



Appendix D3

Literature Review of Research on Offences of Sexual Exploitation

*Summary of a report commissioned by the Research,
Development and Statistics Directorate of the
Home Office for the Review of Sexual Offences*

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March 1999



Introduction

1. This paper reviews the research on offences of sexual exploitation. It primarily covers a cluster of offences relating to prostitution, including: soliciting; causing/encouraging prostitution; living on the earnings of/exercising control over prostitutes; kerb-crawling and persistent soliciting of women; keeping a brothel/letting premises be used as a brothel.
2. While the main focus is the on the exploitative nature of such offences, this aspect cannot be considered in isolation from the offences relating directly to the activity of prostitution.
3. Finally, because of their relevance to issues of sexual exploitation, the topics of sex tourism and trafficking of people are also considered.

Background

4. Under current law in England & Wales, prostitution is not illegal and has never been a criminal offence. However, activities which offend against ‘public order and decency’ such as soliciting, importuning, running a brothel, living off immoral earnings, pimping, procuring and kerb crawling are illegal.
5. There is a lack of coherence in parts of the law in this area. Dingwell (1997) argues that one of the major problems with current law is that it is made up of piecemeal legislation that seeks to criminalise a “variety of objectionable conduct”.
6. Furthermore, terms which are central to the interpretation of the law in this area lack clear statutory definitions. For example, the terms ‘brothel’ and ‘prostitute’ have common law but no statutory definitions (Jerrard, 1992).
7. One of the key considerations discussed in some of literature is the extent to which those working as prostitutes should be treated as offenders or as victims. In some cases, prostitutes themselves (particularly child/under-age prostitutes) are being exploited by those who pimp/control them or even their clients.
8. This issue is difficult to resolve and means that a dual approach is adopted in response to prostitution: so while enforcement action against those working as prostitutes is significant, there are a number of projects and multi-agency responses which work with women and young people involved in prostitution in order to respond to their health, welfare, safety and educational needs.



1. REVIEW OF THE STATISTICS ON THE OPERATION OF THE LAW

Statistical trends

9. Official statistics show a significant fall in the level of cautions and convictions for prostitution (soliciting/loitering) over the past decade: from 15,146 in 1989 to 9,088 in 1997.
10. The number of cautions and convictions for kerb crawling and the persistent soliciting of women for the purposes of prostitution shows that these offences have been enforced since their introduction in 1985 (although there were fewer cautions and convictions for these offences in 1997 – 1,014 – than there were in 1992 – 1,384). Yet in 1997 the total number of cautions and convictions for soliciting (by women) were still about ten times the number for kerb crawling (926) and more than a hundred times the number for persistent soliciting of women (88) in the same year.
11. The number of cautions and convictions (and their proportion of the total) for prostitution offences of girls aged under 18 is small and appears to be declining 762 in 1989, down to 412 in 1997.
12. Cautions and convictions for brothel keeping and living off immoral earnings peaked in 1992 (169 in total) but had declined by almost one-third by 1997 to 102.
13. The number of cautions and convictions for soliciting/importuning by men (s.32 Sexual Offences Act 1956) are relatively small and have fallen over the past decade, from 672 in 1987 to 136 in 1997.
14. There are no official statistics in relation to offences of trafficking for the purposes of prostitution.

Interpretation

15. The statistics suggest a change in law enforcement practices over time. Whether they point to a decline in the extent of prostitution is more debatable.
16. The reduction in enforcement action against 'street' prostitution chimes with other evidence suggesting that the organisation of prostitution may be changing, with more prostitutes working 'off-street'.
17. The police and courts appear to be taking action against the clients or customers of prostitutes (e.g. against kerb crawlers), although in absolute terms still most of the enforcement action is taken against prostitutes.
18. The police may be deploying less resources to policing male prostitutes with the result that fewer are being detected, although male prostitution is relatively more 'invisible' than female prostitution and thus harder to detect.
19. The small numbers of people under 18 cautioned and convicted for offences related to prostitution may reflect that such people are increasingly being seen and treated as victims themselves rather than as offenders.
20. The police may be tolerating prostitution in 'off street' venues such as massage parlours which are run by what May et al (1999) call "non-criminal, risk-averse managers".

2. FINDINGS FROM THE RESEARCH

Street Prostitution

Female Prostitution:

21. Street prostitution by females is regulated by section 1(1) of the Street Offences Act 1959. The section only covers females and does not distinguish between adults and children.
22. There is no statutory definition for what constitutes ‘prostitution’ and writers have commented on the difficulties encountered in establishing a single definition. The courts rely upon the common law definition from the case of *de Munck* (1918), which defined a prostitute as “a woman who offers her body commonly for lewdness for payment in return”.
23. Difficulties in defining the actions that fulfil the criteria for the term ‘prostitute’ are highlighted in the case of *R v McFarlane* (1974). In this case, a man charged with living off immoral earnings declared that his partner was not a common prostitute because she did not actually sell sex but was a ‘clipper’ – i.e. she took the money without intending to perform the service offered. He was convicted because she was found to be a common prostitute in that she offered her body for lewdness and reward.
24. Research suggests that under current law it is very difficult for prostitutes to work legally and safely, with violence against women and young persons involved in prostitution endemic (e.g. Barnard, 1993; Campbell et al, 1996; Day, 1994; Kinnell, 1993; McKeganey and Barnard, 1996; O’Neill, 1996). Research indicates that women and young people involved in prostitution are very loath to take crimes of rape and assault to the police, because of the illegal nature of their activities and the social stigma involved in ‘doing prostitution’. Instead many ‘take for granted’ violence against them and accept it as a part of ‘the job’ (Day, 1994; O’Neill and Barbaret, 1999). Moreover, intensive policing of street prostitution can contribute further to marginalisation and stigmatisation of this group of women and young people.
25. At the same time street prostitution can impact negatively upon residential communities and has given rise to ‘vigilantism’ in some urban areas (Johnston 1996, Hubbard 1999).

Male Prostitution:

26. The activities of male prostitution are regulated primarily by section 32 of the Sexual Offences Act 1956. Compared to female prostitution, male prostitution is relatively invisible. Male prostitution arguably challenges current orthodoxies of what constitutes prostitution: for example, there is no male equivalent for the term ‘common prostitute’.
27. The term ‘man’ used in s.32, SOA 1956 can include boys over 10. There are clear inequalities here for children aged 10-17. For example, a young man under 18 cannot legally have sexual intercourse with another man but can be charged with soliciting/importuning or any other offence. These issues need to be addressed through law reform in the context of the UN Convention on the Rights of the Child, the Children Act 1989, and the European Forum for Child Welfare.
28. There is a lack of available literature on boys and young men involved in prostitution. Existing studies (e.g Davies and Feldman, 1997; Aitchison and O’Brien 1997; Melrose et al 1999) and official statistics suggest that:
 - many male prostitutes may be under 18;
 - very few young men are prosecuted for soliciting/importuning;



- young men involved in prostitution are more likely to be charged with obstructing the highway;
- overlaps with other legislation means that there is no clear indication in the official statistics of how many boys are charged with offences relating to prostitution.

'Off Street' Prostitution

29. There is some evidence to suggest that prostitution could increasingly be moving 'off street'. Factors such as stricter policing of kerb crawlers, the rise of vigilantism, and new technology (e.g. mobile phones) making it easier to contact clients, all may be making it easier, safer, and financially more rewarding to work 'off street'.

30. Statutory offences relevant to 'off street' prostitution include:

more than one prostitute in a house or flat constitutes a brothel. Any premises will be classed as a brothel if used by more than one man or woman for prostitution in series or in tandem (SOA 1956 s. 33).

- it is an offence to keep, manage or assist in the management of a brothel.
- it appears that only women can be charged with exercising control over a prostitute (SOA 1956 s. 31).
- it is an offence to detain a woman against her will. There is no equivalent for detaining a man (over 10 years) against his will.
- it is an offence (Children and Young Persons Act 1933, sec 3) to allow a child between 4 and 15 to reside in or frequent a brothel.

31. Moving 'off street' makes prostitutes, as well as those who control and use their services, less visible. In the light of this there have been calls for the better regulation of 'off street' prostitution (e.g. see Royal College of Nursing, 1991). In some places in the UK initiatives have already been introduced. For example, in Edinburgh entertainment licenses are issued to saunas under the condition that they are regulated by the police and city council (see Taylor-Browne 1999 for an account of the work of the Prostitution Liaison Officer).

32. There is currently a limited amount of research on 'off street' prostitution. This needs to be remedied to gain a better understanding of the issues involved and to map the contours of 'off street' prostitution.

33. Benson and Matthews (1995) reported that half of the twenty-four vice squads they surveyed actively policed 'off street' prostitution in the forms of massage parlours and saunas.

34. May et al (1999) found that many 'off street' establishments are managed in a benign way (often by women who had no significant involvement in other types of crime) and that the risk of violence against the women who worked there seemed relatively low. A pragmatic and tolerant police approach to 'off street' establishments may be the best way of preventing more criminally involved operators colonising the business.

35. Brain et al (1998) identified Nottinghamshire Police's monitoring of saunas and massage parlours as an example of good practice in preventing young women becoming involved in prostitution.

Child/under-age prostitution

36. Children and young people may be dealt with in law for loitering and soliciting/importuning in the same way as their adult counterparts. There are clear problems in treating children involved in prostitution in the same way as adults, and tensions between the substantive law in this area, the Children Act 1989, and the UN Convention on the Rights of the Child.

37. These problems are compounded by the inconsistent coverage of statutory offences against children under 16. For example, while section 2 of the SOA 1956 provides for the offence of buggery of a child under 16, which can attract a life sentence, there is no provision for children aged between 14 and 16 in the Indecency with Children Act 1960. Furthermore, a girl over 13 but under 16 can be charged with soliciting even though she can't give lawful consent to sexual intercourse.

38. Many researchers and writers believe that the law has failed to respond effectively against the men and women who use, abuse and control children involved in prostitution. For example, Edwards (1998) suggests that men who engage in sexual activity with children involved in prostitution are rarely charged with anything more serious than kerb crawling.

39. There is a relative absence of case law on the following statutory measures in relation to children/young adults:

- Sexual Offences Act 1956 s. 28 - causing or encouraging prostitution
- Sexual Offences Act 1956 s. 23 - procuring a girl under the age of 21 to have unlawful sexual intercourse in any part of the world with a third person
- Sex Offenders (Conspiracy & Incitement) Act 1996 - this makes it an offence to plan sexual offences against children outside the UK.
- Sex Offenders Act 1997, part II, s. 7 – this makes it an offence to commit sexual offences against children outside the UK

Kerb crawling

40. Kerb crawling and persistent solicitation of women are the two offences with which customers of prostitutes are likely to be charged. The offences are defined as:

- it is an offence under section 1 of the Sexual Offences Act 1985 to kerb crawl with persistence from a motor vehicle or in a manner likely to cause annoyance to the woman or nuisance to other people in the neighbourhood.
- it is an offence under section 2 of the same Act for men to persistently solicit in a street or public place. Evidence of persistence has been taken to mean more than one act of soliciting the same person or one invitation to different people.

