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Criminal Law Amendment Act 1922

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The Criminal Law Amendment Act 1922 extended legal protections for children throughout the United Kingdom in relation to sexual activity, addressing significant gaps in the 1885 Act of the same name. The earlier Act had raised the age at which girls could consent to sexual intercourse from 13 to 16 years old but imposed a six-month time limit for bringing prosecutions for the relevant offence, unlawful sexual intercourse.¹ This was now raised to nine months: an important amendment as many cases were only discovered when a pregnancy could no longer be concealed. The defence of reasonable belief that a girl was over 16 was also now limited to men under 23 years old. And perhaps most significantly, the age of consent to indecent assault was increased from 13 to 16, for both girls and boys.

The 1922 Act therefore brought greater consistency to sexual age of consent law, in ways that began to challenge the patriarchal Victorian model of sexuality. Less obviously, it is also significant for what it did not do: a Bill the previous year had failed, thanks to a controversial proposal to criminalise sexual activity ('gross indecency') between women. The 1922 Act's lack of reference to gross indecency between females saw the end of these efforts at criminalisation.

I. Context

Historically, the age of consent had been linked to the age for marriage.² Extramarital sexual activity between a man and a woman was in any event viewed as illegitimate (albeit not an offence in the secular courts). Between men, it was wholly illegal. Sex between women was silenced and suppressed, although it was not the

¹Originally three months. See further Lois Bibbings, 'Section 5(1) of the Criminal Law Amendment Act 1885' in Erika Rackley and Rosemary Auchmuty (eds), *Women's Legal Landmarks: Celebrating the History of Women and Law in the UK and Ireland* (Hart Publishing, 2019) 83.

²Laura Lammasniemi, "'Precocious Girls': Age of Consent, Class and Family in Late Nineteenth-Century England' (2020) 38 *Law and History Review* 241, 248.

subject of a specific offence. By the late nineteenth century, these longstanding attitudes had cohered into a particular, highly patriarchal model of sexuality in which penile penetration was the only 'real' sex, and it involved a dominant, active and desiring man who penetrated a submissive, passive and essentially desireless woman. The same model was transposed on to sex between men, which became an abhorrent subversion of the natural gender order; it rendered sex between women unthinkable.³ While alternative models might be found elsewhere (not least, in the women's movement and the new field of sexology),⁴ this one had significant cultural and medical force and prevailed in law.

The later nineteenth century had seen growing concern about the sexual exploitation of children and the law's inability to prevent or punish it. A broad coalition of campaigners for effective legislation included people with very different perspectives.⁵ In particular, leading feminist organisations sought to challenge the sexual double standard that punished women but not men for extramarital sex. Chief amongst these was the organisation that would later become the Association for Moral and Social Hygiene (AMSH), headed by Josephine Butler. She led opposition to the Contagious Diseases Acts, which had sought to control prostitution in military towns through compulsory inspection and treatment of women believed to be prostitutes while leaving men's behaviour unchallenged.⁶ Passed in the 1860s, they would be repeated in 1886. The AMSH continued to favour the abolition of legislation regulating prostitution thereafter, and would be the main organisation to campaign for this in the interwar years.⁷

By contrast, 'social purity' campaigners, including the Salvation Army and other evangelical Christian bodies, opposed 'immorality' in all its forms and were happy to see girls and women punished in order to suppress it. They also welcomed provisions in the 1885 Act that increased regulation of soliciting and brothel-keeping. That enthusiasm for regulation was shared by groups advocating the newer 'social hygiene' approach, which focused upon the need to prevent the transmission of infection and generally secure the reproductive health of the nation. However, the division between the abolitionist and pro-regulation parts of the movement was not clear-cut, and indeed many campaigners worked with and across groups on both 'sides'.⁸

³ Caroline Derry, *Lesbianism and the Criminal Law: Three Centuries of Regulation in England and Wales* (Palgrave Macmillan, 2020) ch 3.

