Buggery and Parliament, 1533-2017

Paul Johnson

Abstract

Over nearly five centuries the UK Parliament, and its earlier incarnations, frequently legislated to ensure the regulation and punishment of buggery, a form of sexual conduct once generally accepted to constitute one of the most serious criminal offences known to law. In the early twenty-first century, Parliament abolished the offence of buggery and, subsequently, granted pardons to certain individuals previously convicted of it. Whilst some aspects of the history of Parliament's approach to buggery are well known – particularly in respect of homosexual law reform – much of this history remains obscure. This article provides an in-depth consideration of the making of statute law in Parliament relating to buggery that reveals the dramatically changing attitudes of legislators towards this aspect of sexual conduct and highlights the significance and importance of the pardons granted to those convicted of the offence.

1. Introduction

In 2017, the UK Parliament took the significant step of enacting legislation designed to pardon people convicted of or cautioned for certain abolished sexual offences in England and Wales, and Northern Ireland, involving consenting adults.[1] The posthumous pardons granted by the legislation extend back over nearly five centuries and include the offence of buggery,[2] once widely understood to comprise the most

[1] Policing and Crime Act 2017, ss.164-172.
[2] Sometimes referred to as 'sodomy'. The terms 'buggery' and 'sodomy' have often been used interchangeably in legislation from the time the criminal offence was introduced.

'detestable' and 'abominable' form of sexual conduct.[3] The conduct regulated by buggery law, which was never defined in statute and therefore became defined by the courts, consisted of penile penetration of the anus of a man or a woman, or anal or vaginal penetration involving a man or woman and an animal.[4] Until the latter half of the twentieth century, consent by a person to an act of buggery with another person provided no defense to prosecution and, for the majority of the period the offence was in force, the punishment upon conviction was death.

This article provides a historical analysis of Parliament's role in creating and shaping law relating to buggery. Although some aspects of this parliamentary history are well known – particularly in respect of the partial decriminalization in 1967 of sexual acts between men – much of it remains obscure.[5] The principal aim of this article is to examine Parliament's approach to legislating on buggery, from the time that it created the criminal offence in the sixteenth century to the present day. By providing an in-depth consideration of the making of statute law in Parliament relating to buggery in England and Wales, Ireland, and Northern Ireland,[6] the article reveals the dramatically changing attitudes of legislators towards the regulation of this aspect of sexual conduct, and highlights the significance and importance of the recent pardons.

[3] Coke, E. (1817) *The Third Part of the Institutes of the Laws of England*, London, Printed for W.Clarke and Sons, p.58.

[4] In common law, by the late twentieth century, buggery was generally formulated as 'sexual intercourse per anum by a man with a man or a woman, or per anum or per vaginam by a man or a woman with an animal' (*Dudgeon v the United Kingdom* (1981) Series A no 45, para.14). However, this definition was the outcome of the progressive interpretation of statute law by the courts which, over time, led to certain acts being included within or excluded from the ambit of the law. For example, in the nineteenth century the English courts would not accept that fellatio between males constituted an offence of buggery (*R. v Jacobs* (1817) Russ & Ry 331). Coke (op. cit., n. 3) provides an overview of the early development of the interpretation of statute law by the courts. The development of the common law in England and Wales, and Northern Ireland, contrasts with other jurisdictions which evolved definitions of buggery or sodomy that covered a wider range of genital acts (for a discussion, see: Naphy, W. (2002) *Sex Crimes from Renaissance to Enlightenment*, Stroud, Tempus).

[5] A number of historians have provided in-depth accounts of the regulation of sodomy that deal with the development of statute law. See, for example: Burg, B.R. (1981) 'Ho hum, another work of the devil: Buggery and sodomy in early Stuart England', *Journal of Homosexuality*, 6: 69-78; Cocks, H.R. (2003) *Nameless Offences: Homosexual Desire in the Nineteenth Century*, London, I.B.Tauris; Moran, L.J. (1996) *The Homosexual(ity) of Law*, London, Routledge; Weeks, J. (1981) *Sex, Politics and Society: The Regulation of Sexuality since 1800*, London, Longman. Rictor Norton's online sourcebook of homosexuality in eighteenth-century England contains a range of documents relating to the statute law: http://rictornorton.co.uk/eighteen/index.htm (accessed 19 May 2018).

[6] Buggery was not an offence in Scotland. Sodomy, which was equivalent to buggery insofar as it related to sexual acts between men, was a common law offence in Scotland and was abolished by Sexual Offences (Scotland) Act 2009, s.52.

2. Origins of buggery law

The Parliament of England first brought buggery into English criminal law by way of a bespoke Act enacted in 1533.[7] The preamble of that Act made clear that Parliament's reason for acting was based on its view that 'there is not yet sufficient and condign punishment appointed and limited by the due course of the laws of this Realm' to deal with this 'detestable and abominable vice'.[8] To rectify this apparent problem, the Act made buggery 'committed with mankind or beast' a felony, empowered Justices of the Peace to hear cases, and stated that those convicted 'shall suffer such pains of death' as well as 'losses and penalties of their goods, chattels, debts, lands, tenements and hereditaments'.[9] The Act also contained the crucial provision that 'no person offending […] shall be admitted to his clergy',[10] thereby becoming one of several 'less important laws' by which legislators achieved the more general ambition of restricting benefit of clergy.[11]

In creating the criminal offence of buggery, Parliament took control of the regulation of sodomy[12] previously dealt with by the ecclesiastical courts independently of the royal courts.[13] Although the Act of 1533 can be seen to reiterate the religious morality

[7] 25 Hen. 8 c.6 ('An Acte for the punysshement of the vice of Buggerie' 1533). Whilst this Act, according to standard practice, is dated 1533 it originated on 17 January 1534 when the House of Lords ordered that the Judges prepare a Bill for the punishment of the sin of sodomy with death. The Lords gave the Bill its first reading on 19 January 1534 and, after progressing through the various stages of both Houses, the Bill was agreed by the Lords on 7 February 1534. See *Journal of the House of Lords: Volume 1*, pp. 59-60, 65.

[8] 25 Hen. 8 c.6. Quotations from sixteenth century statutes are given with modernized spelling.

[9] Ibid.

[10] Ibid.

[11] Makower, F. (1895) *The Constitutional History and Constitution of the Church of England*, New York, MacMillan and Co., p.447.

[12] The earliest records of English law relating to sodomy are in *Fleta* and *Britton* (circa 1290). *Fleta* states: 'Contrahentes vero cum Judæis vel Judæabus pecorantes & Sodomitæ in terra vivi confodiantur, dum tamen man' oper' capti per testimonium legale vel publice convicti' (Selden, J. (1685) *Fleta, seu Commentarius Juris Anglicani Sic Nuncupatus*, London, H. Twyford, T. Bassett, J. Place, & S. Keble, p.54). Bailey translates this as: 'Those who have dealings with Jews and Jewesses, those who commit bestiality, and sodomists, are to be buried alive, after legal proof that they were taken in the act, and public conviction' (Bailey, D.S. (1955) *Homosexuality and the Western Christian Tradition*, London, Longmans, p.145). *Britton* states that 'sodomites' who are 'publicly convicted' 'shall be burnt' (Nichols, F.M. (1901) *Britton: An English Translation and Notes*, Washington DC, John Byrne & Co., p.35).

