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Disgraceful Conduct: Parliamentary Regulation of Homosexuality in the British Army, 1829-1992

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ABSTRACT
The injustices created by the historical criminalisation of consensual same-sex sexual acts between adult men in the UK are now widely recognised and in 2012 and 2017 the UK Parliament enacted legislation with the aim of righting the wrongs of the past. What has been less recognised are the historical injustices suffered by armed forces personnel who were convicted of service discipline offences for engaging in consensual same-sex sexual acts that would today be lawful. This article provides an analysis of how one service discipline offence, the offence of 'disgraceful conduct', was used to regulate homosexuality in the British Army. It focuses on the making and maintaining of this aspect of service law by Parliament, from the early nineteenth to the late twentieth century, and examines the attitudes and intentions of the legislators who shaped it. The article explains the significance of legislation enacted in 2022 which, in acknowledgement of the discriminatory use of service discipline offences in the past, provides redress to service personnel who were convicted of such offences for conduct involving same-sex sexual activity that would be lawful today.

Introduction

The Armed Forces Act 2006 – which provides a single system of service law for the British armed forces – contains a provision that makes it an offence to engage in disgraceful conduct of a cruel or indecent kind.[1] The 'Commanding Officers Guide' to service law states that, for the purposes of this offence, 'an act of sexual nature that occurs in private with the consent of persons present and where such persons are old

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[1]Armed Forces Act 2006, s. 23.

enough to give consent will not generally be regarded as indecent'.[2] Those unaware of the history of the offence of disgraceful conduct may be surprised that commanding officers need to be informed that consensual sexual acts between adults in private will not generally be regarded as 'indecent'. Yet, this information is given in the context of the offence of disgraceful conduct having previously been used by the British armed forces – including the British Army during a period of 163 years[3] – to discipline personnel who engaged in same-sex sexual acts which, in some cases, would be lawful today and, for some of the period the offence was used, were lawful if committed by civilians.

This article considers the history of the offence of disgraceful conduct and its use to regulate same-sex sexual acts committed by Army personnel. It focuses on the making and maintaining of this aspect of service law by the UK Parliament.[4] The article traces the evolution of the offence of disgraceful conduct from the time that Parliament introduced it in the early part of the nineteenth century and examines the attitudes and intentions of the legislators who shaped it. Disgraceful conduct was not the only offence by which same-sex sexual acts were regulated in the Army; other service discipline offences could be applied[5] and, in certain contexts and at specific times, Army personnel could be prosecuted under service law for civil offences that regulated

[2]Commanding officers guide (manual of service law: JSP 830 volume 1) ch. 7, pp. 1-7-76 to 1-7-77.

[3]From the time of the Mutiny Act 1829 (10 Geo. 4 c. 6, An Act for punishing Mutiny and Desertion; and for the better Payment of the Army and their Quarters) to Parliament ending, in 1992, prosecutions under service law of same-sex sexual acts that were otherwise legal in civilian life (HC Deb 17 June 1992 vol. 209 cols. 989-990).

[4]For broader historical considerations of the regulation of homosexuality in the British armed forces and the experiences of gay service personnel, see: Stephen Bourne, *Fighting Proud: The Untold Story of the Gay Men Who Served in Two World Wars*, (London: I.B.Tauris, 2017); Matt Cook, *London and the Culture of Homosexuality, 1885-1914*, (Cambridge: Cambridge University Press, 2003); John Costello, *Love, Sex, and War: Changing Values, 1939-45*, (London: Collins, 1985); Matt Houlbrook, 'Soldier Heroes and Rent Boys: Homosex, Masculinities, and Britishness in the Brigade of Guards, circa 1900–1960', 42, no. 3 (July 2003), pp. 351-388; Matt Houlbrook, *Queer London: Perils and Pleasures in the Sexual Metropolis, 1918-1957*, (Chicago: University of Chicago Press, 2005); Graham Robb, *Strangers: Homosexual Love in the Nineteenth Century*, (New York: W.W. Norton, 2004); Emma Vickers, *Queen and Country: Same-Sex Desire in the British Armed Forces, 1939–1945*, (Manchester: Manchester University Press, 2013).

[5]For example: Army Act 1955, s. 64 (scandalous conduct of officer) and s. 69 (conduct to prejudice of military discipline).

same-sex sexual acts.[6] Nevertheless, as the article shows, the offence of disgraceful conduct was a principal provision by which the Army sought to regulate its personnel in respect of homosexual conduct.

The history of the use of offences such as disgraceful conduct to regulate consensual same-sex sexual acts has been relevant to recent legislative initiatives. In 2012, the UK Parliament took action to address historical injustices suffered by gay and bisexual men and made available a scheme whereby a person living with a conviction or caution, secured under English law for certain abolished offences, can apply to have that conviction or caution disregarded.[7] Furthermore, in 2017, Parliament made provision for those convicted or cautioned for the same abolished offences under English law to be pardoned.[8] The principal offences covered by the disregard and pardon schemes upon enactment were buggery and gross indecency and, insofar as civil offences could be prosecuted as service offences, the schemes extended to those convicted of these offences under service law.[9] However, as originally enacted the disregard and pardon schemes contained two key problems in respect of the armed forces which, between 2016 and 2022, the author worked with Lord Cashman and Lord Lexden to address.

The first problem identified with the pardon scheme was that the provisions made to grant posthumous pardons to armed forces personnel convicted under service law of

[6]For purposes of clarity, throughout this article I use the term 'service discipline offence' to mean those offences which can only be committed under service law and distinguish these offences from civil (criminal) offences which can be dealt with under service law.

[7]Protection of Freedoms Act 2012, pt. 5, ch. 4 (as enacted). Scotland and Northern Ireland are covered by separate legislative provision.

[8]Policing and Crime Act 2017, s. 164-167 (as enacted). This Act also makes provision for Northern Ireland (see: s. 168-172) in respect of disregards and pardons. Scotland is covered by separate legislative provision.

[9]As originally enacted the Protection of Freedoms Act 2012, s. 92(1) provided that a person convicted of or cautioned for an offence under particular provisions, which criminalised buggery and gross indecency between men, may apply to have the conviction or caution disregarded. The references in s. 92(1) of the Act to offences under particular provisions were to be read (by virtue of s. 101(3) of the Act) as including references to offences under certain sections of the Service Discipline Acts which allowed a 'corresponding civil offence' to be dealt with under service law (for example: Army Act 1955, s. 70). Similar provision was made by the Policing and Crime Act 2017, s. 164, as originally enacted, to grant posthumous pardons in respect of service offences corresponding to offences under particular civil provisions which criminalised buggery and gross indecency between men (and s. 165 of the Act made provision to grant pardons for those still living).

certain abolished civil offences, involving conduct which would not be an offence today, were inadequate in respect of the Army and Royal Marines. This inadequacy was eventually rectified by provisions in the Armed Forces Act 2021.[10]

The second problem identified was that convictions for same-sex sexual acts under service discipline offences, such as disgraceful conduct, were not within the scope of the disregard and pardon schemes.[11] The inadequacy of the disregard and pardons schemes was recognised by the Government when, in 2016, it accepted amendments to the Policing and Crime Bill, moved by Lord Cashman, to enable the Secretary of State to extend, by regulations, the list of offences eligible to be disregarded and

[10]Posthumous pardons were granted by the Policing and Crime Act 2017, s. 164 as originally enacted for particular civil offences, including civil offences of buggery extending back to 1533. At the time that this legislation was considered by Parliament, I pointed out that it was inadequate in respect of the equivalent service offences. The matter was raised by Lord Lexden (HL Deb 12 December 2016 vol. 777 col. 1017) and, as a consequence, amendments were moved to provide for posthumous pardons in respect of the Royal Navy extending back to 1661 (HL Deb 19 December 2016 vol. 777 col. 1477). However, posthumous pardons were not granted to Army personnel or Royal Marines personnel (when ashore) prior to 1881. I conducted research to identify the legislation relevant to the Army and Royal Marines and this underpinned two Private Members Bills introduced by Lord Cashman (Armed Forces (Posthumous Pardons) Bill [HL], introduced 23 October 2019; Armed Forces (Posthumous Pardons) Bill [HL], introduced 21 January 2020). The essence of those Bills found expression in the Armed Forces Act 2021, s. 19 which provided posthumous pardons, under certain conditions, to those convicted under provisions in the Articles of War made under any Mutiny Act or Marine Mutiny Act previously in force (the Mutiny Acts extend back to an Act of 1688). For a historical overview see: Lord Lexden, HL Deb 7 September 2021 vol. 814 cols. 763-764. The Armed Forces Act 2021, s. 19 has since been subject to amendments by the Police, Crime, Sentencing and Courts Act 2022 (see note 16).

