Gay and Lesbian Perspectives IV

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Robert Aldrich and Garry Wotherspoon
Editors

'Agreed To Without Debate': Silencing Sodomy in Colonial Western Australia, 1870-1905

Bruce Baskerville

Homosexuality was one of the mute, stark, subliminal elements in the 'convict stain' whose removal, from 1840 onwards, so preoccupied Australian nationalists.
Robert Hughes, *The Fatal Shore* (London, 1987)

Colonial Western Australia's ruling gentry elite,[1] although hardly Australian nationalists, were similarly preoccupied with 'their' convict stain. From the 1870s onwards, they also sought to remove this stain and, in a typically Westralian way, they used the tactic of publicly pretending sodomy did not exist in order to silence any public discourse about this unwestralian Other, while at the same time copying English legislation to enforce the silence legally.[2]

Throughout the colonial period laws were in force prohibiting certain types of non-procreative sexual behaviour. Among these was a law

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This article is a reworking of an Honours essay titled 'Veiled in Mystery: Coaxing Homosexuality out of the Closet of Western Australian History 1870-1905', Department of History, University of Western Australia (1991).

1 The 'gentry' were that group of free migrants who had originally settled the colony, before economic collapse necessitated the importation of (cheap) convict labour.

2 Westralia is a contraction of the term Western Australia invented with the introduction of the telegraph system. It remains in local use as a provincial alternative to the idea of Australia.

prohibiting sodomy. At the colony's foundation in 1829, the definition of sodomy referred to sexual acts of any sort between humans and animals, to oral sex between two people of either sex and to anal sex between men. It is within this last context that the word sodomy is used in this article. This male, anal sodomy has a similarly elastic definition, with the legal terms 'buggery' and 'unnatural act' both being used.

During the so-called convict period (1850-1868), twenty-four men were transported to the colony for sodomy offences. Although these twenty-four men constituted a mere 0.3 per cent of all convicts landed in Western Australia, they do at least form one definable group of men who engaged in sexual relationships with other men.

Another group definable by being jailed, or at least charged, for sodomy, are the twelve men tried in the WA Supreme Court between 1872 and 1905, half of whom were expirees (i.e., former convicts).[3] This article is directed towards analysis of the public trial circumstances of this group of twelve men for some understanding of the controls used in Western Australia to prevent men from engaging in sodomy, and of the choices open to those men to try and limit the effectiveness of such controls.

Westralian Silence

Captain Stirling proclaimed the annexation of New Holland as the British Colony of Western Australia in 1829. Under the legal lie of *terra nullius*, the existing native laws were deemed non-existent, and the mantle of

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[3] The group is somewhat larger than this. These twelve were identified from the Police Commissioner's Reports to Parliament (that were made for specific political purposes) which were then checked against Supreme Court Registers for further details. For some details of the larger group, see J. Bavin-Mazzi, 'An Unnatural Offence: Sodomy in Western Australia from 1880 to 1900', in C. Fox, (ed.), *Historical Refractions: Studies in Western Australian History*, XIV (1993), pp. 102-120.

British law cloaked the new territory with centuries of mainly English legal and judicial practices. One of these laws was the Offences Against the Person Act 1828, which had retained the death penalty for buggery.[4] Although the penalty was often carried out, the trend was towards a decline in executions. The last naval execution for buggery was in 1829, and in 1836 civil executions for buggery were suspended, although they remained on the statute book until a new Offences Against the Person Act was passed in 1861.[5] This reduced the penalty to a sentence of between ten years and life imprisonment, and introduced a new offence of Intent to Commit Buggery, with a three to ten year sentence, with or without hard labour. In 1885 this was supplemented by the Criminal Law Amendment Act, which made illegal all sexual contact between males short of buggery, in public or in private, with a maximum two-year jail term with or without hard labour.[6] This process of legally proscribing sexual activity between men in England (generally referred to as Imperial Acts or laws) was closely paralleled in Western Australia.

The 1828 Imperial law operated in Western Australia until the Criminal Law Ordinance 1865 was proclaimed. Four cases were tried in the colony under the 1828 Act.[7] The 1865 Ordinance brought into effect the 1861 Imperial law, ending the death penalty and introducing the new

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4 9 George IV, c31 - *An Act for Consolidation of ... Statutes in England ... relative to Offences Against the Person*, assented to 27 June 1828. Sodomy first came within the scope of English statute law by an Act of 1533 that superseded earlier ecclesiastical laws.

