CRIME AND THE LESBIAN AND GAY CLIENT

1.1 Consensual Offences

The criminal law has almost nothing to say about the regulation of consensual sexual activity between lesbians. By default the age of consent for sexual activity for gay women is 16. Apocryphally this silence on lesbian sexuality originates from the legislators' reluctance to broach the subject with Queen Victoria when the offences regulating gay male sexuality were first considered as part of the Criminal Law Amendment Act 1885. More realistically the silence on lesbian sexuality has more to do with the manner with which women's sexuality is ignored by the law in general. In this particular case the oversight is something to be welcomed rather than challenged.

Gay men, on the other hand, have been the specific target of the criminal law for a least a century (the precise genesis of specific gay male sexual offences is the subject of some debate). The 'classic' charges brought against gay men engaging in consensual sexual offences are buggery, gross indecency and importuning. The latter two are either way offences and the former indictable only. For gay men who were the subject of gross indecency or importuning charges in the 60's and 70's the typical scenario was a brief and shameful court appearance, a guilty plea, a stiff financial penalty and humiliating publicity. The targets of much of this prosecution work were men caught allegedly abusing the facility of public lavatories (cottages) or engaging in sexual activity at night in deserted parks or wasteland (cruising grounds)

In the 1980's, with the rise in gay politicisation, an increasing number of men charged with such offences chose to fight the allegations - often citing the fabrication of evidence or homophobia by the police. The typical venue for contested cases became the Crown Court where juries showed an increasing willingness to acquit defendants facing such charges. Two factors seemed to be at play - first, a growing readiness amongst juries to accept that the police did fabricate evidence against what were seen as 'easy targets' and secondly, an apparent 'collective disapproval' that police time and energy was being expended on pursuing ostensibly victimless offences when the victims of 'real' crimes like robbery car theft or burglary were given little assistance beyond a crime report number.

Unfortunately, the collective cynicism displayed by juries towards the 'classic' offences' was not shared by lay and stipendiary magistrates in the lower criminal courts

From his experience as a practitioner looking after a large number of gay male defendants in the 1980's the author would put the acquittal rate in the Crown Court at about 80% whilst the corresponding rate in the Magistrates Court during the same period ran at about 20%.

Consequently in the late 80's there was a distinct shift in prosecution policy, particularly within London, away from the 'classic' either way offences and towards the use of summary only offences - including an extensive reliance on local by-laws, s.5 Public Order Act 1986, s.48 Town Police Clauses Act and, ironically outraging public decency. Irony is mentioned in respect of the last matter because it is in fact indictable only as a common law offence - a fact simply not appreciated by many charging police officers. On occasions this prosecution strategy took on the semblance of an undignified scrabble - as soon as a defendant indicated that they were electing trial at the Crown Court the prosecution would ferret around for and substitute some unlikely summary only offence.

This section looks therefore at the 'classic' triumvirate of gross indecency buggery and importuning and at the more recently utilised summary offences.

1.1.1 Gross Indecency and Buggery

ss. 12 and 13 of the Sexual Offences Act 1956 confirmed the criminalisation of sexual activity between men. S.12 made it an offence to engage in the act of buggery (more commonly known as anal intercourse). The section covered not just buggery between men but also a man and a woman or a man and an animal. S13 of the Sexual offences Act 1956 rendered it an offence for men to engage in acts of gross indecency (basically sexual activity short of anal intercourse). The Sexual Offences Act 1967 partially decriminalised sexual activity between men providing that the relevant acts were in private and between men who had attained the age of 21. The Criminal Justice and Public Order Act 1994 further lowered the age of consent for gay men to 18. At the time of writing (August 1998) the House of Commons had passed an amendment to the Crime and Disorder Bill equalising the age of consent for gay male sexual activity at 16 (the age of consent for heterosexual activity). The amendment was however defeated by the House of Lords and the government allowed the amendment to lapse promising to introduce new legislation in the autumn of 1998 to affect equality.

The Sexual Offences Act 1967 is sometimes seen as 'legalising' gay male sexual activity. It does not do so. Rather it decriminalises such sexual activity within a very small window.

The conditions for legality are that any such acts are in private and both parties have attained the age of 18.

'Private' has a particular definition. S.1(2) of the SOA 1967 provides that an act is not in private when:-

a. more than two persons take part or are present
b. the act is in a lavatory to which the public have or are permitted to have access whether on payment or otherwise.

