V E I L E D - I N - M Y S T E R Y

Coaxing homosexuality out
of the closet of
Western Australian history

1870 - 1905

CONTENTS

Moral people, as they are termed, are simply beasts. I would sooner have fifty unnatural vices, than one unnatural virtue. It is unnatural virtue that makes the world, for those who suffer, such a premature Hell.

Oscar Wilde, 1897.

Homosexuality was one of the mute, stark, subliminal elements in the "convict stain" whose removal, from 1840 onwards, so preoccupied Australian nationalists.

Robert Hughes, 1987.

PART ONE: CONCEPTS AND DEFINITIONS

'An Act to make Better Provision for the Protection of Women and Girls, and for Other Purposes'

title of the Criminal Law Amendment Act 1892.

"The concept of social control as used by historians could...usefully be broken down into two broad categories: (1) coercive controls, which either use or imply force, legal or extra-legal, and (2) social controls, which consist of group self-regulation outside the boundaries of force...Together these constitute a control system (for) a pluralistic society (which) can better account for...numerous sub-cultures, each engaged in certain amounts of self-regulation."[1]

This broad concept of 'social control' assumes the existence of a society composed of various sub-cultures, in which one or more groups try to influence the behaviour of other groups or individuals by both coercive and social controls. This is a society nothing like the idealized colonial Western Australia of traditional historiography; a classeless pioneer community, free of social divisions and conflicts, described by Stannage as the 'pioneer myth'[2].

Despite the many coercive and social controls imposed by the controlling groups in colonial society, sub-cultural groups continued to exist, such as the growing Aboriginal communities on the fringes of the pastoral towns*, Ghantowns of the inland, the nascent Italian fishing community at Fremantle#, the ageing Expirees, or as expressed in a dialectic such as town versus country. This raises a question of how much control was actually exerted by the control measures?, and how much choice was available to the targets of the measures to escape the attempt to influence or alter their behaviour?

Mayer asserts that[3] individuals can consciously associate thenselves# to a control process from which they can easily withdraw. Such an associative social control

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* see 'Aboriginies Dept. Report for the year ended 30.6.1901', V & P of WA Parlt, 1901-02

see lecture notes: Italian Migrants in WA pre 1914, 2.5.1990.

which includes such things as club or church membership, involves self-regulation by members of the group to prevent coercive controls being applied to the group, and makes members aware of the values and behaviours of both the sub-culture and the dominant group. The question which then arises as to what extent does the power of the target group limit the influence that the controllers can apply in a particular process? Thus, just as Aboriginal groups developed their own strategies to limit the effects of controls imposed upon them according to their perception of the effectiveness of those controls*, it seems reasonable to assume that other sub-cultural groups did likewise. This question, however, assumes the existence of some sort of organization within the targeted group, and it is towards this assumption that the essay question is directed.

Throughout the colonial period, laws were in force which prohibited certain types of sexual behaviour. Among these was a law prohibiting sodomy. The definition of sodomy was somewhat elastic, and could refer to sexual acts of any sort between human and animal, to oral sex between two people of either sex, or to anal sex between two men. It is within this latter context that the word sodomy is used in this essay. This type of sodomy had a similarly elastic definition, with the terms 'buggery' and 'unnatural act' being indiscriminately interchanged. Under these laws, men were tried in Western Australian Courts throughout this era. During the Convict period, 24 men were transported to the colony after being sentenced for the crime of committing sodomy. Although these 24 men constituted a mere 0.28% of all convicts landed between 1850 and 1868, they do at least constitute one definable group of men who apparently enjoyed sexual relationships with other men. The other important factor they all shared was being convicted of a crime because of that enjoyment. Another such group definable by similar criteria are the 12 men# tried in the colonial

* see Haebich, A. For their own Good, , Nedlands, 1988.

There may have been more than this. Records consulted were the Police Commissioners Reports to Parliament for references to trials for sodomy offences. Those found were checked against the Supreme Court Registers for details of the actual events.

Supreme Court between 1872 and 1905, half of whom were Expirees.

The question, then, to which this essay is directed is:

> Does an analysis of the trial circumstances of this group of twelve men provide any understanding of the controls used in colonial Western Australia to prevent men from engaging in homosexual behaviours such as sodomy, and of the choices open to those men to try and limit the effectiveness of such controls?