[13] According to *Britton*, although the 'Holy Church shall make their inquests of […] sodomites […] if the king by inquest find any persons guilty of such horrible sin, he may put them to death, as a good marshall of Christendom' (Nichols, op. cit., n. 12, pp.35-36). This suggests that although the ecclesiastical courts commonly tried the offence of sodomy they did not have exclusive jurisdiction to

that had hitherto been enforced by the ecclesiastical authorities, it is unlikely that Parliament was principally motivated by a religious fervor to enhance the regulation of this aspect of sexual practice. Rather, as Hyde argues, '[i]ts primary object was part of Henry's policy in general towards the Church [which] included the progressive reduction of the jurisdiction of the ecclesiastical courts'.[14] Understood this way, the Act of 1533 can be seen to reflect the strong anti-papist sentiment encapsulated by a number of enactments during this crucial period of English Reformation[15] and as one element of a broader package of legislative changes designed to diminish ecclesiastical legal authority. Smith argues that the Act of 1533 'was not an isolated piece of legislation but part of a whole battery of laws initiated by the Crown with the single purpose of undermining the political power of the Roman church' and gave 'Henry's agents the legal power they needed to make answerless accusations during the impending visitation of the monasteries'.[16]

The Act of 1533 was not made as permanent legislation but, as it made clear, was intended 'to endure till the last day of the next Parliament'.[17] Although time-limiting a statute in this way had hitherto been an occasional feature of parliamentary practice, the Reformation Parliament dramatically increased the use of this legislative technique.[18] As Elton argues, this 'achieved a novel sophistication which called for a more careful review of laws that would expire unless explicitly continued by further acts'.[19] The Act of 1533 was explicitly continued by further statute, but the process by which this was achieved does not appear to be characterized by 'careful review'. For instance, Parliament unnecessarily passed two Acts in 1536 that continued the Act of

do so and the royal courts could exercise independent authority. For a discussion of how the ecclesiastical courts dealt with sodomy in England, see: Outhwaite, R.B. (2006) *The Rise and Fall of the English Ecclesiastical Courts 1500-1860*, Cambridge, Cambridge University Press.

[14] Hyde, H.M. (1970) *The Other Love: An Historical and Contemporary Survey of Homosexuality in Britain*, London, Heinemann, p.39.

[15] Such as 25 Hen. 8 c.19 ('An Acte for the submission of the Clergie to the Kynges Majestie' 1533), and 26 Hen. 8 c.1 ('An Acte concernynge the Kynges Highnes to be supreme heed of the Churche of Englande & to have auctoryte to refourme & redresse all errours heresyes & abuses yn the same' 1534).

[16] Smith, B.R. (1994) *Homosexual Desire in Shakespeare's England: A Cultural Poetics*, Chicago, University of Chicago Press, pp.43-4. For a discussion of anticlericalism in Parliament at this time see Cavill, P.R. (2015) 'Anticlericalism and the Early Tudor Parliament', *Parliamentary History*, 34(1): 14-29.

[17] 25 Hen. 8 c.6.

[18] Elton, G.R. (1986) *The Parliament of England 1559-1581*, Cambridge, Cambridge University Press, p.137.

[19] Ibid.

1533 in whole.[20] However, one of the Acts of 1536 did explicitly extend the Act of 1533 to persons in holy orders, specifying that such persons would henceforth be under the same 'pains and dangers' if convicted of buggery as those not in holy orders.[21] The Act of 1533 was continued once more in 1539,[22] until it, as well as the extension to persons in holy orders, was finally made perpetual by an Act of 1540.[23]

The Act of 1540 stated that all provisions relating to buggery would be 'observed and kept for ever'.[24] However, 'for ever' in this case proved to be short lived because, seven years later, a statute passed by the first Parliament of Edward VI repealed the Act of 1533.[25] This can be seen as the beginning of a short legislative period in which the greater political and religious currents of the Reformation produced a vacillating approach by Parliament to buggery. For example, although an Act of 1548 re-established buggery as a criminal offence[26] – albeit in a more limited form than the Act of 1533[27] – this was wholly repealed under the reign of Mary I in 1553[28] as one of a number of measures 'intended to restore the former jurisdiction of the ecclesiastical courts'.[29] However, by an Act of 1562, jurisdiction for buggery was returned to the criminal courts when an early Parliament of Elizabeth I revived the original Henrician statute and made it perpetual.[30] In doing so, the Act of 1562 made clear that the lack of statutory provision on buggery had resulted in 'divers evil disposed persons' having become 'more bold to commit the […] most horrible and detestable vice of buggery

[20] 28 Hen. 8 c.1 ('An Acte that Felons abjuryng for Pety Treason murder or felony shall not be admytted to the benefyte of their Clergye' 1536), and 28 Hen. 8 c.6 ('An Acte for the contynuyng of the Statutes […] ayenst the vice of Buggery' 1536).
[21] 28 Hen. 8 c.1, s.2.
[22] 31 Hen. 8 c.7 ('An Acte for Beggers and Vagabonds' 1539).
[23] 32 Hen. 8 c.3 ('For the continuacion of Actes' 1540).
[24] Ibid.
[25] 1 Ed. 6 c.12, s.4 ('An Acte for the Repeale of certaine Statutes concerninge Treasons, Felonyes, &c.' 1547) resulted in 'all offences made felony' since the first year of the reign of Henry VIII, having 'not being felony before', being 'repealed and utterly void, and of none effect'.
[26] 2-3 Ed. 6 c.29 ('An Acte againste Buggorie' 1548).
[27] Ibid. The Act stated that any person convicted would suffer death, without loss of goods, lands, or any other commodity. A proviso, likely inserted by the House of Commons when it considered the Bill, time-limited the prosecution of an offence to six months after it was alleged to have taken place, placed limitations on who could act as a witness or give evidence against a defendant, and removed corruption of blood to any heir of an offender.
[28] 1 Mary Sess.1 c.1 ('An Acte repealing certayne Treasons Felonies and Premunire' 1553). Although s.3 of this Act seemingly repealed 2-3 Ed. 6 c.29 in full, the Statute Law Revision Act 1863 also claimed to repeal it, suggesting some confusion or uncertainty.
[29] Hyde, op. cit., n. 14, p.40.
[30] 5 Eliz. 1 c.17 ('An Act for the punishement of the Vyce of Sodomye' 1562).

[…] to the high displeasure of Almighty God'.[31] The provisions made by the Act of 1562 were to remain in force for 266 years.

