular, the laws were justified by reference to legislators' desires to protect the vulnerable in society from verbal abuse. However, the limited evidence available suggests that the growing voice given to ideals and high-minded sentiments that occurred with the shift to 'civil society' was at odds with the reality of the law's operation. Thus, it is argued that the latter half of the nineteenth century saw a growing divergence between the ideals of public order law-making and the reality of law enforcement, a divergence which would come to be characteristic of offensive language laws (Lennan 2007).

The Governor's Ordinances and the New South Wales Act of 1823

The laws against offensive language in New South Wales have their origins in penal ordinances which applied only to convicts. In the early nineteenth century, convicts made up the majority of the colony's European inhabitants. In 1806, Governor King proscribed the use of abusive or insulting language by convicts to military personnel (McQueen 1968; Tubbs 1979:81). There were, and still are, doubts about the validity of ordinances issued by colonial governors prior to 1823 (see, for example, *Mabo v Queensland* (1991) 175 CLR 1 at 37 per Brennan J). At the time, these concerns provided a rallying point for the free settlers' demands for representation. The settlers' demands were met with the grant of

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(albeit limited) representation in 1823, by the British Parliament's passage of an Act 'for the better administration of Justice in New South Wales and Van Diemen's Land' (the 'New South Wales Act' 4 Geo IV Cap 96, 19 July 1823). Section 19 of that same Act vested in the Supreme Court summary jurisdiction over 'all complaints made against such felons or offenders for ... abusive language to their, his or her employers or overseers' punishable by whipping or other corporal punishment, transportation, or hard labour. The settlers were thus granted the same protection from abusive language from convicts in their employ as was afforded to the military, a move that changed the character of the law from a penal regulation to a criminal offence.

Settler-justices and Summary Justice

For the settlers of New South Wales, it was not enough that the law protected them from abuse by convicts; they wanted to have the power to punish convicts for breaking the law. Within two years of the *New South Wales Act* vesting summary jurisdiction in the Supreme Court, Governor Brisbane, with the assent of the new Legislative Council, extended the power to punish convicts summarily to Justices of the Peace. The *Male Convicts Punishment Act* of 1825 gave Justices of the Peace the power to inflict on any male convict for 'any misbehaviour or disorderly conduct' ten days at the treadmill, fifty lashes, solitary confinement on bread and water for seven days, or confinement and hard labour for three months: 6 Geo IV No 5, 8 February 1825. In reality, settlers acting as Justices of the Peace, or 'settler-justices', had already taken the punishment of insolent convicts into their own hands in a manner which Governor Bourke was to describe as 'repugnant to the clearest maxims both of Law and moral Justice' (cited in Woods 2002:73). Aware of the arbitrary punishments meted out by settler-justices, the Legislative Council in the same year passed the *Justices Indemnity Act* to indemnify Justices of the Peace for past illegalities of this kind: 6 Geo IV No 18, 2 October 1825. In 1830, Governor Darling increased the punishments which the justices of the peace were entitled to impose summarily on assigned male convicts guilty of 'abusive language or other disorderly conduct' to 'once, twice or thrice' fifty lashes or other punishments: *Offenders' Punishment and Transportation Act,* 11 Geo IV No 2, 20 May 1830. The effect of the law was that the power to punish for abusive language was extended from the military and the courts to the settlers; the purpose was to facilitate discipline.

Despite the expanded scope for punitive discretionary sentences under the law, irregular punishments were common practice. As Woods (2002:197) outlined, Governor Bourke reviewed this situation when he arrived in 1831. He found punishment in the colony to be petty and brutal. Bourke discovered that 'when [settlers'] own assigned convicts were lazy, or spoke back, they would call upon a neighboring squatter magistrate to visit and impose summary punishments; and they would in turn reciprocate the favour for their fellow settlers'. Sturma (1983:127–128) has documented such instances as the seven days solitary confinement imposed on John Hazel for allegedly making 'a noise like a breaking wind' when his overseer chastised him about the speed of his ploughing, and the twelve months in an iron gang for John Morris for rashly threatening his master who had criticised the dimensions of a haystack Morris was making. Other cases described by Woods (2002:76) included the 25 lashes inflicted on William Fuller for insolence and neglect, during which 'blood appeared about the 8th lash', and the fifty lashes inflicted on Edward Davis for, while drunk, making use of improper language before the family of a Mr Folkard. Of Davis, it was observed:

> This man was never punished before; he cried out loudly at the first lash; the skin was lacerated at the 14th lash, and he continued to cry out loudly. Twelve lashes would have been sufficient punishment; he continued crying after the flogging was over.