An analysis of the circumstances surrounding the trials will be made to elicit the various types of social and coercive controls being imposed upon each event, and to try and gain a picture of any social structures that may have supported those on trial, and so undermined the effectiveness of those controls[4].

PART TWO: STRUCTURES OF CONTROL

> "the third part contains a number of miscellaneous provisions. I do not think it necessary to go into the details of such a bill as this, as hon. members can see for themselves."
>
> Attorney-General Sir George Shenton, second reading of the Criminal Law Amendment Bill in the Legislative Council, 26 February 1892.

It is necessary to begin with an outline of the framework of coercive control: the legislation dealing with the crime of sodomy in colonial Western Australia.

On the 18th June 1829, Captain Stirling, standing beside a newly-felled tree in a jarrah woodland recently designated as 'Perth', read a Proclamation officially annexing New Holland as a British colony. From then on:

> "...the Laws of the United Kingdom as far as they are applicable...do therein immediately prevail upon all His Majesty's subjects...upon pain of being arrested, prosecuted, convicted and punished..."[5].

Amongst those laws was a recent statute, the Offences Against the Person Act 1828[6]. Under Section 18, buggery remained a criminal offense, as it had done since 1533. Section 15 spelt out the penalty "...every person convicted...shall suffer Death as a felon.". The penalty was often carried out - in 1810, 6% of civil executions and 18% of naval executions were for buggery; while in 1812, the figures were 1,2% of civil and 40% of naval executions. However, the longer trend was towards a decline in executions. 1829 marked not only the foundation of the colony, but also the final naval execution for buggery when William Maxwell was hanged on HMS Tweed. Civil executions for buggery were suspended in 1836[7], although they remained law until a new Offences Against the Person Act[8] came into force in 1861, which abolished the death penalty for sodomy. Section 61 provided for a penalty of between 10 years and Life. Section 62 introduced a new crime - attempt or intent to commit buggery, with a penalty of between 3 and 10 years,

with or without hard labour. However, the old 1828 Act continued to operate in Western Australia for another four years until the Criminal Law Ordinance 1865[9] was proclaimed, which brought into force through out the colony the 1861 Imperial Act. It was under this Ordinance that five of the cases were tried. The Criminal Law Amendment Act 1892[10] brought into operation in the colony the sections of an 1885 Imperial Act[11] of the same name that had criminalized 'acts of gross indecency', whether in public or private, between men. This ambiguous term was ruled to include any sort of homosexual behaviour in the Oscar Wilde cases of 1895. Section 14 of the colonial Act imposed a penalty of up to two years jail, with or without a whipping. Four of the cases come from this period. Finally, the Criminal Code 1902 incorpirated all these strands. Section 181 criminalized 'carnal knowledge of any person against the order of nature', and (permitting) a male person to have carnal knowledge of him(self)' penalty 14 years with hard labour, with or without a whipping. Section 182 criminalized any attempt at this behaviour - penalty 7 years with hard labour, with or without a whipping. Section 183 criminalized indecent dealings with a boy under 14 years - penalty 7 years with hard labour, with or without a whipping. Section 184 criminalized acts of gross indecency, procuring others for that purpose, and attempts to procure, whether in public or private - penalty 3 years with hard labour, with or without a whipping. These laws remained in force until March 1990, and three of the cases were tried in the early years of the Code.

The three Acts of 1865, 1892 and 1902 all roughly coincide with three faily discrete periods. The first covers the post-transportation period, when from 1870 a settler administration sought to preserve a gentry social order, and control one of the larger perceived sub-cultures in the colony - the Expirees and Convicts. In 1877, Expirees petitioned for a lifting of restrictions "under which the Bond class suffers"[13], and it is significant that all the sodomy trials in this period were of Expirees. The second period 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 changes and uncertainty, it is interesting to note that all trials in this period occurred within a short concentrated few months, perhaps indicating some attempt to restate the importance of social controls that may have been perceived as weakening by the controllers. The final period covers the first few years after Federation, when the State Cabinet still had a Colonial Secretary, but looked increasingly towards Melbourne 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 imposing sentences, possibly indicating a perceived need to increase coercive controls, and so reinforce social controls, following the turbulence of the goldrush years. Behind all these events lay the network of coercive controls formulated by gentry Ministries and enforced by the colonial Police. This network was one element within a wider framework of social controls.