5 24 & 25 Victoria, c100 - *An Act to Consolidate and Amend the Statute Law of England and Ireland relating to Offences Against the Person*, assented to 6 August 1861.

6 48 & 49 Victoria, c69 - *An Act to make further Provisions for the Protection of Women and Girls, the Suppression of Brothels, and Other Purposes*, assented to 14 August 1885.

7 Louis De Mayo 1839, Edwin Gatehouse 1854, William Ramshaw 1860 and Joseph Carter 1864 - Supreme Court Criminal Record Books, October 1830 - April 1953, Vol. I, 1830 - 1887, State Archives of Western Australia, WAS 49, Cons. 3422.

crime of intent, all with the same penalties.[8] Five cases were tried in the Supreme Court under the 1865 Ordinance. The Criminal Law Amendment Act 1892 brought into operation in the colony those sections of the 1885 Imperial Act that had criminalised 'acts of gross indecency'.[9] The penalty varied slightly, with the maximum two-year jail term accompanied by a 'with or without whipping' clause. At least four cases were tried in the Supreme Court under this law until the Criminal Code 1902 was proclaimed.[10] Three cases were tried in the Supreme Court under the code up to 1905. This law remained in effect until March 1990.[11]

The 1902 Code brought together the various strands of the earlier laws. Section 181 criminalised 'carnal knowledge of any person against the order of nature', and '[permitting] a male person to have carnal knowledge of him[self]', with a penalty of fourteen years with hard labour, with or without a whipping. Section 182 criminalised any attempt at this behaviour, with a penalty of seven years with hard labour, with or without a whipping. Section 183 criminalised indecent dealings with a boy under fourteen years, with a penalty of seven years with hard labour, with or without a whipping. Section 184 criminalised acts of gross indecency, procuring others for that purpose, and attempts to procure, whether in private or public, with a penalty of three years with hard labour, with or without a whipping. Parliamentary debate of the new

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8 29 Victoria, c5 - *The Criminal Law Consolidation Ordinance*, assented to 7 July 1865.

9 55 Victoria, c24 - *An Act to make Better Provision for the Protection of Women and Girls, and for Other Purposes*, assented to 18 March 1892.

10 1 & 2 Edward VII, No. 14 - *An Act to Establish a Code of Criminal Law*, assented to 19 February 1902.

11 The peak period for trials under the Code was in the 1950s, with 143 charges in 1956 - see Police Commissioner's Annual Reports, Votes & Proceedings of the WA Parliament.

Code was minimal, with Hansard recording that the above sections were 'Agreed to without debate'.[12]

The three colonial laws of 1865, 1892 and 1902 roughly demarcate three fairly discrete periods. The first (1865-1892) covers the post-convict period, when (from 1870) a settler administration sought to preserve a gentry social order, and control one of the larger perceived subcultures in the colony - the expirees and convicts. In 1877 expirees petitioned for a lifting of the restrictions 'under which the Bond class suffers', and it is significant that all of the sodomy trials in this period were of expirees.[13] The second period (1892-1902) covers the boom associated with the goldrushes. Self-government in 1890 allowed the gentry to retain their hold over the colony politically, while population quadrupled and the social fabric was altered by demographic and economic forces largely beyond their control. During this time of rapid change and uncertainty it is notable that all the trials referred to occurred within a short concentrated period of a few months. This may indicate some attempt to restate the importance of social controls that may have been perceived as weakening. The third period (1902-1905) covers the first few years after Federation, when the State Cabinet still had a Colonial Secretary, but looked increasingly towards Melbourne (the temporary capital) rather than London. Like the new Commonwealth, the new Criminal Code needed some adjusting to, and the trials of this period were somewhat uncertain about the new laws, notably resulting in the failure of police prosecutions.

The legislative trend was towards more detailed and complex laws, with greater discretion for the courts in sentencing, pointing to a perceived

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12 *Hansard*, debate on the Criminal Code Bill, Legislative Assembly, 8 October 1901.