Thus any group sexual activity between men is automatically unlawful as is activity between two men with another merely observing person. Similarly any activity in a public lavatory, even within a locked cubicle is automatically unlawful.

The courts have also given consideration to the question of privacy particularly in relation to outdoor locations which might ordinarily be considered public but where sexual activity takes place late at night.

In the case of R. v. Reakes R was indicted for committing an act of buggery other than in private and without the consent of his sexual partner. The act took place in an enclosed unlit private yard at about 1 am. There was a gate form a public road into the yard and in the yard was a 'water closet' used by patrons of two neighbouring restaurants and the employees of a taxi service. Someone came to use the WC shortly after the act. R's defence was that the act was done in private and with his partner's consent. The judge directed as to privacy 'you look at all the surrounding circumstances, the time of night, the nature of the place including such matters as lighting and you consider further the likelihood of a third person coming upon the scene'. On appeal the direction as to privacy was held to be clear and wholly satisfactory. The appellate court rejected submissions that the test of privacy was subjective and that regard should only be had to the moment when the act took place: all the circumstances had to be looked at and considered.

The direction appears to concede that the public or private nature of a place can vary from time to time. The act done in a public bar or public library would presumably be done in

private if it occurred when all the patrons had gone home, the doors were locked and only the two participants were present.

In the case of R. v. Ghik, G was indicted for committing an act of gross indecency with C in a public place, namely the underground car park at Euston station. The act was alleged to have taken place on stairs inside the NCP at 0035. The station shut at 0100 hours. The case was before the Central Criminal Court and at the end of the prosecution case the defence submitted that the onus of disproving privacy lay upon the prosecution and that there had to be at least some evidence of the likelihood of a third person coming upon the scene. The fact that the place was ordinarily a public place was not conclusive since Parliament, in the 1967 Act, by specifically excluding from its provisions acts done in private in a public lavatory, clearly envisaged that privacy could be found and relied on in other public places.

The court accepted that there was no evidence of the likelihood of anyone coming on the scene nor even that the car park was open at the time and directed a verdict of not guilty.

There exists a great myth within the gay community (one of several relating to the operation of the law) that sexual activity between two men in a hotel room is de facto unlawful as it breaches the 'privacy' condition. There is absolutely no authority for this proposition and, indeed, the analysis offends against what authorities do exist

The directions on privacy do leave some questions unanswered however:-

- ∞ If an act takes place on, for example, a piece of parkland late at night and is observed by police officers specifically task to detect such activity can those police officers be considered to be 'persons likely to come upon the scene', thereby losing the parkland its otherwise private status?
- ∞ If an act takes place on a piece of parkland late at night which is notorious for gay male sexual activity (a 'cruising' ground) and there is evidence that whilst no third parties were directly present but many other people were around can those others, apparently there for similar purposes, be held to be persons likely to come upon the scene?

The author has been confronted by both scenarios and has sought to argue that the purpose of the 'privacy' provisions in the legislation is to protect 'innocent' members of the public not police officers or other gay men. Such arguments have not met with much success although the adverse decisions were taken at a low level within the criminal justice system.

What is gross indecency?

Buggery (anal penetration) is a self-explanatory activity (although it should be noted that both the penetrator and the receiving partner are guilty of the offence) but gross indecency is not specifically defined. Through prosecution practice it has come to cover a variety of sexual activity between men - oral sex and mutual masturbation being the most obvious examples. However gross indecency has also been held to cover the activity of two men masturbating themselves in conjunction with no actual physical contact. The offence is not committed unless both men actually participate in the indecency - 'with another man' cannot be construed as meaning 'against' or 'directed towards' a person who did not consent. More recently attempts have been made to argue that the meaning of gross indecency must be seen as changing with changing mores and that 'grossly indecent' acts should be confined to exceptional activities. This argument was used in particular in the Bolton 7 case - a well publicised group sex prosecution from 1997.

Time Limits

There is a very frequently overlooked provision contained in s.7 of the SOA 1967 which places a time limit of 12 months from the commission of the relevant act for a prosecution to be brought in:-

- Any case of gross indecency
- Any case of buggery not amounting to an assault and not being an offence involving a boy under 16.

Therefore for any group sexual activity and for any sexual activity involving a consenting 16 or 17 year old a prosecution must be commenced (i.e. charge made or information laid) within 12 months.