41. It seems that the courts are now prepared to apply section 32 of Sexual Offences Act 1956 to men who solicit women (although the offence is still mostly used for homosexual soliciting). Being convicted under section 32 for soliciting/importuning could attract a maximum penalty of six months imprisonment, whereas kerb crawling carries a maximum £1000 fine. However, statistics show an increase in the use of the 1985 kerb crawling legislation and a declining use made of section 32.



42. Research (Matthews, 1993) has suggested that the requirements of the SOA 1985 – in particular, the continued surveillance necessary to prove ‘persistence’ on the part of the kerb crawler – can make convictions for kerb crawling difficult to achieve. Benson and Matthews (1995) found that proving ‘nuisance’ could also pose evidential problems.

43. Benson and Matthews reported in their survey that although the officers interviewed identified clients as causing more nuisance than the prostitutes, the clients were dealt with more leniently and more informally than the prostitutes.

44. Benson and Matthews (1995) and Edwards (1998) recommend making kerb-crawling an arrestable offence. However, the English Collective of Prostitutes and other researchers and commentators have opposed this recommendation for the following reasons: it might further endanger the safety of women working on street; that prostitution is not a casual activity that is easy to deter; that there is a need to find more sustainable ways of ‘managing’ prostitution which do not further criminalise those involved;

Pimping/Procuring:

45. Pimping comprises a number of different offences relating principally to procuring or controlling prostitutes, and living off the earnings of prostitution (e.g. sections 30 and 31 of the Sexual Offences Act 1956). A pimp is generally defined as someone who coerces another person into prostitution. The central difficulty facing the law in this area has been to try and catch and prosecute those who exploit people working as prostitutes without also criminalising non-exploitative partners, husbands and even children.

46. The official statistics suggest that law enforcement is directed far more at the suppliers and purchasers of sexual services than those who pimp, control, or manage these services, despite the latter being arguably the most exploitative group. May et al (1999) state that proceedings against pimps in England and Wales have always been rare.

47. There is little available research on pimping and procuring. There is a real need for more research to better understand the complex dynamics and patterns of pimping (O’Connell-Davidson 1998, Phoenix 1999).

48. While one study indicated that officers view the current legislation on pimping as sufficient and do not favour substantial revision (May, 1999), another reported that half the squads they studied had no successful prosecutions for pimps and only two squads reported that all prosecutions were successful (Benson and Matthews, 1995). The main problems officers identified with the current legislation were as follows:

- evidential problems in proving ‘living off immoral earnings’
- lack of resources and manpower needed to conduct lengthy operations
- sanctions imposed by the court are seen as inadequate and no deterrent
- witnesses are insufficiently protected by the criminal justice system and are fearful of short sentences being passed on offenders
- inconsistent approach to prosecuting pimping by the CPS.

49. At least some of the pimps known to the police will be under 18. In the context of multi-agency approaches, ACPO guidelines and the Children Act 1989, it is not clear whether these young people will be diverted from their activities or be prosecuted. What is clear is that a sensitive understanding of the complexities involved is required.

50. May et al (1999) suggest that pimps often display a wide repertoire of offending and have characteristics commonly associated with extensive criminal involvement – such as low educational achievement and high levels of unemployment.

51. There is other legislation which can possibly be used against pimps:

- offences of abduction, kidnapping, false imprisonment, and detention of a woman against her will;
- offences against the person (e.g. common assault; assault occasioning ABH and GBH; rape)
- causing or encouraging prostitution of a woman in any part of the world who is a “defective” (section 29, Sexual Offences Act 1956)
- harassment (Protection from Harassment Act 1997 s. 4 (1))

Sex Tourism

52. The term ‘sex tourism’ is generally taken to refer to people travelling abroad (usually to countries in the developing world) with the express purpose of engaging in sexual activity there, often with children.

53. Political pressure, both domestically and internationally, has been mounting in recent years to stop sex tourism. The government has introduced laws making it an offence to conspire to commit, or incite someone else to commit certain sexual acts against children abroad (Sex Offenders [Conspiracy & Incitement] Act 1996). However, these can be difficult to prove for evidential reasons. Under the Sex Offenders Act 1997, part II, section 7 it is now an offence to commit sexual offences against children outside the UK.

54. Cottrell (1996) suggests that an alternative would be to help countries where the offences occur prosecute offenders themselves and for us to extradite offenders back to those countries.

Trafficking

55. Section 22 of the Sexual Offences Act 1956 makes it an offence for a person to procure a woman to become a prostitute. This includes procuring a woman to become a prostitute in any part of the world or procuring a woman to leave the UK to work in a brothel elsewhere. In addition, legislation against pimping and procuring can be used against those who procure, force and cause prostitution in this country.

56. There is a need for more action to tackle illicit trafficking for the purposes of prostitution both in this country and at a wider international level – it being by definition an international problem.

57. As well as action against the traffickers, measures are also needed to ensure persons who have been trafficked have proper access to justice and that they may be permitted to stay in the country during any legal proceedings against traffickers.

58. Morrison (1998) suggests that as part of measures of protect those who are trafficked, the government ‘opt in’ to all asylum-related initiatives arising from ratification of the Treaty of Amsterdam to develop an integrated approach to refugee protection and settlement.



59. In some instances, 'clean' entrepreneurs are involved in joint ventures with members of 'unofficial economies' (for example, the farming sector in need of unregistered seasonal workers) and organised crime (Ruggiero, 1997). Efforts by the EU alone to tackle these issues may be thwarted as they incorporate countries and economic interests beyond EU control.

60. There is very little British research literature on trafficking. Such literature as there is relates primarily to the trafficking into the UK of domestic workers (Anderson 1993) and refugees (Johnson, 1998), rather than the trafficking of women and children for the purposes of prostitution. However, some recent newspaper reports have focused on the trafficking of women into this country by organised criminal gangs for the purposes of sex work.

61. While the Asylum and Immigration Act 1996 s. 8 makes it an offence for anyone to employ someone over 16 and over who does not have the permission to be in or work in the UK, the issue of what constitutes an 'employer' is important here.

62. As a wider issue, there is potential conflict in law between the Asylum and Immigration Act 1996, the Asylum and Immigration Act 1999, and European and international instruments that aim for greater understanding of the position of those who are involved in prostitution (see below).

Trafficking and the wider European and International context:

63. The aim of legislation at the European and International level has been to protect women and children and punish those who coerce and traffic human cargo. To combat the cross-border problem of trafficking, some researchers suggest the need for a compatibility of laws on sexual exploitation across Europe.

64. European and international instruments (e.g. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949, Resolution 38/107 On The Prevention Of Prostitution 1983) provide for a clear and humane understanding of the experiences of those trafficked and those who are involved in prostitution for reasons underpinned by economic need and lack of alternatives.

65. The Council of Europe Final Report of Special Group EG-S-VL (1997) documents measures introduced in other European countries such as Germany and the Czech and Slovak republics to combat trafficking and sex tourism.

66. The Council of Europe's Recommendation R (91) 11 on sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults (adopted by the Committee of Ministers in 1991) recommended more police attention to offences of sexual exploitation, as well as programmes to raise public awareness of the problem generally.

3. CONCLUSION AND RECOMMENDATIONS EMERGING FROM THE LITERATURE

67. Fuller use should be made of the existing legislation with the aim of preventing young people in particular becoming involved in prostitution, and ensuring the protection of all those already involved in prostitution.

68. The law in this area is very gender-defined. This has produced differences which are potentially discriminatory: for example, women soliciting for the purpose of prostitution constitutes ‘immoral purpose’ but men soliciting the favours of a prostitute is unlikely to be ruled an ‘immoral purpose’. The emphasis on gender specificity can also cause other problems – e.g. the difficulties in applying the law in respect of trans-sexual or trans-gender persons engaged in prostitution or pimping. For these reasons the legal distinctions between genders should be abolished and the law should refer instead to *persons* who pimp/solicit/procure/control etc.

69. The law also generally fails to adequately differentiate between adults and children involved in prostitution (for example, no distinction is drawn in section 1(1) of the Street Offences Act 1959).

70. The piecemeal nature of the law means that it lacks a coherent structure. There are tensions with other areas of the law. For example, there is the possibility of a maximum 2-year prison sentence for breaching an anti-social behaviour order imposed under the Crime and Disorder Act 1998 for persistent prostitution, despite the fact that soliciting per se is not an imprisonable offence.

71. Overall there is a need to update the language of the law which is often archaic and out-dated – for example, the use of the word ‘defective’.

72. There is a need for greater management of ‘off street’ prostitution. Existing research, however, does not recommend a ‘zero tolerance’-style policing approach to ‘off street’ prostitution.

73. A shift away from prosecuting prostitutes to a focus upon prosecuting those who control, force and actively pimp should be encouraged.

74. Connected to this, greater consideration should perhaps be given to appropriate legal responses to both ‘forced’ and ‘voluntary’ prostitution. In the Netherlands a pragmatic approach to prostitution operates and voluntary prostitution is regulated and “integrated into the infrastructure of city life” (Visser, 1997). Bindman and Doezema (1997) suggest a redefinition of voluntary prostitution is required incorporating international labour law.

75. Generally there is a need to focus upon the safety of those working as prostitutes. Greater protection to children involved in prostitution could be extended by addressing the following:

- the lack of differentiation between adults and children in some of the relevant legislation (e.g. Street Offences Act 1959).
- extending the Indecency with Children Act 1960 to include 14 and 15 year olds.
- extending section 28 of SOA 1956 [cause or encourage the prostitution of girl under 16] to cover all adults and not just those who have responsibility for the child.
- amending SOA 1959 to exclude young women under 16 from its provisions.

76. A domestic equivalent to the Sex Offences (Conspiracy and Incitement) Act 1996 is recommended.



77. There is a need introduce new legislation or strengthen existing legislation with regard to trafficking for the purposes of sexual exploitation. This should include extending legal penalties for those who traffick others but should not criminalise people seeking refuge and asylum in the UK. Migrant workers, refugees and asylum seekers should not be conflated with persons trafficked for the purposes of prostitution. International co-operation with respect to combating trafficking should be improved.

78. Finally, more research should be undertaken on the following topics:

- the specific experience of boys and young men involved in prostitution
- pimping and patterns of pimping
- kerb crawling
- trafficking of women and children into the UK for the purposes of sexual exploitation.
- 'off street' prostitution

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Appendix D4

Literature review of research into homosexual offences

*A report commissioned by the Research,
Development and Statistics Directorate of the
Home Office for the Review of Sexual Offences*

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March 1999





Contents

| Chapter | Page |
|---|-------------|
| Summary | 198 |
| 1. Introduction | 200 |
| 2. Rape (of a man) | 201 |
| 3. Buggery | 205 |
| 4. Assault with intent to commit buggery | 209 |
| 5. Indecent assault on a man | 211 |
| Gross indecency | 215 |
| Soliciting | 218 |
| Conclusion | 222 |
| Bibliography | 225 |
| Table of cases | 228 |



SUMMARY

Introduction

This paper critically reviews the research into the law on homosexual offences. It firstly describes the current law on an offence by offence basis, including references to penalties and sentencing. For each offence discussed there is an evaluation section, which considers the adequacy of the law, difficulties in application, problems of enforceability, and coherence and clarity, as well as issues of fairness and discrimination.