13 'Memorial Petitioning for the Withdrawal of Restrictions under which the Bond class suffers', Battye Acc. 392, Box 62, 12 June 1877; quoted in R. Erickson, *Dictionary of Western Australians 1829-1914*, Vol. IV, (Nedlands, WA, 1985), p. ix.

need to increase coercive controls and reinforce social measures following the turbulence of the goldrush years. Other laws made at this time included the monumental Aborigines Act 1905 and the Lunacy Act 1903, as well as the less far-reaching Slander of Women Act 1900, the Indecent Publications Act 1902, an amendment to the Police Act in 1902 instituting summary proceedings against persons keeping brothels and males living off the earnings of prostitution or persistently soliciting, and an amendment to the Education Act in 1905 providing for the control of habitual truants.[14]

Legislation was not the only means of enforcing social control. Centuries of religious rhetoric and symbolism lay behind words such as those of the Chaplain of Fremantle Prison, who raised the spectre of 'offences against the natural order' when preaching on the subject of the transportation of only male convicts in 1854:

> What will ensue when we have thousands of men cooped up in the colony without wives and unable to seek them elsewhere? Evil will be the result - too humiliating for the mind to dwell upon - too revolting to name. ... That moral evil of far greater magnitude, which has of old brought down the signal judgement of Heaven, will result.[15]

A seductive image of the middle-class family was also used to dissuade men from sexual contacts with each other. The gentryist Surveyor-General Septimus Roe 'considered free women a most powerful humanising agent, they lead the men to better things, and greatly assisted

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[14] *Aborigines Act 1905*, 5 Edward VII, 14; *Lunacy Act 1903*, 3 Edward VII, 15; *Slander of Women Act 1900*, 64 Victoria, 36; *Indecent Publications Act 1902*, 2 Edward VII, 14; *Police Act Amendment Act 1902*, 2 Edward VII, 31; *Public Education Amendment Act 1905*, 5 Edward VII, 6 - all in *Statutes of Western Australia*.

[15] Quoted in M. Anderson, 'Women and the Convict Years in WA', in R. Erickson, *The Brand on His Coat: Biographies of Some Western Australian Convicts* (Nedlands, WA, 1983).

their reformation', while another writer opined that 'the act of matrimony on the part of the male, I look upon as the greatest step towards reformation'. An idealised family portrayal of 1857 read:

> Why has God filled the earth with these little bands of united individuals, called families, if He had not in this arrangement deigned to promote the virtues and happiness of man? If there be anything that will soothe agitated passions of the Soul, which will calm the turbulence of feeling which the din and bustle of the world so frequently excite, it is the soothing influence of a cheerful fireside.[16]

By the 1890s this message had become so suffocating that unmarried men were being forced to defend their self-chosen status. In 1898, the colony's main daily newspaper, the *West Australian*, carried several letters under the heading 'Married or Single' from bachelors protesting discrimination in employment in favour of married men.[17]

From the mid-1860s, notions of sexual attraction and behaviour between men as a form of madness gained currency in Europe. With these new ideas came not only the invention of the word 'homosexual', but cures such as castration and confinement to asylums. In 1912 the *'Cyclopedia of Western Australia* carried an entry for the Lunatic Asylum that stated:

> The original lunatic asylum ... was erected at Fremantle in the old convict days to accommodate those unfortunates whose mental balance ... debauchery or other causes had destroyed.[18]

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16 Quoted in M. Grellier, 'The Family: Some Aspects of its Demography and Ideology in Mid-Nineteenth Century Western Australia', in C.T. Stannage (ed.), *A New History of Western Australia* (Nedlands, WA, 1981), pp. 498-99.

17 *West Australian*, letters, 22 October 1898, 25 October 1898.

18 J.S. Battye (ed.), *'Cyclopedia of Western Australia*, Vol. I, (Adelaide, 1912), pp. 519-20.

While the gentryist *'Cyclopedia* was careful to locate the debauched lunatics in the context of a convict past, the new Inspector-General for the Insane took a more scientific approach. The Lunacy Act of 1903 codified existing laws, and the Inspector-General who drafted it also designed the new Claremont Institution, staffed it with Scottish and English assistants and introduced innovations such as the nursing of male patients by women. Suffice it to say that the equation of homosexuality and madness quickly gained currency in the colony, probably through English and Scottish medical journals and the importation of all skilled medical personnel from overseas.

