

7BR Part-Heard

[Intro music]

Reiss Palmer: Hello, and welcome to 7BR's Part-Heard, the podcast that traverses the legal landscape, examining issues across multiple practice areas, guided by the diverse expertise of our Members. I'm Reiss Palmer, Chamber's Paralegal. We're joined today by Simon Rowbotham, who is here today to discuss the historic illegal development of LGBTQ+ legislation and policy in England and Wales in the 1980s and the impact of those events today.

Simon is an experienced family practitioner at 7BR. He is regularly instructed in all areas of family law with a strong private client practice. He accepts instructions in all areas of private law, children work, and has experience in cases involving child sexual abuse, press restriction orders, domestic violence, and relocation to non-Hague Convention countries. He is also an experienced financial practitioner and is regularly instructed following divorce and the dissolution of civil partnerships. He has appeared at all levels, including the Court of Appeal. More notably in relevance to today's podcast, Simon is the Vice Chair of Middle Temple's LGBTQ+ Forum and speaks and writes regularly on the LGBTQ+ topics. Simon, welcome to the podcast.

Simon Rowbotham: Thank you for having me.

Reiss: So, Simon, thank you for joining today. I understand that as it's still Pride Month, you're here talking to us about LGBTQ+ legislation, how it was back in the 1980s and how it's developed and where we are now based off of the TV show 'It's a

Sin', using that as sort of the template to give some guidance as to how the law was it at that time. Before we go into all of that, could you perhaps just tell us a bit more about what It's a Sin is and how that led to you developing this, talking this way?

Simon: Thanks, Reiss. So 'It's a Sin', for anybody that didn't watch it, was on earlier this year. It was on Channel Four, a drama written by Russell T Davies, that follows a group of (I think it's about) five friends over a series of five episodes through their lives in London in the 1980s. And it covers a decade from 1981 to 1991. But it covers a very critical period in LGBT history because we get, obviously, the emergence of the AIDS crisis, which is really the focus of the drama. But there are some interesting legal points that that come out of that, which we'll talk about, I'm sure, a little bit later on. But it's also, I think, a good opportunity to reflect on what the law was in the 1980s because it's perhaps not as clear as people think it is. And it's often seen as a decade that followed the 1967 reforms and that things had got better through the 70s. But actually, when we look back at the way that things were moving politically, it perhaps wasn't such a great decade as we might think, looking back.

Reiss: You're going to talk to us about three of the characters - Ritchie, Colin and Ash.

Simon: Yes.

Reiss: If we start and we pick up with Ritchie, who is the main character for purposes of the show. I know that there are so many parts of the show that you probably want

to pick apart, but what was the key point that you wanted to bring to light in regards to this character?

Simon: So the main character, as you've said Reiss, is Ritchie Tozer, who really the series focuses on through most of the episodes and played by Ollie Alexander. What particularly interested me about that character was that it's his plot lines that sort of attract the most press, certainly the most tabloid coverage. So I think there was a headline after the first episode aired in The Sun that said, 'It's A Sin' viewers shocked by drama's explicit sex montage with raunchy threesome and oral sex. And I did think that if you haven't watched the show before you read the headline, then you'd be daft not to watch it after. (Chuckle)

But the headline itself I found quite interesting because the law at the time probably was such that although they were obviously celebrating it and showing it on the telly, actually what which he was doing probably wasn't within well, it wasn't within the letter of the law at the time. And I think I said earlier, that a lot of people think that the 1967 Sexual Offences Act effectively legalized homosexuality. It's often phrased in that way and I know that we had some big celebrations back in 2017 to celebrate the anniversary of that Act. But actually what it did was it relaxed criminalization as opposed to removing it entirely. So the Sexual Offences Act in 1967, it's oddly crafted.

Normally a criminal law says you can't do this or it is a criminal offense to do this. What the Act actually did was to say that this act specifically is not a criminal offense, i.e. everything else is. And what it says is that a homosexual act in private shall not be an offense, provided that the parties consent thereto and have attained the age of 21 years. And the Act then went on, and it defines what in private is and it probably doesn't

mean what the regular person on the street would mean, because “in private” literally means between two people, not just indoors in your own space, but actually between two people. So to go back to the quote in The Sun about the raunchy threesome was illegal. You couldn't have a third person involved in a same sex relationship.