Individual offences

Rape of a man

- This section examines the change to the law of rape enacted under the Criminal Justice and Public Order Act 1994 which incorporated non-consensual anal intercourse into the legal definition of rape.
- While this change is to be welcomed, possible problems with the application of the law remain. For example, there is some evidence to suggest that male rape victims may be reluctant to report the offence either out of fear among homosexual men of encountering any anti-homosexual bias, or among heterosexual men a fear of being perceived as gay.
- It has been argued that the definition of rape of both males and females should include forced oral penetration.

Buggery

- With the inclusion of non-consensual anal intercourse in the definition of rape, there are strong grounds for arguing that buggery is now a purely consensual act. Its continued criminalisation thus seems to depend on anal intercourse being seen as an inherently more harmful activity than vaginal intercourse. It is not clear on what evidence such a judgement could be made.
- The privacy element of the offence appears to discriminate against homosexual sex, as there is no such restriction upon acts involving vaginal intercourse. This section also discusses other inconsistencies in the law.
- The provisions relating to the requirement of privacy are criticised with particular reference to the ways in which the law discriminates between heterosexual and homosexual acts. A comparison is drawn with the common law offence of outraging public decency.

Assault with intent to commit buggery

- The redefinition of the offence of rape appears to make buggery a solely consensual offence. In turn, this would mean that the offence of assault with intent to commit buggery an impossible one, as assault by definition requires lack of consent but consent is an ingredient of buggery.
- The section discusses possible alternative charges. As the offence of assault with intent to commit rape no longer appears to exist, it seems that there is a gap in the law that requires filling.

Indecent assault on a man

- This section focuses on the issue of consent, particularly in relation to sado-masochist behaviour. It examines whether, in the light of the House of Lords decision in *Brown*, there are any grounds for concluding that the law on consent in this context discriminates unfairly against homosexual men. While this point is perhaps moot, it does seem that the law in this area is uncertain which in itself is unsatisfactory.

Gross indecency and procuring an act of gross indecency.

- Gross indecency is an offence that can only be committed by men and so by definition is a homosexual offence. The nearest heterosexual equivalent is 'outraging public decency'. However, the stricter requirements of the latter offence (e.g. the necessity of a third party being offended or outraged) mean that, in effect, acts carried out between two men could constitute an offence which if carried out between a man and a woman would not.
- The all-embracing nature of the offences is discussed together with the inadequacy of the defences.

Soliciting

- The legislative history of the offence is examined together with its subsequent application to homosexual and heterosexual soliciting.
- The courts appear to have adopted a presumption that homosexual behaviour per se constitutes an 'immoral purpose', while in the case of heterosexual soliciting, behaviour would only be deemed immoral if it was offensive or disturbing to the victim. This appears to be discriminatory.
- Overall, the wide interpretation of the offence has made an all-embracing means of controlling a whole range of homosexual behaviour.

Conclusion

- The report concludes that the current law discriminates unfairly against homosexual men by criminalising many consensual activities that do not attract a criminal sanction when carried out between men and woman. The conclusion is also drawn that the law lacks the clarity and consistency that is an essential feature of a fair and just criminal code. A comparison is drawn with the law in other European countries and the possible impact of the Human Rights Act 1998 is discussed. Proposals for reform of the law are included.



1. INTRODUCTION

Purpose and methodology

The purpose of this paper is to provide a critical review of research into the law on homosexual offences, with the aim of informing the work of the Home Office's Sex Offences Review.

The methodology adopted comprises three perspectives: descriptive, evaluative and normative. The descriptive sections outline the features of the current law and include references to penalties and sentencing. The evaluative sections seek to draw out common themes and reveal discrepancies and problems of clarity, application and enforcement with the current law. Inconsistencies within the offences are examined and the reasoning in cases analysed and evaluated. Variations in policing and sentencing practices are also discussed. The normative perspective is included within the sections on evaluation and considers issues of fairness and discrimination, and compliance with the European Convention on Human Rights. Consideration is given to the impact of the law on the groups affected by it and the extent to which the law is acceptable to the general public. The possible impact of the Human Rights Act on individual offences is discussed.

Sources of the review

The review focuses primarily on research literature published over the past ten years so as to reflect current social and moral trends. Where earlier research is relevant to the analysis this has been included.

Sources include:

- judicial decisions
- parliamentary papers
- Reports of the Law Commission and other bodies
- textbooks, legal and other journals, newspapers
- publications and contributions from relevant bodies and correspondence and conversations with individuals

The current legal framework is discussed by reference to relevant cases and statutes. The primary statutory source is the Sexual Offences Act 1956 as amended by the Criminal Justice and Public Order Act 1994. Other relevant sources which are included are the Sexual Offences Act 1967, the Sexual Offences (Amendment) Act 1976, the Sex Offenders Act 1997 and the Human Rights Act 1998. Some reference is made to legislation in other common law jurisdictions.

The penalties attached to the offences have been included in outline together with a short account of conviction and sentencing rates.

2. RAPE (OF A MAN)

The nature of the offence

Section 142 of the Criminal Justice and Public Order Act 1994 redefined the offence of rape by enacting a new section 1(2) of the Sexual Offences Act 1956. In doing so it brought male rape within the scope of the offence:

- 1(2) A man commits rape if:
- (a) he has sexual intercourse with a person (either vaginal or anal) who at the time of the intercourse does not consent to it; and
 - (b) at the time he knows that the person does not consent to the intercourse or is reckless as to whether the person consents to it.¹

Prior to the 1994 Act the offence of rape was one which could only be committed against a woman. The effect of the Act is to remove the inconsistencies which had existed between the penalties for non-consensual buggery of a male and rape of a female.² It is now clear that non-consensual anal intercourse must be charged as rape and, unless rape is alleged and proved, a sentence cannot be imposed on conviction for buggery which reflects a conclusion that the victim was not consenting.³

Penalties

Prior to the 1994 Act the maximum sentence for the rape or buggery of a female was life imprisonment, even, with buggery, if the woman was a consenting adult. For buggery of a male over the age of 18, whether consenting or non-consensual, the maximum sentence was 10 years imprisonment (life imprisonment if the victim was under 16). With the redefinition of rape, male rape now attracts a maximum sentence of life imprisonment. Also during the trial, male victims now receive the same protection as female victims in relation to cross-examination about their sexual history.⁴

The guidelines for sentencing in female rape cases were laid down in *Billam*.⁵ There is some evidence in the pre-1994 cases that judges were applying these guidelines in cases of non-consensual adult male buggery but with an appropriate reduction to reflect the perception of it, through the lower maximum penalty, as a lesser offence.⁶ Similar principles appear to have been applied when the victim of the buggery was an adult woman.⁷

¹ Under section 44 of the 1956 Act, sexual intercourse is deemed to be complete on proof of penetration. It is not necessary to prove the completion of the intercourse by the emission of seed.

² *Infra* p2.

³ *R v Davies* [1998] Crim. LR 75.

⁴ Section 2 of the Sexual Offences (Amendment) Act 1976.

⁵ [1986] AC 182. Factors to be taken into account include the level of violence used, the use of a weapon, whether the rape is repeated, subjecting the victim to other indignities or perversions, the age of the victim, the criminal record of the offender and whether the offender manifested perverted or psychopathic tendencies and was likely to remain a danger to women for an indefinite period.

⁶ *Stanford* [1990] Crim. LR; *Jenkins* [1991] Crim. LR 460.

⁷ *Mendez* (1992) 13 Cr. App. R.94 (five years imprisonment, the same sentence as in *Stanford*).



The first case to consider the issue of sentencing for male rape under the new law was *R v Richards*.⁸ Lowry J imposed a sentence of life imprisonment, a decision which was upheld by the Court of Appeal, although the recommended minimum period of detention was reduced from ten to six years, on the grounds that the attempted rape was not prolonged for any considerable period.⁹

It was argued by some that the imposition of a life sentence for attempted rape was perhaps an indication that the courts were prepared to treat the attempted rape of a man more seriously than the completed rape of a woman.¹⁰ However, in a carefully structured response, Rumney and Morgan-Taylor¹¹ argue that the sentence was in accordance with the *Billam* guidelines and that the approach of Lowry J 'gave primacy to the facts of the case rather than the sex of the victim.'

Evaluation

The reform of the law on rape was generally welcomed and has been described in one article as 'a recognition of male victimisation' and a reflection of 'the modern understanding of sexual violence, its nature and consequences.'¹² Nevertheless it has been argued that the reform does not go far enough.¹³ In particular, the definition of rape has been criticised as being too narrow in that, first, it remains a gender-delineated crime which can only be committed by a male¹⁴ and secondly, that it excludes 'oral rape' and penetration by objects.

The first issue is not relevant to a discussion on homosexual offences so is outside the scope of this paper. However, consideration should be given to the second, as, although it also applies to female victims, it is relevant in the context of sexual attacks on male victims. Attacks involving oral rape and penetration by objects were described by the Criminal Law Revision Committee as 'grave' and 'severely degrading experiences'.¹⁵ However, at present, they can be charged only as indecent assault. Other common law jurisdictions have adopted a broader definition of rape.¹⁶ The drafting of the original clause 93 of the Criminal Justice and Public Order Bill would have defined sexual intercourse for the purpose of rape as 'vaginal or anal penetration to any degree by any part of the assailant's body, or any object, and shall include non-consensual oral sex.' This definition was rejected by the government.

⁸ Unreported, 9 June 1995.

⁹ [1996] 2 Cr. App. R (S) 167.

¹⁰ 'Do the courts view rape more seriously when it's a man who is the victim?' *The Guardian*, 12 June 1995.

¹¹ Rumney and Morgan Taylor, 'Sentencing in cases of male rape' (1988) 6 JCL 263. See also by the same authors 'Sentencing for male rape' (1996) 146 NLJ 262 and a critique of their arguments in Codd, 'The treatment of complaints' (1996) 146 NLJ 447; for the response of the authors see their letter (1996) 146 NLJ 872.

¹² Morgan-Taylor and Rumney, 'A male perspective on rape' (1994) 144 NLJ 1490. For arguments against the definition of rape as a gender neutral offence see Naffine, 'Possession: Erotic Love in the Law of Rape' (1994) 57 MLR 10; Temkin, 'Towards a Modern Law of Rape' (1982) 45 MLR 399;

¹³ Rumney and Morgan-Taylor, 'Recognising the Male Victim: Gender Neutrality and the Law of Rape' (1997) 26 Anglo Am L Rev 198, 330. Padfield, 'A tiger by the tail: sex offences in the CJPOA 1994' *Archbold News*, Issue 2, 1 March 1995.