Centuries of religious rhetoric and symbolism lay behind the words of preachers such as the Chaplain at Fremantle Prison who addressed the question of homosexuality in 1854:

> "...what will ensure when we have thousands of men cooped up in the colony without wives and unable to seek them elsewhere? Evil will be the result - to humiliating for the mind to dwell upon - to revolting to name...that moral evil of far greater magnitude, which has of old brought down the signal judgement of Heaven, will result..."[14].

Gradually, the contemporary imagery of the middle-class family began to vie with the religious attack. A more subtle message to dissuade men from homosexual behaviours with an alternative vision was offered. Surveyor-General Roe "...considered free women a most powerful humanizing agent, they lead the men to better things, and greatly assisted their reformation.", while another writer stated that "...the act of matrimony on the part of the male, I look upon as the greatest step towards reformation.". An idealized family icon 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 sooth agitated passions of the Soul, which will calm the turbulence of feeling which the din and bustle of the world so frequently excite, is the soothing influence of a cheerful fireside."[15]

So suffocating could this message become that single men were forced to defend their self-chosen status. In 1898, the West Australian carried several letters under the heading "Married or Single" from bachelors defending their right to the same job opportunities as married men.[16]

From the mid-1860s, the idea of homosexuality as a form of madness gained popularity in Europe, and with it came 'cures' such as Asylums and castration, and such attitudes can be seen in Western Australia by the 1870s. In 1912, Battye wrote that"...the original lunatic asylum...was erected at Fremantle in the old convict days to accomodate those unfortunates whose mental balance...debauchery or other causes had destroyed"[17] The Lunacy Act of 1903 codified the existing Laws, and its drafter, the Inspector-General for the Insane, also designed the new Claremont Institution, staffed with Scottish and English assistants, and introduced such innovations as the nursing of male patients by women. The rôle played by the concept of 'homosexuality as an illness' in social control would require an essay of its own, Suffice to say that such notions quickly gained currency in the colony, perhaps through medical journals, and the importation of all skilled

medical personel from overseas.

These social controls were probably countered to some extent by several factors in the colonial environment.

Firstly, the imbalance beteen the sexes meant that there were many more men than women, especially in the rural, pastoral and mining areas. In 1868, there were 14 415 men and 8 500 women*. Not until 1880 did women constitute more than 40% of the total population. In 1889, the female population peaked at 42%, before falling to 39% in 1891, and only 34% in 1895, then gradually rising again to 38% in 1900[18]. In 1881, 3% of women and 43.5% of men aged 45-49 had never married[19]. It can only be guessed at how much such an imbalance allowed many men to by-pass the social and coercive controls on homosexual behaviour, and develop close relationships with other men that they may not have otherwise had.

Secondly, convictism left a legacy of several thousand men who had been imprissoned for several years in penal institutions where homosexual behaviour was widespread. Hughes documents such behaviour among prison inmates in the Eastern colonies during the 1830s and 40s. Bteween 1825-1835, 24 men were tried in New South Wales and Van Diemens Land for 'unnatural offences', 12 convicted and one executed. Some sort of sub-culture 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".

At 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."[20]

However, Hughes is of the opinion that much of the sexual behaviour was not lovemaking, but humiliation, in which sexuality was the instrument of control within the wider convict society. It is probable that something similar

* does not include Aboriginies.

within the Western Australian convict establishment.

As the convict period receded further into the past, and the frontier expanded to distant pastoral stations and inland goldfields, a third factor came into play - the homo-eroticism of Ward, in which isolated men in the bush developed deep, loving relationships with other men, though not necessarily involving sexual acts, within the mateship ethos[21]. The isolation of their lives provided practical and emotional needs for such relationships, and Hughes quotes Catholic Bishop William Ullathorne as saying that amongst stockmen, "a great deal of <u>that</u> crime" was practised, and that they had even taught sodomy to the Aboriginies![22].

Finally, there is the possibility that some urban, middle-class sub-culture may have existed. Weeks states that London, Dublin, and most other British and Indian naval towns had large homosexual sub-cultures by the 1880s, and refers to the use of the term 'queen' and other argot being transmitted to Australia during the 1880s. These urban sub-cultures were often dominated by casual sex and prostitution, and often included an element of class-crossing between middle-class professionals and marchants, and the more proletarian soldiers, sailors and street boys of the ports and towns[23]. Such sexual colonialism was not the only expression of urban homosexuality, and Johnston & Johnston refer to an incident in Sydney in 1916 where Police raided a house in which several 'well connected' men were living together as 'man and wife'[24].