[11]The Home Office previously made clear that the disregard scheme extended to convictions under service law 'in respect of acts contrary to the provisions listed' in s. 92(1) of the Protection of Freedoms Act 2012 (as originally enacted) and applications for 'any other convictions cannot be accepted' (Home Office, *Disregards and pardons for historical gay sexual convictions: Application form and guidance notes on applying for a disregard and pardon of convictions for decriminalised sexual offences*, 15 February 2021). That meant that civil offences of buggery and gross indecency dealt with under service law were covered by the disregard scheme, but other specific service discipline offences were outside of its scope. This was also the case for the pardon scheme (see: Policing and Crime Act 2017, s. 164-165, as originally enacted).

pardoned.[12] The power created by the Policing and Crime Act 2017[13] to extend the disregard and pardon schemes was never utilised by the Government, despite repeated representations from Lord Cashman,[14] Lord Lexden,[15] and other parliamentarians on the importance of the issue. Finally, however, provisions in the Police, Crime, Sentencing and Courts Act 2022 expanded the disregard and pardon schemes to cover any person convicted of, or cautioned for, an offence 'in circumstances where the conduct constituting the offence was sexual activity between persons of the same sex' (providing that any other person involved in the sexual activity was aged 16 or over, the offence has been repealed or abolished, and the sexual activity would not now constitute an offence).[16] Consequently, those convicted of engaging in consensual same-sex sexual acts under service discipline offences, such as disgraceful conduct, are now able to apply to have a conviction disregarded, and to be pardoned.

This article examines the regulation of same-sex sexual conduct in the Army during three historical periods. It begins at the time that the offence of disgraceful conduct was introduced, during a period when the regulation and discipline of the Army was governed by an annual Mutiny Act passed by Parliament and by Articles of War made by the Crown under the authority of the Mutiny Acts. During this period, Parliament paid no attention to what would later be termed 'homosexuals' and 'homosexuality' but, rather, focused attention on the regulation of 'indecent' and 'unnatural' conduct. The article then considers the period during which the provisions in the Mutiny Acts and the Articles of War were consolidated and harmonised into one single Act of Parliament. From this point onwards, Parliament gradually began to focus explicitly on the issue of homosexuality and the 'problem' of homosexual soldiers serving in the Army. The article finally considers the period following the partial decriminalisation of homosexual acts in England and Wales, and the progressive movement to end the regulation of such acts under service law. During this period, Parliament gave extensive consideration to issues relating to homosexuality and the Army, becoming increasingly critical of the regulation of Army personnel for engaging in conduct that was, in civilian

[12]Baroness Williams of Trafford, HL Deb 12 December 2016 vol. 777 col. 1021.
[13]Policing and Crime Act 2017, s. 166.
[14]HL Written Question tabled on 7 February 2017 (HL5299); HL Deb 12 July 2018 vol. 792 col. 1015; HL Written Question tabled on 4 June 2020 (HL5288).
[15]HL Written Question tabled on 7 October 2020 (HL8867); HL Deb 9 June 2021 vol. 812 col. 1421.
[16]Police, Crime, Sentencing and Courts Act 2022, pt. 12. This change resulted from Government amendments that, as Baroness Williams of Trafford explained, drew heavily on earlier amendments to the Police, Crime, Sentencing and Courts Bill and the Armed Forces Bill that I had worked on with Lord Cashman and Lord Lexden (HL Deb 10 January 2022 vol. 817 cols. 910-913).

life, lawful. The article concludes by outlining the significance of the recent legal reforms that make disregards and pardons available to those convicted of disgraceful conduct and other service discipline offences, and considers what more could be done in the future to address the injustices of the past.

The Mutiny Acts and the Articles of War: 1829-1878

Parliament introduced the offence of disgraceful conduct in the Mutiny Act 1829 to classify certain conduct and specify the powers available to the courts martial to deal with it.[17] The Act of 1829 made explicit that disgraceful conduct concerned 'vice or misconduct' and empowered a court martial to punish such conduct and 'recommend such offender to be discharged as unfit for the service … he having been once previously convicted of disgraceful conduct'.[18] The Act of 1829 did not explicitly specify any 'vice or misconduct' of a sexual nature but, later that year, in respect of the issuing of Supplementary Rules and Articles of War, a War Office Circular communicated the following explanation:

> I … call your attention to the amendment made in the 70th Article of War, in which 'Disgraceful Conduct' is declared to mean any offence of a disgraceful character … In order that the practical application of the words 'Disgraceful Conduct,' and offences of a 'Disgraceful Character,' may be liable to the least possible misconception … I have to state that 'Disgraceful Conduct' implies confirmed vice, and all unnatural propensities, indecent assaults, repeated thefts and dishonesty, ferocity in having maimed other soldiers or persons, self-mutilation, tampering with the eyes, and all cases of confirmed malingering where the conduct is proved to be so irreclaimably vicious, as to render the offender unworthy to remain in the army.[19]

The term 'unnatural propensities' was reportedly already in use in the courts martial – in respect of 'crimes which the English law … declares *unfit to be named among christians* [and] which military law does not stain its annals by any recognizance' – and

[17] 10 Geo. 4 c. 6 (An Act for punishing Mutiny and Desertion; and for the better Payment of the Army and their Quarters), s. 9. For a discussion of the introduction of the offence of disgraceful conduct, see: Thomas Frederick Simmons, *The Constitution and Practice of Courts Martial (Seventh Edition)*, (London: John Murray, 1875), p. 102. For a discussion of the role of the then Secretary at War, Sir Henry Hardinge, in introducing the offence in the Mutiny Act and Articles of War, see: Henry Marshall, *Military Miscellany*, (London: John Murray, 1846), p. 84.

[18] 10 Geo. 4 c. 6 (An Act for punishing Mutiny and Desertion; and for the better Payment of the Army and their Quarters), s. 9.

[19] Circular, War Office, 23 November 1829, in *The United Service Journal, and Naval and Military Magazine*, 1830, pt. 1, p. 115-116.

can be read as including sexual conduct between men.[20] 'Unnatural' (meaning against the 'order of nature'[21]) was then a long-established legal term that denoted acts within the scope of the offence of buggery (sodomy) which regulated, inter alia, anal intercourse between men.[22] One of the earliest uses of the word unnatural in statute in respect of buggery was in the Navy Act 1661,[23] and it was used thereafter in a number of other equivalent enactments. The Offences Against the Person Act 1861, for example, used the designation 'unnatural offences' to group together a number of offences that regulated male same-sex (and other) sexual acts, including buggery, attempted buggery, assault with intent to commit buggery, and indecent assault upon any male person.[24] The offence of buggery encompassed, what would be termed today, both consensual and non-consensual sexual acts and, in 1829,[25] consent provided adult men who had engaged together in such acts with no defence to a charge because, as Coke put it, both 'the agent and consentient are felons'.[26]

Four months after the War Office Circular was issued, Parliament expanded provisions in the Mutiny Act 1830 relating to disgraceful conduct which more explicitly

[20]General Orders, 9 December 1809, reported in Robert Bisset Scott, *The Military Law of England, With All the Principal Authorities [Etc.]*, (London: T. Goddard, 1810), pp. 33 and 35. The term 'unnatural propensities' was used again in a Horse Guards Circular Memorandum of 18 July 1850 relating to the use of corporal punishment. George D'Aguilar, *Observations on the Practice and the Forms of District, Regimental, and Detachment Courts Martial*, (Dublin: The University Press, 1865), p. 19.

[21]Edward Coke, *The Third Part of the Institutes of the Laws of England*, (London: W. Clarke and Sons, 1817), p. 58.

[22]From the time of an Act of 1533, English law criminalised the 'detestable and abominable vice of buggery committed with mankind or beast' (25 Hen. 8 c. 6, An Acte for the punysshement of the vice of Buggerie) and this was progressively interpreted by the courts which, over time, led to certain acts being included within, or excluded from, the ambit of the law. By the late 20th 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). For a history of the offence see: Paul Johnson, 'Buggery and Parliament, 1533-2017', *Parliamentary History*, 38, issue 3 (2019), pp. 325-341.

[23]13 Cha. 2 St. 1 c. 9 (An Act for the establishing Articles and Orders for the regulating and better Government of his Majesties Navies, Ships of War, and Forces by Sea), s. 32.

[24]Offences Against the Person Act 1861, s. 61-62.

[25]9 Geo. 4 c. 31 (An Act for consolidating and amending the Statutes in England relative to Offences against the Person), s. 15.