¹⁴ For the statutory definition of sexual intercourse see s44 of the Sex Offences Act 1956.

¹⁵ Criminal Law Revision Committee, 15th Report, *Sexual Offences* (1984) Cmnd 9213, para 4.5.

¹⁶ See, for example, some American states, e.g. Washington State. Also Victoria, Australia, s37 Crimes Act 1958 (as amended by s3 Crimes (Sexual Offences) Act 1991. In Canada, the Criminal Amendment Act SC 1980-81-82 contains a broadly drawn offence of sexual assault.

There is little research on the extent of these forms of assault in the United Kingdom.¹⁷ Project SIGMA, which examined the incidents of non-consensual sexual activity among 219 active homosexual men in England and Wales, found that 23 (10.6%) had been subjected to oral sex alone.¹⁸

Rumney and Morgan-Taylor claim to have observed a ‘growing judicial recognition of the similarities between some acts of indecent assault and rape.’¹⁹ They provide, as examples, the cases of *Wilson*²⁰ and *Hiscock*²¹ in which an analogy was drawn between forced oral sex and rape. A different analogy has been drawn by Hicks and Branston in their discussion of the case of *Mathews*²² which examined the question of whether the artificial vagina of a transsexual could constitute a vagina for the purpose of rape. Hooper J concluded that it could. Hicks and Branston argue that if an artificial vagina can constitute an ‘intimate orifice’ for the purpose of rape, then the natural orifice, the mouth, should also be capable of being the object of rape.

Rape by penile penetration has traditionally been seen as a distinct form of criminal behaviour²³ but this approach may no longer accurately reflect the public view and by excluding these other forms of attack from the definition of rape, it can be argued that the present law emphasises the rights of some female rape victims to the exclusion of the rights of other victims of sexual assault.²⁴

Putting aside these criticisms, the reform of the law on rape has removed an important element of discrimination in the law. However, many concerns remain over how effective the changes will be in practice. Research has shown that the physical and psychological results of a sexual attack on men parallel those experienced by women.²⁵ The factors which have been shown in the past to discourage women from reporting attacks are also relevant to male victims. In addition the latter may feel that they will be confronted with anti-homosexual bias by the public and the police and during the course of any subsequent trial.²⁶ This is particularly so when the victim is heterosexual, where the fear of being perceived as gay may be a very strong deterrent. Other dissuading factors can include the shame, as a male, of not having been able to defend yourself against the attack and at the physical reaction to the assault, which can often include ejaculation by the victim.²⁷

¹⁷ The subject has been more widely researched in the United States. See Rumney and Morgan-Taylor, supra n13, pp 348-353 for an analysis of the legal responses to male rape in the USA.

¹⁸ Hickson et al, ‘Gay Men as Victims of Nonconsensual Sex’ *Archives of Sexual Behaviour*, Vol 23, No 3, 1994, 281.

¹⁹ Rumney and Morgan-Taylor, supra n13, pp.344-345.

²⁰ (1993) 14 Cr. App. R (S) 627.

²¹ (1992) 13 Cr. App. R (S) 24.

²² Hicks and Branston, ‘Transsexual Rape-a Loophole Closed?’ [1991] Crim. LR 565.

²³ Criminal Law Revision Committee, 15th Report, Sexual Offences (1984) Cmnd 9213, para 2.47.

²⁴ Rumney and Morgan-Taylor, supra n13, p.211.

²⁵ Mezey and King, ‘The effects of sexual assault on men: a survey of 22 victims’ (1989) *Psych Med* 205; McMullen, *Male rape: breaking the silence on the last taboo*. (GMP: London 1990). Ch. 5.

²⁶ Of the 98 men who have contacted the support agency, Survivors, only 56 had reported the attack to the police. (*The Inside Job*, May 1998).

²⁷ Mezey and King, supra n25 at p.208 and Rumney and Morgan-Taylor supra n102at p.1493.



The reporting of attacks by female rape victims has dramatically increased since the 1980's and there has been a significant improvement in the police handling of these cases.²⁸ There is some evidence that the lessons which have been learnt through the more sympathetic treatment of female victims of rape are being applied to male victims.²⁹

Home Office statistics show that the number of recorded offences of male rape have shown a steady increase, with 150 cases being reported in 1995 increasing to 342 in 1997³⁰. However, it is not possible to draw any conclusions from this increase as many of the cases would previously have been reported as buggery.³¹ There appears to be no published research to date which offers a comprehensive account of the treatment of the victims of male rape and the incidence of reporting. Dr Michael King of the Institute of Psychiatry has carried out the first national survey of victims of male sex abuse. The results of the survey are due to be published in the April edition of the *British Medical Journal*. Another project is currently being undertaken by Phillip Rumney of Sheffield Hallam University. The results of this research will not be available until early 2000 but at this stage, they indicate the need for greater understanding by the police and judiciary about the distinct nature of male rape and its effect on the victims.

Clearly, the aims of the reforms to the law of rape under the 1994 Act may be undermined if these issues are not addressed. The above research projects should begin to provide valuable data on ways of improving the law's effectiveness.

²⁸ The most recent study on this is Temkin, 'Reporting Rape in London: a Qualitative Study', *The Howard Journal*, Vol 38, No 1, Feb 1999, p.17.

²⁹ For example, the Male Abuse Steering Group set up by the Metropolitan Police and the Greater Manchester Lesbian and Gay Policing Initiative.

³⁰ In contrast, the police recorded 6337 allegations of rape against females in 1997, an increase from 4986 in 1995.

³¹ Cases of reported buggery declined in the same period from 1258 in 1994, 818 in 1995 and 645 in 1997. The figures do not distinguish between male and female buggery.

3. BUGGERY

The nature of the offence

Buggery

There is no statutory definition of buggery. Under common law it has been defined as intercourse *per anum* by a man with a man or a woman and intercourse *per anum* or *per vaginam* by a man or woman with an animal.³²

Under section 12(1) of the 1956 Act it is an offence for a person to commit buggery with another person or an animal otherwise than in the circumstances described in s12(1A).

Section 12(1A) provides:

The circumstances referred to in subsection (1) are that the act of buggery takes place in private and both parties have attained the age of eighteen.³³

In relation to homosexual acts of buggery, the requirement of privacy is further defined under section 12(1B) of the 1956 Act (as amended):

An act of buggery by one man with another shall not be treated as taking place in private if it takes place:

- (a) when more than two persons take part or are present; or
- (b) in a lavatory to which the public have or are permitted to have access, whether on payment or otherwise.

The requirement of privacy

The Court of Appeal in *Reakes*³⁴ confirmed that the test for determining the issue of privacy is a purely an objective one; it is a question of fact for the jury taking into account ‘all the surrounding circumstances, the time of night, the nature of the place including such matters as lighting and ... the likelihood of a third person coming upon the scene.’ It is not necessary for another person to have witnessed the act providing there is some possibility that it will be witnessed. In *Ghik*³⁵, an act of gross indecency committed in an underground car park at 00.35 hours was not committed in public as there was no evidence of the likelihood of anyone coming upon the scene nor even that the car park was open at the material time. The fact that the location was normally a public place was not conclusive of the act having been done in public.

³² 1 Hale 669; 1 Hawk c4; 1 East PC 480; 1 Russ. Cr. 735; *Wiseman* (1718) Fort 91; *Bourne* (1952) 36 Cr. App. R.125.

³³ S143 of the 1994 Act amended s12 of the 1956 Act by decriminalising heterosexual acts of buggery involving consenting adults. The age of consent for homosexual buggery was also lowered from 21 to 18.

³⁴ [1974] Crim. LR 615.

³⁵ [1984] Crim. LR 110.



Parties to the offence

Both participants in the act commit the offence as principal. A woman, therefore, can be charged with and convicted of, buggery. This is because, whilst the statute refers only to 'buggery', the common law definition includes intercourse by a woman with an animal.³⁶ With the removal of the presumption of *doli incapax* under section 1(1) the Sexual Offences Act 1993, it is now possible, in theory, for a boy, aged between 10 and 14 years, who had allowed himself to be penetrated to be charged as principal to the offence.

Penalties

The offence is triable on indictment only. The maximum penalties under section 12(1) of the 1956 Act (as amended) are:

- with a person under 16 or an animal: life imprisonment
- by a person over 21 with a person under 18: five years
- by a person under 21 with a person aged 16 or 17 or if both parties are over 18 but the act is not in private: two years.

Evaluation

The Court of Appeal in *Bourne*³⁷ took the view that the offence does not depend upon consent; it depends on the act. However, with the inclusion of anal intercourse within the definition of rape and the decision in *Davies*,³⁸ there are very strong grounds for arguing that the act of buggery is now a purely consensual one.³⁹ It is suggested that the word 'buggery' 'should have no part to play in the modern law of sexual offences'.⁴⁰ Conversely, the Criminal Law Revision Committee concluded that, although the word has a 'condemnatory flavour' its usage was nevertheless appropriate for the offence.⁴¹ The Committee also felt that, because of the risk of physical and psychological damage caused by anal intercourse, it should remain a separate offence.⁴² It is not clear on what evidence the Committee based its conclusion about the particular damage caused by anal intercourse compared, for example, to the risks associated with pregnancy arising from vaginal intercourse. As anal intercourse has now been equated with vaginal intercourse by being included in the definition of rape, in situations when the participants have consented there seems to be little reason for treating the former as necessarily more harmful than the latter.

³⁶ See Rook and Ward, *Rook and Word on Sex Offences* (Sweet & Maxwell: London, 1997).

³⁷ (1952) 36 Cr App R 125.

³⁸ *Supra* p.1 n3.

³⁹ Additional support for this argument can be found in the wording of s1(12A) which makes no reference to consent unlike the wording in the earlier s1(1) of the 1956 Act. See *infra* p.12.

⁴⁰ Padfield, *supra* p.3, n13.

⁴¹ *Supra* p4, n15, para 6.9.

⁴² Para 6.8.

Much of the criticism of the law on buggery has focused on the age of consent and the requirement of privacy under section 12(1B) of the 1956 Act. The former issue was ruled on by the European Commission on Human Rights⁴³ and is currently being addressed under the Sexual Offences (Amendment) Bill which proposes to reduce the age of homosexual consent to 16. There are also strong arguments in favour of dispensing with the privacy requirement.

There are two major problems with the requirement of privacy. The first relates to the drafting of the various relevant sections, the second to issues of discrimination. With regards to the first, section 12(1A) clearly relates to acts of buggery between males and females and males and males. However, there is an overlap with this section and section 1(1) of the Sex Offences Act 1967 which provides:

‘A homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of 18 years.’⁴⁴

Section 1(1) includes a reference to consent but there is no reference to consent in section 12(1A). This contradiction requires clarification. In addition, it is unclear under section 1(12A), which refers to ‘both parties’, whether anal intercourse involving a man and a woman will be ‘in private’ if more than two people are present.