It is within such a context of coercive and social controls that such various expressions of homosexual sub-cultures are claimed to exist. Rather than a crude determinism of "more available women = less homosexual desire" operating, these examples of convict, frontier and urban sub-cultures, despite their dissimilarities, are all constructed around a central concept of men having sexual and emotional relationships with other men in a society hostile to such relationships.

PART THREE: CASE STUDIES

"...liable to imprissonment with hard labour for fourteen years, with or without a whipping."

s.181, Criminal Code 1902.

TIMOTHY McAULIFF

Timothy McAuliff arrived in the colony on the convict ship 'Phoebe Dunbar' in 1853 from Ireland, where he had been convicted at Cork of burglary in 1849, aged 16. He was a tailor, and spent the first twelve months of his sentence in Mountjoy Prison in solitary confinement, as was the standard practise. His character was described as 'good' before his conviction, but by the time he stepped off the ship in Fremantle, it was 'pretty fair, but indolent'. Aged 20, he now had tattoos on both hands and a scar across his left eyebrow. He had no relatives. After a year in Fremantle Prison, he gained his Ticket-of-leave, finally leaving jail for the first time in five years, and headed for the Avon Valley seeking work. In January 1855, he was convicted of robbing a garden at Toodyay, and returned to Fremantle to serve a sentence of six months with hard labour. A few months after his release in Perth, he was back in jail serving a seven year sentence for larceny. By 1859, he was back on his ticket and back in the Avon Valley, this time at York, where he worked around the area labouring at 20 - 30 shillings per month, generally for storekeepers, occaisionally for a farmer. Several times he appeared before the local magistrate on minor charges, such as obscene language, or working without a contract, when he was 'ordered to the Depôt', where he also spent periods of unemployment. In November 1864, the remaining portion of his sentence was remitted. He appears to have remained in the district, probably working casually as he had been doing, for another eight years.

In the winter of 1872, Timothy McAuliff was apprehended by the York Police while making love with another man, and charged with'committing an unnatural crime'. On the 6th November, he was on trial in the Supreme Court in Perth for 'sodomy'. He pleaded Not Guilty, but the jury thought differently, and Chief Justice Burt sentenced him to 15 years penal servitude. The Perth Gazette reported the trial verdict without any comment.

At the age of 39, Timothy re-entered the penal system, with another tattoo on his right arm of a flag which he had tried to remove, scarring himself in the process. After a short time in Fremantle jail, he was placed on Probation and put on a road gang at Freshwater Bay. On 10th May 1873, he escaped from the gang, and managed to evade recapture until Ocober 1874, when he received a further two years with hard labour. Presumably, his behaviour was acceptable after this, as he received a series of remissions off his sentence. In November 1879, it was noted on his record that he was "...considered of eccentric habits and somewhat weak minded..". In January 1881, he received his Ticket-of-leave, and spent the next five years labouring at various places between Guildford and Carnamah on the Overland Road to Geraldton, keeping well clear of the local magistrate. From 1885, he was employed by Robert Paul, a brickmaker at Guildford, cutting wood, and he remained there until his sentence finally expired in 1886. Now aged 53, Timothy McAuliff had spent just over half of his life under the direct control of police and prison authorities in Ireland and Western Australia.[25]

Since being a boy of 16, Timothy had been subjected to the brutalization of the convict system. His character had changed from 'good' to 'indolent', after extensive periods of solitary confinement and hard labour. The only break from this régime had been in the beds of other men. The fact that he worked for several Expirees on his Ticket-of-leave, many of whom had been convicted of sexual offences, may be significant, especially Robert Paul, for whom the ageing Timothy may have continued working after his freedom. Is this indicative of some sort of support network amongst such Expirees? How did Timothy manage to remain at large for a year and a half in the Perth area if not supported by some group? Finally, the note concerning eccentric habits and a weak mind, may indicate the impact of the 'homosexuality as an illness' concept.

JOB JARVIS

Job Jarvis arrived on the convict ship 'Norwood' in June 1862, after being convicted in Stafford in 1859 at the age of 26 of robbery and violence. His conduct on the ship was 'good', and after five months in Fremantle prison he received his Ticket-of-leave, and spent the next three

years as a labourer around the Swan district. In January 1865, he was convicted by the Guildford magistrate for 'Indecent Assault on a Child', and fined 10 shillings - about a fortnights pay. He left the area soon after, and was labouring at York until December 1865 when he received his freedom.

