QIFIG AN AIRE DLÍ AGUS CIRT

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April 1993

DRAFT MEMORANDUM FOR THE GOVERNMENT

The decriminalisation of homosexual acts

Decision sought

1. The Minister for Justice seeks

(i) the decision of the Government on the form which legislation to comply with the decision of the European Court of Human Rights in the case of Norris .v. Ireland should take; (paras. 10 and 11)
(ii) the decision of the Government on the age of consent in such legislation; (paras 12 to 15)
(iii) the authorisation of the Government to draft a Bill implementing these decisions and making consequential changes in the law as set out in the General Scheme at Appendix I (paras 16 to 21).

Present law

2. Buggery is a felony at common law, the penalty for which is fixed by Section 61 of the Offences Against the Person Act, 1861, which reads "whosoever shall be convicted of the abominable crime of buggery, committed with mankind or with any animal shall be liable to be kept in penal servitude for life". Buggery is sexual intercourse per anum with a man or a woman or intercourse (per anum or per vaginam) by a man or woman with an animal of either sex. The latter offences are known as bestiality. Consent is irrelevant. Section 62 of the 1861 Act deals with attempts. The maximum penalty is ten years penal servitude. The Penal Servitude Act, 1891 allows a court to impose a fine in lieu of imprisonment in respect of offences under both of these provisions.

3. Homosexual acts between men which fall short of buggery or attempted buggery are covered by Section 11 of the Criminal Law Amendment Act, 1885. Under the heading of unnatural offences, it proscribes acts of gross indecency between men committed, procured or attempted, either in public or in private. The maximum penalty is two years imprisonment.

Challenge to the present laws

4. Senator David Norris sought a declaration that these laws were inconsistent with the Constitution. The Supreme Court, in 1983, decided by a 3/2 majority that the laws were not inconsistent with the Constitution. This is not to say, as some commentators have alleged, that the laws are as required by the Constitution.

5. Senator Norris then brought an application before the European Court of Human Rights, and the Court, in 1988, found that the laws were in breach of Article 8 of the European Convention on Human Rights. This Article requires respect for a person's private and family life, his home and his correspondence and prohibits interference with this right by a public authority, save in certain limited circumstances (protection of health, morals etc.). The European Court found that none of these provisos could save Ireland from being in breach of Article 8.

Effect of decision

6. The effect of the decision is that our laws are in breach of the Convention only to the extent that they criminalise homosexual acts in private between consenting male adults. Insofar as our laws criminalise public homosexual acts or homosexual acts with young people, they were not found to be in breach of the Convention.

Consequences of non-compliance with decision

7. Article 53 of the Convention on Human Rights provides that "the high contracting parties undertake to abide by the decisions of the Court in any case to which they are parties." Under Article 54 of the Convention, judgments of the Court are transmitted to the Committee of Ministers of the Council of Europe which supervises their execution. It is for the Party concerned (in this case the Government of Ireland) to give effect to the judgment, and should it fail to do so, it would be for the Committee of Ministers to decide what action should be taken. The Committee does not have power to force a State into compliance but it would, if the need arose, have strong persuasive authority, backed, in the last resort, by the power of suspension from the Council of Europe. It is considered that Ireland's membership of the Council of Europe should not be called into question over this matter and this can only be ensured through enactment of legislation necessary to comply with the judgment.

8. The Convention allows for a derogation from its obligation in specified circumstances limited to time of war or other public emergency threatening the life of the nation. It is clear that derogation is not applicable in relation to the judgment and that, if our continued membership of the Council of Europe is not to be put at risk, there is no choice but to legislate in the matter.