One thing is clear, however, is that there is no two party restriction on acts involving vaginal intercourse. Group heterosexual sex between consenting adults is not an offence *per se*. The discriminatory nature of the privacy requirement was recognised by the Criminal Law Revision Committee agree with the view that the section was an excessive interference with privacy.⁴⁵

‘It places a homosexual couple, if another person is present, at risk of prosecution for conduct which would usually be regarded as taking place in private ...’

It is possible that this law is contrary to the right to privacy under Article 8 of the European Convention on Human Rights and one would expect this to be tested in the national courts once the relevant provisions of the Human Rights Act 1998 are implemented.

Section 12(1B)(b), the clause relating to public lavatories,⁴⁶ also appears discriminatory in that an act of vaginal or anal intercourse involving a man and a woman is not an offence in itself simply because it takes place in a public lavatory. Such an act would be charged under the common law offence of outraging public decency and no offence would be committed unless at least two people either witnessed the act or were able to do so.⁴⁷

⁴³ *Sutherland v UK* [1998] EHRLR 117 finding that the higher age of consent was a breach of Article 8.

⁴⁴ A homosexual act is defined under s.1(7) of the 1967 act as buggery or gross indecency or being party to the commission of such an act.

⁴⁵ Criminal Law Revision Committee, *Working Paper on Sexual Offences*, (HO, 1980). Para 134.

⁴⁶ For one explanation of the reason why some gay men frequent public lavatories see Crane, *Gays and the Law* (Pluto Press: London, 1982) p.34. Phillip Fairweather of the Greater Manchester Gay and Lesbian Policing Initiative is one of the many who argue that the extent of the practice is exaggerated.

⁴⁷ (*May* (1990) 91 Cr. App. R.157). This view was more recently confirmed in *R v W* (1995) JP 509.



There is clearly a need for the law to protect members of the public from being unwilling witnesses to offensive behaviour but the privacy requirements under section 12(1B) go beyond this. The law on indecent exposure and outraging public decency should be sufficient to protect the public from the offensive behaviour of both homosexuals and heterosexuals. At present a couple over the age of 18 having consensual gay sex, other than in private (under the strict definition of that word), are subject to a maximum penalty of two years imprisonment even though no other person may have been offended or 'outraged' by the activity. Heterosexual sex in public which offends public decency is often subject only to a small fine.⁴⁸

In addition to the above criticisms relating to the requirement of privacy, there are other inconsistencies in the law on buggery which need to be addressed. These are:⁴⁹

- the anomaly of a woman being capable in law of committing the offence of buggery as principal.
- a higher age of consent for anal intercourse involving a female (18) than for vaginal intercourse (16).
- the maxima for consensual buggery with a young person under the age of 16 (life imprisonment) or 18 (five years imprisonment) are much higher than for consensual vaginal intercourse with a girl under 16 (two years unless the girl is under 13).
- as both parties are principal to the offence, a young person under the age of consent who has consensual anal intercourse as the party penetrated, is liable to prosecution. A girl under the age of 16 commits no offence if she has consensual vaginal intercourse.
- the inclusion of the age of 21 in the sentencing tariffs for the offence appears perverse when it has no significance in the law of sexual offences. It is also at odds with the abuse of trust provisions in the Sexual Offences (Amendment) Bill, which distinguishes only between people over and under the age of 18 years.
- the absence of a mistaken belief defence.

As anal intercourse is an act probably engaged in more frequently by homosexual males than by heterosexual people, the effect of these anomalies in the law is to discriminate against the former group. If the age of homosexual consent is lowered to 16, this will clearly have major implications for the law on buggery and the opportunity should be taken to undertake a complete reform of that law.

⁴⁸ A Stonewall fact sheet, 'Gay sex and the law' gives the example of a heterosexual couple having sexual intercourse on a train in the full view of the other passengers, being fined £25 each. See Law Commission Report No. 76, *Report on Conspiracy and Criminal Law Reform*, (HMSO, 1976) p.196 for the recommendation of a draft law which would penalise any person who engaged in sexual behaviour which was likely to cause offence.

⁴⁹ See discussion in Card, Cross and Jones, *Criminal Law* (Butterworths: London 1998), p.248. Also Bowley, 'An overdue reform' (1999) 149 *NLJ* 140.

4. ASSAULT WITH INTENT TO COMMIT BUGGERY

The nature of the offence

Section 16(1) of the Sexual Offences Act 1956 provides:

‘It is an offence for a person to assault another person with intent to commit buggery’.

Buggery

For the requirements of buggery see the section on that offence.⁵⁰

It can be seen that by using the wording ‘a person’, in section 16(1) it preserves the theoretical possibility that a woman can commit buggery, although in relation to another person, this is clearly a legal fiction.

Assault

The definition of assault can be found in the case of *Fagan v Metropolitan Police Commissioner*.⁵¹

The offence of assault with intent to commit buggery encompasses both assault and battery.⁵²

The defendant must either:

- (i) intentionally or recklessly inflict unlawful force on the victim (battery) or
- (ii) intentionally or recklessly cause the victim to apprehend the immediate infliction of violence.

An assault can be committed by words alone providing that they cause the victim to apprehend the immediate infliction of violence.⁵³ For the purpose of force, even light touching will suffice.⁵⁴ An act which would otherwise constitute an assault may be lawful if the ‘victim’ consents. The absence of consent must be proved by the prosecution.

Penalties

The offence is triable on indictment only and attracts a maximum sentence of 10 years imprisonment. Of the six convictions in the period 1995-97, four resulted in custodial sentences, two in community sentences.

Evaluation

An essential ingredient of the offence is lack of consent. With the redefinition of the offence of rape to include anal intercourse, and the subsequent decision in *Davies*,⁵⁵ there is strong evidence to support the view that buggery is now a solely consensual act. Even in the circumstances where the act is unlawful in that it does not satisfy the requirements in sections 12(1A) and 12(1B) of

⁵⁰ Supra p.8.

⁵¹ [1969] 1 QB 439.

⁵² *DPP v Taylor*; *DPP v Little* [1992] 1 All ER 299.

⁵³ *Ireland*; *Burstow* [1997] 4 All ER 225.

⁵⁴ *Cole v Turner* (1704) 6 Mod Rep 149.

⁵⁵ Supra p.1.



the 1956 Act (as amended), the consent of the parties remains valid. If the argument is accepted then the offence of assault with intent to commit buggery is one which cannot be committed, as the assault requires lack of consent, but consent is an ingredient of buggery. The case of *Cratchley*⁵⁶ provides an example of this. The defendant had been convicted of assault with intent to commit buggery. The question before the court was whether the boys involved were accomplices so that their evidence required collaboration. The point which was not addressed was whether the 'victim' of the assault had consented. If so, there was no assault. This 'unsatisfactory aspect' of the case is acknowledged by Rook and Ward.⁵⁷

Alternative charges would be indecent assault, attempted rape or procuring or attempting to procure an act of gross indecency under section 13. However, these alternatives do not exactly fit the gap which would be left.⁵⁸ A charge under section 13 attracts a lower maximum penalty which might not reflect the seriousness of the assault. An indecent assault may be difficult to prove through a lack of evidence of indecency.⁵⁹ Similarly, a charge of attempted rape may be inappropriate if the circumstances are not sufficient to constitute an attempt.⁶⁰

Until recently, an appropriate, alternative charge may have been assault with intent to rape. However, it is now settled that this offence has ceased to exist.⁶¹

The Criminal Law Revision Committee disposed of section 16 in one short paragraph.⁶² After noting that there was no corresponding offence of assault with intent to commit rape, the Committee concluded that 'We consider that section 16 is no longer required and we say no more about it.' No explanation is given although it could be assumed from the context of the paragraph that the Committee considered that the law on indecent assault was sufficient to cover the offence. We have seen that it might not be.

In relation to assault with intent to rape a female, a reasonably satisfactory alternative can be found under section 17(1) of the 1956 Act which makes it an offence for 'a person to take away or detain a woman against her will with the intention that she shall marry or have unlawful intercourse with that or any other person ...'. The maximum sentence of 14 years is comparable to that of indecent assault (10 years) but below that for attempted rape (life). The defendant in *R v Philip White* had pleaded guilty to this alternative count and was sentenced to two years imprisonment. However, for male victims of assault with intent to commit rape, there does appear to be a gap in the law which needs to be addressed. Some consolidating legislation which takes account of the redefinition of the offence of rape and its impact on these lesser offences would appear to be an appropriate solution.

⁵⁶ (1913) 9 Cr. App. R.232.

⁵⁷ *Supra* p.10, n5 at p.142. There is some evidence that, even before the redefinition of rape under the 1994 Act, the courts treated consensual and nonconsensual buggery as two separate offences. See *R v DPP ex parte C* (1995) 1 Cr. App. R.136.

⁵⁸ See Spencer, 'Assault with intent to rape – dead or alive?' [1986] Crim. LR 110 for a discussion of this.

⁵⁹ *Infra* p.20.

⁶⁰ *Attorney-General's Reference (No 1 of 1992)*. (1993) 96 Cr. App. R.298 for the meaning of attempt in reference to rape.

⁶¹ *R v P* [1990] Crim. LR 323 following *R v Phillip White* [1988] Crim. LR 434. For discussion see Spencer, *supra* n9.

⁶² *Supra* p.4 n15 at Para 4.3.

5. INDECENT ASSAULT ON A MAN

The nature of the offence

Section 15(1) of the Sexual Offences Act 1956 provides:

‘It is an offence for a person to make an indecent assault on a man’.

The offence can be committed by a man or a woman so it is not an exclusively homosexual offence.

The characteristics of an assault were discussed earlier,⁶³ although it is unclear with indecent assault whether it can be committed by words alone.⁶⁴ It now seems settled that there is no requirement of hostility or aggression in the offence,⁶⁵ but for an assault to constitute an indecent assault it must occur in circumstances which right-minded persons would consider to be indecent.⁶⁶ This is a matter of fact for the jury to decide according to contemporary standards of modesty and privacy. Some circumstances in themselves would not be considered indecent and the question has arisen as to what extent the motive of the assailant is relevant to the offence. In *Court*, Lord Ackner identified three types of cases. These are:

- i Where the assault is inherently indecent or rendered indecent by its circumstances.⁶⁷ Motive is irrelevant in these types of cases.
- ii Where the incident viewed objectively is incapable of being indecent.⁶⁸ In these cases, the defendant’s motive does not render the act indecent when there are ‘no overt circumstances of indecency’.
- iii Where the assault is not inherently indecent but is capable of being so depending on the circumstances under which it occurs.⁶⁹ In these cases the motive of the defendant is crucial to the offence and evidence of the defendant’s explanation for his actions may be used to show that he had intended to carry out an indecent assault.

As with common assault, the absence of the consent of the victim is crucial and must be proved by the prosecution. No offence is committed when the act is carried out with the ‘victim’s’ consent. However, the consent must be valid and will be vitiated if it is given under mistake as to the identity of the assailant or the nature of the transaction.⁷⁰ In addition, consent may be invalidated on the grounds of public policy, so that in some circumstances the law will hold that an offence has been committed even when the ‘victim’ has genuinely consented.⁷¹ In *Donovan*⁷² the Divisional

⁶⁴ pp.16-17.