⁴ See, for example, Lucy Bland, *Banishing the Beast: English Feminism and Sexual Morality 1885–1914* (Penguin, 1995); Lesley A Hall, 'Hauling Down the Double Standard' (2001) 16 *Gender and History* 36; Sheila Jeffreys, *The Spinster and Her Enemies: Feminism and Sexuality 1880–1930* (Spinifex, 1985).

⁵ Deborah Gorham, 'The "Maiden Tribute of Modern Babylon" Re-Examined: Child Prostitution and the Idea of Childhood in Late-Victorian England' (1978) 21 *Victorian Studies* 353, 364.

⁶ Judith R Walkowitz, 'Butler [Née Grey], Josephine Elizabeth (1828–1906), Social Reformer and Women's Activist', *Oxford Dictionary of National Biography* (23 September 2004).

⁷ Julia Laite, 'The Association for Moral and Social Hygiene: Abolitionism and Prostitution Law in Britain (1915–1959)' (2008) 17 *Women's History Review* 207–08.

⁸ Gorham, n 5, 354–65.

Despite its internal differences, this coalition had successfully campaigned for the Criminal Law Amendment Act 1885, which created the offence of unlawful sexual intercourse with a girl under 16. While parliamentary opponents were unable to stop the Bill, they significantly moderated its effects by including a time limit for bringing prosecutions and a defence of reasonable belief that the girl was over 16, which made successful prosecutions difficult in practice. A last-minute amendment had also introduced an offence of gross indecency between males, which explicitly criminalised all sexual contact between men. Such conduct had already been prosecuted using other offences, such as attempted buggery,⁹ but the provision (known as the ‘Labouchère amendment’ after the radical MP, Henry Du Pré Labouchère, who introduced it) gave fresh encouragement to such prosecutions.

The 1885 legislation therefore met only part of the coalition’s aims, and the practical effects of its apparent protections for girls were severely limited. (Parliament proved more willing to strengthen laws regulating prostitution, which it did in the Criminal Law Amendment Act 1912.) Campaigners continued to seek age-of-consent reform, and after the First World War a similarly broad coalition of over 50 organisations, led by the feminist and abolitionist AMSH, maintained the pressure for reform. The AMSH, under the leadership of Alison Neilans, was committed to opposing state regulation of women’s sexuality, particularly the regulation of prostitution. The Association accepted that legal protections for girls were appropriate, but it was concerned – as many of its allies were not – to ensure that girls were not punished for perceived immoral behaviour. Neilans was therefore often in the difficult position of having to address her allies’ willingness or enthusiasm for regulation as well as her opponents’ more obvious aversion to reform.¹⁰

II. The Landmark

The Criminal Law Amendment Act 1922 did not meet all the campaigners’ demands, but it did achieve their main aims. Sixteen was now the age of consent for both sexual intercourse and indecent assault. Girls were thus given more comprehensive legal protection, while the application of the same age to boys for indecent assault was a small chip in the façade of the sexual double standard. On a practical level, amendments made the law more readily enforceable. The extension of the time limit for prosecuting unlawful sexual intercourse meant that cases that became known only when a pregnancy became obvious could now be prosecuted. A more restricted reasonable belief defence would also facilitate successful prosecutions.

⁹ Charles Upchurch, *Before Wilde: Sex between Men in Britain’s Age of Reform* (University of California Press, 2009).

¹⁰ Caroline Derry, ‘Lesbianism and Feminist Legislation in 1921: The Age of Consent and “Gross Indecency between Women”’ (2018) 86 *History Workshop Journal* 245, 251–54.

Anomalies remained: unlawful sexual intercourse could only be committed against a girl, so sex between a woman and boy had to be prosecuted as indecent assault. All sexual conduct between males remained criminal. The extension of the time limit for unlawful sexual intercourse prosecutions was still inadequate and would later be extended to a year by the Criminal Law Amendment Act 1928. The defence to unlawful sexual intercourse of a reasonable belief that the complainant was over 16 was confined to a 'young man's defence' rather than abolished. Interestingly, neither the defence nor the time limit was applied to indecent assault.