3. Naval law

For nearly a century after the Act of 1562, Parliament paid no attention to buggery in statute, save to except the offence from any 'general pardons' that were issued.[32] In an Act of 1661, however, Parliament made statutory provision to ensure 'the regulating and better government' of the navy[33] and, in doing so, enacted Articles of War that dealt with a number of matters touching upon 'morals',[34] one of which was 'the unnatural and detestable sin of buggery or sodomy'.[35] The relevant Article stated that any person or persons 'in or belonging to the fleet' committing this offence would be punished by 'death, without mercy'.[36] Whilst the formulation of this provision undoubtedly reflected the sentiment of the general criminal law, the reason for its explicit inclusion in the Articles is not entirely clear. Burg, for example, argues that there is 'no indication that the Restoration prohibition against sodomy reflected a response to homoeroticism run rampant in the navy' and that '[n]o sodomites were prosecuted under it during the final forty years of the seventeenth century'.[37] Nevertheless, Parliament reenacted the naval prohibition on buggery in a subsequent Act of 1749 – albeit in a modified form that omitted any reference to 'mercy' and specified that the punishment of death would be 'by the sentence of a court-martial'[38] – and maintained it in a series of statutes, the last of which was enacted in 1866,[39] before it was omitted from the Naval Discipline Act 1957 in place of a general Article covering all 'civil offences'.[40] Parliament made no specific or explicit provision

[31] Ibid.
[32] For example: 7 Jac. 1 c.24 ('An Acte for the Kings most gracious general and free pardon' 1609); 12 Car. 2 c.11 ('An Act of free and generall pardon indempnity and oblivion' 1660).
[33] 13 Car. 2 St. 1. c.9 ('An Act for the Establishing Articles and Orders for the regulateing and better Government of His Majesties Navies Ships of Warr & Forces by Sea' 1661).
[34] For a discussion, see: Malcomson, T. (2016) *Order and Disorder in the British Navy, 1793-1815: Control, Resistance, Flogging and Hanging*, Woodbridge, The Boydell Press, p.27.
[35] 13 Car. 2 St. 1. c.9, art.32.
[36] Ibid.
[37] Burg, B.R. (2007) *Boys at Sea: Sodomy, Indecency, and Courts Martial in Nelson's Navy*, Basingstoke, Palgrave MacMillan, p.30.
[38] 22 Geo. 2 c.33, art.29 ('An Act for amending, explaining and reducing into one Act of Parliament, the laws relating to the Government of his Majesty's ships, vessels and forces by sea' 1749).
[39] Naval Discipline Act 1866. Article 45 makes no reference to buggery, only sodomy.
[40] Naval Discipline Act 1957, art.42.

regulating buggery in respect of the Army – over which the Crown retained authority for making Articles of War until 1879[41] – or the Royal Air Force. However, Army and Air Force personnel who engaged in this practice could be prosecuted and punished under other, more general provisions in the Articles of War and relevant service discipline legislation.

4. Consolidation and codification of the criminal law

During the nineteenth century, Parliament made a number of significant changes to the criminal law of buggery. These changes in statute law reflected and, in some ways, responded to the significant development of common law by the courts during the time since Parliament had last enacted a criminal law statute on buggery in 1562. As Cocks argues, 'statute was usually a long way behind the common law and simply confirmed patterns of policing, sentencing and prosecution which had grown up in response to local necessity'.[42] In 1828, as part of Robert Peel's efforts to codify English criminal law, Parliament repealed the extant Tudor buggery statutes and enacted legislation that designated buggery as an 'offence against the person'.[43] The Act of 1828 made no significant change to the wording of the buggery offence – stating that 'every person convicted of the abominable crime […] shall suffer death as a felon'[44] – but did introduce a new provision instructing the courts on what they should accept as 'sufficient proof of carnal knowledge'.[45] The reason for this was that Parliament considered that 'offenders frequently escape' justice because of the 'difficulty of the proof' required by the courts and, as a remedy to this, established that henceforth it would not be necessary in cases of buggery 'to prove the actual emission of seed in order to constitute a carnal knowledge, but that the carnal knowledge shall be deemed

[41] Annual 'Mutiny Acts' passed by Parliament from the seventeenth century onwards saved to the Crown the authority to make Articles of War until the Army Discipline and Regulation Act 1879 consolidated them into one statute. The Act of 1879, and the Army Act 1881 that superseded it, contained a proviso allowing the Crown to continue to make Articles of War but this can be seen as an 'empty formality' (McLean, R. (1917) 'Historical sketch of military law', *Journal of the American Institute of Criminal Law and Criminology*, 8(1): 27-32, p.29). Annual 'Marine Mutiny Acts' regulating marines while on shore functioned in a similar way until 1879 by empowering the Lord High Admiral to make Articles of War.
[42] Cocks, op. cit., n. 5, p.22.
[43] Offences Against the Person Act 1828 repealed 25 Hen. 8 c.6 and 5 Eliz. 1 c.17.
[44] Offences Against the Person Act 1828, s.15.
[45] Ibid, s.18.

complete upon proof of penetration only'.[46]

The new provision on proof originated in an amendment made by a Committee of the whole House of Commons to the Bill at the behest of Home Secretary Peel.[47] Although Peel stated that it was 'very difficult to discuss' a subject involving the crime 'inter Christianos non no-minandum', he strongly expressed the view that 'public justice was often thwarted' by the 'unnecessary difficulty which the law had placed in its way' by establishing that 'two kinds of proof were necessary to conviction' in respect of buggery and certain other crimes.[48] Removing one of those proofs – 'actual emission of seed' – would, Peel argued, result in the 're-establishment of the ancient law of England, as it existed' before the courts had established, in 1781, that this was required.[49] Although Parliament accepted provisions lowering the standard of proof that had been developed by the courts in respect of buggery, it was not content to enact a provision that would have extended the penalty of death to those convicted of 'counselling aiding or abetting'[50] the crime of buggery and this was removed from the Bill at a late stage of its passage.[51]

In the same year as the Act of 1828, Parliament enacted further legislation to make criminal law provision for buggery in the East Indies[52] and, a year later, in Ireland.[53] Around this time, Parliament also made a number of other changes to statute that intensified aspects of criminal law relating to buggery. For example, in 1825, Parliament amended the law regulating the sending of threatening letters to ensure that a wider range of communications touching upon 'the abominable crimes of sodomy or buggery' be deemed 'infamous' and, as a consequence, offenders be subject to more severe punishment.[54] The principal aim of this change was to ensure that those who sent letters as a means to 'extort money or other valuable things' by 'charging an

[46] Ibid.
[47] *Journals of the House of Commons*, vol.83, 5 May 1828, p.316.
[48] HC Debate, 5 May 1828, vol.19, c.354.
[49] Ibid, c.355.
[50] A Bill, as amended on re-commitment, intituled, an Act for consolidating and amending the statutes in England relative to offences against the person, 16 May 1828, p.10.
[51] Offences Against the Person Act 1828, s.31 made provision for accessories to offences.
[52] Criminal Law (India) Act 1828, s.63.
[53] Offences Against the Person (Ireland) Act 1829, s.18. This Act repealed 10 Car.1 st.2 c.20 ('An Act for the punishment of the vice of Buggery' 1634) which was the statute enacted by the Parliament of Ireland that had incorporated buggery into the criminal law of Ireland.
[54] Threatening Letters Act 1825.