Law Reform Commission recommendations

9. The Commission examined the question of homosexual law reform in the context of its study of the law on child sexual abuse. The Commission proceeded on the basis that the State would wish to continue as a party to the Human Rights Convention and said that, "in general, the same legal regime should obtain for consensual homosexual activity as for heterosexual and that, in particular, no case had been established for providing that the age of consent should be any different.". In its 1990 Report on Child Sexual Abuse it recommended the repeal of sections 61/62 of the 1861 Act and section 11 of the 1885 Act and the enactment of a provision that would make homosexual acts with persons under 17 an offence. (Buggery is a common law offence - section 61 merely provides the penalty, it does not create the offence. Strictly, therefore, the Commission should also have recommended the abolition of the common law offence of buggery). Following the Commission's recommendation would mean that acts of anal intercourse would be criminal where they involve children (male and female) under 17 but not otherwise.

Options for legislation

10. The legislation raises questions as to whether homosexual intercourse between consenting adults should be a crime in any circumstances when heterosexual intercourse is not, and whether an offence of gross indecency between men (even in private) should be retained when there is no similar provision when women are involved. A previous Minister for Justice has made the point that if buggery were not a crime in our existing law it would be unlikely now to be made a crime. It is likely that any legislation proposed will attract criticism no matter what form it takes. On one side there will be those who are opposed to any change in the law even though some change is required by our obligations under the European Convention on Human Rights. On the other side there will be those who will be satisfied with nothing less than change which would in effect equate, for the purposes of the law, homosexual and heterosexual

behaviour. For these groups any retention of the 19th century legislation would be unacceptable and they will press for change on the lines of the 'gender neutral' Law Reform Commission recommendations.

11. As regards the shape of the proposed legislation there are two options which the Government might consider. The difference between them is that the first decriminalises homosexual acts in private only. The choice between them is quite distinct from the question of the age of consent. That issue will have to be decided on its merits, irrespective of the shape of the legislation, and is discussed below in paragraphs 12 to 15.

OPTION I

I. The first option is to make the minimum change needed to satisfy the European Court judgment, amended to also take account of heterosexual buggery. It would leave the existing sections 61 and 62 of the Offences against the Person Act 1861 and section 11 of the Criminal Law Amendment Act 1885 in place together with the common law offence of buggery, but exempt from their effect acts in private of buggery between consenting adults and of gross indecency between consenting male adults.

Such a Bill might be along the following lines:

(a) Notwithstanding any statutory provision or rule of law, a sexual act in private shall not be an offence if the parties consent thereto and have attained the age of consent or are married to each other.

(b) For this purpose a person shall be treated as doing a sexual act if, and only if, that person commits buggery with another person or being a man commits an act of gross indecency with another man or is a party to the commission by a man of such an act.

In the legislation in England and Northern Ireland an act is not treated as being in private if it is committed in a public lavatory or on an occasion where more than two persons are present.

If option I is adopted the Minister would propose for consideration that an act would not be treated as being in private if more than two people are present.

Comment

This is the approach adopted in Northern Ireland and, effectively, in England and Wales (the only difference being that the above proposal also deals with heterosexual buggery). As it leaves in place the existing provisions, while providing for exemptions, it retains the principle in law that the sexual conduct in question is unacceptable. To that extent, this approach might attract less opposition from people who are opposed to changing the law on homosexuality.

It would be strongly criticised by those pressing for change on the ground that it does not go far enough and that it retains the pejorative language of the 1861 and 1885 Acts. They would contend that it discriminates against homosexuals in that homosexual intercourse would remain a crime, while heterosexual intercourse is not, and in retaining the offence of gross indecency which does not apply to heterosexuals.

An alternative way of dealing with option I would be to repeal the 19th Century provisions and restate the law in modern terms. While this would get rid of the pejorative language of the existing provisions it is not being put forward for consideration since it would mean the creation of a modern offence of non private homosexual acts between consenting adults and it is assumed that the Government would not want to be seen to do this.

OPTION II

II The second option is to repeal the existing law prohibiting buggery between persons and gross indecency between men and to enact new provisions prohibiting this conduct with young persons, in a similar way to the existing prohibition on sexual intercourse with young girls.

Such a provision might be along the following lines:

(a) sections 61 and 62 of the 1861 Act (save as they apply to buggery with animals) and section 11 of the 1885 Act are hereby repealed.