Those partial successes are indicators of the compromises that had to be made in order to get the legislation through Parliament. For the AMSH and its leader Neilans, the dangers came from their own allies as well as parliamentary opponents. In particular, other organisations were willing to accept (or even welcomed) repressive measures to which the AMSH was completely opposed. The National Vigilance Association, formed to monitor the implementation of the 1885 Act, took an overtly moralistic approach and defined its purpose as 'the repression of criminal vice'.¹¹ Many feminist organisations supported the Bill, although their main work and expertise was elsewhere, and Neilans was aware of the risk that they would accept measures amounting to 'neo-regulation' without understanding their implications. For example, when a similar Bill had come before Parliament in 1917, the AMSH had opposed amendments allowing the detention of sexually 'misbehaving' girls under 18 but other campaigners had not.¹²

Given these internal tensions, Neilans' leadership achieved remarkable success not only in getting the 1922 Act passed but also in ensuring that it did not contain more repressive measures. When a similar Bill had been introduced by the Bishop of London in 1921, the AMSH had proved willing to lose the Bill rather than see an amendment passed that would have criminalised gross indecency between women.¹³ That Bill, a consolidation of three similar Bills introduced in 1920, had been allowed only very limited parliamentary time by the Liberal/Conservative Coalition Government: it could only pass if it remained agreed (and therefore did not need to move back and forth between the House of Commons and House of Lords). This meant that a 'spoiling amendment' that made the Bill controversial would prevent its becoming law. Such an amendment had therefore been introduced in the House of Commons by Conservative MPs Frederick Macquisten, Howard Gritten and Sir Ernest Wild; the subject matter they chose was criminalisation of gross indecency between women.

¹¹ Quoted in Alan Hunt, *Governing Morals: a Social History of Moral Regulation* (Cambridge University Press, 1999) 161.

¹² Derry, n 10, 252.

¹³ *ibid.*

This was an effective choice for several reasons. First, it could be presented as a matter of sex equality, since it mirrored the 1885 Act's Labouchère amendment. Second, the proposers may have known or suspected that some of the leading reformers, including Neilans, were lesbians themselves. Third, while parliamentarians agreed that sex between women was a very bad thing, the consensus on how to address it was showing signs of stress. The longstanding policy of regulating sex between (respectable, higher-class, white, Christian) women by silencing its existence was seemingly under threat. The rise of sexology had brought discussion of the topic to a wider audience (albeit primarily elite men, including doctors and lawyers), as had a notorious trial a few years earlier. Celebrated dancer Maud Allen had been accused by right-wing MP Noel Pemberton-Billing of belonging to the 'cult of the clitoris' – that is, being a lesbian – and thus, according to his conspiracy theory, being one of thousands of male and female homosexuals compromised by German agents. She had lost her libel trial, whose subject matter remained obscure in the press but was an open secret among lawyers and parliamentarians.¹⁴

The MPs proposing the spoiling amendment presented lesbianism as a present and growing danger. Its opponents insisted that silencing remained effective while criminalisation would make it public knowledge that 'there was this offence; that there was such a horror'.¹⁵ The amendment passed in the House of Commons, where about a third of MPs voted. Some members of the House of Lords would have been willing to accept the amendment rather than lose the Bill, but timely lobbying by Neilans ensured that this did not in fact happen. Prompted by her representations, the Lords rejected the amendment. No longer agreed, the Bill failed for lack of time.¹⁶

Faced with popular anger at the Bill's failure, and with a general election approaching, the Government made sufficient parliamentary time available the following year and reintroduced the measure as a government Bill. Thanks to Neilans' organising, opposition to a gross indecency amendment had become the coalition's policy. Among activists, there was even discussion of the need to decriminalise male homosexuality: Neilans addressed this explicitly in an editorial for the AMSH journal, *The Shield*.¹⁷ In the event, the coalition did not have to assert its opposition to criminalisation. The Bill's opponents did not give up and attempted to reintroduce an amendment criminalising gross indecency between women, but this time it was ruled out of order. The 1922 Act became law without any such provision.

