

## ARTICLE

## Outcasts: The Changing Regulation of Sexual Activity between Men in New Zealand c. 1840–1930

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This article examines the attempts to intensify the regulation of sexual activity between men in New Zealand between 1840–1930 and investigates how and why this intensification came about. Drawing upon the theory that sexuality is socially constructed and historically specific, this article argues that moral influences originating in the United Kingdom resulted in the regulation of sexual activity between men expanding in scope between 1840–1893. It is important to consider that the law is, to some extent, contingent upon wider societal influences. However, New Zealand legislators tended to copy British statutes, and these regulations were no exception. By 1893, any sexual contact between men was criminalised, whether consensual or not. The rise of the eugenics movement, spurred on by the findings of sexology, propelled more extreme proposals in the early 20th century to regulate such behaviour. These extreme proposals were ultimately rejected, including the use of sterilisation and castration. They tested the boundaries of what government interference in the lives of ordinary citizens was acceptable in liberal society. Ultimately, this distressing period of our history shines a light on the complicated relationship between law and wider society and demonstrates the importance of legal history to our times.

### I Introduction

So there will be more that comes from tonight, but for now I commend this bill. I celebrate the fact that we are expunging these convictions. I say sorry, again, to the men and their

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families, and commit again to supporting a legacy from this that will ensure that in the future, generations of young people know they matter. Love is not a crime. They should be who they are.

—Hon Grant Robertson MP during the Third Reading of the Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Bill 2017<sup>1</sup>

Mr Robertson, the first openly gay man to hold the roles of New Zealand's Minister of Finance and Deputy Prime Minister, provides us with a glimpse into a seemingly unfamiliar New Zealand. Despite grappling with some residual issues around casual homophobia, New Zealand is today considered a beacon of progress when it comes to the treatment of its LGBT+ citizens. However, as Robertson alluded to, things were not always this rosy. For much of the 19th and 20th centuries, New Zealand was a land hostile to those who felt sexual desires that strayed from the heterosexual, procreative sex found within the confines of marriage.

This article examines one of the most intense periods of subjugation for men who engaged in same-sex activity. In the period between 1840–1930, societal attempts to regulate such behaviour through the law intensified. This article seeks to investigate how and why this intensification came about. When British law was first introduced in New Zealand in 1840, only sodomy was criminalised. However, by 1893, any sexual contact between men, whether consensual or not, and involving sodomy or not, was criminalised. The rise of the eugenics movement propelled more extreme proposals in the early 20th century, including surgical procedures such as castration and sterilisation, to regulate men who engaged in same-sex sexual activity. These proposals ultimately failed to gain acceptance and were rejected by Parliament. However, the influence of their ideas gained traction in other spheres of the law, including the segregation of male prisoners convicted for engaging in same-sex activity, an increase in the number of convictions obtained for such behaviour, and a change in the way criminal cases involving such behaviour were framed and considered by judges.

In considering this intensification in the law and how and why it came about, I will first outline in Part II the theoretical foundations upon which this article sits and how it will shape my analysis. In Part III, I will outline the regulation of male same-sex sexual activity in New Zealand between 1840–1867 and the societal influences behind it. In Part IV, I will consider how and why the regulation of male same-sex sexual activity intensified with the adoption of the Labouchère Amendment in 1893, which effectively criminalised all sexual activity between men. Finally, I will examine in Part V the more extreme attempts to regulate male same-sex sexual activity which arose between 1893–1930, why these largely failed to become law despite some minor success, and what this failure demonstrates about the relationship between law and wider social movements.

## II Theoretical Foundations

Before examining the changing nature of sexual regulation in New Zealand, it is important to outline the theoretical foundations upon which this article sits. This article makes use of a theory of knowledge in sociology known as social constructionism. Broadly speaking, this is the idea that certain phenomena hold their meaning due to their being ascribed that meaning by society and applies this idea to history. In the context of ideas surrounding

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sexuality, social constructionism argues that while people may perform the same physical acts across a wide range of contexts, the meaning and interpretations placed upon those acts may vary. They contend that societal culture has a major role in shaping an individual's attitude towards, and understanding of, sexuality and, thus, ideas around sexuality are prone to change as society changes.

Changing societal attitudes towards gender and sexuality can, in turn, impact on and change the law. As Jim Phillips argues in his article "Why Legal History Matters":<sup>2</sup>

... legal history teaches us about the contingency of the law, about the fact that law is not a set of abstract ahistorical and universal principles, it does not exist in a vacuum. Rather, it is formed by, and exists within, human societies, and its forms and principles, and changes to them, are rationally connected to those particular societies.

However, it is important to acknowledge that the relationship between law and wider social movements is not a one-way street. While Phillips claims that the law is in many ways contingent on its societal context, he also acknowledges that at times, law is "an autonomous agent, not wholly derivative of other histories".<sup>3</sup> Law itself has a material role to play, and has a degree of ideological and symbolic power in and of itself.<sup>4</sup> Therefore, "[l]aw has always had some degree of autonomy, has been to some extent impervious to change from outside influences and indeed able to influence other histories."<sup>5</sup>

This article adopts this broad theoretical framework when examining the changing nature of sexual regulation in New Zealand. In doing so, it seeks to uncover both the changing ideologies in New Zealand society which have led to changes in the law, and the values and ideologies sustained by the law which resisted such change.

In applying this theoretical lens, this article avoids the use of words such as "homosexual", "bisexual", "heterosexual", "gay", "straight" or "lesbian" when referring to individuals and groups. While these concepts of sexual identity seem natural to us today, they did not exist until the late 19th century with the rise of sexology.<sup>6</sup> Scholars such as Kim M Phillips and Barry Reay have argued that modern scholars will be "constantly blocked in their understanding" if they lock themselves into using modern concepts and terminology in the context of the pre-modern world.<sup>7</sup> As such, this article will avoid the use of these modern terms in the context of premodern societies.

### III The Regulation of Sexual Activity between Men in Early Colonial New Zealand—1840–1867

As a colony of Great Britain, early European New Zealand derived much of its attitudes and laws relating to sexual behaviour from its mother country. Therefore, it is important to first outline the state of British attitudes toward, and their legal regulation of, sexual activity between men prior to and just after the application of British law to New Zealand in 1840.

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2 Jim Phillips "Why Legal History Matters" (2010) 41 VUWLR 293 at 295.

3 At 302.

4 At 302.

5 At 302.

6 Chris Brickell "The sociological construction of gender and sexuality" (2006) 54 *The Sociological Review* 87 at 91.

7 Kim M Phillips and Barry Reay *Sex Before Sexuality: A Premodern History* (Polity Press, Cambridge, 2011) at 8–9.

*A British laws and attitudes toward sexual activity between men*

## (1) Christian origins

British attitudes to sex and sexual behaviour were shaped largely by theological influences that took hold in the Early and High Middle Ages. The Book of Genesis in the Old Testament was cited by the Christian church, as Adam and Eve became aware of their nakedness and, by implication, their sexual nature, upon defying God's order not to eat the forbidden fruit from the tree of knowledge.<sup>8</sup> Upon discovering this disobedience, God cast Adam and Eve out of Paradise, dooming their descendants to a mortal life of birth, work, suffering and, ultimately, death.<sup>9</sup> As sex is closely connected with the fall from grace, this created a dimension of unease about the subject for most people in the Middle Ages. The sinful and forbidden nature of sex was then further developed by the work of theologians such as Saint Augustine, who argued that all subsequent sexual acts mirrored the original act of disobedience by Adam and Eve in the Garden of Eden.<sup>10</sup> Virginity was thus considered the superior state; however, this was somewhat tempered by the recognition that procreation was needed for the continuation of humanity.<sup>11</sup> Therefore, procreative sex, within the context of marriage, was sanctioned by the Catholic Church as the only appropriate form of sexual behaviour.<sup>12</sup> All other forms of sexual activity that did not lead to procreation, including sexual activity between men and, most notably, sodomy, were viewed as extremely sinful and in need of repression.

## (2) From church to state regulation

Offences for sodomy were at first dealt with by ecclesiastical courts, reflecting the religious nature of the offence. The adoption of the Buggery Act 1533 (the 1533 Act) under Henry VIII formally brought "buggery" under the jurisdiction of statute law,<sup>13</sup> and punished those found guilty of the offence with death.<sup>14</sup>

The 1533 Act was subsequently repealed by the Offences Against the Person Act 1828 (the 1828 Act).<sup>15</sup> However, s 15 of the 1828 Act retained buggery as an offence, and the death penalty as punishment. Section 18 of the 1828 Act also repealed a previous common law requirement to prove the emission of seed (ejaculation) in the commission of the offence, and clarified that the offence was complete upon penetration.

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8 *Holy Bible New International Version* (Committee on Bible Translation (translator), 4th ed, eBook ed, Biblica, 2011) at Genesis 3:6.

9 At 3:14–3:21.

10 Phillips and Reay, above n 7, at 23.

11 Pierre J Payer *The Bridling of Desire: Views of Sex in the Later Middle Ages* (University of Toronto Press, Toronto, 1993) at 18.

12 At 18.

13 Jeffery Weeks *Coming Out: Homosexual Politics in Britain, from the Nineteenth Century to the Present* (Quartet Books, London, 1977) at 12.

14 Buggery Act 1533 (Eng) 25 Hen VIII c 6. "Buggery" and "sodomy" have been used interchangeably throughout history to describe non-procreative sex, and is often meant as a reference to anal sex. The term "sodomy" derives from an exegesis of the story of Sodom and Gomorrah in the Book of Genesis, where the two legendary biblical cities were destroyed by God for the wickedness and sin of their inhabitants (although many contemporary scholars dispute that the sin of the inhabitants referred to in the Book of Genesis was actually anal sex).