attempt to commit a certain offence' would be punished as severely as those who sent letters 'charging with the offence itself'.[55] The consequence of this was that the law regulating threatening letters was expanded to cover not only letters accusing a person of an attempt to commit buggery but also 'every solicitation, persuasion, promise, threat or menace, offered or made to any person, whereby to move or induce such person to commit or to permit' that offence.[56]

Parliament's abhorrence of buggery during the nineteenth century is plainly illustrated by its attitude towards punishing offenders with death. When a Bill was introduced into the House of Commons in 1841 that proposed to abolish death as a punishment for those convicted under English law of buggery, rape or unlawful carnal knowledge of a girl under the age of ten years, replacing it with transportation beyond the seas or imprisonment,[57] MPs were uneasy at making this change on the basis that, for example, 'there could be no doubt that the more atrocious cases of the kind were as deserving of death as any crime'.[58] Although the House of Commons ultimately accepted the removal of the punishment of death for buggery,[59] the House of Lords did not concur. The Earl of Wicklow argued, for example, that 'the people of this country would never confirm' that 'sodomy and rape were not crimes of so heinous a character as to deserve death'.[60] The Earl of Winchilsea, who was strongly against any change in the law regarding buggery, 'implored their Lordships not to withdraw the punishment of death from a crime so utterly abhorrent to the feelings of human nature' and proposed an amendment designed to omit the reference to buggery in the Bill, allowing the punishment of death to continue for that offence.[61] The Marquess of Normanby stated that if Parliament 'commuted the punishment to transportation for life, that would necessarily imply communion of the offenders with other prisoners,

[55] Robert Peel MP, HC Debate, 24 March 1825, vol.12, c.1163.
[56] Threatening Letters Act 1825. See also Larceny Act 1827; Larceny (Ireland) Act 1828; Robbery from the Person Act 1837; Threatening Letters, etc. Act 1847; Larceny Act 1861; Larceny Act 1916. For a discussion see: Upchurch, C. (2009) *Before Wilde: Sex Between Men in Britain's Age of Reform*, Berkeley, University of California Press.
[57] A Bill for taking away the punishment of death in certain cases, and substituting other punishments in lieu thereof, 12 February 1841, clause 4.
[58] Lord John Russell MP, HC Debate, 3 May 1841, vol.57, c.1418.
[59] In Committee, the House voted Ayes 123 to Noes 61 in respect of the clause removing the punishment of death for buggery. HC Debate, 3 May 1841, vol.57, c.1420.
[60] HL Debate, 17 June 1841, vol.58, c.1557.
[61] HL Debate, 18 June 1841, vol.58, c.1568.

which would be highly improper' and the amendment was agreed.[62] As a consequence, Parliament abolished the punishment of death for rape and unlawful carnal knowledge of a girl under the age of ten years, but retained that punishment for buggery.[63]

Twenty years later, in 1861, Parliament removed the punishment of death for the crime of buggery when it consolidated the criminal law relating to offences against the person for both England and Wales, and Ireland.[64] It had been 26 years since the last execution in England for buggery[65] when Parliament decided that a person convicted of that crime would 'be kept in penal servitude for life or for any term not less than ten years'.[66] In the two years before Parliament took this decision, the sentences of death that had been handed down to those convicted of sodomy had been commuted to punishments ranging from penal servitude for life to imprisonment for 12 months.[67] Parliament's decision to set the minimum sentence for buggery at ten years of penal servitude might be seen to express the desire to keep the punishment for buggery as severe as possible. However, the original Bill had proposed a mandatory sentence of penal servitude for life,[68] and it was a Select Committee of the House of Commons that introduced an amendment making provision to allow the courts to pass sentences of ten years.[69] The Select Committee, however, took a more punitive approach in respect of the offence of attempting to commit buggery – which appeared in statute for the first time[70] – and amended the penalty originally proposed in the Bill, of

[62] Ibid, c.1569.
[63] Substitution of Punishments for Death Act 1841, s.3.
[64] Offences Against the Person Act 1861. The provisions relating to buggery in Offences Against the Person Act 1828 and Offences Against the Person (Ireland) Act 1829 were repealed by Criminal Statutes Repeal Act 1861.
[65] Trial of John Smith, James Pratt and William Bonill (Central Criminal Court, Sessions Paper, Eleventh Session, 21 September 1835, pp.728-9) resulted in the execution of Smith and Pratt.
[66] Offences Against the Person Act 1861, s.61.
[67] House of Commons Papers, 'Return of convicts reprieved from execution of capital sentences, 1859-69', vol.17, p.21.
[68] A Bill to consolidate and amend the statute law of England and Ireland relating to offences against the person, 14 February 1861, clause 62.
[69] House of Commons, 'Reports from the Select Committee on the Offences Against the Person, &c. Bills', 7 May 1861. This decision was probably taken to bring statute law into line with the practice of the courts, as discussed by Cocks (op. cit., n. 5, p.31).
[70] Offences Against the Person Act 1861, s.62. Prior to this, depending on the circumstances of the case, an attempt to commit buggery could be dealt with in English law under provisions in the Hard Labour Act 1822 (which made provision in respect of 'any assault with intent to commit felony' and 'any attempt to commit felony') and Offences Against the Person Act 1828 (s.25 of which made provision in respect of 'assault with intent to commit felony'). See Upchurch (op. cit., n. 56, p.93) for a discussion of the operation of these statutes and how they 'incorporated aspects of established common-law

imprisonment for any term not exceeding three years with or without hard labour,[71] to allow for a sentence of penal servitude for any term not exceeding ten years and not less than three years.[72] This amendment was accepted by Parliament and enacted as one aspect of an expanded package of buggery laws that were given the designation 'unnatural offences'.[73]

5. Marriage and divorce

Parliament's concern with buggery in the nineteenth century expanded beyond the criminal law when, in relation to a Bill of 1854, it considered the question of whether a wife should be able to seek the dissolution of a marriage on the basis that her husband had committed 'unnatural crimes'.[74] At that time there was 'much vacillation' on this issue[75] but, three years later, in 1857, as part of a more extensive reform of English divorce law, Parliament declared that any wife could present a petition to the newly established Court for Divorce and Matrimonial Causes praying that her marriage be dissolved on the ground that, since the celebration of the marriage, her husband had been guilty of sodomy.[76] This provision, which was not included in the original Bill,[77] was inserted by the House of Commons during its Committee stage consideration of the grounds on which a wife should be legally permitted to petition for divorce.[78] Originally, the Bill had focused on a husband's adultery as grounds for divorce, but the inclusion of the sodomy provision – as well as provisions relating to bestiality and rape – created grounds for a wife to seek a divorce not connected with adultery.[79] The House of Commons rejected a proposal that a husband should have to be 'convicted'

practice'. For a discussion of the origins and development of the common law in respect of attempted buggery see Cocks (op. cit., n. 5, p.32).