These social controls were countered to some extent by several other factors within the colonial environment. Firstly, the imbalance between the sexes in the settler population meant that there were many more men than women, especially outside the metropolitan area. In 1868, the colonial (i.e., not including indigenous) population consisted of 14,415 men and 8,500 women. Not until 1880 did women account for more than 40 per cent of the settlers. In 1889 the female population peaked at 42 per cent of the colonial population, before falling to 39 per cent in 1891 and only 34 per cent in 1895, then gradually rising again to 38 per cent in 1900.[19] In 1881, 3 per cent of women and 43.5 per cent of men aged 45-59 had never married.[20] These statistics can only indicate that such an imbalance may have allowed many men to by-pass the social and coercive controls on same-sex behaviour and develop closer relationships with other men than they may have otherwise had.

Secondly, convictism left a legacy of several thousand men who had been imprisoned for several years in penal institutions where same-sex contact was widespread. Hughes documents such behaviour among prison inmates in the Eastern colonies during the 1830s and 1840s.

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[19] J.S. Battye, *op. cit.*, statistical tables.

[20] Figure in Grellier, *op. cit.*, p. 483.

Between 1825 and 1838, twenty-four men were tried in New South Wales and Van Diemen's Land for 'unnatural offences', twelve convicted and one executed. Some sort of subculture existed in the penal system. The Molesworth Inquiry of 1836 heard testimony that

> Incredible as it may appear, feelings of jealousy are exhibited by those depraved wretches, if they see the boy or young man with whom they carry on this abominable intercourse speak to another person.

On Norfolk Island,

> The natural course of affection is quite distracted, and these parties manifest ... much eager earnestness for the society of each other. ... Two-thirds of the island were implicated.[21]

Hughes is of the opinion that much of this sexual behaviour was not love-making but humiliation, in which sexual contact was the instrument for exercising control within the convict system. It is probable that something similar occurred within the convict establishment in Western Australia, but no documentation has been located.

As the convict period receded and the colonial frontier expanded ever northwards and eastwards to pastoral stations and goldfields far distant from Perth, isolated men in the bush developed deep loving relationships with other men, although not necessarily involving sexual contacts, within a mateship ethos - what Ward referred to as homoeroticism.[22] As for convict sexuality, no historical documentation was uncovered in Western Australia regarding homoeroticism on the frontier, but it is worth noting that Catholic Bishop William Ullathorne in New South Wales in the

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21 Quoted in R. Hughes, *The Fatal Shore: A History of the Transportation of Convicts to Australia 1787-1868* (London, 1987), pp. 267-90.

22 As quoted in C. Johnston and R. Johnston, 'The Making of Homosexual Men', in V. Burgmann and J. Lee (eds), *Staining the Wattle: A People's History of Australia Since 1788* (Melbourne, 1988), pp. 90-91.

1840s claimed that stockmen had taught sodomy to Aboriginal men, and that amongst the stockmen 'a great deal of that crime was practised'.[23]

Finally there is the possibility that some urban, middle-class subculture may have existed in the Perth-Fremantle area. Weeks states that London, Dublin and most British and Indian naval towns had large homosexual subcultures by the 1880s, and refers to the use of the term 'queen' and other argot being transmitted to Australia during the 1880s. These urban subcultures were characterised by casual sex and prostitution, often with an element of class-crossing between middle-class professionals and merchants and the more proletarian soldiers, seamen and street boys of the harbour towns.[24] Given the constant naval and mercantile contacts between Fremantle and imperial ports around the Indian Ocean as well as English and Irish ports during this period, it might be expected that similar observations could be made of Perth and Fremantle. Such sexual colonialism might not be the only expression of urban homosexuality, as Johnston and Johnston refer to an incident in Sydney in 1916 when police raided a house in which several 'well-connected' men were living together as 'man and wife'.[25]

It is within such a context of coercive and social controls that various expressions of male homosexual subcultures may be claimed to exist in colonial Westralia. Rather than a crude determinism of more available women = less homosexual desire operating, the concepts of convict, frontier and urban subcultures, despite their dissimilarities, are all constructed around a central idea of men having sexual and emotional relationships with other men in a colonial society officially hostile to such relationships. Examination of the circumstances surrounding some of the

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[23] Quoted in Hughes, *op. cit.*, p. 267.

[24] J. Weeks, *Coming Out: Homosexual Politics in Britain, from the Nineteenth Century to the Present* (London, 1977), pp. 33-44.

[25] Johnston and Johnston, *op. cit.*, p. 91.

twelve trials between 1870 and 1905 clearly indicates the existence of some sort of male same-sex subculture in the colony.