Interestingly, the show, probably because it's Russell T Davies, focuses mostly on men. The law here of England and Wales has never criminalized women, so the act only applied to men. But the other thing that Ritchie throws up as a character is he's left the Isle of Wight. He's travelled to London. I think Reiss, you might remember better than me, but I think he must only be about 18 or 19 because he's just left school and he's starting. And actually, as we've just heard in when I read the Sexual Offences Act out, it's between consenting adults aged 21 years and over. So the chances are that Ritchie was falling foul of the law on all sorts of fronts. And that was something certainly that had become an issue at the time.

There had been a big case to the European Human Rights Commission back at the very end of the 70s. So just before this period, where the British Government stood by their decision to keep the age of consent at 21, and in fact, it remained at the age of 21 until, I think it was 1994, it only reduces to 16 in 2000. So relatively recently, and that is to be compared to heterosexual sex, which the age of consent has been 16 for some time.

But the other interesting thing about the show is obviously the characters are out and about in London and they're meeting people or having what today I think we probably call hook-ups. And this was a huge issue at the time. So going back to the Act and this whole word, the use of the word “in private”, well, that was the point. People were okay with it happening as long as they didn't know it's happening, which is why we don't

really see any legislation about celebrating LGBT in a more public way. You don't see family law, for example, there were no developments in terms of civil partnership and adoption. That wouldn't be until much later.

But actually, on a more conservative level, you've got a Conservative government, obviously, Maggie Thatcher is elected in in the 80s, and across the pond you've got Reagan who comes in and everything takes a swerve towards Conservatism. And in London and Manchester and some of the other big cities, what we find is the police forces that are very actively out to find gay men. So even though the act in private is now legal, we end up with a slightly paradoxical situation where gay men who go out and try and meet people and with a view to going back to their home, commits an offense. Because what the law had done is it had left in place Section 32 of the Sexual Offenses Act 1956, which said that it is an offense for a man persistently to solicit or importune in a public place for immoral purposes. And, I find this quite hard to get my head around, because you would imagine that once the law has effectively said something is no longer criminal, you would have thought that for criminal purposes, it wouldn't be immoral. But actually what they said at the time was, well, that's a question of fact. And there was a case that came - there were loads of cases, I should say, at that time - of young men being picked up by plain clothes police officers in London. But there is a particular case called the case of *Crown v James Gray*, right from the start of the 1980s and 1981.

And James was 30 and he had been hanging around outside a pub in Earl's Court when he saw a chap standing on his own across from the pub. And James's defence at the time was, well, he looked he looked like he was a bit lonely and I went over and offered him to come back to my flat, we could have some whiskey. And what the Crown said was that actually he went one step further than what he said was, 'would you like

to stay the night and have some whiskey?’ And he was found guilty. But the reason that the case is interesting from a legal perspective is because the judge at the trial had almost left to the jury that was the immoral act inviting somebody home to stay overnight for the purposes of gay sex. Was that immoral? And in the judges summing up, he sort of flip flops around by saying, well, of course, members of the jury, it's a matter for you, but common sense might dictate. And he kind of made it really clear to the jury that, yes - that is immoral. And so the jury seemed to have taken that as a direction that the judge has told them, yes, if he has done that, it's immoral and he should be found guilty. And so he was convicted and sentenced to nine months suspended sentence and he got a fine. So this goes up to the Court of Appeal. And what the Court of Appeal say is, yes, it should have been left to the jury. It's a question of fact whether or not what he did was immoral. But sadly for James, his conviction was not quashed, although the sentence was. But there are loads and loads of cases in the case reports of plain clothes police officers doing this sort of thing. And it's just the slightly odd point that I think I said right at the start about this period in the 80s, where perhaps in a time when LGBT expression is really high, there's lots of things going on in London, it's really visible, but the government and the law are probably now falling way behind the times. And the idea that the police were using their resources to go and track down consenting men in this way, it's kind of hard to imagine, looking back on. But it happened.