[71] A Bill to consolidate and amend the statute law of England and Ireland relating to offences against the person, 14 February 1861, clause 63.

[72] Op. cit., n. 69. Enacted as Offences Against the Person Act 1861, s.62, which made provision for attempt to commit buggery, any assault with intent to commit buggery, and any indecent assault upon any male person, and specified that any person convicted 'shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour'.

[73] Offences Against the Person Act 1861, ss.61-63.

[74] Joseph Henley MP, HC Debate, 24 July 1857, vol.147, c.376.

[75] Ibid.

[76] Matrimonial Causes Act 1857, s.27.

[77] A Bill intituled an Act to amend the law relating to divorce and matrimonial causes in England, 25 June 1857.

[78] HC Debate, 13 August 1857, vol.147, c.1585.

[79] Joseph Henley MP, HC Debate, 21 August 1857, vol.147, c.1977.

of sodomy, rather than merely deemed 'guilty' of it by his wife, for a divorce to be lawful.[80] However, when the House of Lords considered and ultimately accepted the 'revolting' provision relating to sodomy,[81] it is clear that there was some confusion over the meaning of the word 'guilty' – the Lord Chancellor considered that 'the word "guilty" […] would mean convicted' whilst other peers thought it would not[82] – and it was Lord Redesdale who clarified that 'the question of the person's guilt would have to be inquired into and decided upon by the Court'.[83]

The Act of 1857 did not specify the sex of the partner that a husband must commit sodomy with in order to be deemed guilty of that act for the purpose of his wife obtaining a divorce. However, when Parliament returned to this issue in 1937 during consideration of a Bill related to marriage, an amendment moved by Viscount Dawson of Penn made clear that legislators understood the provision on sodomy to provide a remedy to wives whose husbands had engaged in same-sex sexual acts. Viscount Dawson's amendment sought to make provision for either a husband or a wife to obtain a divorce on the ground that a spouse had 'since the celebration of the marriage been guilty of the practice of homo-sexuality'.[84] He explained that the focus on homosexuality – which is one of the earliest recorded uses of this word in a Parliamentary debate[85] – was designed to avoid the 'inadequate and unsuitable' concept of 'sodomy' which was 'a rather vulgar crime which is only open to the male'.[86] Making homosexuality a ground for divorce would, Viscount Dawson argued, 'protect the man against the Lesbian' just as the existing law protected 'a woman against a male homo-sexualist'.[87] Viscount Dawson was incorrect in his assertion that the 'crime' of sodomy was 'only open to the male', but he was correct that the sodomy provision in divorce law did not provide a husband with a means to obtain a divorce if his wife engaged in same-sex sexual acts. The amendment was negatived and the

[80] HC Debate, 13 August 1857, vol.147, cc.1585-7.
[81] Lord Cranworth, HL Debate, 24 August 1857, vol.147, c.2046.
[82] Ibid, c.2047.
[83] Ibid.
[84] HL Debate, 7 July 1937, vol.106, c.140.
[85] The first recorded reference to 'homosexuality' in a parliamentary debate appears to be in a speech by Viscount Dawson of Penn (HL Debate, 28 June 1937, vol.105, c.829) who subsequently described this as 'a matter which is almost foreign' to Parliament (HL Debate, 7 July 1937, vol.106, c.144).
[86] HL Debate, 7 July 1937, vol.106, c.141.
[87] Ibid, c.145.

sodomy provision remained applicable only to men deemed guilty of this act[88] until it was removed from English divorce law in 1973.[89]

6. Decline and repeal of the criminal law

The most well known aspect of buggery law – its partial decriminalization in England and Wales in 1967 – marked the start of a period of legislative reform, spanning four decades, during which Parliament progressively dismantled and ultimately abolished this aspect of sexual regulation.[90] Ten years after the 'Wolfenden Report' of 1957,[91] the Sexual Offences Act 1967 established that an act of buggery[92] (or 'gross indecency'[93]) would no longer be an offence if it was committed in private and involved two consenting men who had attained the age of 21 years.[94] This change precipitated a number of legislative concerns and complexities in respect of aspects of buggery that, over a period of forty years, Parliament was required to address.

6.1 Non-consensual buggery

The Sexual Offences Act 1967 introduced a novel concept into English criminal law,

[88] See Supreme Court of Judicature (Consolidation) Act 1925; Matrimonial Causes Act 1937; Matrimonial Causes Act 1950; Matrimonial Causes Act 1965.
[89] Matrimonial Causes Act 1973.
[90] For in-depth discussion of the Parliamentary debates on the Sexual Offences Act 1967 see: Grey, A. (1992) *Quest for Justice: Towards Homosexual Emancipation*, London, Sinclair-Stevenson; McManus, M. (2011) *Tory Pride and Prejudice: The Conservative Party and Homosexual Law Reform*, London, Biteback Publishing; Johnson, P. and Vanderbeck, R.M. (2014) *Law, Religion and Homosexuality*, Abingdon, Routledge.
[91] Home Office, *Report of the Committee on Homosexual Offences and Prostitution* (Cmnd. 247), London: Home Office, 1957.
[92] The offence of buggery, in England and Wales, was consolidated in Sexual Offences Act 1956, s.12.
[93] Sexual Offences Act 1956, s.13 ('indecency between men'), originating in Criminal Law Amendment Act 1885, s.11 ('outrages on decency'). The Criminal Law Amendment Act 1885 – which criminalized '[a]ny male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person' – provided a statutory framework to regulate what contemporary commentators on the law termed 'men [who] have been guilty of filthy practices together, which have not been sufficiently public to have constituted indecent exposure, or which have not had sufficiently direct connection with a more abominable crime to allow of an indictment for conspiring or for soliciting one another to commit an unnatural offence' (Mead, F. and Bodkin, A.H. (1885) *The Criminal Law Amendment Act 1885 with Introduction, Notes, and Index*, London, Shaw and Sons, p.69). The Act of 1885 therefore enabled the regulation of male same-sex sexual acts in private without the need to prove any connection to buggery. For a discussion of 'gross indecency' law, and specifically its relationship to buggery law, see Cocks (op. cit., n. 5) and Johnson and Vanderbeck (op. cit., n. 90).
[94] Sexual Offences Act 1967, s.1(1).