[26]Coke, *The Third Part of the Institutes*, p. 59.

specified the scope of the offence. The legislation provided that a soldier could be convicted and punished for, in addition to certain enumerated acts, 'any other disgraceful conduct, being of a cruel, indecent, unnatural, felonious, or fraudulent nature'.[27] This 'any other disgraceful conduct' limb of the offence can be seen as a general, catch-all provision. Moreover, the specific provision made for dealing with 'indecent' and 'unnatural' conduct can be seen as capable of regulating a wide range of sexual acts, including consensual acts between adult men, that, if committed today, would be lawful. In this respect, it is noteworthy that the Act of 1830 did not reproduce the language of the War Office Circular relating to 'indecent assaults' but, instead, employed the more general term 'indecent' which, arguably, was capable of capturing disgraceful conduct of an indecent kind that did not amount to assault.

The general provision on disgraceful conduct of a 'cruel, indecent, unnatural, felonious, or fraudulent nature' remained in the Mutiny Acts only until 1833. The Mutiny Act 1833 removed the reference to 'felonious' or 'fraudulent' conduct from the 'any other disgraceful conduct' limb of the provision.[28] This left in place a general, catch-all provision covering 'any other disgraceful conduct, being of a cruel, indecent, or unnatural kind'[29] and this endured in the Mutiny Acts until 1860 – although the whole provision on disgraceful conduct was repositioned in the Mutiny Acts from 1847 onwards under a new heading relating specifically to forfeiture of pay and pension by sentence of court martial.[30]

By 1849, it was clear that the administration of the offence of disgraceful conduct was causing some problems. A Circular Memorandum of that year stated that the term disgraceful conduct 'should never be employed in framing charges, except in relation to those offences strictly contemplated by the Mutiny Act and Articles of War' because it was 'evident' that 'indiscriminate use of the term tends to weaken its moral

[27]11 Geo. 4 & 1 Will. 4 c. 7 (An Act for punishing Mutiny and Desertion; and for the better Payment of the Army and their Quarters), s. 9. Separate provision on disgraceful conduct was also made from 1830 in respect of the Royal Marines (11 Geo. 4 & 1 Will. 4 c. 8, An Act for the Regulation of His Majesty's Royal Marine Forces while on Shore) and from 1840 in respect of the East Indies (3 & 4 Vict. c. 37, An Act to consolidate and amend the Laws for punishing Mutiny and Desertion of Officers and Soldiers in the Service of the East India Company [etc]).
[28]3 & 4 Will. 4 c. 5 (An Act for punishing Mutiny and Desertion; and for the better Payment of the Army and their Quarters), s. 9.
[29]Ibid.
[30]10 & 11 Vict. c. 12 (An Act for punishing Mutiny and Desertion, and for the better Payment of the Army and their Quarters), s. 28. See also: s. 33 and s. 34 of this Act.

effect'.[31] A further Circular Memorandum in 1851 stated that doubts had arisen about the legality of trying soldiers by court martial for disgraceful conduct in respect of 'any offence amounting to actual felony' and that, whilst the Attorney and Solicitor General had found that such offences could be tried and punished by courts martial, officers in command should bear in mind that 'the proper tribunals to deal with this class of offences are the Civil Courts'.[32] The Circular Memorandum added that courts martial should only deal with such cases when 'the Civil Authorities may decline or omit to prosecute' or when circumstances 'render it difficult to bring the case' before the civil courts.[33]

The Mutiny Act 1860 omitted the provisions previously in force relating to disgraceful conduct, leaving in place only an explicit provision in respect of the power to inflict corporal punishment for disgraceful conduct.[34] Explicit provision on the acts covered by disgraceful conduct was now confined to the Articles of War.[35] The legal framework in place in 1860 provides a good illustration of the potential complexity of dealing with same-sex sexual acts committed by a soldier during this period. For example, dealing with a case of buggery (a felony punishable by death under the civil law[36]) would have brought into play a provision in the Articles of War that required, in respect of an accusation of certain crimes (including capital crimes, and offences against the person), relevant officers, upon application, to use their utmost endeavours to deliver the accused person to the civil magistrate.[37] The courts martial did have jurisdiction to deal with such offences, as civil offences, in places beyond the seas (either in or outside

[31]Circular Memorandum Horse Guards, 19 November 1849, in D'Aguilar, *Observations*, p. 39.

[32]Circular Memorandum Horse Guards, 29 November 1851, in A Brevet Major, *Charges and Penalties with Reference to the Mutiny Act and Articles of War*, (Bombay: Bombay Education Society's Press, 1852), pp. xvii-xviii.

[33]Ibid., p. xviii.

[34]23 & 24 Vict. c. 9 (An Act for punishing Mutiny and Desertion, and for the better Payment of the Army and their Quarters), s. 22. The Marine Mutiny Acts continued to make explicit provision for the acts covered by disgraceful conduct.

[35]*Rules and Articles for the Better Government of Her Majesty's Army, from 25 April 1860*, published by Her Majesty's Command, (London: George E. Eyre and William Spottiswoode, 1860), art. 84-88.

[36]9 Geo. 4 c. 31 (An Act for consolidating and amending the Statutes in England relative to Offences against the Person), s. 15. The last execution in England for a civil offence of buggery was in 1835, and the crime ceased to be capital in 1861.

[37]*Rules and Articles for the Better Government of Her Majesty's Army, from 25 April 1860*, art. 18. See also: Mutiny Act 1860 (23 & 24 Vict. c. 9, An Act for punishing Mutiny and Desertion, and for the better Payment of the Army and their Quarters), s. 75, which made provision for the ordinary course of criminal justice not to be interfered with.

of the dominions) where, because there was either no civil judicature or court of civil judicature in force, they could not be tried in an ordinary criminal court.[38] Moreover, same-sex sexual acts determined not to be within the purview of the criminal courts, but nevertheless deemed to be 'indecent' and/or 'unnatural', could have been proceeded against as disgraceful conduct, for which the courts martial had jurisdiction.[39]

Although Parliament was provided with regular information during this period on the prosecution and punishment of soldiers for disgraceful conduct, it is not possible to discern from parliamentary records alone the extent to which this covered sexual acts involving adult men that would, by today's standards, be deemed consensual. The information provided to Parliament on the number of soldiers prosecuted and punished for disgraceful conduct often contained no details about the nature of the conduct constituting the offence and, as such, did not differentiate indecent or unnatural offences from other offences.[40] Where details were given that indicate an offence concerned indecent or unnatural conduct, it is not possible to know if the offence involved same-sex sexual acts or whether any acts would, by today's standards, be deemed lawful.

Parliamentary records do, for example, show instances of individuals in the Army being punished for 'unnatural crime',[41] 'disgraceful conduct (attempt to commit sodomy)',[42] 'disgraceful conduct (an indecent assault on the person of private John McDougall)',[43]

[38]*Rules and Articles for the Better Government of Her Majesty's Army, from 25 April 1860*, art. 146-148.

[39]Ibid., art. 86. Same-sex sexual acts could also have been dealt with under the provision on 'scandalous behaviour of an officer' (ibid., art. 84). Moreover, a general provision (ibid., art. 109) allowed the courts martial to deal with 'all crimes not capital' and, depending on the 'nature and degree of the offence', this potentially also covered certain same-sex sexual acts.

[40]For example, see data on soldiers belonging to regiments and depots in Great Britain and Ireland convicted and punished for disgraceful conduct. House of Commons Papers, *Returns of Punishments in Royal Marines, Royal Artillery and Army, 1831-37*, 1837-38, XXXVII.151, p. 153.

[41]House of Commons Papers, *Return of Number of Persons flogged in Army of Great Britain and Ireland: 1854-55*, 1857 Session 1, IX.201, p. 201.

[42]House of Commons Papers, *Return of Number of Persons flogged in Army of Great Britain and Ireland: 1856*, 1857-58, XXXVII.307, p. 308.

[43]House of Commons Papers, *Return of Number of Soldiers undergoing Punishment in Military Prison of Gibraltar*, 1861, XXXVI.385, p. 396.

'indecent conduct',[44] and 'disgraceful conduct, and unnatural crime'.[45] Moreover, such records provide details of the number of individuals in the Army tried by the civil powers for 'indecent offences' which included 'unnatural offences',[46] and the number imprisoned for civil and military offences including 'sodomy', 'attempted sodomy' and 'indecent assault'.[47] However, from these records alone, it is not possible to know whether the conduct constituting any offence involved, what would be considered today, consensual same-sex sexual acts between adult men. Some parliamentary records invite speculation – such as the record of a soldier imprisoned in 1872 for 'Disgraceful conduct in allowing an indecent assault to be committed on him', with its notable inclusion of the word 'allowing'[48] – but, ultimately, it is not possible to know from such records either the nature of the conduct constituting the offence or whether such conduct would be an offence today.