(b) any rule of law whereby buggery between persons is an offence is hereby abrogated.

(c) it shall be an offence for a person to commit an act of buggery with a person under the age of consent, unless he is married to that person.

(d) it shall be an offence for a man to commit an act of gross indecency with a male person under the age of consent or be a party to the commission by a male person under that age of such an act.

(e) provide for penalties - the existing penalties are up to life for buggery, up to 10 years for attempted buggery and up to 2 years for gross indecency; if this option is adopted it would be proposed to align the sentence for buggery with a young person with the penalties for sexual intercourse with a young girl i.e. up to life imprisonment if the young person is under 15 and up to 10 years if the young person is under the age of consent.

Comment

This approach is generally on the lines of the Law Reform Commission's recommendations. It is the approach that, of the two, would find most favour with those groups which have been pressing for change, as it would mean that the general principle applying to all sexual acts would be the same, i.e. sexual conduct with young persons would be prohibited and consensual acts between adults would be lawful.

It would be strongly criticised by those opposed to change who would see it as marking society's approval of homosexuality as an acceptable or parallel lifestyle.

Following the repeal of sections 61 and 62 of the 1861 Act and section 11 of the 1885 Act, public acts of gross indecency would be dealt with under section 18 of the Criminal Law Amendment Act 1935 and the common law. Section 18 of the 1935 Act provides that every person who commits at or near or in sight of any place along which the public habitually pass as of right or by permission, any act in such a way as to offend modesty or cause scandal or injure the morals of the community shall be guilty of an offence. The penalty was increased in 1990 to a fine of £500 or up to 6 months imprisonment or both. At common law any indecent act in any open or public place in the presence of more persons than one is a misdemeanour. Non-consensual buggery committed against a man or a woman is covered by the offence of rape under section 4 of the Criminal Law (Rape) (Amendment) Act, 1990 (max penalty of life imprisonment) and the repeal of the 19th century provisions would have no effect on this. The offences of aggravated sexual assault and sexual assault would also be applicable to non-consensual acts against men or women.

Age of Consent

12. A decision needs to be made to fix the age below which homosexual acts with young people will be illegal. The age of consent for heterosexual intercourse is seventeen. The Criminal Law Amendment Act, 1935 makes it an offence for a man to have sexual intercourse with a girl under seventeen unless he is married to her. Only young girls are protected by that provision, boys are not. In the Minister's view there are three options which might be considered with regard to the age of consent above which anal intercourse - in private, under Option I - would not be a criminal offence. It is proposed that whatever that age might be would also be the age of consent for such intercourse as between men and women. In other words, the law on anal intercourse would be non-discriminatory in its application.

17 years of age

13. An age of consent of 17 for homosexual acts would mean that 17 would be the common age of consent for full sexual relations. This is the approach recommended by the Law Reform Commission and is favoured by the homosexual community. Other European countries with a common age of consent are Belgium (16), Netherlands (16), Norway (16), Switzerland (16), Portugal (16), Sweden (15), Denmark (15), Poland (15), Greece (15), France (15), Italy (15) and Spain (15). A common age of consent could, however, cause genuine problems for many people who are concerned about the alternative life style promoted by the homosexual community. It could also provide encouragement for a campaign for recognition of what have been called "the more bizarre manifestations of homosexuality", such as homosexual marriage.

18 years of age

14. 18 years is the present age of majority. Campaigners for the decriminalisation of homosexual acts would see any age other than 17 to be unequal and discriminatory. However, 18 is an age by which most boys will have left school, in some cases boarding school, and will be regarded by society as being "grown-up" and emotionally mature. Unlike the U.K., the proposal here is to decriminalise homosexual and heterosexual anal intercourse, so that an age limit of 18 would apply not only to homosexuals but to anyone wishing to engage in such conduct.