15 Offences Against the Person Act 1828 (UK) 9 Geo IV c 31, s 1.

The 1828 Act itself was short-lived and subsequently replaced by the Offences Against the Person Act 1861 (the 1861 Act).<sup>16</sup> Under s 61, the death penalty for buggery was abolished and was instead replaced with penal servitude for life or for a term of not less than ten years. However, s 62 also criminalised attempted buggery, assault with intent to commit buggery and indecent assault upon a male. It also imposed a penalty for such offences of either penal servitude of between three to 10 years, or imprisonment for no more than two years with or without hard labour. Section 63 retained the equivalent of s 18 of the 1828 Act.

Despite this official shift in jurisdiction from church to state, the Judeo-Christian anxiety underlying the prohibitions lived on. Sir Edward Coke, first Chief Justice of the Court of Common Pleas and subsequent Chief Justice of the Court of King's Bench, decried sodomy in the 17th century with emotive and religious language:<sup>17</sup>

Buggery is a detestable, and abominable sin, amongst [C]hristians not to be named, committed by [carnal] knowledge against the ordinance of the Creator, and order of nature, by mankind with mankind ...

## B *The arrival of British laws and attitudes to New Zealand*

### (1) Early attitudes and encounters

As British colonisation of New Zealand expanded in the early 19th century, British settlers and missionaries brought with them their Judeo-Christian beliefs around sex and gender which condemned sexual activity between men. Concerns about such behaviour were of particular concern in colonies such as New Zealand. In addition to being morally sinful, many politicians viewed such behaviour as failing to produce the numerous children needed to build “the Greater Britain of the South”.<sup>18</sup> For instance, as part of investigating the desirability of regulating the settlement of British subjects in New Zealand, the British Parliament issued a report from a Select Committee of the House of Lords in 1838. In it, a witness by the name of John Watkins assured the Committee that “I have not known any Case of Sodomy discovered in New Zealand; in Australia that is deemed to be prevalent.”<sup>19</sup> Such an observation however proved contrary to the experience of many settlers who found to their concern that sexual activity between men was commonly practiced among Māori, and there were several instances of unions between Māori and non-Māori men.<sup>20</sup>

### (2) Formal prohibitions in New Zealand

In terms of formal, legal prohibitions, the British law around sodomy eventually came to be applied in New Zealand, although confusion abounded at first as to exactly when this

16 Offences Against the Person Act 1861 (UK) 24 & 25 Vict c 100.

17 Edward Coke *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes* (W Clarke, London, 1817) at 58.

18 Stevan Eldred-Grigg *Pleasures of the Flesh: Sex & Drugs in Colonial New Zealand 1840-1915* (Reed, Wellington, 1984) at 49.

19 *Report from the Select Committee of the House of Lords, appointed to inquire into the present state of the Islands of New Zealand, and the expediency of regulating the settlement of British subjects therein* (7 August 1838) at 20.

20 Chris Brickell *Mates & Lovers: A History of Gay New Zealand* (Godwit, Auckland, 2008) at 27.

occurred.<sup>21</sup> The English Laws Act 1858 definitively settled the issue by stating that the laws of England, as at 14 January 1840, were in force in New Zealand so far as they were applicable to the circumstances of the colony.<sup>22</sup> Thus, the British prohibition against buggery, as encapsulated in the 1828 Act, became part of New Zealand law, perhaps retrospectively, in early 1840.<sup>23</sup>

While sodomy was technically punishable by death under s 15 of the 1828 Act, no executions for the offence were ever carried out in New Zealand. However, this is not to say that judges looked upon those convicted with sympathy. In *R v Wilson*, Johnston J excoriated a defendant found guilty of sodomy with religious fervour:<sup>24</sup>

You intended to pollute the minds, the bodies, and the very souls of these young men. Go! I shall waste no words on you. ... I do also trust that the authorities of this place will take such steps as shall prevent this man, who is a disgrace to humanity, from walking about the town and becoming the talk of children of the rising generation who should not, if possible, know that such abominations are possible.

The views of Johnston J in *Wilson* were typical of the wider judiciary. As Sarah Carr notes, judges reiterated the Christian basis for these laws in their sermon-like summary speeches.<sup>25</sup> Even those acquitted of the offence were marked out as targets by the authorities for their mere association with such behaviour. In *R v Curtis*, “[h]is Honour cautioned the prisoner as to his future conduct, as he was a marked man, and the police would have an eye upon him.”<sup>26</sup>

New Zealand finally enacted its own legislation relating to criminal offences with the Offences Against the Person Act 1867 (the 1867 Act), which mirrored the 1861 Act in force in the United Kingdom. This superseded the 1828 Act in force up to that point but proved little different to the 1861 Act in relation to the prohibitions regarding sexual activity between men. Section 58 of the 1867 Act, in line with s 61 of the 1861 Act, criminalised sodomy and substituted the death penalty with penal servitude for life or for a term not less than 10 years as punishment. Section 59 of the 1867 Act, in line with s 62 of the 1861 Act, criminalised attempts to commit sodomy, assault with the intent to commit sodomy, and indecent assault upon a male person, punishing those convicted with either penal servitude of between three to ten years, or imprisonment for a term not exceeding two years with or without hard labour. Finally, s 60 of the 1867 Act, in line with s 63 of the 1861 Act, retained the clarification that the offence was complete upon penetration.

The 1867 Act was adopted without a word of discussion in Parliament. However, the direct adoption of the British prohibitions against sodomy and indecent assault mirrors not only the Christian morality of British settlers in New Zealand, but also the wider utility many colonial governments found in copying British statutes. Jeremy Finn notes that British statutes could be presumed effective, and thus legislation could be implemented

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21 Peter Spiller, Jeremy Finn and Richard Boast *A New Zealand Legal History* (2nd ed, Brookers, Wellington, 2001) at 76.

22 English Laws Act 1858, s 1.

23 For a detailed analysis of the circumstances that led to the passage of the English Laws Act 1858, see David V Williams “The Pre-History of the English Laws Act 1858: *McLiver v Macky* (1856)” (2010) 41 VUWLR 361; and David V Williams “Application of the Wills Act 1837 to New Zealand: Untidy Legal History” (2014) 45 VUWLR 637.

24 *R v Wilson* SC Nelson, 16 January 1863 available at <[www.wgtn.ac.nz/law/nzlostcases](http://www.wgtn.ac.nz/law/nzlostcases)>.

25 Sarah Carr “Preserving Decency: The Regulation of Sexual Behaviour in Early Otago 1848-1867” (PhD Thesis, University of Otago, 2014) at 220–221.

26 *R v Curtis* SC Wellington, 5 December 1864 available at <[www.wgtn.ac.nz/law/nzlostcases](http://www.wgtn.ac.nz/law/nzlostcases)>.

at low cost in colonies with scarce legal resources.<sup>27</sup> Less experience and ability were needed to amend an existing statute compared to drafting an original piece of legislation from scratch, and less time was needed scrutinising the end product before it was implemented.<sup>28</sup> This was especially useful given that, as in other colonies, New Zealand found competent legal personnel in short supply, especially in the early years of settlement.<sup>29</sup> Thus, “[a]ny expedient that eased the burdens on administrators and governmental legal advisers was welcome.”<sup>30</sup>

### (3) The limits of state regulation

Despite the outward vilification of sexual activity between men, there was a practical limit on the extent to which the state could regulate such behaviour. As many onlookers rarely welcomed state intrusion into their own domestic affairs, the reality was that many men were able to conduct liaisons with each other without being subject to unwanted attention from the law.<sup>31</sup> As long as both participants consented, onlookers were frequently willing to turn a “blind eye” to their behaviour.

*R v Ross* provides an interesting insight into the subtle nature of colonial attitudes toward consensual same-sex acts.<sup>32</sup> Alexander Ross was accused of having attempted anal sex with a 13-year-old boy.<sup>33</sup> One of the prosecution witnesses, “Thompson”, shared the bedroom with the accused and the victim on the night of the alleged incident.<sup>34</sup> However, Richmond J noted that Thompson had “been almost privy to an act of the same kind on a previous occasion, without informing the authorities or any body else”, and “[t]hat alone cast a very considerable shade of suspicion upon the evidence of the witness.”<sup>35</sup> Thompson blindly admitted to this but claimed to have said nothing as the participants had both consented.<sup>36</sup> These details demonstrate the limits on the extent to which the state could regulate sexual activity between men. Its reach could only extend as far as people were willing to bring it to the attention of authorities, and in some instances, people were willing to let the behaviour go unchecked.

This conclusion is supported by the findings of Finn and Charlotte Wilson. In the course of investigating the enforcement of the criminal law in the Supreme Court in Canterbury between 1852–1872, they conclude that “there are remarkably few cases of alleged homosexual offending”, and that “[i]t is possible that such conduct was rarely detected ... [and] unlikely to be reported to the authorities unless it involved an adult taking advantage of a child.”<sup>37</sup>

Even in cases where such conduct was brought to the attention of authorities, any social disapproval and legal consequences which might have followed sometimes gave

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27 Spiller, Finn and Boast, above n 21, at 79.

28 At 79.

29 At 79.

30 At 79.

31 Brickell, above n 20, at 35.

32 *R v Ross* SC Wellington, 3 June 1864 reported in *Otago Daily Times* (Dunedin, 4 June 1864) 5 at 5.