What parliamentary records do tell us is that disgraceful conduct was regarded as one of the 'gravest offences'[49] and that it was regularly prosecuted and punished. In 1878, for example, a total of 1042 offences of disgraceful conduct were tried by the courts martial – 605 at home, and 437 abroad.[50] Parliament was informed in 1878 that the offence of disgraceful conduct was 'mostly' used to deal with 'petty thefts and acts of that description which one soldier commits towards another',[51] but it was also made aware that the offence was used to deal with more serious indecent or unnatural conduct. The following exchange in a Select Committee in 1878, on the meaning of the terms indecent and unnatural in the offence of disgraceful conduct, suggests an awareness of how the offence related to the unnatural (civil) offence of buggery:

> Sir H. Thring (Government Draftsman): The 'indecent or unnatural' kind [of conduct covered by the offence of disgraceful conduct] of course explains itself.

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[44]House of Commons Papers, *Return of Number of Persons flogged in Army and Militia: 1863-65 (Number of Men marked with Letters D. or B.C.)*, 1866, XLI.453, p. 454 and 462.
[45]House of Commons Papers, *Return of subsequent Conduct of Men in H.M. Military Forces subjected to Punishment by Lash*, 1866, XLI.413, p. 425.
[46]House of Commons Papers, *Return of Number of Non Commissioned Officers and Men serving with Army at Home tried by Civil Power, 1870-75*, 1876, XLIII.803, p. 803.
[47]House of Commons Papers, *Return of Number of Soldiers under Punishment for Civil or Military Offences in Prisons, 1869-75*, 1876, XLIII.605. Several entries also record 'sodomy and bestiality'.
[48]Ibid., p. 756.
[49]House of Commons Papers, *Select Committee on Army and Ordnance Expenditure, Report (Army), Proceedings, Minutes of Evidence, Appendix, Index*, 1850, X.1, q. 2543.
[50]*General Annual Return of British Army: 1878*, 1878-79, C. 2435, p. 33, table 32.
[51]House of Commons Papers, *Select Committee on Mutiny and Marine Mutiny Acts, Report, Proceedings, Minutes of Evidence, Appendix, Index*, 1878, X.253, q. 793.

> Chairman: If that means an unnatural offence it seems very extraordinary that the military punishment of it should be of so very different a character from the civil punishment of it; but I should imagine that it means something less than that?
>
> Sir H. Thring: I presume that it means something less than the actual offence.[52]

This exchange can be seen to show that disgraceful conduct was understood as an offence that could be used to deal with conduct that fell short of the full civil offence of buggery. There may be a temptation to infer from this exchange that what is being described is the regulation of a wide range of sexual acts, including consensual sexual acts, committed between men. In part, that may be true, but it is important to remember that the designation 'unnatural offence' covered a range of conduct that included sexual acts committed between people, as well as sexual acts committed by people with other animals.[53] It is therefore not possible to know the extent to which parliamentarians in this period would have perceived, what we would now call, consensual sexual acts between adult men as distinct from other conduct captured by the term 'unnatural offence'. Any debates in Parliament during this period about what we would now call 'homosexuality' – a word not recorded in a parliamentary debate until 1937,[54] when its speaker noted that it was 'a matter which is almost foreign' to Parliament[55] – was framed in largely euphemistic terms where, in place of specific details about sexual conduct, words such as indecent and unnatural were used.[56]

[52]House of Commons Papers, *Select Committee on Mutiny and Marine Mutiny Acts, Report, Proceedings, Minutes of Evidence, Appendix, Index*, 1878, X.253, q. 793-794. The Select Committee was considering a draft Bill that proposed that the punishment of disgraceful conduct should be any punishment not exceeding imprisonment (cl. 23), and the proposed maximum term of imprisonment was two years (cl. 46) (ibid., pp. 418 and 421). It is reasonable to assume that the 'very extraordinary' difference referred to by the Chairman is the difference between the proposed military punishment and the then punishment for the offence of buggery – designated an unnatural offence – which was penal servitude for life or for any term not less than ten years (Offences Against the Person Act 1861, s. 61).

[53]See 'Unnatural Offences' in Offences Against the Person Act 1861, s. 61-63.

[54]HL Deb 28 June 1937 vol. 105 col. 829. The word 'homosexual' is first recorded in HC Deb 4 August 1921 vol. 145 col. 1800.

[55]Lord Dawson of Penn, HL Deb 7 July 1937 vol. 106 col. 144.

[56]For a discussion see: Leslie J. Moran, *The Homosexual(ity) of Law*, (London: Routledge, 1996).

Consolidation and harmonization: 1879 to 1966

Parliament consolidated and harmonised the Mutiny Act and Articles of War in the Army Discipline and Regulation Act 1879.[57] This brought back into parliamentary legislation the explicit provisions regulating 'disgraceful conduct of a cruel, indecent, or unnatural kind'.[58] Parliament set the maximum punishment for disgraceful conduct as imprisonment for two years.[59]

An important feature of the Act of 1879 is that it simplified the approach to the prosecution of civil offences committed by those subject to military law. The Act gave the courts martial jurisdiction to deal with any offence which was punishable by the law of England.[60] Although exceptions to this applied to a certain class of offences (treason, murder, manslaughter, treason-felony, and rape) the Act made clear that civil offences, such as buggery, were within the jurisdiction of the courts martial.[61] When a person was found guilty of a civil offence (other than the certain class of offences previously mentioned) by a court martial they were liable either to be punished in accordance with provisions in the Act of 1879 relating to conduct to prejudice of military discipline (a term of up to two years of imprisonment)[62] or in accordance with the punishment assigned for an offence by the law of England.[63]

The Act of 1879 was replaced by the Army Act 1881, but the provisions relating to 'disgraceful conduct of a cruel, indecent, or unnatural kind' remained the same.[64] The Act of 1881, like the Act of 1879, grouped together a wide range of offences under

[57]The final Mutiny Act of 1878 was temporarily continued (by the Mutiny Act (Temporary) Continuance Act 1879) until the Army Discipline and Regulation Act 1879 came into force.

[58]Army Discipline and Regulation Act 1879, s. 18(5). This Act extended to the Royal Marines in certain circumstances; provisions relating to 'disgraceful conduct, being of a cruel, indecent, or unnatural kind' in the Marine Mutiny Acts had endured until the final Marine Mutiny Act 1878.

[59]Army Discipline and Regulation Act 1879, s. 18 and s. 44 (see also: Army Discipline and Regulation (Annual) Act 1881, s. 4 which made provision for summary punishment of a soldier on active service for an offence of disgraceful conduct under the Act of 1879).

[60]Army Discipline and Regulation Act 1879, s. 41.

[61]The jurisdiction of the courts martial was, in this respect, subject to provisions in the Army Discipline and Regulation Act 1879 that prevented interference with the jurisdiction of the civil courts.

[62]Army Discipline and Regulation Act 1879, s. 40. This was the maximum punishment for soldiers; the maximum punishment for officers was cashiering.

[63]Army Discipline and Regulation Act 1879, s. 41(5).

[64]Army Act 1881, s. 18(5).

the heading 'disgraceful conduct of soldier' but, as one contemporary commentator observed, only a charge relating to 'cruel, indecent, or unnatural' conduct should have included the words 'disgraceful conduct' because those words were only explicitly applied by the Act to that specific conduct.[65] The Act of 1881, like the Act of 1879, also gave the courts martial jurisdiction in respect of any civil offence.[66]

In 1885, Parliament created the civil offence of 'outrages on decency' which criminalised any male person who, in public or private, committed, or was a party to the commission of, or procured or attempted to procure the commission by any male person of, 'any act of gross indecency with another male person'.[67] This offence provided an encompassing statutory framework to regulate, what contemporary commentators 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.[68]

In other words, the offence of gross indecency expanded provisions in the statute law regulating consensual same-sex sexual acts between adult men in private.[69] The offence of disgraceful conduct had long empowered the military authorities to regulate 'indecent' acts committed by soldiers and the maximum punishment for that offence – imprisoned for a term not exceeding two years[70] – was the same as the civil offence of gross indecency.