This is, as stated, an important but frequently overlooked provision - overlooked particularly by the police and prosecution. In group sexual activity detection of the offence is rarely by way of one of the parties complaining but by the police discovering some record (most typically photos or a video) ancillary to another investigation. Such records may be dated but frequently are not. The issue then arises as to when the activity took place. The onus is on the prosecution to prove that the activity took place within the last 12 months. Without such proof a prosecution will fail. A defence lawyer confronted with overwhelming photographic records or group sexual activity may feel compelled to advise his client to plead to an offence, or even worse, may advise his client in the Police Station to answer questions about the date of the activity.

In R. v. Lewis where it was unclear upon the evidence given at trial whether the offence charged had been committed within the 12 month period prior to the commencement of proceedings the court quashed the conviction The court held that a judge need not in every case to which s.7 SOA 1967 applied direct the jury to be sure about the date of the offence but must do so where the issue was raised by the defence or where it clearly arose on the evidence at trial.

It is also becoming increasingly common for male 'victims of sexual abuse' in their teens to complain about such activity during adulthood even when those acts were, on the face of it, consensual. If the acts complained of occurred when the complainant was 16 or 17 (or indeed if there is uncertainty about whether the complainant had achieved such an age) then s.7 may provide a defence or a bar to any proceedings. S.7 does not, however, have any application in cases of sexual assault, however old.

Powers of Arrest & Punishments

Gross indecency is an either way offence. Buggery is indictable only. Gross indecency is punishable with a maximum of 5 years imprisonment in cases of underage sexual activity but with a maximum of 2 years imprisonment for group or other non-private sexual activity. This means that 'underage' gross indecency is an arrestable offence under the Police and Criminal Evidence Act 1984 (PACE) but 'non-private' gross indecency is not. Again this may be a point of some significance since the police invariably purport to arrest someone accused of committing non-private gross indecency - especially someone arrested in a public lavatory ('cottaging'). The police may seek to justify their arrest by relying on s.25 PACE which allows arrests for non-arrestable offences when one or more stated conditions (general arrest conditions) are satisfied. The conditions most commonly relied on in gross indecency arrests are:-

- That the name of the relevant person is unknown and cannot readily be ascertained
- That the constable has reasonable grounds for believing that an arrest is necessary to prevent the relevant person committing an offence against public decency.

The latter condition can only be relied on however when members of the public going about their normal business cannot reasonably be expected to avoid the person to be arrested.

It would be fair to say that the police regularly fail to abide by the arrested requirements set out in ss. 24 and 25 PACE. Frequently they purport to arrest for gross indecency *simpliciter*. When challenged on the issue reference may be made to the s.25 general arrest conditions - particularly the prevention of an offence against public decency. However in many cases the idea that a man approached by a police officer and obliged to give his name and address will then continue 'cottaging' is inconceivable. Furthermore the police tend to rely on this exemption even in situations where there is no member of the public going about his or her normal business present - e.g. where an 'arrest' takes place on a late night cruising ground.

One of the most notorious cases of a mass arrest of gay men for gross indecency took place in the village of Hoylandswaine in 1993. 36 men were arrested after the police raided a private party purportedly looking for stolen goods. None of the men were engaged in any form of sexual activity and indeed all were fully clothed. The allegation made by the police was that the men were conspiring (planning) to commit acts of gross indecency in the sense of engaging in group sexual activity. All 36 men were interviewed and all declined to answer police questions on legal advice. The Crown Prosecution Service advised taking no action against the men through lack of evidence. 16 of the men subsequently sued South Yorkshire Police for wrongful arrest and false imprisonment relying on the fact that gross indecency is not an arrestable offence. The police settled the case without admitting liability - paying out some £42500 in damages.

The situation regarding sentencing (and thus powers of arrest) for buggery are rather more complex. The maximum penalty for buggery with a person under the age of 16 is life imprisonment (thus this is an arrestable offence); if the accused is over 20 and the other person under 18 - 5 years (again arrestable); otherwise 2 years (not an arrestable offence).

Procuring

There is a specific secondary offence with respect to buggery which is enshrined in s.4 Sexual Offences Act 1967. It is an offence for a man to procure another man to commit and act of buggery with a third man even where the act procured is entirely lawful. The maximum penalty is 2 years imprisonment. The offence is either way. The provision has lead to fears within the gay community that the introduction of two friends in the hope that they will 'get on' and possibly enter into a sexual relationship will be sufficient for the commission of this offence. In reality 'procuring' quite clearly requires more effort than this - 'you procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening'.