33 At 5.

34 At 5.

35 At 5.

36 At 5.

37 Jeremy Finn and Charlotte Wilson “‘Not Having the Fear of God Before Her Eyes’: Enforcement of the Criminal Law in the Supreme Court in Canterbury 1852-1872” (2005) 11 *Canta LR* 250 at 269.

way to other concerns. In *R v Parsons* and *R v Burton*, extortion charges were brought against the defendants for attempting to blackmail Arthur Acheron Dobbs for “unnatural practices”.<sup>38</sup> While there seems to have been sufficient evidence to have Dobbs tried for the offence, “in each case the judge was quick to characterise the accused as evil men preying upon an innocent”.<sup>39</sup> This was likely due to the high social standing of Dobbs in Canterbury society, as his sister was married to the Duke of Manchester.<sup>40</sup>

#### (4) Acts versus identities

Finally, it is important to recognise that it was the act of non-procreative sex which drew condemnation, and no stigma was necessarily attached to an individual for having an intense emotional relationship with a member of the same sex.<sup>41</sup> Furthermore, the prohibitions found in ss 58 and 59 of the 1867 Act could apply equally to interactions between members of the same sex and members of the opposite sex. The law had yet to single out the “homosexual” as a specific category for punishment, but rather punished men who engaged in same-sex sexual activity as part of a wider group of “deviants” who engaged in non-procreative sex.<sup>42</sup>

## IV Shifting Sands: The Rise of the Labouchère Amendment—1867–1893

The regulation of sexual activity between men in colonial New Zealand was, at first, part of a broader movement that targeted all non-procreative sex. However, by the turn of the century, sexual acts between men came to be specifically targeted by the law. This major overhaul in the law is attributable to two factors: the impact of new moral concerns in the United Kingdom, and the tendency on the part of New Zealand legislators to copy British statutes.

### A *The social purity crusade in the United Kingdom*

The origins of this major change are first sourced in the feminist-driven, social morality crusades of the mid-late 19th century in the United Kingdom. Many campaigners, such as Josephine Butler, decried what they saw as the “double standard of morality”, stricter standards of sexual behaviour applied to women and greater latitude afforded to men.<sup>43</sup> Their aim, as articulated by social campaigner Ellice Hopkins, was to overturn this double standard and “to bring back the moral law in its entirety, the one standard binding upon men and women alike”.<sup>44</sup> In their view, if even one crack was to appear in the moral order,

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38 *R v Parsons* SC Christchurch, 15 June 1859 reported in *The Lyttleton Times* (Canterbury, 18 June 1859) 4 at 4 as cited in Finn and Wilson, above n 37, at 253; and *R v Burton* SC Christchurch, 2 December 1861 reported in *The Lyttleton Times* (Canterbury, 4 December 1861) 4 at 4 as cited in Finn and Wilson, above n 37, at 253.

39 Finn and Wilson, above n 37, at 253.

40 At 253.

41 Brickell, above n 6, at 92.

42 Weeks, above n 13, at 12.

43 At 16.

44 Ellice Hopkins *The Standard of the White Cross: Do We Need It?* (Hatchards, London, 1885) at 13 as cited in Sue Morgan “Faith, Sex and Purity: the religio-feminist theory of Ellice Hopkins” (2000) 9 *Women’s History Review* 13 at 19.



society would be swept away in a flood of lust.<sup>45</sup> Thus, for many social morality campaigners, sexual activity between men was the ultimate manifestation of wanton lust, a product of men's sexual selfishness, which needed to be repressed for the good of society.<sup>46</sup>

The aims of the social purity campaign were furthered in early 1885 when WT Stead published a series of articles that described the ease with which young girls could be purchased for sex.<sup>47</sup> This threw Victorians into a state of moral panic, forcing the Government to respond with the Criminal Law Amendment Act 1885. It was in this Act that restrictions on sexual activity between men were tightened.

### B *The rise of the Labouchère Amendment in the United Kingdom*

The focus of the Criminal Law Amendment Act 1885 was “to make further provision for the Protection of Women and Girls, the suppression of brothels and other purposes”.<sup>48</sup> However, its notoriety derived largely from s 11 of the Act, which reads as follows:<sup>49</sup>

Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.

Section 11, which was added to the Bill by Henry Labouchère MP, is now known as “the Labouchère Amendment” (the Amendment).<sup>50</sup> In effect, it expanded the prohibitions against sexual activity between men from those contained in ss 61 and 62 of the 1861 Act, to encompass all sex acts between men, whether consensual or not, and whether involving sodomy or not. The Amendment also represents a shift in how the law approached such conduct. Rather than targeting male same-sex sexual activity as part of a wider aim to prohibit non-procreative sex, the Amendment specifically marked out conduct between men for punishment on its own accord.

Parliamentary discussion around the Amendment was limited, and it was adopted late at night with few MPs present in the House of Commons.<sup>51</sup> However, the few comments made by those considering the Amendment shine a light on parliamentary attitudes towards sexual activity between men. It went without saying that sexual activity between men was immoral, and there was no need to verbalise this in lengthy debate.

The introduction of the Amendment began with Mr Labouchère moving to include his clause in the Bill.<sup>52</sup> However, Charles Warton MP interrupted to object, questioning the relevance of the motion in relation to the wider Bill.<sup>53</sup> This objection was overruled by the Speaker who responded that “[a]t this stage of the Bill anything can be introduced into it

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45 Weeks, above n 13, at 16.

46 At 16.

47 See WT Stead “The Maiden Tribute of Modern Babylon I: The Report of Our Secret Commission” *The Pall Mall Gazette* (United Kingdom, 6 July 1885).

48 Criminal Law Amendment Act 1885 (UK) 48 & 49 Vict c 69.

49 Section 11.

50 Weeks, above n 13, at 14.

51 At 15.

52 (6 August 1885) 300 GBPD HC 1397.

53 (6 August 1885) 300 GBPD HC 1397.

by leave of the House.”<sup>54</sup> As an MP, Mr Warton gained a reputation for insisting on the enforcement of procedural rules<sup>55</sup> and, thus, his objection was unlikely to be motivated by any concerns over the substantive restrictions proposed by the Amendment. In other circumstances, such an amendment might have been ruled out of order, but the Speaker allowed the Amendment to proceed.<sup>56</sup> Such an attitude might have stemmed from a desire to have the Bill passed without delay so that the legislative arrears could be cleared in preparation for a general election.<sup>57</sup> However, it might have also reflected the personal feelings of the Speaker towards the Amendment as well.

Mr Labouchère then continued to move that the Amendment be included in the Bill because the Government would be “willing to accept it”.<sup>58</sup> His understanding was correct and the Amendment was incorporated into the Bill.<sup>59</sup> However, before the Amendment was formally adopted, Sir Henry James, the former Attorney-General, successfully proposed that the penalty under the Amendment be increased from one year’s imprisonment to two.<sup>60</sup> Such a move more definitively illustrates the contemporary background against which the Amendment was considered, one of increasing hostility towards men who engaged in same-sex sexual activity.

### *C The implementation of the Amendment in New Zealand*

New Zealand adopted a version of the Amendment in 1893 with the passage of the Criminal Code Act 1893 (the 1893 Code), the Act that superseded the 1867 Act. Section 137 of the 1893 Code merged previous prohibitions under s 59 of the 1867 Act with the Amendment, and read as follows:

Everyone is liable to ten years’ imprisonment with hard labour, and, according to his age, to be flogged or whipped once, twice, or thrice, who—

- (1) Attempts to commit buggery; or
- (2) Assaults any person with intent to commit buggery; or
- (3) Who being a male indecently assaults any other male.

It shall be no defence to an indictment for an indecent assault on a male of any age that he consented to the act of indecency.

Section 136 retained the prohibition against buggery and the clarification that proof of penetration was sufficient to establish the offence:

- (1) Everyone is liable to imprisonment with hard labour for life, and, according to his age, to be flogged or whipped once, twice, or thrice, who commits buggery either with a human being or with any other living creature.
- (2) This offence is complete upon penetration.

Section 137 effectively criminalised all sexual activity between men, as such acts were considered indecent assaults, and willing participants could not argue the defence of

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54 (6 August 1885) 300 GBPD HC 1397.

55 Parliament of Western Australia “Biographical Register of Members of the Parliament of Western Australia – Charles Nicholas Warton” <[www.parliament.wa.gov.au](http://www.parliament.wa.gov.au)>.

56 Richard Davenport-Hines *Sex, Death and Punishment: Attitudes to Sex and Sexuality in Britain Since the Renaissance* (Collins, London, 1990) at 132.

57 At 132.

58 (6 August 1885) 300 GBPD HC 1397.

59 (6 August 1885) 300 GBPD HC 1398.

60 (6 August 1885) 300 GBPD HC 1398.

consent. This marked a departure from the previous provision relating to indecent assault found in s 59 of the 1867 Act, which did not include a provision that abrogated the right of the parties to argue consent. Sections 136 and 137 also introduced flogging as a new form of punishment.

While the adoption of the Amendment in New Zealand seems like a logical extension of the close connection between the Colony and the historical background of the United Kingdom in the late 19th century, this assumption needs closer scrutiny. New Zealand legislators proved far less concerned than their British counterparts with the occurrence of sexual activity between men.<sup>61</sup> This is reflected in the views of feminist and social purity campaigners in New Zealand at the time, who were more focused on the sexual vulnerability of young girls.<sup>62</sup> They did not consider sexual activity between men to be a serious problem for the Colony and associated such problems with the old country: with effeminate aristocrats rather than hearty colonials.<sup>63</sup> Lady Stout, a prominent feminist and wife of the former New Zealand Premier Robert Stout, remarked in a letter to the editor of *The Times* that “[w]e have no class of men who are effeminate in dress or intellect or degenerate in morals, as in older countries.”<sup>64</sup> This lack of concern can also be substantiated by the conviction rates for sodomy, which remained consistently low between 1873–1893.<sup>65</sup>

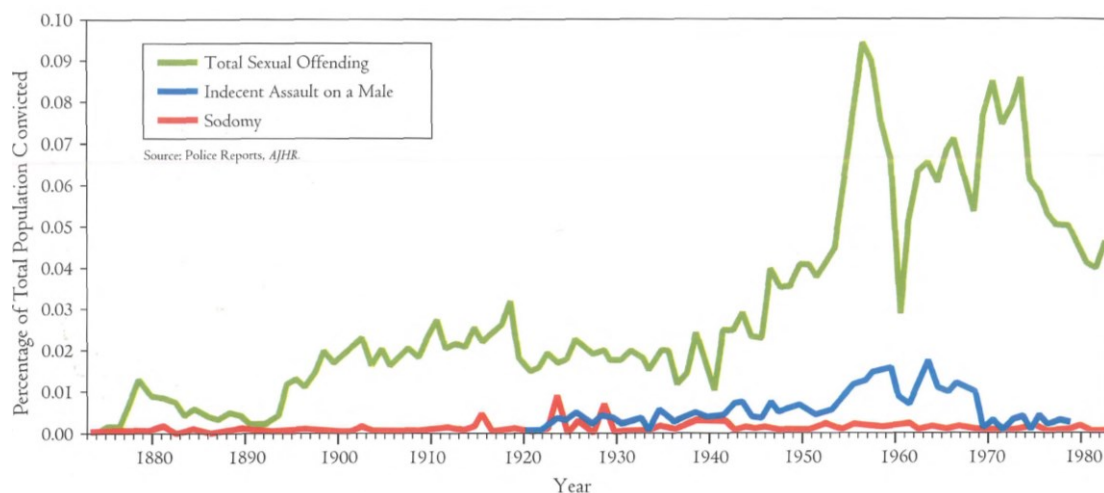


Figure 1: Convictions for Sodomy, Indecent Assaults on a Male, and all Sexual Offences, 1873–1981 (Police Reports, AJHR).