Seven decades passed following the enactment of the Act of 1881 until Parliament next considered substantially changing the legislation that provided for the discipline

[65]Major F. Cochran, *A Handy Text-Book on Military Law*, (Edinburgh and London: William Blackwood and Sons, 1884), p. 22.
[66]Army Act 1881, s. 41.
[67]Criminal Law Amendment Act 1885, s. 11.
[68]Frederick Mead, and A.H. Bodkin, *The Criminal Law Amendment Act 1885 with Introduction, Notes, and Index*, (London: Shaw and Sons, 1885), p. 69.
[69]For a discussion of the extent to which s.11 of the Criminal Law Amendment Act 1885 widened the scope of statute law in respect of regulating consensual sexual acts committed between adult men in private see: H.G. Cocks, *Nameless Offences: Homosexual Desire in the Nineteenth Century*, (London: I.B. Tauris, 2003); Paul Johnson and Robert M. Vanderbeck, *Law, Religion and Homosexuality*, (Abingdon: Routledge, 2014), p. 37.
[70] Army Act 1881, s. 18 and s. 44.

and regulation of the Army. As a consequence of the significant social changes that had taken place during that period of time, parliamentary discussions of the regulation of homosexuality by service discipline law became much more detailed and candid. This is illustrated by, for example, a discussion in the Select Committee dealing with a proposed new Army Act, in 1953, regarding the need for and scope of the clause relating to disgraceful conduct, which was proposed to be pared back to deal only with conduct of a cruel, indecent and unnatural kind.[71] Lieutenant-General Sir Kenneth McLean explained the need for the offence:

> From the purely Army point of view, we have these men in a monastic community. Naturally these indecent offences loom much larger than in civil life when you get soldiers all boxed up with their own kind, and we must stamp on this the moment it is found. You may not be able to produce all the requisite evidence you need for these rather technical offences under civil law. Out in the desert you do not know the details of the civil law, but you must have something so that you can pounce upon this sort of offence at once.[72]

Mr. Sée (Parliamentary Counsel) elaborated that the offence was necessary to 'hit cases where there was consent, and it is particularly wanted for the case which is not grave enough to amount to gross indecency, and where there is consent and yet nevertheless it must be stopped'.[73] Clearly, therefore, a chief concern was to retain a catch-all provision capable of dealing with same-sex sexual acts that may not amount to an offence under civil law, or be too difficult to prosecute under civil law. That this provision was intended to apply to sexual acts committed between women[74] demonstrates that it was considered appropriate to regulate in certain circumstances, what Mr. Wyatt MP called, 'such things [that] are not punished by the civil law'.[75]

Much of the discussion in the Select Committee was focused on the issue of abusive and coercive same-sex sexual acts, including acts committed against individuals under sixteen years old.[76] In this respect, Mr. Nield MP distinguished between two kinds of offence: 'the older man who seduces the boy and two grown up persons'.[77] There was also discussion of the difference between, what Mr. Paget MP called, persons 'born

[71]House of Commons Papers, *Report from the Select Committee on the Army Act and Air Force Act together with the proceedings of the committee, minutes of the evidence and appendices*, 1952-53, III.633.
[72]Ibid., q. 600.
[73]Ibid., q. 601.
[74]Ibid., q. 606.
[75]Ibid., q. 607.
[76]Ibid., q. 602.
[77]Ibid., q. 614.

unnatural and others natural'.[78] These discussions led one member of the Select Committee, Mr. Harvey MP, to argue that there were 'three very clear categories' of cases of same-sex sexual activity:

> The first is the purely medical case. Then there are those offences between senior and junior in rank, and possibly in age. Then there are the cases where the normal sex impulse is not having its natural expression. It seems to me there are three very clear categories in which there should certainly be a difference in treatment in terms of punishment.[79]

Similarly, Mr. Paget MP felt that the offence and its punishment should distinguish between cases involving a 'senior and junior in rank' and 'two equals'.[80]

As a consequence of this debate about the appropriateness of the offence and its scope – which touched upon the extent to which 'psychiatry and medical treatment' should be employed to deal with same-sex sexual conduct[81] – the Select Committee referred the matter to the Departmental Committee which, in due course, produced a Memorandum that can be seen as one of the earliest official justifications for the offence of disgraceful conduct to deal with 'homosexual' acts.[82] In the Memorandum, the Departmental Committee sought to address three questions: first, whether some distinction could be made between different types of disgraceful conduct cases, for example between 'the true pervert and the person guilty only of a single offence'; secondly, whether the punishment for such offences should be kept as imprisonment not exceeding two years; and thirdly, whether treatment could be arranged for offenders.[83] The Departmental Committee reached the conclusion that it should be left to administrative action by the Army to ensure that the 'psychiatric aspects' of each case were taken into account when sentencing, in order to decide whether to 'discharge the accused who is a true pervert' or provide 'treatment either while the soldier is serving his sentence or while he is under suspended sentence'.[84] It was noted, however, that 'many soldiers who indulge in homosexual practices, such as those who do so when deprived of an opportunity for normal sexual relationships, are not in need of psychiatric treatment'.[85] The Departmental Committee stated that in 1951

[78]Ibid., q. 611.
[79]Ibid.
[80]Ibid., q. 616.
[81]Ibid., Mr. Hutchison MP, q. 616.
[82]Ibid., Annex 36 (M.45 (1952-53)) Memorandum by the Departmental Committee on offences of an indecent or unnatural kind.
[83]Ibid., p. 1138.
[84]Ibid., p. 1140.
[85]Ibid., p. 1139.

and 1952 there had been a total of approximately 250 convictions of offences of an indecent or unnatural kind, but no information was given as to the nature of the conduct constituting any of the offences.[86] The Departmental Committee stated:

> From the disciplinary point of view, it is essential in the Services that all offences of an indecent or unnatural kind should be dealt with swiftly, and that in most cases they should be dealt with severely. Any appearance of leniency might lead it to be believed that such offences are not regarded seriously by the Authorities.[87]

When the Select Committee considered the Memorandum, Mr. Paget MP remained unconvinced about the offence of disgraceful conduct on the grounds that the Army 'have the civilian law' and asked '[w]hat is the offence which should be punished in the Army and which should not be punished in civilian life?'[88] Mr. Cahn (Assistant Judge Advocate-General) replied:

> … the civil law is so complicated. Although you probably could get a person in all indecency cases if you charged the right offence, and if the evidence was cleverly led and it was cleverly argued by Counsel, it is really thought in cases of this kind it is necessary for the military to have a simple offence which alleges indecency.[89]

It is clear, therefore, from this and other aspects of the Select Committee discussion that what the Army desired to retain was a provision to deal with the widest possible range of sexual activity, including activity that may not amount to an offence under civil law or would be too difficult to prosecute under civil law. The arguments that the offence of disgraceful conduct was necessary to regulate abusive and coercive sexual acts because civil law provisions proved problematic in the military context, and was required to deal with situations in which 'vice spreads widely' – for example, in the context of a 'barrack room' in which '[o]nce you get it started … you get the whole lot corrupted'[90] – ultimately persuaded the Select Committee that the offence should be retained. None of the concerns expressed in the Select Committee about the need to differentiate between types of offences – such as those involving conduct between adult men that were characterised as consensual – prevailed and retaining the offence was recommend.[91]

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[86]Ibid. It was noted that 'all serious cases of this kind are charged as civil offences'.
[87]Ibid.
[88]Ibid., q. 2005.
[89]Ibid., q. 2007.
[90]Ibid., q. 615, Lieutenant-General Sir Kenneth McLean.
[91]Ibid., p. 651.

The Army Act 1955 contained the offence of 'disgraceful conduct of a cruel, indecent or unnatural kind'[92] and identical provision was made for the Royal Air Force.[93] In 1956, proposals were made to include in naval law a provision on disgraceful conduct similar to the Army provision, 'to cover immoral or dirty acts contrary to nature which, owing to the circumstances in which they are committed, do not amount to offences under the criminal law'.[94] The original proposal was to create a naval offence covering 'any disgraceful conduct of an indecent or unnatural kind'[95] but the Select Committee considering this heard concerns regarding the inclusion of the word 'unnatural' which, it was said, would problematically allow 'homosexuality' to be dealt with under this provision.[96] Naval law (unlike Army law) had made specific provision for offences of buggery (sodomy) since 1661[97] and, in the context of a draft Bill that proposed to remove this specific provision,[98] there was a concern that including the word unnatural in the offence of disgraceful conduct would create an overlap with those unnatural offences dealt with under civil law provisions.[99] A specific concern was that this would allow homosexual acts to be dealt with summarily under the disgraceful conduct provision rather than as (more serious) civil offences.[100] This concern was in stark contrast to the view expressed on the Army in the 1953 Select Committee, discussed above, where it was argued that the offence of disgraceful conduct was necessary because of stated inadequacies in the operation and application of the civil law in the military context.