that of consensual buggery. As a consequence of this, Parliament enacted several statutes that, for the first time, made reference to the offence of buggery 'without consent'[95] or with 'a person who has not consented'.[96] The Act of 1967 also introduced revised punishments for consensual and non-consensual acts of buggery between men. One consequence of this was that the maximum punishment imposable on a man convicted of non-consensual buggery with another man of or over the age of 16 years was reduced from imprisonment for life to imprisonment for 10 years.[97] By contrast the maximum punishment for buggery of a female remained life imprisonment.[98] During the early 1990s, some parliamentarians concerned with the issue of 'male rape' sought to challenge the law relating to non-consensual buggery. For example, in 1994, Robert Spink MP argued for a change in the law relating to 'forced buggery' on the grounds that the existing law created 'discrimination on the irrational basis of the gender of the victim'.[99] In 1994, the House of Lords agreed an amendment moved by Lord Ponsonby to the Criminal Justice and Public Order Bill that sought to redefine rape as 'sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse does not consent to it'.[100] As a result of this, non-consensual buggery of a man or a woman was reclassified as rape and the punishment for the offence set at life imprisonment. Earl Ferrers stated that the government was 'confident' that Lord Ponsonby's amendment was not 'pre-empting public opinion in suggesting that rape should be re-defined in this way' but, rather, providing legislators with the 'opportunity to catch up with it'.[101]

6.2 Heterosexual buggery

The Sexual Offences Act 1967 made no change to the law regulating buggery committed between a man and a woman and, as a consequence, left in place the total prohibition of such acts. This was, at the time, regarded by some parliamentarians as

[95] Criminal Justice Act 1982, sch.1 pt.2 para.13.
[96] Police and Criminal Evidence Act 1984, sch.5 pt.1 para.7(b); Criminal Justice Act 1988, sch.14 para.2(g)(ii).
[97] Sexual Offences Act 1967, s.3(1).
[98] Sexual Offences Act 1956, sch.2 para.3.
[99] HC Debate, 14 March 1994, vol.239, c.720.
[100] HL Debate, 11 July 1994, vol.556, cc.1605-8. Enacted as Criminal Justice and Public Order Act 1994, s.142 (amending Sexual Offences Act 1956, s.1).
[101] HL Debate, 11 July 1994, vol.556, c.1608.

an ‘extraordinary state of affairs, and one not less calculated to preserve respect for the law’.[102] However, following the Act of 1967, legislators consistently overlooked this aspect of buggery law because, as was often the case, buggery was mistakenly understood as a ‘homosexual offence’. This was probably also the case with the general public who, as Baroness Mallalieu argued in 1994, ‘are astonished to learn’ that consensual heterosexual buggery remained a criminal offence attracting a maximum penalty of life imprisonment.[103] The effect of this continuing prohibition, Baroness Mallalieu claimed, was that people ‘continued to be sent to prison for heterosexual consensual buggery for nearly 30 years after consensual homosexual buggery was legalised’.[104]

There was certainly explicit resistance in Parliament to removing the total prohibition of heterosexual buggery. Some, such as Lord Campbell of Alloway, believed that ‘a man owes a certain duty to a woman’ and that it would be wrong to conclude that the law ‘has no moral role in setting the standards’ in this respect.[105] Nevertheless, in 1994, the House of Lords accepted an amendment to the Criminal Justice and Public Order Bill which resulted in buggery of a female being partially decriminalized in England and Wales in largely the same way as the law then applied to buggery between males.[106] In giving his approval to this change in the law, Earl Ferrers stated that he had ‘no idea, thank heavens, and no way of knowing whether it is a common practice’ but that it was ‘obvious that this offence is unenforceable’.[107] In 2003, during a period of suspension of the Northern Ireland Assembly, the UK Parliament passed legislation partially decriminalizing buggery of a female in Northern Ireland.[108] However, by this stage, when buggery was often described in Parliament as an offence

[102] Ian Percival MP, HC Debate, 3 July 1967, vol.749, c.1464.
[103] HL Debate, 20 June 1994, vol.556, c.75.
[104] HL Debate, 11 July 1994, vol.556, c.1625.
[105] HL Debate, 20 June 1994, vol.556, c.78.
[106] HL Debate, 11 July 1994, vol.556, cc.1623-6. Criminal Justice and Public Order Act 1994, s.143 partially decriminalized heterosexual buggery in England and Wales and set the same minimum age of 18 years for both heterosexual and homosexual acts of buggery in private. However, buggery between men remained subject to stricter privacy requirements. Criminal Justice and Public Order Act 1994, s.143(3) (amending Sexual Offences Act 1956, s.12) provided that, in respect of an act of buggery by one man with another, no act would be deemed to be ‘in private’ if more than two persons took part or were present, or it took place in a public lavatory (this reiterated Sexual Offences Act 1967, s.1(2)).
[107] HL Debate, 11 July 1994, vol.556, c.1626.
[108] Sexual Offences Act 2003, s.140 and sch.7 repealed Offences Against the Person Act 1861, ss.61-2. Criminal Justice (Northern Ireland) Order 2003 continued to partially criminalise buggery (art.19) and assault with intent to commit buggery (art.20).

that criminalized 'consensual sexual activity in private between men that would not be illegal between heterosexuals'[109] and applied only to 'male homosexual acts',[110] it is clear that the heterosexual dimension of buggery had already been significantly forgotten.

6.3 Homosexual buggery

The Parliamentary debates that accompanied and led to the progressive decriminalization of male homosexual acts from 1967 onwards are very well known and extensively documented.[111] What has been less remarked upon is the extent to which the path of this decriminalization was determined by specific concerns among legislators over buggery. For example, prior to the Sexual Offences Act 1967, many legislators who were supportive of the partial decriminalization of male homosexual acts, argued in favour of retaining a complete prohibition of what the Archbishop of Canterbury, Geoffrey Fisher, called the 'extreme offence'.[112] It was often because of specific concerns regarding buggery, rather than other sexual acts between men, that parliamentary debates about homosexual law reform became fraught and legislative change was stunted.

It was, for example, the campaign to 'save Ulster from sodomy' that contributed to the UK government deciding not to legislate to partially decriminalize male homosexual acts in Northern Ireland in the late 1970s,[113] which resulted in that change being delayed until the government was compelled to act in 1982[114] in order to comply with a judgment of the European Court of Human Rights.[115] In 1994, concerns about 'the buggery of adolescent males'[116] and of 'putting your penis into another man's arsehole'[117] were a basis on which parliamentarians rejected a proposal to reduce the

[109] Lord Falconer of Thoroton, HL Debate, 13 February 2003, vol.644, c.775.
[110] Lord Alli, HL Debate, 13 February 2003, vol.644, c.796.
[111] See, for example: Grey op. cit., n. 90; Gleeson, K. (2008) 'Freudian slips and coteries of vice: The Sexual Offences Act of 1967', *Parliamentary History*, 27(3): 393-409.
[112] HL Debate, 4 December 1957, vol.206, c.757.
[113] HC Written Answers, 2 July 1979, vol.969, c.466W.
[114] Homosexual Offences (Northern Ireland) Order 1982.
[115] *Dudgeon v the United Kingdom* (1981) Series A no 45.
[116] Tony Marlow MP, HC Debate, 21 February 1994, vol.238, c.78.
[117] Nicholas Fairbairn MP, HC Debate, 21 February 1994, vol.238, c.98.