Reiss: I think you mentioned that there were lots of cases in the circumstances that you have described of people approaching each other in public to engage in private sexual acts. But what then, moving to the second character, Colin, that I thought would be an interesting point to ask and sort of a spoiler alert to anybody who's not listened

or watched the show yet. Colin is the character who contracts HIV and is then detained and quarantined in a hospital. And what I thought would be an interesting point to delve into is whether or not that was legal at the time and whether or not there were many cases, as you said there were with the Ritchie example.

Simon: So Colin obviously was one of the more popular characters in the show and it's certainly, I think, the plot line that caused the most got the most media attention because it's horrible and you see quite vividly the impact of the HIV and then AIDS has on him and he ultimately dies. So spoiler for those. You've already been warned. Reiss warned you. (Chuckle) But what I hadn't been aware of before I saw the show was there's an interesting scene in it where there is a barrister who is in some form of hearing room fighting to get him released from hospital. And so I went away and I did a little bit of digging about this. And before I say what happened from a legal perspective, I think it is important to say that while it's right that the government, both here and in America showed a lot of indifference at the time and perhaps they didn't act as quickly as they should, there was still a lot of confusion about what HIV was (and) how it was transmitted. One of the things I find quite interesting is that one of the key names that it doesn't come up in 'It's a Sin', but it does come up if you look at anything from America at the same period, is that a name that we're very familiar with now was also very familiar to LGBT people then – and that's Dr. Anthony Fauci. Anthony Fauci was still the head of diseases over in America. He wrote an article, an editorial rather, in the Journal of the American Medical Association back at the start of the 80s where people were still, I think at that stage that it had actually been named as Acquired Immune Deficiency Syndrome, but there were still questions about what it was. They hadn't quite identified the virus. And he wrote this editorial in which he

talks about routine close contact potentially being the cause. And that went on to a New York Times headline that spread and people saw it all around the world, which was mere contact may spread AIDS. So really early on there was a huge amount of concern because - and we saw this with coronavirus. When people don't know that much about the virus, rumours and theories spread about how it [the virus] can spread. And of course it was no different then. So the European Parliament stepped in pretty quickly and adopted a Resolution about the rights of AIDS patients and stated that it may be necessary in certain well-defined circumstances to limit the rights of patients where they would involve a danger to public health.

And what then happens in this country is that the government used their powers under the Public Health Control of Diseases Act of 1984 to introduce regulations. So the Public Health Act of 1984 is one that many people don't know about, but they should because it is the Act that is being used now to keep us all at home. And it was used last year during the lockdown, and there's been a lot of debate around whether or not that was right. Lord Sumption in particular has been a critic of the Government's decision to use it in that way. But the Coronavirus Regulations, for example, are a good example of how that Act has been used. Well, it's interesting because it wasn't it was used in a similar way, way back in 1985, because the Government used their powers to pass the Public Health Infectious Diseases Regulations. And what that did, was it brought in Acquired Immune Deficiency Syndrome. It brought it under the Act as what the Act refers to as a "notifiable disease". So a notifiable disease basically, in the Act, where if a medic diagnoses you with it or suspects that you have it, they have to tell the local authority, and the local authority then have various powers to bring applications, which can include, and they did - with AIDS and HIV - it included the ability to ask for compulsory medical examination, compulsory removal from your