The Select Committee engaged in an extensive consideration of the meaning of the word unnatural which, the Chairman noted, was used in the Army Act and intended

[92]Army Act 1955, s. 66. This offence extended to any person subject to military law, in contrast to previous enactments that limited the offence to soldiers.
[93]Air Force Act 1955, s. 66.
[94]House of Commons Papers, *Report from the Select Committee on the Naval Discipline Act together with the proceedings of the committee, minutes of evidence and appendices*, 1955-56, IX.489, p. 625.
[95]Ibid., p. 950.
[96]Ibid., q. 990-991.
[97]13 Cha. 2 St. 1 c. 9 (An Act for the establishing Articles and Orders for the regulating and better Government of his Majesties Navies, Ships of War, and Forces by Sea), s. 32.
[98]See the justification for removing specific provision for sodomy in respect of civil offences. House of Commons Papers, *Report from the Select Committee on the Naval Discipline Act together with the proceedings of the committee, minutes of evidence and appendices*, 1955-56, IX.489, p. 626.
[99]Ibid., q. 990.
[100]Ibid., q. 991 and 1000.

to refer to 'homosexual acts'.[101] Mr. Montagu (Judge Advocate of the Fleet) thought that retaining the word 'unnatural' was important because 'every indecent offence which can be committed on a ship is almost certain to be homosexual', because no female personnel were present, and '[w]e ought not to risk its being construed differently from the Army Act, because any indecent offence in a ship is almost certain to be "unnatural"'.[102] In contrast, Vice-Admiral Hughes Hallett MP stated:

> … I do press strongly for the omission of 'unnatural'. I should have thought that the clause was quite strong enough to meet our purposes if it simply said 'disgraceful conduct of an indecent kind'. If that clause had existed in the Naval Discipline Act when I was Captain of a ship, I would have made use of it in what I consider to be minor cases of unnatural vice, in order to save the trouble of applying for a court martial.[103]

These discussions demonstrate how the terms 'indecent' and 'unnatural' were used to denote particular homosexual acts and the strong concern to ensure the most robust regulation of such acts. Upon enactment, the offence of disgraceful conduct in the Naval Discipline Act 1957 was limited to 'conduct of an indecent kind'.[104] However, in 1971, following the partial decriminalization of male homosexual acts (discussed below), which meant that these acts could (to the extent they had been decriminalised) no longer be tried under service law as civil offences, Parliament amended the disgraceful conduct offence in the Naval Discipline Act 1957 to correspond with the provision in the Army Act 1955 and, by including the word unnatural, made clear that conduct classified as such could continue to be tried as a service discipline offence.[105]

Decriminalisation of homosexual acts: 1967 to 1992 (and beyond)

In 1967, consensual homosexual acts between men (buggery and gross indecency) ceased to be an offence in England and Wales if committed in private by two people of or over the age of 21 years.[106] This legislative change had a considerable impact on Army and other service law. Until 1967, homosexual acts committed by armed forces personnel could be prosecuted under either civil or service law, and as civil offences under service law. Following the enactment of the Sexual Offences Act 1967,

[101]Ibid., q. 993.
[102]Ibid., q. 997-999.
[103]Ibid., q. 990.
[104]Naval Discipline Act 1957, s. 37.
[105]Armed Forces Act 1971, s. 31. For a discussion see: House of Commons Papers, *Special report from the Select Committee on the Armed Forces Bill [Lords]*, 1970-71, l.175, q. 361.
[106]Sexual Offences Act 1967, s. 1(1).

homosexual acts, of a kind decriminalised in England and Wales, that were committed by Army or other service personnel could no longer be prosecuted as civil offences under service law. This meant that the Army was, for the first time, entirely reliant upon its own service discipline offences – such as disgraceful conduct – to prosecute such acts. By virtue of special provision made in the Act of 1967, the Army remained free to prosecute and punish individuals under service discipline offences, such as disgraceful conduct, for engaging in consensual same-sex sexual acts that were no longer a criminal offence for civilians.[107]

Retaining the jurisdiction of the Army and other branches of the armed forces to prosecute homosexual conduct that was no longer a criminal offence was proposed by the 'Wolfenden Report' in 1957.[108] The Wolfenden Report, which proposed the partial decriminalization of male homosexual acts, stated:

> We recognise that within services and establishments whose members are subject to a disciplinary régime it may be necessary … to regard homosexual behaviour, even by consenting adults in private, as an offence. For instance, if our recommendations are accepted, a serving soldier over twenty-one who commits a homosexual act with a consenting adult partner in private will cease to be guilty of a civil offence … The service authorities may nevertheless consider it necessary to retain Section 66 of the [Army] Act (which provides for the punishment of, *inter alia*, disgraceful conduct of an indecent or unnatural kind) on the ground that it is essential, in the services, to treat as offences certain types of conduct which may not amount to offences under the civil code.[109]

When the first of several Bills was introduced in Parliament to give effect to the recommendations of the Wolfenden Report relating to homosexual acts in private,[110] there was considerable concern about its impact on service law. A chief anxiety was that the legislation would reduce the scope of the offence of disgraceful conduct which, it was noted, 'ensures that homosexual behaviour, even with consulting [sic] adults, is dealt with by court martial'.[111] Viscount Dilhorne expressed 'without the slightest doubt' that decriminalising male homosexual acts in civilian life would lead to individuals who were prosecuted for disgraceful conduct saying 'it is not an offence

[107] Sexual Offences Act 1967, s. 1(5).
[108] Home Office, Scottish Home Department, *Report of the Committee on Homosexual Offences and Prostitution*, 1957, Cmnd. 247.
[109] Ibid., para. 144.
[110] HL Deb 13 May 1965 vol. 266 col. 268.
[111] Baroness Gaitskell, HL Deb 24 May 1965 vol. 266 col. 685.

for me to do it'.[112] On this basis, Viscount Dilhorne unsuccessfully attempted to amend the Bill so that the provisions it made to decriminalise homosexual acts did 'not operate at all in relation to any members of the Armed Forces' and, as a consequence, would permit them to be tried for criminal offences that had been decriminalised for civilians.[113] Parliament, instead, decided that special provision should be made in the Bill to ensure that the partial decriminalization of homosexual acts 'shall not prevent an act from being an offence (other than a civil offence) under any provision of the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957'.[114] The Lord Chancellor confirmed that this would preserve the ability of the armed forces to continue to prosecute individuals under service discipline offences for engaging in conduct that would cease to be an offence for civilians.[115]

In 1966, the Select Committee examining the Armed Forces Bill considered the extent of homosexual offences committed by members of the armed forces. No mention was made of the Army, but it was stated that there were 'quite a lot' of offences in the Royal Navy,[116] and a 'very constant problem' in the Royal Air Force.[117] In light of proposals to decriminalise consensual homosexual acts in private for civilians, the Select Committee was told that 'discipline would be very adversely affected if it could not be treated as an offence' in the armed forces.[118] Although the Sexual Offences Act 1967 did preserve the ability of the armed forces to prosecute homosexual conduct that was no longer a criminal offence for civilians, the punishment of those convicted was limited to the maximum available sentence allowed by service law – which, for disgraceful conduct in the Army, was imprisonment for a term not exceeding two years.[119] However, it is notable that, four years after the Sexual Offences Act 1967 was enacted, when the Select Committee examining the Armed Forces Bill asked witnesses whether that Act had changed the sentences awarded for homosexual offences under service law, it was told '[b]roadly speaking I understand not',[120] and '[n]o, we are dealing with them exactly as before'.[121]

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[112]HL Deb 24 May 1965 vol. 266 col. 707.
[113]HL Deb 21 June 1965 vol. 267 cols. 350-352.
[114]HL Deb 16 July 1965 vol. 268 col. 431. Enacted as Sexual Offences Act 1967, s. 1(5).
[115]HL Deb 16 July 1965 vol. 268 cols. 435-436.
[116]House of Commons Papers, *Special report from the Select Committee on the Armed Forces Bill together with the proceedings of the committee minutes of evidence and appendices*, 1966-67, X.39, q. 448, Rear-Admiral Woodifield.
[117]Ibid., q. 450, Air Commodore Allen Jones.
[118]Ibid.
[119]Army Act 1955, s. 66 (upon enactment).
[120]House of Commons Papers, *Special report from the Select Committee on the Armed Forces Bill [Lords]*, 1970-71, I.175, q. 362, Mr. Kent (Deputy Under-Secretary of State).
[121]Ibid., Captain Jobling (Chief Naval Judge Advocate).

