

3. HOMOSEXUALITY AND THE CRIMINAL LAW

3.1 Although it has been no part of our Inquiry to investigate homosexual behaviour as such, we have incidentally learned a great deal about a wide range of homosexual behaviour. It varies from stable and faithful relationships, openly conducted, at one extreme, to more or less clandestine promiscuity and prostitution at the other. Anyone who has read the indictment in the case of *HMA v Neil Bruce Duncan and Others* (referred to in the Orr Report as "OPERATION PLANET—THE RENT BOY CASE") will gain an impression of some types of homosexual behaviour. One matter which we should perhaps mention here is the use of some licensed premises as places where homosexuals meet and, if they are so inclined, arrange for subsequent sexual activity to take place. Such places, commonly called "gay bars", include, at least by repute, licensed premises in Edinburgh called "The Laughing Duck" and "The Blue Oyster".

3.2 Whilst there seems to be no type of homosexual behaviour which, allowing for anatomical differences, cannot be paralleled in heterosexual behaviour, the criminal law relating to homosexual behaviour differs from that relating to heterosexual behaviour. Prosecution of unlawful homosexual conduct in Scotland can be instituted under section 80 of the Criminal Justice (Scotland) Act 1980. This section provides that a homosexual act in private is not to be an offence provided that the parties consent thereto and have attained the age of 21 years. Other than in these circumstances, it is an offence to commit or to be party to the commission of, or to procure or attempt to procure the commission of a homosexual act otherwise than in private or without the consent of both parties to the act, or with a person under the age of 21 years. An act which would otherwise be treated for the purposes of the 1980 Act as being done in private is not to be so treated if done when more than two persons take part or are present, or in a lavatory to which the public have, or are permitted to have, access whether on payment or otherwise. The common law also provides a range of crimes which can be used to prosecute acts of gross indecency of both a heterosexual and homosexual nature. These crimes include the offence of breach of the peace, shameless indecency and lewd and libidinous practices.

3.3 We are aware that, as we shall discuss more fully when we come to that case, counsel for some of the accused in the case of *Duncan and Others* proposed to argue that apart from the provisions of the 1980 Act and apart from the common law crime of sodomy no crime is committed when males over the age of 16 years engage in homosexual activity. That is not an argument which has been tested in court and we prefer to proceed on the basis that the law is as stated in the preceding paragraph.

3.4 In the case of *Duncan and Others* most of the charges proceeded on the basis of common law, although some were based on the 1980 Act. In the period after that case was disposed of in January 1991 there was some public concern about the appropriateness of basing charges on the common law rather than the statute. In particular, Derek Ogg, Advocate, who had acted as counsel for one of the accused, made comments to that effect which were quoted in an article published in "The Glasgow Herald" on 20 February 1991. At about the end of March 1991 Elish McPhilomy, Senior Legal Assistant at the Crown Office, was asked to prepare a background paper on the prosecution of consensual homosexual offences. Her paper concluded that if a policy direction was considered to be appropriate and necessary with regard to homosexual offences, some consideration might be given to the following aspects:

- (1) The minimum age for homosexual relations.

- (2) The need for preventive prosecution directed at the male trade in prostitution with use of section 46 of the Civic Government (Scotland) Act 1982.
- (3) The restriction of prosecution of the client or older man to those situations demonstrating in particular a clear breach of trust, or the overcoming of will by drugs, threats etc.
- (4) The treatment of homosexual and heterosexual acts of indecency on an equivalent basis.
- (5) The use of statutory provisions rather than common law charges wherever possible.

3.5 This background paper was discussed at a meeting held on 29 April 1991 attended by, among others, Lord Fraser, the Lord Advocate, Alan Rodger, the Solicitor General, Duncan Lowe, the Crown Agent, and Alfred Vannet, the Deputy Crown Agent. In the course of the discussion the Lord Advocate suggested the writing of a letter to the Association of Chief Police Officers of Scotland. In due course a letter dated 1 July 1991 was written by the Crown Agent to Sir William Sutherland, Chief Constable of Lothian and Borders Police, as Honorary Secretary of ACPOS. This letter stated that the Lord Advocate wished to ensure that prosecution policy in relation to homosexual offences was based on a careful analysis of where the public interest lay and that there was a clear understanding of the type of conduct requiring the imposition of a criminal sanction. It continued:

"It will clearly be necessary for police reporting practice to reflect that policy and Chief Constables will no doubt wish to consider a consistent enforcement approach."

It concluded by stating that the Lord Advocate was currently reconsidering elements of prosecution policy in this area.

"It is of importance that this exercise takes into account any special features of police policy and practice which you regard as pertinent to this issue and the Lord Advocate would be pleased to consider the views of the Association before finalising his instructions in the matter."

Sir William replied by letter dated 30 August 1991 referring to guidelines which had been issued by a previous Lord Advocate on 1 February 1981 and discouraging any change in existing prosecution practice. The letter also suggested that a "careful analysis of where the public interest lies" was a matter for Parliament.

3.6 Consideration was given to the views of ACPOS as well as those of other persons who had communicated with the Lord Advocate. There was also press coverage of the matter. In due course Crown Office Circular No. 2025 dated 28 November 1991 was issued to Procurators Fiscal. This circular stated that the Lord Advocate considered that the public interest was not served by routinely prosecuting all persons who participated in those consensual homosexual acts which remain unlawful. It then set out guidelines which included the following:

"Where both of the participants are over 16 years but one or both are under 21 years and the act has taken place in private and where there are no circumstances pointing to exploitation, corruption, or breach of trust, prosecution would not be appropriate."

3.7 The terms of the circular became public and extensive publicity and correspondence with the Lord Advocate ensued. The Lord Advocate apparently took the view that there was public misapprehension about the significance of the review which he had undertaken, which was fuelled by speculation that he intended to effect a unilateral change in the law on the age of consent; that was not his intention, as such a change in the law would be a matter for Parliament. The circular was, however, reconsidered and on 20 December 1991 a new Crown Office Circular No. 2025/1 was issued to Procurators Fiscal. This circular made reference to the continuing review, and set out new, provisional directions by the Lord Advocate which replaced the directions contained in the previous circular. These directions included:

"1. Where both of the participants are over 18 years but one or both are under 21 years and the act has taken place in private and where there are circumstances pointing to exploitation, corruption, or breach of trust, prosecution would be appropriate. Where the Procurator Fiscal

- receives a report involving individuals in this age group and none of these circumstances is present, but the Procurator Fiscal considers there are other circumstances which would justify proceedings, a report should be made to Crown Office for consideration by Crown Counsel.
2. Where both of the participants are over 16 years but one or both are under 18 years and the act appears to have been consensual and in private, the Procurator Fiscal should report the case to Crown Office for consideration by Crown Counsel.
 4. Where it appears that one of the parties has engaged in homosexual acts *before* the occasion under consideration and has acted as a prostitute, there is little justification in pursuing the client of such an individual, while ignoring his activity as a prostitute...."

We understand that the review continues, and meantime the circular of 20 December 1991 sets out the Lord Advocate's current directions.