21 years

15. This is the age of consent in the U.K. for homosexual acts between men (although when homosexual acts were legalised in England, 21 was the age of majority there - now it is 18). In 1981 the Policy Advisory Committee on Sexual Offences recommended that the age limit should be reduced to 18. As regards heterosexual anal intercourse, the 1984 Report of the English Criminal Law Revision Committee recommended its decriminalisation and an age of consent for women of 16 years.

OTHER MATTERS

Protection of the mentally impaired

16. Section 4 of the Criminal Law Amendment Act, 1935 makes it an offence for any person, in circumstances which do not amount to rape, to have or attempt to have unlawful carnal knowledge of a woman or girl who is an idiot or an imbecile or is feeble minded. The wording of the provision is offensive but the principle should, in the Minister's opinion, be extended, in modern language, to protect the mentally impaired from anal intercourse or gross indecency. This would either take the form of a specific offence of anal intercourse or gross indecency with a mentally impaired person, if the Government decides to repeal the existing provisions under option II, or of providing that any exemption from the existing provisions under option I would not apply to any act with a mentally impaired person. The Minister's proposals are based on the recommendations of the Law Reform Commission in its 1990 Report on Sexual Offences against the Mentally Handicapped.

Prostitution

17. Prostitution is not itself illegal, but certain aspects of prostitution which affect the general public, such as soliciting and brothel-keeping, are offences. These offences have never applied to male homosexual prostitution, as male homosexual acts are at present prohibited in all circumstances. The decriminalisation of buggery and gross indecency between men in private (or generally), however, means that offences such as soliciting and brothel-keeping will have to be extended to male prostitution, unless male homosexual soliciting and brothels are to be legal. In some cases this will mean a straightforward amendment of the existing law. In other cases, however, the existing law on certain aspects of prostitution is inoperable and will have to be completely

18. The Law Reform Commission in its Report on Vagrancy and Related Offences (LRC11-1985) made recommendations on three aspects of prostitution, viz.

(a) street offences by prostitutes,
(b) solicitation by males, and
(c) living on the earnings of prostitution.

The Minister's proposals set out below implement, with minor variations, the recommendations of the Law Reform Commission and extend the law to cover male homosexual prostitution.

Brothel-keeping

19. The Minister proposes to amend the provision in the Criminal Law Amendment Act, 1935 which deals with brothel-keeping so as to bring male prostitution within its scope. Advantage is being taken of this opportunity to increase the penalties for brothel-keeping from their present unrealistically low level (head 2).

Soliciting

20. The present laws on heterosexual soliciting are essentially inoperable. The Minister proposes, therefore, to take the opportunity to create a new, gender-neutral offence of soliciting for the purposes of prostitution (whether heterosexual or homosexual) in a public place (head 3). This offence will apply to clients as well as to prostitutes and indeed to third parties. In addition, kerb-crawling will be covered by the offence.

Organising prostitution

21. The law on living off the earnings of prostitutes and of controlling prostitutes for gain should also, the Minister believes, be changed to take account of male prostitution. The existing law is that it is an offence for a man to live off the earnings of a (female) prostitute and for a woman to exercise control over (female) prostitutes for gain. The Minister proposes to replace these provisions with a new gender-neutral offence of organising (male or female) prostitution (head 4). The penalty will reflect the extent of the organisation.

Homosexual acts in the defence forces or on merchant ships

22. Legislation in the neighbouring jurisdictions has not decriminalised homosexual acts in the defence forces or aboard merchant ships, wherever they may be, or between members of the crew of such ships registered in the United Kingdom. This is a matter primarly for the Ministers for Defence and the Marine whose views the Minister for Justice will take into account.

23. Implications for women

Unlike the legislation in England and Northern Ireland, which dealt strictly with homosexual acts, the proposal in both Option I and II is to extend the decriminalisation of buggery to include buggery between men and women.

24. Views of other Departments

General Scheme of the Proposed Criminal Law Amendment Bill

Head 1

(1) Option 1 or 2 as decided by the Government.

(2) Provision protecting the mentally impaired.