The Silenced

Timothy McAuliff arrived in the colony on the convict ship 'Phoebe Dunbar' in 1853 after being convicted of burglary in Cork, Ireland. He was aged twenty, with tattooed hands and a scar across his left eyebrow, and a character described as 'pretty fair, but indolent'.[26] In 1855 McAuliff gained his ticket-of-leave (a form of parole that provided cheap labour for the settlers), and in 1864 his remaining sentence was remitted.

In 1872 McAuliff was charged by the police at York, in the Avon Valley, with 'committing an unnatural crime'. On 6 November that year, he was tried at the Supreme Court in Perth for 'sodomy' and pleaded not guilty. The jury returned a guilty verdict and the Chief Justice sentenced him to fifteen years jail. The *Perth Gazette* reported the trial verdict without any detail or commentary. By May 1873 McAuliff was working on a road gang at Freshwater Bay, between Perth and Fremantle, when he escaped from the gang. He remained at large until October 1874, when he was recaptured and received a further two years imprisonment with hard labour. Something had happened to McAuliff, however. His record indicates a series of remissions for good behaviour, and in 1879 it was noted that he was 'considered of eccentric habits and somewhat weak-minded'. In 1881 he received his ticket-of-leave, and by 1885 was employed at Guildford by Robert Paul as a woodcutter, where he remained when his sentence finally expired the next year.

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[26] McAuliff's life has been reconstructed from Convict Registers 12, 16 and 18; Convict Description Lists, Supreme Court Criminal Indictment Register, Case 537, and R. Erickson (ed.), *Dictionary of Western Australians 1829-1914*, Vol. II. (Nedlands, WA, 1985).

Almost all of McAuliff's employers while he was 'working his ticket' were expirees, and many of them, such as Robert Paul, had been convicted of sexual offences. McAuliff had remained at large for nearly eighteen months during 1873-1874 and this, along with his choice of employers, suggests some sort of support network amongst such expirees in the Perth area. The note concerning his eccentric habits and weak mind may also indicate that ideas of sodomy as madness were gaining circulation in the colony.

Job Jarvis was convicted at Stafford, England in 1859 of robbery and violence, and arrived in WA on the transport 'Norwood' in 1862.[27] He received his ticket-of-leave within a few months and began labouring around the Swan District. In 1865 he was convicted by the Guildford magistrate of 'Indecent Assault on a Child' and fined ten shillings.

In 1879 Jarvis was tried in the Supreme Court at Perth on a charge of 'Unnatural Offence' in a case involving a boy of fourteen. The *West Australian* reported the case in sensational detail and, along with the defence counsel, effectively placed the fourteen-year-old boy on trial. The credibility of his evidence was questioned, and an impression made that a personal vendetta by the boy was involved. Much was made of the fact that he had waited two weeks before reporting the incident. The jury returned a verdict of guilty on the lesser charge of an attempt to commit an unnatural offence, and the Chief Justice handed down a sentence of seven years in jail.

The defence of Jarvis worked by equating the position of the boy with that of a woman. The 1865 Ordinance, the defence lawyer, the press coverage, Jarvis himself, and presumably, the reading public, made no distinction between the woman and the boy as such. The boy and the

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[27] Jarvis' life has been reconstructed from Convict Registers 9 and 11; Convict Description Lists, Supreme Court Criminal Indictment Register, Case 907, and Erickson, *op. cit.*

woman both took great risks in reporting sexual assaults as both were considered dependents of men.[28] Jarvis used the very system which tried to control non-procreative sexual activities to undermine condemnation of his 'unnatural offence'. Job Jarvis' case shows that many men engaging in same-sex activities were still apparently able to identify with mainstream, colonial social values rather than any sodomitical subculture.

Thomas Ford and William McDonald were both in their early twenties when convicted in London of robbery and pick-pocketing. They arrived on the 'Racehorse' in 1865 and the 'Norwood' in 1867, respectively.[29] By late 1867 both were working on various public projects and amassed a long list of charges for insubordination, malingering, insolence and absconding. William McDonald's record was noted: 'may be weak minded'. They obtained tickets-of-leave in 1872 and found various labouring jobs around the Swan District, Avon Valley and Geraldton. Charges for drunkenness, disorderly conduct, loitering and, on one occasion, supplying alcohol to a road gang punctuate their records during this time.