minimum age for male homosexual acts to 16 years[118] (buggery continuing to be regarded by some as 'medically dangerous, social destructive and unnatural'[119]). In 2000, when Parliament addressed again the minimum age for male homosexual acts, it was a decision by the House of Lords to retain a higher minimum age for buggery, in contrast to all other sexual acts,[120] that precipitated the government using the Parliament Acts 1911 and 1949 to overcome resistance to lowering the minimum age for both homosexual and heterosexual buggery.[121] This action can be seen to have produced a decisive change in Parliament's approach to buggery and, when the offence was abolished in English criminal law three years later, there was no significant debate on the issue.[122]

6.4 Bestiality

The aspect of buggery law that remained most undisturbed in statute from the point of its inception concerned sexual activity between a human and another animal.[123] Until 2003, buggery with an animal was punishable by life imprisonment but, when the buggery offence was repealed, and a new offence of 'intercourse with an animal' was created, the maximum punishment was reduced to imprisonment for two years on conviction on indictment, or six months imprisonment on summary conviction.[124] At the time that the new offence was introduced, Lord Falconer stated that the behaviour being criminalized is 'generally accepted to be deviant' but that the maximum penalty

[118] HC Debate, 21 February 1994, vol.238, Division No.136. The House of Commons did agree an amendment that, upon enactment in Criminal Justice and Public Order Act 1994, s.145 reduced the minimum age for male homosexual acts to eighteen years (HC Debate, 21 February 1994, vol.238, Division No.137). Criminal Justice and Public Order Act 1994, ss.145-6 also partially decriminalized male homosexual acts in respect of the armed forces and merchant navy, but provided that this did not prevent 'a homosexual act' (buggery and gross indecency) from constituting a ground for discharging a member of the armed forces or dismissing a member of the crew of a merchant ship. The provisions relating to the armed forces were repealed by Armed Forces Act 2016, s.14 (I should declare the interest that this was the result of evidence I gave, with Duncan Lustig-Prean, to the Armed Forces Bill Select Committee: see Mark Lancaster MP, HC Debate, 11 January 2016, vol.604, c.601) and to merchant shipping by Merchant Shipping (Homosexual Conduct) Act 2017.
[119] Robert Spink MP, HC Debate, 14 March 1994, vol.239, c.719.
[120] HL Debate, 13 November 2000, vol.619, Division No.1.
[121] HC Debate, 30 November 2000, vol.357, c.1137; Sexual Offences (Amendment) Act 2000.
[122] For a discussion of this change in parliamentary discourse see: Johnson and Vanderbeck, op. cit., n. 90.
[123] Offences Against the Person Act 1828, s.15 introduced the word 'animal' in place of the previously used word 'beast'.
[124] Sexual Offences Act 2003, s.69; Sexual Offences (Northern Ireland) Order 2008, art.73.

of life imprisonment was 'disproportionate'.[125] The change in law attracted little parliamentary debate and virtually no dissent. Lord Lucas made an unsuccessful attempt to extend the new offence beyond the penile penetration of the vagina or anus of a living animal to also include a dead animal, and beyond the penetration of a human vagina or anus by the penis of a living animal to include other forms of penetration.[126] There was no appetite for these proposals among legislators who appeared to be in general agreement that, as Lord Monson put it, 'the Government have broadly got it about right' in their approach to changing the law.[127]

7. Disregards and pardons

Following the abolition of the offence of buggery in English law in 2003[128] and in Northern Irish law in 2008,[129] the UK government took the step of enacting legislation in 2012 that, as Theresa May MP stated, 'rights historic wrongs' by addressing the problem that 'gay men can still be penalised and discriminated against because of convictions for conduct which is now perfectly lawful'.[130] The legislation introduced a scheme whereby any person convicted of, or cautioned for, buggery or gross indecency between men in England and Wales is able to apply to the Home Office to have the conviction or caution disregarded. If certain statutory conditions relating to the offence are met[131] and a person has a conviction or caution disregarded then they are treated for all purposes in law as if they had not committed the offence or suffered any criminal justice system consequence for it.[132] The disregard scheme was widely supported by parliamentarians and was positively welcomed in both Houses and across benches, including the Bishops' benches.[133]

[125] HL Debate, 19 May 2003, vol.648, c.575.
[126] HL Debate, 9 June 2003, vol.649, cc.80-83.
[127] Ibid, c.82.
[128] Sexual Offences Act 2003, s.140 and sch.7 repealed Sexual Offences Act 1956, s.12 ('buggery').
[129] Sexual Offences (Northern Ireland) Order 2008, art.83 and sch.3 repealed Criminal Justice (Northern Ireland) Order 2003, arts.19-20 ('buggery' and 'assault with intent to commit buggery').
[130] HC Debate, 1 March 2011, vol.524, c.213.
[131] Protection of Freedoms Act 2012, s.92(3). The conditions are that it appears to the Secretary of State that the other person involved in the conduct constituting the offence consented to it and was aged 16 or over, and the conduct now would not be an offence under Sexual Offences Act 2003, s.71 ('sexual activity in a public lavatory').
[132] Protection of Freedoms Act 2012, s.96(1).
[133] Bishop of Bristol, HL Debate, 8 Nov 2011, vol.732, c.179.

In light of the introduction of the disregard scheme for people living with cautions or convictions for now repealed sexual offences, Lord Sharkey made two unsuccessful attempts in 2012 and 2014 to extend the scheme to offer 'comfort and rehabilitation' to 'families, relatives, friends and loved ones of those convicted […] who have since died'.[134] The government was unreceptive to the idea of 'posthumous disregards' and, as a response to this, Lord Sharkey turned his attention to obtaining a posthumous pardon for Alan Turing as a 'symbolic first step' towards achieving the same outcome for all deceased men convicted of repealed homosexual offences.[135] Lord Sharkey's Alan Turing (Statutory Pardon) Bill received an enthusiastic reception in the House of Lords and achieved its Third Reading, at which point it was halted by the government successfully requesting that the Queen issue Mr Turing a posthumous pardon under the Royal Prerogative of Mercy[136] – an act which attracted considerable criticism, not least in the form of a petition which received over 600,000 signatures calling for pardons for 'all of the estimated 49,000 men who, like Alan Turing, were convicted of consenting same-sex relations under the British "gross indecency" law' and 'also all the other men convicted under other UK anti-gay laws'.[137]

The public response to Mr Turing's pardon almost certainly encouraged the Conservative Party to pledge in its 2015 Election Manifesto that it would 'introduce a new law' to pardon men who suffered from 'historic charges, even though they would be completely innocent of any crime today'.[138] This was achieved by way of a government supported amendment moved by Lord Sharkey to the Bill that became the Policing and Crime Act 2017 which, upon enactment, provided posthumous pardons for those convicted of or cautioned for buggery (or gross indecency between men) under English law extending back to the Henrician statute of 1533.[139] Posthumous pardons are granted to any convicted or cautioned person who died before the Act of

[134] HL Debate, 20 Mar 2012, vol.736, c.875. See also HL Debate, 21 July 2014, vol.755, cc.1001-8.
[135] HL Debate, 19 July 2013, vol.747, c.1006.
[136] The pardon was granted 24 December 2013.
[137] Change.org website. https://www.change.org/p/british-government-pardon-all-of-the-estimated-49-000-men-who-like-alan-turing-were-convicted-of-consenting-same-sex-relations-under-the-british-gross-indecency-law-only-repealed-in-2003-and-also-all-the-other-men-convicted-under-other-uk-anti-gay [accessed 25 March 2018].
[138] The Conservative Party Manifesto 2015, p.46.
[139] Policing and Crime Act 2017, s.164.