Head 2 Amendment of the Criminal Law Amendment Act, 1935

Provide that:

(a) In section 13 of the Act of 1935 "prostitution" includes male prostitution and in that section and section 19 of the same Act "brothel" includes a premises resorted to for male prostitution.

(b) In section 13 of the Act of 1935 a penalty of £1,000 is substituted for the penalty of £100 and a penalty of £5,000 is substituted for the penalty of £250.

Note

Up until this Bill, there has been no need for the laws on prostitution and brothel-keeping to take account of male prostitution, as homosexual acts have been completely prohibited.

Subhead (a) provides that section 13 of the 1935 Act (brothel-keeping) and section 19 (search of brothels) will apply to all brothels, whether there are female or male prostitutes or both.

Subhead (b) takes the opportunity to increase the monetary penalties for brothel-keeping from their present inadequate level.

Head 3 Soliciting for the purposes of prostitution

Provide that:

(a) It shall be an offence for any person in a public place to solicit another person for the purposes of prostitution or to loiter for the purpose, or with the intention, of so soliciting.

(b) For the purposes of this section:
"loitering" includes loitering in a vehicle;
"prostitution" means male or female prostitution;
"public place" includes any place to which the public have access, whether by payment or otherwise.

(c) The penalty for an offence under this section shall, on summary conviction, be a fine not exceeding £1,000 and/or up to 6 months imprisonment.

Note

The purpose of this Head is to revise and up-date the law on soliciting for the purposes of prostitution. This is discussed in the Law Reform Commission's Report on Vagrancy and Related Offences (LRC 11-1985).

Prostitution is not itself an offence, but soliciting for the purposes of prostitution is, under a variety of statutes. Court decisions in 1981 and 1982 have, however, rendered these laws inoperable, due to the invariable use of the phrase "common prostitute" and the general requirement that there be evidence of annoyance to passers-by.

In King v. The Attorney General 1981 IR233, the offence under section 4 of the Vagrancy Act, 1824 of "loitering with intent" by a "suspected person" was found unconstitutional. It involved the same act being an offence for some persons but not for others, with the mere charging of a person with the offence having implications for his character, and the same reasoning was clearly applicable to the offences of soliciting.

In 1982, in the District Court case of Garda Kellegher v. Patricia Cullen and others (unreported), a charge under section 14(II) of the Dublin Police Act, 1842 was dismissed on the grounds that (i) the words "common prostitute" involved evidence of character before conviction, and (ii) there was no evidence of annoyance to passers-by (who are notoriously reluctant to give such evidence).

Since then, charges have been brought, where possible, against both prostitutes and clients under section 5 of the Summary Jurisdiction (Ireland) Amendment Act, 1871 (indecent exposure or an act contrary to public decency) or section 14(13) of the Dublin Police Act, 1842 (breach of the peace). These are not effective measures in this context and were never intended to deal with soliciting.

Subhead (a) provides for a new offence of soliciting. The existing, redundant statutory provisions are repealed in Head 8.

The new offence is intended to apply to all acts of soliciting for the purposes of prostitution i.e.

- by a prostitute of a client;
- by a client of a prostitute;
- by a third party on behalf of a prostitute or client.

This is in line with the recommendation of the Law Reform Commission (LRC 11-1985), with one exception. The Commission also recommended that the offence should include loitering for the purpose or with the intention of being solicited. It would seem strange to make it an offence to hope that some other person will commit an offence by soliciting, especially since the act of being solicited is not an offence.

The Commission also recommended that, in addition, there should be a new offence of a person in a public place loitering or soliciting another person for the purpose of the commission of a sexual offence. It is considered, however, that the law on attempting to commit offences is adequate to deal with any situation of genuine concern.

Subhead (b) provides for certain definitions. "Loitering" is intended to cover kerb-crawling.