By 1879, Job was in the Perth area, where on 1st October he faced the Supreme Court on a charge of 'Unnatural Offense' in a case involving a boy of 14. He pleaded Not Guilty, and his defense counsel used the same tactics often employed in rape cases of, in effect, putting the victim on trial by questioning the credibility of his evidence, and trying to create the impression that some personal vendetta by the boy was involved. Much was made of the fact that the boy had waited a week to report the offense. The West Australian reported the case in sensational detail, constructed to support the defense argument. The jury finally returned a verdict of guilty on the lesser charge of an Attempt, and Chief Justice Burt handed down a sentence of 7 years penal servitude.[26]

The Jarvis case illustrates one defence by those charged with sodomy: blame the other person, and equate that persons position with that of a woman. The 1865 Ordinance made no distinction between men and boys, and neither did the defence lawyer, the press, Job Jarvis, or, presumably, the general public. The boy and the woman both took great risks in reporting sexual offences, both being considered dependents of men, and any man charged with sodomy could try and use this hierarchical distinction - in effect using the very system that tried to control homosexual behaviour to undermine condemnation of his sexual activities. Such an approach seems to show that many men engaged in homosexual behaviour still identified with more mainstream, heterosexual male values rather than any homosexual sub-culture.

THOMAS FORD and WILLIAM McDONALD

William McDonald and Thomas Ford were both Londoners, Thomas convicted in 1863 for robbery with violence, and William in 1865 for pick-pocketting. Both had previous convictions, and both received 10 years. Despite their ages of only

20 and 21, they had already experienced English prisons and new their way around the London street crime scene. Possibly they already knew each other. Thomas arrived on the 'Racehorse' in August 1865, and William on the second-last convict ship, the 'Norwood' in July 1867.

By late 1867, both were on probation, working on various public projects. Both amassed a considerable list of charges for insubordination, malingering, insolence and absconding. Thomas was charged with having a dirty cell; and Williams record has a notation that he 'may be weak minded'. Despite their descriptions as 'fresh'(William) and 'fair(Thomas), and their lack of tattoos or marks, these two young men seem to have had a long history of rebellion (or hooliganism, depending on your point of view), and this attitude they applied in the colonial situation. Both obtained their Tickets-of-leave in early 1872, and obtained labouring work around the Swan and Avon valley towns, William also going to Geraldton for a while. Their periods of work, however, were frequently punctuated by charges for drunkeness and disorderley conduct. William was also charged with loitering - something of a euphamism for unemployment - and once for supplying alcohol to a road party. Thomas obtained his release in 1876, and William received his in 1881.

By 1882, aged 38 and 39, Thomas and William had found a niche within colonial society, perhaps somewhat similar to that they had in London, and by this time they certainly did know each other. In September they faced committal hearings in Perth, and in October were on trial in the Supreme Court on a charge of committing an 'Unnatural crime'. Both men pleaded Not Guilty. The jury, however, returned a verdict of Guilty, and Justice Wrenfordsley passed a sentence of 15 years penal servitude on each. There is no mention of the trial in the press, although the proceedings of every sitting of the Supreme Court are usually reported in some detail.[27]

This case illustrates the determination within the control system to punish sodomists, and maintain some control over the Expiree population. Despite the fact that both men

may have been making love with each other, rather than a third party, the fact that they came from the Expiree sub-culture determined to a certain degree the reaction of jurors and judge to their crime. The non-reporting of the case in the press may indicate some desire to support a social control concept by the Editors of 'respectability' in the colony as it gradually moved through its post-transportation transition.

GEORGE STRICKLAND

George Stricland was a 29 year old shoemaker and painter when convicted at Salop in 1859 for larceny. He had a previous conviction and was sentenced to 10 years. He was imprissoned in Portland Jail, where he spent time in solitary confinment and on bread and water for misconduct, before arriving at Fremantle on the 'York' in December 1862, where he again spent time in solitary confinment for misconduct on the ship.

There is no record of his Probation and Ticket-of-leave events, but the fact that he remained on a Ticket-of-leave for twenty three years, by which time he had served 30 years for a 10 year sentence, indicates that it was period of some turbulence, as every appearance in Court made a release date recede further into the future. However, he gained his Ticket-of-leave in April 1866, and by 1880 was self-employed in Perth, possibly as a shoemaker, when he hired two other Ticket-of-leave men to assist him.