Therefore, while the United Kingdom’s Criminal Law Amendment Act 1885 inspired much debate about the age of consent in New Zealand, it provoked barely any comment on the Amendment.<sup>66</sup>

In 1888, the Offences Against the Person Bill 1888 (the 1888 Bill) came before Parliament and proposed, for the first time, to include the Amendment as a clause.<sup>67</sup> However, the Amendment failed to gain the support of legislators and was subsequently

61 Tracy C Tulloch “State Regulation of Sexuality in New Zealand 1880-1925” (PhD Thesis, University of Canterbury, 1997) at 308.

62 At 310.

63 At 310–311.

64 Anna P Stout “Votes for Women” *The Times* (United Kingdom, 19 November 1909) at 10.

65 Brickell, above n 20, at 388.

66 Tulloch, above n 61, at 308.

67 At 308; and Offences Against the Person Bill 1888 (120-1).

dropped from the 1888 Bill.<sup>68</sup> Vincent Pyke MP was the only MP who spoke on the clause, and he opposed its inclusion:<sup>69</sup>

Did any one suppose for a moment that males were liable to indecent assault? He never heard of such a thing in his life. He had heard of the iniquities of Sodom and Gomorrah, but he had never heard or thought society was so bad in New Zealand as to require a Bill of this kind. If it was as bad as that, it was time that society in New Zealand was wiped out altogether, as Sodom and Gomorrah were wiped out.

Through examining the social purity movement in New Zealand and the comments of Pyke, it seems unlikely that New Zealand adopted the Amendment in 1893 out of any moral panic regarding sexual activity between men. Another explanation is needed.

Legislators in both chambers of Parliament accepted the Amendment without commenting on the clause itself.<sup>70</sup> However, other remarks shine a light on the motive for its inclusion and indicate that coherency with British law was likely a very influential factor. William Downie Stewart, Independent Member of the Legislative Council, commented during debate on the 1893 Code that it would have been preferable to wait until the United Kingdom passed a code so that judges would benefit from British precedent.<sup>71</sup>

The 1893 Code represented a large-scale codification of the New Zealand criminal law. It was adopted in the face of little guidance from the United Kingdom, which had given up attempts at large-scale codification after 1883.<sup>72</sup> Thus, in passing the 1893 Code, many legislators, including Stewart, were motivated to adopt as many aspects of British law as possible, including the Amendment, to maximise whatever guidance they could get from British judges.

This attitude towards the adoption of the 1893 Code can be seen throughout its more than decade-long gestation. In 1880, Walter Scott Reid, one of two Commissioners on the Statutes Revision Commission, sent an unofficial memo to the Premier, John Hall. The Commissioners expressed reluctance to proceed with codification of the criminal law in the face of spirited debate in the United Kingdom about its desirability, especially when there was “no pressing need for amendment” here.<sup>73</sup>

The Hall Government accepted the advice of the Commissioners and, in a formal reply as Minister of Justice, Thomas Dick commented that “it will be better to postpone dealing with the subject until it has been more fully considered by the Mother Country”.<sup>74</sup> This attitude was also shared by Joseph Tole, the Minister of Justice in the Stout Government, who at first advised the Premier to wait until issues around codification had been dealt with in the United Kingdom.<sup>75</sup> While New Zealand would eventually codify its criminal law

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68 Tulloch, above n 61, at 308–309.

69 (31 July 1888) 62 NZPD 330.

70 Tulloch, above n 61, at 309.

71 (28 September 1893) 82 NZPD 796.

72 Stephen White “The Making of the New Zealand Criminal Code Act of 1893: A Sketch” (1986) 16 VUWLR 353 at 357–358.

73 Memo from Walter Scott Reid (Commissioner on the Statutes Revision Commission) to John Hall (Premier of New Zealand) on the Codification of New Zealand’s Criminal Law (4 March 1880) as cited in White, above n 72, at 359.

74 Letter from Thomas Dick (Minister of Justice) to the Commissioners on the Statutes Revision Commission on the Codification of New Zealand’s Criminal Law (30 March 1880) as cited in White, above n 72, at 359.

75 Minute by Joseph Tole (Minister of Justice) (9 February 1885) as cited in White, above n 72, at 362.

in 1893 despite a continued lack of guidance from the United Kingdom, such concerns nevertheless dominated the debate right up to the adoption of the 1893 Code. Concerns about New Zealand going out on a legislative limb did have weight, and likely motivated legislators to adopt provisions such as the Amendment.

A similar concern around coherency with British law also motivated some MPs when the 1888 Bill came before Parliament. The proposer of the 1888 Bill himself, Thomas Fergus MP, made his motivations for passing the Bill extremely clear: “to bring our laws somewhat in conformity with the law existing at the present time in England and in the adjoining colonies”.<sup>76</sup> Thomas Hislop MP also echoed the desire to adopt British statutory language when discussing a different clause in the 1888 Bill, because “the Imperial Parliament knew something about the nature and quality of the English language and the necessity for using those words” so the wording was “perfectly in order”.<sup>77</sup>

While other MPs argued that the wholesale adoption of British law was neither necessary nor desirable,<sup>78</sup> this view clearly did not hold sway with most MPs in relation to the Amendment. Overall, it seems clear that the adoption of the Amendment into New Zealand law was not driven by wider societal concerns about sexual activity between men. Rather, it was a top-down change driven by the desire of New Zealand legislators to emulate British statutes.

## V The Crusade Against “Degenerates”—1893–1928

### A *The calm before the storm*

In the immediate period after the Amendment’s adoption in New Zealand, the focus of feminist and social purity campaigners remained firmly fixed on heterosexual offending.<sup>79</sup> Convictions for sodomy remained consistently low, just as they had been prior to the adoption of the Amendment.<sup>80</sup> Meanwhile, New Zealand’s criminal law was consolidated by the Crimes Act 1908 (the 1908 Act), and the provisions relating to sexual activity between men were restated without substantive change from the 1893 Code. Section 153 prohibited buggery and retained the clarification that the offence was complete upon penetration:

- (1) Every one is liable to imprisonment with hard labour for life, and, according to his age, to be flogged or whipped once, twice, or thrice, who commits buggery either with a human being or with any other living creature.
- (2) This offence is complete upon penetration.

Section 154 provided for all other offences and the Amendment:

- Every one is liable to ten years’ imprisonment with hard labour, and, according to his age, to be flogged or whipped once, twice, or thrice, who—
- (1) Attempts to commit buggery; or
  - (2) Assaults any person with intent to commit buggery; or
  - (3) Who, being a male, indecently assaults any other male.

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76 (31 July 1888) 62 NZPD 329.

77 (31 July 1888) 62 NZPD 330.

78 (31 July 1888) 62 NZPD 334.

79 Tulloch, above n 61, at 310.

80 At 311.

It is no defence to an indictment for an indecent assault on a male of any age that he consented to the act of indecency.

However, the influence of new scientific and medical authorities began to take hold in New Zealand, pivoting the discourse around male same-sex sexual activity away from an exclusively religious focus. This impacted upon the ways in which the legal system attempted to regulate such behaviour. First came the ideas of sexologists, which led to wider societal awareness of men who engaged in same-sex sexual activity. Then came the ideas of the eugenics movement, which led to more extreme attempts to regulate sexual activity between men.

### B *The impact of sexology*

In the second half of the 19th century, the medical profession, comprised mostly of doctors and psychiatrists, began a process of the classification and labelling of sexual “deviants”.<sup>81</sup> Known as “sexologists”, this school of thought promoted the scientific study of human sexuality, cataloguing sexual interests and behaviour in minute detail.<sup>82</sup> Sexologists produced a variety of terms to describe those attracted to members of the same sex. Karl Heinrich Ulrichs coined the term “Uranian” in the mid-1860s to describe men who favoured sexual relations with each other.<sup>83</sup> Subsequently, Károly Mária Kertbeny (or Karl Maria Benkert) coined the term “homosexual” in 1869 to describe individuals who seemed to have an innate attraction to members of the same sex.<sup>84</sup>

This explicit labelling of those who engaged in same-sex sexual activity constitutes a marked moment in the history of Western society’s view of sexuality. The development of the concept of the “homosexual” in the late 19th century is a departure from the previous theory that same-sex sexual activity was a vice that any man may fall foul of.<sup>85</sup> This new term suggested that only a certain type of person, namely the “homosexual”, was prone to such conduct.<sup>86</sup> In doing so, it marked this new group as a foreign “other” in need of intervention, which in turn would be provided by the eugenics movement. As Michel Foucault once famously remarked, “[t]he sodomite had been a temporary aberration; the homosexual was now a species.”<sup>87</sup> In New Zealand, the ideas of the sexologists were slow to proliferate due to censorship laws.<sup>88</sup> However, the influence of their ideas, especially the notion that men who engaged in same-sex sexual activity were of a certain “type”, gradually spread in the early twentieth century.