In 1981, the Select Committee examining the Armed Forces Bill gave extensive consideration to the continuing regulation of consensual same-sex sexual acts committed by members of the armed forces. The Select Committee requested data on homosexual offences and was informed that, in respect of the Army, 29 servicemen in 1979, and 31 servicemen in 1980 had been convicted of such offences.[122] The Select Committee also considered a Memorandum from the Campaign for Homosexual Equality which argued that the special provision in the Sexual Offences Act 1967 allowing consensual homosexual acts to be prosecuted as service discipline offences should be repealed.[123] The Select Committee was divided on this issue and eventually rejected a proposal to recommend that the Service Discipline Acts be amended to provide that homosexual acts should not be offences unless the conduct can be shown to be prejudicial to good order and discipline, and that the special provision made in the Act of 1967 for the armed forces be repealed.[124] The Select Committee reached the conclusion that, although it found the official argument that legalising homosexuality in the armed forces would make homosexuals more open to blackmail 'at best a poor one', it accepted the submission by the Services that 'the tolerance of homosexual practices might erode the trust and confidence within and between all ranks on which the successful operation of the forces depends'.[125]

When the Armed Forces Bill was re-committed to the House of Commons from the Select Committee a further attempt was made to prevent prosecutions for homosexual acts (that were legal for civilians) as service discipline offences unless the conduct could be shown to be prejudicial to good order and discipline, and repeal the special provision in the Sexual Offences Act 1967 relating to the armed forces.[126] In moving an amendment to the Bill to achieve this, Mr. Davidson MP argued:

> I do not wish to initiate a major debate on homosexuality. I certainly do not want to go into the argument whether legalising homosexual acts makes those who indulge in them more or less vulnerable to blackmail. Neither do I seek to

[122]This includes convictions by court martial, summary hearings and the civil courts. Data were also provided for the Royal Navy and Royal Air Force. House of Commons Papers, *Special report from the Select Committee on the Armed Forces Bill. Together with the proceedings of the committee. Minutes of evidence and appendices*, 1980-81, HC 253, p. 81.
[123]Ibid., p. 84.
[124]Ibid., p. xvi-xvii. The Select Committee divided Ayes, 2 and Noes, 3.
[125]Ibid., p. viii.
[126]HC Deb 19 May 1981 vol. 5 col. 249.

> bring Armed Forces lawfully into line with the law in general. I seek merely to cure a massive injustice and a blatant act of discrimination.[127]

The amendment was not approved, Parliament being persuaded by the argument that 'the need for absolute trust and confidence both within and between all ranks, require that the potentially disruptive influence of homosexual practices should be excluded'.[128]

The Memorandum that had been submitted by the Campaign for Homosexual Equality to the Select Committee on the Armed Forces Bill in 1981 was part of a broader and long-standing campaign to address discrimination against and ill-treatment of gay people serving in the armed forces. This campaign was aided by a number of media considerations of the issue which brought it more into public view.[129] For example, national newspaper coverage was given to '[f]our private soldiers serving in the Army's Eastern District' who were to 'face court martial for alleged homosexuality' after being charged with 'disgraceful conduct of an indecent nature'.[130] Following the conviction of the four soldiers for disgraceful conduct, the Campaign for Homosexual Equality and the National Council for Civil Liberties stated that 'nothing remotely like these cases could have been brought if the men had been civilians'.[131] Press attention was also given to John Bruce, a Campaign for Homosexual Equality member, who had been convicted of disgraceful conduct and discharged from the Army in consequence of having same-sex relationships, and who was bringing a case under the European Convention on Human Rights.[132] That case, which was unsuccessful,[133] also attracted the attention of the Select Committee on the Armed Forces Bill.[134]

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[127]Ibid.

[128]Mr. Goodhart MP, HC Deb 19 May 1981 vol. 5 col. 251.

[129]For a discussion see: Nigel Warner, 'Peter Ashman Memorial Archive: Notes on CHE law reform archive (1973-1990)', unpublished draft obtained from author.

[130]'Homosexuality charges', *The Times*, 6 August 1981, p. 3.

[131]Campaign for Homosexual Equality, 'CHE protests as soldiers are jailed: "Suspicion is enough," says Minister', *Broadsheet: a Monthly Report from National CHE*, 1 Nov 1981, p. 3.

[132]'Ministry defends Forces bar on homosexuals', *The Times*, 15 April 1981, p. 4.

[133]For a consideration of this case see: Paul Johnson, *Going to Strasbourg: An Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights*, (Oxford: Oxford University Press, 2016), p. 31-32.

[134]House of Commons Papers, *Special report from the Select Committee on the Armed Forces Bill. Together with the proceedings of the committee. Minutes of evidence and appendices*, 1980-81, HC 253, q. 280.

In 1981, Parliament was informed that over the five years to the end of 1980 there were 137 discharges from the Army of servicemen following conviction for 'homosexual misconduct', and 95 soldiers had been given custodial sentences before discharge.[135] Information was not provided about the number of these cases which would not have involved a criminal offence if the conduct in question had taken place between civilians. In the same period, 138 servicemen and 175 servicewomen had been administratively discharged from the Army on the grounds of homosexuality without any disciplinary proceedings having been taken.[136] By 1985, further information provided to Parliament on the Army suggested a decline in cases involving homosexual conduct being prosecuted in the courts martial (41 cases in 1981, compared to 9 cases in 1984) while the number of administrative discharges (258 cases between 1981 and 1984) remained stable.[137]

In 1986, the Select Committee examining the Armed Forces Bill received detailed submissions from the Campaign for Homosexual Equality, the National Council for Civil Liberties, and AT EASE (a counselling service) on the subject of the treatment of gay people in the armed forces.[138] The Select Committee gave extensive consideration to the continuing regulation of same-sex sexual acts under service law and considered the following recommendation proposed by Mr. McNamara MP:

> The Ministry [of Defence] witnesses [on homosexuality and the armed forces] displayed muddle, confusion and at times came near to contradicting each other's evidence … The opinions expressed were of 'perceptions of society' which were not substantiated by any solid scientific or sociological research. The contradictions and the apparent denial of natural justice by the Services had not been examined, nor had the possibility that maintaining 'disgraceful conduct of an indecent kind' as a specifically military offence could lead to homosexuals being blackmailed and thus an avoidable security risk created from conduct which in civilian life is not illegal if in private and if the partners are of full age and are consenting. The Committee therefore recommend that homosexual acts should be treated in military law as they are in the ordinary criminal law,

[135]HC Written Answers 16 June 1981 vol. 6 col. 346.
[136]Ibid., cols. 346-347. Statistics are also provided for the Royal Air Force and Royal Navy.
[137]HC Written Answers 8 March 1985 vol. 74 cols. 624-625. Statistics are also provided for the Royal Air Force and Royal Navy.
[138]House of Commons Papers, *Special report from the Select Committee on the Armed Forces Bill, Session 1985-86, Together with the proceedings of the committee and the minutes of evidence, with appendices*, 1985-86, HC 170.

> and should only constitute a military offence where they amount to conduct likely to be 'prejudicial to good order and discipline'.[139]

The Select Committee rejected the proposed recommendation,[140] and instead recommended that it would not 'be wise to change the existing law' because the 'existence of sexual relationships between servicemen' would be 'intrinsically liable to generate social and emotional tension of a kind which could only be harmful to morale and military efficiency'.[141]

Witnesses before the Select Committee in 1986 confirmed that the offence of disgraceful conduct was used to regulate the consensual same-sex sexual relationships of members of the armed forces, even when those relationships took place outside of the service environment.[142] In other words, 'a relationship which went off base' could 'amount to disgraceful conduct of an indecent kind'.[143] This was not least because, in some cases, 'one has an admission made by the soldier himself when he has come back'.[144] It was now absolutely clear to Parliament that the offence of disgraceful conduct was being used to prosecute service personnel who were engaged in conduct away from their workplaces (sometimes with civilian partners) which was completely lawful in civilian life. It was on this basis that Lord Graham of Edmonton attempted to amend the Armed Forces Bill to make provision to nullify the special provision in the Sexual Offences Act 1967 that allowed consensual homosexual acts, which were lawful for civilians, to constitute service discipline offences:

> … something which is legal and permissible outside the armed forces – homosexuality between two consenting adults in private – when it takes place between one or two members of the armed forces is held to be disgraceful conduct of an indecent kind. In simple equity, let alone in justice and humanity, I believe that we ought not to tolerate a situation in which that is the law of the land.[145]

This amendment found no support and several members of the House of Lords strongly objected to it on the grounds that, for example, homosexuality was 'like a

[139]Ibid., p. xxxi-xxxii.
[140]Ibid., p. xxxii. The Select Committee divided Ayes, 3 and Noes, 5.
[141]Ibid., p. xi.
[142]Ibid., q. 689-692.
[143]Ibid., q. 691, Mr. Stuart-Smith (Judge Advocate General).
[144]Ibid.
[145]HL Deb 19 May 1986 vol. 475 cols. 38-39.

virus' that 'runs … through the services' and was in need of regulation by military law.[146] Consequently, the law remained unchanged.