¹⁴ Lucy Bland, *Modern Women on Trial: Sexual Transgression in the Age of the Flapper* (Manchester University Press, 2013) ch 1.

¹⁵ The Earl of Desart, HL Deb 15 August 1921, vol 46, cols 572–73.

¹⁶ Derry, n 10, 259–60.

¹⁷ Alison Neilans, 'Editorial' *The Shield* (November–December 1921) 203–04.

III. What Happened Next

Having achieved its main aims, the uneasy alliance that had promoted the 1922 Act faded away. The AMSH's law reform activity centred upon attempting to get solicitation laws criminalising 'common prostitutes' repealed. It was remarkably successful in gaining the support of other feminist organisations, and was even instrumental in the establishment of a departmental Committee on Street Offences in 1928, whose findings partly supported the AMSH position. However, despite its efforts, it did not succeed in obtaining a full Royal Commission or in the ultimate goal of repeal.¹⁸

Women's organisations had long engaged in other forms of legal work, including observing court cases and supporting complainants. They were therefore well aware that changes to age-of-consent law were one small part of the picture, and their continuing work on sexual exploitation of women and girls largely focused on areas such as prosecutorial practice and sentencing. They also led resistance to both sex trafficking and state regulation of prostitution, nationally and internationally. The AMSH continued to do so within a framework of opposition to state regulation of women – and, as editorials in its journal made clear, of opposition to the criminalisation of both male and female homosexuality.¹⁹ They thus pre-empted the legal developments of the later twentieth century, which moved the criminal law away from regulation of private morality.

It would be some decades before there were major changes to the legal regime of which the 1922 Act formed part. Following the 1956 Wolfenden Report,²⁰ the public debate shifted to a clash between moralism and liberalism in sexual regulation. The latter approach made a significant advance when sexual activity between men was partially decriminalised by the Sexual Offences Act 1967. However, the same report prompted greater criminalisation of soliciting by women, which would have been anathema to Neilans and her colleagues.

The provisions of the 1922 Act in relation to the age of consent for girls remained largely unchanged until their replacement by the gender-neutral provisions of the Sexual Offences Act 2003. The Sexual Offences Act 1956 consolidated them but did little to change them. The law remained sharply gendered. Sexual intercourse with a boy under 16 remained outside the statutory regime, to be dealt with as indecent assault instead. Indecent assault was also charged in cases where unlawful sexual intercourse could not be charged within the narrow time limit, a very real issue given the difficulties of disclosing child sexual abuse. All sexual activity between males remained a criminal offence until partial decriminalisation in 1967, but the liberalising legislation imposed a significantly higher age of consent of 21.²¹

¹⁸ Laite, n 7, 218.

¹⁹ Derry, n 3, 156–57.

²⁰ Committee on Homosexual Offences and Prostitution, *Report of the Committee on Homosexual Offences and Prostitution* (Cmnd 247, 1957).

²¹ Sexual Offences Act 1967.

Lesbianism remained legally silenced, despite the growing influence of sexology and its theories of 'female inversion'. The most prominent British sexologist, Havelock Ellis, painted a picture of masculine 'true invert' whose innate sexuality not only influenced them physically and psychologically but also attracted feminine 'pseudo-inverts' who would otherwise turn to men. That model proved culturally influential and coloured perceptions of lesbianism for many decades. It was aired in court in the obscenity proceedings against Radclyffe Hall's novel *The Well of Loneliness* (a plea for tolerance of the female invert) in 1928, but met with a moralist response from judge Sir Chartres Byron.²² While the trial of 'Colonel' Barker the following year drew more closely upon sexological discourse, that proved to be a temporary aberration. Silencing remained the dominant legal response to sex between women, and sexology would make significant inroads into legal and popular discourse only in the 1950s. Meanwhile, Parliament would not explicitly discuss lesbianism again until the debates on section 28 of the Local Government Act 1988, which prohibited the 'promotion of homosexuality' by local authorities.²³