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81 At 305.

82 Brickell, above n 6, at 91.

83 Tulloch, above n 61, at 305.

84 At 305.

85 Chris Brickell “Court Records and the History of Male Homosexuality” [2008] *Archifacts* 25 at 36.

86 At 36.

87 Michel Foucault *The History of Sexuality – Volume 1: An Introduction* (Robert Hurley (translator), Pantheon Books, New York, 1978) at 43.

88 Brickell, above n 20, at 69; and Tulloch, above n 61, at 309–310.

### C *The rise of eugenics*

#### (1) Beginnings

At the same time the ideas of the sexologists were beginning to take hold in New Zealand, another parallel movement was also beginning to impact on the discourse around sexuality. Eugenics is the theory and practice of improving the human species through selective breeding and excluding those with undesirable traits. This became more popular in the late 19th and early 20th century.<sup>89</sup> Rapid social change, growing rivalries on the world stage, and increased international tensions encouraged national concerns over the health and welfare of populations.<sup>90</sup> Eugenics, drawing upon the ideas of Charles Darwin's theory of natural selection and inheritance, seemed to provide the answer to the problem of preventing populations from becoming weak.<sup>91</sup> "Positive eugenics" emphasised the need for fit and healthy white members of the middle-class to reproduce, while "negative eugenics" focused on preventing the "unfit" and "degenerate" from perpetuating their defective traits.<sup>92</sup> Sexual activity between men, now more recognised in society due to the work of the sexologists, was a focus of eugenics for two reasons. First, such behaviour involving men of the middle class was seen as an abandonment of their duty to reproduce, and secondly, such behaviour was widely presumed to be the result of some mental defect.<sup>93</sup>

Feminist and social purity campaigners happily adopted the ideology of eugenics, viewing it as scientific justification for their beliefs, and expanded the compass of "undesirables" who were targeted to include men who engaged in same-sex sexual activity.<sup>94</sup> Behaviour that was previously deemed immoral under Judeo-Christian doctrine was now also viewed as evidence of mental or physical degeneration.<sup>95</sup> Feminist and social purity reformers characterised those who engaged in inappropriate sexual behaviour as exhibiting low intelligence and being unable to appreciate the consequences of their actions.<sup>96</sup> They represented a physical, mental and moral threat to national health.<sup>97</sup> Such a threat needed to be neutralised by reforming the law to enable and permit segregation, sterilisation, or even perhaps castration. The power of the state was to be harnessed to achieve this end. Such a view reflected a new conception of the role of the Government in the lives of ordinary citizens, one that looked to override individual liberties in pursuit of "national fitness". As Stephen Garton notes:<sup>98</sup>

Prominent medical authorities, reformers and politicians, frustrated by the checks and balances of liberal political cultures and the subservience of social policy to political expediency and populism, urged the State to base its deliberations on science rather than

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89 Tulloch, above n 61, at 318.

90 At 318.

91 At 318.

92 At 319.

93 Brickell, above n 20, at 93.

94 Tulloch, above n 61, at 319.

95 At 319.

96 At 319.

97 At 319.

98 Stephen Garton "'Liberty of the Nation': Eugenics in Australia and New Zealand and the Limits of Illiberalism" in Diane B Paul, John Stenhouse and Hamish G Spencer (eds) *Eugenics at the Edges of Empire: New Zealand, Australia, Canada and South Africa* (Springer Nature, Cham, 2018) 21 at 22–23.

electoral success. Key reformers, doctors prominent among them, argued that certain democratic rights (liberty, habeas corpus, free association, the presumption of innocence) be set aside in particular contexts and for specific problem populations in the national interest.

The influence of eugenics, and this new medical model of sexuality, can be seen in this cartoon below from an August 1911 issue of the *New Zealand Truth* newspaper.<sup>99</sup> In it, the traditional punishment of flogging under the 1908 Act, representative of traditional moral condemnation of sexual activity between men, is juxtaposed against the rising influence of medical doctors, who claim that they can “save him” with surgical instruments and science:

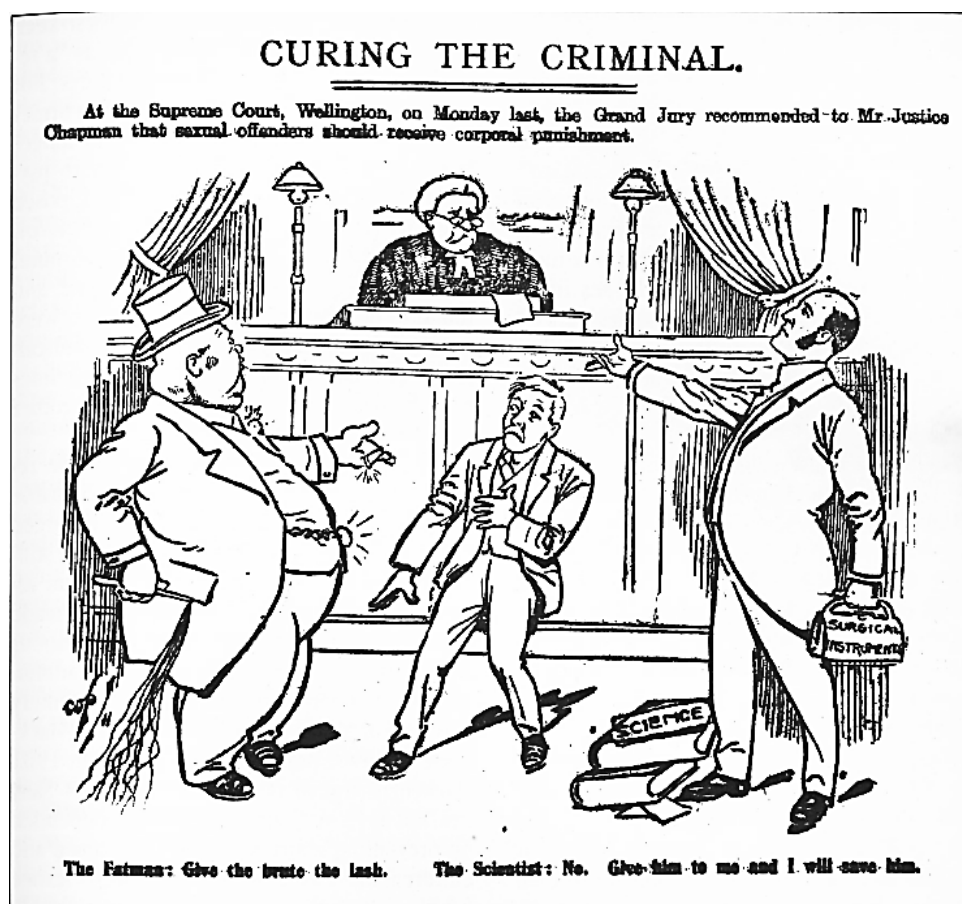


Figure 2: “Curing the Criminal” Editorial Cartoon, *New Zealand Truth*, 19 August 1911.

The first hint of the legislative impact of the growing societal focus on same-sex sexual activity may be found in the Habitual Criminals and Offenders Act 1906 (the 1906 Act). Under the 1906 Act, courts were granted the power to indefinitely contain certain offenders whose conduct was thought to present a continuing threat to law and order. To be classified as a “habitual criminal”, one had to be convicted a certain number of times for certain types of offences. The exact number of convictions required depended on the type of offence in question. To be classified as a habitual criminal upon committing a Class I Offence, which included sexual offences and abortion, only two other previous

99 “Curing the Criminal” *New Zealand Truth* (New Zealand, 19 August 1911) at 5.



convictions for Class I Offences were necessary.<sup>100</sup> To be classified as a habitual criminal upon committing a Class II Offence, which covered violence and property crimes, four other previous convictions for either Class I or II Offences were required.<sup>101</sup> This decision to classify criminal offences relating to sexual activity between men as a more serious Class I Offence reflected the growing societal condemnation of such conduct.

The influence of eugenics—and its calls for segregation—is more explicitly reflected in the way the prison system dealt with men convicted under ss 153 and 154 of the 1908 Act.<sup>102</sup> The interest in classifying sexual degenerates encouraged new approaches to the treatment of those convicted.<sup>103</sup> In the decades immediately after the arrival of British law in New Zealand, men convicted of sexual offences received little systematic attention and were imprisoned in gaols all across New Zealand.<sup>104</sup> However, in 1910, the liberal-minded Minister of Justice, Hon John Findlay MP, having been educated in psychiatry himself while at university, devised a new scheme.<sup>105</sup> Offenders were to be classified into separate categories such as drunkards, professional criminals, those of unsound mind, and, most importantly for us, “sexual perverts”. In 1917, the single prison in New Plymouth was set aside almost exclusively for men convicted under ss 153 and 154 of the 1908 Act, where they continued to be sent until 1952.<sup>106</sup> Prisoners convicted for such crimes who had been residing in other institutions were transferred to New Plymouth.<sup>107</sup> The handful of local prisoners incarcerated for other crimes were kept in an entirely separate wing of the New Plymouth prison, and the section of the prison for sexual offenders was “worked as near as possible as if it were a separate prison”.<sup>108</sup>

## (2) Post-World War I

Eugenic concerns surrounding sexual activity between men peaked in the early 1920s.<sup>109</sup> The experience of World War I had further heightened concerns over the health and strength of the nation, and the impact of those who were deemed “unfit” on society.<sup>110</sup> Reformers contended that additional efforts were needed to prevent New Zealand from being beset by evils that plagued the old world, in order to retain its status as an ideal society.<sup>111</sup>

For example, in 1921, the New Zealand Prisons Board passed a resolution suggesting that the Government take a more scientific approach in how it dealt with men convicted of unnatural offences, arguing for the continued segregation of offenders and medical treatment where appropriate. The resolution read:<sup>112</sup>

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100 Habitual Criminals and Offenders Act 1906, s 2(1)(a).