By 1882 their sentences had expired and both men were living in Perth where, aged thirty-eight and thirty-nine, they were on trial in the Supreme Court on a charge of 'unnatural crime'. Both pleaded not guilty, but the jury returned a guilty verdict and the judge handed down a sentence of fifteen years in jail for each man. The local press carried no word of the trial amongst the otherwise lengthy reporting of court cases.

Presumably the charge arose from sexual activity between the two men observed by a third party. It clearly illustrates a determination to punish sodomists and, coupled with their convict origins, to control expirees.

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28 See Bavin-Mazzi, pp. 113-16 for some discussion of this.

29 Ford and McDonald's lives have been reconstructed from Convict Registers 15 and 30; Convict Description Lists, Supreme Court Criminal Indictment Register, Case 1016, and Erickson, *op. cit.*

Their long history of rebellion against the convict authorities, continuing associations with convicts (such as supplying them with alcohol), and McDonald's 'weak mind' (i.e., madness) all paint a picture the jurists would have read as dangerously subversive, especially when coupled with consensual sodomy that was apparently acceptable amongst at least a certain section of the expirees. Such behaviour in colonial Westralia had to be punished and further expressions of it prevented. The non-reporting of the case in the local press points to a desire by the gentry press-owners to support the colony's move towards 'respectability' as the convict years began to recede. Any didactic function of reporting the trial was negated by a desire to erase the convict stain.

George Strickland was convicted of larceny at Salop, England in 1859, and arrived at Fremantle on the 'York' in 1862.[30] He spent several periods in solitary confinement for misconduct during this period. No record of his ticket-of-leave details has survived, but the fact that he remained on his ticket for the next twenty-three years, by which time he had served thirty years for a ten year sentence, indicates this was a turbulent time.

In August 1889 Strickland was apprehended 'for having committed an Unnatural Offence, with and upon one Tasman Jackson, at Perth'. The Supreme Court trial was reported in the *West Australian*, although 'the evidence ... was ... of a nature unfit for publication'. The jury returned after an absence of only five minutes with a guilty verdict, and the judge handed down a sentence of ten years imprisonment. Two years later in December 1891, Strickland died in Fremantle Prison Hospital, aged sixty-one. The fate of Tasman Jackson remains unknown.

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[30] Strickland's life has been reconstructed from Convict Registers 7 and 22; Convict Description Lists, Supreme Court Criminal Indictment Register, Case 2295, *West Australian* 4 October 1889, and Erickson *op. cit.*

This was the last sodomy trial in the colony involving an expiree, and the last before the 1892 amendment came into force. The press reports did not mention that Strickland was an expiree, and together with the non-reporting of the Ford and McDonald trial suggests a conscious effort being made to 'forget' the convict stain. Strickland's trial was topical because it occurred at the same time as reporting of the Cleveland Street Scandal in London, which involved prominent aristocrats, a homosexual brothel, working-class messenger boys and hints of royal involvement. The reticence of the colonial press in reporting the details of Strickland's trial indicates a more repressive form of social control that denied any validity of expression for non-conforming values. Gentry legislators aware of the 1885 Imperial Act that criminalised all forms of sexual behaviour between men besides sodomy would have noted the 'need' to update the colonial law in this respect.

As the expirees grew older and dwindled in number, they became an ever decreasing concern to gentry hegemony. New threats had to be countered, and sodomy laws reverted from being an element of penal control to an older function of preventing non-procreative sexual activities. Social reformers guided by concepts of Social Darwinism (or biological exclusivism) postulated the advent of an ideal society from which all forms of deviation had been removed, and under the banner of 'national efficiency' were preparing European and colonial manhood for the creation of the Perfect Man. This was an ideology that fell upon fertile ground in gentryist Westralia as the chaos of the goldrushes threatened to swamp the established order. New controls were needed to maintain the old ways.

The year 1898 was a busy year for sodomy trials in the WA Supreme Court. In April James Doyle appeared before the court charged with having 'committed an abominable offence upon William James ... several

times ... at Burswood'.[31] Doyle pleaded guilty and asked to be treated as a first offender. The judge dismissed his request because of the 'seriousness of the crime', and handed down a sentence of life imprisonment. The report in the *West Australian* concluded with some post-sentencing dialogue:

> Prisoner: Will your Honour allow me light labour and tobacco?
> His Honour: That is a matter of prison discipline. I cannot say anything about it at all. I cannot direct prison discipline. You go to penal servitude for life.