home or anywhere to a hospital, and then, once you're in hospital, compulsory detention. And that is exactly the statute that would have been used with a case like Colin in 'It's a Sin'. So it's section 38 of the Public Health Diseases Regulations Act. Compulsory detention in hospital. The detention was made by a magistrate, so just one single magistrate on an application by a local authority and it was made *ex parte*. So without notice, this could all happen without you even knowing about it. And the powers that the magistrate had were actually really sweeping. So there's no time limits on the detention and any detention, if there was a time limit, could be extended for as long as anybody thought necessary. And that was the only test - Was it necessary? Sorry, I say that was the only test. There was, of course, a test about to keep someone detained. The judge had to be satisfied that on leaving the hospital, they be provided with lodging or accommodation that would stop them spreading the disease. But what the Government did in 1985 was extend that test to include not just is their suitable lodging and accommodation, but actually are precautions - is this person going to take precautions in any other place that they go? And there was a lot of discussion at the time amongst academics, but also amongst medics, interestingly about what does this mean from a practical perspective? So if a magistrate isn't satisfied that somebody's going to use a condom, does that bring them under the Act? And are we going to start using hospitals as prisons? And there was a huge amount of concern and discussion, I say a huge amount. It was relatively limited to some sort of medical journals and the legal commentators, but people didn't know exactly how it's going to be used. And then there is, at least so far, that I have found, one case of somebody experiencing exactly what Colin experiences in 'It's a Sin'.

So back in September 1985, there is a case of a man in Manchester where a magistrate ordered his detention at the Montville Isolation Hospital and that order was

made for a period of three weeks. And what the reports from the time say is that the order that the decision was made within five minutes on the basis that if he was to be released, it would be very dangerous to the public. It's really important to note that I don't think he was even present at that hearing and he certainly wasn't represented. As I say, it was *ex parte*. Now, luckily there was a group came forward called the Terrence Higgins Trust. So Terrence Higgins, for those that don't know, was a young man who died and was one of our first men to die from HIV AIDS in the UK. And the charity was set up in his name and they support the young man in Manchester to appeal the order that's made. And the route of appeal at that time was to a High Court judge sitting in the Crown Court. So on the 24 September, about ten days later in 1985, Mr Justice Russell eventually hears this appeal. And it's a bit of an odd one because on appeal the barrister that's there for the local authority says that actually the patient's condition had substantially improved and no longer justified detention. And it's quite clear from the reports that the judge raised some eyebrows at that and said, well, ten days ago he was incredibly dangerous to the public and now you're saying that he's not. And what it appears to have come down to is that the man himself had said, you know what, I'm staying in hospital. So the judge said, well, okay, the order can be discharged.

The important point, however, is that in discharging the order, Mr Justice Russell makes the point that the order was properly made which could potentially have opened the gateway up to other local authorities to do the same. It doesn't appear that they did. And this may have been an isolated case, but it is interesting that the reason he was eventually discharged was on the quite narrow point that he was saying he was happy to stay. It actually led to a headline in The Guardian where they said, AIDS man wins Court but Spurns Freedom. But still an interesting point and what is kind of difficult

to look back on is that we were seen as being out of step by some other countries. And certainly there were academics in America who were comparing the approach from the different governments in America, in Australia and in the UK. And in 1985 there were two academics from the Library of Congress who write that:

“...it's difficult to imagine a more intrusive regulatory scheme, compulsory medical examinations based only on suspicion and compulsory hospital detention are allowable without the individual being given an opportunity to be heard, except to appeal the detention order. Where AIDS is concerned, the British apparently feel that the need to protect the public easily outweighs the individual's interest in freedom from government intervention.”

But certainly this is an example of an Act that I think today we'd look back on and think that can't be right. And it's got echoes of today because there are people that are making the same arguments or similar arguments now with Coronavirus. But yes, Colin is definitely one of those areas of the program that they researched and that there is some truth in it. They obviously take some degree of dramatic license with the courtroom scene. I doubt that it was anything as dramatic as that, although I do try and make my hearings relatively exciting. But no, it does have roots in a true story and I think that's one of the reasons I think the show is so important, because that's not something I was aware of as someone that's looked at legal history and I'm sure a lot of other viewers weren't aware that that had happened.

Reiss: Of course. And thank you for doing the research and verifying that what the BBC portrayed was in fact going on and a serious issue and something that may not necessarily that people may not necessarily have been aware of. If we move now to

the third character that you're going to talk to us about today, I believe that is Ash, who is a teacher, and you're going to touch upon the effects of Section 28 of the Local Government Act.