⁶⁴ Mackesy, ‘Criminal Law and the Woman Seducer’, [1956] Crim. LR 530, 531-3.

⁶⁵ *Faulkner v Talbot* [1981] 3 All ER 468; *R v Court* [1989] AC 28.

⁶⁶ *R v Court* *ibid.*

⁶⁷ *Leather* (1993) 14 Cr. App. R (S) 736; *Beal v Kelly* [1951] 2 All ER 763.

⁶⁸ *George* [1956] Crim. LR 52.

⁶⁹ *Court* *supra* n3.

⁷⁰ Other vitiating factors which apply to the offence of rape are also relevant to the offence of indecent assault.

⁷¹ For an example of a statutory provision see s.15(2) of the 1956 Act in relation to boys under the age of 16.

⁷² [1934] 2 KB 498.



Court held that consent was not relevant in regards to ‘an act likely or intended to cause bodily harm’. *Donovan* was followed in *Boyea*,⁷³ an indecent assault likely or intended to cause bodily harm is an offence regardless of the consent of the other party, except when the injury is ‘transient or trifling’. In *Attorney-General’s Reference (No 6 of 1980)*⁷⁴ the Court of Appeal concluded that it ‘is not in the public interest that people should try to cause, or should cause, each other actual bodily harm for no good reason’.⁷⁵ ‘Good reasons’ included properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions etc.

The controversial case of *Brown*⁷⁶ has most recently concentrated attention on the issue of consent. The House of Lords was required to consider whether the activities of a group of male homosexual sado-masochists should be included amongst the ‘good reasons’. The defendants had been charged under sections 20 and 47 of the Offences Against the Person Act 1861, an action under section 13 for gross indecency being time barred. By a majority of 3-2, the House concluded that there was no good reason for including these activities in the exceptions to the general rule; it was not in the public interest to recognise valid consent to the intentional causing of actual bodily harm in these circumstances. Indeed, there were good reasons why sado-masochist practices should be unlawful. These included the risk of serious injury and the possible spread of diseases such as AIDS and the danger that young people could be drawn into such activities. Lord Mustill, dissenting, concluded that the situation did not come within the provisions of the 1861 Act. He argued that the law should only intervene if there was good reason for doing so.⁷⁷ Whilst not condoning the morality of the appellants’ activities:

‘What I do say is that these are questions of private morality; that the standards by which they fall to be judged are not those of the criminal law.’⁷⁸

A similar view was expressed in the more recent case of *R v Wilson*.⁷⁹ The defendant, at his wife’s instigation, had branded his initials on her buttocks with a hot knife. He was charged under section 47 of the Offences Against the Person Act 1861 of an assault occasioning actual bodily harm. The trial judge ruled that, following *Brown*, the consent of the defendant’s wife was no defence. On appeal, the Court of Appeal held that the trial judge had misdirected himself by failing to take full account of the facts of the case. It was not in the public interest that the appellant’s activity should be visited by the sanctions of the criminal law.

‘Consensual activity between husband and wife, in the privacy of the matrimonial home, is not, in our judgement, normally a proper matter for criminal investigation, let alone criminal prosecution.’

⁷³ [1992] Crim. LR 574.

⁷⁴ [1981] 1 QB 715.

⁷⁵ *Ibid* p.719.

⁷⁶ [1993] 2 WLR 556.

⁷⁷ *Ibid* p.600.

⁷⁸ See also *Report on the Committee of Sexual Offences and Prostitution*, Cmd 247 (HMSO: 1957) at para 61.

⁷⁹ [1997]QB 47.

Penalties

The offence is triable either way with a maximum sentence of 10 years imprisonment for conviction on indictment or six months on summary conviction or a maximum fine of £5000. The offence will normally be tried summarily unless there are particular features of the case for which the sentencing powers are inadequate. Of the 165 prosecutions brought in 1997, there were 112 convictions, 54 of which resulted in a custodial sentence.

Evaluation

The focus of debate for the purpose of this paper is on the issue of consent as highlighted in the case of *Brown*. As the case was brought under the Offences Against the Person Act, it did not directly address the subject of homosexuality. Indeed the trial judge, Rant J, directed the jury that:

‘This is not a witch-hunt against homosexuals. The unlawful conduct could result equally in the prosecution of heterosexuals ...’

Nevertheless, it has been argued that some significance can be attached to the fact that the ‘first case to consider fully the legality of sado-masochist activity, involved not a heterosexual couple but a group of gay men’.⁸⁰ In addition, although the decision in *Brown* also applies to heterosexual sado-masochism, fears have been expressed that, because of the tendency of the police to target gay men, it will be this group which will suffer most from the decision.⁸¹ Further concerns are expressed over possible anti-gay prejudices within a jury which could lead to a greater willingness to convict when the defendants are homosexual.

It is arguable that any perception of judicial antipathy to homosexual practices has been reinforced by the decision in *Wilson*. However the European Court of Human Rights⁸², when hearing the case of *Brown*, concluded that there was no evidence to support the applicants’ allegation of bias on the part of the House of Lords. The Court ruled that the majority of the Lords had based their decision on the extreme nature of the activities. This also formed the basis of the European Court’s judgement. The Court concluded that, although the applicants’ right to respect for private life under Article 8 had been violated, it was satisfied that this had been ‘necessary in a democratic society’ for the protection of health and morals. It had been evident from the facts that the activities had involved a significant degree of injury and wounding. Furthermore, State authorities were entitled to consider not only the actual harm but also the potential for more serious injury inherent in the activities.

The criminalising of sado-masochist activities has been strongly criticised by many. However, a detailed examination of these criticisms is outside the scope of this paper.⁸³ The Court of Appeal in *Wilson* expressed the view that the law in this area should be left to develop on a case by case

⁸⁰ Bibbings and Alldridge, ‘Sexual Expression, Body Alteration and the Defence of Consent’. (1993) 20 *Journal of Law and Society* 356, 364. See also Wintermute, ‘Sexual Orientation Discrimination’ in McCrudden and Chambers, *Individual Rights and the Law in Great Britain*, (Clarendon Press: Oxford, 1994) p500 and Padfield, ‘Consent and the Public Interest’ (1992) 142 *NLJ* 430 on the question of whether the prosecution should have been brought.

⁸¹ Power, ‘Entrapment and gay rights’ (1993) 143 *NLJ* 47.

⁸² *Laskey, Jaggard and Brown v UK*, (1997) 24 *EHRR* 39.

⁸³ For a very comprehensive critique see the submission to the Law Commission (infra n22) by the Gay and Lesbian Humanist Association. For the arguments of one of the few authors to supported the decision of the House of Lords see Edward, *Sex and Gender and the Legal Process* (Blackstone: London 1996) pp.76-89, although the author disagrees with much of the reasoning. An account of the nature and meaning of sado-masochism can be found in Jeffreys, *Anticlimax* (The Women’s Press: London 1990)



basis. This carries the risk of creating an unacceptable level of uncertainty. The Law Commission⁸⁴ has sought to provide a statutory framework under which consent for sexual purposes would be a defence to a charge of assault unless the risk was of a 'seriously disabling injury' defined as one which causes 'permanent bodily injury or functional impairment or serious disfigurement'.⁸⁵ Card *et al*⁸⁶ argue that this draws the level at harm at too high a point or, if the level is correct, that the definition ignores whether or not the injury is remedial by surgery. In addition, the emphasis on whether or not the victim consented to serious injury leaves unprotected, those victims who are in special need of protection.

This subject is strongly linked to questions of morality which are beyond the scope of this paper. Nevertheless, it is clear that the current state of the law is one of uncertainty and, on these grounds alone, would justify further consideration.

⁸⁴ *Consent in the Criminal Law*, (1995) Law Commission Consultation Paper No 139.

⁸⁵ *Ibid*, p.41.

⁸⁶ *Supra* p.14, n18 at p.137.

6. GROSS INDECENCY

The nature of the offence: gross indecency

Section 13 of the Sex Offences Act 1956 provides:

‘It is an offence for a man to commit an act of gross indecency with another man, whether in public or in private, or to be a party to the commission by a man of an act of gross indecency with another man, or to procure the commission by a man of an act of gross indecency with another man’.

Section 13 creates two substantive offences;⁸⁷ one of committing or being a party to the commission of an act of gross indecency and one of procuring such an act.

‘Gross indecency’

There is no legal definition of the term gross indecency and most cases will be decided on their own particular facts. The Wolfenden Committee concluded that the words had acquired a fairly fixed connotation in relation to male homosexual acts, including mutual masturbation and genital-oral contact.⁸⁸ However it has been held that the offence may be committed without any physical contact. In *Hunt and Badsey*⁸⁹ the defendants were convicted after being discovered in a shed indecently exhibiting themselves to each other. The defendants in *Preece and Howells*⁹⁰ were masturbating in adjoining cubicles in a public lavatory whilst watching each other through a hole in the wall. In the *Romans in Britain* prosecution,⁹¹ Staughton J ruled that a simulated homosexual act on stage could constitute an act of gross indecency.

‘with another man’

It is clear that the words ‘with another man’ mean that both men must voluntarily participate.⁹² It is not sufficient that the act was ‘against’ or ‘directed at’ another. The prosecutor must show that the man towards whom the act is directed ‘willingly participated and co-operated in the indecent exhibition.’⁹³

The offence is subject to the same defence as the offence of buggery under sections 1(1) and 1(2) of the 1956 Act (as amended by the 1994 Act).⁹⁴

The nature of the offence: procuring an act of gross indecency

A definition of the word ‘procure’ is found in *Attorney-General’s Reference (No 1 of 1975)*:

⁸⁷ *Chief Constable of Hampshire v Mace* (1987) 84 Cr. App. R.40.

⁸⁸ *Supra* p23, n16. para 105.

⁸⁹ [1950] 34 Cr. App. R.135.

⁹⁰ [1976] 2 WLR 745.

⁹¹ For an account of this case see Robertson and Nicol, *Media Law* (Penguin: London, 1990) pp.112-115.

⁹² *Allen* (1848) 1 Den 364.

⁹³ *Hunt v Badsey* (1950) 34 Cr. App. R.135. This view of the offence is clearly correct but it does not sit happily with s.1 of the 1967 Act which makes it an offence to commit an act of gross indecency without the consent of the other party. If the offence can only be committed with the consent of the other party, then the provision in s1 is superfluous. The offence can only be one of attempting to commit an act of gross indecency.

⁹⁴ *Supra* p.9.



'To procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce the happening.'⁹⁵

It is lawful for a man to procure an act of indecency for himself under section 4(3) providing the conditions of section 1 are satisfied. However it remains an offence under section 4(1) to procure an act of buggery between two other people even if the act is lawful under section 1. Although no reference is made to gross indecency in section 4(1), in the light of the restrictive wording of section 4(3) it would appear that it would be an offence to procure an act of gross indecency between two other men even when that act would be lawful under section 1(1). It is not clear whether it would be an offence to procure an act of buggery for oneself.