Doyle's guilty plea and request for first offender status indicate a belief in the inherent justice of the law that was not upheld. The fact that he admitted to engaging in sodomy 'several times' presumably indicated to the judge that he enjoyed it, and therefore needed stronger discipline. The press reports portray Doyle as somewhat simple-minded, and their overall tone is one of justifiable punishment for an unrepentant criminal. The fate of James remains unknown.

May 1898 saw two juveniles, Robert and John Leader, aged sixteen and fifteen respectively, on trial for committing an 'unnatural offence upon Samuel Lawrence, aged thirteen'.[32] Both boys pleaded not guilty, but their juries thought otherwise and returned verdicts of guilty for Robert, and guilty of an attempt for John. The remarks of the judge were reported in the *West Australian* as a wider warning:

> His Honour ... said that he would have made the punishment heavier had it not been for the prisoner's youth. He hoped that he would take a warning from the result of his crime.

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31 Supreme Court Criminal Indictment Register, Case 2832; *West Australian*, 30 April 1898, 2 May 1898.

32 Supreme Court Criminal Indictment Register, Cases 2843 and 2844; *West Australian*, 6 May 1898 - see also Bavin-Mazzi, *op. cit.*, whose work on this case only became known to me after the original essay was finished.

Robert was sentenced to ten years penal servitude, and John to seven years.

Boys had to be dissuaded from believing that such behaviour could be expressed and accepted, just as a London press editorial after Oscar Wilde's conviction in 1895 hoped that the trial 'will be a salutary warning to unhealthy boys'.[33] If an asylum could not cure unhealthy sodomists, then a jail could certainly contain them, and boys who did not conform could expect such a terrible fate.

Frank Dawe appeared before the Supreme Court charged with an 'unnatural offence' in October 1898.[34] He pleaded not guilty, and the jury returned a verdict of not guilty. The local press carried no reports of the trial. This seems to have been the first not guilty verdict returned for a sodomy trial in the colony's sixty-nine years. Somehow Dawe had been able to convince a jury that he had not broken the law. The press, however, having faithfully conveyed the unacceptability of sodomy and the punishments for transgressors, now fell silent. No details of how Dawe had 'escaped' the law were published. Such dangerous information had to be kept unspoken.

This series of trials in 1898 occurred after the introduction of the 1892 Amendment, with mixed results. Pleas of guilty and verdicts of not guilty were contrary to the experience under the 1865 Ordinance, as was the heavy-handed sentencing. The selective reporting or non-reporting of trials that all occurred within a single year suggests a deliberate policy: James Doyle was portrayed as sordid and probably mad, the Leader brothers as juvenile delinquents: not the sort of healthy, red-blooded men needed for the Coming Race. The Wilde trial in London only three years earlier had helped make homosexuality explicit in the public mind. The 1898 trials in Perth were the Westralian equivalent, with the image of the

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[33] *London Evening News*, quoted in Weeks, *op. cit.*, p. 20.
[34] Supreme Court Criminal Indictment Register, Case 2905.

homosexual being firstly created and then publicly cast out from colonial society, as he had been in England. The convict sodomite had been replaced by the urban degenerate, and the new Criminal Code of 1902 provided a comprehensive and rational system of legal controls for these new criminals.

Ernest Ive was apprehended at Maylands in 1904 and charged with 'carnal knowledge of an animal'.[35] This was apparently the first case under Section 181 of the Criminal Code, which grouped together the non-procreative sexual crimes of bestiality, homosexuality, male prostitution and paedophilia. Ive pleaded not guilty, and was eventually found not guilty. The trial was reported by the local press in some detail.

Thomas Hoban appeared before the Supreme Court in March 1905 on a charge of 'indecently dealing with a boy under fourteen years', to which was later added a charge of 'attempted unnatural offence'.[36] Both of these activities had been criminalised in Sections 182 and 183 of the Code. The judge then directed the jury to return a verdict of not guilty, which it did. The case was not reported in the press.