101 Section 2(1)(b).

102 Chris Brickell “Psychiatry, Psychology and Homosexual Prisoners in New Zealand, 1910–1960” (2021) 65 *Medical History* 1 at 3.

103 Tulloch, above n 61, at 318.

104 Brickell, above n 102, at 3.

105 At 3.

106 At 3–4.

107 At 3.

108 At 3–4 (footnote omitted).

109 Tulloch, above n 61, at 323.

110 At 323.

111 At 323.

112 Prisons Board “Prisons Department: Prisons Board (Annual Report Of) For 1920” [1921] II *AJHR* H-20A at 4.

Whereas an increasing number of sexual offences has been the subject of frequent and serious judicial comment, especially in cases where young children were the victims, or the very serious nature of the charge connoted a perversion dangerous to the moral well-being of society; and, as the experience of the Board in dealing with prisoners of this class accords, as far as it goes, with the now generally accepted opinion that, with certain exceptions, persons committing unnatural offences labour under physical disease or disability, or mental deficiency or disorder, or both, which accounts for the sexual perversion and the morbid character of the offence charged: It is resolved by the Prisons Board to strongly recommend to the Government an amendment of the Crimes Act under which such offenders could be dealt with scientifically—

- (1) Before sentence is pronounced, by furnishing expert medical or surgical reports or evidence;
- (2) By sanctioning an indeterminate sentence;
- (3) By segregating persons so sentenced and subjecting them, under proper safeguards, to any medical or surgical treatment which may be deemed necessary or expedient either for their own good or in the public interest.

While the Government at first refused to act on the demands of the Prison Board, continued lobbying by reformers—who, in turn, were joined by other organisations—kept the pressure on.<sup>113</sup> Under such pressure, the Government relented, and in 1924 established the Committee of Inquiry into Mental Defectives and Sexual Offenders. The object was to investigate the “necessity for special care and treatment of mental defectives and sexual offenders in New Zealand” and any changes in the law necessary to give effect to its recommendations.<sup>114</sup>

### (3) The 1925 and 1927 reports

#### (a) The 1925 Mental Defectives and Sexual Offenders Report

Membership of the 1924 Committee of Inquiry was dominated by medical professionals, a reflection of the concerns underlying the inquiry. Four well-respected doctors were appointed: Sir Donald McGavin, Sir Frederic Truby King, J Sands Elliot and Ada Paterson.<sup>115</sup> King and Paterson were known to hold strong eugenic views.<sup>116</sup> The Committee spent four months gathering evidence from various groups thought to be experts in the area, and visiting various settings such as prisons, mental asylums, special schools and reformatories.<sup>117</sup>

Before examining the Committee of Inquiry and its 1925 report, it is important to note that sexual activity between men was investigated by the Committee as one of three main areas of interest (the others being feeble-minded women and paedophiles). This article, of course, will examine only the discussion and recommendations around sexual activity between men.

While taking evidence from those before the Committee, the relationship between same-sex sexual activity and mental deficiency emerged as a major issue. While some asserted that all men who engaged in same-sex sexual activity were mentally deficient as “otherwise they would not be perverts”, a significant number of those giving evidence

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113 Tulloch, above n 61, at 324.

114 Committee of Inquiry “Mental Defectives and Sexual Offenders” [1925] AJHR H-31A at 2.

115 At 3.

116 Tulloch, above n 61, at 326.

117 Committee of Inquiry, above n 114, at 3–4.

were careful not to rush to such a conclusion.<sup>118</sup> Dr Stuart Moore, for instance, declared that “[t]he possibility of sexual perversion is universal. It exists potentially in everybody and an individual becomes civilised by overcoming that”.<sup>119</sup> Kevin McGrath, a Catholic priest, expressed a similar sentiment when commenting: “All sex criminals are not degenerates, and must not be bracketed in a homogenous class out of which no good can come”.<sup>120</sup> Other submitters also noted that sex offenders were often people of high intellect.<sup>121</sup>

In deciding how to respond to such behaviour, those before the Committee considered a variety of different methods such as sterilisation, castration and segregation. For many, the surgical solutions seemed an attractive alternative to incarceration. Dr RM Beattie, for example, observed: “Take the case of Oscar Wilde ... a man like that shut up for life would be a loss to the whole world. I would desexualise him and let him loose to a large extent”.<sup>122</sup> Dr Beattie also noted the case of a “lawyer mayor” who had been imprisoned for same-sex sexual activity.<sup>123</sup> He argued that had he been “desexualised”, the nation could have saved the expense of incarcerating him for such a lengthy period.<sup>124</sup> Many noted that sterilisation or castration would prevent offenders from reproducing, thus restricting the growth in those deemed “unfit” in society—those whose behaviour was viewed as being on account of a hereditary defect.

However, the contributions from those who argued against the surgical methods demonstrate the emerging limit of what many felt was acceptable. Many contributors noted that sterilisation and castration were unlikely to prevent re-offending.<sup>125</sup> Furthermore, many argued that castration represented an enormous interference with individual liberty and would cause great mental and physical harm to those operated on.<sup>126</sup> The reluctance expressed by many who gave evidence before the Committee of Inquiry testifies to the limits of the relationship between the law and wider social movements. In the context of early 20th century New Zealand, the values and ideologies promulgated by the law, which in turn influenced wider social histories, included the related liberal concepts of freedom from interference from others and personal autonomy. These values of the law came up time and time again, providing a powerful counterbalance to those in wider society advocating for the more extreme ideas of the eugenics movement. This firmly demonstrates what Phillips claims as the ideological and symbolic power of the law, its ability to influence other histories, and the nature of the law in being, to some extent, impervious to change from outside influences.<sup>127</sup>

After hearing all the evidence, in 1925, the Committee of Inquiry presented its report (the 1925 Report) to the Minister of Health. In line with many of those who presented

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118 Evidence Presented to the Committee of Inquiry Appointed by the Hon Sir Maui Pomare (1924) H3/13 W1628 (NA) [Committee of Inquiry Evidence] at 304 as cited in Tulloch, above n 61, at 335.

119 Committee of Inquiry Evidence, above n 118, at 496–499 as cited in Tulloch, above n 61, at 336.

120 Committee of Inquiry Evidence, above n 118, at 91 as cited in Tulloch, above n 61, at 336.

121 Committee of Inquiry Evidence, above n 118, at 308 and 540 as cited in Tulloch, above n 61, at 335–336.

122 Committee of Inquiry Evidence, above n 118, at 296 as cited in Tulloch, above n 61, at 338.

123 Committee of Inquiry Evidence, above n 118, at 296 as cited in Tulloch, above n 61, at 338.

124 Committee of Inquiry Evidence, above n 118, at 296 as cited in Tulloch, above n 61, at 338.

125 Committee of Inquiry Evidence, above n 118, at 172 as cited in Tulloch, above n 61, at 338.

126 Tulloch, above n 61, at 338–339.

127 Phillips, above n 2, at 302.

evidence before the Committee, the 1925 Report drew a sharp distinction between sexual offending and mental degeneracy:<sup>128</sup>

It is true that a certain proportion of mental defectives show their lack of self-control in regard to sex instincts and functions as in other respects ... but it is very far from correct to suppose that all feeble-minded persons are sexual offenders, or that all sexual offenders are mentally defective. On the contrary, among sexual offenders of the worst type, those convicted of unnatural offences, are occasionally found to be persons possessing intellectual and artistic powers above the average.

In relation to men who engaged in same-sex sexual activity, the Committee opined that few were engaging in such behaviour on the account of some mental impairment.<sup>129</sup>

However, to conclusively determine whether behaviour from a specific person was the result of mental degeneracy, the 1925 Report cited the suggestion of Dr FS Hay, the Inspector-General of Mental Hospitals, with approval:<sup>130</sup>

I think that he should be brought to trial in the ordinary way, with perhaps suppression of publication of names of the offender and victim. If found guilty, he should be given an indeterminate sentence, and be removed to a farm reformatory prison, where he would be brought under skilled medical and lay observation, and his case studied in respect to—*Mentality*, when if afterwards it is decided that he is mentally defective or deficient in terms of the Act he can be transferred to the proper institution; *physical condition*, when if there is any disorder it can be remedied. If the disorder is causative (e.g., prostatic in the elderly) and surgical or medical interference is necessary, it will be carried out and its results carefully watched and reported on.

The 1925 Report then went on to address how offenders should be dealt with. First, they considered the possibility of sterilisation. In line with many who gave evidence before the Committee, the 1925 Report recognised that sterilisation usually did not appreciably impair sexual desire and the capacity for sexual intercourse.<sup>131</sup> However, it argued that it may be of use in cases where such behaviour was the result of a hereditary mental impairment, as it prevented these men from reproducing and thus passing on their defects.<sup>132</sup>

The 1925 Report then went on to consider the possibility of castrating men who engaged in same-sex sexual activity, whether or not such behaviour was the result of mental impairment. This method was enthusiastically endorsed by many giving evidence before the Committee, such as Dr Beattie. The 1925 Report noted that the impact of such a procedure on the offender would depend on the age at which the procedure was carried out.<sup>133</sup> If such a procedure was carried out on the offender before puberty, it was more likely to impair sexual desire and capacity.<sup>134</sup> However, if it were carried out on the offender after puberty, the 1925 Report considered the results to be much less pronounced, as “[t]he secondary sexual characteristics have been already established and

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128 Committee of Inquiry, above n 114, at 5.