Attempt to procure an act of gross indecency

Section 1(1) of the Criminal Attempts Act 1981 provides:

'If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.'

Offences excluded from the provisions of section 1(1) include, under section 1(4)(b) 'aiding, abetting, counselling, procuring or suborning the commission of an offence.'

Despite the wording of this section it remains an offence to attempt to procure the commission of an act of gross indecency.

It is clear from *Cope*⁹⁶ and *Miskell*⁹⁷ that an attempt need not involve a specific invitation; the surrounding circumstances will be taken into account. However, these decisions must now be seen in the light of more recent cases brought under the section 1 of the Criminal Attempts Act 1981. The statutory definition of attempt is 'something more than merely preparatory' and it appears from *Rowley*⁹⁸ that an important factor will be the presence of some sexually explicit proposition.

Penalties

As with buggery, sentencing provisions vary the maximum penalty according to the age of the participants, thus having the effect of creating four offences.

- man over 21⁹⁹ with a man under 18: five years
- man under 21 with man under 18 or both parties over 18 but not in private: two years.
- man of 21 procures an act by a man under 18 with another man: five years
- man under 21 procures an act by a man under 18 with another man or man over 18 procures an act by a man over 18 with another man: two years.

⁹⁵ [1975] QB 773, 779.

⁹⁶ (1921)16 Cr. App. R.77.

⁹⁷ [1954] 1 WLR 438.

⁹⁸ (1992) 94 Cr. App. R.95.

⁹⁹ See supra p.15 for comment on the relevance of this age.

There is some indication, in relation to gross indecency when the parties are over 18 years of age, that many arrests result in a formal caution.¹⁰⁰ When a case is prosecuted, modern sentencing practice is to impose a financial rather than a custodial penalty for a first offence. An immediate custodial sentence is considered to be inappropriate and excessive where the offender is of previous good character.¹⁰¹ Of the 163 convictions in 1997, 138 resulted in a fine with only two attracting a prison sentence.

Evaluation

Gross indecency

Gross indecency is an offence which can only be committed between men, so it is essentially a homosexual offence. The term has been criticised for being too vague to provide a satisfactory basis for a criminal offence¹⁰². It is argued that the very existence of the offence makes gay men vulnerable to the whims of over-zealous police officers and interferes with their rights to privacy. The defences under sections 1(1) and 1(2) of the 1956 Act apply only to men over the age of 18; *all* homosexual acts between men under that age are unlawful even if conducted in private. In addition, given the strict definition of ‘private’ in relation to acts between adult males,¹⁰³ many acts carried out between men constitute criminal offences when no such sanction would attach to similar acts between a male and a female.

Procuring

The law on procuring an act of gross indecency has been described by one writer as ‘a bizarre spider’s web’.¹⁰⁴ It lacks clarity and also has a discriminatory effect in that it is not an offence for a woman to procure the commission of an act of gross indecency between men. In addition, the law also extends beyond the need to protect the vulnerable from the exploitation of others. By comparison, the regulation of heterosexual procuring is limited to those circumstances in which the law may be seen to play a legitimate role, such as protecting women from being pressurised into prostitution (e.g section 22 of the Sexual Offences Act 1956). Section 13 creates a series of potentially victimless crimes by criminalising behaviour between homosexual men which is within the law when the participants are men and woman.

¹⁰⁰ In 1997 206 cases were prosecuted, 203 cautions were issued.

¹⁰¹ *Morgan and Dockerty* [1979] Crim. LR 60 (fines of £100 and £50); *Clayton* [1981] Crim. LR 425 (fine of £50).

¹⁰² The Criminal Law Revision Committee *Working Paper on Sexual Offences* (HMSO, 1980) para 87.

¹⁰³ See *supra* pp.12-14 for a critique of this.

¹⁰⁴ Crane, *supra* p.13, n15 at p.26.



7. SOLICITING

The nature of the offence

Section 32 of the Sexual Offences Act 1956 provides:

‘It is an offence for a man persistently to solicit or importune in a public place for immoral purposes.’

‘Persistently’

The requirement of ‘persistently’ involves ‘a degree of repetition’¹⁰⁵ of either more than one invitation to one person or a series of invitations to different people.¹⁰⁶ It now appears that the requirement is also satisfied by a continuing course of action. In *Tuck*,¹⁰⁷ the persistence consisted of masturbating in a public lavatory for seven minutes, rather than two or more distinct acts.

‘Solicit or importune’

There is no legal distinction between soliciting and importuning.¹⁰⁸

The meaning of the word ‘solicit’ under section 1(1) of the Street Offences Act 1959 provides authority for its meaning under section 32. In *Weisz v Monahan*¹⁰⁹ it was held that this must involve the physical presence of the alleged offender, so that an advertisement does not constitute ‘soliciting’ for the purpose of the Act.

With regards to the type of behaviour which will constitute soliciting it is clear from *Horton v Mead*¹¹⁰ that there is no need for words to be spoken, a physical movement will suffice, nor for the invitation to reach the mind of the intended recipient. However, later cases may cast some doubt on this. In *Behrendt v Burrige*,¹¹¹ a case brought under s1(1) of the Street Offences Act, reference is made to the defendant ‘projecting her solicitation to passers by’. More recently, in *DPP v Ollerenshaw*¹¹² the Divisional Court concluded that, in relation to the offence of kerb crawling under s1(1) of the Sexual Offences Act 1985, soliciting implies ‘begging a favour, an element of importuning or asking’. In both cases the words used imply that the message must be conveyed to the intended recipient.

‘A public place’

There appears to be no direct authority on the meaning of a public place under section 32. Guidance must therefore be drawn from decisions relating to other statutory offences, although the interpretation will vary according to the mischief which the particular offence is designed to remedy. The question is one of fact for the jury to decide.

¹⁰⁵ *Barker v Barker* [1949] p.219, 221.

¹⁰⁶ *Dale v Smith* [1967] 1 WLR 700.

¹⁰⁷ [1994] Crim. LR 375. This point remained unclear after *Burge* [1961] Crim LR 412 which involved the display of a card in a shop window. The conviction in that case was later quashed on the grounds that the display did not constitute ‘soliciting.’

¹⁰⁸ *Field v Chapman* [1953] CLY 787.

¹⁰⁹ [1962] 1 All ER 664.

¹¹⁰ [1913] 1 KB 154.

¹¹¹ [1976] 3 All ER 285.

¹¹² *The Independent*, 6 January 1992.

‘Immoral purposes’

The phrase ‘immoral purposes’ is not defined in the 1956 Act nor is it used in any other statute. In *Crook v Edmondson*¹¹³ Winn LJ concluded that Parliament had intended to confine its meaning to what is immoral in respect of sexual conduct. It is now clear that this is a matter of fact for the jury (or magistrates) to decide.¹¹⁴ The role of the judge is confined to deciding whether the act in question is capable of being immoral. With the decriminalisation of certain homosexual acts under the 1967 Act, the question arose as to whether these activities could constitute ‘immoral purposes’ under section 32. In *Ford*¹¹⁵ the Court of Appeal held that they could. This view has since been confirmed in *Gray*¹¹⁶ and *Kirkup*.¹¹⁷

Until 1966, section 32 was used exclusively to prosecute homosexual soliciting. The first reported case to be brought under this section in relation to heterosexual soliciting was *Crook v Edmondson*. The issue was whether sexual intercourse with a prostitute constituted an immoral purpose. The majority in the Court of Appeal concluded that it did not. This was based on the view that there was no evidence that section 1(1)(b) of the Vagrancy Act 1898, the predecessor to section 32, had ever been used for that purpose.¹¹⁸ Subsequent cases have held that soliciting a girl under the age 16 for the purpose of sexual intercourse is an immoral purpose.¹¹⁹ In *Goddard* it was also held that soliciting for the purpose of consensual sexual relations with an adult woman other than a prostitute was an offence under the section. This was on the grounds that the appellant’s public and persistent conduct was ‘unpleasant, offensive and disturbing’ to the victim. By focusing on the effect of the action this case seems to add an extra requirement in relation to heterosexual soliciting.

Penalties

The offence is triable either way. On conviction on indictment the maximum sentence is two years imprisonment; when tried summarily, six months imprisonment or up to a £5000 fine. A prison sentence is rarely imposed. Of the 47 convictions for soliciting in 1997, just one resulted in a prison sentence. With the other 46, nine received an absolute or conditional discharge, 33 were fined and four received a community sentence. In addition to these figures, many of those arrested agree to a formal caution: in 1997, during which 74 prosecutions were brought, 89 men were cautioned. In contrast, the 1995 figures for cautions, prosecutions and convictions for soliciting were all markedly higher: 126, 111, and 72 respectively.

¹¹³ [1966] 2 QB 81, 91A.

¹¹⁴ *Goddard* (1991) 92 Cr. App. R.185; *Kirkup* (1993) 96 Cr. App. R.352.

¹¹⁵ (1978) 66 Cr. App. R.46.

¹¹⁶ (1982) 74 Cr. App. R.324.

¹¹⁷ *Supra* n10.

¹¹⁸ See further discussion of this *infra* p.36.

¹¹⁹ *Dodd* (1978) 66 Crim. App. R.87; *Goddard* (1991) 92 Crim. App. R.185.



Evaluation

There is strong evidence that the predecessor to section 32, section 1(1)(b) of the Vagrancy Act, was passed to control the action of touts and pimps.¹²⁰ It is therefore arguable that the later section was aimed at the same mischief. However, the broad wording of the Act lends itself to a wider interpretation of its intention and section 32 has become an all-embracing means of controlling homosexual behaviour some of which, if conducted between males and females might be seen as no more than casual 'chatting-up'. This in itself is discriminatory, but it is also possible to demonstrate that this discrimination may have been increased by the way in which the courts have applied the statute. We have already seen that, when applied to homosexual behaviour, the offence can be committed without the soliciting reaching the mind of the intended recipient. In contrast, offences relating to the soliciting of a woman appear to include this requirement. There are two other issues which also require consideration.

First, there is some evidence that judicial reasoning on the meaning of 'immoral purposes' seems to operate from a presumption that homosexual behaviour is immoral. The reason for leaving the interpretation of the phrase to individual juries was that the behaviour could be judged by the contemporary standards of right thinking people.¹²¹ Yet misdirections by trial judges on this point have not been sufficient to overturn the convictions in two key cases. In *Gray* the trial judge had stopped the appellant's counsel from addressing the jury on whether the defendant's purpose had been immoral, stating that he intended to direct them that, as a matter of law, it was. The Court of Appeal held that this was a misdirection and a material irregularity in the course of the appellant's trial. Nevertheless, the appeal was dismissed on the grounds that the 'jury would inevitably have convicted'. This decision appears to ignore the reason for leaving such matters to the jury. This is, that there is always the possibility that a jury will not convict. The trial judge had left it no alternative but to convict.