In August 1889, George was apprehended by the Police "...for having committed an Unnatural Offense, with and upon one Tasman Jackson, at Perth...". The trial in the Supreme Court in October 1889 was reported in the West Australian. The editorial policy on this issue was clear in its reporting. "The Crown Solicitor...detailed the evidence which would be brought forward, which was, however, of a nature unfit for publication...". The jury was similarly clear about how it felt, and "...returned after an absence of five minutes with a verdict of guilty...". The judge, after hearing the evidence, had recommended that the charge be altered to one of an Attempt, and with the verdict of guilty, he pronounced the maximum penalty for an attempt: 10 years penal servitude. Two months later, George's original sentence

finally ended as he began his fourth decade of incarceration. George's life ended, still in prison, in December 1891 in the Fremantle Prison Hospital aged 61 years.[28]

At the time of his trial, the Cleveland Street Scandal in England was being reported in the local press, with prominent aristocrats, a homosexual brothel, working-class messenger boys, and hints of royal involvement, all coupled with criticism of the government for trying to cover up the affair. Although the charge against George was reduced he received the maximum penalty. Two years later, the 1892 Amendment came into operation, with a broader definition of homosexual behaviours that it criminalized.

This was the last sodomy case involving an Expiree, and the last one before the 1892 Amendment came into force. The press coverage did not mention that George was an Expiree, which together with the non-reporting of the Ford & McDonald case, could suggest a conscious effort being made to 'forget' the convict past. The case of George Strrckland was topical because of the Cleveland Street reporting, and it served to show that the colony was not immune from the social trends in Britain. People aware of the 1885 Imperial Act that criminalized all other homosexual behaviours besides sodomy, would have noted the 'need' to update colonial laws in this regard. The fact that the evidence was regarded as to terrible to print is a further indication of a more repressive form of social control being instituted, with all non-conforming values being denied any validity or expression. Similarly, the defense argument was not reported in the press.

George Strickland, like Ford & McDonald before him, seems to have lacked any support, and in fact faced hostility in the press and jury box. As Expirees grew older and dwindled in number, and so became an ever decreasing threat to gentry hegemony, new threats had to be countered, and sodomy laws changed from being an element of penal control to one of sexuality control, in the service of ideologies such as 'national efficiency' and 'social darwinism', which postulated ideal societies from which all forms of 'deviants' had been removed to make way for the Perfect Man.

Before leaving these Expiree cases, it is worth noting that all the Pleas were of Not Guilty, and all the verdicts were of Guilty. 15 years was the average sentence, or 8½ years for an Attempt. There was an average of one sodomy trial every four years.

JAMES DOYLE

The year 1898 was particularly busy for Supreme Court sodomy trials. In April, James Doyle appeared before the Court charged with having "...committed an abominable offense upon William James...several times...at Burswood.". This was possibly the first trial following the widely reported Oscar Wilde trials of 1895, which may account for the press coverage of the event. James Doyle pleaded Guilty to the charge "...and threw himself on the mercy of the Court, asking to be treated under the First Offenders Act..".

The judge, careful to "...pass a just sentence...", dealt with the request to be treated as a first offender first. As "...that Act was only intended for trivial offences, or offences by juveniles..." it could not be applied in this case, and even "...if he could do so, he would not...". The seriousness of the crime meant that "...the prisoner would have to go to penal servitude for Life...". The court report 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 that at all. I cannot direct prison discipline. You go to penal servitude for life.".[29]

James Doyles apparent belief in inherent justice within the law was not upheld. The fact that he had admitted to engaging in sodomy several times indicated that he enjoyed it, and this may have been a factor in the decision behind the sentencing. No argument is presented in the press report, only the judges remarks. The overall tone, however, is of justifiable punishment for one of the members of criminal society - James Doyle is portayed as somewhat simple minded, which accords with the 'illness' concept, while the sentence fits with the idea of the criminality of sodomy. As William James was not on trial, it is possible that he may have initiated the legal proceedings, and this may be another example of the 'blame the other person' defence, whereby he was able to shift the onus for his

behaviour away from himself. Presumably, social controls such as sin and family overcame Williams enjoyment of his relationship with James, and the trial of James may have relieved his emotional guilt and gained him some public grace. James Doyles reliance upon 'justice' showed that, for those unskilled in legal practise and its nuances, it offered no protection against a coercive system of state controls.

Alone, James Doyle was sent down to Fremantle Prison for life.