Simon: Yes. So Ash Mukherjee is a character that he has a bit of a bit-part, really in the show, but he comes out in, I think it's the fourth episode, it comes out more in terms of the plot line. He's a teacher teaching at the time that Section 28 of the Local Government Act had come in. And we see in the show clips of him being asked by the head teacher to sit in the library and destroy books that refer to homosexuality. And I think I'm right in saying there's a bit of a dream sequence where he imagines turning around to the head teacher and saying, no, I'd have to destroy every book in the library. But then actually that is just a daydream and he does go through with it. And that bit of the show, I think, is probably the bit that's the most covered. But a lot of people have at least heard of Section 28, although they may have heard it referred to as clause 28. But this issue really comes back to (it being) the best indicator of the view of the government at the time to the issue of LGBT rights. And to understand Section 28 a little bit and just the run up to Ash having to rip those pages out of the library books, you have to look at what was happening politically. So there'd been a big dispute between the Conservative Party and Labour MPs, and there was an allegation from the Conservatives that Labour councils had been splashing public cash on LGBT groups. And in the run up to the election, these arguments really got ramped up and became a big part of the Conservative government at the time. But it became part of their election manifesto, and they were really fighting the election in some courses on this issue. So there were even posters up saying, claiming that Labour wanted LGBT books to be sent to every school. And at the party conference in Blackpool in 1987,

Mrs Thatcher addressed conference with the line, children are being taught that they have an inalienable right to be gay. All of those children are being cheated of a sound start in life. So I think that probably gives you an indicator of what the views in the Cabinet were. That was the official line of the party. On the other side of this, there's a dispute going on in some of the tabloids, and it does then filter through into Parliament about a book called - I've never seen it, I've never read it - but there's a picture book called *Jenny Lives with Martin and Eric*,¹ and I think it is a Danish picture book about a little girl and a day in her life with her two dads.

There was one copy of this book in London in a teaching centre for teachers. So it never got anywhere near a school, it had been deemed unsuitable for reading. But it gets picked up, I think the Daily Mail comment on it, and it gets brought up in Parliament as being, look at these books. Look at this disgusting picture book that Labour Councillors are getting into your local schools. So all of this sentiment filters its way into section 28, or what some people call Clause 28 of the Local Government Act. Section 28 actually inserts section 2A into the Local Government Act, and that, in effect, says that the local authority shall not intentionally promote homosexuality or publish material with the intention of promoting homosexuality or promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship. Now, I find that quite - I'd always known about that. I knew that that was the wording. But I think my assumption had always been, and I say this as someone that was at school up until 2005, the Act doesn't get appealed until 2003. So most of my school life was spent with this Act in force. The Act itself doesn't seem to say, teachers can't do this, teachers can't teach or talk about it. And there does seem to have been some confusion. Well, there's definitely confusion on the ground. It receives

¹ The book is titled *Jenny Lives with Eric and Martin* (1981) by Susanne Bösche, a Danish author.

Royal Assent on the 24 March 1988, which is actually when this fourth episode of 'It's a Sin' is set. And in the May, the Department of Education, as it then was released some guidance for schools on what does Section 28 actually mean for you in practice? And it's really not very clear. So at one point it says it specifically prohibits a local authority from promoting the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship. The effect of this will be that a local education authority will be prohibited from promoting homosexuality in the expression of its policy on sex education. But it goes on to say that that does not affect the activities of school governors, nor of teachers. It will not prevent the objective discussion of homosexuality in the classroom, nor the counselling of pupils concerned about their sexuality. So already that's two paragraphs that don't appear to gel completely. And then the guidance kind of goes on and it talks about if you are going to talk about it in school, you have to do it in, quote, "such a manner as to encourage pupils to have due regard to moral considerations and the value of family life." So the guidance on the one hand is saying this doesn't impact teachers, they can go on with their job, but actually you shouldn't be doing anything to promote the acceptability of homosexuality. And if you do have a discussion about it in schools, you need to make very clear that you're not promoting it and the outcome of the impact on that. But nobody really knew what is promoting it. How do you have a discussion without promoting it unless you were then going to specifically criticize it? And I think that the impact at the time, people predicted that this was not going to end well.