Nevertheless, 11 years later, the decision in *Gray* was followed, with some degree of reluctance, in *Kirkup*.¹²² The trial judge, Goldstein J, had, somewhat puritanically, instructed the jury that any form of sexual contact, sexual activity or sexual congress was an immoral purpose. The Court of Appeal held that the judge had misdirected the jury but nevertheless, Staughton L J felt bound to follow *Gray* because there was no evidence that public attitudes had changed since that case. This reasoning upholds the fallacy that the verdict in *Gray* was a clear indication that the members of the jury thought that the conduct was immoral. As previously argued, they had no alternative but to convict. The jury in *Kirkup* was similarly bound to convict in the light of the direction by Goldstein J.

Some groups have argued that terms such as 'immoral' should have no place in modern legal codes¹²³. Others call for a statutory definition of the term and criticise the rule that the meaning of the phrase is a matter for the jury. This is on the grounds that it leaves too much scope for inconsistent decision-making.¹²⁴ In contrast, it is argued that a statutory definition would be too rigid.¹²⁵ On either grounds it is clear that the present situation is unsatisfactory.

¹²⁰ Cohen, 'Soliciting by Men' [1982] Crim. LR 349; Renshaw and Goldrein, 'Soliciting by Men' [1959] Crim. LR 276.

¹²¹ *Goddard* supra p.35 n10.

¹²² *Supra* n50.

¹²³ Submission to the Sex Offences Review by the Gay and Lesbian Humanist Association.

¹²⁴ [1993] Crim. LR 777, 778. See also Staughton LJ in *Kirkup*, at p.358.

¹²⁵ Rook and Ward, supra p.10, n5 at p.157.

On the second issue, although *Goddard* extended section 32 to heterosexual soliciting, it did so in a way which discriminates against homosexuals. It would appear that a man will only be guilty of soliciting a woman if his actions are ‘unpleasant, offensive and disturbing’ to the victim. No such requirement has been applied to homosexual soliciting. Although, in law, the decision in *Goddard* is flawed in that it goes beyond the statutory provisions of the offence, there are, nevertheless, strong reasons for arguing that the approach is, in principle, correct. The conduct of individuals in the area of morality should only be criminalised by reference to the harm it caused to others. By omitting this requirement, section 32 creates what in some cases may be a victimless crime.

Given the considerable autonomy enjoyed by individual police authorities, targeting of these offences will vary across different areas. For example, in the period 1995-97, there were 44 prosecutions and 66 cautions in relation to the offence in the West Yorkshire police area compared to no prosecutions and three cautions during the same period in the Thames Valley area. The difference is arguably greater than could be accounted for just by variations in population size and public behaviour.¹²⁶ Many homosexual men believe that in some areas it is used as an easy means of increasing detection rates. It is also argued that police perception of public opinion can lead to an increase or decrease in police activity.¹²⁷ The number of defendants proceeded against decreased steadily and significantly in the period from 1987 to 1997¹²⁸ and this must be explained to some extent at least, by a perception on behalf of the police of greater public tolerance of male homosexuality. These vagaries leave homosexual men vulnerable to the whims of individual police authorities and unverified perceptions of public morality. There is an increasing distinction being drawn within the criminal law between actions which are a danger to the public and those which are not. In the majority of cases, the activities covered by section 32 clearly come within the latter category and serious consideration should be given to its repeal and bringing those activities which cause offence and distress within the context of offences which apply equally to homosexuals and heterosexuals.

¹²⁶ The Campaign for Homosexual Equality in Bolton has published a leaflet which argues that Bolton is the ‘home of homophobia’ in Britain. It provides an account of cases brought in Bolton, including that of the ‘Bolton 7’, which CHE claims would not have been brought in other areas of the country.

¹²⁷ See West and Woelke in West and Green, *Sociological Control of Homosexuality: a Multinational Comparison* (Plenum: New York 1997), p.206 and Power, ‘Gay Men and Part 1 of the Sex Offenders Act 1997’, [1998] 1 Web JCL.

¹²⁸ Cautions in 1987, 172, proceeded against, 595. Cautions in 1997, 89, proceeded against, 74.



8. CONCLUSION

The analysis in the previous chapters provides clear evidence that the criminal law in England does discriminate against male homosexuals, whether directly or indirectly, in relation to consensual sexual behaviour. The key areas are:

- the criminalisation of the act of buggery;
- the criminalisation of other forms of homosexual acts under the blanket label of gross indecency;
- the age of consent in relation to buggery and acts of gross indecency;¹²⁹
- the requirement of privacy in relation to buggery and acts of gross indecency;
- the criminalisation of procuring and attempting to procure an act of buggery or gross indecency even if those acts would be legal;
- the criminalisation of soliciting in the absence of harm or nuisance to others.

The question then arises as to whether the law should be reformed. The reasons for maintaining discriminatory laws must be very forceful if they are to be justified, particularly when they involve the criminalisation of private, consensual behaviour. The traditional arguments in favour of discrimination are based on the presumption that homosexual behaviour is intrinsically wrong and contrary to the public good in that it is a menace to the health of society and has damaging effects on family life. These arguments were rejected by the Wolfenden Committee¹³⁰ as long ago as 1957. More recently those arguing against reform have focused on the concept of the homosexual as a threat to children.¹³¹ Again there is no scientific evidence to support the view that young people are more at risk from gay men than they are from heterosexual men¹³² and the criminal law already provides for situations of coercion through the strict rules on consent.¹³³

Nevertheless the law continues to reflect these presumptions to the cost of those who find themselves with a criminal record as a result. In 1997 there were 314 convictions (and 634 prosecutions for offences relating to consensual buggery (16 convictions), indecency (237 convictions), soliciting (47 convictions) and procuring (14 convictions). The number affected is even greater when account is taken of the men who are cautioned rather than prosecuted; for consensual buggery, 6, indecency, 307, soliciting, 89 and procuring, 21. The effects of a conviction or caution for buggery or gross indecency are even more serious as these activities are caught, in some circumstances, by the registration requirements under the Sex Offenders Act 1997.¹³⁴

¹²⁹ This will be removed if the age of consent is lowered to 16 under the Sex Offences (Amendment) Bill 1999.

¹³⁰ *Supra* p.23, n16, para 54 and 55.

¹³¹ For example see Scruton, 'Our sexual supermarket' *The Times*, 15 July 1997 and David Maclean MP during the debate on the Sex Offenders Bill (HC Debs, vol 289, col 27).

¹³² For one analysis of the reconviction rates of sex offenders see Soothill and Francis 'Sexual Reconvictions and the Sex Offenders Act 1997 (1997) 147 *NLJ* 1285 and 1324. Their methodology and conclusions are strongly criticised by Power in 'Gay Men and Part 1 of the Sex Offenders Act 997 [1998] 1 *Web JCLI*.

¹³³ *Olugboja* [1982] QB 320 in relation to rape and indecent assault and the invalidity of the consent to indecent of a boy under 16 under s.15(2) of the 1956 Act.

¹³⁴ For a very comprehensive discussion of the effects of this see Power, *supra* n4.

As discussed in chapter 6, enforcement action (as measured by prosecutions and cautions) in relation to consensual homosexual offences have decreased significantly over the past 10 years and this must be explained to some extent at least, by a perception on behalf of the police of greater public tolerance of male homosexuality. Yet the targeting of these offences has varied across different police force areas. These variations seem greater than can simply be accounted for by difference in population size and public behaviour. Such vagaries can leave homosexual men in the position where they do not know whether the local police will rigorously apply the law or be prepared to turn a blind eye to their sexual activities. Laws producing this result are surely unsatisfactory as they are contrary to the need for consistency and certainty. This is true both from the perspective of those subject to regulation by such laws as well as those who have to enforce them.

In addition to this argument there three further grounds for supporting reform of the present law. These are:

- (i) the practical ground that, in the light of the campaign against AIDS, the law discourages young people from seeking advice and inhibits health education and healthcare. In the area of crime detection, it also inhibits them from reporting attacks on themselves to the police.
- (ii) the humanitarian ground that the law causes considerable distress and misery to many people which can lead to suicide or attempted suicide;¹³⁵
- (iii) the liberal ground that discrimination is wrong in principle.

Many European countries have gone beyond the basic reforms of legalising homosexuality and equalising the age of consent. The present state of the criminal law in England is out of step with these liberalising trends. There is evidence of increasing public acceptance in this country of homosexuality. The ‘outing’ of a government Minister is now more likely to attract sympathy for the intrusion into his private life than any revulsion. The openness of many public figures about their sexual orientation has encouraged this climate of acceptance. With this has come a growing support for equal treatment. A Stonewall factsheet on public opinion which examined a number of opinion polls from 1983, drew the conclusion that, whilst there was still a lot of homophobia about, the polls increasingly showed that a majority of the public supports gay and lesbian equality.¹³⁶ Whilst many may continue to feel that homosexual activity is wrong, to attach criminal sanctions to it is to confuse issues of personal morality with those of criminality. A majority of people, if asked, would probably hold the view that branding your initials on your wife’s buttocks with a hot knife is wrong, but we have seen that it is not criminal.

In relation to the criminal law, the issue of reform may soon not be an optional one. Many of the offences discussed in this report will undoubtedly be the subject of actions under the Human Rights Act 1998 once the relevant sections have been implemented in 2000. There are strong grounds for predicting that such actions will be successful. In *Dudgeon*¹³⁷ the European Court held that a person’s sexual life is a ‘most intimate aspect’ of his or her private life. Intrusion into

¹³⁵ Correspondence with individuals during the course of this research clearly demonstrated the intense feelings of humiliation, anger and resentment felt by those who have fallen foul of the law.

¹³⁶ See also Wintermute, supra p.24, n1118 p.532 quoting evidence of increasing public support in England for reform.

¹³⁷ *Dudgeon v UK* (1981) 4 EHRR 149.



that private life must be justified as a 'pressing social need' if it is not to be a breach of Article 8. This will be the standard by which the substantive law will be judged. The Article also protects against arbitrary action by public authorities and intrusive methods of investigation.¹³⁸ Thus inconsistent policing policies and the surveillance devices which have been used to entrap gay men, may also fall foul of Article 8. In addition, it is also argued that trial evidence obtained through the latter procedures may be a breach of Article 6, the right to a fair trial.¹³⁹

A model for legislative reform can be found in the Criminal Law (Sexual Offences) Act 1996 of the Republic of Ireland.¹⁴⁰ This Act was passed in response to the European Court's decision in *Norris*.¹⁴¹ In one short piece of legislation the age of consent between homosexuals and heterosexuals was equalised, the acts of buggery and gross indecency were decriminalised except in circumstances which apply equally to heterosexuals and the criminalisation of soliciting was confined to the purpose of committing a sexual offence. This statute perhaps demonstrates that the task of reform can be quite a simple one.

¹³⁸ See *Under Surveillance: Covert Policing and Human Rights Standards*, (JUSTICE 1998).

¹³⁹ *Ibid.*

¹⁴⁰ See also Brazier, 'Reform of Sexual Offences' [1975] Crim. LR for draft legislative reform.

¹⁴¹ *Norris v Ireland* (1991) 13 EHRR 186.

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