IV. Significance

The 1922 Act increased protection for girls under 16 from sexual assault, abuse and exploitation. The process leading to its passing also ensured that sex between women never became explicitly criminalised. In all these ways, the Act shaped the criminal law on sexual offences for decades to come. Indeed, its effects are still felt today: the age of consent remains at 16, for example. It is thanks to the efforts of feminist campaigners that the Act was passed at all; that it did not criminalise sex between women; and that it did not extend repressive, quasi-criminal regulation of young women's sexual behaviour.

However, the provisions of the 1922 Act were imperfect, and their implementation by the criminal justice system exacerbated their shortcomings. The structure of sexual offences remained profoundly gendered in ways that drew upon the sexual double standard. The corollary of its underlying assumption that men were dominant sexual actors was that women and girls were expected to act as sexual gatekeepers. As the less desiring partners, it was up to them to resist male advances; and when they failed to do so to the limits of their physical powers, the fault was understood to be theirs. Thus the apparently universal protections for girls under 16 proved inaccessible to those who were not virgins: whatever the letter of the law, police officers and courts understood such girls to be outside their protection.

²²Caroline Derry, 'DPP v Jonathan Cape and Leopold Hill (1928)' in Rackley and Auchmuty (eds), n 1, 271.

²³Derry, n 3, chs 5 and 6.

Those shortcomings have persisted to the present day. Rape myths continue to exert a powerful influence over the criminal justice system – and despite the name, they also affect prosecutions for other sexual offences. Meanwhile, the age of consent has become a settled aspect of the criminal law. The specific age of 16, which was largely a matter of pragmatism, has taken on something of a moral as well as legal force. Proposals to lower it have met with little support and often outright condemnation. There has been no movement for a higher general age of consent – something many of the 1922 campaigners favoured – although it has been raised to 18 where the older party is in a position of trust. Feminists continue to find themselves attempting to educate lawmakers and the criminal justice system on wider issues of exploitation and abuse, which the age of consent can play only a limited role in addressing. They have had some success with greater legal recognition of grooming and coercive control, but rates of prosecution and conviction for age-of-consent offences remain very low.

Sex between women has never fully escaped the silencing imposed upon it by lawmakers. Despite the brief moments of visibility mentioned here, it has generally attracted little consideration in its own right. Rather, since the Wolfenden Report of 1957, whose recommendations led to partial decriminalisation of male homosexuality, sex between women has been understood as a parallel but lesser version of sex between men. Women were characterised in that report as less troublesome and less sexual beings than their male counterparts, and those assumptions remain powerful today. Thus legal reforms aimed at removing discrimination from the law, culminating in the Sexual Offences Act 2003, have paid little attention to their specific needs and perspectives. The ways in which relationships between women can nonetheless be criminalised have attracted little attention, even where they resulted in substantial sentences. There has been greater recent consideration of the law on ‘deceptive consent’ in this context, but the battle to ensure that women’s subjectivities are considered remains ongoing.

Further Reading

- Lucy Bland, *Banishing the Beast: English Feminism and Sexual Morality 1885–1914* (Penguin, 1995).
- Caroline Derry, ‘Lesbianism and Feminist Legislation in 1921: The Age of Consent and “Gross Indecency between Women”’ (2018) 86 *History Workshop Journal* 245.
- Julia Laite, ‘The Association for Moral and Social Hygiene: Abolitionism and Prostitution Law in Britain (1915–1959)’ (2008) 17(2) *Women’s History Review* 207.