Subhead (c) provides for penalties. The proposed fine of £1,000 is a substantial increase on the derisory fine of £2 (at present even that cannot be applied as the offences cannot be prosecuted). The alternative of 6 months imprisonment will apply in all cases. At present, under the 1935 Act, it only applies in relation to second and subsequent offences. The Law Reform Commission recommended (in 1985) that the maximum penalty should be £500 and up to 6 months imprisonment.

Head 4 Organisation of prostitution

Provide that:

(a) It shall be an offence for a person for gain

(i) To control or direct the activities of a prostitute; or

(ii) to organise prostitution, i.e. to control or direct the activities of more than one prostitute.

(b) For the purposes of this section "prostitute" means a male or female prostitute.

(c) The penalty for an offence under this section shall, on summary conviction, be a fine not exceeding £1,000 and/or up to six months imprisonment, and on conviction on indictment of an offence of organising prostitution a fine not exceeding £5,000 and/or up to 3 years imprisonment.

Note

This Head provides for two new offences broadly in line with the recommendation of the Law Reform Commission (LRC 11-1985, Chapter 17), the only difference being that the Commission recommended a composite offence whereas this Head seeks to reflect the differing degrees of exploitation of prostitutes by creating two separate offences.

The recommendation of the Law Reform Commission to retain the offence of living on the earnings of a prostitute is not being followed.

The existing law, to be repealed and replaced by this Act, is that it is an offence for a man to live on the earnings of a prostitute and for a woman to exercise control over prostitutes for gain. It is considered that the latter concept addresses the real issue and it is the principle behind the new offences which will apply to men and women. The new offences will address the issue of the exploitation of prostitutes by pimps, without the unfair

possibilities associated with the offence of living on the earnings of a prostitute, such as an incapacitated husband reluctantly but knowingly supported by his wife's prostitution. This view is supported by the report of the English Criminal Law Revision Committee (17th report: 1985).

Subhead (a) creates two new offences which reflect the very real difference between a person controlling or directing one postitute for gain and a person organising large scale prostitution.

Subhead (b) provides that the new offences shall apply to the prostitution of males and females.

Subhead (c) provides for penalties.

Head 5 Repeals

Provide for the repeal of:

- section 14(11) of the Dublin Police Act, 1842;
- section 72 of the Towns Improvement (Ireland) Act 1854 (so far as relates to loitering and importuning by common prostitutes or nightwalkers);
- section 28 of the Town Police Clauses Act, 1847 (so far as relates to loitering and importuning by common prostitutes or nightwalkers);
- section 7 of the Criminal Law Amendment Act, 1912; (and the repeal of the Vagrancy Act, 1898 if it isn't achieved by the repeal of section 7 of the 1912 Act);
- section 16 of the Criminal Law Amendment Act, 1935.

Note

This Head provides for the repeal of statutory provisions made redundant by Head 3.

Section 14(11) of the Dublin Police Act, 1842 makes it an offence for any common prostitute or night-walker to loiter or be in any thoroughfare or public place for the purpose of prostitution or solicitation to the annoyance of the inhabitants or passengers. The penalty is a fine of £2.

Section 72 of the Towns Improvement (Ireland) Act, 1854 and section 28 of the Town Police Clauses Act, 1847 contain, inter alia, similar provisions.

Section 1(1) of the Vagrancy Act, 1898, as amended and extended to Ireland by section 7 of the Criminal Law Amendment Act, 1912 provides for the offence of persistent soliciting or importuning in a public place by a male person for immoral purposes. it is not clear whether the scope of this provision applies simply to touting by a male on behalf of a female prostitute or whether it extends to direct solicitation by a man of another man or a woman. The 1898 Act and section 7 of the 1912 Act also contain provisions on living on the earnings of prostitutes and these are dealt with in head 7.

Section 16 of the Criminal Law Amendment Act, 1935 provides that every common prostitute who is found loitering in any street, thoroughfare or other place and importuning or soliciting passers-by for purposes of prostitution or being otherwise offensive to passers-by shall be guilty of an offence. The penalty for a first offence is a fine not exceeding £2 and, for a subsequent offence, imprisonment for a term not exceeding six months.

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