In 1991, extensive consideration was again given to the issue of homosexuality by the Select Committee on the Armed Forces Bill. It was now clear that the number of Army personnel dismissed as a result of a conviction for a service discipline offence in respect of 'homosexual activities' (22 male personnel, between 1987 and 1990) was far lower than the number of Army personnel administratively discharged for such activities (77 male personnel, and 98 female personnel, between 1987 and 1990).[147] As such, the Army was more commonly dismissing personnel for 'homosexual activities' by means of administrative rather that disciplinary action. The Select Committee again received detailed submissions from groups seeking to end discrimination against gay people in the armed forces, including from the recently founded Stonewall Group, members of which appeared before the Select Committee to give oral evidence.[148] Specific information was provided to the Select Committee in respect of the use of service discipline offences to deal with homosexual conduct:

> … under Service law offenders are generally charged under the provisions dealing with disgraceful conduct of an indecent kind, or conduct prejudicial to good order and discipline, or possibly (but very rarely) scandalous conduct by officers. I will not say that dismissal is automatic in every case of a prosecution under the Service Discipline Acts, but I will say it is almost certain. To explain that, if there were a fairly minor piece of homosexual activity which perhaps grew out of over-intense horseplay amongst very young men or adolescents, in such a case it might be considered that whatever punishment of presumably a fairly minor nature was visited upon the offenders it would not be necessary to dismiss from the Service if it could be categorised as a transient phase rather than an orientation towards homosexuality.[149]

After extensive consideration, the Select Committee was 'not persuaded that the time has yet come to require the Armed Forces to accept homosexuals or homosexual

[146]Lord Marshall of Leeds, HL Deb 19 May 1986 vol. 475 col. 41.
[147]House of Commons Papers, *Special report from the Select Committee on the Armed Forces Bill together with the proceedings of the committee, minutes of evidence and memoranda*, 1990-91, HC 179, Supplementary Memorandum from MoD on Service Personnel dismissed/discharged the Armed Services for homosexual activities, p. 177. Statistics are also provided for the Royal Air Force and Royal Navy.
[148]House of Commons Papers, *Special report from the Select Committee on the Armed Forces Bill together with the proceedings of the committee, minutes of evidence and memoranda*, 1990-91, HC 179, p. 95.
[149]Ibid., Captain Lyons, q. 622.

activity' but, however, that 'we see no reason why Service personnel should be liable to prosecution under Service law for homosexual activity which would be legal in civilian law'.[150] On this basis, the Select Committee recommended that 'homosexual activity of a kind that is legal in civilian law should not constitute an offence under Service law'.[151]

In 1992, the Government announced that the recommendation of the Select Committee had been accepted and that the special provision in the Sexual Offences Act 1967 relating to the armed forces should no longer apply and 'criminal proceedings should no longer be brought'.[152] It was stated that the purpose of this change was to 'tidy up the differences between military and civilian law' and was 'not intended to alter the present disciplinary climate of service life'.[153] The Sexual Offences Act 1967 (and equivalent legislation in Northern Ireland and Scotland) was amended by the Criminal Justice and Public Order Act 1994 to remove the exemption of the armed forces from provisions partially decriminalizing male homosexual acts.[154] The result was 'the removal of the most overt but increasingly irrelevant form of discrimination against homosexuals in the armed forces'.[155] It was 'increasingly irrelevant' because, in the vast majority of cases in which the armed forces successfully took action against a homosexual serviceperson because of their sexual orientation, the serviceperson was administratively discharged without any formal disciplinary charge being laid.[156] Of those personnel that had been administratively discharged from the Army on the grounds of sexual orientation in the four years preceding 1991, over half were women – the armed forces being 'no more lenient of lesbianism than of homosexuality in men'.[157] Indeed, the Criminal Justice and Public Order Act 1994 made explicit that the changes it made in relation to service discipline offences did not 'prevent a homosexual act (with or without other acts or circumstances) from constituting a ground for discharging a member of Her Majesty's armed forces from the service'.[158] The administrative discharging of armed forces personnel on grounds of sexual orientation

[150]Ibid., p. xiv.
[151]Ibid.
[152]Mr. Aitken MP, HC Deb 17 June 1992 vol. 209 col. 989-990.
[153] Ibid., col. 990.
[154] Criminal Justice and Public Order Act 1994, s. 146-147.
[155]Gerry R. Rubin, 'Section 146 of the Criminal Justice and Public Order Act 1994 and the "Decriminalization" of Homosexual Acts in the Armed Forces', Crim. L.R. 393, (1996), p. 402.
[156]House of Commons Papers, *Special report from the Select Committee on the Armed Forces Bill together with the proceedings of the committee, minutes of evidence and memoranda*, 1990-91, HC 179, p. xiv.
[157]Ibid.
[158]Criminal Justice and Public Order Act 1994, s. 146(4) and 147(3).

ended in 2000, following successful litigation in the European Court of Human Rights, when the Government announced that 'homosexuality will no longer be a bar to service in Britain's armed forces'.[159] The provisions in the Criminal Justice and Public Order Act 1994 permitting such discharges were repealed in 2016.[160]

Conclusion: the past, the present and the future

Between 1829 and 1992, Parliament made and maintained legislation that provided the basis for regulating and punishing those in the Army who engaged in same-sex sexual acts that were deemed to be disgraceful conduct of an indecent or unnatural kind. During this period, the disgraceful conduct offence provided a means of regulating same-sex sexual acts that, by today's standards, would be classified as consensual and lawful. After 1967, the offence of disgraceful conduct could still be used to regulate consensual sexual acts committed between adult men of a kind which were by then lawful in civilian life. It is not possible to know how many service personnel were convicted of the offence of disgraceful conduct for engaging in same-sex sexual acts that would, if committed today, be lawful. However, on the basis that it was possible to convict service personnel under this or other service discipline offences for acts that would today be lawful, it is important that Parliament has recently enacted legislation to address any historical injustices.

The expansion of the disregard and pardon schemes in 2022 to include repealed service discipline offences 'rights historic wrongs'[161] by providing those living with a conviction for an offence such as disgraceful conduct, where the conduct constituting the offence was sexual activity between persons of the same sex, with the opportunity to apply to have a conviction disregarded and, if successful, be pardoned for the offence.[162] Moreover, the pardon scheme now grants, subject to certain conditions, a posthumous pardon to those who were convicted of repealed service discipline offences such as disgraceful conduct, where the conduct constituting the offence was sexual activity between persons of the same sex, and who have since died.[163] Extending the disregard and pardon schemes to include repealed service discipline offences was important for at least three reasons: first, it provides an important form of redress for those previously cruelly treated solely because of their sexual orientation; secondly, it acknowledges and draws a line under a shameful and long history of state-sanctioned

[159]Mr. Hoon MP, HC Deb 12 January 2000 vol. 342 col. 288. For a discussion of the litigation in the European Court of Human Rights see: Johnson, *Going to Strasbourg*.
[160]Armed Forces Act 2016, s. 14. This was the result of evidence I gave, with Mr. Duncan Lustig-Prean (former Lieutenant Commander, Royal Navy), to the Select Committee on the Armed Forces Bill (see: HC Deb 11 January 2016 vol. 604 col. 601).
[161]Mrs. May MP, HC Deb 1 March 2011 vol. 524 col. 213.
[162]Protection of Freedoms Act 2012, s. 92 (as amended).
[163]Policing and Crime Act 2017, s. 164 (as amended).

discrimination; and third, it sends a clear message that such discrimination must never happen again. This latter point is particularly important at a time when, in various parts of the world, discriminatory legislation continues to be proposed and enacted in order to regulate individuals solely on the grounds of sexual orientation.

The UK government has announced that it will commission an independent review into the impact that the ban on homosexuality in the armed forces has had on LGBT veterans today.[164] This review will 'seek to better understand the experience of LGBT veterans who served in the Armed Forces between 1967 and 2000'.[165] The experience of many such LGBT veterans will almost certainly have been shaped by the fact that same-sex sexual acts were punishable, for most of the period of time covered by the review, as service discipline offences. A review of the impact of this legal regulation on the lives of armed forces personnel during this period is therefore essential in order to fully acknowledge and address the pain and suffering it caused. It is to be welcomed that the government has also explicitly stated that it will 'explore ways to enable veterans with convictions for service offences relating to their sexual orientation to apply to the Home Office for a disregard'.[166]

[164]Office for Veterans' Affairs, *Veterans' Strategy Action Plan: 2022-2024*, January 2022, CP 598.
[165]Ibid., p. 29.
[166]Ibid., p. 4.