ROBERT LEADER and JOHN LEADER

The next month, May, saw the case of two juveniles, Robert Leader, aged 16, and John Leader, aged 15, reported in the local press.

Robert was convicted of an 'unnatural offense upon Samuel Lawrence, aged 13', and John of 'an attempt to commit an unnatural offense upon Samuel Lawrence, aged 13'. Both boys pleaded Not Guilty, but the jury determined otherwise. The remarks of Justice James were repeated in the West Australian report as a wider warning:

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

Robert was sentenced to 10 years penal servitude, and John to 7 years penal servitude[30].

The boys were charged under the original Ordinance, rather than the new Amendment, or the Police Act of 1892 which had made assaulting a boy under 14 a criminal offense. This particular method of control was employed presumably because the evidence of the Police would best support a charge of this kind. Further, boys had to be dissuaded from believing that such behaviour could be expressed and accepted, just as a London press editorial after Oscar Wildes conviction hoped that the trial "...will be a salutary warning to unhealthy boys..."[31]. If an asylum couldn't cure homosexuality, then prison would certainly contain it, and boys who didn't conform to the social controls could expect some such fate. But how, in the first place,

did these boys know about such behaviour? Was it 'learnt' from older men - as has been shown, the boundary between child and adult was by no means clear, or even meaningful, although some attempts to define it were being made. Is this event indicative of Weeks urban sub-culture of casual sex and prostitution?, or is it an incident derived from some other area of colonial society?

FRANK DAWE

The case of Frank Dawe was the third for sodomy to appear before Mr. Justice James in 1898. Charged with an 'unnatural offense', Frank faced the Supreme Court on October 20th. He pleaded Not Guilty, and the Jury returned a verdict of Not Guilty. Unable to exercise any sentencing powers, the judge discharged Frank Dawe. The local press carried no reprts of the trial[32].

For the first time in at least 26 years, and possibly since 1829, a charge of sodomy had failed in the courts. What could have lead the jury to break with such a well-established tradition? The non-appearance of any report in the press may have related to a general editorial policy of not detailing Court cases where a Not Guilty verdict was returned, although there are plenty of examples of such cases being reported where they do not deal with a sexual offense. Its non appearance may be related to a desire not to publicise the possibilities of 'escaping' the law, especially in view of earlier sentences that year. Somehow, Frank Dawe had managed to evade criminal status by convincing a jury that he had not broken the law - a further method of escaping coercive control on homosexual behaviour that had not, until now, been successful.

These events all occured after the introduction of the 1892 Amendment, with mixed results. Pleas of Guilty, and Verdicts of Not Guilty, were all contrary to the experience under the 1865 Ordinance, as was Justice James heavy-handed sentencing. The criminalization of all homosexual behaviour had not increased conviction rates, but may instead had lead Police to lay charges without fully knowing what would be acceptable evidence. Similarly, the jury may have been less willing to convict a man on vaguer charges such as

gross indecency or attempted procuring than they had been with relatively straight forward charges of sodomy.

The Criminal Code of .1902 attempted to overcome some of these problems with a comprehensive and uncomplicated Criminal Code based upon the Queensland, Italian and Dutch Codes, with specific crimes and penalties plain for all to know about.

ERNEST WILLIAM IVE

Ernest Ive was apprehended by the Police at Maylands on 28 October 1904, and was apparently the first case brought under Section 181 of the Criminal Code. The charge was for 'carnal knowledge of an animal', and although not directly relevant to homosexuality, it was viewed as its equivalent by the controllers, who placed bestiality in a category along with homosexuality, male prostitution and paedophilia. Ernest Ive pleaded Not Guilty, but the jury was unable to agree on a verdict. The next week, before a new jury, and on a reduced charge of 'attempted carnal knowledge', he was found Not Guilty and discharged. Each trial was reported by the local press in some detail.[33]

THOMAS HOBAN

In March 1905, Thomas Hoban was on trial in the Supreme Court, originally on a charge of 'indecently dealing with a boy under 14 years'. Section 183 of the Code had criminalized this activity for the first time. The charge was then altered by the addition of an extra charge of 'attempted unnatural offense' (Section 182). As the boy had apparently consented, there was no assault charge. Mr. Justice Burnside, after hearing the evidence, directed the jury to return a verdict of Not Guilty, which it did, and Thomas Hoban was discharged. The case was not reported in the press[34].