129 At 25.

130 At 26.

131 At 26.

132 At 26.

133 At 27.

134 At 27.

persist.”<sup>135</sup> Furthermore, the Committee considered that the physical impacts on the offender would be great as “certain mental effects are produced”.<sup>136</sup> However, as sexual behaviour and preferences manifest only after puberty, the Committee considered that castration was unlikely to be of much use as it could only be deployed when its effectiveness would be at its lowest.<sup>137</sup> Thus, in line with many who expressed reservations before the Committee about the overall efficacy of the procedure—besides it merely preventing reproduction—and the major infringement of individual liberty involved, the 1925 Report cautioned against automatically adopting the procedure: “The problematic result and the extent of the mutilation restrain the Committee from any suggestion that such an operation should be made compulsory.”<sup>138</sup>

This reluctance of the 1925 Report to recommend castration is yet another demonstration of the influence of the liberal values of the law in providing a strong counterbalance to the ideas of the eugenics movement. These liberal values limited the influence of wider societal notions on the law.

Overall, the Committee suggested that the holistic question of whether sexual offenders should be sterilised or castrated should be further investigated by a proposed Eugenics Board because the information at hand was inadequate to make a final judgement.<sup>139</sup>

Compared to its ambivalence around the surgical procedures (subject to the Committee’s endorsement of sterilisation for men whose behaviour was the result of hereditary mental degeneracy), the Committee was far more enthusiastic about the idea of segregating men who engaged in same-sex sexual activity and imposing on them an indeterminate sentence, lauding the New Plymouth prison project:<sup>140</sup>

... the Committee have come to the conclusion that it is most desirable, in continuation of the system of prison reform which has been inaugurated with so much success in this country ... In the judgment of the Committee, the best way of dealing with persons guilty of sexual crimes is by means of the indeterminate sentence. Each case should be examined by a psychiatrist as well as by the Prison Medical Officer, and the length of the period of detention should be determined by the Prisons Board after looking into the nature of the offence and considering the report of the psychologist and evidence as to the conduct of the prisoner while under detention. In cases of the worst type the indeterminate sentence would doubtless resolve itself into detention for life.

This greater enthusiasm for segregation reinforces the notion that the liberal values of the law are at play here. Segregation represented a far less invasive way of implementing the wishes of the eugenics movement, especially considering that men who engaged in same-sex sexual activity were already punishable by imprisonment. Segregation in incarceration merely meant a reshuffling of prisoners. Therefore, this method was met with far less resistance from the law and wider society.

Overall, the Committee recommended:<sup>141</sup>

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135 At 27.

136 At 27.

137 At 27.

138 At 27.

139 At 27.

140 At 27.

141 At 27–28.

- (1) That the Crimes Act be amended to provide for the passing of an indeterminate sentence upon persons convicted of sexual offences. The Courts to be given full discretion as to whether the sentence shall be definite or indeterminate.
- (2) That the Prison Board be vested with the same power of recommendation for the release on probation or final discharge of prisoners under an indeterminate sentence as they have now in regard to all other prisoners.
- (3) That a psychiatrist be appointed to advise the Prisons Department as to the classification and treatment, and that he be available to the Courts for the examination, before sentence, of sexual offenders, or of offenders who are thought to be irresponsible on account of mental defect.
- (4) That the Prisons Board be advised by the Eugenic Board in regard to the release on probation or final discharge of all sexual offenders or feeble-minded offenders coming under its jurisdiction.
- (5) The Committee feel that the information at present available in regard to sterilization or desexualization of sexual offenders is quite inadequate to permit of a sound and final judgment as to the value of the procedure. They recommend, therefore, that the whole question be remitted for careful investigation to the Eugenic Board which it is proposed should be set up.

(b) The 1927 Mental Deficiency and its Treatment Report

After the publication of the 1925 Report, the Government commissioned Dr Theodore Gray, the Deputy Inspector-General of Mental Defectives, on a wide-ranging tour of Europe and the United States to investigate eugenics programmes.<sup>142</sup> His report, published in 1927 (the 1927 Report), largely echoed much of what was recommended in the 1925 Report. Like the 1925 Report, Gray emphasises the distinction between sexual offending and mental degeneracy:<sup>143</sup>

... contrary to public belief, they [sexual offences] are not all due to perverted instincts, nor are the offenders all feeble-minded or degenerate. Rape or unlawful carnal knowledge is not any more likely to be accompanied by mental defect than theft or forgery, but there are certain cases where the offence is due to a definite perversion of normal instincts, or to mental deficiency with or without accompanying physical disease.

However, Gray then provides a tentative link between such behaviour and mental degeneracy:<sup>144</sup>

Sexual perversion is not generally considered *per se* to be mental disease, but it is undoubtedly a borderland condition, and should at any rate be regarded as a *prima facie* qualification for a clinical examination.

In relation to how offenders should be dealt with, Gray's views largely align with those expressed in the 1925 Report. He expresses enthusiasm for segregation, commenting that "[m]any will require permanent segregation—probably all cases of homosexuality and

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142 Hamish G Spencer "Eugenic Sterilization in New Zealand: The Story of the Mental Defectives Amendment Act 1928" in Diane B Paul, John Stenhouse and Hamish G Spencer (eds) *Eugenics at the Edges of Empire: New Zealand, Australia, Canada and South Africa* (Springer Nature, Cham, 2018) 85 at 89.

143 Theodore Gray "Mental Deficiency and its Treatment" [1927] AJHR H-7A at 17.

144 At 17 (emphasis in original).

unnatural offences should be dealt with in this way”.<sup>145</sup> In relation to castration and sterilisation, Gray expressed a reluctance even greater than that of the 1925 Report. He noted that castration takes many years to reduce desires, and still allows for the production of “perversion and consequent danger to children”.<sup>146</sup> Furthermore, he asserted that “[i]n some cases it appears to have a general calmative influence and probably some degree of mental enfeeblement.”<sup>147</sup> It seems as if the efficacy of castration, besides merely preventing the offender from reproducing, was again the issue. When balanced against the consequences of such an invasive procedure, this procedure was unpalatable for Gray. Gray noted that castration “does not lessen desire or potency—it merely prevents procreation”.<sup>148</sup> In contrast to the 1925 Report, it seems that Gray did not see much utility for the eugenics movement in preventing these men from reproducing.

The reluctance of the 1925 and 1927 Reports in recommending the extreme measures of sterilisation and castration of offenders demonstrates the influence of the liberal values of the law on wider societal histories. It foreshadowed the limits of what was thought acceptable and drew the battlelines for the acrimonious and contentious debate ahead. This came to a head in 1928 when the Mental Defectives Amendment Bill came before Parliament and attempted to heighten the stakes for those accused of committing sexual offences on account of a mental defect.

#### (4) The Mental Defectives Amendment Bill 1928

The Mental Defectives Amendment Bill 1928 (the 1928 Bill),<sup>149</sup> an amendment of the Mental Defectives Act 1911, was the culmination of all the efforts of the eugenics movement. While much of the 1928 Bill was uncontroversial, several clauses stood out.

First was cl 7, which expanded the definition of “mentally defective person” to include “[p]ersons socially defective”, defined as “persons who suffer from mental deficiency associated with or manifested by anti-social conduct, and who require supervision for their own protection or in the public interest”.

The impetus of this change was a recommendation of the 1925 Report, which proposed to include “moral imbecile” as a class of persons falling within the definition of “mentally defective person” in s 2 of the 1911 Act. According to Gray in the 1927 Report, such a clause was “obviously ... to bring within the purview of our legislation people of feeble mind who offended our moral code more particularly in sexual matters”.<sup>150</sup> However, Gray criticised this title as being too narrow in scope as it failed to include those whose abnormal behaviour was not confined to vice or crime.<sup>151</sup> Therefore, Gray proposed the class of “social defective” that cl 7 largely adopted.<sup>152</sup>

Second was cl 25(1), which gave the Eugenics Board the ability to authorise sterilisation of those registered under the 1911 Act—including men who were perceived as engaging in same-sex sexual activity on account of some mental defect—if sterilisation would be “desirable in the public interest”.

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145 At 17.

146 At 18.

147 At 18.

148 At 18.

149 Mental Defectives Amendment Bill 1928 (24-1).

150 Gray, above n 143, at 2.

151 At 2.

152 At 2.

Notably, the clause clarified that such surgical operation on men should not amount to castration. The wording of the draft clause prohibiting castration was a direct reflection of the reluctance that had developed towards adopting the invasive procedure. While such a procedure would invariably prevent reproduction, it failed to appreciably reduce sexual desire and, when balanced against its invasive nature, was regarded as unacceptable. The law, with its balanced consideration of both protection of the public interest and the individual's rights, had put an end to any consideration of such an invasive procedure. These sentiments were reflected by the Minister of Health and proponent of the 1928 Bill, the Hon Alexander Young MP:<sup>153</sup>

There is specifically excluded from the functions of the Board the power to approve of castration, because it does not appear that any advantage would be gained by its performance. Indeed, it is well known that that operation may produce untoward mental effects in its subjects.

Nevertheless, the sterilisation clause, despite prohibiting the more radical option of castration, engendered bitter opposition. Leader of the Opposition Harry Holland MP argued that environmental factors, not just hereditary factors, played an important role in individuals, and thus such an extreme infringement of liberty in the form of sterilisation was not justifiable:<sup>154</sup>

I venture to say that none of us in this House is sufficiently well informed to warrant our hastily passing some of the more far-reaching proposals contained in the Bill ... I am sure the Minister will forgive me for saying that I do not think he has paid that degree of attention to the influences of environment that might have been expected when a measure of this nature was being drafted.

This concern was also echoed by Ted Howard MP, who commented that:<sup>155</sup>

It is all very well to say that a mental defective married a mental defective, and produced a child who was mentally deficient; but you can produce a mental defective by lack of care and by starvation ... I cannot agree that there is any call in this country for such drastic and dangerous legislation as that now before the House.