The authorities were aware of the brutality of the punishments inflicted; the above description was taken from a report to Governor Bourke. Even the 'Fifty Lashes Act', introduced by Bourke to curb excessive punishment by establishing the Court of Petty Sessions and reducing the number of lashes which a single justice could inflict, permitted Justices of the Peace to inflict fifty lashes for a single misdemeanour: *An Act for defining the respective powers and authorities of General Quarter Sessions, and of Petty Sessions; and for determining the Places at which the same shall be holden; and for better regulating the Summary Jurisdiction of Justices of the Peace, and for repealing certain Laws and Ordinances relating thereto*, 1832 (NSW) 3 William IV No III s16(xvi). Even so, the 'Fifty Lashes Act' was regarded, by settler-justices, as an 'impudence' (Woods 2002:74–75; Grabosky 1977:65).

The law was manifestly directed to disciplining convicts. The 'Fifty Lashes Act' emphasised that such offences were applicable only to the transported felon or offender, 'whose sentence shall not have expired or been remitted' at the time of committing the offence: 3 William IV No III s27, s16. This had to be proved by production of the convict's 'indent': s35. Under the *Master and Servant Act* of 1828, as Woods (2002:63) noted, free persons were not to be tried summarily, but only by the 'said Courts ... and seven Commissioned Officers of His Majesty's sea and land forces'. The law, in that it punished only convicts and protected only their military masters or settler employers, was an asymmetrical protection against insult. It was inequitable on its face, but the penal colony made no pretence of equality. Punitive in purpose and punitive in fact, these early laws illustrate the disciplinary tendencies that would shape the operation of their more recent variants.

'For the Vindication of our Society': Laws from 1835 to 1908

In the mid-nineteenth century, New South Wales began the transition from a penal colony to a largely civil society, and the public order laws which were introduced during this period reflected the colony's changed social make-up. The laws controlling public order — the laws on abusive language among them — continued to be punitive in character, but it is argued that in this period the laws developed another face, that of the semblance of justice.

The Vagrancy Acts

In 1835 the Legislative Council introduced an Act 'for the prevention of Vagrancy, and for the punishment of Idle and Disorderly Persons, Rogues and Vagabonds, and Incorrigible Rogues, in the Colony of New South Wales': 6 William IV No 6, 1835. The law was, as Finnane (1987:90) argues, based on the English *Vagrancy Act* of 1824 (5 Geo IV c83), although it did contain one offence 'uniquely Antipodean', that of lodging or wandering with Aborigines (Grabosky 1977:62–63). The New South Wales *Vagrancy Act* of 1835 contained no provision specifically directed at the use of language. At this stage, the use of 'insulting, abusive or threatening language' remained a crime only for the colony's convict population.

By the mid-nineteenth century, there were more free citizens than there were convicts in New South Wales. It was also the Victorian age, typified by concern with respectability and morality, and these concerns were amplified in the colony of New South Wales as it emerged from the convictism of its foundations. With the burgeoning urban middle class

came increased demands to clean up the streets (Frances 1994:7). The complaints took on a moralistic tone; indeed, as Sturma (1983:127–128) notes, in accounts of the colony in this time, 'invective against New South Wales' moral character became a literary convention'. The 'respectable persons' of Sydney voiced their concern at the behaviour of lower orders, particularly their language and drinking. On 29 August 1839, the Sydney *Gazette* reported:

> It is a matter of doubt which is the greatest evil in Sydney, the vice of drunkenness or the custom of vile swearing in the streets. Great as is the former evil it is in some respects less objectionable than the horrid oaths and obscene language which is current in our streets among the lower orders, and so disgusting to all respectable persons, but more particularly so to those newly arrived in the colony.

There was little distinguishing the convicts from the poor because, as Judge William Burton wrote in the *Colonial Magazine* in 1840, 'the convict vices manifest themselves continually in the lower order ... in language profane disgusting and unclean' (Sturma 1983:28). While the offensive speech of convicts could be disciplined under the penal laws, there was a desire to expand the apparatus of discipline to the non-convict population.

In 1851, the new *Vagrancy Act* prohibited the use of 'any threatening, abusive, or insulting words or behaviour in any public street, thoroughfare, or place, with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned': 15 Vic No 4, s6. Essentially, the law took the prohibition on 'threatening, abusive or insulting' words and applied it to the public interactions of the growing population outside the martial law of the colony, punishable by a five pound fine or three months in gaol. The expanded *Vagrancy Act* 1851 (NSW) also incorporated provisions, taken from an older police power and consolidated in the English *Police Act* 1847, regarding obscene or indecent language or representations in public places (Finnane 1987:91). The vagrancy laws, originally introduced in Elizabethan times to control wandering labour, were thus broadened to become instruments for the regulation of public places, and modernised police forces were charged with the duty of their enforcement (Finnane 1994:95; Chambliss 1964). As Cunneen (1988:200–201) writes, the enforcement of a 'bourgeois form of spatiality' was vested in the criminal justice system. The new laws meant that the 'respectable persons' of the colony, accustomed to the right to brutally punish insulting words from convicts, could have insult from the lower orders in society similarly punished.