2017 came into force if certain statutory conditions are met.[140] The government would not accept that living persons should receive a pardon in the same way as deceased persons – it rejected a proposed amendment to the Bill by Lord Cashman designed to achieve this[141] – and living persons with a conviction or caution must first successfully obtain a disregard in order to then be granted a pardon.[142] Baroness Williams of Trafford argued that it was 'important that we link the pardons for the living to the disregard process' as this 'mitigates the risk of individuals claiming to be cleared of offences that are still crimes today'.[143]

At Committee stage of the Policing and Crime Bill, Lord Lexden introduced a number of amendments designed to extend the pardons 'for iniquitous former offences' and the disregard scheme to Northern Ireland.[144] At Report stage of the Bill the government accepted these amendments in modified form and, consequently, made provision for disregarding and pardoning convictions and cautions for buggery and gross indecency in Northern Ireland.[145] As a result of this, the Northern Ireland Assembly was required to consider issuing a Legislative Consent Motion, which caused one MLA to raise the strong objection that 'we only show interest in, concern for and act for the homosexual community, but, in our rush to get this through, we turn our backs and do nothing for the heterosexual community'.[146] When the Assembly enthusiastically issued the Legislative Consent Motion members appeared oblivious to the fact that the pardons for buggery that they were consenting to did relate to the 'heterosexual community' and the debate – as was the case in all debates in Parliament relating to disregards and pardons – remained entirely focused on gay men. In addition, no attention was given to the jurisdictional and legal conundrum created by

[140] Ibid, s.164(1)-(2). The conditions are that the other person involved in the conduct constituting the offence consented to it and was aged 16 or over, and the conduct would not be an offence under Sexual Offences Act 2003, s.71 ('sexual activity in a public lavatory'). The condition relating to the age of the other person is set, problematically some may consider, at the contemporary 'age of consent' even though the conduct at issue may have taken place at a time when the minimum age for other, legal sexual acts was lower.
[141] HL Debate, 9 November 2016, vol.776, cc.1263-6. I should declare the interest that I drafted the amendment (214S) referred to in the debate.
[142] Policing and Crime Act 2017, s.165.
[143] HL Debate, 9 November 2016, vol.776, c.1267.
[144] Ibid, c.1262. I should declare the interest that I drafted the amendments (214H to 214L, 235A and 239C) referred to in the debate.
[145] HL Debate, 12 December 2016, vol.777, cc.1021-2; Policing and Crime Act 2017, ss.168-172.
[146] Jim Allister MLA, Assembly Debate, 28 November 2016, 3.45pm.

the UK Parliament granting posthumous pardons to persons convicted or cautioned 'in Northern Ireland'[147] prior to the formation of that province of the UK.

At Report stage of the Policing and Crime Bill, Lord Lexden pointed out that the provisions granting pardons for buggery committed by members of the armed forces were inadequate because they extended only as far back as 1866.[148] Consequently, Baroness Williams of Trafford tabled an amendment to the Bill at Third Reading to ensure that posthumous pardons for offences of buggery under naval law extend back to 1661.[149] However, in respect of the Army, the government was unable to make the required amendments to the Bill – due to not being able to identify all the relevant statutes – to ensure that eligible Army personnel convicted of buggery prior to 1881 are granted a posthumous pardon.[150] The government has indicated that it is 'continuing to research this issue'[151] but, in the meantime, those soldiers convicted of consensual acts of buggery during nearly two centuries prior to 1881 await a posthumous pardon.

8. Conclusion: the after-life of buggery

Whilst the criminal offence of buggery has been abolished in English and Northern Irish law references to buggery continue to endure in a range of statutes which, for example, make provision for granting anonymity to people who allege they are victims of the offence,[152] ensure the continuity of sexual offences law in respect of criminal justice proceedings,[153] and regulate what information a person must provide when making an application for a licence to provide gambling facilities.[154] Buggery also

[147] Policing and Crime Act 2017, s.169(1).
[148] HL Debate, 12 December 2016, vol.777, c.1017. I should declare the interest that, as noted in his speech, I brought this matter to the attention of Lord Lexden and subsequently provided the Bill Team with advice on Naval statutes.
[149] HL Debate, 19 December 2016, vol.777, cc.1477-8.
[150] Policing and Crime Act 2017, s.164 extends back only to the Army Act 1881 when it should extend further back to cover the period of 'Mutiny Acts' that were enacted between the seventeenth century and the Army Discipline and Regulation Act 1879. It should also extend further back to cover the period, prior to 1879, when 'Marine Mutiny Acts' regulated marines while on shore (see n. 41).
[151] Earl Howe, 19 January 2017, answer to Written Question HL4522 by Lord Lexden. I should declare the interest that I have provided the Ministry of Defence with details of the relevant statutes that need to be added to Policing and Crime Act 2017, s.164.
[152] Sexual Offences (Amendment) Act 1992.
[153] Violent Crime Reduction Act 2006, s.55.
[154] Gambling Act 2005, s.69 and sch.7.

forms one of the offences for which a person can become subject to the notification requirements of the 'sex offenders register'.[155] In due course, when those who were victims of buggery and those who committed the offence are deceased, all of these statutory provisions will become superfluous and, along with the legislation making provision for the disregarding of offences, will likely be repealed. At such time, the only references to buggery that will endure in UK statute law will be in the legislation that provides pardons for past offences (which, as discussed above, will hopefully be expanded in the future in respect of armed forces personnel). Buggery will not, however, disappear from parliamentary debate but will continue to be discussed in relation to those jurisdictions to which Britain 'exported' the offence and where it, or some version of it, continues to endure in criminal law.[156] A concern with buggery will remain an inherent aspect of the 'common enterprise' that has recently developed amongst legislators committed to challenging and abolishing 'oppressive discriminatory laws' affecting LGBT people around the world in Commonwealth nations, as well as in the Crown Dependencies and British Overseas Territories.[157]

[155] Sexual Offences Act 2003, s.80 and sch.3 (see also sch.4 which provides a procedure for ending notification requirements for acts which are no longer offences).
[156] Kirby, M. (2011) 'The sodomy offence: England's least lovely criminal law export?', *Journal of Commonwealth Criminal Law*, 1: 22-43.
[157] Lord Lexden, HL Debate, 16 March 2017, vol.779, c.2032.