Furthermore, Holland also echoed the concerns of the 1925 and 1927 Reports when he noted that "scientists [tell] us that this method which the Minister proposes will not destroy either desire or the power of coition".<sup>156</sup> In particular, Holland cites the "male sexual offender", which included men who engaged in same-sex sexual activity, as a direct example of the ineffectiveness of sterilisation:<sup>157</sup>

When he comes to the case of male sexual offenders, he says, "I am not convinced that any benefit is likely to be derived from surgical measures in these cases." We find the same element of apparent doubt in the resolution carried by the British Medical Association when it held its annual conference at Auckland in April, 1924. The resolution there read:—

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153 (24 July 1928) 217 NZPD 702.

154 (24 July 1928) 217 NZPD 679.

155 (24 July 1928) 217 NZPD 694.

156 (24 July 1928) 217 NZPD 680.

157 (24 July 1928) 217 NZPD 680.



“That this conference can make no recommendation for surgical desexualization in the treatment of the adult sex pervert ...”

The views of Holland and Howard are representative of a wide array of MPs who were opposed to the sterilisation clause. This fierce opposition from many was recognised by Young himself when he conceded that:<sup>158</sup>

The Government does not propose to force the issue as far as sterilization is concerned, but it desires to give a lead to public opinion. Whether public opinion is ready for such a step remains to be seen, but I feel convinced that it is only a matter of time when the step must be taken. If, however, there is a strong public opinion showing that the country is not yet ready, I am prepared to accept any reasonable amendments to make the Bill a workable measure and a credit to the country.

Throughout the debate, concerns surrounding the infringement of individual liberty were raised, and the perceived ineffectiveness of the surgical procedure predominated. Ultimately, the controversy surrounding the proposal, coupled with the fact that 1928 was an election year in which the Government did not want to alienate voters, caused cl 25(1) to be dropped from the 1928 Bill.<sup>159</sup> The 1928 Bill was ultimately passed into law without the measure.

The failure of the eugenics movement to achieve the passage of sterilisation legislation in New Zealand demonstrates the limits of the correlation between law and wider social movements. The ideology promulgated by the law during this time were the related liberal concepts of freedom from interference and personal autonomy. The reluctance of many of those who gave evidence before the 1924 Committee, the 1925 and 1927 Reports, and MPs such as Holland and Howard in recommending the surgical methods, demonstrate the influence of these values. These values of the law came up time and time again, ultimately dooming the passage of sterilisation legislation into law. In a similar vein, Garton, commenting on the broader failure of the eugenics movement to achieve sterilisation legislation, observed that:<sup>160</sup>

In the early to mid-twentieth century, a cohort of influential bureaucrats and politicians in Britain and the Dominions, often trained in the humanities and law, sustained a focus on the civic and constitutional importance of checks and balances against equally influential voices proclaiming the need for social engineering and intervention for the national good. The former, however, were often in the interstices of governments, advising ministers and governments, counselling political caution where there was doubt and the importance of protecting individuals from unnecessary interference by the state. Within these cautious legal, bureaucratic and political frameworks, the state should act only in the interests of the individual unless there was compelling evidence that the state was threatened.

Ultimately, the values and ideologies promulgated by the law had a sustained influence on the attitudes of wider society and what society thought acceptable in terms of government interference in the lives of ordinary citizens. As Phillips notes, “law itself has a concrete role to play, [and] it has significant symbolic and ideological power”.<sup>161</sup> Here, the relationship between law and society was clearly a two-way street. On one hand, the

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158 (19 July 1928) 217 NZPD 618.

159 Spencer, above n 142, at 93–94.

160 Garton, above n 98, at 34–35.

161 Phillips, above n 2, at 302.

attitudes of certain segments in society drove the crusade to include cl 25(1) in the 1928 Bill. On the other hand, the values and ideologies promulgated by the law influenced the attitudes of many in society to oppose the inclusion of the clause. Young's comment that the Government desired "to give a lead to public opinion",<sup>162</sup> and the subsequent demise of cl 25(1), firmly demonstrates that the influence of the latter won out.

#### (5) The impact of the eugenics movement outside the 1928 Bill

The defeat of the sterilisation clause in the 1928 Bill represents the high tide in terms of attempts to target men who engaged in same-sex sexual activity. No legislation was ever introduced proposing to sterilise or castrate men who engaged in same-sex sexual activity that were not viewed as doing so on account of some mental defect. However, this is not to say that the eugenics movement had no practical impact on the legal treatment of men who engaged in same-sex sexual activity. Ultimately, despite the relative autonomy of law in resisting the adoption of sterilisation legislation, in some other areas of the law, societal context did exert great influence.

First, it seems segregation was adopted as the primary way to regulate these men's sexuality. Those convicted under ss 153 and 154 of the 1908 Act, excluding those classed as mentally defective, continued to be sent to New Plymouth prison until 1952.

Secondly, during the leadup to the 1928 Bill, a highpoint in terms of the influence of eugenics, there was a notable increase in convictions for sodomy and indecent assault on a male under the Amendment.<sup>163</sup> Evidently, in the context of increasing hostility towards sexual activity between men, judges seemed to take the prohibitions in the 1893 Code much more seriously than previous judges took the prohibitions in the 1867 Act.<sup>164</sup>

Finally, the focus of the judiciary shifted towards consideration of the accused's mental weakness, often described in terms of nervous instability, in cases involving sexual activity between men. This marked a notable departure from previous cases such as *Wilson*, where the focus of Johnston J was squarely and exclusively on the immoral nature of the defendant's actions. Such a change arose from the passage of s 7 in the Mental Defectives Amendment Act 1928. As the introduction of the section was "obviously ... to bring within the purview of our legislation people of feeble mind who offended our moral code more particularly in sexual matters",<sup>165</sup> men who engaged in same-sex sexual activity were now brought within the jurisdiction of the 1911 Act, and therefore actively assessed as to whether they were a "mentally defective person". Physicians were now often called upon to testify as to the accused's psychological motivations, and this was actively considered by judges as part of the file.<sup>166</sup>

This is demonstrated by materials contained in the 1928 sentencing file of a Dunedin man arrested after police were informed that he had sexual relations with a male youth. The man received treatment from a Rotorua sanatorium for his homoerotic desires, and the sanatorium doctor wrote a letter to his guardians that was included in the case file. The doctor noted that "although he had no money, I felt I could not send him away from

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162 (19 July 1928) 217 NZPD 618.

163 See Figure 1 in this article.

164 Eldred-Grigg, above n 18, at 170.

165 Gray, above n 143, at 2.

166 Brickell, above n 85, at 33.

the door of the place most suitable in New Zealand for the treatment of his condition”.<sup>167</sup> His file also included a letter from a general practitioner who noted that:<sup>168</sup>

I have attended to L\_\_\_ W\_\_\_. He was suffering from anxiety states and phobias. He was a masturbator, had a constant fear of heart failure, cancer and tubercular infection. W\_\_\_ has been an inmate of a hospital in Rotorua where he was treated for neurasthenia [nervous exhaustion].

The inclusion of these files from medical practitioners demonstrates the influence of eugenics on considerations of sexuality, one which tentatively linked same-sex sexual acts with mental degeneracy before inviting a thorough examination.

## VI Conclusion

In some respects, of course, the answer to the question of why legal history matters is the same as the answer to the question of why history of any kind matters. That is, it is always better to understand not just the shape that some aspect of our present world takes, but also how it got that way. Moreover, our history is more than an explanation of past developments, it is an essential form of understanding of the world around us, because it is invariably still with us, aspects of it remain embedded in every part of our society.

—Jim Phillips<sup>169</sup>

These insightful comments from Phillips make for a cogent argument as to why legal history does indeed matter, especially for those who identify as LGBT+. While New Zealand is today considered a fine example of progress when it comes to the treatment of its LGBT+ citizens, it is important to remember that not long ago, this was not the case.

One of the most intense periods of subjugation of people of non-heterosexual orientation occurred between 1840–1930, when attempts to regulate sexual activity between men intensified. The first stage of this movement came about due to the growth in the social purity movement in the second half of the 19th century, which caused societal attitudes in the United Kingdom to harden against sexual activity between men. The height of this abhorrence was expressed in “the Labouchère Amendment”, a piece of legislation that prohibited any form of sexual contact between men, not only sodomy, even if this contact was consensual. New Zealand also adopted the Amendment, but this was not due to general social disquiet about sexual activity between men as most New Zealanders seemed largely unaware of the extent of such acts. Rather, this adoption resulted from a tendency on the part of New Zealand legislators to copy British statutes.

The rise of the eugenics movement drove more extreme proposals in the early 20th century to regulate men who engaged in same-sex sexual activity. These largely failed to gain legal foundation as they represented an extreme infringement of individual liberties. Balanced against their perceived ineffectiveness in achieving the aims of the eugenics movement, they were clearly considered unacceptable. This failure to achieve legislation for surgical intervention in such cases is a clear demonstration of the parallel relationship between law and wider society.

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167 Sentencing File, LW, 1928, DAAC 256 412 24, ANZ as cited in Brickell, above n 85, at 33.

168 Sentencing File, LW, 1928, DAAC 256 412 24, ANZ as cited in Brickell, above n 85, at 33.

169 Phillips, above n 2, at 294.

Despite many of us believing that we have progressed past this ugly period in our history, the reality is that the legacies of this intense period of subjugation and repulsion still live with us today. Casual homophobia, which remains endemic in New Zealand society, is a hangover of the intense hate generated against non-heterosexuals in this period of our history. Our contemporary discussions around conversion therapy, and the recent ban on the practice with the enactment of the Conversion Practices Prohibition Legislation Act 2022, are measures to undo much of the ideology that was generated in this period. As Phillips notes, “aspects of [our previous history] remain embedded in every part of our society”.<sup>170</sup> Ultimately, this is “Why Legal History Matters”.

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170 At 294.