The criminalisation of sexual activities between men over fourteen and boys under fourteen was part of a wider process, also enforced in other sections of the Code, of defining children as distinct legal and sexual entities. This section of the Code was derived from the Police Act of 1892, which had first made a specific offence of assaulting a boy under fourteen. Even though Hoban had persuaded the judge of his innocence, this dangerous news was once again not reported in the press. The gentry legislators had been convinced that homosexual behaviour was a threat to Westralia that had to be controlled through increasingly complex forms of

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35 Supreme Court Criminal Indictment Register, Case 3601; *West Australian*, 7 December 1904, 13 December 1904, *Daily News*, 7 December 1904, 13 December 1904.

36 Supreme Court Criminal Indictment Register, Case 3638.

legal coercion. Any organisation among these new criminals had not been sufficient to prevent these controls being imposed.

What Was Being Silenced?

The controls used to prevent men from engaging in sodomy and homosexual behaviours included legislation, law enforcement, religious rhetoric and symbolism, concepts of the middle-class family, medical notions of insanity and Victorian ideals of respectability.

Prominent among any alternatives to submitting to these coercive and social controls was convict and expiree society. There appears to have been a airly coherent expiree subculture, with its own values and support networks, and possibly within that, a sub-group of sex offenders; this reflected the legislative non-distinctions between such offenders. However, any commentary on such a 'subculture' is difficult to sustain without further research. Five criminal trials over sixteen years may or may not represent a significant proportion of a larger group - a group of aging expirees ever-declining in size.

Another group that could be defined is boys and young men, aged between thirteen and twenty. Three of the five expirees were in this age group at the time of their original convictions. Of the sixteen men and boys involved in all twelve trials, one-hird were in this age group. All but one of the trials involving boys and young men occured between 1898 and 1905, indicating an increasing legislative concern with defining and controlling children, or an urban subculture of casual sex and prostitution or some combination of both. While the expiree population aged and shrank in number, homosexuality continued to attract new controls, and the trial records seem to indicate an increasingly juvenile nature of those involved. However, the records consulted provide no clear indication of any group self-identification between these boys and young men.

The individual trial defences that are known do not indicate any common threads. Two blamed the other person, and two persuaded the jury of their innocence. Either way, they had to justify their actions in terms their gentry-aspiring, white, male jurors could understand - the very interests that were prosecuting them.

Thus, by the time of Federation, there may have existed a group of men in the Perth-Fremantle area who actively participated in one or more small, loose groupings of casual sexual contacts and prostitution. There may have been some derivation of this sub-group from an earlier sub-grouping of men who shared a common experience of convictism and emotional and power relationships based upon sodomy.

This argument, however, must be very tenuous at the moment, and is determined largely by the nature of the records consulted. Just as sodomy and homosexual laws were discrete elements within broader systems of social control over convicts and youths, they later played a role in enforcing White Australia - sodomy trials between 1911 and 1915 seem to focus on Perth Muslims and Broome Filipinos, and in 1924 featured Geraldton Italians, and it is only from the 1930s that trials really begin in 'frontier' regional towns.

Concentrating on a limited range of court records and press reports has produced a better understanding of the ever-changing public enforcement of laws to suppress homosexual behaviour among men than of the men and their orientations and motivations. This is to be expected when the initial identification of cases has been the highly political annual Police Commissioner's Report to Parliament.

Jeffrey Weeks wrote in the mid-1970s that

> oppression does not produce an automatic response, but it does provide the conditions within which the oppressed can begin to develop their own consciousness and identity. In the nineteenth century, law and science, social mores and popular prejudice set the scene, but homosexual people

> responded. In doing so, they created, in a variety of ways, self-concepts, meeting places, a language and style, and complex and varied modes of life.[37]

That sodomy was practised among certain settlers in colonial Westralia cannot be denied. That a homosexual subculture developed in the colony in response to the repressive silencing of sodomy is less certain, although that such a subculture did exist by the early twentieth century is likely, if the evidence of Edward Cahill is a guide. Cahill, described by his judge in 1909 as 'a pest to Society', was convicted of an unnatural offence after being caught in Russell Square with another man, unknown to him, who 'wanted to stuff me'. Cahill freely admitted to getting stuffed in Russell Square by strangers for some two years. He had a jar of vaseline in his pocket when caught, and told the arresting officer that he did it 'Just for fun'.[38] Cahill was silenced with a jail sentence of seven years with hard labour.

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37 Weeks, *op. cit.*, p. 33.

38 Thanks to Robert French for drawing my attention to this case.