The criminalization of sexual behaviour between men over 14 and boys under 14 was part of a wider process of defining children as distinct legal and sexual entities from adults which is reinforced in other areas of the Code. It also introduced the concept of 'indecent dealing' without any clear definition of what that was, hence the alteration of the charge against Thomas. The alteration, and the direction of the jury, seem to indicate some confusion about the new control measures, a confusion which Thomas

may have been able to use to his advantage. The specific crime of sodomy with a boy under 14 years was new, and as such it recognized and criminalized paedophilia as one of the non-procreative sexual activities that had to be controlled. 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 14. The increasing complexity of controlling homosexual and other sexual behaviours outside of marriage may not have lead to easier convictions of these 'new criminals'. However, by criminalizing these behaviours, the legislators had been pursuaded that they did exist in Western Australia, and that they had to be controlled through coercion. Any organization among the 'new criminals' had not been sufficient to prevent such controls being imposed, while the social controls of the past had apparently failed to contain the 'problem'.

PART FOUR: MENTALITÈ OR COMMUNITY?

"Chapter XXII: Agreed to without debate"

Hansard, debate on the Criminal Code Bill,
Legislative Assembley, 8.10.1901.

Having attempted some analysis of sodomy trials in colonial Western Australia, and of the context within which they occured, I will now try and provide some answer to the initial essay questions.

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

Prominent among alternatives to submitting to these coercive and social controls was convict and Expiree society. There appears to have been a fairly coherent Expiree sub-culture, with its own values and support networks, and possibly within that a sub-group of sex offenders generally which reflected the legislative non-distinctions between such offenders. However, without knowing the nature and extent of such a group, it cannot really be said how successfull this group was at self-regulation, or even if it attempted it. Five criminal trials over sixteen years may or may not be a significant proportion of a larger group. There is also the ever declining size of the ageing Expiree population to consider.

Another group is that of boys and young men, aged beteen about 13 and 20. Three of the five Expirees were in this group at their original convictions. Of the sixteen men and boys involved in all twelve trials, six (37%) were in this age group. The apparently high rate of trials involving boys and young men, all of which but one occur after 1898, could be indicative of either the increasing legislative concern with defining and controlling children, or of Weeks urban sub-culture of casual sex and prostitution, or a combination of both. However, the records used give no indication of any self-identification as a group amongst these boys and young men.

While the Expiree population was ageing and shrinking, homosexual behaviour continued to attract new control

measures, with eventually the network being extended wide enough to include enough boys and young men to seemingly suggest an increasingly juvenile nature of those involved in homosexual behaviour, or at least of that behaviour detected by the Police, which could support the concept of an urban sub-culture.

The individual trial defences that are known of do not indicate any common threads. Two of them 'blamed the other person', and two pursuaded the jury of their innocense. Either way, those accussed had to justify their actions in terms that the jurors, generally members of the dominant group, could understand, despite the paradox of being prosecuted by the same interests.

Thus, by the turn of the century, there may have existed a group of men in the Perth-Fremantle urban area who actively participated in a small, loose grouping of casual sexual contacts and prostitution. There may be some derivation of this sub-group from an earlier sub-grouping of men who shared a common experience of convictism and close emotional or power relationships based upon homosexual behaviour.

At the moment, however, the argument is very tenuous, and determined largely by the nature of the records consulted. A full record of all the apprehensions and trials for the period, plus access to all the original documents, would provide a better sourced and constructed argument; as would some understanding of who composed the controlling group(s) in Western Australian society, and what their aims were; and a clearer definition of what a 'sub-culture' is, or can be, in a colonial society.

> "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. The multicoloured patterns that emerge from the debris piled upon them by history belie the drab court-room images that have usually been offered."[35]

Clearly, a great deal of work needs to be done with Western Australian history before some comprehensive picture can emerge of the mentalité underlying any homosexual sub-culture in colonial and post-colonial Western Australia.

This is an excellent essay Simon, thoughtful subtle and properly cautious. You have found a most interesting body of sources and weaved your evidence into a highly sophisticated social analysis using some difficult social theories. If you were able to be as complete as you wanted then that is simply the product of the type of exercise this is and, as you say, the processing nature of the work. I hope you are going on to complete the project in an honours Thesis or beyond. Could I photocopy it please. I would like to use some of these references (suitably acknowledged of course) for my crime & punishment course next year.

28/30. A++

Chris Anderson

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