Larrikins and the Chinese

As well as the change in demographics, the transition from a penal colony to a largely civil society brought about change in the colony's political processes. The law-making process of the mid-nineteenth century, conducted by the Legislative Council rather than the Governor alone, necessarily involved debate. And, while the laws remained punitive in substance, there seemed to be a greater sense of the moral possibilities of the law in society. Laws were increasingly justified in idealistic terms.

One issue which roused the moral feeling of legislators during the late nineteenth century was that of 'larrikinism'. Like the English hooligans described by Bellamy (1993) and Pearson (1983), Sydney's larrikins gathered in gangs or 'pushes' of youths and harassed respectable pedestrians on the streets, 'making objectionable remarks to passers-by' (Grabosky 1977:85). Grabosky (1977:70) described one early Sydney gang, the Cabbage Tree Hat Mob, engaged in 'the delivery of insulting or offensive remarks to wealthier passers-by, and the occasional knocking off of the symbol of high status, the tall black hat'. Grabosky (1977:85) noted that there were reports of pitched battles between rival pushes, and assaults on pedestrians and police. The issue was repeatedly debated in public and in parliament (Woods 2002:76; NSWPD Legislative Assembly 30 March 1881; NSWPD

Legislative Council 10 August 1881). In 1883, the Legislative Council debated the introduction of a law proscribing 'Certain Offences by Boys and Youths', as a solution to the larrikin problem: *Criminal Law Amendment Act* 1883 ss446–447 (Woods 2002:324, 429).

One consideration voiced in support of the law was the need to protect vulnerable segments of the community from abuse by larrikins. A couple of members argued that the provisions should be passed in order to prevent the victimisation of Chinese people (NSWPD Legislative Council 22 February 1883:631). Dalley, an advocate of racial tolerance, said:

> I myself on Christmas morning saw two of those ruffians brutally ill-treating a Chinaman, and I felt the strongest indignation that any human being should be subjected to such treatment. I felt how fortunate it would be for the vindication of our humanity before the civilised world if we could have the offenders dragged up and flogged much more severely than this clause would allow us to flog them (NSWPD Legislative Council 31 January 1883:179).

There was also, among legislators of the day, an awareness of the possibility of real or perceived abuses of the law; in particular, intemperance and inequality in its enforcement. The proposed law provided for whipping, but gave a discretion to impose a fine of up to 20 pounds instead. Parliamentary debate encapsulated the enduring dilemma of discretionary punishment, 'that what some see as reasonable flexibility in sentencing others see as inconsistency or discrimination' (Woods 2002:324). Sir George Innes explained the need for discretion, saying:

> There may be boys who cannot fairly be called larrikins, and who yet may be drawn into the commission of offence[s] and be subjected to this very severe punishment of flogging. We can imagine what would be the feeling of a respectable parent, who knew that this was the first error of his son, when he saw that son triced up by a constable or a common flogger ... (NSWPD Legislative Council 31 August 1881:870).

Sir Alfred Stephen argued against a discretionary punishment, arguing that 'there ... [would be] cases in which it would be suspected, even if it were not the case, that the sons of rich persons would be let off with a fine while the sons of the poor would be flogged' (NSWPD Legislative Council 31 August 1881:870) (curiously enough, Sir Alfred's concern about the perception of injustice did not prevent him from, while a government official in Tasmania, urging that whites should not, if necessary, shrink from the extermination of the aboriginal population of that colony (Woods 2002: 429)). Edward Flood, aged 77, the illegitimate son of an Irish convict, likewise cautioned against the law, having 'seen a man flogged at a cart's-tail from George-street to the gaol, a distance of about half-a-mile, blood pouring down his back all the way' (NSWPD Legislative Council 31 January 1883:178). The grant of discretion was thus protested because of the real or perceived inequality it would permit in the application of the law. There was a sense, moreover, that even a perception of inequality in the law's operation was something that *mattered*; that the law ought to have a semblance of normative legitimacy independent of the fact of its validity and its coercive force. The concerns expressed about the possibilities for abuse of the discretion resulted in the provisions being changed, with the scope of discretion significantly reduced: *Criminal Law Amendment Act* 1883 s447.