There was some discussion back in 1988 between academics about what the impact of this was actually going to mean. And there was an academic from the University of Leeds called MRT McNair, who predicted that given the drafting of Section 28, its direct effects on education may be limited, the indirect effect will go deeper and last

longer. And unfortunately, he was absolutely right. So although the law itself, the wording of the statute and all the guidance seemed to say to teachers, this doesn't directly impact you, what happened was that teachers felt that it did. And by 1994 there was a report conducted by a lady called Debbie Epstein and she found that within schools there's undoubtedly been an enormous amount of self-censorship by '94. And in '97, the University of London, they do a big survey, it's got 307 schools from all across England and Wales. And what they find is that the majority of teachers teaching at that time so this is by 1997, almost a decade later, the majority of them do not understand the impact of the Act. And so err on the side of caution, they don't talk about it because they don't want to fall on the wrong side. And in fact, over a quarter of the teachers that they surveyed actually thought that Section 28 made discussion of homosexuality in schools illegal. And this had a really bad impact because 82% of those schools also reported problems with homophobic bullying, but said they didn't feel able to challenge it because they'd be seen to promote homosexuality. So the impact of this really is that we had, until it was repealed in 2003, no teaching on homosexuality in schools. And I think the best indicator, sort of symptom of that is that even now we are unable to agree on a program of education in schools about modern families. And when this government tried to introduce it a few years ago, you might recall, Reiss, that there were the protests in Birmingham and parents up in arms saying, actually, we don't want our kids (being taught) about this. We lost decades in which that curriculum could have been built because teachers felt that they were not allowed to teach about it because of the law. So to go back to Ash: did the Act require him to rip up books in the library that referred to homosexuality? I think probably not, but certainly he wasn't alone in thinking that that's what the law was telling him to do.

Reiss: Right. And as you've said, as 'It's a Sin' portrayed, the ripping up of the books is quite symbolic to the silencing of any LGBTQ+ history or existence that could have led to where we are now being more open and more accepting, whilst society is now more accepting. As you said, a decade has passed where curriculums and opinions education that fall contrary to the straight, more conservative narrative could have been incorporated and allowed for more cohesion and acceptance in society today.

Simon, it's been great having you on. Thank you very much for this history lesson into LGBT+ legal history. For any of our listeners who are interested, (are) there any books, any documentaries that you could recommend that they search and look for and read up on?

Simon: So if anybody hasn't seen 'It's a Sin', then they definitely need to do that, even though we've obviously included some spoilers. There are lots and lots of books that are obviously written on this subject. And if anybody is wandering around Holborn area, I definitely recommend going up to Bloomsbury to the little shop called Gay's the Word,² which is a great LGBT bookshop. But some of the books you might want to have to look at, say, Peter Ackroyd's *Queer City*.³ That's great for anybody living in London, and it gives some really good positive view of some of the milestone moments in legal history while telling you about lots of other parts of gay life going all the way back to the Roman times. That's pretty cool. *United Queerdom* by Dan Glass,⁴ I think is really good for covering the 80s. If want to look at something a bit more off the wall,

² Located at 66 Marchmont Street, London WC1N 1AB.

³ *Queer City: Gay London from Romans to the Present Day* (2017) by Peter Ackroyd.

⁴ *United Queerdom: From the Legends of the Gay Liberation Front to the Queers of Tomorrow* (2020) by Dan Glass.

there's a great book called *Fabulosa!* by Professor Paul Baker,⁵ which talks about the language of Polari, which, if you don't know what Polari is, you should definitely look it up because it is good fun. So, yeah, these are my suggestions.

Reiss: Thank you, Simon. Thank you for joining me today.

Simon: Thank you for having me. Thank you to our listeners.

Reiss: If you enjoyed this week's episode and Simon's overview into the LGBTQ+ legal history, you can find more of our podcast on Chambers website and other major streaming platforms. Until next week, thank you. Happy Pride Month and goodbye.

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⁵ *Fabulosa!: The Story of Polari, Britain's Secret Gay Language* (2019) by Paul Baker. You can read the first couple of pages for free at <[The Book – Fabulosa! \(lancls.ac.uk\)](http://lancls.ac.uk)>