The debates over the legislative response to larrikinism illustrate the change in law-making procedures that occurred with New South Wales' transition to a civil society and a civil system of government. The fact that ideals like justice and equality were voiced to justify legislative change is significant because it marks the change to a process of law-making in which law-makers felt compelled to justify their laws at all. Further, the use of

ideals to give the law a legitimacy independent of its coercive force, a sense of being right (or 'civilised', or 'humane'), marks the advance of the idea that law ought to have a semblance of normative legitimacy independent of the fact of coercive force, a conception of law's legitimacy equivalent to Kant's notion of *rechtsgeltung*.

Between Ideals and Reality

Although there is sparse evidence of the operation of public order laws in this period, including insulting or offensive language laws, there are indications that, despite the rhetoric, they remained punitive in character. The warnings voiced by Sir Alfred and Edward Flood about the dangers of discretionary punishment proved to be prescient. The Statistical Registers show that in the late nineteenth century and early twentieth century, Irish-born offenders were over-represented in most arrest categories, especially the so-called 'Offences against Good Order'. In 1901, Irish-born persons accounted for 23.4% of 'Offences against Good Order', despite making up only 4.4% of the total NSW population (Grabosky 1977:86). These figures suggest that the laws, although equal on their face (in that they applied to the entire population rather than convicts only), reinforced class divisions. For the Irish population of the colony, the law was highly inequitable.

Moreover, whilst public order laws were justified by their capacity to deter victimisation of the Chinese, it is apparent that they were sadly ineffective in curbing anti-Oriental attacks. In the late 1800s, popular anti-Oriental sentiment took expression in riots and protests, most infamously in those at Lambing Flat. Moreover, the law's capacity to protect the Chinese population was undermined by officially sanctioned victimisation. Anti-Oriental sentiment found official expression in laws which virtually stopped the migration and naturalisation of Chinese (*Chinese Influx Restriction Act* 1881 (NSW) and *Chinese Restriction and Regulation Act* 1888 (NSW)); in the convening of the 1891 Royal Commission into allegations of gambling, opium smoking and white slavery; and, ultimately, in the White Australia Policy (Grabosky 1977:81). It is telling that what the Royal Commission on Chinese Gambling in fact found was that, while allegations of gambling, opium smoking and white slavery were unsubstantiated, the Chinese were over-represented among victims of assault (NSW Parliament 1892).

The laws shaped in this period provided a template for the regulation of offensive speech for much of the twentieth century, in the form of the Vagrancy Acts of 1901 and 1902. Until 1970, the only major change to the law was the removal of the element of the offence that words result in, or intend, a breach of the peace: *Police Offences Act (Amendment) Act* 1908 amending the *Vagrancy Act* 1902 (Brown et al 2001:954). This meant that a broader range of speech could be considered 'offensive'. It made the law considerably stricter than the law that applied in England, which continued to require evidence of a breach of the peace for words found to be offensive (such as the disorder described in the 1900 case of *Wise v Dunning* which occurred after a Protestant crusader publicly called Roman Catholics 'rednecks').

The pattern of inequitable enforcement of the law persisted. Just as the Irish-born of New South Wales experienced inequitable enforcement of the laws at the turn of the twentieth century, so too have indigenous Australians disproportionately experienced enforcement of NSW offensive language laws in the time since then (Royal Commission Into Aboriginal Deaths in Custody 1991:228–229; Aboriginal and Torres Strait Islander Commission 1997:67; Cunneen 2001:25–28, 85–91).

Conclusion

In early nineteenth-century New South Wales, convicts who 'spoke back' to their masters — military or settler — were severely punished. The laws were, indeed, inequitable, but the penal colony of New South Wales made no claims to equality. This early period in the development of the offence of insulting or offensive language provides a prelude to later offensive language laws, displaying the undisguised brutality that was the law's original object and which would continue to shape its operation long after the penal era was past.

Even after the law was expanded to apply to all persons in the colony, the law remained disciplinary and punitive in character. Moral concerns and ideals had been used, during the law-making process, as justification for the new public order laws. Proponents cited the need to protect those vulnerable to verbal abuse. Despite this, the laws, in fact, failed to curb victimisation of those who were, like the Chinese population, most likely to be the target of abuse. The Irish-born were disproportionately punished. Shaped by its penal origins, the manner in which the law dispensed both punishment and protection continued to be inequitable. There was a clear divergence between the ideals by which the laws were justified and the manner of their operation. This divergence developed just at the time when the nineteenth-century provisions were being adopted as the blueprint for twentieth century public order laws. Accordingly, the historical development of the offensive language laws and their operation may illuminate subsequent patterns in the operation of the provisions.

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